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 DeFRANCESCO, Deceased,

PATRICIA VELCICH, as Executor of the Estate of MARION MAY HEOTIS, Deceased,

FAITH HEIMBRODT, as Independent Administrator of the Estate of CAROL ORLANDO, Deceased,

Plaintiffs-Appellants,

v.

GENEVA NURSING AND REHABILITATION CENTER, LLC d/b/a BRIA HEALTH SERVICES OF GENEVA,

Defendant-Appellee.

On Appeal from the Appellate Court of Illinois, Second District, No. 2-22-0180.
There Heard on Appeal from the Circuit Court of the Sixteenth Judicial Circuit,
Kane County, Illinois, Nos. 2020 L 247, 2020 L 259, 2020 L 260, 2020 L 264 & 2020 L 273.
The Honorable **Susan Boles**, Judge Presiding.

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Nature of the Case

This appeal arises from the global pandemic that arrived in Illinois in the spring of 2020, and from the efforts of Governor JB Pritzker through Executive Order 2020-19 to address the novel coronavirus and "ensure the Illinois healthcare system has adequate capacity to provide care to all who need it." *See* Executive Order No. 2020-19, Preamble ("EO20-19"). To ensure that Illinois' health care system remained operational during the pandemic, the Governor ordered all "Health Care Facilities" to "render assistance" to the State. The Governor's Order defined Health Care Facilities to include not only nursing homes like the Defendant, but also hospitals, the Emergency Medical Services System, developmental centers, and licensed community mental health centers. *See* EO20-19, §1.

All were included because the "health care *system*" depends on all the various health care actors working together. *See* EO20-19, Preamble (emphasis supplied). For example, nursing homes provide transitional short-term care for patients who no longer require hospitalization but cannot yet return home. When nursing homes continued to accept patients from hospitals during the pandemic as EO20-19 required, hospital beds remained available for patients suffering from advanced COVID-19 and other serious diseases and injuries.

The Governor's proactive intervention worked. In comparison to many other States, the Illinois health care system fared exceedingly well during the pandemic. For example, whereas the intensive care units in 16

States and the District of Columbia were nearly full for extended periods of time (Alabama's for 517 days, with a national average of 112 days), Illinois experienced zero such days.[1]

The underlying litigation concerns five individual cases in which each plaintiff represents the interest of a deceased former resident of Geneva Nursing and Rehabilitation Center LLC, doing business as Bria Health Services of Geneva ("Bria"). Each plaintiff alleged that Bria was negligent in the care and treatment of a resident, in ways that caused the resident to contract the novel coronavirus that causes COVID-19.

This certified-question appeal pursuant to Illinois Supreme Court Rule 308 concerns the immunity afforded to the "Health Care Facilities" that were "direct[ed]" by Governor Pritzker on April 1, 2020, to "render assistance to the State" in combating the COVID-19 outbreak and ensuring that the "Illinois health care system has adequate capacity to provide care to all who need it." *See* EO20-19, Preamble, §2. The Appellate Court "modif[ied] the certified question to state as follows: "Does Executive Order No. 2020-19, which triggered the immunity provided in 20 ILCS 3305/21(c) [the Illinois Emergency Management Agency Act, hereinafter

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[1] *See* David C. Radley, Jesse C. Baumgartner, and Sara R. Collins, *2022 Scorecard on State Health System Performance: How Did States Do During the COVID-19 Pandemic?* (Commonwealth Fund, June 2022), available at https://www.commonwealthfund.org/publications/scorecard/2022/jun/2022-scorecard-state-health-system-performance (relying on data from the United States Department of Health and Human Services). Illinois has been ranked twelfth in the nation in its performance across an array of COVID metrics. *See id.*

"the IEMA"], grant immunity for ordinary negligence claims to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic?" And we answer that question in the affirmative." *James v. Geneva Nursing and Rehabilitation Center*, LLC, 2023 IL App (2d) 220180, ¶ 21 ("Opinion").

Not satisfied with the answer, the Plaintiffs argue here that the Appellate Court left the question "completely answered" and thereby "left the parties in precisely the same position they were in" before the appeal. *See* Plaintiffs' Brief at 9, 11. This is untrue: the Second District answered the substantive question that the certified question presented (though not to Plaintiffs' liking), ruling that "Bria would have immunity from negligence claims *if and only if* it can show it was 'rendering assistance' to the State during this time," and rejecting the argument that "Bria could be immune only for acts directly connected to measures implemented in response to the pandemic." *See* Opinion at ¶¶14, 20 (emphasis in original).

Plaintiffs and their *amici* ask this Court to create and insert assorted limitations into the Governor's executive order to limit EO20-19's immunity. Defendant Bria respectfully asks this Court to apply EO20-19 as it is written and as it was understood by the private health care facilities that it immunized in return for commandeering them to assist the State. This Court should uphold the Appellate Court's conclusion that EO20-19 and the IEMA grant health care facilities immunity from ordinary negligence claims for acts or omissions that occurred while they were

engaged in the course of rendering assistance to the State, as EO20-19 ordered them to do.

Statutes and Executive Orders Involved

Illinois Emergency Management Agency Act, 20 ILCS 3305/15 (in pertinent part):

Sec. 15. Immunity. Neither the State, any political subdivision of the State, nor, except in cases of gross negligence or willful misconduct, the Governor, the Director, the Principal Executive Officer of a political subdivision, or the agents, employees, or representatives of any of them, engaged in any emergency management response or recovery activities, while complying with or attempting to comply with this Act or any rule or regulations promulgated pursuant to this Act is liable for the death of or any injury to persons, or damage to property, as a result of such activity...

Illinois Emergency Management Agency Act, 20 ILCS 3305/21:

Sec. 21. No Private Liability.

* * *

(c) Any private person, firm or corporation, and any employee or agent of such person, firm or corporation, who renders assistance or advice at the request of the State, or any political subdivision of the State under this Act during an actual or impending disaster, shall not be civilly liable for causing the death of, or injury to, any

person or damage to any property except in the event of willful misconduct.

The immunity provided in this subsection (c) shall not apply to any private person, firm or corporation, or to any employee or agent of such person, firm or corporation whose act or omission caused in whole or in part such actual or impending disaster and who would otherwise be liable therefor.

Executive Order 2020-19 (in pertinent part):

WHEREAS, ensuring the State of Illinois has adequate bed capacity, supplies, and providers to treat patients afflicted with COVID-19, as well as patients afflicted with other maladies, is of critical importance; and,

WHEREAS, eliminating obstacles or barriers to the provision of supplies and health care services is necessary to ensure the Illinois healthcare system has adequate capacity to provide care to all who need it; and,

WHEREAS, Section 21(c) of the IEMA Act, 20 ILCS 3305/21, provides that "Any private person, firm or corporation, and any employee or agent of such person, firm or corporation, who renders assistance or advice at the request of the State, or any political subdivision of the State under this Act during an actual or impending disaster, shall not be civilly liable for causing the death

of, or injury to, any person or damage to any property except in the event of willful misconduct";

* * *

Section 2. Pursuant to Sections 15 and 21(b)-(c) of the IEMA Act, 20 ILCS 3305/15 and 21(b)-(c), and the Good Samaritan Act, 745 ILCS 49, I direct all Health Care Facilities … to render assistance in support of the State's response to the disaster recognized by the Gubernatorial Disaster Proclamations (COVID-19 outbreak).

* * *

Section 3. Pursuant to Sections 15 and 21(b)-(c) of the IEMA Act, 20 ILCS 3305/15 and 21(b)-(c), I direct that during the pendency of the Gubernatorial Disaster Proclamation, Health Care Facilities, as defined in Section 1 of this Executive Order, shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by the Health Care Facility, which injury or death occurred at a time when a Health Care Facility was 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 of such Health Care Facility, if 20 ILCS 3305/15 is applicable, or by willful misconduct, if 20 ILCS 3305/21 is applicable.

* * *

Section 6. Nothing in this Executive Order shall be construed to preempt or limit any applicable immunity from civil liability available to any Health Care Facility, Health Care Professional, or Health Care Volunteer.

* * *

Executive Order 2020-37 (in pertinent part):

Section 3. Pursuant to Sections 15 and 21(b)-(c) of the IEMA Act, 20 ILCS 3305/15 and 21(b)-(c), I direct that during the pendency of the Gubernatorial Disaster Proclamations, Hospitals that continue to cancel or postpone all elective surgeries or procedures in order to respond to the COVID-19 outbreak, or Health Care Professionals providing service in such a Hospital, shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by the Hospital or Health Care Professional, which injury or death occurred at a time when a Hospital or Health Care Professional was rendering assistance to the State in response to the COVID-19 outbreak by providing health care services consistent with current guidance issued by IDPH. This section is inapplicable if it is established that such injury or death was caused by gross negligence or willful misconduct of such Hospital or Health Care Professional, if 20 ILCS 3305/15 is applicable, or by willful misconduct, if 20 ILCS 3305/21 is applicable.

Section 4. Pursuant to Sections 15 and 21(b)-(c) of the IEMA Act, 20 ILCS 3305/15 and 21(b)-(c), I direct that during the pendency of the Gubernatorial Disaster Proclamations, Hospitals that conduct elective surgeries or procedures beginning on or after May 11, 2020, or Health Care Professionals providing services in such a Hospital, shall be immune from civil liability for any injury or death relating to the diagnosis, transmission, or treatment of COVID-19 alleged to have been caused by any act or omission by the Hospital or the Health Care Professional, which injury or death occurred at a time when a Hospital or Health Care Professional was rendering assistance to the State in response to the COVID-19 outbreak by providing health care services consistent with current guidance issued by IDPH. This section is inapplicable if it is established that such injury or death was caused by gross negligence or willful misconduct of such Hospital or Health Care Professional, if 20 ILCS 3305/15 is applicable, or by willful misconduct, if 20 ILCS 3305/21 is applicable.

Statement of Facts

In the early days of the pandemic, Governor Pritzker issued a series of Executive Orders addressing several subjects, including a moratorium on residential evictions, various restrictions related to the operation of

bars and restaurants, and restrictions on the transfer of prisoners between county jails and state correctional facilities.[2]

Among these pandemic-related executive measures was Executive Order 20-19, which "direct[ed]" healthcare facilities and workers in Illinois to "render assistance" to the State so as to address the pandemic and "ensure the Illinois healthcare system has adequate capacity to provide care to all who need it." *See* EO20-19, Preamble. In return, the Order immunized health care facilities from ordinary negligence claims for "any acts or omissions" that occurred when they were "engaged in the course of rendering assistance to the State …" *See* EO20-19, § 3.

Despite the State's effort to mitigate the impact of the pandemic, many individuals succumbed to COVID-19. Residents of Bria were among those whose deaths have been attributed by their survivors to the pandemic. Each of the plaintiffs in the five actions at issue here sued Bria, claiming that a decedent had been a Bria resident during the initial days of the coronavirus pandemic and had died as a proximate cause of Bria's alleged negligence (S.R. C1 *et seq.*; S.R. C82 *et seq.*; S.R. C161 *et seq.*; S.R. C239 *et seq.*; S.R. C318 *et seq.*):

- Plaintiff Faith Heimbrodt is the daughter and independent administrator of the estate of Carol Orlando, a resident of Bria

[2] *See Fox Fire Tavern, LLC v. Pritzker*, 2020 Il App (2d) 200623, ¶26; *Alley 64, Inc. v. Society Ins. Co.*, 2022 IL App (2d) 210401, ¶ 6; *JL Props. Grp. B, LLC v. Pritzker*, 2021 IL App (3d) 200305; *State & 9 St. Corp. v. Society Ins. Co.*, 2022 IL App (1st) 211222-U, ¶¶ 4–5.

from approximately October 15, 2018, through April 25, 2020, the day she died (S.R. C2–3).

- Plaintiff Mark Doneske is the son and executor of the estate of Rose Doneske, a resident of Bria from approximately September 5, 2019, through April 28, 2020, the day she died of acute viral infection caused by COVID-19 (S.R. C82–83).
- Plaintiff Donald James is the son and executor of the estate of Lucille Helen James, a resident of Bria until May 1, 2020, the day she died of complications from COVID-19 (S.R. C161–62).
- Plaintiff Frances G. DeFrancesco is the wife and executor of the estate of Jack P. DeFrancesco, a resident of Bria from approximately January 31, 2020, through April 26, 2020, the day he died of complications from COVID-19 (S.R. C239–40).
- Plaintiff Patricia Velcich is the daughter and executor of the estate of Marion May Heotis, a resident of Bria from approximately January 30, 2020 through April 28, 2020, who died April 29, 2020 of COVID-19 (S.R. C318–19).

Each of the plaintiffs filed a separate lawsuit against Bria, seeking damages for the death of his or her decedent and claiming that the decedent's death had been caused by Bria's alleged negligence and/or willful and wanton conduct. Bria moved to dismiss the Plaintiffs' claims sounding in ordinary negligence, but not Plaintiffs' willful misconduct claims (S.R. C396–97, C804–05, C807–08, C1106–07, C1603–04)). Bria

pointed to EO20-19, in which Governor Pritzker had extended immunity for ordinary negligence to all health care facilities that had rendered assistance to the State. In support of its motions to dismiss, Bria supplied evidence that it had rendered assistance to the State in the ways the executive order had detailed and demanded, and on that basis argued that it was entitled to immunity under the Governor's order (*see*, *e.g.*, S.R. C449–803, C897–903).

The parties engaged in discovery on the issue of whether Bria had undertaken the activities that EO20-19 specified as constituting 'rendering assistance' and required them to do. *See*, *e.g.*, S.R. C2969–3101. In support of Bria's contention that it had rendered the assistance necessary to receive immunity under EO20-19 against Plaintiffs' ordinary negligence claims, Bria administrator Patti Long testified to various actions that Bria had taken to render assistance to the State, including a detailed account of what it had done to preserve personal protective equipment, to take patients from hospitals so as to free up hospital beds, and to prepare to treat patients suffering from COVID-19 (*see* S.R. C2547–54).

Despite this evidence, the circuit court denied Bria's motions to dismiss Plaintiffs' ordinary negligence claims, rejecting the argument that EO20-19 provided "blanket immunity" against allegations of ordinary negligence to healthcare facilities that "render[ed] assistance" to the State in the ways specified by EO20-19 (S.R. C4449, C4450, C4451, C4452; Tr.

07 at 23–25). Still, the circuit court acknowledged that there was room for disagreement with its interpretation of EO20-19, and since this foundational legal question had the potential to terminate a substantial portion of the litigation at that early point in the procedural process, it concluded that an interlocutory appeal would be appropriate and certified a question to that effect (S.R. C4486–87; Tr. 28–29). The Plaintiffs moved to reconsider the certification of this question (S.R. C4490), but the circuit court denied their motion, expressly reiterating its findings under Rule 308 and recertifying the question (S.R. C4509, C4510, C4511, C4512, C4513; Tr. 46–47, 48).

Bria filed a timely application to the Appellate Court, Second District, for leave to appeal under Supreme Court Rule 308, which the Appellate Court granted. The Appellate Court accepted for review the question the circuit court had certified for interlocutory review, which asked whether EO20-19 provides "blanket immunity for ordinary negligence [claims] to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic." Opinion at ¶ 2.

Bria's argument that it was entitled to immunity on Plaintiffs' ordinary negligence claims (though not Plaintiffs' willful misconduct claims) was grounded in the language of the Governor's executive order. The Governor's Order "direct[ed]" Health Care Facilities to "render assistance in support of the State's response to the [COVID-19] disaster…" EO20-19, at §2. The Order specified that rendering assistance "must

include measures such as increasing the number of beds, preserving personal protective equipment, or taking necessary steps to prepare to treat patients with COVID-19." *Id.* The Order provided that health care facilities "shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by the Health Care Facility, which injury or death occurred at a time when a Health Care Facility was engaged in the course of rendering assistance to the State by providing health care services in response to the COVID-19 outbreak" with the sole exception of harm caused by "willful misconduct." *Id.* at §3. The Order also stated that "[n]othing in this Executive Oder shall be construed to preempt or limit any applicable immunity from civil liability available to any Health Care Facility …" *Id.* at §6.

Believing that the parties were incorrectly focusing on the language of EO20-19 instead of Section 21(c) of the IEMA, the Appellate Court modified the certified question before providing its ultimate legal conclusion. The Appellate Court first ruled "[i]t is axiomatic that an executive order, issued pursuant to statutory authority, cannot convey more than the statute that authorized it. Again, the question is not what the executive order says but rather what the relevant *statute* that the executive order invoked says." Opinion at ¶ 19 (emphasis in original). The Appellate Court thus assumed that EO20-19 was grounded exclusively on the IEMA. In fact, EO20-19 also expressly relied on "the powers vested in me as the Governor of the State of Illinois," and Section 3 of the IEMA

specifically provides that the IEMA should not be "construed to … limit, modify, or abridge the authority of the Governor … under the Constitution." *See* EO20-19, Preamble; IEMA, at §3(d). Section 3 of the IEMA means that the IEMA does not necessarily provide the maximal limit of the Governor's authority to grant immunity in emergencies. In any event, this Court need not address this issue because, as Bria later explains, EO20-19's immunity does not exceed what the IEMA authorizes. *See also* Opinion at ¶18 ("We agree with the Attorney General that the executive order's elaboration is not inconsistent with the relevant portions of the [IEMA].")

The Appellate Court's analysis also seemed to assume that the immunity in the Governor's executive order necessarily coincided with the maximum immunity that the IEMA allowed. *See* Opinion at ¶¶19 – 21. But as the Attorney General's brief argued, the Governor's constitutional authority to execute the law encompasses the power to grant less immunity than he is constitutionally and statutorily authorized to extend. *See* Attorney General's Brief at 6-7. But this did not undermine the correctness of the Appellate Court's ultimate conclusion that the healthcare facilities' immunity is not subject to a relatedness requirement that would extend immunity only to "acts directly connected to measures implemented in response to the pandemic." *See* Opinion at ¶14. The reason the Appellate Court's ultimate legal conclusion was correct is that EO20-19 does not contain a relatedness requirement, but instead

expressly extends immunity to "*any* injury or death alleged to have been caused by *any* act or omission by the Health Care Facility, which injury or death occurred at a time when a Health Care Facility was engaged in the course of rendering assistance to the State …" *See* EO20-19, §3 (emphasis provided). This brief will fully explain why EO20-19 does not contain a relatedness requirement, and why this Court should not graft such a novel limitation onto it.

Plaintiffs argue that the Appellate Court did not answer the certified question, but instead left the question "completely answered" and thereby "left the parties in precisely the same position they were in" before the appeal. *See* Plaintiffs' Brief at 9, 11. But as explained above, although the Appellate Court modified the question, its answer most certainly did *not* leave the parties where they had been before the Appellate Court spoke; Plaintiffs just don't like the answer. Similarly, Plaintiffs argue that the Appellate Court "ignore[d]" and "failed to consider" the Attorney General's brief. *See id.,* at 15-16. But this also is patently untrue; after all, the Second District *accepted* some of the Attorney General's arguments. *See* Opinion at ¶18 ("We agree with the Attorney General that the executive order's elaboration is not inconsistent with the relevant portions of the Act.") What actually occurred is that the Appellate Court rejected arguments that Plaintiffs wished they had accepted.[3]

[3]Furthermore, Plaintiffs' incorporation by reference of a brief included in an appendix is not a proper method of presenting an argument. *Wilcox v.*

Plaintiffs and their amici, the Illinois Trial Lawyers Association ("ITLA") and the Attorney General, each take the position that despite EO20-19's plain language, the executive order actually contains a relatedness requirement or (according to ITLA) even more restrictive implied limitations. For the reasons explained herein, EO20-19 does not contain any such limitations. This Court should uphold the Appellate Court's conclusion that health care facilities are immune from ordinary negligence claims based on acts or omissions that occurred when the facilities were engaged in the course of rendering assistance, but should do so based on EO20-19.

Argument

I. Canons for Interpreting Executive Orders.

There is no controlling precedent concerning how Illinois courts interpret executive orders. *See* Attorney General's Brief at 7 ("there does not appear to be any Illinois precedent deciding if the usual statutory construction canons govern the interpretation of an executive order"). But there is ample authority outside of this jurisdiction to support the conclusion that executive orders should be interpreted as courts interpret legislation. *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1238-39 (9th Cir. 2018) ("As is true of the interpretation of statutes, the interpretation of an Executive Order begins with its text," which "must be

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Advocate Condell Medical Center, 2024 IL App (1st) 230355, ¶ 119, citing *Gruse v. Belline,* 138 Ill.App.3d 689, 698 (2nd Dist. 1985).

construed consistently with the Order's 'object and policy.'"); *United States v. Marzook*, 412 F. Supp. 2d 913, 922 (N.D. Ill. 2006) (courts should interpret Executive Orders in the same manner that they interpret statutes); *Ventilla v. Pacific Indemnity Co.*, No. 1:20-cv-08462 (MKV), 2021 U.S. Dist. LEXIS 218575, at *4 (S.D.N.Y. Nov. 10, 2021) (same); *City of Morgan Hill v. Bay Area Air Quality Management District*, 118 Cal. App. 4th 861, 877, 13 Cal. Rptr. 3d 420, 431 (2004); *In re Murack*, 957 N.W.2d 124, 127-28 (Minn. Ct. App. 2021).

In Illinois, statutory construction begins with the "language of the statute," which is presumptively given its "plain and ordinary meaning." Moreover, "[w]e construe the statute as a whole and cannot view words or phrases in isolation but, rather, must consider them in light of other relevant provisions of the statute." *Mosby v. Ingalls Memorial Hospital*, 2023 IL 129081, ¶ 30. Further, a court will avoid an interpretation of a statute that would render any portion of it meaningless or void. *McNamee v. Federated Equipment & Supply Co.*, 181 Ill. 2d 415, 423-24 (1998) quoting *Hernon v. E.W. Corrigan Construction Co.*, 149 Ill. 2d 190, 194-95 (1992).

Carrying these lessons over to executive orders, it follows that EO20 -19 should be construed in light of its plain language, the problems it sought to address, the purposes it aimed to serve, and in the light of other relevant legal provisions. *See* Attorney General's Brief at 7-8 (citing cases in support of these interpretive canons).

However, the Plaintiffs and the Attorney General also insist that a court's "primary objective" when interpreting an executive order is "to ascertain and give effect to the [Governor's] intent." *See id.*, at 8; Plaintiffs' Brief at 16. This is incomplete when it comes to executive orders. Of equal if not greater importance is the way the Governor's words in the executive order could have been expected to have been understood by their intended audience. There are especially strong reasons to give ordinary effect to the language in executive orders that are directed to, and that aim to incentivize, only a subset of the population by offering something in exchange for what the State wants the private sector to do – as is true of EO20-19.

Failing to honor the terms of a proffered exchange after private actors have done their part is the sort of bait-and-switch that government would not attempt vis-à-vis incentives directed to the population as a whole; government officials' fear of widespread blowback serves as a political check on their doing *that*. But because such a political check is absent vis-à-vis incentives directed to only a small subset of the population, it falls to courts to ensure that executive orders directed at incentivizing discrete sectors are later construed consistently with their plain language and how their intended audiences would have understood them. *See generally* John Hart Ely, Democracy and Distrust (arguing that courts must police issues that the ordinary democratic processes cannot be trusted to handle); *McCulloch v Maryland*, 17 U.S. 316, 428-29 (1819)

(holding that states cannot tax the national bank, even though Congress can, because state legislatures, unlike Congress, are not structured to take account of national interests since the costs of a single state's legislation falls on out-of-staters who have no say in the elections of the taxing state).

II. EO20-19 Does Not Have a Relatedness Requirement.

The Plaintiffs and the Attorney General argue that immunity under EO20-19 does not extend to "conduct that was *unrelated to* [rendering Covid-19] assistance." *See* Attorney General's Brief at 9 (emphasis supplied); *see also id.* at 11 (arguing that there is no immunity if the act or omission "*bore no relation to* any Covid-19 assistance") (emphasis supplied); Plaintiffs' Brief at 18 (arguing that there is no immunity for "conduct entirely unrelated to the provision of [COVID-19] assistance but happened to occur at the same time"). This Court should reject their claim that EO20-19 conditions immunity on an implied relatedness requirement for the following reasons.

A. A Relatedness Requirement would contradict EO20-19's plain language and ordinary meaning.

To begin, the Plaintiffs' and the Attorney General's argument contradicts EO20-19's plain language and ordinary meaning. EO20-19 extends immunity to "*any* injury or death alleged to have been caused by *any* act or omission." *See* EO20-19, §3 (emphasis provided). To state the obvious, EO20-19 does *not* say that immunity extends 'only to injuries or death caused by acts or omissions related to the provision of Covid-19

assistance,' as Plaintiffs and the Attorney General would have it. The Order *does* expressly specify a single limitation: immunity does not extend to "willful misconduct." *See id.* And far from opening the door to additional immunity limitations, EO20-19 consciously goes out of its way to *secure* immunity, providing in Section 6 that "[n]othing in this Executive Order shall be construed to preempt or limit any applicably immunity from civil liability available to any Health Care Facility …" *See* EO20-19, §6.[4]

EO20-19's omission of any relatedness requirement is particularly significant because the Governor certainly knew how to include a relatedness requirement when he wanted to. Just six weeks after issuing EO20-19, Governor Pritzker issued Executive Order 2020-37 ("EO20-37"), which *did* contain an express relatedness requirement. Section 4 of EO20-37 provided that for hospitals that chose to perform elective surgeries, immunity extended only for injuries or deaths "*relating to* the diagnosis,

[4] Likewise, Section 21 of the IEMA provides that private actors that "render[] assistance … at the request of the State during an actual or impending disaster shall not be civilly liable for causing the death of, or injury to, any person … except in the event of willful misconduct." *See* IEMA § 21(c). Thus, while Section 21(c) of the IEMA excludes immunity for willful misconduct, it does not have a relatedness requirement. Its only other limitation is temporal, namely that the injury to person or property have occurred "during an actual or impending disaster." *See id.* Consistent with Section 21(c), EO20-19 only immunizes harms that temporally occurred "at a time when a Health Care facility was engaged in the course of rendering assistance to the State," and does not immunize willful misconduct. *See* EO20-19, §3. In alignment with these parameters, each of the Plaintiffs' decedents allegedly suffered injury when Bria was rendering assistance to the State, and Bria does not seek dismissal of Plaintiffs' willful misconduct claims.

transmission, or treatment of COVID-19."[5] *See* EO20-37, §4 (emphasis supplied).

EO20-37 is highly instructive to interpreting EO20-19 for another reason. In addition to Section 4's express relatedness requirement, EO20-37 contained another section that extended immunity *without* a relatedness requirement. For hospitals that did not perform elective surgeries, Section 3 of EO20-37 granted immunity for "any injury or death … due to any act or omission." *See* EO20-37, §3. In light of Section 4's explicit relatedness requirement, it is fair to say that Section 3 explicitly *lacks* a relatedness requirement.[6] This confirms that Section 3 of EO20-37 does *not* condition immunity on relatedness. Otherwise, Section 4's express relatedness requirement would have been surplusage.

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[5] Bria agrees with the Attorney General that it was within the Governor's authority to issue an executive order granting less than the maximum immunity than the IEMA granted, as the Governor clearly did in Section 4 of EO20-37. *See* Attorney General's Brief at 6-7. But this doesn't mean that the IEMA's statutory immunity marks the maximum immunity that the Governor could have granted. The Governor has *constitutional* authority to address emergencies (which he periodically authorized before the IEMA's enactment), and the IEMA specifically provides that it should not be "construed to … limit, modify, or abridge the authority of the Governor to … exercise any other powers vested in the Governor under the constitution … independent of *or in conjunction with* any provisions of this Act." IEMA §3(d) (emphasis supplied). Section 3 of the IEMA thus explicitly provides that the IEMA was not intended to displace the Governor's constitutional authority to address emergencies. In any event, this case does not present the question of whether the IEMA's immunity grants are coterminous with gubernatorial constitutional power because EO20-19's immunity does not exceed the bounds of what the IEMA allows. *See supra* footnote 4.

[6] Bria acknowledges that 'explicitly lacks' verges on the oxymoronic, but the basic point remains: Section 3 of EO20-37 reflects a deliberate choice to omit a relatedness requirement.

That EO20-37's Section 3 does not condition immunity on relatedness is particularly instructive for understanding EO20-19. This is because EO20-37 Section 3's language of "any injury or death" due to "any act or omission" is word-for-word identical to the language in EO20-19's Section 3. *See* EO20-19, §3 (extending immunity to "any injury or death" caused by "any act or omission"). Under the interpretive canon that an executive order should be construed "in light of other relevant provisions," the conclusion that EO20-37's language of "any injury or death" due to "any act of omission" does not include a relatedness requirement constitutes yet another reason for concluding that EO20-19's identical language likewise does not include a relatedness requirement. *See Mosby*, 2023 Il 129081, ¶ 30.

B. A Relatedness Requirement Cannot Plausibly Be Tied to Other Language in the IEMA or EO20-19.

From what already has been argued, it follows that the Plaintiffs' and Attorney General's argument that EO20-19 has a relatedness requirement boils down to a request that this Court *add* a relatedness requirement to the Governor's executive order. To be sure, the Plaintiffs and the Attorney General try to disguise their ask by arguing that a relatedness requirement can be tied to language in the IEMA and EO20-19. But the language to which they point does not plausibly give rise to a relatedness requirement.

Plaintiffs (alone) attempt to connect a relatedness requirement to Section 15 of the IEMA. *See* Plaintiffs' Brief at 12. But Section 15 by its

terms applies only to "the State [or] any political subdivision of the State" and other specified parts of state government. *See* IEMA §15. Private corporations like Bria are governed by an entirely different section of the IEMA, namely Section 21. Entitled "No *Private* Liability," Section 21 provides that "[a]ny *private person*, *firm* or *corporation* … who renders assistance or advice at this request of the State … during an actual or impending disaster, shall not be civilly liable for causing the death of, or injury to, any person … except in the event of willful misconduct." *See* IEMA §21(c) (emphasis supplied). Critically, Section 21 – the section that applies to private actors like Bria -- does not have the language from Section 15 that Plaintiffs' brief invokes. *See* Plaintiffs' Brief at 12. It is unsurprising that the IEMA accords different degrees of immunity to State actors and non-State actors because they are materially different. It is the job of State actors to work for the public benefit. Not so for the private entities like Bria and the other Health Care Facilities that the Governor commandeered to render assistance to the State during the pandemic.

Both the Plaintiffs and the Attorney General also try to tie a relatedness requirement to EO20-19's language of "at a time" and "engaged in the course of." *See* Plaintiffs' Brief at 11-12, 18; Attorney General's Brief at 17-19. But these arguments also fail. To begin, neither the plain meaning of "at a time" nor "engaged in the course of" is synonymous with 'relatedness' -- a word that was part of the Governor's lexicon when he issued EO20-19, as EO20-37's Section 4 proves.

Indeed, "engaged in the course of" means something very different from relatedness. The case of *Romito v. City of Chicago,* 2019 IL App (1st) 181152, which the Attorney General himself cites, demonstrates that the phrase "engaged in the course of conduct" does not operate as an immunity-*limitation* (as a relatedness requirement would) but as an immunity-*expander*. *See* Attorney General's Brief at 9-10 (citing to *Romito*). *Romito* concerned the scope of immunity afforded by the Tort Immunity Act, which provides that "[a] public employee is not liable for his act or omission in the execution or enforcement of any law …" 745 ILCS 10/2-202. The question in *Romito* was whether police officers had immunity for negligence that occurred while they were filling in paperwork in their patrol car after having responded to a domestic violence call. *Romito* observed that "enforcing the law is *rarely a single, discrete act but instead is a course of conduct*," and held that "[w]here the evidence establishes that at the time of his alleged negligence a public employee was *engaged in a course of conduct designed to carry out or put into effect any law*, an affirmative defense based upon [the Tort Immunity Act] should be available." *Romito*, 2019 Il App. (1st) 181152, ¶¶38, 43 (emphasis supplied).

In other words, *Romito* understood that the phrase "engaged in a course of conduct" *broadened* the scope of immunized conduct beyond the narrowest way that the Tort Immunity Act's immunity conceivably could have been understood. Applied to EO20-19, *Romito* instructs that the

Order's extension of immunity to any "injury or death [that] occurred at a time when a Health Care Facility was engaged in the course of rendering assistance to the State" should not be interpreted as immunizing only deaths that occurred at the moment a facility was undertaking the acts the Order says qualify as 'rendering assistance.' Lest it be thought that nobody would propose such an absurdly restrictive interpretation, it bears mention that Plaintiffs have put forward this precise argument – as did the Attorney General in earlier briefs in this case. *See* Plaintiff's Brief at 18 (arguing that "the idiom 'at a time' is commonly understood to mean 'during one particular moment'"); Attorney General's Brief to Second District, at 9.

For these reasons, *Romito* does not support the Plaintiffs' and Attorney General's argument that EO20-19's language of "at a time" and "engaged in the course of" means that EO20-19 has an immunity-limiting relatedness requirement. Rather, *Romito* means that EO20-19's language "at a time when a Health Care Facility was engaged in the course of rendering assistance to the State" *extended* immunity to all conduct that was "designed to carry out or put into effect" the assistance the facilities rendered to the State by "increasing the number of beds, preserving personal protective equipment, or taking necessary steps to prepare to treat patients with COVID-19." *See Romito*, 2019 IL App (1st) 181152 at ¶43; EO20-19, §2 (emphasis supplied). Later in the brief we explain the

wide swath of activities that properly falls under the scope of "engaged in the course of rendering assistance to the State." *Id.* at §3.

Finally, *Romito* demonstrates that the Plaintiffs' and Attorney General's arguments for a relatedness requirement contradicts EO20-19's plain language in two ways beyond what we already explained. *Romito* makes clear that the Plaintiffs' and the Attorney General's argument ask this Court not only to disregard the Order's immunity-broadening language of "engaged in the course of," but to substitute an immunity-*limiting* relatedness requirement in its place.

C. This Court Should Reject the Plaintiffs' and Attorney General's Attempts to Graft a Novel Relatedness Requirement Onto EO20-19.

There are seven reasons why this Court should not graft a novel relatedness requirement onto EO20-19.

i. Creating A Relatedness Requirement Would Undermine Gubernatorial Intent.

First, in light of (1) the Governor's familiarity with relatedness requirements (as demonstrated by EO20-37), (2) EO20-19's pointed lack of any relatedness requirement, and (3) EO20-19's inclusion of the immunity-broadening language of "engaged in the course of," grafting a relatedness requirement onto EO20-19 would contradict the plain language and gubernatorial intent behind the Order when it was issued.

ii. The Absence of a Relatedness Requirement is Not "Absurd."

The Plaintiffs and Attorney General argue that EO20-19 must contain a relatedness requirement because, they say, it would be "absurd" for the Order to have immunized "conduct that was entirely unrelated to COVID-19." *See* Attorney General's Brief at 16; Plaintiffs' Brief at 13. Their absurdity argument fails for several reasons.

To begin, it runs aground of EO20-37, whose essentially explicit rejection of a relatedness requirement in its Section 3 demonstrates that the Governor did not think that omitting a relatedness requirement in his COVID-era executive orders was "absurd." *See* Part III.B, *supra*.

More fundamentally, the Plaintiffs' and Attorney General's argument that it would be "absurd" if EO20-19 did not have a relatedness requirement overlooks the context in which EO20-19 was issued: COVID-19's early chaotic days when it was all-hands-on-deck in nursing homes (and the other health care facilities) to address the unknowns of the rapidly unfolding pandemic. In connection with this, it is crucial to spotlight a recurrent error in the Plaintiffs' and Attorney General's briefs: they consistently understate what EO20-19 required health care facilities to do. They repeatedly say that the Order directed nursing homes to provide "Covid-19 assistance." *See* Attorney General's Brief at 15 (arguing against immunity for actions that "had no connection to *the Covid-19 assistance* the Governor was trying to stimulate"); *see also id.* at 9, 10, 11, 12, 13, 14;

Plaintiffs' Brief at 14-15 (arguing there is no immunity for "conduct that had no relation whatsoever to *a facility's COVID-19 assistance*"); *id.* at 18 (emphasis supplied).

But this is importantly incomplete because EO20-19 in fact had a far broader purpose: "ensur[ing] the *Illinois healthcare system* has adequate capacity to provide care to all who need it." EO20-19, Preamble (emphasis supplied). For that reason, the "rendering assistance" that EO20-19 ordered was not limited to "taking necessary steps to prepare to treat patients with COVID-19." *See* EO20-19, §2. In addition, the Order explicitly stated that 'rendering assistance' *also* required that health care facilities take "measures such as increasing the number of beds [and] preserving personal protective equipment." *Id.* Accordingly, it is not just the "providing [of] Covid-19 assistance" (as the Plaintiffs and Attorney General would have it) -- but the far broader swath of activities that were "designed to carry out or put into effect" the Governor's demand that health care facilities also "include measures such as increasing the number of beds" and "preserving personal protective equipment" -- that was immunized by EO20-19's language "engaged in the course of." *See id.*

More concretely, when Bria responded to the Governor's directive to render assistance to the State by "increasing the numbers of beds," "taking necessary steps to prepare to treat patients with COVID-19," and "preserving personal protective equipment," the responsibilities and

burdens that fell on nursing homes were exceptional and ever-increasing.[7] As part of the course of conduct of discharging these gubernatorially ordered tasks, Bria was: coordinating with hospitals to take patients so as to free up hospital beds, necessitating the development of new admissions protocols; creating designated units within the nursing home to house residents suspected of being infected with COVID-19, and other units for residents who tested positive; monitoring residents for COVID-19 symptoms, and substantially increasing the frequency that they took vital signs; introducing new disinfecting protocols whose burdens fell on all workers, not just the cleaning staff; providing an onslaught of training sessions to inform staff of the rapidly evolving information concerning COVID-19 and of the new (and ever-changing) procedures that were being implemented to stem its spread; terminating group activities, thereby increasing the reliance on individualized services; prohibiting vendors from entering the facility, thus requiring nursing home staff to carry and transport all deliveries within the facility; and extending work hours to preserve personal protective equipment and ensure coverage as staff fell ill or quit. *See* Long Affidavit, at ¶¶26, 38-40; Long Deposition, at 45-46, 72-73, 81, 125-27.

[7] Bria submitted evidence of rendering assistance by the uncontroverted affidavit of Patti Long which stands as admitted on the record. *Casey v. Rides Unlimited Chicago, Inc.,* 2022 IL App (3rd) 210404, ¶ 28 ("[u]nrebutted affidavits stand as admitted facts"); *Caruthers v. B. C. Christopher & Co.,* 57 Ill.2d 376, 381 (1974) (material facts in uncontested affidavits "must be accepted as true.").

Given all that was happening on the ground in Bria, the very predicate for the Plaintiffs' and Attorney General's absurdity argument is fundamentally mistaken: their absurdity argument disregards the actual context in which EO20-19 was issued. The Order's lack of a relatedness requirement was sensible insofar as it reflected the reality that when the Order was issued, nothing occurring in nursing homes was "entirely unrelated to COVID-19." *See* Attorney General's Brief at 16. As a practical matter, facilities' negligent acts or omissions in the early pandemic were inextricably connected to the unprecedented and then-unknown demands that COVID-19 was making on them as they engaged in the course of rendering the assistance the Governor had ordered so as to keep Illinois' healthcare system up and running. *See Romito*, 2019 IL App (1st) 181152 at ¶43.

iii. A Relatedness Requirement Would Render EO20-19's Immunity a Sham.

Third, this Court should decline the Plaintiffs' and Attorney General's invitation because grafting a relatedness requirement onto EO20 -19 would render its immunity an illusory mirage for harms whose causes for purposes of tort liability cannot readily be pinpointed, such as COVID-19 deaths.

Consider Plaintiffs' proposal: that EO20-19's immunity "only grants immunity for ordinary negligence *that bears a relationship to, and occurred at a time the healthcare facility was rendering assistance to the State*." *See* Plaintiffs' Brief at 20 (emphasis supplied). If EO20-19 contained such a

relatedness requirement, plaintiffs could bypass the Order's immunity for COVID-19 deaths by the simple expedient of arguing that a health care facility had not established that their specific plaintiff's decedent had contracted COVID-19 due to acts or omissions that were related to the facility's provision of COVID-19 assistance. The practical evidentiary burdens involved in establishing how and when any particular decedent contracted COVID-19 would risk gutting the Order's immunity for three interconnected reasons. First, most of the time it *cannot be known* what acts or omissions led to an individual's having contracted COVID-19. Second, most if not all actions that "bear a relationship to, and occurred at a time the healthcare facility was rendering assistance to the State" (Plaintiffs' Brief at 20) would not have been documented by nursing home staff as they were frantically at work during the pandemic's early days. Third, this lack of contemporaneous documentation vis-à-vis specific patients could not be reasonably expected to be overcome through affidavits, as such specific actions or omissions are unlikely to be remembered three-plus years after the fact by the health care facilities' employees.

Because a relatedness requirement would largely gut EO20-19's immunity, the Plaintiffs' and Attorney General's relatedness requirement would lead to a result that the Order's intended audience – Illinois' private health care facilities -- would not have anticipated. On the Plaintiffs' and Attorney General's theory, the nursing homes and other health care

facilities that were commandeered to render assistance in return for immunity "for any injury or death alleged to have been caused by any act or omission" were actually given only phantom relief from negligence lawsuits. *See* EO20-19, §3. The importance of not construing an executive order directed at incentivizing a discrete subset of the population as a bait-and-switch constitutes yet another reason for rejecting the Plaintiffs' and Attorney General's invitation to graft a relatedness requirement onto EO20-19. *See supra* Part I.

iv. *A Relatedness Requirement is Not Necessary to Further EO20-19's Purposes.*

The Plaintiffs and Attorney General also argue that interpreting EO20-19 without a relatedness requirement "would not further the executive order's purposes or help solve the problems the Governor sought to address." *See* Attorney General's Brief at 14-15; Plaintiffs' Brief at 15. This is demonstrably untrue. The Order's express purpose was to "ensure the Illinois health care system has adequate capacity to provide care to all who need it." *See* EO20-19, Preamble. Nursing homes' continued acceptance of patients from acute care hospitals was necessary to ensure that adequate numbers of hospital beds would be available for advanced COVID-19 patients and those who suffered from other serious ailments and injuries. The Governor was concerned that without the Order, nursing homes might stop taking new residents from hospitals to reduce the risk of COVID-19. At the time EO20-19 was issued, it was not well understood how COVID-19 spread and what steps could reduce its transmission. In

light of these uncertainties regarding COVID-19, nursing homes may not have continued accepting patients without immunity. Because a relatedness requirement would have rendered the immunity illusory, the lack of a relatedness requirement furthered the Order's purpose of ensuring that nursing homes were incentivized to continue accepting hospital patients so as to ensure the adequate availability of hospital beds. And it is notable that unlike many other States, Illinois' intensive care units retained capacity throughout the entirety of the pandemic.[8]

v. Grafting a Relatedness Requirement onto EO20-19 would generate an enormous Inconsistency in the Law.

The Attorney General argues that blanket immunity would "create an inconsistency with how the immunity operates as to health care professionals even though the language providing the immunity" to health care professionals and health care facilities "is the same." *See* Attorney General's Brief at 13. This argument fails because more extensive immunity for facilities would not reflect an "inconsistency," but simply would be a different application of the Order's language. Such a difference in application would understandably reflect the material differences between individual professionals and health care facilities that the Attorney General himself points out: "an individual" professional's conduct is "necessarily limited" in a way that a facility's conduct is not. *See id.*

[8] *See supra* note 1 and surrounding text.

In fact, it is the Plaintiffs' and Attorney General's proposed relatedness requirement that would create one of two breathtaking inconsistencies, thereby violating the interpretive canon cited by the Attorney General that executive orders should be "interpreted in light of other relevant provisions." *See* Attorney General's Brief at 8 (quoting *Rushton v. Dep't of Corr.*, 2019 IL 124552, ¶14) The first is an inconsistency *within* EO20-37. Accepting their invitation to graft a relatedness requirement onto EO20-19 would mean that EO20-37's identical language (in its Section 3) *also* has an implied relatedness requirement. But an implied relatedness requirement in Section 3 of EO20 -37 would be inconsistent with Section 4's explicit relatedness requirement –- it would make Section 4's relatedness requirement redundant. This problem with the Plaintiffs' and Attorney General's proposed interpretation of EO20-19 can be avoided only by creating a different type of inconsistency: a glaring inconsistency *between* two executive orders by not grafting a relatedness requirement onto EO20-37, despite having read such a requirement into EO20-19's identical language.

There is only one way out of the conundrum described in the previous paragraph: giving effect to the words that the Governor actually used in EO20-19's and EO20-37's identically worded Section 3 provisions, and by not grafting a relatedness requirement onto *either* of them. Giving effect to the plain meaning of both executive orders avoids both inconsistencies identified above.

vi. A Relatedness Requirement is Not Necessary to Ensure that EO20-19's Immunity is not "Boundless."

Sixth, the Plaintiffs and Attorney General assert that without a relatedness requirement the executive order's immunity would be "boundless." *See* Attorney General's Brief at 13; Plaintiffs' Brief at 17. That is untrue. Under EO20-19's terms, immunity extends to acts and omissions that occurred when a health care facility "was engaged in the course of rendering assistance to the State." *See* EO20-19, §3. While this language immunizes far more than a relatedness requirement would (as explained above in Part III.B), EO20-19's immunity is not "unbounded." Attorney General's Brief at 5. To illustrate through some of the Plaintiffs' and Attorney General's own hypotheticals, "an automobile collision caused by the agent of a healthcare facility while picking up a patient for dialysis treatment" (Plaintiffs' Brief at 13) would not be immunized. That is because an employee driving a dialysis patient is not engaged in a course of conduct "designed to carry out or put into effect" the assistance the facilities rendered to the State by "increasing the number of beds, preserving personal protective equipment, or taking necessary steps to prepare to treat patient with COVID-19." *See Romito*, 2019 IL App (1st) 181152 at ¶43; EO20-19, §2 (emphasis supplied).

A harder question is presented by the hypothetical of a visitor who sustained injuries in a fall in the parking lot that was "caused by a facility's negligent failure to maintain its premises." *See* Plaintiffs' Brief at 13;

Attorney General's Brief at 10. The strongest argument *for* immunity is that the nursing home's failure to adequately maintain its parking lot occurred as it was engaged in the course of conduct of rendering assistance insofar as the nursing home's limited resources had been diverted to doing all that was involved in "increasing the number of beds," "taking necessary steps to prepare to treat" COVID-19 patients, and "preserving personal protective equipment." In the other direction, the fact that the conduct and injury occurred outside the nursing home's physical plant and did not concern a nursing home resident might be reasons to conclude that the negligent maintenance of the parking lot falls outside the "course of rendering assistance" and accordingly would not be immunized.

Even so, this would not mean that *no* falls should be immunized. Falls are among the leading causes of injury for nursing home residents. There are strong reasons sounding in policy, fairness, and law for concluding that a negligent failure to mop up a spill within the facility that led to a resident's fall would come within the "course of rendering assistance" on account of the extraordinary resource demands nursing homes faced as they were accepting and caring for patients from hospitals (thereby "increasing the number of beds"), and as they were trying to contain and control COVID-19 and to treat residents who had contracted COVID-19 ("taking necessary steps to prepare to treat" COVID-19).

More generally, Bria suggests that the best test for determining what falls within the scope of "engaged in the course of rendering assistance to the State" is to consider the physical location of the allegedly negligent act or omission. Negligent acts and omissions that occurred inside the health care facility should qualify as being in the course of rendering assistance on account of the extraordinary demands that COVID-19 made on the nursing homes as they continued taking patients from hospitals so as to free up hospital beds; nursing homes had to expend tremendous resources to properly intake, test, and isolate these patients, and then to deal with the illnesses they may have brought with them during the pandemic's early days when it was not yet understood how COVID-19 spread. Likewise, the nursing homes' extensive efforts to preserve personal protective equipment (by doing such things as extending workers' hours), and all the resources they expended monitoring residents and isolating those who were sick (which was part of "taking necessary steps to prepare to treat" COVID-19 patients), are the reasons why acts and omissions within the physical confines of the nursing homes during that time properly fall within the scope of "engaged in the course of rendering assistance." The Alabama Supreme Court recently adopted a similar geographical location test for determining the scope of that State's COVID-era immunity for health care providers. *See In Re: Askew v. Triad of Alabama, LLC* (Alabama Supreme Court, SC-2023-0395 at 13) (January 26, 2024) (holding that immunity barred a claim for injuries due to a slip and fall that occurred in a specific

entrance to the health care facility that served patients who sought COVID-19 treatment).

In any event, this Court need not address the more esoteric hypotheticals that appear in the Plaintiffs' and ITLA's briefs. It is sufficient to observe that all the consolidated cases before this Court present the paradigmatic harm that the Order's intended audience understood it to address: COVID-19 deaths due to ordinary negligence that allegedly occurred in a health care facility.

vii. Immunity is Consistent with Public Policy.

Finally, extending immunity to private entities that the government commandeers to assist the State during emergencies is consistent with public policy. The purpose of the IEMA is to allow for the government to use all resources, public and private, to combat emergencies and disasters. The IEMA authorizes the Governor to order private individuals and entities to render assistance to the State to the benefit of the State and its residents during the worst times when disasters strike. In return, the IEMA extends immunity from ordinary negligence claims that may arise from acts or omissions that occur during the time that those commandeered private individuals and entities were rendering assistance to the State.

The arrival of a novel virus that disproportionately impacted citizens with pre-existing medical conditions who comprised a significant portion of the residents of the Defendant's facility was the type of disaster that the

IEMA contemplated. In exchange for rendering assistance to the State in the many ways the Governor demanded, EO20-19 immunized the private sector actors from ordinary negligence claims that might arise during the time they were commandeered by the State to render assistance. This makes sense from a public policy perspective. If a private health care facility is forced by the government to divert its resources to house additional high-risk patients, provide them care, and in so doing exposes other patients to the virus, it is not inconsistent with public policy to immunize that facility from liability because its staff, desperately laboring to save lives and overworked, may have been negligent when preparing food or delivering care to a patient in another area of the facility.

It is well known that nursing homes were ground zero in the early days of the novel COVID-19 outbreak. The tragic loss of lives during the pandemic led to a monumental mobilization effort across our nation to fight COVID-19, an effort that Illinois' private health care facilities joined with enthusiasm and in good faith. Now, after the Health Care Facilities have concluded their rendering of assistance on account of the crisis having subsided, the Plaintiffs and their amici seek to deprive Health Care Facilities of the immunity protections they had been promised by adding novel limitations to the Governor's Order.

There is no public policy that supports the bait-and-switch that the Plaintiffs and Attorney General advocate in effect even if not intent. Doing so would be patently unfair to the private actors like Bria that stepped up

to the plate during the COVID-19 pandemic. And endorsing such a bait-and-switch risks undermining the ability of future governors to use the IEMA to call upon private sector resources when the next emergency arises, as it inevitably will.

III. ITLA's Position Contradicts EO20-19's Plain Meaning and Asks This Court to Drastically Rewrite the Governor's Executive Order.

In their *amicus* brief, ITLA advances a position that contradicts EO20-19's plain meaning and would have this Court rewrite the Governor's Order even more drastically than the Plaintiffs and Attorney General propose. Although ITLA concedes that "[s]tockpiling protective equipment, ensuring the availability of beds, or preparing to treat patients are acts that constitute 'rendering assistance,'" it argues that such acts "are not intended to trigger the immunity" under EO20-19 or the IEMA. *See* ITLA Brief at 5. Instead, ITLA insists that immunity extends only if "the negligence occurred while the health care provider or facility was (a) 'affirmatively treating' a patient or (b) 'trying to prevent spread' of COVID-19." *See id.*

To begin, ITLA acts as if it is unfamiliar with the role of an *amicus* in this Court. That role is clear: "an amicus takes the case as he finds it with the issues framed by the parties." *Burger v. Lutheran General Hospital,* 198 Ill.2d 21, 61-62 (2001). The sole function of the *amicus* is to advise or to make suggestions to the Court within those parameters. *See People v. P.H.,* 145 Ill.2d 209, 234 (1991); *Frye v. Medicare-Glaser Corp.,*

153 Ill.2d 26, 30 (1992). For this reason alone, this Court should reject ITLA's attempt to raise issues not raised by the parties. *See Oswald v. Hamer,* 2018 IL 1222203, ¶ 41; *Karas v. Strevell,* 227 Ill.2d 440, 450-51 (2008).

Furthermore, ITLA's position is remarkable as a substantive matter: it simultaneously disregards the language of EO20-19 as it fabricates entirely new immunity criteria found nowhere in EO20-19. ITLA's proposal should be summarily rejected.

To begin, ITLA's argument completely disregards EO20-19's language. The Executive Order "direct[ed]" health care facilities to "render assistance" in support of the State's response to the pandemic, defined what 'rendering assistance' included ("'rendering assistance' in support of the State's response must include measures such as increasing the number of beds, preserving, personal protective equipment, or taking necessary steps to prepare to treat patients with COVID-19"), and granted immunity from "civil liability for any injury or death alleged to have been caused by any act or omission by the Health Care Facility*, which injury or death occurred at a time when a Health Care Facility was engaged in the course of rendering assistance to the State* by providing health care services in response to the COVID-19 outbreak …" *See* EO20-19, §§2, 3 (emphasis supplied).

While EO20-19 explicitly immunizes injuries and deaths that occurred while health care facilities were "engaged in the course of

rendering assistance," ITLA insists that immunity extends to only a *subset* of the activities that (even they acknowledge) qualify as 'rendering assistance.' But that of course is not what EO20-19 says. If the Governor had intended to immunize what ITLA insists it does, it would have been very easy for the Order to have said so: it need only have said that immunity extended "only to injuries or deaths that occurred when the health care facility was affirmatively treating COVID or trying to prevent its spread." But EO20-19 says no such thing.

Having disregarded the words of the Governor's executive order, ITLA is left with no option but to make up from whole cloth what subset of 'rendering assistance' it thinks should be immunized. After all, EO20-19 does not say anything at all about "affirmatively treating" patients or "trying to prevent the spread" of COVID-19, as ITLA would have it. *See* ITLA Brief at 5.

More generally, ITLA's brief mischaracterizes or misconstrues all that was entailed by the Governor's order that Bria and all other health care facilities render assistance to the State. ITLA argues that everything apart from providing affirmative treatment or trying to prevent spread constituted merely "administrative" acts. *See* ITLA Brief at 6 ("Bria's assertion that it is entitled to immunity simply because it took what amount to administrative steps to address the pandemic, such as storing PPE, ensuring beds were available, and taking other preparatory measures, is overbroad [and] self-serving").

No. The activities described above in Part II.C.2 that were part of Bria's course of conduct of rendering assistance involved far more than just "administrative" acts.[9] *See id.* It is not "manifestly unjust" for EO20-19 to have extended immunity for the ordinary negligence that occurred while health care facilities were engaged in the wide-ranging course of conduct that the Governor ordered them to undertake. *See id.* at 8. Bria's position -- that EO20-19 immunizes harms that occurred while health care facilities were engaged in the course of conduct of rendering assistance -- is not an interpretation that "provide[s] the broadest immunity possible" (*see id.* at 12), but is just the interpretation that reflects what EO20-19 says.

Finally, virtually every reason Bria has given for not creating a novel relatedness requirement (as the Plaintiffs' and Attorney General advocated) applies *a fortiori* to ITLA's even-more radical suggestion. To reiterate just a few, ITLA's position would turn EO20-19's immunity into a sham for harms whose causes for purposes of tort liability cannot readily be pinpointed, such as COVID deaths.[10] Adopting ITLA's bait-and-switch

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[9] And even if that were not so – even if they were only administrative – that wouldn't matter. That's because Bria did exactly what EO20-19 defined 'rendering assistance' to be and ordered health care facilities to do. The Order promised immunity in return, regardless of whether or not the activities it ordered might be characterized as merely administrative (which, as explained above in text, they weren't). *See* EO20-19, §§2-3.

[10] ITLA cites to a federal district court opinion that held that "plaintiffs' claims survive because they have plausibly alleged that [defendant] engaged in willful misconduct," which EO20-19 by its terms does not immunize. *See* ITA Brief at 5 (quoting *Brady for Smith v. SSC Westchester Operating Company LLC*, 533 F. Supp. 3d 667 (N.D. Ill. 2021)). The federal

would be patently unfair to the health care facilities that stepped up to the plate to help the State during the recent COVID-19 crisis, and would imperil the ability of future governors to get help from the private sector when the next emergencies arise.

CONCLUSION

This Court should decline the Plaintiffs' and Attorney General's invitation to create a relatedness requirement for EO20-19, and to ITLA's even more remarkable request. The Governor knew how to include an express relatedness requirement when he wanted to, and he did not put one into EO20-19. A relatedness requirement flies in the face of EO20-19's broad language, which extended immunity to "any injury or death alleged to have been caused by any act or omission." *See* EO20-19, §3. The Plaintiffs' and Attorney General's proposed interpretation also would create problematic inconsistencies within EO20-37 or between EO20-19 and EO20-37. And a relatedness requirement risks eviscerating EO20-19's immunity for the paradigmatic harms that the Order's intended audience reasonably understood they had been given in exchange for being commandeered to render assistance to the State in the pandemic's frantic early days.

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court's discussion of the executive order's immunity not only is dicta, but it is ill-founded because it is vulnerable to all the criticisms explained above in this Section IV. And, it goes without saying, an Illinois reviewing court, especially this Court, is not bound by a trial court decision and is not bound by a federal court's view of Illinois law. *National Fire Ins. Co. of Hartford v. Visual Pak Co., Inc.,* 2023 IL App (1st) 221160, ¶ 45, citing *Travelers Ins. Co. v. Eljer Manufacturing Inc.,* 197 Ill.2d 278, 302 (2001).

For the reasons stated and upon the authorities cited, the Defendant-Appellee, Geneva Nursing & Rehabilitation Center LLC, doing business as Bria Health Services of Geneva, respectfully asks the Court to affirm the judgment of the Appellate Court and to tax costs against the Plaintiffs.

Respectfully submitted:

Geneva Nursing and
Rehabilitation Center LLC
d/b/a Bria Health Services of
Geneva

/s/ Robert Marc Chemers

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Certificate of Compliance

I certify that this brief conforms to the requirements of 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, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 45 pages.

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NOTICE OF FILING and PROOF OF SERVICE

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, Patricia Velcich, as Executor of the Estate of Marion May Heotis, Deceased, Faith Heimbrodt, as Independent Administrator of the Estate Of Carol Orlando, Deceased	)	
Plaintiffs-Appellants,	)	No. 130042
v.	)	
Geneva Nursing and Rehabilitation Center, LLC d/b/a Bria Health Services of Geneva,	)	
Defendant-Appellee.	)	

The undersigned, being first duly sworn, deposes and states that on March 6, 2024, the Brief of Appellee was electronically filed and served upon the Clerk of the above court. On March 6, 2024, service of the Brief will be accomplished through email as well as the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Robert Marc Chemers
Robert Marc Chemers

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Robert Marc Chemers
Robert Marc Chemers