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Alabama State Bar President
Gibson Vance of Montgomery
and his wife, Kate Vance

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W. Gregory Ward, Lanett.....Chair and Editor
wward@mindspring.com



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Are There Constitutional Issues With Alabama's Gubernatorial and Legislative Responses to the COVID-19 Pandemic?

By David G. Wirtes, Jr., Joseph D. Steadman, Aaron N. Maples, and Joseph D. Wirtes

The coronavirus known as COVID-19 reportedly infected

the first American on January 21, 2020.¹ According to the Alabama Department of Health, Alabama has to date suffered 19,890 deaths² and 45,976³ hospitalizations from the virus. In this same time period, 1,053,969 Americans have died,⁴ while 92,761,865 Americans have been confirmed as infected.⁵

In response, every state declared states of emergency at one point or another.⁶ For example, on March 10, 2020, Michigan Governor Gretchen Whitmer issued an executive order declaring a state of emergency.⁷ Alabama's Governor Kay Ivey followed suit three days later when she issued Alabama's first COVID-19 Emergency Proclamation on March 13, 2020.⁸ While responses varied from state to state, most enacted stay-at-home orders, required closures of specific businesses, limited public

gatherings, and mandated the wearing of masks in public.⁹

To be sure, the COVID-19 pandemic presented challenges warranting creative and aggressive governmental responses. But any such responses are required to be tailored to fit within settled limits upon the exercise of governmental power imposed by our state constitution.

However, Governor Ivey's use of COVID-19 emergency proclamations to abolish causes of action, change the standard of care, and confer immunity pursuant to Alabama's Emergency Management Act of 1955 (the "AEMA"), Ala. Code §§ 31-9-1 to -24 (1975), raises serious constitutional questions because it may not fit within those settled limits.

The Alabama Legislature's subsequent promulgation in 2021 of the COVID-19 Immunity Act ("ACIA"), §§ 6-5-790 to -799 likewise raises constitutional questions because it purports to *retroactively* abolish accrued causes of action, change the standard of care, and confer immunity.

In this article we first discuss pertinent Alabama constitutional provisions and the cases interpreting them that discuss the limits of the legislature's ability to delegate legislative power to the executive branch. We next catalogue Governor Ivey's emergency proclamations which purport to change Alabama negligence law and confer immunity upon COVID responders and businesses and explain how such proclamations may not withstand constitutional scrutiny. We move from there to demonstrating how retroactive application of the ACIA to deprive victims of vested negligence causes of action likewise may not withstand constitutional scrutiny. Finally, we examine the Michigan Supreme Court's decision in *Midwest Institute of Health, PLLC v. Whitmer*, an analogue to Alabama's unfolding situation, where the Supreme Court of Michigan held similar governmental responses to the COVID-19 pandemic unconstitutional under Michigan law.

In doing so, our article aims to assist Alabama lawyers contemplating or confronted with defenses to COVID-related injury and death claims premised upon gubernatorial proclamations, the AEMA, and/or the AICA.

Pertinent State Constitutional Provisions

- Article I, § 13 of the *Alabama Constitution of 1901*: “[T]hat all courts shall be open, and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law, and right and justice shall be administered without sale, denial, or delay.”
- Article I, § 21 of the *Alabama Constitution of 1901*: “That no power of suspending laws shall be exercised except by the legislature.”
- Article I, § 35 of the *Alabama Constitution of 1901*: That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assume other functions it is usurpation and oppression.
- Article III, § 42 of the *Alabama Constitution of 1901*: (a) The powers of the government of the State of Alabama are legislative, executive, and judicial. (b) The government of the State of Alabama shall be divided into three distinct branches:

legislative, executive, and judicial. (c) To the end that the government of the State of Alabama may be a government of laws and not of individuals, and except as expressly directed or permitted in this constitution, the legislative branch may not exercise the executive or judicial power, the executive branch may not exercise the legislative or judicial power, and the judicial branch may not exercise the legislative or executive power.

Pertinent Overarching Rules of Construction

- “But it is insisted that this law was enacted by the Legislature to meet an emergency. That emergencies do not authorize the suspension of the Constitution and its guaranties was settled nearly three quarters of a century ago...” *City of Mobile v. Rouse*, 233 Ala. 622, 625, 173 So. 266, 268 (1937), citing *Ex parte Milligan*, 4 Wall.2, 120-121, 18 L.Ed. 281(1866).
- ““Public policy considerations cannot override constitutional mandates.”” *Ex parte Bentley*, 116 So. 3d 201, 203 (Ala. 2012), quoting *Camp v. Kenney*, 673 So. 2d 436, 438 (Ala. Civ. App. 1995).
- “[E]ven in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. ___, ___, 141 S.Ct. 63, 68, 208 L.Ed. 2d 206, 210 (U.S. 2020).

Governor Ivey's Emergency Proclamations

On March 13, 2020, Governor Ivey declared a state of emergency in response to the COVID-19 pandemic and issued her first Emergency Proclamation.¹⁰ In her initial proclamation, Governor Ivey stated that any “alternative standards of care” adopted by health care facilities were declared to be “state-approved” and that the “degree of care” owed to patients by health care professionals under §§ 6-5-540 to -552 (the Alabama Medical Liability Act (“AMLA”)) would be *suspended* as a result of her proclamation.



Governor Ivey issued 27 supplemental proclamations, each addressing miscellaneous topics impacting Alabama citizens.¹¹ Of those, the Fifth and Eighth Supplemental proclamations purport to make substantive changes to Alabama civil tort and damages law. While these provisions of Governor Ivey's COVID-19 emergency proclamations expired by their own terms on October 31, 2021, they purport to impact all causes of action for personal injuries and wrongful deaths accruing while Alabama remained within a state of emergency.¹²

The Fifth Supplemental Proclamation was issued on April 2, 2020.¹³ It authorizes certain health care officials, such as certified registered nurse practitioners and nurse anesthetists, to have an expanded scope of practice during the state of emergency. It also requires state health agencies to allow expedited licensures or temporary permits for medical professionals from out of state to practice in Alabama and further calls for the expedited reinstatement of medical licenses for those who have maintained good standing in Alabama, who have no disciplinary history in Alabama or elsewhere, and are deemed competent by the Alabama Board of Medical Examiners and Medical Licensure Commission.

The Eighth Supplemental Proclamation was issued on May 8, 2020.¹⁴ This proclamation aims to confer broad immunity to health care providers who provide care arguably impacted by COVID. It also purports to confer on businesses broad immunity for liability from "death or injury to persons or for damage to property in any way arising from any act or omission related to, or in connection with, COVID-19 transmission...." The proclamation purports to immunize businesses even from claims arising from alleged failure to abide by public health guidance aimed at stopping or slowing the spread of COVID-19.

The proclamation consists of three key sections: "Findings," "Definitions," and "Emergency Protections." The Findings section contains a series of declarations in which Governor Ivey explains her reasoning for granting immunity to health care providers. For example, the governor references the poor economy, the closure of many businesses, and that mortality rates increase significantly during periods of high employment.

The Definitions section specifies the actions and inactions by health care providers deemed exempt from liability. The essential term is labeled as a "Covered COVID-19 response activity." This term is said to cover "any performance or provision of health care services or

treatment... that resulted from, was negatively affected [or]... impacted by a lack of resources caused by, or... in response to the COVID-19 pandemic..." The pertinent excerpts from this proclamation are as follows:

1. **"Covered COVID-19 response activity"** means any or all of the following activities by a business, health care provider or other covered entity:
 - a. Any testing, distribution of testing materials, monitoring, collecting, reporting, tracking, tracing, investigating, or disclosing exposures or other information in connection with COVID-19 during the ongoing state of emergency;
 - b. Any 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;
 - c. Any design, manufacture, distribution, allowance, use, or non-use of precautionary equipment or supplies such as PPE in connection with COVID-19 during the ongoing state of emergency;
 - d. Any design or manufacture of testing materials done under the direction of ADPH and in accordance with ADPH's specifications.

May 8, 2020 Eighth Supplemental Emergency Proclamation, ¶I(B)(4)(a-d).

The Emergency Protections section purports to amend the standard of care owed by health care providers under Alabama law, the standard of proof to prove a breach of the standard of care and imposes limitations on recoverable damages for claims which meet the heightened burden of proof. First, Governor Ivey proclaims that health care providers are not liable for the death or injury of persons arising from a "covered COVID-19 response activity" except for those resulting from a provider's "wanton, reckless, willful, or intentional misconduct."¹⁵ Second, rather than requiring plaintiffs to prove by substantial evidence that a health care provider breached the standard of care,¹⁶ Governor Ivey proclaims that plaintiffs must now establish a breach by "clear and convincing evidence." Third, while Alabama plaintiffs are traditionally able to recover the full spectrum of

compensatory damages and punitive damages against health care providers (except in certain circumstances),¹⁷ the Eighth Supplemental Proclamation prescribes that victims may no longer recover any noneconomic or punitive damages.¹⁸

The full text of the Emergency Protections section of the Eighth Supplemental Emergency Proclamation states:

C. Emergency protections.

1. Liability protections. A business, health care provider, or other covered entity shall not be liable for the death or injury to persons or for damage to property in any way arising from any act or omission related to, or in connection with, COVID-19 transmission or a covered COVID-19 response activity, unless a claimant shows by clear and convincing evidence that the claimant's alleged death, injury, or damage was caused by the business, health care provider, or other covered entity's wanton, reckless, willful, or intentional misconduct.
2. Limitations on damages. In those instances where liability is established under Section I.C.1 and the acts or omissions do not result in serious physical injury, a business, health care provider, or other covered entity's liability shall be limited to actual economic compensatory damages, and in no event shall the business, health care provider, or other covered entity be liable for non-economic or punitive damages. A party asserting a wrongful death claim under Section I.C.1 is only entitled to an award of punitive damages.
3. Accrued causes of action. For any cause of action relating to COVID-19 transmission or a covered COVID-19 response activity where the cause of action accrued before the issuance of this proclamation and for which a court holds that the provisions of Section I.C.1 and I.C.2 do not apply, the following shall apply:
 - a. Standard of Care. As a matter of law, a business, health care provider, or other covered



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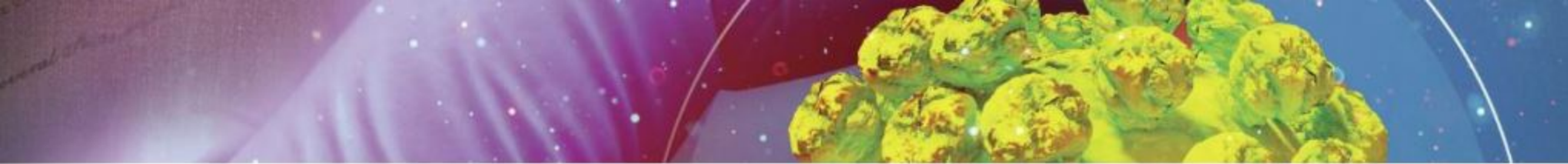
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entity shall not be liable for negligence, premises liability, or for any non-wanton, non-willful, or nonintentional civil cause of action with respect to any individual or entity relating to or in connection with COVID-19 transmission or any covered COVID-19 response activity unless the claimant proves by clear and convincing evidence that the business, health care provider, or other covered entity did not reasonably attempt to comply with the then applicable public health guidance.

- b. Adjustment of remedies. Notwithstanding any other provision of law, a business, health care provider, or other covered entity shall not be liable for damages from mental anguish or emotional distress or for punitive damages but could be liable for economic compensatory damages in a cause of action that does not involve serious physical injury. This subsection shall not prohibit the awarding of punitive damages for wrongful death claims, but no other damages shall be allowed for such claims.

May 8, 2020 Eighth Supplemental Emergency Proclamation, ¶ C(1-3).

The fundamental question to be confronted is whether under Alabama's constitutional system of governance, does Governor Ivey have legal authority to issue such proclamations and make any such substantive changes to Alabama law?

Alabama Emergency Management Act of 1955

Governor Ivey's claimed authority for issuing such proclamations derives from operative provisions of the Alabama Emergency Management Act ("AEMA"), especially §§ 31-9-6 and 31-9-8, which enumerate emergency powers conferred upon Alabama governors once a state of emergency has been declared and filed with the Alabama Secretary of State. These statutes state:

Alabama Code 31-9-6. Powers and duties of Governor with respect to emergency management.

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.

- (2) To prepare a comprehensive plan and program for the emergency management of this state, such plan and program to be integrated and coordinated with the emergency management plans of the federal government and of other states to the fullest possible extent, and to coordinate the preparation of plans and programs for emergency management by the political subdivisions of this state, such plans to be integrated into and coordinated with the emergency management plans and programs of this state to the fullest possible extent.

(3) In accordance with such plan and program for the emergency management of this state, to ascertain the requirements of the state, or the political subdivisions thereof, for food or clothing or other necessities of life in the event of disaster or emergency and to plan for and procure supplies, medicines, materials, and equipment for the purposes set forth in this article; to make surveys of the industries, resources and facilities within the state as are necessary to carry out the purposes of this article; to institute training programs and public information programs; and to take all other preparatory steps, including the partial or full mobilization of emergency management organizations in advance of actual disaster, to insure the furnishing of adequately trained and equipped forces of emergency management personnel in time of need.

(4) To make, amend, and rescind the necessary orders, rules, and regulations looking to the direction or control of practice blackouts, air raid drills, mobilization of emergency management forces, and other tests and exercises, warnings, and signals for drills or attacks, the mechanical devices to be used in connection therewith, the effective screening or extinguishing of all lights and lighting devices and appliances, the conduct of civilians and the movement or cessation of movement of pedestrians and vehicular traffic, public meetings or gatherings, the evacuation and reception of civilian population, and shutting off water mains, gas mains, electric power connections, and the suspension of all other public utilities, during, prior and subsequent to drills or attacks.

(5) To create and establish mobile support units and to provide for their compensation.

(6) To cooperate with the President and the heads of the Armed Forces, with the Emergency Management Agency of the United States and with the officers and agencies of other states in matters pertaining to the emergency management of the state and nation and the incidents thereof.

(7) With due consideration to the recommendation of the local authorities, to appoint full-time state and regional area directors.

(8) To utilize the services and facilities of existing officers and agencies of the state and the political subdivisions thereof.

(9) On behalf of this state, to enter into reciprocal aid agreements or compacts with other states and the federal government, including federally recognized Indian tribes. Such mutual aid agreements shall be limited to the furnishing or exchange of food, clothing, medicine, and other supplies; engineering services; emergency housing; police services; national or state guards while under the control of the state; health, medical and related services; fire fighting, rescue, transportation, and construction services and equipment; personnel necessary to provide or conduct these services; such other supplies, equipment, facilities, personnel, and services as may be needed; and the reimbursement of costs and expenses for equipment, supplies, personnel, and similar items for mobile support units, fire fighting and police units, and health units. Such agreements shall be on such terms and conditions as are deemed necessary.

(10) To sponsor and develop mutual aid plans and agreements between the political subdivisions of the state, similar to the mutual aid agreements with other states referred to in subdivision (1) of this section.

(11) To delegate any administrative authority vested in him or her under this article, and to provide for the subdelegation of any such authority.

(12) To take such action and give such directions to state and local law-enforcement officers and agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of this article and with the orders, rules, and regulations made pursuant thereto.


Alabama Code 31-9-8. Emergency powers Of Governor.

(a) The provisions of this section shall be operative only during the existence of a state of emergency, referred to hereinafter as one of the states of emergency defined in Section 31-9-3. The existence of a state of emergency may be proclaimed by the Governor as provided in this subsection or by joint resolution of the Legislature if the Governor in the proclamation or the Legislature in the resolution finds that an attack upon the United States has occurred or is anticipated in the immediate future, or that a natural disaster of major proportions or a public health emergency has occurred or is reasonably anticipated in the immediate future within this state and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section. If the state of emergency affects less than the entire state, the Governor or the Legislature shall designate in the proclamation or resolution those counties to which the state of emergency applies. The emergency, whether proclaimed by the Governor or by the Legislature, shall terminate 60 days after the date on which it was proclaimed unless the Governor extends the emergency by proclamation or the Legislature extends the emergency by a joint resolution. Upon proclamation by the Governor of a state of emergency, the Governor may call the Legislature into special session. Additionally, the Lieutenant Governor or the Speaker of the House may request in writing that the Governor call the Legislature into special session. During the period that the proclaimed emergency exists or continues, the Governor shall have and may exercise the following additional emergency powers:

(1) To enforce all laws, rules, and regulations relating to emergency management and to assume direct operational control of all emergency management forces and helpers in the state.

(2) To sell, lend, lease, give, transfer, or deliver materials or perform services for emergency management purposes on such terms and conditions as the Governor shall prescribe and without regard to the limitations of any existing law, and to account to the State Treasurer for any funds received for such property.

(3) To procure, by purchase, condemnation, seizure, or other means, construct, lease, transport,



store, maintain, renovate, or distribute materials and facilities for emergency management without regard to the limitations of any existing law; provided, that this authority shall not be exercised with regard to newspapers, wire facilities leased or owned by news services, and other news publications, and provided further, that he or she shall make compensation for the property so seized, taken, or condemned, on the following basis:

* * *

(4) To provide for and compel the evacuation of all or part of the population from any stricken or threatened area or areas within the state and to take such steps as are necessary for the receipt and care of such evacuees.

(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.

(6) To employ such measures and give such directions to the state or local boards of health as may be reasonably necessary for the purpose of securing compliance with the provisions of this article or with the findings or recommendations of such boards of health by reason of conditions arising from enemy attack or the threat of enemy attack or otherwise.

(7) To utilize the services and facilities of existing officers and agencies of the state and of the political subdivisions thereof. All such officers and agencies shall cooperate with and extend their services and facilities to the Governor as he or she may request.

(8) With due consideration to the recommendations of local authorities, the Governor may formulate and execute plans and regulations for the control of traffic in order to provide for the rapid and safe movement of evacuation over public highways and streets of people, troops, or vehicles and materials for national defense or for use in any defense industry, and may coordinate the activities of the departments or agencies of the state and of the political subdivisions thereof concerned directly or indirectly with public highways and streets, in a manner which will best effectuate such plans.

(9) To establish agencies and offices and to appoint temporary executive, technical, clerical, and other personnel as may be necessary to carry out the provisions of this article without regard to the Merit System Act.

The AEMA authorizes the governor to “enforce all laws, rules, and regulations relating to emergency management ... and 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.”¹⁹ Governor Ivey expressly relied upon such authority in issuing her COVID-19 emergency proclamations. For example, her Eighth Supplemental Proclamation states: “Whereas, in accordance with Ala. Code § 31-9-6 and § 31-9-8, I have concluded that it is necessary to promote and secure the safety and protection of the civilian population by ensuring that Alabama’s health care providers have adequate protections and our health care system has adequate capacity to provide health care for the people of this State... .”²⁰

The AEMA’s other pertinent provisions specify that once issued a governor’s emergency order has the full force and effect of law when filed with the secretary of state.²¹ Furthermore, it provides that “[a]ll 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 article, shall be suspended during the period of time and to the extent that such inconsistency exists.”²² Finally, § 31-9-23 prescribes that the AEMA is to be liberally construed in order to effectuate its purpose by providing Alabama governors with significant authority to direct the state’s response to emergency situations.

While on its face the AEMA appears noble in its intentions, if interpreted to grant Alabama’s governors such unbridled authority to change statutory law, it is arguably unconstitutional in many ways. The following sections show why.

History Behind Governor Ivey’s May 8, 2020 Eighth Supplemental Emergency COVID-19 Proclamation

The Alabama Legislature convened in regular session the first week of May 2020. Senator Orr offered

Senate Bill 330 which, among other things, provided for a change in the standard of care for claims arising from or related to COVID-19 transmissions such that negligence claims against health care providers were abolished and damages could be recovered only “if the claimant proved by clear and convincing evidence that the covered entity caused the damages, injury, and death by acting with wanton, reckless, willful, or intentional misconduct.”²³ Senate Bill 330 failed to pass during the 2020 legislative session.

According to one of the drafters of SB 330, Mobile attorney Matthew McDonald, who appeared as an attorney for amicus curiae Alabama Civil Justice Reform Committee in *Joseph R. Dear v. Comfort Care Coastal Hospice, LLC*, Mobile County, Alabama Circuit Court Civil Action No. CV-2021-900780, SB 330 failed to pass in the 2020 legislative session because the legislature adjourned early out of health concerns. McDonald reported this legislative history during a hearing before Mobile Circuit Judge Ben H. Brooks:

“...I and others worked on a statute that got introduced in April of 2020. ...I think it was Senate Bill 30 by Senator Orr.²⁴ We, hurriedly, in March and April – as you know, you write these things by committee as you’ve done with me before many times.”²⁵

* * *

“...We introduced the bill in April, Senate Bill 30 [sic], Senator Orr introduced it. ...but the Legislature adjourned early, again because of health concerns. We could never, literally, get the bill through.”²⁶

Upon ascertaining SB 330 would not garner enough votes to pass, Governor Ivey purported to accomplish the same results through executive proclamation under a claim of authority conferred by the AEMA. Side-by-side comparison of the then-proposed SB 330 with what ultimately became the text of Governor Ivey’s May 8, 2020 Eighth Supplemental COVID-19 Emergency Proclamation shows they are in all material respects *identical*. McDonald conceded before Judge Brooks that “Senate Bill 30 then morphed into the [Governor’s] proclamation.”²⁷

History Behind the Legislature’s Promulgation Of the COVID Immunity Act

Nothing contained within the AEMA authorizes the legislature to confer power upon a governor to change substantive law or confer immunity in times of emergencies. On the contrary, § 21 of the Alabama Constitution of 1901 forbids the legislature from delegating law-making authority just as § 42 (separation of powers provision) forbids the executive branch from exercising legislative power. In apparent recognition of the constitutional vulnerability of the declarations contained within Governor Ivey’s Eighth Supplemental Emergency Proclamation, the legislature reconvened in 2021 and considered a successor to SB 330 which was a mirror image of that same bill and a mirror image of Governor Ivey’s Eighth Supplemental Emergency Proclamation. The new 2021 bill was assigned Senate Bill number 30. Senate Bill 30 passed through the legislature, was signed into law, and was eventually codified as the Alabama COVID Immunity Act (“ACIA”), which, again, mirrors *both* SB 330 and Governor Ivey’s Eighth Supplemental COVID-19 Emergency Proclamation.

In addition, however, the ACIA includes § 6-5-792 which purports to abrogate all negligence causes of action related to COVID-19 transmission including those accruing before February 12, 2021, when the ACIA became law. Section 6-5-793 applies to negligence claims related to COVID-19 transmission “for which a court holds that neither Section 3 [codified at § 6-5-792] nor the liability limiting provisions of any gubernatorial emergency order appl[y].” Section 11 of the Act, which does not appear in the Alabama Code, provides “[t]he provisions of this act shall be retroactive and apply to causes of action filed on or after March 13, 2020.”

As shown below, the purported retroactivity of § 6-5-792’s language runs afoul of Art. I, § 13’s “right-to-remedy” provision, as construed in *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120, 126 (1857) (“[i]t is not within the power of the legislature to take away vested rights.”), *Pickett v. Matthews*, 238 Ala. 542, 545, 192 So. 261, 264 (1939) (“undoubtedly the right to the remedy must remain and cannot be curtailed after the injury has occurred and the right of action vested, regardless of the source of the duty which

was breached, provided it remained in existence when the breach occurred”).

Constitutional Issues with Governor Ivey’s Fifth and Eighth Supplemental COVID-19 Emergency Proclamations

The Executive Proclamations Exceed the Delegation of Authority in the AEMA

The relevant section of the AEMA which purports to grant the governor authority to issue emergency proclamations is set out in § 31-9-6(1):

In performing his or her duties under this chapter, 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 chapter within the limits of the authority conferred upon him or her in this chapter, with due consideration of the plans of the federal government.

None of the specific powers conferred by the various subsections of §§ 31-9-6 or 31-9-8 authorize the governor to change substantive tort law. On the contrary, “[t]he provisions of a statute will prevail in any case of a conflict between a statute and an agency regulation.” *Ex Parte Jones Mfg. Co.*, 589 So. 2d 208, 210 (Ala. 1991). Just like an administrative agency, the governor cannot usurp legislative powers by “enlarg[ing] upon statutory authority.” *Id.*

Moreover, the AEMA does not purport to delegate to the governor any authority to create new law such as conferring immunity from liability for negligence upon private businesses and individuals. “It is axiomatic that administrative rules and regulations must be consistent with the constitutional or statutory authority by which their promulgation is authorized.” *Ex parte Florence*, 417 So. 2d 191, 193 (Ala. 1982); see also *Jefferson Cty. v. Ala. Criminal Justice Info. Ctr. Comm’n*, 620 So. 2d 651, 658 (Ala. 1993) (an agency “cannot claim implied powers that exceed and/or conflict with those express powers contained in its enabling legislation.”).

The only specific provision of the AEMA addressing tort liability concerns emergency workers:

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 or any order, rule, or regulation promulgated pursuant to the provisions of this article 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.

Section 31-9-16(a). In no way can this specific legislative grant of immunity to certain state actors be deemed some delegation of authority to the governor to extend such immunity to non-state actors. And even under the most liberal reading of the AEMA, health care providers remain liable for gross negligence. Under long-settled law, there is no meaningful distinction between “negligence and gross negligence.”²⁸ Consequently, under the AEMA health care providers and state actors reasonably attempting to comply with emergency orders remain liable for their negligence/gross negligence. Therefore, any reliance by anyone upon any part of Governor Ivey’s Fifth or Eighth Supplemental proclamations in support of any claim of immunity from civil liability exceeds the authority delegated to the governor by the AEMA because it conflicts with § 31-9-16(a).

Moreover, as shown below, construing the AEMA’s delegation of authority to the governor as allowing the governor to change burdens of proof in civil actions and to confer immunity for negligence liability raises serious constitutional questions in light of Article 1, § 21 and Article III, § 42 of the constitution.

Any Grant of Immunity From Civil Liability by Executive Order Likely Violates Article I, § 21

Article I § 21 of the Alabama Constitution unequivocally provides: “That no power of suspending laws shall be exercised *except by the legislature.*” Emphasis supplied. As such, the section’s plain text prohibits a construction of § 31-9-13 of the AEMA as delegating a broad suspension power to the governor. Through her emergency proclamations, Governor

Ivey has exercised a broad suspension power pursuant to the AEMA by issuing emergency orders purporting to change substantive tort law. As a result, Governor Ivey's actions are arguably unconstitutional.

The Alabama Supreme Court has previously construed Art. I § 21 to prohibit the legislature from delegating the suspension power to the governor and precluding Alabama's governor from exercising that power.

In *Opinion of the Justices*, 345 So. 2d 1354 (Ala. 1977), Governor George Wallace requested that the court give an opinion on the constitutionality of a bill that would vest him with the power to freeze certain utility rates under an executive order that was established by a state agency, the Alabama Public Service Commission ("PSC").²⁹ The court was presented with three specific questions asking whether the bill violated certain Alabama constitutional provisions.³⁰

One of the questions presented asked whether the bill conflicted with Section 21.³¹ The court held that it did. The court reasoned that the power to freeze a utility rate was equivalent to the power to suspend law.³² Although the court recognized that the state legislature could itself freeze the utility rate, the court declared that the legislature was unable to, consistent with Section 21, authorize its suspension by another agency or, as proposed by the bill, by Governor Wallace. The court reasoned "[t]he power to suspend having been vested exclusively in the legislature by the constitution, *a fortiori* it could not be delegated to the governor in view of [former] Section 43 of our constitution."³³

Here, Governor Ivey's emergency proclamations purport to suspend numerous laws enacted by the Alabama Legislature.³⁴ Her initial proclamation on March 13, 2020 explicitly declared that the degree of care owed to patients by health care professionals under Alabama law was to be suspended as a result of her proclamation.³⁵ In light of the Alabama Constitution and Alabama Supreme Court precedent, Governor Ivey's purported suspension of laws is arguably unconstitutional as a matter of law.

Additionally, Governor Ivey's exercise of the law-making power via emergency proclamation pursuant to the AEMA may also run afoul of the separation of powers mandate of Article III, § 42.

Any Grant of Civil Immunity by Executive Order Also Implicates Article III, § 42

Article III, § 42 provides that:

(a) The powers of the government of the State of Alabama are legislative, executive, and judicial.


(b) The government of the State of Alabama shall be divided into three distinct branches: legislative, executive, and judicial.

(c) To the end that the government of the State of Alabama may be a government of laws and not of individuals, and except as expressly directed or permitted in this constitution, the legislative branch may not exercise the executive or judicial power, the executive branch may not exercise the legislative or judicial power, and the judicial branch may not exercise the legislative or executive power.³⁶

In addition to suspending current Alabama laws, Governor Ivey's emergency proclamation purports to amend existing laws and enact new laws, all without legislative approval. As discussed above, the Eighth Supplemental Proclamation, for example, declares an amendment to the statutory standard of care owed to patients by health care providers and immunizes all businesses from liability as to claims arising from COVID-19 transmission throughout the duration of the state of emergency.

The Alabama Supreme Court's decision in *Hawkins v. James*³⁷ confronted a similar situation. Governor Fob James issued an executive order that instructed Alabama agencies to deny waiver requests by state employees to work beyond the 70-year-old mandatory-retirement age, except in very limited circumstances.³⁸ The plaintiff, who was 74 years of age, previously met conditions allowing her to work beyond the mandatory retirement age.³⁹ However, Governor James's executive order subsequently forced her to retire against her will because she was unable to meet the amended requirements to obtain a waiver.⁴⁰ As a result, she alleged that but for Governor James's unconstitutional exercise of the legislative power she would have remained a paid state employee.⁴¹ The court held that the governor's executive order violated the separation of powers clause of the Alabama Constitution.⁴²

In reaching its decision, the court first noted: "It is commonly held that the executive cannot discharge the functions of the legislature in any manner by so acting in his official capacity that his conduct is tantamount to a repeal, enactment, variance, or enlargement of legislation."⁴³ The court then found that the executive order was an unconstitutional exercise of the legislative power because it had the "direct practical effect" of removing



the consideration previously given to state department heads under law in deciding whether an employee should be entitled to a waiver.⁴⁴ Therefore, since the application of the order had the “effect of an exercise of legislative power,” the court concluded it violated the separation of powers.⁴⁵

Alabama’s Court of Civil Appeals dealt with a similar case in *Jetton v. Sanders*.⁴⁶ There, lawyers appointed to represent indigent criminal defendants filed suit against the state comptroller in seeking to compel payment for services rendered.⁴⁷ The attorneys had been denied payment because Governor Wallace issued an executive order that reduced and limited payments owed to them under Alabama law.⁴⁸ Like *Hawkins*, the *Jetton* court held that Governor Wallace lacked the authority to alter or amend the law at issue and that his executive order was an unconstitutional exercise of the legislative power.⁴⁹

In its opinion, the court first described the separation of powers under the Alabama Constitution.⁵⁰ Then, it looked to the state legislature’s role.⁵¹ As with the suspension power, the court made clear that the legislature could not delegate its authority to Governor Wallace to modify the power to appropriate funds or otherwise amend law because that “would be in effect delegating the legislature’s power to make law.”⁵² The court concluded that by reducing the amount to be paid to the attorneys, Governor Wallace’s Executive Order No. 36 constituted an unconstitutional intrusion into the legislative branch and was therefore void.⁵³

Under the AEMA, gubernatorial emergency proclamations have the full force and effect of law and correspondingly cause the suspension of all existing laws inconsistent with those orders throughout the duration of a declared emergency.⁵⁴ Thus, the Act, in effect, delegates to governors the authority to enact certain laws during a state of emergency. This delegation of the legislative power is arguably unconstitutional. Broad construction of the AEMA as authorizing enactment of new laws and regulations constitutes an unlawful intrusion in the legislature’s exclusive power to make or change statutory laws.

Likewise, Governor Ivey’s emergency orders are tantamount to the “repeal, enactment, variance, or enlargement of legislation.”⁵⁵ As noted above, the governor has effected a change under Alabama law in modifying the standard of care from a “reasonable care” standard⁵⁶ to a “reckless and wanton conduct”

standard.⁵⁷ The governor has also arguably enlarged the purpose of the AEMA through the use of subsection (a)(5)⁵⁸ as a justification for promulgating all manner of laws and regulations via emergency proclamations during the declared state of emergency. By comparison, Governor James was not enacting major pieces of legislation in the issuance of his executive order in *Hawkins*. To be sure, the order likely affected thousands of Alabama state employees at the time. But at issue here are the fundamental rights and liberties guaranteed to all Alabamians by the constitution.⁵⁹

Alabama citizens who are harmed by negligent health care providers are guaranteed a remedy by §13 the same as state employees unconstitutionally forced to retire early. The Alabama Supreme Court recognized in *Hawkins* that they are entitled to that right, and Governor Ivey’s proclamations appear therefore to be an unconstitutional exercise of legislative power to the extent they deprive victims of their right to a remedy for their injuries.

Governor Ivey’s exercise of the legislative power mirrors a historic example from earlier in our nation’s history. In reviewing former Birmingham Mayor Richard Arrington’s actions (similar to Governor Ivey’s),⁶⁰ the Alabama Supreme Court recognized and cited with approval the U.S. Supreme Court’s landmark ruling in *Youngstown Sheet & Tube Co. v. Sawyer*,⁶¹ where the Supreme Court of the United States declared that President Truman’s seizure of certain steel mills by executive order was unconstitutional.⁶² Although President Truman claimed to be acting in the national interest, the Supreme Court found President Truman’s actions to be an unconstitutional usurpation of legislative authority since he failed to seek congressional approval prior to issuing the order.⁶³

Defendants may argue that *Youngstown* stands for the proposition that the executive’s authority is at its greatest when acting pursuant to an express legislative grant of such authority. However, reported opinions from the United States Supreme Court, the Alabama Supreme Court, and elsewhere, including as will be shown below in Michigan under analogous circumstances, require that any such emergency extension of executive power can be sustained only when the legislature precisely defines what those powers consist of, how they may be exercised, and when they end.⁶⁴

In its opinion, *Federation of City Employees v. Richard Arrington*, the Alabama Supreme Court

quoted Justice Black's majority opinion in *Youngstown Sheet & Tube* stating, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a law maker."⁶⁵

In numerous respects, Governor Ivey's actions are similar to those taken by President Truman in *Youngstown*. For example, she exercised the role of the legislature by enacting various laws during the pandemic via emergency proclamations. In doing so, she, like President Truman, claimed to be acting in the public's interest. The Eighth Supplemental Order, for instance, includes multiple statements that can be read to mean exactly that.⁶⁶ However, the Supreme Court explained in *Youngstown* that "[t]he President's power, if any, to issue the [executive] order must stem from either an act of Congress or from the Constitution itself,"⁶⁷ and as shown previously, it has been settled since 1866 that emergencies will not permit the disregard of constitutional commands. Our state constitution controls as the supreme law of the land through the best and worst of times.⁶⁸

Constitutional Issues With the Alabama COVID Immunity Act

Any retroactive application of § 6-5-792 to abrogate accrued negligence causes of action will also likely be deemed unconstitutional. The right-to-remedy provision (Art. I, § 13) of the Alabama Constitution of 1901 as applied in *Pickett v. Matthews*, 238 Ala. 542, 192 So. 261 (1939) and other cases decided both before and long after *Pickett v. Matthews* prevent the legislature from eliminating a remedy after accrual of a cause of action.

The Alabama Supreme Court held more than 160 years ago that "[i]t is not within the power of the legislature to take away vested rights." *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120, 126 (1857). More recently, in considering the constitutionality of the Guest Statute's abolition of a negligence cause of action, the supreme court held in 1939:

Undoubtedly the right to the remedy must remain and cannot be curtailed after the injury has occurred and right of action vested, regardless of the source of the

duty which was breached, provided it remained in existence when the breach occurred. 16 Corpus Juris Secundum, Constitutional Law, p. 1499, § 710. This includes such items of damages as were legally subject to recovery at the time of the breach. *Comer v. Advertiser Co.*, 172 Ala. 613, 55 So. 195; *Marion v. Davis*, 217 Ala. 16, 114 So. 357, 55 A.L.R. 171.

But section 13, *supra*, does not in language, nor intent, prevent the legislature from changing a rule of duty to apply to transactions which may occur thereafter.

Pickett v. Matthews, 238 Ala. at 545, 192 So. at 264. The court relatedly held that "there can be no right to have an existing statute continue in effect without repeal or modification, except as to a cause which has accrued and vested." *Id.* at 548, 192 So. 261, 266.

Forty years after *Pickett v. Matthews*, in *Mayo v. Rouselle Corp.*, 375 So. 2d 449, 451 (Ala. 1979), the court recognized that § 13 "preserves to all persons a remedy for accrued or vested causes of action." Fifty years after *Pickett*, the court held in *Reed v. Brunson*, 527 So. 2d 102, 114 n. 5 (Ala. 1988), that "[s]ection 13 protects the injured party's right to a remedy from the time the civil action accrues until suit is filed."⁶⁹

In 2014, the Eleventh Circuit Court of Appeals considered whether jailers were immune from negligence causes of action which accrued before the legislature amended § 14-6-1 to extend the immunity of the sheriff to jailers "acting within the line and scope of their duties" In *Johnson v. Conner*, 754 F. 3d 918, 919 (11th Cir. 2014), citing both *Pickett v. Matthews* and *Reed v. Brunson*, the court held that the amendment to § 14-6-1 could not be applied retroactively to confer immunity and destroy a cause of action against jailers that accrued before the statute was amended:

But retroactive application of the amendment would take away Appellee's substantive, vested right to sue in violation of Alabama's Constitution. Alabama's Constitution provides "that every person, for an injury done to him ... shall have a remedy by due process of law." Ala. Const. § 13.

That means that when a duty has been breached producing a legal claim for damages, such claimant cannot be denied the benefit of his claim for the absence of a remedy. But this provision does not undertake to preserve existing

duties against legislative change made before the breach occurs.... Undoubtedly the right to the remedy must remain and cannot be curtailed after the injury has occurred and right of action vested, regardless of the source of the duty which was breached, provided it remained in existence when the breach occurred.

Pickett v. Matthews, 238 Ala. 542, 192 So. 261, 263-264 (1939) (citing 16 Corpus Juris Secundum, Constitutional Law, p. 1499, § 710). In other words, a litigant has “a vested interest in a particular cause of action” once the injury occurs. *Reed v. Brunson*, 527 So. 2d 102, 114 (Ala. 1988). Section 13 of Alabama’s Constitution protects litigants from legislative change made after the breach of duty occurs.

Johnson v. Conner, 754 F. 3d at 922. It therefore seems clear that retroactive application of § 6-5-792 to destroy a plaintiff’s cause(s) of action for negligence which accrued before the statute was passed will be deemed unconstitutional.

Defendants may argue that COVID-related negligence causes of action did not accrue because Governor Ivey’s May 2020 executive proclamation changed the standard of care for causes of action relating to COVID-19 transmission and thereby prevented such causes of action from ever arising. This circular argument begs the question of the validity of changing the standard of care or conferring immunity from negligence liability by executive proclamation. As shown, the portion of Governor Ivey’s executive proclamation changing the standard of care and conferring immunity from liability for claims related to COVID-19 transmission likely exceeds the scope of authority delegated by the AEMA and is, in any event, arguably unconstitutional under §§ 21 (no suspension of laws except by legislature) and 42 (separation of powers) of the Alabama Constitution.

Defendants may also argue that the COVID Immunity Act merely ratifies what Governor Ivey’s proclamation had already done. However, § 13 and Alabama’s settled vested-rights jurisprudence must also render invalid any retroactive legislative ratification of Governor Ivey’s May 8, 2020 unconstitutional executive proclamation purporting to abrogate all negligence causes of action related to COVID-19 transmission.

The legislature recognized in the ACIA that given § 13 and the vested rights doctrine and other limitations

on usurpation of legislative power, courts would decline to retroactively apply § 6-5-792’s change in the standard of care, so the new Act provides at § 6-5-793:

that for “[a] health emergency claim for which a court holds that neither Section 6-5-792 nor the liability limiting provisions of any gubernatorial emergency order applies... a covered entity shall not be liable for negligence, premises liability, or for any non-wanton, non-willful, or non-intentional civil cause of action to which this section applies, unless the claimant shows by clear and convincing evidence that the covered entity did not reasonably attempt to comply with the then applicable public health guidance.”

Time will tell whether this change in an injury or death victim’s burden of proof is rationally related to any legitimate governmental purpose and whether this will pass constitutional muster under Article I, § 35, which provides:

Sec. 35. Objective of government

That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression.

By its terms the AICA provides that “[t]he immunity and other provisions provided in this article shall terminate December 31, 2021, or one year after a declared health emergency relating to coronavirus expires, whichever is later, except that any civil liability arising out of acts or omissions related to health emergency claims or claims under Section 6-5-794 where the act or omission occurred during the operation of this article shall be subject to the provisions of this article in perpetuity.” § 6-5-799.

Michigan’s Experience: *Midwest Institute of Health, PLLC v. Whitmer*

In a case that garnered national attention,⁷⁰ the Michigan Supreme Court ruled against Governor Gretchen Whitmer’s invocation of emergency powers to address that state’s COVID-19 pandemic.⁷¹ In *In re Certified Questions from the United States Dist. Court*, 958 N.W.

2d 1, 24 (Mich. 2020), the court held that “the delegation of power to the Governor to ‘promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property,’ MCL 10.31(1), constituted an unlawful delegation of legislative power to the executive and was therefore unconstitutional under Michigan’s Const. 1963, art. 3, § 2, which prohibits exercise of the legislative power by the executive branch.” In so holding, the court revoked all of Governor Whitmer’s executive orders issued pursuant to the state’s Emergency Powers of the Governor Act of 1945 (the “EPGA”) as an unconstitutional exercise of legislative power in violation of the Michigan Constitution.⁷²

The court began its analysis by reference to Michigan’s separation-of-powers principle embodied in the state’s constitution.⁷³ The court next described Michigan’s nondelegation doctrine, observing “the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.”⁷⁴ The court identified three relevant factors in adjudicating challenges alleging an unconstitutional delegation of legislative power: the scope, duration, and standards of the delegated power.⁷⁵

The Michigan Supreme Court considered the EPGA’s scope of delegated power to be “remarkably broad.”⁷⁶ The EPGA authorized a governor “to protect life and property or to bring the emergency situation within the affected area under control.”⁷⁷ The court likened this power to the police power vested exclusively in the legislature.⁷⁸ In describing the statute’s scope, the court identified myriad orders issued by Governor Whitmer and their “sweeping” effects.⁷⁹ The court took issue with the fact that “[e]ach of these policies [had been] putatively ordered ‘to protect life and property’ and/or to ‘bring the emergency situation within the affected area under control.’”⁸⁰

Alabama’s Emergency Management Act upon which Governor Ivey similarly relied in claiming authority to issue her emergency proclamations essentially mirrors the language found in the Michigan statute. In addition to those powers that are specifically enumerated, Alabama governors may “perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population.”⁸¹ Governor Ivey’s “Safer-at-Home” proclamation regulates all types of conduct from limitations on non-work regulated gatherings to requirements that all retail stores enforce social distancing measures and


take reasonable steps to comply with sanitation guidelines.⁸² While these regulations are not nearly as broad in scope as some of those asserted by Governor Whitmer,⁸³ they derive from a statutory provision that similarly bears little to no checks on such an exercise of authority.⁸⁴ Overall, the AEMA’s expansive scope of delegated power – upon which Governor Ivey expressly relied – is virtually identical to that found *unconstitutional* in *Whitmer* and thus must reasonably be deemed constitutionally suspect under Alabama’s separation of powers and nondelegation constitutional provisions.

Under the AEMA, the duration factor is also roughly equivalent to Michigan’s EPGA. The AEMA provides that a state of emergency exists for 60 days upon a declaration by the governor, unless she or the legislature extends it.⁸⁵ For the same reason, an Alabama governor may proclaim that an emergency exists for an unlimited period of time; she need only extend it by an additional declaration, without having to seek legislative approval.⁸⁶ Since her initial order, Governor Ivey did exactly that. To avoid its termination, she issued 27 supplemental orders extending the duration of the state of emergency that she originally declared on *March 13, 2020*. Therein lies the problem: an argument can be made that no reasonable observer can argue that the COVID-19 pandemic has ended; empirical evidence shows this is not the case.⁸⁷ But a law that authorizes perpetual intrusions into the legislative sphere, without any actual temporal restraint, must be strictly scrutinized. Under *Whitmer*’s reasoning, the AEMA also fails to pass constitutional muster for this additional reason.

Lastly, the Michigan Supreme Court addressed the standards directing exercise of the delegated power. According to the court, the essential question presented was:

[w]hat standards or legislative direction are sufficient to transform a delegation of power in which what is being delegated consists of pure legislative policymaking power into a delegation in which what is being delegated has been made an essentially executive “carrying-out of policy” by virtue of the accompanying direction given by the Legislature to the executive in the delegation?⁸⁸

The court stated that “[w]hen the scope of the power delegated ‘increases to immense proportions... the standards must be correspondingly more precise.’”⁸⁹



The court found that the only standards restraining the governor's executive powers under the EPGA were the words "reasonable" and "necessary."⁹⁰ After identifying that neither term carried with it any "genuine guidance," the court determined that the power delegated to the governor was not limited in any meaningful way.⁹¹ Accordingly, the court held that the EPGA could not be sustained by those terms and therefore constituted an unlawful delegation of legislative power.⁹²

The Supreme Court of Alabama approached this inquiry in a similar manner in *Monroe v. Harco, Inc.*⁹³ There the court set forth that in reviewing the constitutionality of a statute, there must initially be a strong presumption in favor of its validity.⁹⁴ Where there are two possible interpretations, one which would render the statute unconstitutional and the other valid, courts should adopt the construction upholding the law.⁹⁵ The court then recognized that "the doctrine of separation of powers does not prohibit the legislature's delegating the power to execute and administer the laws, *so long as the delegation carries reasonably clear standards governing the execution and administration.*"⁹⁶

Although many of the AEMA's provisions are specific as to how the governor may act during an emergency,⁹⁷ the operative seminal phrase relied upon by Governor Ivey is not unlike that found unconstitutional in *Whitmer*.⁹⁸ As previously discussed, the subsection provides the governor with the "powers and duties as are *necessary* to promote and secure the safety and protection of the civilian population."⁹⁹ Only the word "necessary" constrains how Governor Ivey may, consistent with the AEMA, exercise emergency powers.

The Michigan Supreme Court also examined use of the word "necessary" in this context.¹⁰⁰ There the court defined it as "absolutely needed" or "required."¹⁰¹ After examining the inherent problems with the term, the court explained how "necessary," like "reasonable," carries with it next to no constraint.¹⁰² In doing so, the court looked to a 1942 Massachusetts's wartime statute that allowed the state governor to "have and... [to] exercise any and all authority over persons and property, necessary or expedient from meeting the supreme emergency of... a state of war."¹⁰³ The court cited the Supreme Judicial Court of Massachusetts which declared that it "did not believe that the state constitution allowed the legislature to confer upon the governor [via the wartime statute] 'a roving commission to repeal or amend by

executive order unspecified provisions included anywhere in the entire body of' of state law."¹⁰⁴

Plainly speaking, construing the AEMA as delegating to the governor an unbridled legislative power offends separation of powers principles. Under Alabama law (and the Michigan Supreme Court's decision in *Whitmer*), the AEMA's § 31-9-8(a)(5) does not have "reasonably clear standards governing [its] execution and administration and therefore is unconstitutional."¹⁰⁵

Conclusion

Although emergency situations, such as an ongoing global pandemic, call for immediate and thoughtful governmental action, our constitutional mandates must be observed and revered. The Alabama Constitution provides that only the state legislature can exercise the suspension power; moreover, it requires that the executive branch abstain from usurping the law-making function reserved to the legislative branch. In *Whitmer*, the Supreme Court of Michigan concluded that the EPGA unconstitutionally delegated such powers to the governor. In Alabama, lawyers contemplating or confronted with immunity defenses premised upon Governor Ivey's emergency proclamations, the AICA, or the AEMA must be aware of Alabama's constitutional limitations upon exercises of power during emergencies. ▲

Endnotes

1. Derrick B. Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. Times (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html>. The United States declared a National State of Emergency about the virus on March 13, 2020.
2. <https://alpublichealth.maps.arcgis.com/apps/dashboards/6d2771faa9da4a2786a509d82c8cf0f7> (last visited Jul. 27, 2022).
3. <https://alpublichealth.maps.arcgis.com/apps/dashboards/6d2771faa9da4a2786a509d82c8cf0f7> (last visited Jul. 27, 2022).
4. <https://www.worldometers.info/coronavirus/country/us/> (last visited Jul. 28, 2022).
5. <https://www.worldometers.info/coronavirus/country/us/> (last visited Jul. 28, 2022).
6. <https://www.ncsbn.org/14582.htm> (last visited Jul. 27, 2022).
7. See note, "Give Me Liberty or Give Me Death? A Comparative Analysis of Public Health Responses to the COVID-19 Pandemic, Their Efficacy, and Their Legal Implications," 38 *Ariz. J. Int'l & Comp. L.* 319, 320 (2022) (citing Mich. Exec. Order No. 20-4 (Mar. 10, 2020)).
8. <https://governor.alabama.gov/newsroom/covid-19> (last visited July 25, 2022) (compiling Gov. Ivey's COVID-19 Emergency Proclamations).
9. <https://www.webmd.com/lung/news/20200401/32-states-have-issued-stay-at-home-orders#> (last visited Jul. 27, 2022).
10. <https://governor.alabama.gov/newsroom/covid-19> (last visited July 25, 2022) (compiling Gov. Ivey's Emergency Proclamations issued). See attached Exhibit A.
11. *Id.*

12. Paragraph E.4 of Governor Ivey's May 8, 2020 Eighth Supplemental Emergency Proclamation states:

Effectiveness.

"The provisions of this proclamation shall become effective upon my signature and its filing with the Secretary of State and shall be retroactive and effective for acts or omissions occurring from March 13, 2020, until the State COVID-19 public health emergency is terminated."

On October 8, 2021, Governor Ivey extended the state public health emergency until 11:59 p.m. on Sunday, October 31, 2021, "unless otherwise terminated or extended in writing." Governor Ivey did not otherwise terminate or extend in writing that October 31, 2021 ending date.

13. Attached, Exhibit B.

14. Attached, Exhibit C.

15. By contrast, Ala. Code 1975 § 6-5-548 requires that a health care provider "exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case."

16. *Cf.*, Ala. Code 1975 § 6-5-549.

17. *See generally* Ally Windsor Howell, 2 Ala. Pers. Inj. & Torts § 14:11 (2020 ed.).

18. One subsection of this proclamation offers two possible exceptions. First, it provides that a health care provider may be liable for economic compensatory damages for a cause of action that does not involve serious physical injury. And, wrongful death claimants may be entitled to a punitive damages award, but in those cases, no other damages may be recoverable.

19. Ala. Code 1975 § 31-9-8(1), (5).

20. Exhibit C, p. 1.

21. Ala. Code 1975 § 31-9-13.

22. *Id.*

23. The full text of SB 330 is attached as Exhibit D.

24. In fact, the 2020 bill was assigned number SB 330. When that same bill was again proposed in the senate in 2021, it was assigned number 30.

25. *Joseph R. Dear v. Comfort Care Coastal Hospice, LLC*, Mobile County, Alabama Circuit Court Civil Action No. CV-2021-900780, March 10, 2022 hearing transcript, p. 68:8-10; 17-21.

26. *Id.*, 69:9-14.

27. *Id.*, 69:20-22.

28. *See Miller v. Bailey*, 60 So. 3d 857, 867 (Ala. 2010) ("Gross negligence" is negligence, not wantonness"); *Ridgely Operating Co. v. White*, 150 So. 693, 695 (Ala. 1933) ("Ordinarily, 'gross negligence' imports nothing more than simple negligence or want of due care."); *Fid.-Phoenix Fire Ins. Co. v. Lawler*, 81 So. 2d 908, 912 (Ala. Ct. App. 1955) ("[T]he word 'gross' when used in connection with negligence, implies nothing more than negligence.").

29. 345 So. 2d at 1355.

30. *Id.* at 1355-57.

31. *Id.* at 1356-57.

32. *Id.* at 1357.

33. *Id.* The opinion cites former Art. III, § 43, which, before its repeal and substitution by Amendment 905, provided along with § 42 Alabama's separation of powers principles. Those same principles are now found in Art. III, § 42.

34. *See e.g., supra.*

35. *See supra.*

36. *See Ex parte Jenkins*, 723 So. 2d 649, 654 (Ala. 1998) ("The political maxim posited by Montesquieu and embodied in the United States and Alabama Constitutions as a fundamental legal principle mandates that no branch of government be allowed to exercise any power vested in another branch and not vested in it.").

37. 411 So. 2d 115 (Ala. 1982).

38. *Id.* at 116.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 118.

43. *Id.* at 117. (internal citation omitted).

44. *Id.*

45. *Id.*

46. 275 So. 2d 349 (Ala. Ct. Civ. App. 1973).

47. *Id.* at 350-51.

48. *Id.* at 352 ("Executive Order No. 36 reduced the amounts that could be paid to a lawyer in all non-capital criminal cases in any court except recorder's courts from a maximum of \$500.00 per case as provided in Act No. 2420, to a maximum of \$75.00 per case.").

49. *Id.* at 352-54.

50. *Id.* at 352 ("State government is divided into three coordinate branches and each has a sphere in which each is supreme. Powers confided in one cannot be exercised by the other.").

51. *Id.*

52. *Id.* at 353. (internal citation omitted).

53. *Id.*

54. *See supra.*

55. *Id.* at 117.

56. *See* Ala. Code 1975, § 6-5-548.

57. Exhibit ____, p. ____.

58. Ala. Code 1975, § 31-9-8 ("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."); *supra* note 4 (contains link to online compilation of emergency orders).

59. *See e.g.,* ALA. CONST. ART. I § 13 ("That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.") (emphasis added).

60. *Federation of City Employees v. Arrington*, 432 So. 2d 1285 (Ala. 1983).

61. 343 U.S. 579 (1952).

62. *Arrington*, 432 So. 2d at 1288; *see also* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 338-43 (3d ed. 2006).

63. 432 So. 2d at 1288.

64. *See, for example, Mistretta v. U.S.*, 488 U.S. 361, 372, 109 S. Ct. 647, 655, 102 L. Ed. 2d 714 (1989) ("so long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.") (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409, 48 S. Ct. 348, 352, 72 L. Ed. 624 (1928)); *Opinion of the Justices, supra*, 345 So. 2d at 1356 "... the legislature cannot confer upon any person or authority the right, in its discretion to be exercised without regard to fixed standards set up by the Act, to declare when an enactment shall become effective..." (quoting *Mead v. Eagerton*, 255 Ala. 66, 50 So. 2d 253 (1951)).

65. *Id.* (citing *Youngstown*, 343 U.S. at 587).

66. For example, "That reasonable protections from the risk and expense of lawsuits, be provided to businesses and health care providers that comply with or reasonably attempt to comply with applicable public health guidance will encourage businesses to re-open and repair the damage to the economy of the State and the tax revenues of the State and of local governments."

67. *Youngstown*, 343 U.S. at 585.

68. *City of Mobile v. Rouse*, 173 So. 266 (Ala. 1937) ("But it is insisted that this law was enacted by the Legislature to meet an emergency. That emergencies do not authorize the suspension of the Constitution and its guaranties was settled nearly three quarters of a century ago...") (internal citation omitted) (emphasis added); *Ex parte Bentley*, 116 So. 3d 201 (Ala. 2012)



- (“Public policy considerations cannot override constitutional mandates.”) (internal citation omitted); *Horne v. Department of Agriculture*, 576 U.S. 350, 362, 135 S. Ct. 2419, 2428, 192 L. Ed. 2d 388 (2015) (“[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way.”) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922)).
69. In *Reed v. Brunson*, the supreme court also pointed out that § 95 of the Alabama Constitution protects vested rights after suit is filed – “[a]fter suit has been commenced on any cause of action, the legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit.” *Id.* at 114 n.5. The court explained further, “the need for the last sentence of § 95 may be questionable under any interpretation of § 13 as to common-law causes of action or defenses heretofore advanced by the Court; however, it is referred to herein to show that there is a need for § 13’s inclusion in the Constitution under the vested rights approach.” *Ibid.*
 70. See generally Jason Slotkin, *Michigan Supreme Court Rules Against Governor’s Emergency Powers*, NPR (Oct. 3, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/10/03/919891538/michigan-supreme-court-rules-against-governors-emergency-powers> (last visited Jul 29, 2022).
 71. In re Certified Questions (*Midwest Institute of Health, PLLC v. Whitmer*), 506 Mich. 332, 958 N.W. 2d (2020).
 72. *Id.*, 506 Mich. at 385, 958 N.W. 2d at 31.
 73. *Id.*, 506 Mich. at 357, 958 N.W. 2d at 16-17.
 74. *Id.* (citing The Federalist No. 47 (Madison), Montesquieu’s *The Spirit of the Laws*, and John Locke’s *Two Treatises of Government*, among others)).
 75. *Id.*, 506 Mich. at 362-363, 958 N.W. 2d at 20-24.
 76. *Id.*, (citing Mich. Comp. Laws § 10.21 (2006)).
 77. *Id.*
 78. *Id.*
 79. *Id.* (listing dozens of orders codifying gubernatorial mandates such as business closings and hours or operation).
 80. *Id.*
 81. Ala. Code 1975, § 31-9-8(a)(5).
 82. See *supra*.
 83. *Whitmer* (e.g., “prohibiting the sale of carpet, flooring, furniture, plants, and paint... boating, golfing, and public and private gatherings of persons not part of a single household...”).
 84. See Ala. Code 1975, § 31-9-16.
 85. Ala. Code 1975, § 31-9-8.
 86. See *supra*.
 87. See e.g., CBS News, *COVID-19 Hospitalizations Back to March Levels* (Jul. 18, 2022) <https://www.cbs7.com/2022/07/18/covid-19-hospitalizations-back-march-levels/>.
 88. *Whitmer*, 506 Mich. at ____, 958 N.W. 2d at ____ (emphasis added).
 89. *Id.* (citation omitted) (emphasis added).
 90. *Id.*
 91. *Id.* at *16-18 (“There is, in other words, nothing within either the “necessary” or “reasonable” standards that serves in any realistic way to transform an otherwise impermissible delegation of legislative power into a permissible delegation of executive power.”).
 92. *Id.* at *18.
 93. 762 So. 2d 828 (Ala. 2000).
 94. *Id.* at 831.
 95. *Id.*
 96. *Id.* (internal quotation marks and citations omitted) (emphasis added).
 97. See generally Ala. Code 1975, § 31-9-8.
 98. See *supra*, n. 70.
 99. *Id.* (emphasis added).

100. *Whitmer*, 2020 WL 5877599 at *17.
101. *Id.* (alteration in original).
102. *Id.* at *18.
103. *Id.* at *17.
104. *Id.* (citation omitted).
105. *Monroe*, 762 So. 2d at 831.

David G. Wirtes, Jr.



Dave Wirtes has worked for more than 30 years with Cunningham Bounds LLC in Mobile, focusing on strategic planning, motion practice, and appeals.

Joseph D. Steadman, Sr.



Joe Steadman joined Cunningham Bounds LLC in Mobile in 2016. His practice focuses on appellate and motion practice.

Aaron N. Maples



Aaron Maples practices with Cunningham Bounds LLC in Mobile. His practice areas include personal injury, product liability, medical malpractice, industrial accidents, and wrongful death.

Joseph D. Wirtes



Joey Wirtes serves as in-house counsel to Hix Snedeker Companies LLC and Fulcrum Construction Group LLC in Daphne. He focuses on risk management and internal operations.