

No. SC-2023-0601

IN THE SUPREME COURT OF ALABAMA

EX PARTE JACKSON HOSPITAL & CLINIC, INC.,
Petitioner.

THERESA JOHNSON, INDIVIDUALLY, AND EXECUTOR OF THE
ESTATE OF NATHANIEL JOHNSON,
Plaintiff/Respondent

V.

JACKSON HOSPITAL & CLINIC, INC., ET AL.,
Defendants/Petitioners.

AMICUS BRIEF FOR GOVERNOR KAY IVEY
IN SUPPORT OF COVID-19 IMMUNITY PROCLAMATION

On Petition for Writ of Mandamus
to the Circuit Court of Montgomery County,
Hon. Jimmy Pool, No. 03-CV-2021-900980

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STATEMENT OF THE FACTS

I. **March 2020: COVID first strikes Alabama, creating a health and economic emergency**

Nearly four years after most Alabamians first heard of “COVID-19,” it is difficult, perhaps, to recall just how much uncertainty there was at first surrounding the disease and what to do about it. But from the outset, it was clear that this pandemic would touch all aspects of society—including not only the health of individual citizens but also the economy.

Recognizing this reality, Alabama’s government sprang into action. Alabama confirmed its first case of the novel coronavirus, COVID-19, on March 13, 2020. *Governor Ivey Releases Statement on Alabama’s First Confirmed Coronavirus Case*, ALA. GOVERNOR (Mar. 13, 2020).¹ The Governor, that same day, along with the President of the United States and other governors, declared a state of emergency. In her view, like that of many of her fellow chief executives, “the appearance of COVID-19 in the State indicate[d] the potential of widespread exposure to an infectious agent that poses significant risk of substantial harm to a large number

¹ <https://governor.alabama.gov/newsroom/2020/03/governor-ivey-releases-statement-on-alabamas-first-confirmed-coronavirus-case/>

of people.” *Initial Emergency Proclamation*, ALA. GOVERNOR (Mar. 13, 2020).² To that end, she, along with the State Health Officer, issued “a string of proclamations and orders that imposed various restrictions and offered nonbinding guidelines.” *Case v. Ivey*, 542 F. Supp. 3d 1245, 1257 (M.D. Ala. 2021). The “substance of [their] proclamations and orders evolved with the passage of time,” as one federal district court put it, “[d]ue to the fluidity of the pandemic, and as more information about COVID-19 came to light.” *Id.*

The emergency actions taken by the Governor would include numerous, uncontroversial measures to help Alabamians cope, longer-term, with a dangerous disease that is spread through everyday activities like speaking and breathing. For example, where existing law required certain entities to hold in-person meetings, the Governor exercised her power under the Emergency Management Act to allow these meetings to proceed remotely, subject to revised transparency and public-accountability safeguards. *See, e.g., First Supplemental Emergency Proclamation*,

² <https://governor.alabama.gov/assets/2020/03/2020-03-13-Initial-COVID-19-SOE.pdf>

ALA. GOVERNOR, § III (Mar. 18, 2020) (governmental entities);³ *Fifth Supplemental Emergency Proclamation*, ALA. GOVERNOR, § V (Apr. 2, 2020) (shareholders);⁴ *Thirteenth Supplemental Emergency Proclamation*, ALA. GOVERNOR, § I (July 2, 2020) (nonprofit corporations).⁵ The Governor also exercised her power under the Emergency Management Act to allow signatures and witness statements to be notarized remotely, thereby reducing in-person meetings. *See Fourth Supplemental Emergency Proclamation*, ALA. GOVERNOR, § III (Mar. 26, 2020).⁶ And critically, she used her Emergency Management Act powers to cut red tape for healthcare providers—by expanding certain providers’ authorized scopes of practice, by expanding and expediting licensure reciprocity for out-of-state practitioners, and by fast-tracking the reinstatement of retired physicians’ medical

³ <https://governor.alabama.gov/newsroom/2020/03/supplemental-state-of-emergency-coronavirus-covid-19/>

⁴ <https://governor.alabama.gov/newsroom/2020/04/fifth-supplemental-state-of-emergency-coronavirus-covid-19/>

⁵ <https://governor.alabama.gov/assets/2020/07/2020-07-02-13th-Supplemental-SOE-COVID-19.pdf>

⁶ <https://governor.alabama.gov/newsroom/2020/03/fourth-supplemental-state-of-emergency-coronavirus-covid-19/>

licenses—to meet the anticipated surge of demand in Alabama’s hospitals. *See Fifth Supplemental Proclamation*, § I. These are just a few examples of the uncontroversial emergency actions eventually taken by the Governor under the Emergency Management Act to assist Alabamians in adapting to the long-term effects of this unanticipated public-health crisis. For this Court’s convenience, a complete list of the Governor’s emergency orders during the emergency is included in an appendix to this brief.

At first, the emergency actions focused directly on limiting the spread of COVID-19. The State Health Officer limited most gatherings of people to limit COVID transmission, as in most other States. Many stores closed for in-person shopping. Restaurants closed for in-person dining. Schools closed for in-person instruction. Hospitals and doctors’ offices postponed elective procedures. Even beaches closed. *See, e.g., First Supplemental Proclamation*, § II; *Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19*, ALA.

DEP'T PUB. HEALTH, §§ 1, 2, 4, & 6 (Mar. 19, 2020).⁷ Alabama was experiencing a whole-of-society crisis.

The Alabama Legislature was affected in much the same way as the rest of the State and Nation. When the first positive test in Alabama happened, the Legislature was in an intra-session break. *Coronavirus puts hold on Alabama Senate until April 28*, AL.COM (Mar. 26, 2020). Due to the threats posed by COVID, the Legislature had no choice but to postpone its return for several weeks, leaving executive-branch emergency actions as the only way for the State to respond to this rapidly changing pandemic. *See 2020 Legislative Session: May 4–9*, ALA. BAR (May 11, 2020);⁸ *Coronavirus adds uncertainty to Alabama state budget outlook*, AL.COM (Mar. 17, 2020).⁹

⁷ <https://www.alabamapublichealth.gov/legal/assets/order-adph-cov-gatherings-031920.pdf>

⁸ <https://www.alabar.org/news/2020-legislative-session-may-4-9-2020/>

⁹ <https://www.al.com/news/2020/03/coronavirus-adds-uncertainty-to-alabama-state-budget-outlook.html>

II. **May 2020: The Governor issues a proclamation providing for limited immunity from COVID claims to help re-open Alabama’s economy**

Although COVID presented serious health risks, the costs of keeping the economy shut down were also devastating. So, striking a careful balance, the Governor began lifting restrictions and opening the economy in May 2020—well *before* many other States lifted their own similar restrictions. *See, e.g., Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19*, ALA. DEP’T PUB. HEALTH (amended May 8, 2020).¹⁰ The Governor’s issuance of the COVID-19 Immunity Proclamation at issue here was an essential component of Alabama’s early reopening. *See Eighth Supplemental Emergency Proclamation*, ALA. GOVERNOR (May 8, 2020).¹¹

That May 8, 2020, proclamation explained why its immunity provisions would resolve a key predicament the State was facing en route to reopening. On one hand, while the earlier restrictions had “been helpful from a public health perspective,” they had “caused economic hardship to

¹⁰ <https://governor.alabama.gov/assets/2020/05/Safer-at-Home-Order-FINAL-5.8.2020.pdf>

¹¹ <https://governor.alabama.gov/assets/2020/05/2020-05-08-8th-Supplemental-SOE-COVID-19.pdf>

working people and their families.” *Id.* On the other hand, many businesses were “reluctant to reopen” or “fully reopen” because they feared “lawsuits and the risk of the associated expense and liability.” *Id.* The Governor concluded that “encouraging businesses to reopen in a responsible manner will both improve public health *and* preserve the economic well-being of the citizens of Alabama.” *Id.* (emphasis added).

On that basis, the Governor provided “[e]mergency protection[]” to entities including “business[es]” and “health care provider[s]” from liability for “COVID-19 transmission or a covered COVID-19 response activity” unless that transmission was caused by “wanton, reckless, willful, or intentional misconduct.” *Id.*, § I.C.1 (bolding omitted). Those covered COVID-19 response activities included “[a]ny performance or provision of health care services or treatment by a health care provider that resulted from, was negatively affected by, was negatively impacted by a lack of resources caused by, or was done in response to the COVID-19 pandemic or the State’s response thereto.” *Id.*, § I.B.4. The Governor explained that she had worked with both “representatives of businesses and industry” and “Alabama trial attorneys” to understand the “concerns and challenges” faced not only by businesses wary of reopening but also the

“people who have been, or who may be, harmed in the course of the re-opening process.” *Id.*

Those executive measures were especially necessary because the pandemic limited the Legislature’s ability to meet and pass legislation addressing these issues. The Legislature had returned on May 4, but the Alabama Constitution required its regular session to end by May 18. *See* ALA. CONST., art. IV, § 76. As a result, many members “felt like we needed to just address budgets and then move on.” *Alabama House gearing up for session during COVID-19 pandemic*, AL.COM (video 12:46–13:09) (Dec. 8, 2020).¹² So although 24 legislators co-authored a bill that would have provided the same immunity the proclamation did,¹³ the Legislature was unable to vote on it because it had to “to focus only on budget-related and local bills in the COVID-shortened session.” *COVID-19 liability protection bill filed in Legislature*, ALA. DAILY NEWS (Jan. 14, 2021).¹⁴ Ultimately, the “COVID-19 pandemic severely curtailed the Legislature’s

¹² <https://www.al.com/news/2020/12/alabama-house-gearing-up-for-session-during-covid-19-pandemic.html>

¹³ Ala. S.B. 330 (2020), <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2020rs/PrintFiles/SB330-int.pdf>

¹⁴ <https://www.aldailynews.com/covid-19-liability-protection-bill-filed-in-legislature/>

2020 regular session, causing the Legislature to miss nine—or thirty percent—of the thirty legislative days available,” as the Governor later explained. *Twenty-first Supplemental Emergency Proclamation*, ALA. GOVERNOR (Dec. 11, 2020).¹⁵

Following its COVID-truncated regular session, the Legislature remained out of session for the remainder of 2020 as it continued to put “technology in place” and “to work on [its] overflow rooms and get some protocols in place” so it would be prepared to act in accordance with COVID-19 guidelines in the next regular session. *Alabama House gearing up for session during COVID-19 pandemic*, AL.COM (video at 11:15–12:05) (Dec. 8, 2020).¹⁶ The Governor later explained that “it may not be safe or prudent at this time to call the Legislature into special session” due to “COVID-19 guidelines” from public-health authorities. *Twenty-first Supplemental Proclamation*, § II.A.6. In the meantime, the Proclamation continued to be needed as a stopgap measure in sustaining Alabama’s burgeoning economic recovery.

¹⁵ https://governor.alabama.gov/assets/2020/12/2020-12-11_21st-Supplemental-SOE-COVID-19.pdf

¹⁶ <https://www.al.com/news/2020/12/alabama-house-gearing-up-for-session-during-covid-19-pandemic.html>

III. **February 2021: The Legislature ratifies the COVID-immunity proclamation shortly after it returns**

The need for emergency provision of liability protections by the Governor came to an end in February 2021, when the Legislature was able to return for the 2021 regular session. *See 3 things to watch as the Alabama Legislature returns Tuesday*, MONTGOMERY ADVERTISER (Jan. 29, 2021).¹⁷ During the first two weeks, the Legislature passed legislation providing “reasonable protections from the risk and expense of lawsuits to businesses” and “protection [for health care facilities and professionals] to respond to this pandemic.” ALA. ACT 2021-4, § 1(1), (2). That act ratified and built upon the protections the Governor had provided on an emergency basis in her Proclamation.

Much like the Proclamation, the statute provided that “a covered entity shall not be liable for any damages, injury or death” caused by the “contraction of Coronavirus.” *Id.*, §§ 3(a) & 2(13)(a); *cf. Eighth Supplemental Proclamation*, § I.C.1. Much like the Proclamation, the statute provided immunity from claims arising from “the performance or provi-

¹⁷ <https://www.montgomeryadvertiser.com/story/news/2021/01/29/alabama-legislature-returns-february-4-three-things-watch/4259430001/>

sion of health care services or treatment that resulted from, was negatively affected by, was negatively impacted by a lack of resources caused by, or was done in response to the Coronavirus pandemic or the state's response to the pandemic." ALA. ACT 2021-4, § 5(a); *cf. Eighth Supplemental Proclamation*, § I.B.4. And much like in the Proclamation, the statutory immunity would "not apply if the claimant proves by clear and convincing evidence that the covered entity caused the damages, injury, or death by acting with wanton, reckless, willful, or intentional misconduct." ALA. ACT 2021-4, § 3(b); *cf. Eighth Supplemental Proclamation*, § I.C.1. The act even specified that it was to be construed "*in pari materia* with the Emergency Management Act and with any emergency order or proclamation of the Governor relating to Coronavirus and immunity from civil lawsuits." *Id.* § 7.

ARGUMENT

The Governor’s Eighth Supplemental Proclamation, which provided immunity from certain COVID-related claims, was a crucial and valid use of her powers under the Alabama Emergency Management Act. That act required her to find that there was an emergency and that her exercise of powers under that act were necessary to mitigate it. The Governor did so. Because the Legislature itself suspended all laws inconsistent with the Proclamation in the Emergency Management Act when the Governor made those findings, the structure created by the Act—and the Proclamation issued under it—comply with the Alabama Constitution.

I. The Proclamation complied with the Emergency Management Act

The Governor’s powers to issue the Proclamation come from Section 31-9-8(a)(5) of the Emergency Management Act, which expressly authorizes the Governor to perform any functions, and exercise any powers, which are “necessary to promote and secure the safety and protection of the civilian population” as a result of a state of emergency. The plaintiff mistakenly invokes a separate section of that act, arguing it does not au-

authorize this kind of immunity. But that section is irrelevant. The Emergency Management Act provides the Governor two kinds of emergency powers: the basic ones in Section 31-9-6(1) and the “additional” ones in Section 31-9-8.

The Plaintiff mistakenly invokes only the basic powers, which are limited to the authority conveyed on the Governor *under that act*:

In performing his or her duties under this article, **the Governor is authorized** and empowered:

(1) **To make**, amend, and rescind the **necessary orders**, rules, and regulations to carry out the provisions of this article **within the limits of the authority conferred upon him or her in this article**, with due consideration of the plans of the federal government.

ALA. CODE § 31-9-6(1) (emphases added).

Relying on this section, Plaintiff suggests that the Emergency Management Act allows liability for negligence lawsuits because Section 31-9-16(b) does not provide for “gross negligence” lawsuits. This argument fails for two reasons.

First, Section 31-9-16(b) addresses emergency workers performing emergency activities, not with businesses and healthcare workers performing their regular non-emergency work:

§ 31-9-16. Immunity of state, etc., from liability for torts resulting from emergency management activities;

....

(b) Neither the state nor any political subdivision thereof nor other agencies of the state or political subdivisions thereof, **nor, except in cases of willful misconduct, gross negligence, or bad faith, any emergency management worker, individual, partnership, association, or corporation complying with or reasonably attempting to comply with this article [the Emergency Management Act] or any order, rule, or regulation promulgated pursuant to the provisions of this article [the Act] or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state, shall be liable for the death of or injury to persons, or for damage to property, as a result of any such activity.**

(Emphases added.)

Section 31-9-16(b) allows liability for gross negligence resulting from “any such activity”—i.e., “attempting to comply with [the Emergency Management Act] or any order”—*e.g.*, the Proclamation—“promulgated pursuant to the provisions of [the Act].” This “gross negligence” standard is a default that provides a floor of protection for emergency workers engaged in emergency activity: “[N]or, except in cases of willful misconduct, gross negligence, or bad faith, any emergency management worker, individual, partnership, association, or corporation complying with or reasonably attempting to comply with this article or any order, rule, . . . shall be liable for the death of or injury to persons, or for damage to property, as a result of any such activity.” (emphases added.) Here, the

Defendant was not engaged in emergency management activity pursuant to an emergency order. Instead, it was engaged in its regular non-emergency work during the emergency. The default provision of Section 31-9-16(b) does not apply.

Second, Section 31-9-8(a)(5) provides the Governor with “additional emergency powers” that are not limited by other provisions of the Emergency Management Act:

During the period that the proclaimed emergency exists or continues, the Governor shall have and may exercise the following additional emergency powers:

....

(5) To perform and exercise such other functions, powers and duties as are **necessary to promote and **secure the safety and protection** of the civilian population.**

ALA. CODE § 31-9-8(a)(5) (emphases added).

While Section 31-9-6(1) (basic powers) contains the words “within the limits of the authority conferred upon him or her in this article,” Section 31-9-8(a)(5) (“additional emergency powers”) does not. The lack of limiting language in Section 31-9-8(a)(5) means Section 31-9-6(1)’s limiting language and Section 31-9-16(b)’s “gross negligence” language does not apply to Section 31-9-8(a)(5) “additional emergency powers.” *See Trott v. Brinks, Inc.*, 972 So. 2d 81, 85 (Ala. 2007) (“When the legislature uses

certain language in one part of the statute and different language in another, the court assumes different meanings were intended.” (citation omitted)).

The Legislature’s grant of “additional emergency powers” without the same “limits” that for the basic powers does not mean that the Legislature failed to impose any limits on the Governor’s additional powers. ALA. CODE § 31-9-6(1); ALA. CODE § 31-9-8(a)(5). The Legislature specified that—“during the period that the proclaimed emergency exists”—the Governor could “perform and exercise such other functions, powers and duties *as are necessary* to promote and secure the safety and protection of the civilian population.” ALA. CODE § 31-9-8(a)(5) (emphasis added). This provision limits the kind of orders that the Governor can issue under the Act in two ways. First, it ties those orders to the Governor’s declaration of the emergency, such that the scope of the emergency limits the scope of the order. Second, it specifies the connection between the Governor’s exercise of this additional “power[]” and the goal of “promot[ing] and secur[ing] the safety and protection of the civilian population”—by requiring that the Governor’s action be “necessary” to that goal. *Id.* This

Court can, of course, review the Governor’s determination that a particular action is “necessary” under rational-basis review. The Governor’s Proclamation easily satisfies that test. *See supra* at Facts.II.

Plaintiff wrongly contends that “[n]one of the specific powers conferred on the Governor by the various subsections of 31-9-6 and 31-9-8 authorize the Governor to change substantive tort law.” Answer 8. Nothing in the Act excludes tort law from the laws that the Act suspends when they conflict with an order that a governor issues in compliance with the Act. And as the Governor “f[ou]nd” in the Proclamation, this immunity from certain tort claims “[wa]s *necessary*” to “preserve the lives and property of the people of this State” by providing “reasonable protections from the risk and expense of lawsuits . . . to businesses and health care providers.” *Eighth Supplemental Proclamation*, §§ I.A, I.A.6 (emphasis added). This limitation on tort liability gave hospitals and other health care providers a zone of comfort to treat their patients in difficult circumstances. It accordingly was well within the Governor’s authority to provide under the Emergency Management Act.

II. The Proclamation complied with the Alabama Constitution

The Governor’s Proclamation complies fully with both Sections 21 and 42 of the Alabama Constitution. Because Petitioner and other amici address Section 42, this brief focuses on Section 21. Under Section 21, “no power of suspending laws shall be exercised except by the legislature.” ALA. CONST. § 21 (1901). The Proclamation complied with this provision because, if any laws were suspended here, the Legislature itself—not the Governor—suspended them, via the Emergency Management Act.

A. If any laws were suspended, the Legislature, itself, did so in the Emergency Management Act

The Proclamation limited liability to only those circumstances where an injury is caused by “wanton, reckless, willful, or intentional misconduct” and imposition of a “clear and convincing” standard of proof. *Eighth Supplemental Proclamation*, § I.C.1. This limitation did not suspend the law concerning Plaintiff’s negligence claims. Instead, to the extent that the law was suspended at all, the Legislature itself did so in the Emergency Management Act. That act provided that “existing laws” that are “inconsistent with . . . any order, rule or regulation issued under the authority of this article, shall be suspended during the period of time and

to the extent that such inconsistency exists.” ALA. CODE § 31-9-13. That provision states:

All orders, rules, and regulations promulgated by the Governor as authorized by this article shall have the full force and effect of law when a copy thereof is filed in the office of the Secretary of State. **All existing laws, ordinances, rules, and regulations or parts thereof inconsistent with the provisions of this article or of any order, rule, or regulation issued under the authority of this article, shall be suspended during the period of time and to the extent that such inconsistency exists.**

ALA. CODE § 31-9-13 (emphases added).

To the extent that the normal operation of tort law was suspended, it was through the Legislature’s enactment of the Act, not the Governor’s emergency order, and therefore was consistent with Section 21’s reservation of the suspension power to the Legislature. As the Kentucky Supreme Court concluded, in such circumstances, the Legislature, “not the Governor, has suspended the laws.” *Beshear v. Acree*, 615 S.W.3d 780, 811 n.41 (Ky. 2020).

Two additional considerations bolster the conclusion that the Plaintiff has no valid Suspension Clause argument. First, the Proclamation does not implicate the Suspension Clause because it did not suspend tort remedies for plaintiffs altogether. The Proclamation provided immunity

for claims “related to, or in connection with, COVID-19 transmission or a covered COVID-19 response activity”—“unless” a plaintiff establishes “wanton, reckless, willful, or intentional misconduct” by “clear and convincing evidence.” *Eighth Supplemental Proclamation*, § I.C.1. This provision leaves a tort remedy for COVID-19 transmission in place, and accordingly, is not a blanket suspension of the law. As the Oregon Supreme Court has reasoned, when a law simply “authorizes a governing body to ‘modify, remove, or not * * * apply’ certain such regulations in specific situations,” the measure is, in effect, “an amendment”—not a suspension—of the relevant regulations. *MacPherson v. Dep’t of Admin. Servs.*, 130 P.3d 308, 317 (Or. 2006).

Second, the Legislature effectively ratified the immunity provided by the Governor’s Proclamation when it passed a statute providing the same immunity for that same period of time. *See supra* at Facts.III. This effective ratification underscores that the immunity in no way encroached upon the Legislature’s authority.

B. The Legislature can make the suspension of a statute contingent on a finding of fact by the executive branch

This Court has long held that legislative suspensions of laws under Section 21 can be contingent on the finding of a fact or set of facts to exist by the executive branch. For example, in *Hand v. Stapleton*, the Legislature passed a statute that provided for the moving of the Baldwin County seat. 33 So. 689 (Ala. 1903). The Legislature made the act contingent on a board of commissioners finding: “[T]his act shall not take effect until ascertained by said board of commissioners that the amount to be paid by said county for building said court house and jail at Bay Minette . . . will not require an increase of the present tax rate of said county to pay the same.” *Id.* at 690.

This Court explained that “[a] valid law may be passed, to take effect upon the happening of a future contingent event, even where that event involves the assent to its provision by other parties.” *Id.* at 691 (citation omitted). This Court also relied on *Field v. Clark*, 143 U.S. 649 (1892), where, it explained, the U.S. Supreme Court had held that Congress could pass a statute that “conferred upon the President” the authority “to suspend by proclamation the free introduction of sugar[, etc.] . . . when he is satisfied that any country producing such articles imposes

duties or other exactions upon agricultural or other products of the United States.” *Id.* at 692. There was no invalid delegation of power as the “Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency.” *Id.* With respect to the statute to move the county seat, this Court explained that “[t]he Legislature determined *for itself* that the act should not take effect until it was ascertained by the board of commissioners that the amount to be paid by the county for building the courthouse and jail would not require an increase in the tax rate of the county—a limitation expressly declared in the act itself.” *Id.* (emphasis added). And the commissioners needed only “to ascertain th[at] fact.” *Id.* So, “[w]hatever suspension there was of the act,” this Court reasoned, “it was exercised by the Legislature, and not by the commissioners.” *Id.*

C. The Emergency Management Act makes suspension of laws contingent on the Governor’s making specific findings.

Likewise, in the Emergency Management Act, the Legislature provided for suspension if the Governor issued an order:

All existing laws, ordinances, rules, and regulations or parts thereof **inconsistent with** the provisions of this article or of any **order**, rule, or regulation issued under the authority of

this article, **shall be suspended** during the period of time and to the extent that such inconsistency exists.

ALA. CODE § 31-9-13 (emphases added).

And the Legislature required—before issuing such an “order”—the Governor to find that conditions (*e.g.*, an epidemic) warrant the proclamation of a state of emergency and a particular measure in the order is “necessary” to combat the emergency. As in *Hand*, 33 So. at 692, the Legislature suspended the law in the Act, contingent on two findings by a governmental official outside the Legislature. *First*, the Act allowed the Governor to proclaim “the existence of a state of emergency” *if* she “finds that . . . a public health emergency has occurred.” ALA. CODE § 31-9-8(a). *Second*, the Emergency Management Act provides the Governor power to perform her “additional emergency powers” during the declared emergency to the extent she finds them “necessary to promote and secure the safety and protection of the civilian population.” ALA. CODE § 31-9-8(a) & (a)(5).

The Governor made both findings. She made the first when she “declare[d] that a state public health emergency exist[ed]” due to the coronavirus on March 13, 2020. *Initial Emergency Proclamation*. She made

the second when she “f[ou]nd”—in the Proclamation—that “it is *necessary*” to “preserve the lives and property of the people of this State” that “reasonable protections from the risk and expense of lawsuits, be provided to businesses and health care providers.” *Eighth Supplemental Proclamation*, §§ I.A, I.A.6. The Legislature then, through the Emergency Management Act, “suspended” “existing laws” that were “inconsistent with . . . any order . . . issued under the authority of this article.” ALA. CODE § 31-9-13. As in *Hand*, 33 So. at 692, “Whatever suspension there was . . . it was exercised by the Legislature, and not by the [Governor].”

The Plaintiff cites a non-binding advisory opinion, *Opinion of the Justices No. 238*, 345 So. 2d 1354 (Ala. 1977), contending that the Act unconstitutionally delegates the power to suspend laws to the Governor. Answer 12. The proposed statute in that Opinion, however, required no findings of any facts by the Governor and instead allowed him to unilaterally—and arbitrarily—suspend a law:

The Governor of Alabama shall, at any time when in his considered opinion extraordinary action in the matter of utility rates is called for, by Executive Order freeze a utility rate or rates, established by the Alabama Public Service Commission, at the then existing level or may roll said rate or rates back to any level existing at any time during the six month

period immediately preceding said Executive Order for a period not to exceed one year in duration.

Opinion No. 238, 345 So. 2d at 1355 (emphases added) (citation omitted).

Instead of finding a fact to trigger the Legislature’s suspension of a law, under that proposed bill Governor Wallace could have suspended the law himself by simply expressing a “considered opinion” that it would be politically advantageous to roll back electricity rates.

By contrast, the Legislature in the Emergency Management Act did not give the Governor open-ended authority to suspend law based on her “considered opinion.” Instead, the governor has to find that a specific condition—such as an epidemic—exists to declare a state of emergency. She also had to find that particular measures—such as protections from certain COVID-19 lawsuits—were “necessary” to mitigate the emergency. Also unlike the bill in that case, in the Act it was the Legislature, not the Governor, that itself “suspended” all “laws, ordinances, rules, and regulations or parts thereof inconsistent with” the Proclamation. ALA. CODE § 31-9-13.

III. Plaintiff's argument could result in the invalidation of numerous emergency proclamations

The Plaintiff's theory in this case could lead to far-reaching and untenable consequences. It could mean not only that all of the Governor's actions in response to the COVID-19 emergency were invalid, but also that Alabama's governors can no longer rely on the Emergency Management Act to lift onerous regulations in the wake of any future emergency.

A. The immunity provision was part of the Governor's approach that encouraged Alabama's economy to open while protecting Alabamians' health

If this Court adopts the Plaintiff's theory and concludes that the Proclamation violated Section 21, that conclusion will cast doubt on the entire suspension provision of the Emergency Management Act. This would implicate scores of gubernatorial orders since the act's enactment, across numerous administrations.

The Governor issued many such proclamations and orders during the COVID-19 pandemic. *See supra* at Facts.I–II, Appendix. For example, to help care for coronavirus patients, these proclamations allowed more out-of-state and retired physicians, who otherwise could not have practiced in Alabama, to care for patients. *Fifth Supplemental Proclamation*, § I.B. They allowed for documents to be notarized remotely to decrease

the spread of coronavirus through in-person meetings. *Fourth Supplemental Proclamation*, § III. They allowed governmental and other meetings to proceed remotely, for the same reasons. *See, e.g., First Supplemental Proclamation*, § III; *Fifth Supplemental Proclamation*, § V; *Thirteenth Supplemental Proclamation*, § I. They postponed the deadline for filing state taxes. *Third Supplemental Emergency Proclamation*, ALA. GOVERNOR, § I (Mar. 13, 2020).¹⁸ They postponed elections until they could be more safely held. *See, e.g., First Supplemental Proclamation*, § I. Are those municipal elections, the extension of tax deadlines, remotely notarized documents, and remote meetings all void? Neither Section 21 nor common sense requires such a drastic result.

B. This theory would prevent governors from responding to more routine emergencies

The Plaintiff's theory would have ramifications for numerous emergency orders previous governors have used under the powers granted in the Emergency Management Act. Some of these emergency actions bear close resemblance to the proclamation at issue here, such as when, in

¹⁸ <https://governor.alabama.gov/assets/2020/03/2020-03-23-3rd-Supplemental-COVID-19-SOE.pdf>

January 2018, Governor Ivey authorized “alternative standards of care” in health care facilities to respond to an influenza outbreak. *Proclamation*, ALA. GOVERNOR (Jan. 11, 2018).¹⁹ Other emergency actions taken by Alabama governors reflect the full range of emergencies the State routinely faces.

For example, when hurricanes have threatened Alabamians’ ability to access critical medications, previous Governors have found it necessary to implement emergency orders increasing access to prescription drugs. One such emergency order allowed pharmacists to refill “non-controlled prescriptions” to individuals who presented documents that “would provide the pharmacist sufficient information to adequately identify the non-controlled medication and the dosage thereof” during the emergency, despite the normal requirements that pharmacists must receive “written or oral authorization” from the prescriber. *Proclamation*, ALA. GOVERNOR (Sept. 8, 2017) (quoting ALA. CODE § 34-23-70).²⁰ They

¹⁹ <https://governor.alabama.gov/newsroom/2018/01/state-public-health-emergency-influenza/>

²⁰ <https://governor.alabama.gov/newsroom/2017/09/state-of-emergency-hurricane-irma/>; see also *Proclamation*, ALA. GOVERNOR, III.b (Oct. 5, 2017), <https://governor.alabama.gov/newsroom/2017/10/state-of-emergency-tropical-storm-nate/>; *Proclamation*, ALA. GOVERNOR (Apr. 28, 2011), <https://arc->

have likewise included extending time for emergency prescription refills after a hurricane. *Id.* Under the Plaintiff's theory, these life-saving measures could be unavailable.

The Plaintiff's theory also could call into question the government's ability to address life-threatening winter weather. Prior emergency orders have allowed, during winter-weather events, "any propane gas dealer servicing the State of Alabama to fill any container belonging to another propane gas dealer which cannot or will not supply a customer." *Proclamation*, ALA. GOVERNOR (Jan. 15, 2018).²¹ The statutes normally required that "[l]iquefied petroleum gas containers may be filled only by the owner or upon the owner's authorization" and imposed criminal penalties for violating that requirement. ALA. CODE § 9-17-109(d). Under Plaintiff's theory, those life-saving measures would be prohibited.

Plaintiff's theory also could call into doubt measures used to address the devastation wrought by tornadoes. After the 2011 tornadoes,

sos.state.al.us/PPC/VOL13P1112.PDF; *Proclamation*, ALA. GOVERNOR (Oct. 7, 2016), <https://arc-sos.state.al.us/PPC/VOL14P1484.PDF>.

²¹ <https://governor.alabama.gov/newsroom/2018/01/1468/>; see also *Proclamation*, ALA. GOVERNOR (Jan. 28, 2014), <https://arc-sos.state.al.us/PPC/VOL13P1348.PDF>; *Proclamation*, ALA. GOVERNOR (Jan. 5, 2017), <https://arc-sos.state.al.us/PPC/VOL14P1702.PDF>.

an emergency order “allow[ed] persons licensed in other states as social workers to provide professional services in Alabama,” despite the normal rules requiring licensure and certification. *Proclamation*, ALA. GOVERNOR (Apr. 29, 2011).²² That measure was essential because many Alabamians had been “forced to seek refuge and shelter” when their homes “ha[d] been destroyed,” and “best practices” called for them to obtain the “advice and assistance” of social workers who would not have “sufficient time” to obtain licenses in Alabama. *Id.* Yet under Plaintiff’s theory, those services would have been denied to the numerous Alabamians who had been left homeless.

Adopting the Plaintiff’s theory could implicate these actions, and many others. It could prevent Alabama’s Governors from exercising the power that the Legislature has given in the Emergency Management Act. And it could undo the Legislature’s decision to allow the Governor to respond quickly to unforeseen emergencies that present unforeseen challenges within the statutory parameters.

²² <https://arc-sos.state.al.us/PPC/VOL13P1114.PDF>; see also *Proclamation*, ALA. GOVERNOR (Feb. 19, 2010), <https://arc-sos.state.al.us/PPC/VOL13P1154.PDF>.

CONCLUSION

If this Court reaches these issues, it should uphold the Legislature's COVID-19 Immunity Law and the Governor's COVID-19 Immunity Proclamation.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the font and word limitations of Rules 21(d) and 32(a)(7). According to the word count function in Microsoft Word, the pertinent parts of this document contain 5,970 words (5,384 words in the brief and 586 words in the appendix). This document uses Century Schoolbook font in 14-point type.

/s/ Mary K. Mangan
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CERTIFICATE OF SERVICE

On November 13, 2023, I electronically filed this document and served a copy on the attorneys of record via electronic mail at the following addresses:

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APPENDIX

The Governor’s COVID-19 Proclamations and Emergency Orders	
March 13, 2020	Proclaiming state of emergency; establishing alternative care standards, price gouging, closing schools and state offices, waiving federal hours-of-service requirements.
March 18, 2020	<p>Primary Runoff, School Closures, Open Meetings, Emergency-Related Supplies, and Reimbursement for State Employees.</p> <ul style="list-style-type: none"> • “The primary runoff election . . . is hereby rescheduled to July 14, 2020.” • “Notwithstanding any provision of the Open Meetings Act, members of a governmental body may participate in a meeting—and establish a quorum, deliberate, and take action—by means of telephone conference, video conference, or other similar communications equipment”
March 20, 2020	Transportation of emergency equipment supplies.
March 23, 2020	Postponing State-tax filing deadlines.
March 26, 2020	<p>Alternative school instruction, licensure extension, notaries, electronic transactions, summonses in lieu of arrest.</p> <ul style="list-style-type: none"> • “Any person who witnesses a document through videoconference technology may be considered an ‘in person’ witness, provided that the presence and identity of such witnesses are validated by the notary at the time of the signing by the same identifications required under current law.”
April 2, 2020	Modifying healthcare licensure requirements and expanding health care, notaries, public meetings, shareholder meetings; transmission in jails.

April 3, 2020	Eviction protections.
April 13, 2020	Resuming pardon and parole hearings.
May 8, 2020	Easing cooperative debt restrictions, special provisions for July 14 runoff, modifying eviction protections, and extending state of emergency.
May 8, 2020	Liability protections for businesses and healthcare providers.
May 21, 2020	Rescinding eviction protections
June 9, 2020	Corrections issues
June 30, 2020	Extending State Health Officer's safer-at-home order
July 2, 2020	Nonprofit meetings, Extending state of emergency
July 15, 2020	Enforcement of mask requirements and safer-at-home orders
July 29, 2020	Extending safer-at-home order
August 21, 2020	Administering municipal elections.
August 27, 2020	Extending state of emergency & safer-at-home order with minor modifications
September 14, 2020	Establishing state of emergency for Hurricane Sally; Suspending COVID-19 orders to extent they endanger people affected by the hurricane or impede businesses responding to storm or if needed to protect or repair "critical infrastructure," including waiving certain transportation regulations.
September 30, 2020	Extending state of emergency & safer-at-home order with minor modifications; clarifying definitions related to COVID liability protections; reducing in-person interaction of poll workers and election officials.

October 6, 2020	Establishing state of emergency for Hurricane Delta; suspending COVID-19 orders to extent they endanger people affected by the hurricane or impede businesses responding to storm or if needed to protect or repair “critical infrastructure.”
November 5, 2020	Extending state of emergency & safer-at-home order with modifications
December 9, 2020	Extending state of emergency; extending safer-at-home order; rescinding emergency services licensure extension
December 11, 2020	Exempting CARES Act benefits from state taxes; Extending sunset dates for Alabama Jobs Act and Growing Alabama Tax Credits
January 21, 2021	Extending State Health Officer’s safer-at-home order; administration of municipal elections; administration of state elections
March 4, 2021	Extending state of emergency; extending safer-at-home order
March 12, 2021	Revising safer-at-home order
March 22, 2021	Amending safer-at-home order
April 7, 2021	Eliminating mask mandate; incorporating State Health Officer’s safer-apart order
May 3, 2021	Extending safer-apart order (for the only time); Extending state of emergency (for final time)
July 6, 2021	Terminating state of emergency
August 13, 2021	Re-establishing state of emergency; expanding capacity of healthcare facilities and workforce; expanding open-meetings-act exceptions; waiving hours-of-service re-

	quirements for emergency items; relaxing advertising requirements for COVID government contracts; reimbursing actual expenses for state employees traveling for pandemic.
October 8, 2021	Extending state of emergency until October 31, 2021.