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.

***AMICI CURIAE* BRIEF OF AMERICAN HEALTH CARE ASSOCIATION, HEALTH CARE COUNCIL OF ILLINOIS, ILLINOIS HEALTH CARE ASSOCIATION and LEADINGAGE ILLINOIS IN SUPPORT OF DEFENDANT-APPELLEE**

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Statement of Interest of the Amici Curiae

Amici curiae, American Health Care Association ("AHCA"), Health Care Council of Illinois ("HCCI"), Illinois Health Care Association ("IHCA"), and LeadingAge Illinois ("LAIL") (collectively "Amici"), are all involved with supporting and advancing care related to housing, health care, and services for the elderly or organizations providing such services throughout Illinois.

AHCA is the largest association in the United States representing long term and post-acute care providers, with a membership of more than 14,000 facilities. Membership is comprised of non-profit and proprietary skilled nursing centers, assisted living communities, sub-acute centers, and homes for individuals with intellectual and developmental disabilities. Since its founding 75 years ago, AHCA has remained dedicated to providing quality care solutions for people who are frail, elderly, or living with disabilities and receiving care from its member facilities.

HCCI is a non-profit organization that represents housing, health care and ancillary service providers for 55,000 patients throughout Illinois. HCCI members employ 100,000 workers across Illinois. Since its founding in 2008, HCCI's mission is to improve the quality and delivery of care at Illinois' skilled nursing facilities through staff and public education initiatives, legislative advocacy, and regulatory engagement.

IHCA is a non-profit organization founded in 1950. IHCA is comprised of more than 500 licensed and certified long term care facilities,

assisted living facilities, and facilities for the intellectually and developmentally disabled, throughout Illinois. IHCA's goal and mission is to provide education to its members to allow its members to provide and deliver the best care possible to residents throughout the State of Illinois.

LAIL is a 100 year-old association of providers servicing older adults in Illinois. LAIL advocates for quality services, promotes innovative practices, and fosters collaboration. The organization serves a full spectrum of providers, including home and community based services, senior housing, life plan communities/continuing care retirement communities, assisted living, supportive living, and skilled nursing/rehabilitation centers. LAIL's mission is to advance excellence and innovation in adult life services.

The issues raised in this matter are of vital importance to AHCA, HCCI, IHCA, and LAIL, as representatives of organizations and individuals that qualify as "health care facilities," "health care professional," and "health care volunteer" as defined by Executive Order No. 2020-19 ("EO 19").[1] Whether the immunity offered in EO 19 applies as broadly as written impacts these organizations and individuals who heeded the Governor's request for assistance. Furthermore, how the immunity established through the Illinois Emergency Management Agency Act, 20 ILCS 3305 (the "IEMA Act") is construed will directly impact these same entities,

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

members, and the individuals they serve for past services, as well how these same entities and members will likely respond to future disasters. As such, this brief will highlight Illinois' public policy, enacted through the IEMA Act, and how the General Assembly and the Governor put forth a scheme to ensure private actors could assist the State's goals in times of disasters without exposing themselves to ordinary negligence through immunity.

Argument

Nursing homes and long term care facilities serve an important and necessary function in our society. Such institutions offer support and resources for those who need help, often times as people age or suffer from disease or significant injury. Current predictions indicate that the United States lacks the necessary nursing homes and long-term care facilities to meeting the imminent demand created by our aging population.[2]

Nursing homes and long term care facilities serve a necessary need in the complicated health care system that serves the people of Illinois. As such, these organizations and institutions were defined in EO 19 as necessary to meet the State's goal of preventing the spread of COVID-19 and ensuring adequate supplies and facilities to treat those with COVID-19, and other maladies.

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[2] See The U.S. Predicts Big Increases In Skilled Nursing And Long-Term Care Costs (forbes.com) (last visited February 6, 2024) (highlighting that nursing home costs are predicted to raise significant increases, due in part to greater need); Projected | CMS (last visited February 6, 2024) (the Centers for Medicare and Medicaid Services historical and projected data).

The partial immunity[3] established through § 21(c) of the IEMA Act and triggered through EO 19 provides immunity to all qualifying private actors for any bodily injury or death, pursuant to the plain language of the Act and executive order. The plain language supports a broad interpretation. Furthermore, any other interpretation will lead to absurd results, directly contrary to established public policy of Illinois and contrary to the Governor's purpose behind enacting EO 19.

Accepting Plaintiffs' position would improperly require a post-hoc re-interpretation of EO 19 well after the dire circumstances of the pandemic have passed and will cause significant problems for nursing homes and long term care facilities. First, there will be a disincentive for such entities to continue functioning and offering the vital care and services for patients. Second, such entities will have less incentive to offer support or utilize their resources when the next disaster strikes. A ruling affirming the plain and unambiguous intent of EO 19 will ensure that private actors can rely on the State to keep its word and permit such private actors to continue assisting with and promoting the State's goals. A ruling limiting immunity will force private actors in the future to protect themselves (to the possible detriment of the residents they serve) and limit how they use their limited resources, as the uncertainty as to whether immunity exists would create

[3] Amici will refer to the partial immunity established through § 21(c) of the IEMA Act and triggered through EO 19 as "immunity" as it does not apply to willful and wanton conduct.

an untenable situation and defeat the purpose of the IEMA Act and EO-19.

I. The IEMA Act Sets Forth Illinois' Public Policy that Immunity Applies to Any Private Actors' Acts or Omissions during a Declared Disaster if the Actor Renders Assistance Pursuant to the State's Request.

Through enacting legislation, the General Assembly, as opposed to the judicial branch, "occupies a 'superior position' in determining public policy." *Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 56 (2011). This Court has "strictly adhered to the position that the public policy of the state is not to be determined by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public." *Id.* (citation omitted). "Thus, when the legislature has declared, by law, the public policy of the State, the judicial department must remain silent, and if a modification or change in such policy is desired the law-making department must be applied to, and not the judiciary, whose function is to declare the law but not to make it." *Id.* (citation omitted). Courts should be "extremely reluctant to second-guess the clear language of legislation" and not import its own notions of optimal public policy. *Illinois State Treasurer v. Illinois Workers' Comp. Comm'n*, 2015 IL 117418, ¶ 39 (quotation and citation omitted).

The General Assembly enacted the IEMA Act, which provides, in relevant part, as follows:

> 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.

20 ILCS 3305/21(c).

Under the well-established rules related to statutory construction, the Court "may not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent." *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 226 Ill. 2d 559, 567 (2007). "A court should not attempt to read a statute other than in the manner in which it was written." *Id.* The primary objective of a Court is to give the effect to the drafter's intent, which is best indicated by the plain and ordinary language of the statute itself. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 25. "Words should be given their plain and obvious meaning unless the legislative act changes that meaning." *Id.* "In giving meaning to the words and clauses of a statute, no part should be rendered superfluous." *Id.* "Courts weighing legislative intent also consider the 'object to be attained, or the evil to be remedied by the act.'" *Id.* (citation omitted).

The plain language of § 21(c) of the IEMA Act unequivocally conveys immunity to private actors based on two relevant qualifying conditions. First, there must be an actual or impending disaster. Second, the private actor must render assistance at the request of the State. Notably, the IEMA Act does not authorize the Governor to impose additional limitations or conditions as to the immunity detailed in § 21(c).

By enacting EO 19, the Governor expressly declared "all counties in the State of Illinois as a disaster area…" in response to the exponential spread of COVID-19. Furthermore, EO 19 required all "Health Care Facilities, Health Care Professional, and Health Care Volunteers …" as defined in EO 19, "to render assistance in support of the State's response to the disaster recognized by the Gubernatorial Disaster Proclamations (COVID-19 outbreak)."

As the Governor declared all counties in Illinois a disaster area in response to COVID-19, clearly the first qualifier as to immunity was met. EO 19 further requested private actors to render assistance in support of the State's response to COVID-19. Obviously, EO 19 constituted a "request" for private actors to "render assistance." As such, any private entity or individual that falls within the definition of "Health Care Facilities," "Health Care Professionals," or "Health Care Volunteers," as defined by EO 19, that "rendered assistance" in support of the State's response to COVID-19, qualifies for immunity for causing any injury or death of any person, except in the event of willful misconduct.

The Governor's authority to enact executive orders such as EO 19 arises out of the Illinois Constitution, which provides that the "Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws." Ill. Const. art. V, § 8. The General Assembly enacted the IEMA Act, which was signed into law. The relevant portion of § 21(c) of the IEMA Act, as described, *supra*, contains only two qualifying

events to trigger immunity for negligence. As § 21(c) of the IEMA Act does not contain any limitations, neither the Governor nor the judiciary may insert any limitations. *Wilkins v. Williams*, 2013 IL 114310, ¶¶ 22, 55 (this Court refused to read limitations for immunity that the legislature did not express); *Michigan Ave. Nat. Bank v. Cnty. Of Cook*, 191 Ill. 2d 493, 505 (2000) (rejecting the plaintiff's "strained interpretation" and noting that § 6-105 of the Tort Immunity Act did not indicate that the General Assembly intended to confine the scope of the immunity to certain conduct); *Davis v. Toshiba Mach. Co., Am.*, 186 Ill. 2d 181, 186 (1999) (noting that, if the Legislature intended to add a limitation to a statute, "it would have inserted that limitation" and that the plain language did not contain such a limitation).

The Plaintiffs argue that any immunity conferred by the IEMA Act was limited to acts directly related to the COVID-19 pandemic but not other acts[4] (Plaintiffs Brief, pg. 11). The Plaintiffs cite 20 ILCS 3305/15 of the IEMA Act in support (Plaintiffs' Brief, pg. 12). Notably, § 15 applies to immunity as to state actors, not private actors.

"Where the legislature uses certain language in one part of a statute and different language in another, we may assume different meanings were intended." *People v. Hudson*, 228 Ill. 2d 181, 193 (2008). As demonstrated

[4] As Amici will demonstrate, *infra*, Plaintiffs' argument requires ignoring the full picture related to a disaster, attempting to narrow the Court's focus to ignore the fact that private actors have limited resources to respond to a disaster.

by § 15, the General Assembly clearly knew how to put limitations on the immunity detailed in § 21(c) but intentionally chose not to include such limitations. The Plaintiffs' argument actually supports that there are no additional limitations as to the immunity proscribed in § 21(c) beyond the qualifiers. See *Metzger v. DaRosa*, 209 Ill. 2d 30, 44 (2004) (holding that where the legislature has included a private right of action in a specific section of the statute demonstrates the legislature did not intend to imply private rights of action to enforce other sections of the same statute).

The Attorney General's ("AG") amicus brief argues that the Governor is not obligated to convey the full extent of immunity allowed under § 21(c), citing 20 ILCS 3305/6(c)(1) (AG Brief, pg. 6). However, § 6(c)(1) does not provide the Governor discretion to change, modify, or include limitations or conditions within § 21(c), but rather authorizes the Governor to "make, amend, and rescind all lawful necessary orders, rules, and regulations to carry out the provisions of this Act within the limits of the authority conferred upon the Governor." The plain and unambiguous language in § 6(c)(1) merely grants the Governor the authority to, in relevant parts, declare a disaster and request specified private actors to render assistance. But nothing in the section grants the Governor the authority to change or modify § 21(c), as the AG claims.

The AG also cites *Lake Cnty. Bd. of Rev. v. Prop. Tax Appeal Bd. of State of Ill.*, 119 Ill. 2d 419 (1988) and *Julie Q. v. Dep't of Child. & Fam. Servs.*, 2013 IL 113783, claiming that executive officers have discretion to

decide how to fulfill their duties (AG Brief, pg. 7). Notably, these decisions do not support that an executive officer may modify or change an unambiguous statute. Rather, these cases demonstrate that an executive officer has wide latitude to decide how to fulfill his or her duties as prescribed by statute.

The Governor clearly had discretion to declare a disaster as well as to identify and request private actors to render assistance. However, the Governor did not have authority to act beyond the statute and impose his own limitations or conditions as to the immunity within § 21(c). *See generally*, *Lake County*, 119 Ill. 2d at 427 (noting that an officer has only such powers as given to him by statute). The Governor's discretion to declare an emergency and identify private actors to request assistance is not unlimited and the Governor cannot unilaterally change Illinois' established public policy. Such a result would create obvious problems under the separation of powers doctrine. *See generally*, *Board of Trustees of Community College Dist. No. 508 v. Burris*, 118 Ill. 2d 465, 479 (1987) (finding that the Comptroller could not override the action of the legislature and Governor as it would create obvious problems under the separation of powers doctrine). The AG fails to cite any authority to support that the Governor could unilaterally change the IEMA Act or impose limits or conditions into the statute where none existed. The AG's unsupported argument is contrary to Illinois law.

The Illinois Trial Lawyers ("ILTA") argue that the IEMA Act "clearly intends for the immunity to be related to the disaster – not the normal day-to-day operations of a private corporation" (ITLA Brief, pg. 14-15). Notably, the plain language in § 21(c) does not support the argument.[5] As detailed, *supra*, § 21(c) contains only two qualifiers to trigger immunity: (1) an actual or impending disaster; and (2) the private actor renders assistance at the request of the State. The ILTA's argument is an improper request for this Court to change the State's established public policy. The General Assembly sets Illinois public policy, not the judiciary, lawyers or laymen. *Rosen*, 242 Ill. 2d at 56. As the IEMA Act does not include the limitation that ILTA demands, this Court should not modify the IEMA Act to insert such a limitation.

The General Assembly unequivocally set Illinois public policy that during an actual disaster, private actors have immunity for any acts or omissions, if they render assistance at the request of the State. There are no limitations or conditions as to the immunity provided by § 21(c). The Governor does not have authority under the Illinois Constitution or through the IEMA Act to add additional limitations or conditions. Private actors, including Amici and similar entities, relied on the IEMA Act and

[5] The Alabama Supreme Court rejected such an argument, finding that that partial immunity related to "health emergency claim" provided broad immunity as it did not impose any limitations on the chain of causation or the relation between a claim and Coronavirus outside of the plain language of the statute. *Ex parte Triad of Alabama, LLC*, No. SC-2023-0395, 2024 WL 295247, at *5 (Ala. Jan. 26, 2024).

the immunity prescribed in § 21(c), which was triggered through EO 19. The General Assembly obviously recognized that, in times of declared disasters, private resources are often necessary to support the State's goals. As the State needs private actors to pool their resources to respond to disasters, immunity provides the protection those actors need to allocate their resources and support the State's goals.

II. EO 19 Provides Immunity to All Qualified Private Actors Who Rendered Assistance at the State's Request for All Acts and Omissions.

The Court "may not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent." *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 226 Ill. 2d 559, 567 (2007). "A court should not attempt to read a statute other than in the manner in which it was written." *Id.*

The Plaintiffs argue for a narrow interpretation by trying to frame the issue as whether the immunity offered in EO 19 must be connected to the private actor's assistance to combating or preventing COVID-19 (Plaintiffs' Brief, pg. 10). However, Plaintiff's position is incorrect. First, the plain and unambiguous provisions within both EO 19 and § 21(c) of the IEMA Act demonstrate that private actors qualify for immunity for *all* injuries and deaths *if* the private actor was rendering assistance at the request of the State. Second, there would be an absurd result if this Court interprets EO 19 as only providing immunity for acts and omissions that directly arise out of treating COVID-19. Such an interpretation would

punish private actors for rendering assistance to the State by exposing those actors to liability merely because they actually heeded the call to render assistance.

Third, the Plaintiffs' argument is an overly simplistic snapshot of a much larger, complicated picture. The fallacy of the Plaintiffs' argument is the assumption that there was conduct that had no connection with a private actor's rendering of assistance to the State. When considering the disaster, every act or omission was related to rendering assistance to preventing the transmission or preparing to treat those with COVID-19.

1. The plain language of EO 19 supports a broad interpretation for triggering immunity.

EO 19's plain language demonstrates that the Governor requested specified private actors to marshal their resources to assist with the State's efforts in dealing with COVID-19. Specifically, the Governor identified the goal of "preservation of public health and safety" in order "to ensure that our healthcare delivery system is capable of serving those who are sick…." The Governor further identified the goal of ensuring Illinois had "adequate bed capacity, supplies, and providers to treat patients afflicted with COVID-19, as well as patients afflicted with other maladies…." The Governor also identified the purpose as "eliminating obstacles or barriers to the provision of supplies and health care services" to "ensure the Illinois healthcare system has adequate capacity to provide care to all who need it." EO 19 identifies § 21(c) of the IEMA Act as part of the authority necessary to enact the order.

EO 19 specifically identifies what entities were included in the definition of "Health Care Facilities." Section 2 provides, in relevant part:

> Pursuant to Sections 15 and 21(b)-(c) of the IEMA Act, 20 ILCS 3305/15 and 21(b)-(c) of the Good Samaritan Act, 745 ILCS 49, I direct all Health Care Facilities, Health Care Professionals, and Health Care Volunteers, as defined in Section 1 of this Executive Order, to render assistance in support of the State's response to the disaster recognized by the Gubernatorial Disaster Proclamations (COVID-19 outbreak). For Health Care Facilities, "rendering assistance" in support of the State's response must include cancelling or postponing elective surgeries and procedures, as defined in DPH's COVID-19 – Elective Surgical Procedure Guidance, if elective surgeries or procedures are performed at the Health Care Facility. In addition, for Health Care Facilities, "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….

Section 3 provides:

> Pursuant to Sections 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.

Finally, Section 6 provides: "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."

In *Wilkins v. Williams*, this Court held the plain language of § 3.150(a) of the EMS Act broadly declares that a person shall not be civilly liable as a result of their acts or omissions in providing nonemergency medical services. 2013 IL 114310, ¶ 20. This Court rejected injecting a limitation on the statutory immunity. *Id.* at ¶ 22. When the plain language of statutory immunity applies broadly, *Wilkins* supports interpreting the statute broadly. As in *Wilkins*, this Court should interpret EO 19 based on its plain language which supports immunity applying to private actors who rendered assistance at the State's request.[6]

EO 19 demonstrates that the Governor wanted private actors to use their limited resources to support the State's limited resources in preparing to prevent the transmission of COVID-19, preparing to treat patients with COVID-19, ensuring that there were adequate supplies to assist in those efforts, ensuring that the healthcare system could remain functioning and provide necessary care to those with other needs beyond COVID-19, and ensuring that the complex healthcare system could survive during and past the pandemic. The plain language of EO 19 supports applying immunity for all private actors who rendered assistance at the State's request.

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[6] *See also*, *Ex parte Triad of Alabama, LLC*, No. SC-2023-0395, 2024 WL 295247, at *5 (Ala. Jan. 26, 2024) (the Alabama Supreme Court held the plain language of a statute did not contain limitations and interpreted the statute broadly providing immunity as to health care claims resulting from COVID-19.

2. Interpreting EO 19 narrowly would lead to the absurd result of punishing private actors for rendering assistance to the State in service of the public good.

The only reasonable interpretation of EO 19 is that private actors are immune from ordinary negligence as to any injury or death provided they "render assistance" to the State related to its goals. Any interpretation that requires the act or omission to directly relate or arise out of COVID-19 ignores the plain language and would lead to absurd results.

The private actors defined within EO 19 have limited staff, money, and other resources in the best of times, which is exacerbated when responding to a disaster. A private actor, such as a nursing home, that complied with EO 19 by allocating its resources to prepare to provide housing or beds for people with COVID-19 necessarily had *fewer* resources to comply with its other obligations, such as maintaining its driveway. Private actors that heeded the Governor's call for assistance allocated their resources away from their regular tasks and responsibilities to focus on the public good, at the State's express request. Thus, any act or omission that fell below the ordinary standard of care as to any other task was *necessarily related* to the private actor rendering assistance to the State. That is precisely why EO 19 contains the key term of "any" as well as the qualifiers "at the time" and "rendering assistance." Taken as a whole, EO 19 requested specified private actors to assist the State's goal of preparing for COVID-19 while ensuring that the healthcare system, as a whole, could

stay intact and continue functioning, and protected those actors through immunity for "any" injury or death.

"Statutes must be construed to avoid absurd or unjust results." *Evans v. Cook Cnty. State's Att'y*, 2021 IL 125513, ¶ 27. Narrowing the immunity in EO 19 would lead to absurd results. Such an interpretation means that private actors who marshalled their limited resources to assist the State are now exposed to ordinary negligence simply because they used their limited resources to render such assistance to the State, and not for their normal tasks and responsibilities. Why would a private actor utilize its already limited resources to assist the public good when doing so would merely open it up to potential liability? That is precisely why the General Assembly enacted the public policy it did through § 21(c) of the IEMA Act. Any result that would permit a private actor to face liability for ordinary negligence because it used its limited resources to assist the State would obviously lead to absurd results and disincentivize any private actor from providing future assistance. As such, this Court should avoid an interpretation that would lead to the absurd result of punishing private actors for complying with EO 19 by exposing those actors to additional liability.

3. Private actors do not have unlimited resources.

The Plaintiffs' argument requires focusing exclusively on the question as to whether the act or omission was directly related to treating or preventing the spread of COVID-19. The Plaintiffs' argument necessarily

means that the Court should not consider how private actors utilized their limited resources to render assistance to the State. But, much like a magic trick, while the Plaintiffs demand that this Court focus exclusively on the left hand and ignore the right hand, a watchful observer can see both hands work together. Plaintiffs' hyper fixation on one small detail prevents them from seeing the complete picture.

When the State requests assistance to respond to a disaster, private actors must necessarily allocate their resources to both assist the State, and carry out their normal responsibilities. EO 19 requested private actors to support the State's goals, in part, to ensure that the healthcare system would survive and continue functioning. That means all private entities made decisions on how to allocate their resources, such as staff members and their time, technology, medical equipment and supplies, and money, in order to secure additional supplies and modify their existing internal structures and systems. As these private actors had to re-distribute how they allocated their resources to best attempt to handle the problems raised by COVID-19, the simple fact is that every act or omission was connected to the private actor's assistance to the State.

The AG claims that EO 19 should not provide immunity for all negligence that occurred during the same time a facility was rendering assistance, if the negligence was wholly unrelated, "like negligently maintaining its parking lot or operating its kitchen" (AG Brief, pg. 10). Yet, the AG fails to consider that the employees who would usually maintain

the parking lot or operate the kitchen were instead being tasked with other more pressing pandemic-related activities, such as, for example, wiping down surfaces or attempting to secure protective or medical equipment. In essence, the AG's argument boils down to the premise that a private actor should not qualify for immunity under EO 19 for allocating resources to render assistance to the State if the entity does not have sufficient resources to *additionally* handle its regular tasks and responsibilities. But such a narrow focus fails to consider that the *reason* staff were unavailable was due to rendering assistance to the State. The fallacy is the presumption that private actors have unlimited resources. Obviously, that is not the case.

Furthermore, the argument also fails to acknowledge the reality of what was happening in March and April of 2020. While we collectively can look back at what happened with perfect vision, no one at the time knew or had any way to know what resources or tools were necessary to prevent the spread of COVID-19 or what medical treatments were most effective to treat COVID-19.[7]

[7] In fact, in January 2024, recent reporting suggests that the guidance offered by federal health officials as to the "6 feet apart" social distancing guidelines was not based on scientific data, underscoring that even the experts did not know what would work to prevent the transmission of COVID-19 during the pandemic, especially at the beginning. See ICYMI: Wenstrup & Select Subcommittee Members Question Dr. Anthony Fauci for Two-Days, 14-Hours - United States House Committee on Oversight and Accountability (last visited January 26, 2024)

Illinois, like the rest of the country, was in lockdown.[8] No one knew or had any reason to know when the lockdown would end.[9] The federal government recognized the unique challenges and uncertainty of COVID-19 and provided financial assistance to individuals throughout the country.[10] The financial assistance impacted private actors by removing incentive for individuals to work for "health care facilities," including staff or potential employees. At the time, people with underlying medical conditions, or those with immediate family members with such conditions, were likely to avoid working at "health care facilities" to protect themselves.[11] Yet, the Plaintiffs' unfairly argue that "health care facilities" were negligent for failing to employ the necessary staff which they claim was "unrelated" to the rendering of assistance to the State.[12]

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[8] The Governor issued a stay at home order effective March 21, 2020. See Gov. Pritzker Announces Statewide Stay At Home Order to Maximize COVID-19 Containment, Ensure Health Care System Remains Fully Operational (illinois.gov) (last visited January 26, 2024).

[9] For a general description of the uncertainty, see COVID-19 Lockdown: When Will This Feeling End? How To Manage Through Uncertainty (forbes.com) (Last visited January 26, 2024).

[10] The Federal Government made direct payments to individuals totaling $931 billion to help with COVID-19. See Stimulus Checks: Direct Payments to Individuals during the COVID-19 Pandemic | U.S. GAO (last visited January 26, 2024).

[11] The Illinois Department of Employment Security posted frequently asked questions explicitly demonstrating that some people would necessarily have to stay home and not go physically into an office or work space, demonstrating that the issue was prevalent and widespread. See For Claimants (illinois.gov) (last visited January 26, 2024).

[12] For a detailed study as to examining staffing shortages at US nursing homes during COVID-19, see Examination of Staffing Shortages at US Nursing Homes During the COVID-19 Pandemic - PMC (nih.gov) (last visited January 26, 2024). The study demonstrates that nursing homes

The Plaintiffs' attempt to cherry pick what acts or omissions were connected to rendering assistance is a flawed attempt to re-write what the people of Illinois went through in the beginning months of 2020. While hindsight is perfect vision, the relevant question before this Court involves considering what actually was happening, in the moment, during March and April of 2020. Obviously, everyone in Illinois was experiencing trauma during an uncertain and terrifying global pandemic. The Plaintiffs' hyper fixation on only a small detail of the much larger picture requires ignoring what actually happened, and what was actually happening on the frontlines of Illinois nursing homes.

Indeed, the vast majority of private businesses involved in Illinois' complicated healthcare system attempted to assist by taking necessary precautions to prevent transmission and ensure the healthcare system could continue functioning. Suggesting that private actors who fell within EO 19's scope could have taken conduct unrelated to COVID-19 is merely attempting to improperly re-write history after the fact while ignoring what life was really like in March and April of 2020. Furthermore, Plaintiffs' argument ignores the inherent stress that everyone was under in March and April of 2020, including the private actors' employees, who had *additional* responsibilities on the frontlines directly related to preventing the transmission of COVID-19, finding and procuring medical supplies

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struggled to retain necessary staff and new staff needed to be trained, which caused staff burnout and led to high turnover.

and equipment, and ensuring that the facility could service individuals with COVID-19 and other maladies. The Plaintiffs' position ignores the heightened level of stress, the difficulty in preparing for COVID-19, and the practical reality that staff of these private actors simply had to do the best they could, with limited resources.[13]

The Plaintiffs also focus on EO 19's inclusion of the phrases "at a time" and "engaged in the course of" to claim that the immunity only extended to acts or omissions that were directly related to rendering assistance to the State (Plaintiffs' Brief, pg. 18-19). The Plaintiffs cite *Fitzpatrick v. Chicago*, 112 Ill. 2d 211 (1986) to support their argument (Plaintiffs' Brief, pg. 19). Yet, a cursory review of *Fitzpatrick* supports that the narrow snapshot that the Plaintiffs advocate for is *improper* as that case *rejected* the plaintiff's attempt to focus on a single, discrete act, but rather focused on the course of conduct. *Id.* at 221. *Fitzpatrick* supports that the question as to whether immunity applies requires determining whether the private actor was engaged in a course of conduct of rendering requested assistance to the State. Focusing solely on a specific act or omission, without consideration of how the private actor was allocating its resources as a whole, is exactly what the Court in *Fitzpatrick* rejected.

[13] See Front-line Nursing Home Staff Experiences During the COVID-19 Pandemic - PMC (nih.gov) (last visited February 19, 2024) (documenting the real experiences of nursing home frontline workers during the pandemic).

The Plaintiffs also argue that extending immunity to all acts or omissions would render the phrases "at a time" and "engaged in the course of" meaningless (Plaintiffs' Brief, pg. 19). But of course, such an interpretation is entirely consistent with determining whether a private actor was engaged in the course of conduct requested, which was rendering assistance to the State. A broad interpretation actually provides those phrases with meaning, as any act or omission that was too far removed from when the private actor rendered assistance would not be covered. But even more so than the reasonable interpretation that the Plaintiffs ignore, the simple fact remains that the private sector did what it could to prepare for COVID-19 and mitigate the pandemic's threats. Plaintiffs' attempt to narrow the issue requires a microscopic lens to ignore looking at any other part of the much larger picture.

The AG claims that interpreting EO 19 to provide immunity for all injuries and death would create a conflict as to how the immunity applies to health care facilities versus health care professionals (AG Brief, pg. 13-14). But the AG fails to consider that EO 19 specified what assistance was required for health care facilities, as well as for health care professionals. While health care facilities needed to cancel or postpone elective surgeries, if performed at the facility, and increase the number of beds, preserve personal protective equipment, and take steps to prepare to treat patients, health care professionals needed to provide health care services. Interpreting the plain and unambiguous language in EO 19 as providing

immunity for any act or omission for a health care facility does not create a conflict as to immunity for health care professionals, who needed to actually engage in health care services to render assistance. The AG's argument is meritless as it requires ignoring the distinction between what assistance was necessary as to health care facilities and health care professionals, which is improper. See *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 25 ("In giving meaning to the words and clauses of a statute, no part should be rendered superfluous").

The AG also argues that extending immunity to all acts or omissions would not further the purpose or help solve the problems the Governor sought to address (AG Brief, pg. 14). The Governor clearly sought private actors to allocate their resources in a manner to assist the State's goal in being able to maintain the health care system, prevent the transmission of COVID-19, and treat patients for COVID-19 and all other maladies. The AG's argument ignores that private actors do not have unlimited resources to throw at any problem. Again, a nursing home that directed its staff to focus on taking monumental precautions, such as wiping down surface areas or procuring protective equipment and supplies, *necessarily* had fewer resources to allocate to all other tasks and responsibilities.

The flaw in the AG's argument is obvious when considering what the private sector will do in the next disaster. Assuming, *arguendo*, the AG is correct, and the conduct must directly relate to the assistance rendered, why would any private entity change how it allocates its resources to assist

the public during the next disaster? All private actors would face increased exposure to liability for failing to perform their regular tasks and responsibilities because they were otherwise assisting the State. Obviously, such a result would be absurd, and would *directly contradict* the State's goals.

As detailed, *supra*, the General Assembly has already established Illinois' public policy through enacting § 21(c) of the IEMA Act. Clearly, Illinois' public policy supports extending immunity during times of actual or impending disaster to private actors who render assistance at the State's request. The AG's argument would impermissibly flip Illinois' public policy on its head, and would incentivize private actors to focus only on their own self-interest at the expense of the public when the next disaster strikes. For good and obvious reasons, that is not and should not be, the public policy in Illinois.

4. The IEMA ACT and EO 19 balances protecting private actors for allocating their resources to assist the State while still ensuring that private actors can face liability for willful and wanton conduct.

The AG also argues that immunity for all acts or omissions would incentive private actors to render minimal amount of assistance while prioritizing other, more lucrative services (AG Brief, pg. 15). This argument ignores that § 21(c) of the IEMA Act and EO 19 balances the varying interests by leaving liability exposure for willful and wanton conduct. Private actors would potentially open themselves to liability for willful and wanton conduct if they try to appear to render assistance but really only

assist themselves. The AG's argument ignores the overall framework of how partial immunity works.

The Plaintiffs also correctly identify that a court should look to the evil that the legislature sought to remedy (Plaintiffs' Brief, pg. 13). However, the Plaintiffs ignore that the purpose behind § 21(c) of the IEMA Act, and by extension EO 19, was to ensure that private actors could allocate their resources to assisting the public good without fear of being liable based on *how* they allocated their resources. The evil § 21(c) of the IEMA Act sought to remedy is the indifference of the private sector to disasters that impact people within Illinois. Without partial immunity to provide such protection to private actors, such actors would be stuck with a decision as to whether they should protect their own interests or assist the State in times of a disaster. Obviously, § 21(c) of the IEMA Act sought to remove such a difficult question and ensure private actors could allocate their resources without facing liability for assisting the public during a disaster. The fact that § 21(c) of the IEMA Act and EO 19 provide partial immunity, but not total immunity, underscores the balancing act the legislature decided upon to ensure that private actors could still be liable for willful and wanton conduct, so that such private actors could not use the excuse of a disaster for any act or omission.

EO 19 provided immunity for any act or omission by the defined private actors who rendered assistance at the request of the State. Interpreting EO 19 as requiring a causal connection to COVID-19 ignores

the plain language of the order, improperly adds conditions and limitations, and would lead to the absurd result of punishing actors for assisting the State. Furthermore, such an interpretation ignores the reality that private actors have limited resources and every act in March and April of 2020 related to preventing the transmission of COVID-19 and ensuring that the healthcare system could continue functioning. As such, Amici asks this Court to interpret EO-19 broadly, as the plain language in the order is written, and which established Illinois law requires.

Conclusion

For the aforementioned reasons, Amici requests that this Court hold that § 21(c) of the IEMA Act and EO 19 provide immunity for any act or omission of any entity that qualifies for rendering assistance to the State.

Respectfully submitted,

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Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a), (b), Rule 315(h) and 345. The length of this brief, excluding the pages contained in 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 27 pages.

/s/ Jonathan L. Federman
Jonathan L. Federman

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 *Amici Curiae* Brief of American Health Care Association, Illinois Health Care Association, Health Care Council of Illinois, and LeadingAge Illinois was electronically filed and served upon the Clerk of the above court. On March 6, 2024, service of the *Amici Curiae* Brief will be accomplished via 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/ Jonathan L. Federman
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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/ Jonathan L. Federman
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