No. 130042

IN THE
SUPREME COURT OF ILLINOIS

DONALD JAMES, as Executor of the Estate of Lucille Helen James, Deceased; MARK R. DONESKE, as Executor of the Estate of Rose H. Doneske, Deceased; FRANCES G. DEFRANCESCO, as Executor of the Estate of Jack P. Defrancesco, Deceased; and PATRICIA VELICH, as Executor of the Estate of Carol Orlando, Deceased,	)	On Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-22-0180
Plaintiffs-Petitioners,	)	There Heard on Appeal from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, Nos. 20 L 247, 20 L 259, 20 L 260, 20 L 264, & 20 L 273 (consol.)
v.	)	
GENEVA NURSING AND REHABILITATION CENTER, LLC, an Illinois Limited Liability Company d/b/a BRIA HEALTH SERVICES OF GENEVA,	)	The Honorable SUSAN BOLES, Judge Presiding.
Defendant-Respondent.	)	

BRIEF OF *AMICUS CURIAE* ILLINOIS ATTORNEY GENERAL

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INTEREST OF *AMICUS CURIAE*

The Governor issued Executive Order 2020-19 ("EO2020-19") on April 1, 2020, in the early days of the Covid-19 pandemic, when the virus was rapidly spreading throughout Illinois and it was unclear if there were "adequate bed capacity, supplies, and providers to treat patients afflicted with COVID-19." Ill. Exec. Order 2020-19, p. 1.[1] To maximize available health care resources, the Governor exercised his authority under the Illinois Emergency Management Agency Act ("Act"), 20 ILCS 3305/15, 21(b)-(c) (2022), and issued EO2020-19, which, among other things, directed all health care facilities to render assistance in support of the State's response to Covid-19. Ill. Exec. Order 2020-19, § 2. As a complement to that directive, the Governor also ordered that all health care facilities "shall be immune from civil liability" for any injury or death caused by their acts or omissions that "occurred at a time when [they were] engaged in the course of rendering assistance to the State by providing health care services in response to the COVID-19 outbreak, unless it is established that such injury or death was caused by gross negligence or willful misconduct." *Id.* § 3.

This appeal arises from five consolidated actions brought by plaintiffs, the administrators of estates of individuals who died of Covid-19 in late April and early May 2020 while they resided at Bria Health Services of Geneva

[1] EO2020-19 is available at https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-19.pdf.

("Bria"). *See* C4486-87.[2] Plaintiffs asserted several statutory and common law claims against Bria, alleging that it negligently and willfully failed to control the spread of Covid-19 within the facility. *See, e.g.*, C17-74. Bria moved to dismiss the negligence claims, arguing that it was immune from liability for ordinary negligence under EO2020-19 because it had provided the State with Covid-19 assistance in April and May 2020, and the decedents died during that time. *See, e.g.*, C401-02. The circuit court denied Bria's motion to dismiss, holding, in part, that EO2020-19 did not provide "blanket immunity" for health care facilities. C4449-52, 4471. The circuit court then certified the question of whether EO2020-19 provides "blanket immunity for ordinary negligence to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic" for interlocutory review, C4486-87, 4509-13, and the appellate court granted leave to appeal under Ill. Sup. Ct. R. 308, *James v. Geneva Nursing & Rehab. Ctr., LLC*, 2023 IL App (2d) 220180, ¶ 11.

On appeal, plaintiffs argued that EO2020-19 granted immunity only for actions that were related to the Covid-19 assistance that was rendered and that the Governor would have lacked authority to grant the blanket immunity that Bria proposed. AE Br. 17-22. The appellate court ordered the Attorney

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[2] The common law record is cited as "C__." Citations to the briefs filed in the appellate court are as follows: Bria's opening brief as "AT Br. __," plaintiffs' response brief as "AE Br. __," the Illinois Trial Lawyers Association's *amicus* brief as "ITLA Br. __," the Attorney General's *amicus* brief as "AG Br. __," Bria's reply brief as "RY Br. __," and Bria's supplemental response brief as "SR Br. __."

General to file an *amicus* brief expressing the State's views on the arguments raised in plaintiffs' response brief. *See James*, 2023 IL App (2d) 220180, ¶ 11. The Attorney General stated in his *amicus* brief that the court need not decide whether the Governor exceeded his constitutional or statutory authority by granting "blanket immunity" because EO2020-19 did not, in fact, provide immunity to health care facilities for ordinary negligence that was unrelated to any assistance rendered in response to the Covid-19 outbreak. AG Br. 5-14.

In its opinion, the appellate court modified the certified question to ask whether EO2020-19 granted immunity "'for ordinary negligence claims to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic,'" and answered that question "in the affirmative." *James*, 2023 IL App (2d) 220180, ¶ 21. The court declined to analyze the text of EO2020-19 because it determined that the immunity EO2020-19 conferred derived from section 21(c) of the Act, *see* 20 ILCS 3305/21(c) (2022), rather than the executive order itself. *James*, 2023 IL App (2d) 220180, ¶¶ 17-19. The court then concluded that, under section 21(c), "healthcare facilities that rendered assistance to the State during the COVID-19 pandemic" received immunity from "ordinary negligence claims." *Id.* at ¶¶ 20-21. Thus, under the court's decision, the immunity appears to apply to all negligence claims that arose during the relevant period of time, even if they were entirely unrelated to any Covid-19 assistance.

The Attorney General has a significant interest in this appeal because it concerns the scope of the immunity conferred in EO2020-19 pursuant to the Governor's authority under the Act and, potentially, the validity of that portion of the executive order. EO2020-19 has the force and effect of law, and the State has a strong interest in defending the validity of its laws, *see* Ill. Sup. Ct. R. 19(c); *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.,* 118 Ill. 2d 389, 400 (1987), which may not be adequately represented by the parties to this case. Indeed, after briefing by the parties had concluded, the appellate court, *sua sponte*, ordered the Attorney General to file an *amicus* brief expressing the State's views. *See James*, 2023 IL App (2d) 220180, ¶ 11.

The Attorney General thus has a substantial interest in reiterating the arguments that he made in that *amicus* brief, with updates in light of the appellate court's intervening decision. Specifically, the Attorney General has a weighty interest in ensuring that EO2020-19 is given the meaning that was intended and is apparent from its text. And when the executive order is given its intended effect, that will necessarily resolve any potential questions about its validity because there is no dispute that the Governor had the authority to confer the targeted immunity that he chose to provide.[3]

[3] The Attorney General's brief in this Court, like the one he filed in the appellate court, is in support of neither party because it is limited to the related issues of the correct interpretation of EO2020-19 and the Governor's authority to confer the immunity that was granted in that executive order. The Attorney General takes no position on any other issues raised by plaintiffs' claims or the parties' arguments.

ARGUMENT

EO2020-19 does not provide health care facilities with immunity from claims for ordinary negligence that was unrelated to any assistance that they rendered in response to the Covid-19 outbreak. Although the appellate court correctly concluded that the Governor properly exercised his authority under section 21(c) of the Act when issuing EO2020-19, it erred by finding that the scope of the immunity that was conferred was governed by the statute, rather than the executive order itself. As a result, the court adopted an unduly expansive view of the immunity that reaches any negligence by a health care facility that provided Covid-19 assistance, regardless of whether the negligence was wholly unrelated to the assistance that was provided, if it occurred during a certain period of time. That interpretation of EO2020-19 conflicts with the order's plain language, contravenes its intended effect, and runs counter to multiple canons of statutory construction.

This Court should therefore hold that EO2020-19 does not provide such an unbounded immunity. And, given the lack of a dispute over the Governor's authority to confer the targeted immunity that the order's language supports, the Court need not consider whether the Governor would have exceeded his authority by granting immunity for negligence that had no connection to any Covid-19 assistance. In short, there is no reason to decide if the Governor had the power to grant an immunity that he did not, in fact, provide.

I. The appellate court erred by basing its determination of the scope of immunity that EO2020-19 conferred on section 21(c) of the Act, rather than the text of the order itself.

The appellate court declined to analyze EO2020-19's text to ascertain the scope of the immunity that it conferred because, in its view, the immunity derived from section 21(c) of the Act, *see* 20 ILCS 3305/21(c) (2022), rather than the executive order's terms. *See James*, 2023 IL App (2d) 220180, ¶¶ 17-19. But while the court correctly concluded that the Governor properly invoked his authority under section 21(c) in issuing EO2020-19, it erred by deciding that the order did not define the scope of the immunity that was conferred.

To that end, the appellate court appears to have incorrectly assumed that the Governor must have conveyed the full extent of immunity allowable under section 21(c) when it reached the related conclusion that an executive order cannot convey more immunity than is statutorily permissible. *See id.* at ¶ 19. But even if section 21(c) permits the broad immunity the court described in its decision, *see id.* at ¶¶ 20-21, the Governor, while acting within the scope of his statutory authority, had the ability to confer a more targeted immunity. Indeed, section 6(c)(1) of the Act, which the Governor relied upon in issuing EO2020-19, *see* Ill. Exec. Order 2020-19, p. 1, directed him to make all orders necessary to carry out the Act's provisions "within the limits of the authority" conferred upon him. 20 ILCS 3305/6(c)(1) (2022). That specific grant of authority aligns with the general principle that, when the legislature delegates

authority to an executive officer to administer a statute, that grant of power includes the ability to do all that is reasonably necessary to execute the law and provides executive officers with "wide latitude" to decide how best to fulfill their duties. *Lake Cnty. Bd. of Rev. v. Prop. Tax Appeal Bd. of State of Ill.*, 119 Ill. 2d 419, 427-28 (1988); *see Julie Q. v. Dep't of Child. & Fam. Servs.*, 2013 IL 113783, ¶ 28 ("[w]ide latitude is given to administrative agencies to fulfill their statutory duties").

The appellate court thus erred by curtailing the Governor's discretion in executing the Act when it seemingly assumed that he must have conveyed the full extent of immunity that was statutorily permissible. Even if the court was correct about the scope of the immunity that is allowable under section 21(c), the Governor had the ability to grant a more targeted immunity, which he did in EO2020-19. This Court should therefore base its determination of the scope of the immunity conveyed by EO2020-19 on the executive order's text because that is what defined the parameters of the immunity.

II. The usual canons of statutory construction should govern this Court's interpretation of EO2020-19.

Although there does not appear to be any Illinois precedent deciding if the usual statutory construction canons govern the interpretation of an executive order, those rules should apply because an executive order, like an administrative regulation, which is interpreted under the rules of statutory construction, has the force and effect of law. *See Haage v. Zavala*, 2021 IL 125918, ¶ 43 ("rules that govern construction of statutes also apply to the

construction of administrative regulations"). And that approach would be consistent with how executive orders are interpreted in other jurisdictions. *See City & Cnty. of S.F. v. Trump*, 897 F.3d 1225, 1238 (9th Cir. 2018); *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 922 (N.D. Ill. 2006); *Ventilla v. Pac. Indem. Co.*, No. 1:20-cv-08462 (MKV), 2021 WL 5234404, at *2 (S.D.N.Y. Nov. 10, 2021); *City of Morgan Hill v. Bay Area Air Quality Mgmt. Dist.*, 13 Cal. Rptr. 3d 420, 431 (Cal. Ct. App. 2004); *Matter of Murack*, 957 N.W.2d 124, 128 (Minn. Ct. App. 2021).

This Court's primary objective when interpreting an executive order is therefore "to ascertain and give effect to the [Governor's] intent." *Moon v. Rhode*, 2016 IL 119572, ¶ 22. The best evidence of the Governor's intent is the executive order's "plain and ordinary meaning." *In re Craig H.*, 2022 IL 126256, ¶ 25. The Court may also consider "the reason or purpose for the [executive order], the problems it seeks to address, and the consequences of construing the [executive order] one way or another." *Robinson v. Vill. of Sauk Vill.*, 2022 IL 127236, ¶ 17. The Court should consider EO2020-19 as a whole, so that its words and phrases are not construed in isolation but are "interpreted in light of other relevant provisions." *Rushton v. Dep't of Corr.*, 2019 IL 124552, ¶ 14. Finally, the Court should construe EO2020-19 in a way that "avoid[s] absurd results" and reject any reading that the Governor "could not have intended." *Dawkins v. Fitness Int'l, LLC*, 2022 IL 127561, ¶ 27.

III. EO2020-19 does not provide immunity to health care facilities for negligence that was unrelated to the provision of Covid-19 assistance.

A. The plain language of EO2020-19 does not provide the expansive immunity adopted by the appellate court.

The plain language of EO2020-19 grants immunity for injuries that were caused by a health care facility's negligence while it was "engaged in the course of" rendering Covid-19 assistance and does not immunize conduct that was unrelated to such assistance but happened to occur at the same time. By granting immunity for injuries that occurred when a facility was "engaged in the course of" providing such assistance, the Governor defined the immunity relative to the scope of the assistance that was rendered.

Indeed, the phrase "engaged in the course of" typically refers to conduct taken within the scope of an individual's authority to carry out or effectuate a task. *See, e.g.*, *In the Course of Employment*, Black's Law Dictionary (11th ed. 2019) (defining phrase as "having happened to an on-the-job employee within the scope of employment"). Illinois courts have given effect to that ordinary definition of the phrase when applying section 2-202 of the Tort Immunity Act, 745 ILCS 10/2-202 (2022). *See Brown v. City of Chi.*, 2019 IL App (1st) 181594, ¶¶ 43-49 (discussing relevant case law). In *Romito v. City of Chi.*, for example, the appellate court held that the defendant was immune from liability because the negligence occurred while he "was engaged in a course of conduct designed to carry out or put into effect any law," explaining that the evidence showed that he "was still engaged in a course of conduct that was

enforcing or executing a law" when the alleged negligence occurred. 2019 IL App (1st) 181152, ¶¶ 43-44.

This Court should construe EO2020-19 in accord with that ordinary meaning of "engaged in the course of" and hold that the executive order does not grant immunity to health care facilities for injuries or death caused by acts or omissions that bore no relation to, and were thus outside the scope of, any Covid-19 assistance that was rendered. Interpreting EO2020-19 to instead provide immunity for all negligence that occurred during the same time that a facility was also providing Covid-19 assistance, even if the negligence was wholly unrelated to that assistance, like negligently maintaining its parking lot or operating its kitchen, conflicts with that plain meaning. Under such an expansive reading, the immunity's applicability would turn on whether the injury occurred during a certain period of time, even if the facility was not "engaged in the course of" rendering Covid-19 assistance when it caused the injury. This Court should adhere to the ordinary meaning of that phrase and hold that EO2020-19 does not confer immunity for negligence that was wholly unrelated to the assistance that was the subject of the executive order. *See Sharpe v. Crystal Westmoreland*, 2020 IL 124863, ¶ 10 (statutory language should be given its "plain and ordinary meaning," which "is the most reliable indicator of the legislative intent").

Although the appellate court did not analyze the text of EO2020-19 in reaching its decision, *see James*, 2023 IL App (2d) 220180, ¶ 19, Bria offered

four arguments in support of an expansive reading of the executive order in its appellate briefing. None of those arguments demonstrate that such a reading is supported by EO2020-19's plain language.

First, the use of the phrase "at a time" does not show that the Governor intended to confer immunity for all negligence, regardless of whether it was at all related to Covid-19 assistance, so long as it occurred during the same period of time that a facility was also rendering assistance. *See* AT Br. 13; RY Br. 11-12. That phrase means "during one particular moment," *At a time*, Merriam-Webster, https://bit.ly/3RY01FN, and can be used to describe the number of items that are "involved in one action, place, or group," *At a time*, Collins, https://bit.ly/41H48t2. And "moment" is defined as an "instant" or "a minute portion or point in time." *Moment*, Merriam-Webster, https://bit.ly/48z44Ol; *see also Moment*, Dictionary.com, https://bit.ly/3tFINUj ("an indefinitely short period of time; instant"). "At a time," which refers to a specific "moment" or instant," thus did not broaden the scope of the immunity to reach negligence that had no connection to any Covid-19 assistance. Rather, it confirms that the Governor did not intend for the immunity to reach beyond "the course of" providing Covid-19 assistance.

Second, interpreting EO2020-19 not to provide immunity for negligence that bore no relation to any Covid-19 assistance does not improperly insert any unwritten exceptions into the executive order. *See* AT Br. 10-11; *1550 MP Road LLC v. Teamsters Loc. Union No. 700*, 2019 IL 123046, ¶ 30 (courts may

not insert "exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent"). Doing so merely defines the immunity's scope relative to the assistance that was rendered, consistent with the language that the Governor chose to use.

Third, regardless of whether the Governor could have used another phrase, like "arising out of" Covid-19 assistance, to tie the immunity's scope to the rendered assistance, *see* RY Br. 10, the language that he did use — stating that the immunity applied to injuries that occurred when the facility "was engaged in the course of rendering assistance" — demonstrates that conduct entirely unrelated to the assistance rendered is not covered. The Governor was not required to use one phrase instead of another to convey his plain intent.

Fourth, EO2020-19's use of the phrases "any injury or death" and "any act or omission" to describe the occurrences that trigger the immunity does not show that the immunity applies to all negligent conduct that caused an injury or death during a time period that a facility also rendered assistance, even if it had nothing to do with that assistance. *See* SR Br. 5-6, 12-13. That is because EO2020-19 expressly provides that the immunity applies only when those injuries or death occurred while the facility was "engaged in the course of" providing Covid-19 assistance. Ill. Exec. Order 2020-19, § 3. Injuries that occurred when a facility was not "engaged in the course of" providing such assistance therefore are not covered.

B. The relevant canons of statutory construction confirm that the immunity does not extend to negligence that was entirely unrelated to the provision of Covid-19 assistance.

Even if EO2020-19 could be susceptible to multiple interpretations, the expansive immunity that the appellate court described runs afoul of several canons of statutory construction. Specifically, reading EO2020-19 to provide immunity for negligence that has no connection to any Covid-19 assistance would create unnecessary inconsistencies within the executive order and fail to effectuate the order's stated purposes. If anything, such a reading undermines those purposes and produces absurd consequences that the Governor could not have intended.

To start, interpreting EO2020-19 to grant such an expansive immunity to health care facilities would create an inconsistency with how the immunity operates as to health care professionals even though the language providing the immunity to each group is the same. *See* Ill. Exec. Order 2020-19, §§ 3-4 (using identical language to confer immunity to health care facilities and professionals). That is because health care facilities, by virtue of their size and nature, can simultaneously perform countless tasks in various locations throughout the facility, while a health care professional's conduct, as an individual person, is necessarily limited to a specific location and moment in time. As a result, a health care professional's actions during the time she is engaged in conduct that meets the definition of "rendering assistance" will always be related to that assistance. It is thus apparent that EO2020-19 does

not grant immunity to health care professionals for conduct that is wholly unconnected to Covid-19 assistance. Construing that same language to confer an immunity that does reach such conduct to health care facilities would read an unnecessary conflict into the executive order. *See Bd. of Educ. of City of Chi. v. Moore*, 2021 IL 125785, ¶ 40 ("sections of the same statute should be considered so that each section can be construed with every other part or section of the statute to produce a harmonious whole").

Interpreting EO2020-19 to grant immunity for negligence that bore no relation to Covid-19 assistance also would not further the order's purposes or help solve the problems the Governor sought to address. EO2020-19 granted immunity as part of a larger effort to ensure that the State had "adequate bed capacity, supplies, and providers to treat patients afflicted with COVID-19, as well as patients afflicted with other maladies," and "eliminat[e] obstacles or barriers to the provision of supplies and health care services." Ill. Exec. Order 2020-19, p. 1. Because the additional assistance could have "increase[d] a facility's potential exposure to liability," the Governor relieved those facilities of the risk of liability that might arise while they rendered that assistance "by immunizing them from any liability except for willful misconduct." AT Br. 14; *see* RY Br. 12 ("A good faith though ultimately inadequate or misguided effort to render assistance in combatting the pandemic is immunized."). Granting immunity for conduct that had nothing to do with the provision of Covid-19 assistance would not relieve health care facilities of any additional liability

they could potentially incur by rendering such assistance and thus would not address the problem that the Governor was indisputably trying to solve.

If anything, granting immunity for negligence that had no connection to the Covid-19 assistance the Governor was trying to stimulate could undermine the Governor's goals by incentivizing facilities to render some minimal amount of Covid-19 assistance simply to trigger the immunity and then prioritize other, more lucrative services, free from any potential negligence liability. Even if Bria did not engage in such conduct, *see* SR Br. 15 n.3, the possibility that a health care facility might choose to pursue such a strategy was a valid consideration. In any event, given that the Governor did not expressly immunize negligence that was unrelated to the provision of any Covid-19 assistance and his undisputed objectives would be directly advanced by conferring immunity for negligence that was related to Covid-19 assistance, construing EO2020-19 to also grant immunity for negligence that had no connection to any such assistance would not further the executive order's purposes.

Finally, interpreting EO2020-19 to grant such an expansive immunity would produce absurd results that the Governor could not have intended. As explained, the purpose of the executive order was to encourage health care facilities to render Covid-19 assistance by immunizing them from liability for any injuries they caused while they were "engaged in the course of" providing that assistance. Ill. Exec. Order 2020-19, § 3. But if EO2020-19 granted

immunity for all negligence that occurred during a certain period of time, facilities would be immune from liability for conduct that had nothing to do with Covid-19. Again, a facility's negligent conduct in maintaining its parking lot or operating its kitchen would be protected even though those actions lacked any connection to the Covid-19 assistance the Governor was trying to promote. *See also* ITLA Br. 14-15 (listing examples of consequences the Governor could not have intended). The Governor could not have intended to grant immunity for conduct that was entirely unrelated to Covid-19 when the executive order was plainly aimed at solving the medical resource problems caused by the Covid-19 pandemic, and EO2020-19 should not be interpreted in a way that produces such an absurd result. *See Cassidy v. China Vitamins, LLC*, 2018 IL 122873, ¶ 17 (even "a literal reading must fail if it yields absurd, inconvenient, or unjust results").

* * *

In sum, this Court should hold that EO2020-19 does not provide health care facilities with immunity for negligence that was entirely unrelated to the Covid-19 assistance they rendered. Neither the order's plain language nor the relevant canons of statutory construction support such an expansive view of the immunity that was provided. And, given that there is no dispute that the Governor had authority to confer the targeted immunity that EO2020-19 provided, the validity of that executive order should be upheld.

CONCLUSION

For these reasons, this Court should hold that EO2020-19 does not grant health care facilities with immunity for negligence that was entirely unrelated to any Covid-19 assistance that they rendered.

Respectfully submitted,

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January 3, 2024

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 17 pages.

/s/ Frank H. Bieszczat
FRANK H. BIESZCZAT
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CERTIFICATE OF FILING AND SERVICE

I certify that on January 3, 2024, I electronically filed the foregoing Brief of *Amicus Curiae* Illinois Attorney General with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that some of the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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