IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

CASE NO. S24C0385

RESURGENS, LLC, d/b/a RESURGENS ORTHOPAEDICS and JASON VALEZ.

Petitioners,

v.

FRANCES L. ERVIN AND ANTHONY ERVIN,

Respondents.

BRIEF OF GEORGIA HOSPITAL ASSOCIATION, INC. AS *AMICUS CURIAE*

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I. STATEMENT OF INTEREST

A. Amicus Curiae – The Georgia Hospital Association.

The Georgia Hospital Association (GHA) is a nonprofit trade association made up of member health systems, hospitals, and individuals in administrative and decision-making positions within those institutions. Founded in 1929, GHA serves 145 hospitals in Georgia, which in turn employ thousands of physicians and even more nurses and other healthcare providers. Its purpose is to promote the health and welfare of the public through the development of better hospital care for all of Georgia's citizens. GHA represents its members in legislative matters, as well as in filing *amicus curiae* briefs on matters of great gravity and importance to both the public and to health care providers serving Georgia citizens.

B. Interest of Amicus Curiae.

GHA's members treat tens of thousands of patients daily. GHA submits this brief in the interest of carrying out its mission for its member hospitals and in furtherance of the overall health and welfare of the citizens of this State. This appeal involves the recognition of the health care heroes who valiantly fought at the front lines during the COVID-19 public health emergency and the need to honor the protections Governor Kemp granted those heroes to ensure a response to the COVID-19 pandemic and to keep open the doors of Georgia's health care facilities. GHA submits this brief because, if the Court allows the Court of Appeals' opinion

to stand, those protections would vanish, allowing Governor Kemp's difficult policy decisions to be usurped by the courts. GHA's interests lie not only in ensuring that the Executive Order at issue in this case is respected, but also in establishing precedent so that GHA's members will have the confidence of enforcement of future executive orders when the next emergency strikes. This case, therefore, presents issues of critical importance to hospitals and their workers throughout Georgia.

II. INTRODUCTION

At its core, this case involves statutory adherence. Not statutory construction; rather, adherence to the unambiguous terms of the Governor's COVID-19 Executive Order. The Court of Appeals didn't agree with the Governor's policy decisions and therefore invoked principles of "statutory construction," "context," and "intent" to obtain a different result, substituting its own policy determinations for those of the Governor. Courts sometimes employ statutory construction tools as a means to their end, because once invoked, those tools can overcome any obstacle otherwise obstructing the court's preprogrammed destination. *See, e.g., King v. Burwell*, 576 U.S. 473, 518 (2015) (Scalia J., dissenting) ("somersaults of statutory interpretation" operate "to the confusion of honest jurisprudence"). That's why this Court, especially in recent years, has been so adamant about following laws as written. In the absence of an ambiguity, this Court has been clear that courts must refrain from

reaching into their construction toolbox to redesign the statutory house. *S. States Chem., Inc. v. Tampa Tank & Welding, Inc.*, 316 Ga. 701, 713 (2023) ("where the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden") (citations omitted). Here, the Court of Appeals didn't identify any ambiguity but pulled out its crowbar anyway and began reworking the Executive Order.

For the Georgia Hospital Association (GHA), as *amicus curiae*, the Court of Appeals' approach is troubling. GHA and its members work closely with the General Assembly and the Governor's office to help fashion laws and policies that are reasonable and balanced for hospitals and the citizens of Georgia. And that's by no means a unilateral process. The General Assembly and Governor receive similar input from multiple interest groups and constituents, often with diametrically different positions than GHA. After weighing those competing interests, the General Assembly and Governor do their best to strike the right policy determinations and enact those into law, whether legislatively, or as here, through an Executive Order authorized by statute. Once passed, those laws—together with their infused policy determinations—should be respected and enforced as written. Otherwise, the hard work and hard decisions of our General Assembly, the Governor, associations, and our citizens can, as here, be easily usurped.

And beyond the Court of Appeals' error in rewriting the Executive Order, the Court also got things wrong by intuiting that the Governor must have really intended something different or that the Governor's policy decision was wrong. While the grimness may be fading from our memories, the menace of COVID-19 in March of 2020 posed an existential threat beyond any witnessed in decades. Georgians needed hospitals to stay open and health care workers to show up to fight for not only those infected with COVID, but also all the other patients who continued to rely on hospitals and caregivers to deliver necessary care. When practically every other industry closed (including the courts), hospitals were open and at the forefront of the fight—taking all comers. Without immunity protections, hospitals, physicians, and other caregivers could have easily stayed home, choosing to put their own safety and that of their families first. The federal government was shoveling out money to stay home. But instead, they showed up, not only for COVID patients but for *all* their patients, consistent with the protections embodied in the Executive Order.

GHA's interests lie beyond the outcome of this one case. As it did here, the Court of Appeals' opinion will lead to anomalous results and disparate application of the Governor's Executive Order. In this case, the Court of Appeals hinges its outcome on the idea that the surgery was "elective." We'll get to that in a moment, but suffice to say, one person's "elective" surgery is lifesaving for another. In fact, 91% of surgeries classify as "elective." But splitting hairs about the type of

procedure and whether the patient was COVID positive will lead to misapplication of the Executive Order and create an unworkable paradigm for trial courts to apply. Take a nurse who was working a twenty-four-hour shift during COVID because most of his colleagues were infected or quarantining. He's treating some patients with COVID and some without. If, in his exhaustion, he misses a medication for the negative patient, will the Court withdraw his immunity, when it would recognize immunity if it had been the COVID patient? The hairs and the scenarios are too many and too thin to splice, and that's not the role of the courts anyway.

The Governor, with input from many constituents, already made that hard decision, striking the balance in favor of motivating all health care workers and facilities to remain open by granting them broad immunity. And he was not alone; other states did the same. GHA asks the Court to respect and enforce those policy decisions and enforce the Executive Order as written. To do so, GHA urges the Court to grant *certiorari* and review and reverse the Court of Appeals' opinion.

III. ARGUMENT AND CITATION OF AUTHORITIES

A. The COVID-19 Pandemic And Our Health Care Heroes.

In early 2020, the COVID-19 pandemic hit nearly every industry. Many businesses closed their doors. Some temporarily shut down.[8] Nearly 100,000 others were forced to close permanently within the first six months alone.[9] One can only imagine how different things would be if healthcare facilities, like most everyone

else, had shut down and directed their employees to stay home. But they didn't. They kept their doors open. When most employees were required or chose to stay home, medical facilities remained open. And as those facilities reached capacity, doctors, nurses, and support staff worked longer hours and picked up extra shifts to keep up with the simultaneous influx of newly sick patients and tragic losses of others, all while continuing to provide much of the regular care that Georgians require daily.

Health care facilities and the health care workforce were quickly overwhelmed with an unmanageable workload, and facing a grim set of choices in an escalating disaster that was outside of experience, training, and living memory. The scale of the looming challenge was virtually unimaginable, with no end in sight. No vaccines to impede the spread of COVID-19 were available or even on the horizon.[1] Testing for the COVID-19 virus was highly unreliable and took days to provide results.[2] Personal protective equipment ("PPE") was not available in

[1] *See, e.g.*, Kathryn Vasel, *The Pandemic Forced a Massive Remote-Work Experiment. Now Comes the Hard Part,* CNN BUSINESS, Mar. 11, 2021, https://www.cnn.com/2021/03/09/success/remote-work-covid-pandemic-one-year-later/index.html ("In March 2020, companies across the US abruptly shuttered their offices and instructed employees to work from home indefinitely as a result of the pandemic.").

[2] *See, e.g.,* U.S. Chamber of Commerce, *Special Report on Coronavirus and Small Business -April,* Apr. 3, 2020, https://www.uschamber.com/small-business/special-report-coronavirus-and-small-business ("With high levels of concern about COVID-19 reported in every sector and region of the country, one in four small businesses (24%) report having already temporarily shut down.").

sufficient supply.[3] Other crucial equipment and medications, were dwindling in supply or not available at all. For their courage and resiliency in the face of an unknown and evolving danger, the medical professionals who worked throughout the pandemic to protect their communities are properly lauded as heroes.[4]

For their bravery, healthcare workers bore heavy physical, mental, and emotional burdens, and for almost one hundred Georgia health care workers, even death as of August of 2020.[5] The operational and financial tolls associated with the risk of litigation threatened to hit healthcare facilities and professionals at the time when they could least afford the distractions and costs.[6] And given the scale of the tragedy, they faced the certainty of future legal burdens. Without protection from liability, well-intentioned doctors and nurses would have been reluctant, if not remiss, to return to work.

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[3] *See, e.g.*, Anne Sraders & Lance Lambert, *Nearly 100,000 Establishments that Temporarily Shut Down Due to the Pandemic Are Now Out of Business*, FORTUNE, Sept. 28, 2020, https://fortune.com/2020/09/28/covid-buisnesses-shut-down-closed/.

[4] Judi Kanne & Andy Miller, *'The Right Time': Georgia Nurses to Honor their Colleagues*, May 11, 2021, https://www.georgiahealthnews.com/2021/05/the-time-georgia-nurses-honor-colleagues/.

[5] Alan Judd, *For Health Care 'Heroes,' Death Toll Keeps Rising*, ATLANTA J. CONST., Aug. 14, 2020, https://www.ajc.com/news/coronavirus/for-health-care-heroes-death-toll-keeps-rising/UJMMAJS2ZBEDZLEBI6VKRLZLYQ/.

[6] *See, e.g.*, Christopher P. Ferragamo & Sarabeth Rangiah, *National Survey of COVID-19 Medical Malpractice Immunity Legislation*, J&C Blog, May 24, 2021, https://www.jackscamp.com/national-survey-of-covid-19-medical-malpractice-immunity-legislation-as-of-may-24-2021/.

Thus, healthcare workers needed protection too—not only from the virus, but also from the risks of juggling the treatment of infected and non-infected patients in a time of supply shortages, worker shortages, quarantines, lack of sleep, and the constant worry of contracting the virus and becoming a patient (or victim) themselves. Accordingly, Georgia and many other states—at the urging of the federal government—granted healthcare professionals limited[7] immunity from suits arising from their service during the pandemic.

B. The Federal Government Recommended Shielding Healthcare Professionals From Liability During The COVID-19 Pandemic.

On March 24, 2020, the Secretary of the U.S. Department of Health and Human Services (HHS), issued a letter to all state governors emphasizing the need "to carry out a whole-America response" to COVID-19, with a focus on being able to "extend the capacity of the health care work force to address the pandemic" and urging that states "take immediate action" to effect a handful of listed strategies, one of which included bolstering liability protections for healthcare providers:

> For health care professionals to feel comfortable serving in expanded capacities on the frontlines of the COVID-19 emergency, *it is imperative that they feel shielded from medical tort liability*.[8]

[7] As discussed below, the immunity was not absolute. Akin to Georgia's gross negligence standard for emergency services, the Executive Order allows plaintiffs to pursue gross negligence claims for issues arising during the COVID emergency.

[8] Alex M. Azar, II, U.S. Sec'y of Health & Human Serv., "*Dear Governor*," (Mar. 24, 2020), https://www.nga.org/wp-content/uploads/2020/03/Governor-Letter-from-Azar-March-24.pdf (emphasis added).

To illustrate the speed at which the pandemic was unfolding: as of March 20, 2020, there were, per the World Health Organization (WHO), 234,073 confirmed COVID cases and 9,840 deaths.[9] By April 6, there were 1,210,956 confirmed cases and 67,954 deaths.[10] Moreover, on April 7, just five weeks before the surgery at issue here, the federal Centers for Medicare and Medicaid Services (CMS) published guidance on elective procedures, warning that "there is likely to be a significant rise in patients with COVID-19 in the upcoming weeks."[11] CMS cautioned that, "in analyzing the risk and benefit of any medical treatment or service, the clinical situation must be assessed to ensure conservation of resources."[12] CMS recognized that the risk-benefit decisions remained the responsibility of, among others, "state and local health officials."[13] One week after CMS's warning of the impending surge, Governor Kemp issued the Executive Order at the center of this appeal.

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[9] World Health Organization, Coronavirus Disease 2019 (COVID-19) Situation Report – 60 (Mar. 20, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200320-sitrep-60-covid-19.pdf?sfvrsn=d2bb4f1f_2.

[10] World Health Organization, Coronavirus Disease 2019 (COVID-19) SITUATION REPORT – 77 (April 6, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200406-sitrep-77-covid-19.pdf?sfvrsn=21d1e632_2.

[11] CMS, *Non-Emergent, Elective Medical Services, and Treatment Recommendations* (April 4, 2020), https://www.cms.gov/files/document/31820-cms-adult-elective-surgery-and-procedures-recommendations.pdf.

[12] *Id.*

[13] *Id.*

C. The Governor's Executive Order.

On April 14, 2020, just one month after his initial declaration of a COVID-19 pandemic public health emergency, Governor Kemp authorized limited liability immunity for Georgia healthcare facilities and healthcare professionals via an executive order, as he is authorized to do by statute. Governor Kemp entered Executive Order 04.14.20.01, titled "Designation of Auxiliary Emergency Management Workers and Emergency Management Activities" (the "Executive Order").[14] The Executive Order cites O.C.G.A. § 38-3-51, which authorizes the Governor to declare a state of emergency, which is then confirmed by the General Assembly within two days. The Governor found that "[h]ealthcare institutions and facilities require additional flexibility to provide the critical assistance and care needed by the state during this unprecedented emergency." The Executive Order declares that "employees, staff, and contractors of healthcare institutions and medical facilities shall be considered auxiliary emergency management workers pursuant to Code Section 38-3-35." It then declares that "services provided or performed by healthcare institutions and medical facilities . . . *shall be considered emergency management activities pursuant to Code Section 38-3-35*."[15] Under

[14] Gov. Brian Kemp, Exec. Order, DESIGNATION OF AUXILIARY EMERGENCY MANAGEMENT WORKERS AND EMERGENCY MANAGEMENT ACTIVITIES, (Apr. 14, 2020), https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders.

[15] *Id.* (emphasis added).

O.C.G.A. § 38-3-35(b), an "auxiliary emergency management worker," who is "engaged in any emergency management activity," and who is reasonably attempting to comply with emergency orders or regulations is immune from liability for death or personal injury "as a result of any such activity," except in cases of willful misconduct, gross negligence, or bad faith. (Emphasis added.)

Less than a week later, on April 20, 2020, Governor Kemp issued a press release, summarizing the dire situation for health care facilities, equipment and personnel shortages, and the need for facilities to resume elective surgeries:

> To help in the battle against COVID-19, healthcare facilities across Georgia voluntarily paused elective surgeries to reduce equipment and personnel shortages. This selfless act by healthcare leaders enhanced our ability to keep Georgians safe. However, many now find themselves in a difficult financial situation, some losing millions of dollars a day as they sacrifice for the greater good. This is not sustainable long-term for these facilities.[16]

Thus, with his recently issued Executive Order granting limited immunity to facilities and professionals, Governor Kemp was laying the groundwork for health care facilities to reopen their doors for *all* patients, not just those suffering from COVID. By contrast, many other states were more restrictive, refusing to allow hospitals and health care professionals to fulfill their mission to all patients—COVID and non-COVID alike—during the pandemic. For example, in July of 2020,

[16] Press Release, Office of the Governor, *Governor Kemp Updates Georgians on COVID-19* (April 20, 2020), https://gov.georgia.gov/press-releases/2020-04-20/gov-kemp-updates-georgians-covid-19.

Governor Abbott of Texas expanded his ban on elective procedures for one-hundred counties across much of that state.[17]

D. <u>"Elective" Surgery Does Not Mean "Optional" Surgery</u>.

As discussed above, early on, Governor Kemp recognized the need for hospitals to resume elective procedures, both for patients and for the survival of hospitals and other facilities that needed revenue to fight the pandemic on all fronts. Elective surgery is not optional surgery; it may be deemed nonurgent at this time, but it does not mean *unnecessary*.[18] In fact, approximately 91% of US surgeries are "elective."[19] Thus, "[i]t is not possible to define the medical urgency of a case solely on whether a case is on an elective surgery schedule.[20] Take the following example:

> Emily Lipstein lived with 10 years of debilitating, unexplained chronic pain before she finally received a diagnosis—endometriosis—and was scheduled for excision surgery. But when the pandemic hit, her surgery was deemed nonessential and indefinitely postponed. "It felt like everything I'd been looking forward to with my health just evaporated

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[17] Emma Platoff, *Texas Bans Elective Surgeries in More than 100 Counties as Coronavirus Hospitalizations Keep Climbing*, THE TEXAS TRIBUNE, July 9, 2020, https://www.texastribune.org/2020/07/09/texas-coronavirus-hospitalizations-.

[18] Sue J. Fu, *et al*., *The Consequences of Delaying Elective Surgery: Surgical Perspective*. 272(2) Annals of Surgery e79-e80, Aug. 2020, https://journals.lww.com/annalsofsurgery/fulltext/2020/08000/the_consequences_of_delaying_elective_surgery_.24.aspx.

[19] Meghan Prin, *et al.*, *Emergency-to-Elective Surgery Ratio: A Global Indicator of Access to Surgical Care*, 42 World J. Surg. 1971-1980 (2018), https://link.springer.com/article/10.1007/s00268-017-4415-7.

[20] *COVID-19: Guidance for Triage of Non-Emergent Surgical Procedures*, Am. Coll. of Surgeons (March 17, 2020), https://www.facs.org/for-medical-professionals/covid-19/clinical-guidance/triage/

> into thin air," Lipstein told Vox. In the months she waited for a rescheduled surgery, she had to pay for an extra MRI scan and experienced mental health issues, for which she was prescribed antidepressants.[21]

For the thousands of people across the country who were awaiting important medical care, those indefinite cancellations were devastating. "Many people may assume that elective surgeries are unnecessary or cosmetic, but doctors use the word to describe pretty much any procedure that can be scheduled in advance. When officials hit pause on huge swaths of the medical system, some patients were forced to prolong their suffering."[22]

"While most surgeries are necessary, interpreting the meaning of 'elective surgeries' and ensuring patient safety was no easy task. Governments issued recommendations on elective procedures, but with new state orders and societal recommendations, surgeons were left with little to no guidance, resulting in a general decline in physician and patient well-being."[23] Early into the pandemic, the global

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[21] Andrea Becker, *It's Time to Stop Describing Lifesaving Health Care as 'Elective,'* VOX (Sept. 20, 2021), https://www.vox.com/22678393/elective-surgery-nonessential-trans-gender-affirming-hysterectomy.

[22] *Id.* (internal quotes removed).

[23] Aashna Mehta, *et al.*, *Elective Surgeries During and After the COVID-19 Pandemic: Case Burden and Physician Shortage Concerns*. 81 Annals of Medicine & Surgery (Lond.), Sept. 2022, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9388274/.

twelve-week cancellation rate for elective surgeries was approximately 72.3%.[24] Thus, "millions of procedures were canceled, resulting in a variety of potential long-term and short-term effects on patient care . . . . The long-term effects included the risk of uncertain loss of function and adverse prognosis as a collateral effect of the pandemic. While short-term effects included deterioration in patients' conditions, increased disability, and reduced ability to work."

Researchers recognized that delays in elective surgeries would have devastating long-term effects. "The medical consequences of surgical delays will likely manifest in increased costs to the health care system via treatment of more advanced disease, often requiring more intense and more costly treatment."[25] "Even the deferral of procedures traditionally considered low-acuity . . . will have material implications via *reduced activity, mobility, and quality of life for patients*. Many patients who had been waiting and preparing for their surgeries for weeks, if not months, now must suffer additional delays without ability to reschedule or plan for surgery."[26]

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[24] *COVIDSurg Collaborative, Elective Surgery Cancellations Due to the COVID-19 Pandemic: Global Predictive Modelling to Inform Surgical Recovery Plans*. 107 Br. J. of Surgery 1440-1449 (2020), https://academic.oup.com/bjs/article/107/11/1440/6139510.

[25] *See supra* note18.

[26] *Id.* (emphasis added).

Likewise, the WHO warned against neglecting the provision of essential health services including surgical treatment.[27] "When health systems are overwhelmed and people fail to access needed care, both direct mortality from an outbreak *and indirect mortality from preventable and treatable conditions* increase dramatically."[28] "The suspension of surgical services . . . is likely to create substantial backlog in most systems, with some procedures that were initially deemed elective becoming progressively more urgent."[29] And the WHO recognized the same risk-benefit analysis that Governor Kemp undertook, stating: Governments "are making *difficult decisions* to balance the demands of responding directly to the COVID-19 pandemic *with the need to maintain the delivery of other essential health services*."[30] "Many routine and elective services have been suspended, and existing delivery approaches are being adapted to the evolving pandemic context as the *risk–benefit analysis* for any given activity changes."[31] "*Decision-makers* must balance the benefits of specific activities with the risks they pose for the transmission of the

[27] World Health Organization, *COVID-19: Operational Guidance for Maintaining Essential Health Services During an Outbreak*, https://www.who.int/publications/i/item/WHO-2019-nCoV-essential_health_services-2020.2.

[28] *Id.* (emphasis added).

[29] *Id.*

[30] *Id.* (emphasis added).

[31] *Id.* (emphasis added).

virus. The risk−benefit analysis for any given activity depends on the local disease burden and social context . . . ."[32]

As discussed, Governor Kemp, as the lead decision-maker for Georgia during the state of emergency, struck that risk-benefit analysis balance in favor of granting broad, albeit not unlimited, immunity to health care facilities, their staff, and contractors. The immunity extended not only to COVID related care but to *all* care, because they were all intertwined. That decision allowed facilities to continue fighting COVID while also resuming their normal caregiving, including elective procedures. By contrast, other governors either prohibited elective surgeries outright or imposed significant conditions upon resuming those procedures.[33]

And while the type of elective procedure is by no means outcome determinative for this appeal, it is worth briefly discussing the procedure the plaintiff received—a thoracic laminectomy. For anyone who has ever suffered from back pain, its effects can be debilitating—physically, mentally, and even financially.[34]

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[32] *Id.* (emphasis added).

[33] *COVID-19: Executive Orders by State on Dental, Medical, and Surgical Procedures*, Am. Coll. of Surgeons, https://www.facs.org/for-medical-professionals/covid-19/legislative-regulatory/executive-orders/; s*ee also* American Medical Association, *Factsheet: State Action Related to Delay and Resumption of "Elective" Procedures During COVID-19 Pandemic* (2020), https://www.ama-assn.org/system/files/2020-06/state-elective-procedure-chart.pdf.

[34] Justin Mathew, *et al.*, *Backing Up the Stories: The Psychological and Social Costs of Chronic Low-Back Pain*, INT'L J. OF SPINE & SURGERY, e29-e38 (Dec. 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4300970/.

Indeed, chronic pain patients are about five times more likely than people with no pain to have suicidal ideation.[35] A thoracic laminectomy is a decompression surgery that releases pressure off the compressed nerve or spinal cord by removing the lamina, the portion of the vertebral bone that covers the spinal cord from the back. A spinal cord stimulator is then implanted to send low levels of electricity directly into the spinal cord to relieve pain.[36]

In summary, Governor Kemp balanced the competing interests in favor of keeping facilities open for all patients, choosing to let doctors and their patients to consider the relative risks and determine whether to delay or proceed with surgery. Given the risks and the potential that patients who needed care would not receive it, Governor Kemp granted immunity to providers who kept their doors open for patients. He could have, instead, barred elective surgeries altogether. But he balanced the relative risks and benefits, taking a different (and arguably better approach for patients) of allowing them to evaluate their own risks in conjunction with their health care providers and either receive elective surgery or postpone. For as discussed earlier, one patient's "elective surgery" may be a lifesaving surgery for

[35] David Fishbain, *et al.*, *Risk for Five Forms of Suicidality in Acute Pain Patients and Chronic Pain Patients vs Pain-Free Community Controls*, 10(6) PAIN MEDICINE 1095-1105 (Sept. 2009), https://doi.org/10.1111/j.1526-4637.2009.00682.x.

[36] Massino Mearini, *et al.*, *Dorsal Paddle Leads Implant for Spinal Cord Stimulation Through Laminotomy with Midline Structures Preservation*, SURGICAL NEUROLOGY INT'L (DEC. 31, 2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3551524/.

another. This left the decision in the hands of the caregivers and patients to decide whether they should proceed with a procedure—not the courts. *See Ho v. Tulsa Spine & Specialty Hosp., LLC*, 507 P.3d 673, 685 (Okla. 2021) (Winchester, J., dissenting) ("[The majority cannot] tell a hospital, doctor, or patient which surgeries or procedures were elective during the time that the executive order was in place. Common sense tells us that the hospital, doctor, and patient balanced the risks and benefits to determine whether to delay a surgery.").

E. The Court of Appeals' Opinion.

1. The Court Recognized That, As Written, The Executive Order Would Grant Immunity To The Defendants.

In reviewing the Executive Order, the Court of Appeals began, not by applying the text as written, but instead by "consider[ing] its text in the *legal context* it was issued and *that existed at the time of the alleged malpractice*."[37] *Resurgens, LLC v. Ervin*, No. A23A0892, 2023 WL 7011731, *3 (Ga. Ct. App. Oct. 25, 2023) (emphasis added). But the Court then acknowledged that the language of the Executive Order, "*[s]tanding alone*, . . . might suggest the broad interpretation advanced by the defendants: essentially that all services performed while the

[37] The Court gave no explanation for this second clause about considering the context of a law, not when written, but when applied. The text of the law did not change over time. Nevertheless, the Court should have stayed away from context altogether.

Executive Order was in effect, not just services related to the public health emergency, are covered for immunity purpose." *Id.*

The Court of Appeals should have started and ended there, for that is exactly how unambiguous laws are supposed to be interpreted—*standing alone* based upon the text of the law. Nothing more. *Hough v. State*, 279 Ga. 711, 716 (2005) ("Where the language of a statute is plain and susceptible to only one natural and reasonable construction, courts must construe the statute accordingly. In fact, where the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden."). And the Court of Appeals never found or even intimated that the Executive Order was ambiguous or susceptible to more than one interpretation, so again, its text should have been both the beginning and the end.

Without any finding of ambiguity and having noted that the text of the Executive Order would grant immunity, the Court of Appeals nevertheless dove headlong into the "context" of Order as well as its "intent." *Resurgens*, 2023 WL 7011731, at *4. The Court found that the physician "may have been designated an 'auxiliary emergency management worker' under OCGA § 38-3-35." *Id.* But the Court then held, because of the "context" of the Executive Order, that the physician could not show that he was also "engaged in any emergency management activity." *Id.* The Court seemed to hinge this on the theory that the surgery in question was "elective." The Executive Order, however, states that all "services provided or

performed by healthcare institutions and medical facilities . . . *shall be considered emergency management activities* pursuant to Code Section 38-3-35." (emphasis added). The Executive Order does not distinguish among the types of services being performed.[38] In fact, if an employee, staff, or contractor is an "auxiliary emergency management worker" (as the Court of Appeals recognizes was the case here), there is no second step involved of looking at what type of activity they were performing. They enjoy the immunity protections at that point. Yet, the Court of Appeals fingerpainted a second test into the Executive Order, requiring employees, staff, and contractors to also show that they were "engaged in [an] emergency management activity" beyond that already specified in the Order itself. In so doing, the Court of Appeals overreached.

2. With No Ambiguity, The Court Of Appeals Should Have Avoided Using "Context" And "Intent" Construction.

As touched on earlier, if a law (including an executive order) is unambiguous, it should be applied as written without employing cannons of statutory construction. *See Harrell v. Mount*, 193 Ga. 818, 820 (1942) ("the executive order here involved must be held to be what it declares itself to be"). While GHA recognizes that this Court often properly looks to the context of a law for its interpretation, the Court

[38] As discussed earlier, Governor Kemp balanced the competing policy considerations in favor of ensuring that health care facilities remain open and viable for *all* patients by granting immunity regardless of the COVID status of a patient.

also instructs that the contextual journey should only begin after there is first a finding of an ambiguity in the law that needs explanation. *West v. State*, 300 Ga. 39, 42 (2016) ("[W]here the statutory text is 'clear and unambiguous,' we attribute to the statute its plain meaning, and our search for statutory meaning ends.") (internal quotes and citations omitted).

In that way, context is reserved as "a tool for understanding the terms of the law, not an excuse for rewriting them. . . . Ordinary connotation does not always prevail, but the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct." *King*, 576 U.S. at 500-01 (Scalia, J., dissenting). Here, the Court of Appeals itself recognizes that its interpretation conflicts with the plain language of the Executive Order (thus a completely unnatural interpretation); yet the contextual evidence invoked by the Court was nonexistent or just plain wrong.

For example, in footnote six, the Court of Appeals asserted that the straightforward reading of the Executive Order "would be at tension with statutory interpretation principles by foreclosing the right to a trial by jury for their medical malpractice claims." *Resurgens*, 2023 WL 7011731, at n.6.[39] But the immunity

[39] Per the Court of Appeals' reasoning in footnote six, the immunity could not even extend to claims involving a *COVID-positive* patient. The Court failed to explain how there can be a common law conflict for elective patients, on the one hand, but not for COVID patients, on the other. In any event, as discussed below, there was no denial of the right to a jury trial and thus no conflict.

provision of O.C.G.A. § 38-3-35(b) granted through the Executive Order does not "foreclos[e] the right to a trial by jury." Instead, as the Court of Appeals recognized, that statute expressly retains that right to bring claims in case involving "willful misconduct, gross negligence, or bad faith." *Id.* And this Court has already recognized that lawmakers were authorized, in the context of *emergency services*, to limit the right to a jury trial to only those claims involving "gross negligence." *Gliemmo v. Cousineau*, 287 Ga. 7, 11 (2010) (the statute merely "raises the burden of proof in certain cases, it does not deprive them of the right to a jury trial or any other fundamental right).

The Court of Appeals also read the context of the Emergency Management Act as reflecting a legislative "intent" to limit the extent of the Act to the carrying out of "emergency functions" resulting "from emergencies." *Resurgens*, 2023 WL 7011731, at *4.[40] Without any finding of an ambiguity, the Court erred, first, by even trying to discern a legislative intent and, second, by substituting its own intent for the plain meaning of the statute and the Executive Order. *See Six Flags Over Ga. II v. Kull*, 276 Ga. 210, 211 (2003) ("Where the language of a statute is plain and

[40] Even under the Court of Appeals' reading of the legislative intent, immunity should have still attached because the defendants were carrying out "emergency functions" by keeping their doors open and reporting to work for the benefit of Georgians during the pandemic emergency.

unambiguous, judicial construction is not only unnecessary but forbidden."). Moreover,

> as our Supreme Court has instructed, the search for legislative intent must begin with the words of the statute, and if those words are clear and unambiguous, the search also must end there. Put another way, when we consider the meaning of a statute, we must presume that the legislature meant what it said and said what it meant. We cannot substitute by judicial interpretation language of our own for the clear, unambiguous language of the statute, so as to change the meaning.

In re Interest of H. P., 368 Ga. App. 222, 224 (2023); *see also Merritt v. State*, 286 Ga. 650, 656 (2010) (Nahmias, J., concurring specially) (explaining that "when judges start discussing not the meaning of the statutes the legislature actually enacted, as determined from the text of those laws, but rather the unexpressed 'spirit' or 'reason' of the legislation, and the need to make sure the law does not cause 'unreasonable consequences,' [they venture] into dangerously undemocratic, unfair, and impractical territory"); *Richardson v. State*, 276 Ga. 639, 640 (2003) (noting that "[c]ourts of last resort must frequently construe the language of a statute, but such courts may not substitute by judicial interpretation language of their own for the clear, unambiguous language of the statute, so as to change the meaning") (punctuation omitted). As Justice Bethel (a former legislator) has aptly noted, "[a]ny attempt to discern legislative intent beyond the express language passed by a legislative body is as practical and productive as attempting to nail Jell-O to the wall." *Bishop v. State*, 341 Ga. App. 590, 593 (2017) (Bethel, J., concurring). Some

commentators are even more vocal in their criticism of the use of "legislative intent," explaining that legislative intent is "normally of such generality as to be useless as an interpretative tool, unless, of course, it is being used as a cover for the judge to 'do justice' as he sees fit."[41]

F. The Court of Appeals' Rationale Would Expose Workers To Liability For Declining Or Delaying Elective Surgeries—An Absurd Result.

As shown above, the Court of Appeals was wrong in its presumption that the Executive Order would strip away the right to a jury trial. Consistent with Georgia's emergency department tort standard, the Emergency Management Act *retains* the right to a jury trial for not only gross negligence, but also bad faith, and intentional wrongs. Thus, the Court of Appeals erred when it said that its reading is consistent with the purpose of the Executive Order and its authorizing statute.

And it gets worse. Under the Court of Appeals' reasoning, patients could potentially begin suing physicians and facilities for declining or delaying elective surgeries and other tests because of the COVID pandemic if the patients themselves were not COVID-positive. As discussed earlier, delaying elective surgeries and routine tests can result in pain, further disease progression, and other complications. The Court of Appeals' opinion opens the door for lawsuits under such theories, in direct conflict with the Executive Order and the need to reduce the burden on health

[41] John M. Walker, Jr., Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge, 58 N.Y.U. ANN. SURV. AM. L. 203, 236 (2001).

care facilities and providers during the pandemic. In other words, the Court of Appeals' analysis leads to an absurd result, which *is* a statutory tool of construction this Court should use in reversing. *Staley v. State*, 284 Ga. 873, 873-74 (2009) (it is the duty of the court not to "construe a statute as will result in unreasonable or absurd consequences not contemplated by the legislature").

Indeed, in other states, where the grant of immunity was not as broad as in Georgia, Governors had to expressly provide for immunity based on alleged delays in elective procedures. For example, Vermont's governor recognized this very scenario in one of his later executive orders, expressly granting immunity to providers who *cancelled or postponed* elective surgeries.[42] Likewise, the Wisconsin legislature enacted a statute granting broad immunity to providers during the state of emergency and sixty days thereafter whether the provider was treating a COVID patient or not.[43] Thus, like Governor Kemp's Executive Order, the Wisconsin legislation is "broad enough to protect a provider sued for delaying an elective surgery, when that provider would have no protection otherwise in light of Wisconsin not issuing an order requiring the delay of elective surgeries."[44]

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[42] State of Vermont, Executive Dep't, Addendum 9 To Executive Order 01-20 (April 10, 2020), https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%209%20TO%20EXECUTIVE%20ORDER%2001-20.pdf.

[43] *See* Wis. Stat. § 895.4801 (April 15, 2020).

[44] Lorinda Holloway, *COVID-19: Has the Standard of Care Changed and Are Providers Immune from Liability?*, 117(3) MISSOURI MED. 199-201 (May-June

Because it is more encompassing, Governor Kemp's Executive Order provides immunity to providers whether they are performing or postponing an elective procedure. To accept Respondents' argument and the interpretation taken by the Court of Appeals would open Georgia providers up to liability not only for *performing* a surgery (thus placing their own health and safety at risk) but also for *postponing* it—an absurd result.

G. Other Grants Of Immunity Exist In Our Laws.

Respondents assert that the Executive Order conflicts with the common law and would run afoul of the constitutional right to a jury trial. As discussed earlier, this Court has already upheld Georgia's gross standard for claims involving emergency treatment, so the statute and Executive Order here fall squarely within that reasoning. *Gliemmo*, 287 Ga. at 11. Moreover, our General Assembly has also granted broad immunity to schools, hospitals, and health care providers providing charitable care. *See* O.C.G.A. § 51-1-29.1. Georgia also has a Good Samaritan law providing immunity for physicians and others who aid in assisting an accident victim. O.C.G.A. § 51–1–29. The law has been interpreted broadly, even when the patient was seen and treated at a hospital. *See Willingham v. Hudson*, 274 Ga. App.

2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7302037/#:~:text=Governor%20Evers%20of%20Wisconsin%20recently,consistent%E2%80%9D%20with%20public%20health%20emergency.

200 (2005) (physician entitled to Good Samaritan immunity even when tornado victim was treated at "scene of emergency" at hospital because the tornado resulted in irregular influx of victims and created abnormal situation for which physician was called upon to render emergency assistance). And our Good Samaritan statute conflicts with the common law doctrine, wherein, if one undertook to provide aid in an emergency, he assumed the duty to exercise ordinary care; and in the case of physicians, he assumed a particular and higher duty. *See Wallace v. Hall*, 145 Ga. App. 610, 611 (1978). Thus, to adopt Respondents' arguments about the constitutionality of the Governor's Executive Order from a jury trial perspective would place our Good Samaritan and charitable immunity statutes in constitutional jeopardy as well.

IV. CONCLUSION

As indicated, GHA's interests lie beyond the outcome of this one case. The Court of Appeals' opinion will create an unworkable framework for deciding what claims are COVID-related and which are not. Governor Kemp sought to keep hospital doors open for *all* patients during the pandemic. Workers would not have shown up without protections, and patients (whether infected or not) would have had nowhere to turn. Moreover, the Court of Appeals' opinion would create the absurd result of opening the floodgate of lawsuits for patients whose procedures were delayed or canceled. Finally, GHA and its members need to have confidence that

future executive orders will be respected as drafted, rather than being rewritten by the courts. For these and the other stated reasons, GHA supports the arguments advanced by Petitioners and urges this Court to grant *certiorari* and review and reverse the Court of Appeals' opinion.

Respectfully submitted this 14th day of December, 2023.

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ORDER GRANTING EXTENSION

SUPREME COURT OF GEORGIA
Case No. S24C0385

November 22, 2023

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

RESURGENS, LLC et al. v. FRANCES L. ERVIN et al..

Georgia Hospital Association, Inc.'s request for an extension of time to file amicus brief is granted until December 14, 2023.

A copy of this order MUST be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing **BRIEF OF GEORGIA HOSPITAL ASSOCIATION, INC. AS AMICUS CURIAE** to be served upon counsel for all parties by depositing a copy of same in the United States Mail, with sufficient postage affixed thereto to ensure deliver, addressed to the following:

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This 14th day of December, 2023.

/s/ Jason E. Bring
Jason E. Bring