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IN THE CIRCUIT COURT FOR THE FOURTH JUDICIAL CIRCUIT
CLAY COUNTY, ILLINOIS

JAMES MAINER, in his individual)
capacity and on behalf of all)
citizens similarly situated, and)
HCL DELUXE TAN, LLC, an Illinois)
limited liability company, on)
its behalf and on behalf of all)
businesses similarly situated,)
Plaintiffs,)
vs.) NO. 20-CH-10
GOVERNOR JAY ROBERT PRITZKER,)
in his official capacity,)
Defendant.)

REPORT OF PROCEEDINGS of the hearing held
before the Honorable MICHAEL D. MCHANEY on the 22nd day
of May, 2020.

APPEARANCES: MR. THOMAS DeVORE
MR. ERIK HYAM
On behalf of the Plaintiffs
MR. THOMAS VERTICCHIO
on behalf of the Defendant

PREPARED BY: LORI SIMS
Certified Shorthand Reporter
No. 084-003424



1 THE COURT: I've got 20-CH-10, James, is it
2 Mainer? Am I pronouncing that correctly?

3 MR. MAINER: Yes, sir.

4 THE COURT: Versus Governor Jay Robert Pritzker.
5 Set today for petition for TRO?

6 MR. DeVORE: Correct, Your Honor, with notice.

7 THE COURT: All right. You may proceed.

8 MR. DeVORE: Thank you, Your Honor. Judge, Mr.
9 Mainer is an individual who lives within Clay County.
10 He's also a business owner who owns HCL Deluxe Tan, LLC.
11 It's a small business also within Clay County. He
12 brought this cause of action for declaratory judgment
13 and for injunctive relief.

14 The allegations raised in our, differ
15 significantly from what this court has seen already in
16 other matters in this court, specifically Mr. Bailey,
17 which the court is aware is now in the federal court for
18 the time being. Mr. Mainer brings this cause of action,
19 Your Honor, on a representative basis, which I'll get to
20 in a minute, on behalf of himself and all individuals.
21 It's on behalf of the entity and all businesses
22 similarly situated.

23 THE COURT: Now, how can he do that --

24 MR. DeVORE: I have case law.

25 THE COURT -- without certification of a class or

1 standing?

2 MR. DeVORE: Yes. I have case law for the
3 court. Would you like me to address that now?

4 THE COURT: Please.

5 MR. DeVORE: Okay. I got their 240-page brief,
6 Your Honor, and went through it and I was aware that
7 that issue would likely be -- may I approach, Judge?

8 THE COURT: Yeah. Sure.

9 MR. DeVORE: Would be an issue that the court
10 would want to consider, and this case I think will make
11 that dispositive for the court, Your Honor. It deals
12 with the issue of representative actions versus class
13 actions, as the court is familiar, a class action where
14 you have to certify a class, et cetera. This case,
15 which goes back a long time, lays out the law in our
16 state, it's 1938, and the court can take the time, once
17 it's heard all of the evidence and arguments here today
18 that's in the pleadings and consider this case, I would
19 ask it to consider it.

20 I'm going to flip to page 11, Your Honor, and I
21 think I would like to put into the record some of the
22 relevant language which I think will answer this
23 question for the court. I'm at the top right of
24 page 11, sir, where the respondents in this particular
25 case argued that this cause was not a representative

1 suit. The term representative suit and class suit are
2 used interchangeably. Generally the word representative
3 refers to the named individuals actually bringing the
4 action, while the word class embraces the entire group
5 which the named person purports to represent.

6 Jumping down a little bit. There's a lot of
7 language in between there. I'll get the highlights for
8 the court. I'd ask it to read from about that paragraph
9 on for itself. It talks about down below, the general
10 rule, in courts of equity, as to parties, this is the
11 general rule, Your Honor, I agree, all persons
12 materially interested in the subject matter ought to be
13 made parties to the suit -- I believe that's the
14 argument that my colleague makes on behalf of the
15 Governor -- either as plaintiffs or as defendants,
16 however numerous they may be, in order, not only that
17 complete justice may be done, and that multiplicity of
18 suits may be prevented.

19 Going on down below. Undoubtedly this does
20 furnish a safe and satisfactory guide in many cases of
21 ordinary practice; but it may admit of doubt whether it
22 is universally true, or whether it is not equally as
23 open to criticism as is the common formulary, in which
24 the rule is expressed.

25 The truth is, sir, is that the general rule in

1 relation to parties does not seem to be founded on any
2 positive and uniform principle and, therefore, it does
3 not admit of any, admit of being expounded by the
4 application of any universal theorem, as a test. It is
5 a rule founded partly in artificial reasoning, partly in
6 considerations of convenience, partly in solicitude of
7 courts of equity to suppress multifarious litigation,
8 and the parts I'm getting to I think will speak to the
9 end, Judge, down below, bottom left, page 12. On this
10 account it is of great importance to ascertain, what are
11 the admitted exceptions to the general rule, and to
12 ascertain what are the grounds on which they are
13 founded; for when these exceptions, and the grounds
14 thereof, are fully seen and explained, they will furnish
15 strong lights to guide us in our endeavors to apply the
16 rule and the exceptions to new cases as they arise.

17 All these exceptions will be found to be
18 governed by one and the same principle, which is, that
19 as the object of the general rule is to accomplish the
20 purposes of justice between all parties in interest, and
21 it is a rule founded, in some sort, upon public
22 convenience and policy, rather than upon positive
23 principles of municipal or general jurisprudence, courts
24 of equity will not suffer it to be so applied as to
25 defeat the very purposes of justice, if they can dispose

1 of the merits of the case before them without prejudice
2 to the rights or interests of other persons, who are not
3 parties, or if the circumstances of the case render the
4 application of the rule wholly impracticable, the rule
5 being everybody should be a party.

6 Getting to the end where I think this case,
7 Judge, will make it clear for the court. Bottom right,
8 page 12. Even in the cases in which the court will thus
9 administer relief, so solicitous is it to attain the
10 purposes of substantial justice, that it will generally
11 require the bill to be filed, not only in behalf of the
12 plaintiff, here you go, but also in behalf of all other
13 persons interested, who are not made direct parties,
14 although in a sense they are made so, so that they may
15 come in under the decree to take benefit. The court
16 will go further, and in such cases, it will entertain a
17 bill or petition, which shall bring the rights and
18 interests of the absent parties more distinctly before
19 court, if there is any certainty, or even danger, of
20 injury or injustice to them. The most usual cases
21 arranging themselves under this head of exceptions are
22 where the question is one of common or general interest.

23 Your Honor, that is this case. This case is
24 outlined here under the exception that is laid out from
25 1938 to where this cause of action, on behalf of all

1 citizens similarly situated or businesses, is a product
2 of an executive order and proclamations that touched
3 every person in this state. The Governor would suggest
4 that the way to seek redress for 12 million people is to
5 put them all in individual causes of action. That's
6 impracticable under the standards set forth in this
7 case, Judge.

8 If the court reads through that again, if
9 necessary, it will find that this is the case to where
10 representative action would apply. We would ask the
11 court to find that be the case.

12 THE COURT: All right.

13 MR. DeVORE: Getting to the cause of action,
14 Judge, I think it helps to lay a basic foundation and
15 then to start with the court with the 200 something,
16 highlighting some of the 200-something pages that the
17 Governor's office filed in response. This cause of
18 action, Your Honor, lays out three declaratory judgment
19 actions. Three. Either one of those three, in and of
20 itself, would be a basis to find likelihood of success
21 on the merits. One is that proclamation number three
22 does not rise to the definition of disaster as it is
23 written in the statute. Two, regardless of that, the
24 30-day limitation that's in the Illinois Emergency
25 Management Agency Act should apply and it should not

1 allow to be bootstrapped on to and serially proclaimed
2 to the benefit of the executive branch. Three, even if
3 you get past step one and step two, the question becomes
4 whether or not the power the Governor is wielding in the
5 executive order has constitutional authority or it has
6 authority delegated under the Emergency Management
7 Agency Act.

8 He has to have one of those two powers delegated
9 to him either by the constitution of the state -- I want
10 to make sure I say the state because I don't want to end
11 up in federal court -- or of the Emergency Management
12 Agency Act. That's distinct, Your Honor. If the court
13 finds that proclamation three does not meet the
14 definition of a disaster, if the court finds that, not-
15 withstanding that, the 30-day limitation still applies
16 and, notwithstanding that, the power to restrict the
17 movements of our people or closure of our businesses is
18 not authority given to the Governor by the Emergency
19 Management Agency Act nor is it given to him by the
20 constitution. That's what's at play here, Your Honor.

21 If I jump into their, into their introduction,
22 Judge, before I lay out what I think is clear and un-
23 equivocal likelihood of success on each of those three
24 issues, I think it bears mention looking at their
25 response, and I think the court, if it does that and

1 allows me to, it will see where the differences are
2 between my client's position and the Governor's
3 position.

4 Page 1 talks about other courts that have
5 reasoned opinions that rejected arguments for the
6 plaintiff, that the plaintiff asserts here. I think we
7 have made that clear that those opinions aren't
8 controlling. Could they be persuasive to this court?
9 Certainly. I would suggest to the court they don't
10 necessarily raise the issues that we're raising here.
11 They skirt tail it, but they don't get there.

12 Dropping down below on page 1, it talks about
13 how the court might disagree with the Governor's actions
14 but the General Assembly and Illinois Constitution
15 provide him with the authority. The Governor is taking
16 the position, Your Honor, that not only does the General
17 Assembly, Emergency Management Agency Act I presume, but
18 the Illinois Constitution gives him the authority to
19 restrict people's movements from their homes and their
20 activities as well as forcibly closing the businesses of
21 this state. It's written right here. That's what
22 they're suggesting to this court.

23 Jumping to page 2 of their position, because
24 disasters (like flooding and pandemics) do not adhere to
25 calendars and may exist beyond 30 days, the Act allows

1 the Governor to exercise emergency powers for multiple
2 or successive 30-day periods whenever a disaster exists.
3 The Act imposes no other condition or limitation.
4 That's the issue in front of the court as to one of the
5 issues that my client has raised, not to all three of
6 them, but that's really -- I know that they're -- it's
7 almost like gas lighting a little bit that if it
8 continues to be written over and over again, it makes it
9 true.

10 What we're going to be asking the court to do is
11 look at the definition of disaster specifically and
12 we're going to break it apart and I believe the court
13 will find that there is a limitation in the legislative
14 authority. Again, I want to point out to the court on
15 page 4 that the Governor again reiterates, again I keep
16 using gas lighting because it's a word that stuck with
17 me for the last two months that I've been working on
18 this matter. The Governor uses his powers under the
19 Act, again, Emergency Management Agency Act, and the
20 Illinois Constitution. Now, I'm not going to get ahead
21 of myself, but the court has seen the cite and I brought
22 the case to where our Illinois Supreme Court, which is
23 controlling authority for this court, says that that's
24 not true. We'll get to that. But, again, they continue
25 to say it in here over and over again, Your Honor.

1 The Governor again, on page 4, three disaster
2 proclamations he has issued, which we agree, related to
3 COVID-19, which we agree, they were all the same virus,
4 citing numerous facts to demonstrate why the current
5 circumstances in Illinois comprise a disaster. I'm
6 going to read that again, and the court has seen in each
7 of these three disaster proclamations the ink continues
8 to flow with all of the facts, those facts are not taken
9 lightly by my client or by myself, but those facts
10 demonstrating the circumstances comprising a disaster.

11 Your Honor, what is a disaster is defined by the
12 statute and I'm going to get to that, too. I'm not
13 going to get ahead of myself. It talks about a threat
14 or an occurrence, and all of the ink that's being laid
15 of all of the real issues that we have in our state, I'm
16 asking the court not to let that take away from the
17 basic breakdown of what defines a disaster.

18 THE COURT: How can a pandemic not be a
19 disaster?

20 MR. DeVORE: I understand. I'm going to get to
21 that. I'm not saying that a pandemic is not a disaster.
22 I'm saying that, according to the definition of disaster
23 as written, whether or not that definition gives rise to
24 the triggering of the proclamation under the statute.
25 Of course, we would all sit here as adults, intelligent

1 adults saying, well, a pandemic, a public health
2 emergency is a disaster. We're all going to go, well,
3 of course it is. I think if the court, when it looks at
4 the issues within the definition, will find it doesn't
5 fit and I will get to that, sir.

6 Again, with more gas lighting, Your Honor,
7 page 4, plaintiff urges the court to declare that the
8 only source of authority available to officials to
9 address the unprecedented catastrophe caused by COVID-19
10 is section 2 of the department of health. I'm going to
11 read that again, Your Honor, because this is extremely,
12 extremely important. They want to say that my client's
13 position is this: That the court should declare that
14 the only source of authority available to Illinois
15 officials to address the unprecedented catastrophe
16 caused by COVID-19 is Section 2 of the department of
17 health. My client is not saying that. They want the
18 court to believe my client is saying that.

19 First of all, I would point out to the court
20 they continue to use the word unprecedented. I do not
21 take COVID-19 lightly as a citizen of this state and I
22 know my client doesn't, but when we use words like
23 unprecedented, we have to consider that in our state's
24 history there's been a lot of public health disasters.
25 I would imagine the good people of the 1920s where we

1 lost over a hundred thousand citizens to Typhoid, a case
2 of which I brought in front of this court, they probably
3 thought that it was unprecedented in their time, too.
4 Making something an unprecedented catastrophe does not
5 give us the ability to circumvent the rule of law and
6 moreover, Your Honor, my client is not saying that if we
7 have a disaster, a public health emergency, that we're
8 asking this court to declare that the only source
9 available is Section 2. What my client is saying is
10 that, when it comes to the issue of restricting our
11 people's movement or their activities or to forcibly
12 close our businesses within our state, we're saying that
13 that is controlled by the Illinois Department of Public
14 Health Act. That's certainly not the only available
15 resource that this state has. It has significant
16 resources.

17 The Governor has certain resources that he can
18 employ as executive and he should, but we're taking the
19 position that the Department of Health Act -- it's one
20 of three positions my client takes. One is the
21 Department of Health Act is the authority to deal with
22 those specific issues and, again, saying that that's the
23 only authority for this whole pandemic, that's mis-
24 leading, Your Honor. They're trying to do that in
25 order, in my humble opinion and my client's, to scare

1 people.

2 Page 6 of the Governor's response, bottom,
3 Section 7 of the Act authorizes the Governor to exercise
4 emergency powers for periods of 30 days if he has
5 proclaimed the existence of a disaster, and to continue
6 to exercise those emergency powers for additional
7 30 days if he determines and proclaims that a disaster
8 still exists. Again, just because we continue to say
9 that doesn't make it true, and when I ask the court to
10 break down the language in the Act itself, I don't
11 believe the court will find that.

12 Now I know the Governor wants to say that, that
13 as long as there's a COVID-19 disaster, he can continue
14 bunny hopping proclamations into perpetuity. I don't
15 believe the court will find that when it actually breaks
16 down the definition, and the language that they kind of
17 put here on page 2 that I'll get to in detail, Your
18 Honor, where does the definition of disaster start? It
19 starts with an occurrence or a threat. That language is
20 going to be important. I'm going to ask the court --
21 we've got three big words inside this definition, Your
22 Honor. We've got occurrence. We've got threat and
23 we've got avert.

24 Page 12 of the Governor's response, having
25 recognized and declared that disaster continued to

1 exist, on April 30th the Governor exceeded his
2 authority, exercised, I apologize, exercised his
3 authority under the Act to issue Executive Order 2020,
4 it says 33, I'm going to assume maybe attorney general
5 might have meant 32, they can speak to that, that's what
6 I took it to mean, which extends for an additional
7 30 days many components of his comprehensive response.
8 There's a lot to be gleaned, Your Honor, from this, a
9 lot.

10 A disaster that continued to exist. That's an
11 admission that the occurrence or threat that they were
12 proclaiming, at least number two and number three
13 proclamations, was the same one that they issued number
14 one. Governor also admits where he is going to extend
15 for 30 days his components for his comprehensive
16 response is admitting to this court that he's no longer
17 exercising emergency powers to try to avert a public
18 health emergency. He's, in fact, using those continued
19 powers to manage this public health emergency in a
20 comprehensive response. I have tried as hard as I can
21 on behalf of my client to glean that from the department
22 of, or the Illinois Emergency Management Agency Act and
23 I can't get there, sir.

24 I think I just have one or two pieces left, Your
25 Honor, of their response that I think speaks to what the

1 court should be looking at. Bottom of page 30, sir.
2 Once 30 days has passed, the Governor's emergency powers
3 would have lapsed by law, don't disagree with that,
4 unless he made a new determination that the disaster
5 continued to exist. Again, I have read the Emergency
6 Management Agency Act a thousand times in the last two
7 months and I find no such interpretation and I'm asking
8 the court, when we get to my client's case in chief, to
9 find that there's nothing to be gleaned to say that you
10 can continue those 30 day emergency powers by making a
11 new determination that the disaster continues to exist.

12 Then they say that my client is asking the court
13 to rewrite the statutory definition of a disaster to
14 exclude epidemics and public health emergencies. That's
15 absurd. I would never do that. I think that epidemics
16 and public health emergencies are absolutely things that
17 should be addressed on an emergency basis, but what I'm
18 asking the court to say is when we look at proclamations
19 two and proclamations three, that that's not what's
20 going on there, Judge. That's not an occurrence or
21 threat of COVID-19 that requires those proclamations to
22 be issued.

23 THE COURT: Well, then, what is it?

24 MR. DeVORE: I'm going to jump ahead. If you
25 look, Your Honor, at the proclamation number one -- if

1 you look at all of the proclamations that they've given
2 this court, there's, what, a hundred of them, you won't
3 find any 30-day termination in the proclamation until
4 about the time that Governor Rauner takes over. Prior
5 to then there's no dates.

6 On March 9th, there was a proclamation of
7 disaster. My client doesn't contest that COVID-19
8 existed on March 9th and it was an occurrence or threat
9 that could cause loss of life that required emergency
10 action of the Governor to try to avert a public health
11 emergency. He doesn't object to that. Jump to
12 April 1st with the same exact definition that the court
13 has to consider, what is the occurrence that occurred
14 causing proclamation number two to require issuance?
15 It's not COVID-19, sir. It's the arbitrary 30-day date
16 that they put in proclamation one that caused it to
17 expire. That was the occurrence that precipitated the
18 need because, if not for that 30-day date in
19 proclamation one, proclamation two is unnecessary. It's
20 not necessary.

21 So if the court is asking itself, I have a
22 proclamation on April 1st, why is that proclamation
23 issued? Is it a disaster as defined under Section 4
24 that caused the need for this proclamation? The answer
25 is no, sir, it's not. The occurrence was quite simply

1 the 30-day date that was, is unnecessary, even though
2 they will argue to you that it's required, it's not. It
3 was not even heard of until Governor Rauner took over.
4 That was what caused it. If you jump to May 1st or
5 April 30th, we have proclamation number three, which is
6 where we sit today. What was the threat or occurrence
7 that caused that? The Governor acknowledges, and I
8 think he comes right out and says that it's the same
9 COVID-19 virus. It's always been the same COVID-19
10 virus. What's the occurrence on April 30th that
11 required proclamation number three? It's not the virus.
12 It's always been there. It's the 30-day termination
13 date that they put in proclamation number two, and I
14 would suggest to this court, absent some relief, it's
15 going to be the same 30-day date that could be put in
16 proclamation number four hypothetically.

17 That's where, Judge, in Count I my client is
18 specifically taking the position, and it's not so --
19 these court cases that they're talking about here, they
20 don't talk about that. Actually those cases, if the
21 court reads them, it says the Governor must identify an
22 occurrence or threat, both of them. If the court reads
23 closely, it will find proclamation two and proclamation
24 three, there is no occurrence or threat as defined by
25 the statute, and I've argued for my client in my brief

1 that until such time as the legislature says, under the
2 definition of Section 4, that an occurrence or threat
3 can be the reissuing of a disaster proclamation, merely
4 to address the fact that the 30-day window that the
5 legislature never required is put in there and
6 terminates the one before it, until that happens, Judge,
7 that's an improper use and improper designation of a
8 disaster. It doesn't fit its own definition, sir, by
9 construct.

10 Going now -- so that really lays out, Your
11 Honor, what Count I is all about. My client has laid
12 out in Count I that proclamation number three should not
13 be, should be void. If the court would choose to not
14 void the whole thing, it can choose to void the 30-day
15 part, which we'll get to second, but it's my client's
16 position quite clearly, Your Honor, that proclamation
17 number three, as we sit here today, was not issued on
18 April 30th under the strict interpretation definition of
19 Section 4 of the IEMAA. There was no occurrence, Your
20 Honor. The only occurrence was arbitrarily, I would say
21 artificially created with that 30-day deadline.

22 Now my colleague, in Mr. Bailey's case, I'm not
23 suggesting it, but my client suggested to this court, if
24 it recalls, that attacking a proclamation of disaster
25 was a proper way to address this concern, and I believe

1 my colleague went so far as to say that if the court
2 might find bad faith on the issuance of a proclamation,
3 I'm not suggesting that nor would I suggest that, but I
4 would suggest to the court is that the proclamation
5 number three was not issued within the definition and I
6 think the court can invalidate it and should invalidate
7 it for that very reason. It should, at a minimum, find
8 there's a likelihood of success on the merit of what we
9 just argued.

10 Going to number two, Your Honor, is not a new
11 issue for the court. It was touched upon in some
12 fashion. It deals with this 30-day emergency power.
13 30-day emergency power they're going to argue says one
14 thing. My client is going to argue it says another, and
15 the court herein lies its discretion to figure it out.
16 I think the court, in using long well-established
17 principles of statutory construction, would hopefully
18 find in my client's favor or, at least when we get to
19 the merits, Your Honor, when we get to the merits, will
20 find there is a likelihood that we will do that.

21 There's an overlap, Judge, and I would ask you
22 to go back to the arguments that were just made
23 regarding the proclamation definition and consider it
24 here. I don't believe there's any doubt, as all of us
25 sit in this room in the court, that the 30 days that's

1 being put in these proclamations is but a fiction to
2 continue having emergency powers wielded by the
3 executive branch. I don't think anybody would argue
4 that. I think the Governor would argue to this court
5 that the statute doesn't say that he can't.

6 My client believes that it does. If the
7 court -- it doesn't expressly say it either way. I
8 think we can get there. I think the court has to go to
9 legislative intent. Did the legislature intend, when it
10 put the provision in there, I want to read it, upon the
11 issuance of a proclamation, Governor, I'm paraphrasing,
12 the Governor can exercise emergency powers for 30 days,
13 period not to exceed 30 days. The legislature put that
14 in there and this court is charged with trying to figure
15 out what the legislative branch meant in a way that
16 doesn't completely vitiate that provision. My colleague
17 and the court is aware that statutory interpretation is
18 to be done in such a way that not only does it eliminate
19 or render meaningless a provision, it doesn't result in
20 preposterous results. Absurdity I think the law uses.

21 So we have proclamation one, proclamation two,
22 proclamation three. Regardless of whether it fits the
23 definition, this court has to ask itself does that, in
24 and of itself, that same COVID-19 that's called a
25 continuing disaster, that the Governor has acknowledged

1 that he is now using emergency authority to manage his
2 comprehensive plan, whether this court should find that
3 that is an allowable interpretation, an allowable use of
4 the 30 days. I point out to the court that there is no
5 provision, again, that says you have to have a 30-day
6 termination date of a proclamation. That's put in there
7 arbitrarily, it's not necessary.

8 Your Honor, if this court were to say that the
9 way that this is being interpreted as to this issue,
10 which is issue number two of my client, is proper, that
11 leaves the Governor in a position to continue to issue
12 proclamations of disaster into perpetuity until such
13 time as he alone has determined that a disaster no
14 longer exists. I don't know how long that's going to
15 last. COVID-19 could be with us, Your Honor, for the
16 next year or two. It's possible. None of us know.
17 Unless we have medical experts at some point give us an
18 opinion, which we're not here for today, we have to
19 presume we don't know. So the court is being asked to
20 interpret that 30-day language because the court should
21 give it some credence. What does the legislature mean?
22 They're asking the court to interpret it in such a way
23 that renders it meaningless. What we're asking the
24 court to do is to find, as the legislature was clear,
25 that upon an occurrence -- again, get back to the

1 occurrence or threat, Your Honor.

2 What was the occurrence or threat on March 9th?
3 COVID-19. That's true. What was the occurrence or
4 threat, again, on April 1st and April, and April 30th as
5 it relates to the definition of a disaster? It was
6 their termination date, but we can certainly still all
7 agree that COVID-19 on April 30th was still around,
8 still around as we sit here today. So they're trying
9 to, again, create this fiction, Your Honor, to get this
10 30-day re-energizing power is what I've been calling it
11 and I'm asking the court not to find that that is a
12 proper interpretation because it creates absurd results.

13 It allows the Governor, by practice, to be
14 shutting down businesses, which I'm getting to in
15 step three, but still he is using that power, whether
16 that's proper or not, to shut down businesses, to
17 restrict people's movements, and when people try to seek
18 redress and get their businesses open, the heavy hand of
19 the administrative agencies is coming down on them with
20 their licenses, and I'm asking the court not to allow
21 that to be interpreted that way in Count II.

22 Count II, Your Honor, is one --

23 THE COURT: Hold on. Before you get to Count
24 III, what's your response to the defendant's including
25 in his response your client's Facebook post he's in

1 business? What's the big -- why do we need a TRO? He's
2 working.

3 MR. DeVORE: That's a good question, Your Honor,
4 and the question, the answer would be is, as we speak,
5 the Department of Health is trying to shut him down.
6 That's what's going on. The administrative agencies of
7 this state are coming down on licensure to enforce this
8 executive order. That's the harm, Your Honor, and
9 that's what he is here for today is to be able to be
10 free to keep his business open. Subject to being
11 closed, and I'll get to that, by the Department of
12 Health, should he be a health risk, we understand that,
13 but as of right now, the executive -- he's open and he's
14 being threatened with licensure as we sit here today
15 because he needs that license to operate. So they're
16 dangling that over his head, Your Honor. That's the
17 injury and that's the harm that's really -- and I would
18 suggest to the court that is not a unique issue to this
19 gentleman. That's an issue that is the conversation of
20 the state at all levels, the utilization of
21 administrative agencies to keep businesses from opening
22 when the local health departments may not be trying to
23 stop them.

24 Count III, Your Honor, is the one that the cases
25 that my colleague cites that have had this issue in

1 their courts across our state, none of them have touched
2 upon it. I think it's one of the most egregious ones
3 that we're dealing with, and it deals with the power,
4 Your Honor. Who has the power to take a business and
5 force it closed? Who has the power to tell anybody
6 that, unless you have one of these essential reasons,
7 you can't leave your house? Count III is all about
8 that.

9 Now the constitutional provisions they suggest
10 gives the Governor power. Then they also say, in
11 addition to that, the Emergency Management Act gives
12 them the power, the power to control people's
13 livelihoods, the power to control people's movements.
14 That's the issue, the main issue. That's the elephant
15 in the room, sir. Now, as it relates to the
16 constitutional power, my colleague talks about, on
17 behalf of the Governor, about the disastrous
18 consequences that might be present if we don't allow the
19 executive branch to wield this power.

20 Court's likely aware, I know I was when I went
21 to law school, the Youngstown Steel Mill case of the
22 United States Supreme Court. The court can look it up.
23 It's a landmark case. We were at war with Korea, yes,
24 Korea. President Truman authorized the seizing of all
25 of our steel mills because if it didn't happen there was

1 going to be chaos and our nation would be at risk, and
2 the US Supreme Court stepped up and said it doesn't
3 matter. The court ought to read that case, bring tears
4 to your eyes, where they said, even under these times of
5 emergencies, the executive office does not wield the
6 police power to seize our businesses. That is delegated
7 to the legislative branch. It's federal. It's the same
8 issues. I'm getting to the case law for Illinois. They
9 don't wield that power, Judge. The executive cannot
10 wield the power. And, again, I would ask the court, if
11 it's going to take this in any fashion under review for
12 any amount of time, read that case. That case tells it
13 all about constitutional separation of powers, which is
14 what's at risk in this courtroom.

15 Getting though back to Illinois constitutional
16 law, we have a case that we cited. My colleague, on
17 behalf of the Governor, seems to ignore it. They
18 unequivocally take the position, page 45 of their
19 response, they suggest that my client's misreading of
20 the Public Health Act would create a significant
21 constitutional problem by stripping the Governor of his
22 executive authority to protect the public and vesting it
23 exclusively in an unelected official. Then it goes on,
24 the Governor shall have the supreme executive power and
25 shall be responsible for the ethical, or faithful

1 execution of the laws, and then he goes on, this
2 executive power includes the ability to exercise the
3 state's police power to protect the public health and he
4 cites *Barmore*.

5 *Barmore* is a 1922 case during the Typhoid that
6 I've given to every person across this state that would
7 read it that actually would suggest to the contrary.
8 What the Governor is suggesting here, that it gives the
9 executive power, police power over our people, but the
10 court, when it reads that provision, the Governor makes
11 it clear to this court, clear in his opinion that he
12 wields constitutional authority to restrict people's
13 movements and their activities and to forcibly close
14 their businesses, notwithstanding the Illinois Emergency
15 Management Agency Act, which is a delegated authority
16 from our legislature.

17 Your Honor, I provided to this court *Buettell v.*
18 *Walker*, Supreme Court of 1974. That was an executive
19 order issued by the Governor, and I want to read --
20 granted they're saying constitutional article V, sub-
21 section 8 gives the Governor power to wield that kind of
22 control over our people. With respect to the authority
23 of the Governor to promulgate executive order number
24 five, we do not agree with the defendant's contention
25 that the order falls within the authority granted the

1 Governor by Section 8, Article V of the Constitution,
2 which states the Governor shall have supreme executive
3 power and be responsible for the faithful execution of
4 the laws. That's what they write right here and this is
5 what the Illinois Supreme Court said almost 50 years
6 ago, the purpose of the order appears to formulate a new
7 legal requirement, sound familiar, sir, rather than
8 execute an existing one and, while the order properly
9 emphasizes the desirability of regulating the conduct of
10 people, the desirability of regulation must be
11 distinguished from the power to promulgate it. I would
12 ask the court to require the Governor to explain to it
13 why it should not follow Illinois Supreme Court
14 precedent that says the Governor does not wield that
15 kind of power.

16 Then we go to the issue of *Barmore*. They cite
17 the *Barmore* case, which Your Honor has it, too, where
18 they say this executive power includes the ability to
19 exercise the state's police power to protect the public
20 health. *Barmore*, 302 at 427. Your Honor, I have the
21 *Barmore* case with me right here. If the court doesn't
22 have a full copy, I have one for it, and I'm at
23 page 427, and I find no where -- it says the state is a
24 sovereign power, we understand that, there's a duty to
25 preserve the public health, finds ample support in the

1 police power. That's true. We all know that as
2 lawyers. They suggest that here and they put the words
3 executive in there.

4 Let me flip to the next page, sir. Generally
5 speaking, what laws or regulations are necessary to
6 protect the public health and secure public comfort is a
7 legislative question. The exercise of the police power
8 is a matter resting in the discretion of the
9 legislature. United States, or Illinois Supreme Court
10 precedent. I would like the court to ask, not only
11 where does the authority come from for the Governor to
12 suggest to this court he has constitutional authority,
13 which *Buettell* 100 percent refutes, where is it that the
14 executive can exercise police power where *Barmore*
15 refutes?

16 Constitutional power to the Governor does not
17 lie, Your Honor, as it relates to restricting people's
18 movements and activities or closing their businesses.
19 Does he have some power under the Emergency Management
20 Agency Act? Certainly. Does he have the power to do
21 those things? He does not, sir. We go to the Emergency
22 Management Agency Act and look there for power. Did the
23 legislature give the Governor's office power to wield,
24 that extraordinary power to wield over our people? The
25 court has to look to the Emergency Management Agency Act

1 and it can also look, guess what, to the *Barmore* case,
2 1922.

3 The *Barmore* case was about a lady who had been
4 quarantined in her home because of, guess what, sir, the
5 Typhoid, the Typhoid virus. She was quarantined. Now
6 she ended up having to stay quarantined because she had
7 the antibodies in her system of the Typhoid virus even
8 though she showed no symptoms. She was complaining to
9 our supreme court of this state that they shouldn't be
10 able to quarantine her because she wasn't sick. She
11 wasn't showing symptoms. They said, no, if you've got
12 the virus, you can be quarantined.

13 There's a couple of things in this case, Your
14 Honor, that I think will interest the court and will
15 interest the people that are listening. I've been
16 listening for two months, my client has, too, about
17 flattening the curve. We've all heard this term,
18 flattening the curve. I interpret that as a citizen, my
19 client interprets it as someone in this court to say
20 let's try to prevent the spread of this disease. That's
21 a noble cause. We all agree with that. Prevent the
22 spread of the disease. Let's get the least amount of
23 people infected as we can. I understand.

24 Supreme Court, 1922, still good law in this
25 state, health authorities cannot promulgate and enforce

1 rules which merely have a tendency to prevent the spread
2 of contagious and infectious disease, which are not
3 founded upon existing conditions because the authorities
4 cannot interfere with the liberty of citizens until it
5 actually exists. That's the law of this state, Your
6 Honor. You can't enforce rules and promulgate rules
7 that merely tend to prevent.

8 That's why, when I get to the final part of my
9 argument to the court, is why the Department of Public
10 Health, long-standing statutes and rules are significant
11 and that's why the court, I'm hoping to find, that the
12 legislature never intended to give the Governor any
13 power under the Emergency Management Agency Act as it
14 relates to quarantining or isolating our people or
15 closing our businesses.

16 The court now, if it goes to the specific
17 provisions of the Emergency Management Agency Act,
18 there's six of them that the Governor lists.

19 THE COURT: Hold on a minute. Are you saying
20 that the Governor has to wait until millions of people
21 are dead and dying before action can be taken?

22 MR. DeVORE: No. I'm not saying that. When
23 you're talking about action, if you're talking about
24 quarantining or isolating people.

25 THE COURT: Yeah.

1 MR. DeVORE: I can get to that. What I'm saying
2 to the court --

3 THE COURT: Isn't that the whole point? You
4 want to prevent that from happening, and the only way to
5 prevent that from happening are these executive orders.

6 MR. DeVORE: That's not true. We have, Your
7 Honor, and it's been in place for what I can tell is
8 over a century, the Illinois Department of Public Health
9 Act.

10 THE COURT: I get you. I get that argument.

11 MR. DeVORE: Okay. Going to -- again, looking
12 at the existing structure of our law, as the court
13 knows, our legislature is in session right now and I've
14 seen the proposed bill thrown around and if they want to
15 come up with some solutions they can. Looking at what
16 we have as law right now, the Governor listed the six
17 provisions of the Emergency Management Agency Act. One
18 of them, Your Honor, of the six, with a strained
19 interpretation, the court might be able to say did the
20 executive, did the legislative branch intend to give the
21 Governor this power? It's number 8 under subsection 7.
22 It talks about limiting the movement of people within a
23 disaster area or controlling the occupancy of premises
24 within the disaster area. That's as vague as it gets.

25 The court may ask itself, okay, what does that

1 mean? I have to figure out what that means. Does that
2 language mean that the legislature intended to give that
3 power to the Governor? Again, leave the 30-day issue
4 out and leave the proclamation issue out. This is an
5 independent question, Judge. Did the legislature
6 intend, with that language, because I'll tell you, the
7 other five that they cite, 1, 2, 3, 9 and 12, they don't
8 even get there. They're not even close. Number 8 is
9 the operative language the court needs to consider.
10 Limiting the movement of people within a disaster area,
11 controlling the premises, occupancy of premises within
12 the disaster area. The court then has to look and say,
13 okay, I have that language. What did the legislature
14 mean by that? The court has to decide, and I would ask
15 the court to consider, as the courts do across the state
16 and have as long as we've been here, you have another
17 act. You have the Illinois Department of Public Health
18 Act. The legislature created that, too. Court has to
19 ask itself is there a conflict between the two acts?
20 And, if there is, that's step 1. Step 2 is which one
21 does the court believe the legislature intended to
22 control the issue that's in front of it today.

23 The Illinois Department of Public Health Act,
24 Your Honor, if you go to the *Barmore* case, 1922, makes
25 it clear and it says that the Department of Public

1 Health Act is the supreme authority when it comes to
2 these matters.

3 In this case, Your Honor, there was someone
4 within the city of Chicago, I believe a commissioner,
5 who they tried, the Board of Health tried to delegate
6 that authority to. Supreme court said no, no, no. Read
7 that case, Judge. What it says is clear. It says that
8 the power over our people cannot be wielded by one man.
9 It says that monarchies were created in such ways. It
10 says the power is wielded by a board. That's what it
11 says, sir. It says a board. We have a board of health,
12 state board of health. They have delegated to every
13 county board of health across this state the power.
14 It's codified in the statute. It's been reduced to
15 administrative rules. I would even suggest to you, sir,
16 it's been reduced to forms for orders of closure and
17 orders of quarantine that are used by counties across
18 this state. I've seen them. That's a structure that's
19 in place.

20 It's very clear that if a citizen's business is
21 going to be closed, if his movements are going to be
22 restricted, there's due process. There's due process
23 that eventually gives a business or a man or a woman the
24 ability to come in front of this court and to say I
25 don't believe I'm a health risk, sir. It lays out the

1 substantive standards, Your Honor, and they're clear and
2 convincing evidence that has to be proven of specific
3 facts that this person is a public health risk, not that
4 we're just trying to force that down on our people
5 because it might tend to prevent or reduce the spread,
6 because there's real articulable facts.

7 I'm not here asking the court to think that that
8 is wise. I'm not asking the court to think that there's
9 not a better way or that whether our legislature maybe
10 ought to make some changes. I'm asking the court to
11 look at what the law is as we have it today and, if this
12 court grants my client's relief, contrary to what the
13 Governor's office wants to say, there's not going to be
14 pandemonium. We have 102 local health departments that
15 have the full resources of the state department of
16 health if they need them.

17 The court goes to the county code in addition to
18 the Department of Health Act, Your Honor. It lays out
19 in there how the county health departments have been
20 charged with the responsibility and the duty to enforce
21 the provisions of the Department of Public Health Act.
22 Now I'm not sure in this county how many people have
23 been, have caught the disease, have been contagious or
24 any of that. It doesn't matter. It's all conjecture,
25 but I've heard of nothing and I would ask this court to

1 consider where is the overwhelming effect on our local
2 departments of health. They're operating right now,
3 Your Honor. They're doing exactly what the law
4 prescribes them to do. It's there. If this court
5 enters a temporary restraining order, none of that
6 changes.

7 The proposed order that my client has put in
8 front of Your Honor to consider specifically says that
9 nothing that this court is doing would interfere with,
10 what, the supreme authority to handle these affairs,
11 nothing. So when the court looks at the Department of
12 Health Act, reads the procedural substantive due process
13 that's required, including a courtroom interfering, if
14 necessary, to protect people's rights, and it compares
15 that to, what does it compare it to, sir, it compares it
16 to one sentence within the Emergency Management Agency
17 Act that says a Governor can, in some facts, in some
18 affect, control the movement of citizens within a
19 disaster area or control occupancy of a house. Which
20 one, sir, is more specific?

21 The court is aware of the specific versus
22 general canon of statutory interpretation. There's no
23 question, Your Honor, it's more specific. It's grossly
24 more specific and that's what's here to protect our
25 people. And, moreover, the supreme court authority that

1 I asked the court to consider says we don't give that
2 power to one man. Doesn't matter if that man has good
3 intentions or not, it's too dangerous.

4 For all of those reasons, Your Honor, my client
5 believes that we've more than established a likelihood
6 of success on the merits.

7 Irreparable injury, it's the same thing. He
8 wants to try to support his family. This man served in
9 Iraq, helped build a road to Baghdad, and he merely
10 wants to be able to support his family without being
11 sent letters from the Department of Health saying that
12 he can't have a business open, not because, Your Honor,
13 this is so crucial, not because the Department of Health
14 feels that he's a health risk under the provisions of
15 the Department of Health Act. No. No. No. That would
16 be appropriate. Then he could come to this courtroom
17 and argue to the court. They're sending him these
18 letters saying you're in violation of the executive
19 order and you're going to close or you're in trouble.
20 We're going to take your license away from you. That's
21 the irreparable injury, Your Honor, and that's what's
22 holding back my client from being able to exercise his
23 rights of freedom.

24 For those reasons, we ask you to enter the
25 temporary restraining order. We ask you to enter that

1 order saying that this executive order is either, one,
2 not enforceable as it relates to closure of businesses
3 or as to the controlling and restricting of people,
4 that's number three, Count III. Number II is the
5 30 days. They can't bootstrap for the reasons we've
6 argued. And, number one, proclamation number three was
7 not fitting a definition of disaster. Thank you, Your
8 Honor.

9 THE COURT: Defense.

10 MR. VERTICCHIO: Thank you, Your Honor. Thomas
11 Verticchio for the attorney general on behalf of
12 Governor Pritzker. Your Honor, over the course of the
13 last three weeks, there have been three cases in which
14 TROs were presented to courts in this state seeking the
15 relief that the plaintiff seeks here with the identical
16 issues at stake that are raised here, the same argument
17 about the Governor not being able to exercise emergency
18 powers under the Act for more than 30 days that are
19 raised here.

20 On May 3rd in a case filed in Rockford,
21 Illinois, Federal District Judge John Lee agreed with
22 the Governor's reading of the Act. Judge Lee ruled,
23 quote, so long as the Governor makes new findings of
24 fact to determine that a state of emergency still
25 exists, the Act empowers him to declare successive

1 disasters even if they stem from the same underlying
2 crisis, close quote. That's the Beloved Church case.
3 Judge Lee went on to conclude that plaintiff's statutory
4 argument, same as the one made here, quote, lacks even a
5 negligible chance of success, close quote.

6 Five days later on May 8th, Cook County Circuit
7 Judge Gamrath agreed, again agreed with the Governor's
8 interpretation of the Act and the statutory instruction
9 relating to the Governor's authority. Judge Gamrath
10 wrote, quote, based upon his April 30th disaster
11 proclamation, Governor Pritzker has the authority under
12 the Act to continue to exercise his emergency powers for
13 an additional 30 days and issue executive order 2020-32,
14 close quote. That's the very executive order that
15 plaintiff challenges here.

16 Judge Gamrath denied the plaintiff's motion for
17 temporary restraining order there. Same issues. She
18 concluded that plaintiff there, quote, has not shown a
19 likelihood of success on the merits of his claim that
20 Governor Pritzker exceeded his power in issuing the
21 executive order under these exceptional circumstances,
22 close quote. Judge Gamrath's opinion, Your Honor, is
23 Exhibit 2 to our memorandum. Judge Lee's exhibit, is
24 Exhibit 3.

25 Yesterday, yesterday, May 21st, Sangamon County

1 Circuit Judge Grischow ruled that Section 7 of the Act,
2 quote, makes clear that the 30-day period during which
3 the Governor may exercise emergency powers is triggered
4 by the Governor's proclamation declaring a disaster, not
5 by the date on which the disaster initially arises. If
6 a disaster still exists, Section 7 of the Act permits
7 the Governor to continue declaring its existence by
8 proclamation and utilizing the emergency powers
9 conferred on him for the 30-day period following each
10 such proclamation, period, close quote. Same exact
11 issue here.

12 Judge Gamrath (sic) continued, quote, the
13 April 30, 2020, disaster proclamation statutorily
14 authorized the Governor's Section 7 emergency powers
15 implemented by executive order 2020-32 on April 30,
16 2020. Plaintiff's assertion that Section 7 emergency
17 powers were statutorily permitted for only one single
18 30-day period after the initial March 9, 2020, disaster
19 proclamation is, thus, contrary to the plain meaning of
20 the Act. Judge Grischow's opinion, Your Honor, is
21 Exhibit 1 to our memorandum. Like Judge Lee, like Judge
22 Gamrath, Judge Grischow denied the plaintiff's motion
23 for temporary restraining order finding simply there's
24 no likelihood of success on the merits.

25 Three cases over the last three weeks, three

1 different judges across this state, same decision by
2 each on the identical issue raised here by plaintiff.
3 Judges Lee, Gamrath and Grischow, Your Honor, all
4 recognized that, when the Illinois General Assembly
5 passed the Emergency Management Agency Act, it did it to
6 ensure that the state was ready in the event of a
7 disaster. They all looked at Section 2 of the Act that
8 said it was promulgated in order, quote, to protect the
9 public peace, health and safety in the event of a
10 disaster, period, close quote.

11 The Act grants the Governor the ability and
12 authority to declare by proclamation a disaster and
13 those proclamations trigger the emergency powers of the
14 Act.

15 THE COURT: How many proclamations have there
16 been?

17 MR. VERTICCHIO: There's been three, Your Honor.
18 March 9th, April 1st, April 30th.

19 THE COURT: All right. What if proclamation
20 number four says I'm declaring a disaster exists until
21 every citizen in this state is vaccinated? Does he have
22 that authority according to your statutory
23 interpretation?

24 MR. VERTICCHIO: He certainly has that
25 authority, and then that brings us to where we were

1 before a few weeks ago that if there then is a
2 challenge --

3 THE COURT: You're saying --

4 MR. VERTICCHIO: Wait a minute. The basis --
5 the basis -- if the basis of the proclamation is
6 challenged, then that's fair game, but that's not
7 happening. We've heard it multiple times from Mr.
8 DeVore today, of course, COVID-19 is here. Of course,
9 we have a disaster. Now, we have heard that but the
10 operative April 30th proclamation wasn't promulgated
11 because of a disaster. It was promulgated because the
12 30 days was running.

13 The critical issue is let's look at the record
14 and did a disaster exist on April 30? I don't think
15 there's a dispute about that, that a disaster existed.
16 Exhibit 4, I'm sorry, Exhibit 3 to the complaint, Your
17 Honor, is the April 30th promulgation from the Governor
18 and it details page after page the health risks and
19 findings of the medical experts and what's going on in
20 this state with regard to COVID-19, and then in
21 Section 1 of the promulgation, the Governor wrote
22 pursuant to the provisions of Section 7 of the Illinois
23 Emergency Management Agency Act, I find a disaster
24 exists. So the question is was that finding based on
25 fact, and we've heard nothing to even suggest that it

1 was not. So on the 30-day issue, really the driver of
2 the claim and the issue before the court, I --

3 THE COURT: Why did the proclamations or the
4 executive orders even mention 30 days? Why even put
5 that in there?

6 MR. VERTICCHIO: Because of wording of the Act,
7 Your Honor.

8 THE COURT: Why didn't he just say I deem it a
9 disaster and I will deem it so until I undeem it?

10 MR. VERTICCHIO: I don't think he can do that.
11 He has to have a basis for the disaster. A disaster has
12 to exist at the time he makes the proclamation, and he
13 made that proclamation on April 30th. So then the
14 executive order came the same day, and the question is
15 did that executive order trigger 30 days of emergency
16 powers and, in order to determine the answer to the
17 question, you, of course, have to look to the statute.

18 My first boss in this business, Your Honor, more
19 decades ago than I would like to admit, told me that if
20 the case is about a statute, read the statute. So let's
21 read Section 7. Here's what it says. Quote, Emergency
22 Powers of the Governor. In the event of a disaster, as
23 defined in Section 4, the Governor may, by proclamation
24 declare that a disaster exists. Upon such proclamation,
25 the Governor shall have and may exercise for a period

1 not to exceed 30 days the following emergency powers,
2 and then it continues and delineates the powers. So
3 reading the statute, it's clear that there is a singular
4 criteria to issue a proclamation.

5 THE COURT: But it says not to exceed 30 days.

6 MR. VERTICCHIO: Exactly, but if the criteria to
7 issue a proclamation exists, a disaster, then the Act
8 says upon such proclamation, what proclamation? The
9 proclamation that there's a disaster. So upon the
10 April 30 proclamation, quote, the Governor shall have
11 and may exercise for a period not to exceed 30 days the
12 following emergency powers, close quote. So when you
13 look at the series of events here as we know them now to
14 exist, they're all, they're attached as exhibits to
15 plaintiff's complaint, March 9th there was a
16 proclamation of disaster, that's Exhibit 1 to the
17 complaint, I find, the Governor determined, I find a
18 disaster. That's the proclamation. That then triggered
19 the ability on March 20 to issue the executive order for
20 a period of 30 days because, upon such proclamation, he
21 can issue the executive order and exercise emergency
22 powers for 30 days.

23 April 1st, the second proclamation, I find,
24 present tense, a disaster exists. There's no dispute
25 that it didn't exist. I find that it exists on April 1.

1 What did that do? Upon such proclamation, the emergency
2 powers under the plain reading of the Act triggered for
3 30 days. April 30, I find that a disaster exists. This
4 is Exhibit 3 to the complaint. What did that
5 proclamation do? Upon such proclamation, the emergency
6 powers of the Act trigger for 30 days.

7 The executive order at issue here, Exhibit 4,
8 issued the same day that the April 30 proclamation was
9 issued, allowed the exercise of emergency powers for
10 30 days. There's no limitation within the Act on the
11 number of such proclamations.

12 Now, in your hypothetical, could the Governor
13 just issue a proclamation because he feels like it? No.
14 There has to be a disaster, and that's the guardrail
15 here, but there's no limitation on the number of
16 proclamations he could issue, and where the plaintiff's
17 construction get confused is that the plaintiff somehow
18 reads a 30-day limit on emergency powers as linking to a
19 particular disaster thinking, well, no, there was a
20 disaster on March 9, 30 days hence, April 9, we're done,
21 but it doesn't link to the disaster. It links by the
22 specific words to the proclamation. Again, read the
23 statute and here's what it says, this is a separate
24 standalone sentence, quote, upon such proclamation, the
25 Governor shall have and may exercise for a period not to

1 exceed 30 days the following emergency powers, close
2 quote.

3 Not only does the section plainly read support
4 the Governor's construction but the statute as a whole
5 supports the Governor's construction. Section 3 of the
6 Act, which is the limitations section of the Act, the
7 only portion of the Act that constrains the Governor's
8 ability at all and it says, quote, that the Act should
9 not be construed, I'm sorry, the Act should not be
10 construed to constrain the Governor's ability to, quote,
11 exercise any other powers vested in the Governor under
12 the Constitution, statutes, or common law of this state,
13 independent of or in conjunction with any provision of
14 this Act, close quote.

15 There's no limitation there on the Governor's
16 ability to issue successive proclamations which then
17 trigger the Act, and the question then becomes when you
18 look at the Act as a greater whole, was there somewhere
19 in the Act that the General Assembly did speak to this
20 issue? Was there somewhere within the Act that they did
21 say slow down, if you issue a proclamation of disaster,
22 you can only do it for a limited period of time? And
23 the answer to that, of course, is yes. Yes. They did
24 it in Section 11.

25 Section 11 of the Act permits principle

1 executive officers of political subdivisions to declare
2 local disasters. However, upon such a local disaster
3 declaration, the General Assembly said this, a local
4 disaster declaration, quote, shall not be continued or
5 renewed for a period in excess of seven days except by
6 or with consent of the governing board of the political
7 subdivision, close quote. So when the General Assembly
8 wanted to tie a limitation on the ability to exercise
9 emergency powers for a limited period of time, it did.
10 For the local subdivisions, it said only seven days, and
11 then you have to get authority and agreement from the
12 governing body of the political subdivision. That
13 simply doesn't exist with regard to the Governor.
14 There's no such limitation placed upon the Governor in
15 Section 7.

16 And on this issue, Your Honor, Judge Grischow
17 yesterday addressed that very point at page 5 of her
18 opinion. Quote, the General Assembly demonstrated it
19 was capable of creating limits on renewing disaster
20 declarations when it believes such limitations were
21 appropriate. Continuing, while the General Assembly
22 permitted the Governor to declare a disaster with no
23 limitation on subsequent declarations and the renewed
24 triggering of emergency powers under Section 7, it
25 explicitly precluded local executive officials from

1 continuing or renewing such declarations without the
2 intervention of the local legislative body, period,
3 close quote.

4 So Judge Grischow, when reading the Act as a
5 whole, said and ruled when denying a TRO that the
6 General Assembly knows how to make a limitation on this.
7 It did it in the Act, within this very Act with local
8 subdivisions. It didn't do it with regard to the
9 Governor.

10 Plaintiff's construction of the Governor's
11 emergency power that it lapses, it lapsed on April 8th
12 violates, therefor, multiple rules of statutory
13 construction. The plain reading of the Act, it adds
14 restrictions where none exists and it ignores that the
15 General Assembly knows how to limit it when they want
16 to. And on that point, Your Honor, Judge Grischow
17 yesterday also commented and ruled as follows: Quote,
18 because the interpretation of the act upon which
19 plaintiff bases its claims cannot be squared with either
20 the plain reading of Section 7 of the Act or an
21 examination of the Act as a whole, there is no
22 likelihood that plaintiff will succeed on the merits of
23 its claim, close quote. But the plaintiff's theory, we
24 heard it today, it's in the brief, it's in the
25 complaint, is multiple successive disasters though and

1 multiple then successive triggering of the 30 days
2 renders the 30 days meaningless. Well, no, because the
3 guardrail is that the, there has to be a disaster. The
4 30-day limitation compels the Governor to make periodic
5 determinations as to the existence of a disaster, and
6 most recently he made that on April 30 and we've heard
7 nothing to suggest that the determination of whether a
8 disaster existed on April 30 was in any way unfounded.
9 If a disaster exists at a point in time, then it
10 triggers the 30 days for emergency powers.

11 And on that point, Your Honor, we heard today
12 that, well, but Section 4 says but it's an occurrence,
13 it's an occurrence, and there can only be one occurrence
14 and that occurrence -- we all know the occurrence was
15 sometime in March, maybe it was before, but the
16 occurrence was the beginning of the COVID-19 pandemic.
17 So if that's a disaster and it's only an occurrence, you
18 can't have another occurrence and another occurrence and
19 another occurrence, but that reads, again, words out of
20 the statute because Section 4 is much broader than that.
21 It says, quote, disaster means an occurrence or threat
22 of widespread or severe damage, injury, or loss of life,
23 and then it continues on referring to resulting from any
24 natural or technological cause, including but not
25 limited to an epidemic.

1 So it's more than an occurrence. It's the
2 threat of injury or loss and, as we sit here today on
3 this record, there's nothing to suggest, in fact,
4 there's not even been an attempt to try that as of
5 either March 9, April 1, or April 30th there was not a
6 threat of injury or loss, and counsel made a point of
7 the word avert because the statute says that disaster is
8 part of, quote, requiring emergency action to avert,
9 among other things, an epidemic. Well, avert means to
10 ward off, and I don't think there's a suggestion, nor
11 could there be a credible suggestion, that all of the
12 action undertaken by the Governor was not in an effort
13 to ward off, avert the dangers and injuries resulting
14 from the pandemic.

15 Judge Gamrath, in her decision a few weeks ago,
16 addressed this very point. She said, quote, a
17 reasonable interpretation of the Act grants Governor
18 Pritzker the authority to extend his power beyond an
19 initial 30-day period where, as here, the disaster is
20 ongoing and has not abated. Plaintiff correctly notes
21 that the limit of 30 days in the Act encompasses the
22 occurrence of a discrete event, one that stops and
23 starts in a relatively short amount of time
24 necessitating implementation of emergency powers for
25 30 days.

1 However, the Act also contemplates more and is
2 not to be read so narrowly. That's at paragraphs 21 and
3 22 of her opinion, Your Honor, which you, of course,
4 have. And here's how she wrestled with the it
5 contemplates more at paragraph 25. Quote, Section 4 of
6 the Act defines a disaster as an occurrence or threat of
7 widespread or severe damage, injury or loss of life
8 resulting from an epidemic. The unrefuted facts and
9 objective data show that COVID-19 continues to infect
10 and kill Illinois residents at a high rate. Therefore,
11 a threat of widespread or severe damage, injury or loss
12 of life continues to exist. And, on this record, it
13 can't be disputed that that is just as true today as it
14 was on May 8th.

15 The numbers are in our brief, Your Honor, but I
16 believe that as of today there's 102 cases of COVID-19
17 reported in Illinois and 4,600 approximately reported
18 COVID-19 deaths. It's somewhat telling that that
19 number, that death number is almost 3,000 more deaths
20 than it was the day I walked in this courtroom four
21 weeks ago. So that evidence can't be disputed and
22 there's no effort to dispute it. The disaster exists.
23 The continuing threat exists, therefore, the
24 proclamation of disaster triggered the 30 days on
25 April 30 and those days continue. And, of course, the

1 guardrail which we've mentioned is that the Governor has
2 to make this good faith determination and that's an
3 issue that, and I'm sorry to belabor the point, Your
4 Honor, but these are three judges that took the time,
5 they considered the cases, the record before them, and
6 made reasonable written opinions and here's what Judge
7 Grischow said on this issue, the guardrails, quote, this
8 is at page 5, the court is not saying the Governor's
9 authority to exercise his emergency powers is without
10 restraint. As the Act outlines, he must identify an
11 occurrence to support each emergency declaration or the
12 threat. Once the emergency has abated, the Governor's
13 authority to issue executive orders will cease, and
14 there's no evidence here or even an attempt at evidence
15 that the emergency as of April 30, the proclamation and
16 executive order at issue, had abated such as, such that
17 the Governor's proclamation and executive orders were
18 not appropriately exercised, and the proof of all of
19 this, the statutory language, the clear language of
20 Section 7, the statute as a whole supporting that clear
21 language is the historical practice.

22 Counsel referred to Governor Rauner. We know
23 that Governor Rauner and Governor Pritzker and, before
24 that, Governor Quinn issued successive and multiple
25 proclamations. It was flooding. It was H1N1, and at no

1 time did the legislature say time out, Governor, that's
2 not what the Act means. You don't have authority to do
3 that but, in fact, we know that the Act had been amended
4 11 times over the last two decades when these Governors
5 did that and that has legal consequence.

6 The cases that we cite to you, Your Honor, the
7 *Pielet* case is the lead case on this issue, says that,
8 quote, a reasonable interpretation of a statute by an
9 agency charged with enforcement of that statute is
10 entitled to great weight. Such a construction is even
11 more persuasive if consistent, long-continued, and in
12 conjunction with legislative acquiescence on the
13 subject. Such acquiescence appears where the
14 legislature, presumably aware of the administrative
15 interpretation in question, has amended other sections
16 of the Act since that interpretation but left untouched
17 the sections subject to the administrative
18 interpretation in question, and that is exactly what we
19 have here.

20 We have clear statutory directive, a practice by
21 multiple governors in issuing successive and multiple
22 proclamations, acquiescence by the legislature because
23 it was amended 11 times and nobody said, hey, we better
24 amend that section because these governors are running
25 wild. Hasn't happened. Why? Because it's in

1 conformance with the intent of the legislature and the
2 plain language of Section 7.

3 Regardless of all of that, the plaintiff's
4 theory in this case is, no, that here the Governor
5 proclaimed a disaster on March 9 so as of April 9 he
6 could do no more in terms of his emergency authority.
7 Everything up through April 9, all of the protections,
8 and they're all in the record, Your Honor, because
9 they're attached to the complaint, all of the
10 protections, all of the procurements, all of the
11 executive orders relating to foreclosures and re-
12 possessions and purchase of ventilators and, of course,
13 the, what's termed, the stay-at-home order, the social
14 distancing, the threading back and paring back of
15 certain businesses to allow online, curb-side, all of
16 that as of April 9, according to the plaintiff, is gone
17 and one day past that by the Governor is unenforceable,
18 invalid, and I think the phrase in the complaint is void
19 *ab initio*.

20 Well, that's an absurd result because we know
21 standing here on May 22nd the General Assembly hasn't
22 addressed any of this. They haven't passed any COVID-19
23 protection issues. The Governor's proclamations
24 pursuant to the Act gave him the authority for the
25 30 days and then 30 days and then 30 days and no one

1 said you can't do that. The General Assembly did not
2 suggest that he couldn't. There's been no action by
3 them suggesting that he can't, but if plaintiff's theory
4 is right, everything since April 9 goes poof, and that
5 cannot be consistent with the purpose of the Act in
6 Section 2 again to, quote, protect the public peace,
7 health and safety in the event of a disaster.

8 A little bit about the 2001 Informal Opinion,
9 Your Honor. It's stressed in plaintiff's filing, we
10 didn't hear much about it today, but the Informal
11 Opinion by Attorney General Ryan, we lay this out in our
12 brief, Your Honor, that opinion didn't address any of
13 the rules of statutory construction that I just marched
14 through for you, probably more laborious than I should
15 have, but marched through nonetheless. It didn't
16 consider Section 11, didn't consider Section 7, didn't
17 consider Section 3, and as Judge Lee and Judge Grischow
18 and Judge Gamrath concluded, the construction of
19 Section 7 is completely consistent with the Governor's
20 actions here to the extent the 2011 opinion, or 2001
21 opinion disagreed. All of those courts said that under
22 the facts we have here, under the language here, it's
23 appropriate.

24 And the other thing to consider about the 2011
25 (sic) opinion letter is that the Act was different. It

1 has since been amended. The Act then did not include,
2 for example, public health emergencies as part of the
3 disaster. Well, public health emergencies are something
4 we're experiencing right now that obviously can go on
5 far more than 30 days, far more than a few months, and
6 we are right smack in the middle of it.

7 Just as importantly, the predecessor act, Your
8 Honor, the Civil Defense Act, in Section 7 of that Act
9 there was a rule for the legislature on the Governor's
10 promulgation of disaster and how long he could exercise
11 emergency powers. The predecessor act had a rule for
12 the legislature, the General Assembly in it. This Act
13 does not. The General Assembly must be presumed, under
14 rules of statutory construction, that they knew they
15 were changing it and they did.

16 Probably one of the most telling things about
17 the 2001 letter opinion, which the plaintiff doesn't
18 mention, is what was the question that was asked? The
19 question asked was can the Governor extend the 30-day
20 period? That's not what this case is about. No one is
21 saying that that 30-day period should really be 31 or 32
22 or 48, not at all. It's 30. It's 30 upon such
23 proclamation and, as it sits today, we're within the
24 April 30 proclamation so that 30 days runs well.

25 Last thing on the 2001 opinion, Your Honor, the

1 Illinois Supreme Court told us, we cite you the case,
2 the *Dew-Becker* case, last month, that when it comes to
3 an attorney general opinion, like the 2001 opinion, if
4 it's not well researched, not only is it not
5 precedential, it's not relevant. Those were the words
6 of the Illinois Supreme Court.

7 The executive orders in place, in place have put
8 in force protections for the people of the state of
9 Illinois and, even at that, we're up to 102 occurrences,
10 4,607 deaths. If they're removed, then those numbers
11 are only going to go up and that would lead to an absurd
12 result that's hard to imagine consistent with the
13 legislative intent.

14 The Public Health Act, we heard about the Public
15 Health Act, and I guess the simple thing about the
16 Public Health Act is that it simply doesn't apply.
17 There's no suggestion that the Department of Public
18 Health in this county or others is actually taking
19 action under the Act and, if it was, that's independent
20 with what the Governor did under the Emergency
21 Management Agency Act. The Public Health Act, itself,
22 says that the two work in conjunction.

23 THE COURT: If the Act doesn't apply, why have
24 it?

25 MR. VERTICCHIO: It doesn't apply to the facts

1 of this case, to the facts of this case. The Governor's
2 proclamations and exercise of emergency powers is under
3 the Emergency Management Act. The facts that the
4 plaintiff has pled to you don't trigger the Public
5 Health Act because no one has undertaken that conduct
6 against him and he's not complaining about it in his
7 pleadings in front of you in the verified complaint.

8 First and foremost, and Judge Lee recognized
9 this, it's in our brief, this, the situation described
10 by the plaintiff and that exists as a result of the
11 executive orders is neither an isolation nor a
12 quarantine nor a business closure. That's just not
13 what's happening here and Judge Lee ruled as such. It's
14 not isolation, it's not a quarantine. If it were an
15 isolation or a quarantine or a business closure, then
16 all of the provisions in the executive order wouldn't be
17 allowed because the executive order sets forth all kind
18 of abilities of people to move and travel and businesses
19 to open to degrees. If it were truly a public health
20 department quarantine, the business is shut down.

21 THE COURT: Only as deemed, quote, essential,
22 end quote.

23 MR. VERTICCHIO: Well, even for non-essential,
24 even for deemed, to use your phrase, non-essential. For
25 a business, there's curbside online and there's other

1 non-sales related activity that are specifically set
2 forth as allowable under the executive orders. Clearly
3 not a public health closure order under the Public
4 Health Act. The two are just separate and can they both
5 apply to a given situation? Yes, but the Governor's
6 orders were issued pursuant to the Emergency Management
7 Act, and there's just no question that under the terms
8 of the Act and, frankly, the common parlance of the
9 words, there is no quarantine, isolation or business
10 closure. So the Public Health Act, simply, it doesn't
11 apply.

12 Beyond the statutory authority, Your Honor, the
13 Governor's April 3rd executive, April 30th executive
14 order was also issued, of course, under his
15 constitutional authority of police powers and this
16 follows, again, from three really irrefutable,
17 constitutional, fundamental doctrines. The first that
18 state police powers authorize the government or supreme
19 executive to take action in response to pandemics. The
20 second is that the legislature, the General Assembly has
21 not prohibited the Governor from taking such action, and
22 the third is COVID-19 is, of course, a health emergency
23 pandemic.

24 As to the first, we heard a little bit about the
25 *Barmore* case. Well, in *Barmore*, the Illinois Supreme

1 Court upheld the restrictions upon Mrs. Barmore as a
2 result of Typhoid in the rooming house. Mr. DeVore will
3 tell you that, well, yeah, but that was legislative
4 action, but the point is *Barmore* approved and allowed
5 the use of police powers in the time of a public health
6 emergency. And on the issue of what about the
7 executive? What about the executive? The constitution
8 says that the Governor is the, quote, supreme executive
9 and shall, quote, have the supreme executive power.

10 The United States Supreme Court, cited you the
11 case, the *Apollon* court almost 200 years ago spoke to
12 this very issue that's being refuted today. Well, the
13 executive can't do this. Here's what the court said,
14 quote, it may be fit and proper for the government, in
15 the exercise of the high discretion confided to the
16 executive, for great public purposes, to act on a sudden
17 emergency, or to prevent an irreparable mischief, by
18 summary measures, which are not found in the text of the
19 laws, period, close quote. That's the constitutional
20 authority of the executive.

21 What do we hear from the plaintiff on that?
22 Well, plaintiff tells you look at *Buettell*. Look at
23 *Buettell*. That's authority for the proposition that the
24 Governor can't just issue executive orders because in
25 *Buettell* the Illinois Supreme Court said, no, that

1 executive order kind of, to use your phrasing, Your
2 Honor, kind of looked like a duck, walked like a duck,
3 quacked like a duck so it was legislative in nature, but
4 *Buettell* has no application at all. *Buettell* was not a
5 police powers emergency case. In *Buettell* they were
6 dealing with political contributions and required
7 disclosure of political contributions and the Illinois
8 Supreme Court said the Governor went too far. *Buettell*
9 is just simply not a police powers case. It's not an
10 emergency case. It doesn't apply.

11 Which brings us to what does apply? The cases
12 say, *Barmore*, others that we cited say at the time of an
13 emergency, the police powers exist. We've heard in this
14 courtroom a little bit about, well, what does apply with
15 regard to this constitutional issue? Your Honor, in the
16 *Bailey* case on April 27th, you said, I'm looking at
17 page 65 of the transcript of proceedings, when talking
18 about this very issue, what about the constitutional
19 authority, you said settled rule, quote, allows the
20 state to restrict, for example, one's right to peaceably
21 assemble, to publicly worship, to travel, and even to
22 leave one's home. Courts owe substantial deference to
23 government actions, particularly when exercised by
24 states and localities under their police powers during
25 the bona fide emergency, close quote. And then you went

1 on in the very next paragraph to say that courts will
2 intervene if the action, quote, to protect the public
3 health or the public safety has no real or substantial
4 relation to those objects, or is beyond all question, a
5 plain, palpable invasion of rights secured by the
6 fundamental law, close quote. And then finally you
7 recognize, quote, courts reviewing a challenge to a
8 measure responding to a society-threatened epidemic of
9 COVID-19 should be vigilant to protect against clear
10 invasions of constitutional rights while insuring they
11 do not second guess the wisdom or efficiency of the
12 measures enacted by the democratic branches of
13 government, on the advice of health experts.

14 So that's what you said about the standard to
15 apply, and what has the plaintiff said in this case, in
16 this very case? Here's what the plaintiff said, I'm
17 looking at his, the plaintiffs, their legal brief in
18 support of plaintiffs' claims, paragraph 29, quote,
19 while the courts will not pass upon the wisdom of the
20 means adopted to restrict and suppress the spread of
21 contagious and infectious diseases, they will interfere
22 if the regulations are arbitrary and unreasonable.

23 So the plaintiff tells you you can interfere.
24 You can strike down constitutionally the executive
25 orders, quote, if the regulations are arbitrary and

1 unreasonable. You have said that it's constitutionally
2 deficient in authority if the action, quote, to protect
3 the public or public safety has no real or substantial
4 relation to those objects.

5 From there the question becomes, well, were
6 those standards satisfied? And the answer is not on
7 this record, not on this record, because there is not
8 one piece of evidence that the Governor's actions are
9 arbitrary or unreasonable or that they weren't done to
10 protect the public in the case of an emergency. There's
11 been a lot of talk, a lot of talk but no evidence.

12 We're here on a motion for temporary restraining
13 order. Zero evidence on the point on the plaintiff's
14 side. The only evidence on the issue about whether this
15 conduct was arbitrary or unreasonable is the evidence in
16 the complaint in the form of the attached disaster
17 proclamations. The exhibits to the complaint are part
18 of the complaint. They're part of plaintiff's evidence,
19 and the disaster proclamations march through the public
20 health emergency and march through, more importantly,
21 the evidence that supports it and there's nothing in
22 those documents and we've heard nothing today and
23 there's nothing in a submission to suggest that any of
24 it is arbitrary or unreasonable because it was all done
25 to protect the citizens of the state of Illinois. It's

1 the plaintiff's burden to come forward with evidence.
2 They have to come forward with evidence and, not only
3 didn't they, they didn't even try. There is simply no
4 likelihood of success on the merits as Judge Lee, Judge
5 Grischow and Judge Gamrath all found on the statutory
6 construction of Section 7 and the Act as a whole.

7 Separately and independently, the Governor had
8 constitutional authority that has not been refuted and
9 there hasn't been an attempt to refute it. As a result
10 of that, the TRO request must be denied, but there's
11 actually more because plaintiff has told you, and
12 they're right, he has the burden of showing irreparable
13 harm, irreparable injury and Your Honor hit it right on
14 the head when noting, well, the business is operating.
15 That issue came up in Sangamon County, too.

16 THE COURT: But you put in your brief he's
17 operating in violation of the executive order.

18 MR. VERTICCHIO: He absolutely is. And on that
19 point, if there is an administrative remedy to be had,
20 if someone tries to shut him down as a result of that,
21 then he can pursue his administrative remedy but, as you
22 sit here today adjudging irreparable harm of the
23 business, there is none. Judge Grischow reached this
24 exact issue in the *Running Central* case when she ruled
25 yesterday that, because the plaintiff was operating, it

1 failed in its burden to show irreparable harm. That
2 doesn't mean the case was over. Didn't mean it at all.
3 It just meant that, for the sake of a temporary
4 restraining order, that was another reason why it could
5 not be granted, and she had also obviously concluded
6 that there was no likelihood of success on the merits.

7 Now, we just heard from counsel because you
8 asked him, well, he's still operating, what's the harm,
9 and the answer was, well, he gets these letters, he gets
10 these threatening letters, and there was a comment about
11 an inability to operate enough to support the family,
12 which it's hard to imagine anything more important than
13 that, but the point is it's not in the record.

14 We're here on an emergency temporary restraining
15 order that the Governor got notice of yesterday at
16 about, I don't know, 4:00 or so, so less than 24 hours
17 later we're here and it's plaintiff's burden to support
18 this extraordinary request for extraordinary relief with
19 evidence, and, respectfully, it's not here. So
20 likelihood of success? No. Irreparable harm? No. But
21 what else? The plaintiff fully concedes that the court
22 is to balance the equities. The court is to balance the
23 equities and, when you look at that balancing, given the
24 lack of any evidence on the plaintiff's side of harm,
25 other than talk, against all of the evidence, even

1 within plaintiff's complaint, about the damage to the
2 public should the executive orders be held invalid as of
3 April 9th, the balancing isn't even close because it's
4 undisputed on this record that the modeling of the state
5 is that, if there's not social distancing and if there's
6 not limitations put on businesses that are not found to
7 be essential, the modeling in this record says deaths
8 would be ten to 20 times greater than they are. The
9 modeling in this record, it's undisputed, is that, if
10 the executive orders are found invalid, the health care
11 systems will be overwhelmed. That's the evidence.
12 There's just nothing contrary to it and, Your Honor,
13 this court can take judicial notice of the records in
14 the circuit. You granted in the Bailey case the
15 Illinois Health and Hospital Association right to file
16 an Amicus brief and supporting affidavits on this
17 balancing of harms issue. It's in the records of this
18 court that the court can take judicial notice of.

19 Here's what the Illinois Health and Hospital
20 Association concluded on this balancing issue, and it
21 almost sounds trite to these days but it's not trite.
22 These people, they're on the front lines. We hear it
23 all the time. These are the healthcare workers on the
24 front lines, and the record on this issue from them is
25 sworn testimony in the affidavit of Dr. Wahl, two

1 striking conclusions, quote, absent the executive
2 orders, hospital beds and medical equipment will not be
3 available leaving the critically ill without needed
4 medical care, close quote. Quote, absent the executive
5 orders, greater numbers of frontline health care workers
6 will get sick and hospitals will be under staffed, close
7 quote.

8 Your Honor, the only evidence on the balancing
9 of harms shows that it's not even close. So, in the
10 end, no likelihood of success, the conduct is
11 statutorily authorized separately and independently from
12 constitutionally authorized, there's no irreparable harm
13 or, if there is, it's not on this record. The balancing
14 is not close and there hasn't even been an attempt from
15 the plaintiffs on the balancing burden.

16 And on the issue that you originally asked
17 about, how can you bring this on behalf of similarly
18 situated individuals throughout the state, similarly
19 situated businesses throughout the state, I appreciate
20 that counsel was able to find an appellate court opinion
21 from more than 80 years ago with some loose language on
22 this point, but it's about 40 years plus older than the
23 rules of civil procedure and the authorities cited by
24 the Governor to you on these issues in the brief. It
25 could not be more clear. The only time that plaintiffs

1 or the court can extend the grant of relief past the
2 plaintiff is in three circumstances, either interested
3 parties intervene in the case, that hasn't happened,
4 other parties join as plaintiffs, that hasn't happened,
5 or there is a class certified. That hasn't happened.
6 There hasn't even been a motion for class certification.
7 There is not one allegation in the complaint even
8 purporting to satisfy the obligations of requirements
9 for class. So Your Honor was, identified the issue
10 quickly and the 80-year-old opinion doesn't get around
11 rules of practice as they exist in 2020.

12 Mr. DeVore used an interesting phrase when he
13 was closing about the rule of law and that does, that's
14 what it comes down to here, the rule of law, because, if
15 the court considers the rule of law, plaintiff can't
16 win. The burdens haven't been satisfied.

17 I know that most people in this courtroom, maybe
18 all of them, don't like the Governor's orders. The
19 court has expressed opinions about the wisdom of the
20 Governor's orders, but the orders are for the executives
21 to determine. It's within the statutory power. It's
22 within his constitutional power, and the rule of law
23 supports it.

24 For all of those reasons, the motion for
25 temporary restraining order should be denied. Thank

1 you, Your Honor.

2 THE COURT: Response, plaintiff.

3 MR. DeVORE: Yes. Thank you, Judge. If the
4 standard by which the court is being asked to rule on
5 this matter is protecting the public and if that's the
6 standard that courts across this state and nation will
7 continue into the future, protecting the public at all
8 costs no matter what the law says, what a world our
9 children might find ourselves in when they're our age.

10 I'm reading from the *Barmore* case, and I admire
11 my colleague for that very good presentation that he
12 gave, but as I sat and listened closely, I found myself
13 interested on how those conclusions could be drawn from
14 the very cases that we both use. I'm in the *Barmore*
15 case right now, Judge. A board of health must
16 necessarily consist of more than one person and it
17 generally consists of several. This is where it gets
18 good. Many authorities contend that the administration
19 of public health should be vested in an individual and
20 maybe that individual should be a person trained in the
21 science of public health. This contention is based on
22 the grounds that this form of administration of health
23 laws is productive of efficiency and economy. Does that
24 sound familiar, Your Honor?

25 The same argument might be made in favor of an

1 absolute monarchy, but the experience of the world has
2 been that other forms of government, perhaps more
3 cumbersome and less efficient, ensure the people a more
4 reasonable and less arbitrary administration of the law
5 during the Typhoid, Your Honor.

6 My colleague makes it clear, pretty much admits
7 to this court that the Governor's goal is to limit the
8 spread of the virus. I ask the court to take some
9 judicial notice of a few things. Maybe the court might
10 take judicial notice of the fact that medical health
11 professionals across this part of the state are getting
12 laid off. Precarious, but seems to be the case, but
13 prevent the spread of the virus, that's what the goal of
14 the Governor is. They talked about it. Going to have
15 medical facilities overwhelmed. Many people are going
16 to be ill. I hope that's not the case but, nonetheless,
17 until such time as the law of this state changes, the
18 Illinois Supreme Court says you can't promulgate rules
19 that merely tend to prevent the spread of infectious
20 disease. Those are not my words, Your Honor. Those are
21 the words of the Illinois Supreme Court a hundred years
22 ago.

23 The court would need to know nothing more about
24 these various arguments of statutory construction we've
25 talked about. It can merely consider for itself whether

1 this stay-at-home provision that my colleague
2 interestingly enough points out -- they try real hard
3 not to call it a quarantine or an isolation, Judge.
4 They try to stay away from those words because, again,
5 more gas lighting.

6 I would point you to Section 16 of the executive
7 order where I read the intent of this executive order is
8 to ensure that the maximum number of people self-isolate
9 in their residence to the maximum extent feasible, while
10 enabling essential services to slow the spread of
11 COVID-19. The extent of the, or the intent of the
12 executive order, the Governor admits, is not allowable
13 by our own supreme court of this state but yet, boldly
14 enough, he lays it in there. I think the court can stop
15 there.

16 They talk about Governor, or states attorney,
17 Attorney General Ryan's section, or his 2001 opinion
18 about the 30 days, et cetera. They say there was
19 nothing else Attorney General Ryan talked about, Judge.
20 I would disagree. Attorney General Ryan points out to
21 Section 9 of the Act, Emergency Management Act. It
22 says, talks about the Governor's use of funds. It says,
23 if necessary, and the General Assembly is not in
24 session, the transfer of funds from other accounts but
25 only until such time until a quorum of the General

1 Assembly can convene in regular or extraordinary
2 session. So he did take that into account. I agree
3 it's not controlling in this court. It's persuasive for
4 whatever purpose the court wants to use it, but that
5 attorney general believed that the 30-day limitation
6 period did apply. I would ask the court to use its own
7 judgment and determine whether or not it applies and not
8 the judgment solely of the attorney general or of any of
9 these other courts.

10 My colleague also talks about this issue over
11 and over about the occurrence of a threat, talks about,
12 again, this good faith dispute of whether proclamations
13 two or three were done in good faith. Let's just talk
14 about number three. I'm not here to say the Governor
15 did anything in bad faith. I would never suggest that,
16 but the occurrence or threat, Your Honor, by definition
17 was only done because of the arbitrary end date.

18 They talk about serial proclamations of prior
19 Governors. The proclamations up to the point of
20 Governor Rauner never had a 30-day end date in them,
21 ever. As the court suggested, just issue a
22 proclamation. The proclamation terminates when the
23 disaster terminates. Seems like every Governor that
24 they've cited, there's, I don't know, this many of them,
25 an inch thick, except for Governor Rauner and Governor

1 Pritzker, they didn't put dates.

2 Governor Rauner, when he put dates in for
3 flooding things, et cetera, like that, he was not
4 issuing emergency powers, wielding emergency powers,
5 controlling people's movements and restricting their
6 activities. This is the first time in this state that
7 I'm aware of that that's ever happened. So my colleague
8 also talks about, well, there's some authority out there
9 that if the legislature has acquiesced, maybe there is
10 an inference the court can take that there was intent.
11 I would suggest to this court this is the first time
12 that a Governor in our history that we have in front of
13 us on this record today that that's ever happened.

14 The court can take judicial notice, again, of
15 Senate Bill 3993, it's a public record right now, that
16 would suggest an inference to this court that that
17 wasn't intended because they're trying to limit the very
18 power of the Governor to issue serial proclamations. So
19 to suggest that the legislature acquiesced for years to
20 this is misleading, Your Honor, because there is no such
21 facts where someone has controlled our people to this
22 extent under the emergency powers, and it seems now the
23 first time that our legislature gets back in session
24 they're taking that issue on.

25 Again, there's this talk about the proclamations

1 one, two or three. My colleague talks about the
2 definition, and I pointed that out to the court, too, an
3 occurrence or event that is to avert or, as my colleague
4 says, to ward off a public health emergency. I agree
5 with that definition, occurrence or a threat to avert or
6 ward off a public health emergency. That's what the
7 emergency act is all about.

8 The court can look at each of those
9 proclamations number two and number three, but number
10 three is sufficient, and it states, Your Honor, that all
11 of these circumstances constitute and it is a public
12 health emergency and I would ask the court to consider
13 under the strict definition how do you ward of or avert
14 with emergency powers something that your own
15 proclamation says is present and existing right now and
16 you have put a plan together to, a comprehensive plan to
17 deal with it. That's not an emergency, Your Honor.

18 Lastly, Your Honor, they talk about the, you
19 know, the *Barmore* case talks about arbitrary and
20 unreasonable. We cite that authority. We agree with
21 that authority. The courts, if it takes it out of
22 context, will not interfere with the Board of Health is
23 what *Barmore* said, the Board of Health's promulgating
24 and to use their authority to control people's movements
25 and activities or to close their businesses unless it's

1 arbitrary and unreasonable. That's what it said and I
2 agree with it.

3 Is it arbitrary and unreasonable for the
4 executive under the facts present in this record to
5 wield that power? That's by definition arbitrary and
6 unreasonable, not by looking at to what actually he's
7 doing as my colleague would suggest, but the mere fact
8 he can't be doing it in the first place. That is
9 arbitrary and unreasonable. For all of these reasons,
10 Your Honor, the facts in this record are clear that the
11 court should grant a temporary restraining order. The
12 balancing of the equities is not going to harm anyone.
13 The public health department has resources in every
14 county that we have. They're there and they're
15 operating and they're able to take care of this and we
16 would ask the court to enter relief. Thank you.

17 THE COURT: All right. This court has reviewed
18 the plaintiff's complaint, including attachments, prior
19 to today's hearing. The court has had an opportunity to
20 review the response submitted by the defendant and
21 attachments and case law.

22 Before I rule, I'm advising everybody in this
23 room, no public outbursts or displays. The court is
24 still in session until you are told otherwise.

25 Since the inception of this insanity, the

1 following regulations, rules or consequences have
2 occurred: I won't get COVID if I get an abortion but I
3 will get COVID if I get a colonoscopy. Selling pot is
4 essential but selling goods and services at a family-
5 owned business is not. Pot wasn't even legal and pot
6 dispensaries didn't even exist in this state until five
7 months ago and, in that five months, they have become
8 essential but a family-owned business in existence for
9 five generations is not.

10 A family of six can pile in their car and drive
11 to Carlyle Lake without contracting COVID but, if they
12 all get in the same boat, they will. We are told that
13 kids rarely contract the virus and sunlight kills it,
14 but summer youth programs, sports programs are
15 cancelled. Four people can drive to the golf course and
16 not get COVID but, if they play in a foursome, they
17 will. If I go to Walmart, I won't get COVID but, if I
18 go to church, I will. Murderers are released from
19 custody while small business owners are threatened with
20 arrest if they have the audacity to attempt to feed
21 their families.

22 These are just a few of examples of rules,
23 regulations and consequences that are arbitrary,
24 capricious, and completely devoid of anything even
25 remotely approaching common sense.

1 State's attorneys in this state, county
2 sheriffs, mayors, city councils and county boards have
3 openly and publicly defied these orders followed by
4 threats to withhold funding and revocation of necessary
5 licenses and certifications unless you obey.

6 Our economy is shut down because of a flu virus
7 with a 98 percent plus survival rate. Doctors and
8 experts say different things weekly. The defendant
9 cites models in his opposition. The only thing experts
10 will agree on is that all models are wrong and some are
11 useful. The Centers for Disease Control now says the
12 virus is not easily spread on surfaces.

13 The defendant in this case orders you to stay
14 home and pronounces that, if you leave the state, you
15 are putting people in danger, but his family members
16 traveled to Florida and Wisconsin because he deems such
17 travel essential. One initial rationale why the rules
18 don't apply to him is that his family farm had animals
19 that needed fed. Try selling that argument to farmers
20 who have had to slaughter their herds because of
21 disruption in the supply chain.

22 When laws do not apply to those who make them,
23 people are not being governed, they are being ruled.
24 Make no mistake, these executive orders are not laws.
25 They are royal decrees. Illinois citizens are not being

1 governed, they are being ruled. The last time I checked
2 Illinois citizens are also Americans and Americans don't
3 get ruled. The last time a monarch tried to rule
4 Americans, a shot was fired that was heard around the
5 world. That day led to the birth of a nation
6 consensually governed based upon a document which
7 ensures that on this day in this, any American courtroom
8 tyrannical despotism will always lose and liberty,
9 freedom and the constitution will always win.

10 That said, plaintiff, your request for a TRO
11 with respect to Count I is denied. Your request for the
12 TRO on behalf of similarly situated individuals is
13 denied. If you develop some other case law or ability
14 to convince me that that appellate court opinion you
15 cite trumps current civil practice rules, I'll be glad
16 to consider it later. Counts II and III are granted to
17 your client only.

18 MR. DeVORE: Yes, sir.

19 THE COURT: Do you have an order?

20 MR. DeVORE: I'll prepare it, sir.

21 THE COURT: And please provide it to the
22 defendant to approve as to form. Any request to stay
23 will be denied.

24 MR. VERTICCHIO: Your Honor, for the record,
25 move to stay enforcement pending appeal.

1 THE COURT: I will deny that.

2 MR. VERTICCHIO: I understand that. I know you
3 know why I made the motion.

4 THE COURT: Sure. I understand.

5 MR. VERTICCHIO: Understood. Thank you, Your
6 Honor.

7 MR. DeVORE: When do you want to come back, Your
8 Honor?

9 THE COURT: Next Friday. Is that all right,
10 defense?

11 MR. VERTICCHIO: What are we coming back for?

12 THE COURT: It's only good for ten days.

13 MR. VERTICCHIO: It's with notice, Your Honor.

14 THE COURT: I made you give notice. Ten days
15 doesn't apply. You pick, defense.

16 MR. VERTICCHIO: Well, we're going to take an
17 appeal so why don't we come back after we get a
18 decision. How about a status?

19 THE COURT: I'll put a date determined between
20 the counsel and coordinated with the clerk's office.
21 How is that?

22 MR. VERTICCHIO: That's fine, Your Honor. For
23 status?

24 THE COURT: Yeah. Right. Madam clerk, I will
25 hand you the file so you can make sure they get copies,

1 which they're going to want. All right, ladies and
2 gentlemen, exit the courtroom as directed by the
3 sheriff. Court adjourned.

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CERTIFIED SHORTHAND REPORTER'S CERTIFICATION

I, LORI SIMS, Certified Shorthand Reporter for the Circuit Court of Clay County, Fourth Judicial Circuit of Illinois, do hereby certify that I reported in machine shorthand the proceedings had on the hearing in the above entitled cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable MICHAEL D. MCHANEY, Judge of said Court.

Dated this 23rd day of May, 2020.

Lori Sims

Lori Sims
Official Court Reporter
CSR #084-003424