

**STATE OF MICHIGAN  
IN THE COURT OF APPEALS**

MICHIGAN UNITED FOR LIBERTY,  
Plaintiff/Appellant,

Court of Appeals Case No.: 353643  
Court of Claims Case No.: 20-000061-MZ

v.

**IMMEDIATE ACTION REQUESTED**

GRETCHEN WHITMER,  
Defendant/Appellee

---

OUTSIDE LEGAL COUNSEL PLC  
PHILIP L. ELLISON (P74117)  
Attorney for Plaintiff/Appellant  
PO Box 107  
Hemlock, MI 48626  
(989) 642-0055  
pellison@olcplc.com

KYLA BARRANCO (P81082)  
JOSHUA O. BOOTH (P53847)  
ANDREW J. JURGENSEN (P81123)  
MI DEPT OF ATTORNEY GENERAL  
Attorneys for Defendant/Appellee  
PO Box 30217  
Lansing, MI 48909  
(517) 335-7650  
barrancok@michigan.gov  
boothj2@michigan.gov  
jurgensena2@michigan.gov

MATTHEW E. GRONDA (P73693)  
Attorney for Plaintiff/Appellant  
PO Box 70  
St. Charles, MI 48655  
(989) 249-0350  
matt@matthewgronda.com

---

**APPELLANT MICHIGAN UNITED FOR LIBERTY'S  
REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR LEAVE**

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

REPLY ..... 1

    I.    Appellees have failed to establish the Governor is solely acting in  
          her sphere of powers. .... 2

    II.   Neither “emergency” statute meets this constitutional standard—but  
          especially violative is the EPGA..... 5

    III.  The statutes’ standards are not “reasonably precise as the subject  
          matter requires.” ..... 6

    IV.  Substantial harm is self-evident and established as a matter of law..... 7

RELIEF REQUESTED ..... 10

**TABLE OF AUTHORITIES**

**CASES**

*Blue Cross and Blue Shield of Michigan v Milliken*,  
422 Mich 1; 367 NW2d 1 (1985)..... 4

*Christie v Bd of Regents of Univ of Michigan*,  
364 Mich 202; 111 NW2d 30 (1961)..... 3

*Garner v Mich State Univ*,  
185 Mich App 750; 462 NW2d 832 (1990) ..... 8

*In re Brewster St Housing Site*,  
291 Mich 313; 289 NW 493 (1939)..... 7

*Jones v Powell*,  
462 Mich 329; 612 NW2d 423 (2000)..... 8

*Judicial Attorneys Ass’n v Michigan*,  
459 Mich 291; 586 NW2d 894 (1998)..... 4

*Klammer v Dep’t of Transportation*,  
141 Mich App 253; 367 NW2d 78 (1985) ..... 6

*People v Green*,  
260 Mich App 710; 680 NW2d 477 (2004) ..... 6

*Pittsfield Charter Twp v Washtenaw Co*,  
468 Mich 702; 664 NW2d 193 (2003)..... 5

*SBC Mich v PSC (In re Compl of Rovas)*,  
482 Mich 90; 754 NW2d 259 (2008)..... 3

*Smith v Dep’t of Pub Health*,  
428 Mich 540; 410 NW2d 749 (1987)..... 8

*Soap & Detergent Ass’n v Natural Resources Comm’n*,  
415 Mich 728; 330 NW2d 346 (1982)..... 4

*State Conserv. Dep’t v Seaman*,  
396 Mich 299; 240 NW2d 206 (1976)..... 6

*Westervelt v Nat Resources Comm*,  
402 Mich 412; 263 NW2d 564 (1978)..... 4

**CONSTITUTIONAL PROVISIONS**

Const 1963, Art III, § 2 ..... 2  
Const 1963, Art IV, § 39 ..... 7  
Const 1963, Art V, § 8 ..... 7  
Const 1963, Art V, § 15 ..... 7  
Const 1963, Art V, § 16 ..... 7  
Const 1963, Art V, § 17 ..... 7

**STATUTES**

MCL 10.31 ..... 5  
MCL 30.403 ..... 5

**SECONDARY SOURCES**

05/22/2020 Video Message, Rep Jack O'Malley,  
<<https://www.facebook.com/watch/?v=248581286411261>> ..... 1  
Clip of April 20, 2020 Press Conf,  
<<https://www.youtube.com/watch?v=RFK1fQJ5RN4>> ..... 1, 6

## REPLY

Appellees' answer is both legally inaccurate and a blatantly improper attempt to scare this Court with overblown COVID-19 "facts" with the hope of this Court ignoring clear constitutional obligations. The over 7,000 members of Appellant Michigan United for Liberty (MUFL) appeals to this Court not to be afraid. Our State will meet the challenge. COVID-19 is, no doubt, a serious health concern but it deserves the attention, experience, expertise, and knowledge of our entire government and all of its elected officials, not a select few with secret "data" known only to the Governor. 05/22/2020 Video Message, Rep Jack O'Malley, <<https://www.facebook.com/watch/?v=248581286411261>> (starting at 04:00) (Executive Branch is not sharing the data on which liberty-restrictive executive orders are based upon). However, the Governor wants to be able to ignore the policymaking arms of State governance the People—as the ratifiers of the Constitution—put into place. It is wrong and unconstitutional. The Executive Branch is also intentionally flouting the obligation of the separation of powers which has made our state and country strong in all other times of peril and menace. Clip of April 20, 2020 Press Conf, <<https://www.youtube.com/watch?v=RFK1fQJ5RN4>> ("My powers come from a couple of different parts of the statutes and so I believe that regardless of what the legislature does I still retain those powers but I would like for them to be partners in this we work have worked very well together in a number of fronts; we need to continue working together because this is not a partisan issue."). There is no real or legal reason to cast it aside for political or public policy expediency. Many governments—both modern and ancient—have collapsed because a leader—even well-intentioned—cries "emergency" and the consent of the governed is cast aside for the "greater good." Michigan should not be one of them.

**I. Appellees have failed to establish the Governor is solely acting in her sphere of powers.**

The Michigan Constitution is clear: the powers of government are divided into three branches: legislative, executive and judicial. Const 1963, Art III, § 2. “No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” *Id.* Incredibly, Governor Whitmer never denies she is violating that prohibition of legislating new laws and amending statutes via the 100 executive orders issued in response to COVID-19. She does not deny it *because it is exactly what she is doing and has done*. She spent money without legislative appropriation. EO 2020-24. She has cancelled the remainder of school year. EO 2020-35. New employment rights and employer obligations have been purportedly created without legislation. EO 2020-36; EO 2020-97. Government transparency laws and administrative hearing standards have been halted or suspended. EO 2020-15; EO 2020-38; EO 2020-103. Driver’s licensing along with vehicle and watercraft registrations are halted. EO 2020-101. Purported changes to deadlines applicable to the commencement of all civil and probate actions and proceedings. EO 2020-58; EO 2020-100. There has been halted travel, limited freedom of movement, and criminalizing the freedom of association. EO 2020-96. The Whitmer Administration created essential versus non-essential businesses and entities without due process, suspended governmental business, and criminalized non-compliance. EO 2020-96. The Executive adopted new public policies about health testing and waiver of medical privacy. EO 2020-104. Medical licensing and safety oversight have been suspended. EO 2020-30. Gasoline standards have been altered. EO 2020-31. Animal care services have been terminated. EO 2020-34. Events and assemblages have been shuttered. EO 2020-5. Access to loved

ones and friends have been halted. EO 2020-6. And these just names a few. Some of these ideas are likely good ones; several are highly troubling; and others are downright unconstitutional or illegal. Especially after April 30, 2020, all were undertaken without a single vote of the 148 elected legislators.

Uncontested by the Governor, the “executive power” of Article V, Section 1 only grants the Governor the power to *administer* or *execute* the laws created by the constitutionally proscribed process commencing in the Legislature. Governor Whitmer correctly recognizes that no Michigan governor has the right to act without applicable enabling statutes. In this instance, two statutes—the *Emergency Management Act* (“EMA”), MCL 30.401 et seq, and the *Emergency Powers of Governor Act* (“EPGA”), MCL 10.31 et seq—serve as the entire legal basis for the Governor’s extraordinary exercise of unilateral executive fiat. Due to the non-extension of EMA powers by the Legislature, the Governor is now down to one statute, the EGPA.

By this lawsuit, Michigan United for Liberty screams foul on this executive order legal regime. Lawmaking is “legislative power.” *SBC Mich v PSC (In re Compl of Rovas)*, 482 Mich 90, 98; 754 NW2d 259 (2008). This includes making, altering, amending, and repealing laws. *Christie v Bd of Regents of Univ of Michigan*, 364 Mich 202, 216; 111 NW2d 30 (1961). Our Constitution is clear: a person from the executive branch cannot exercise powers properly belonging to the legislative branch. It is in black and white. Const 1963, art III, § 2. Even if the Legislature had intended to convey its lawmaking power to the executive branch in 1945 and 1976 for emergencies, it was constitutionally impossible to have done so because the prohibition clause of Article III, Section 2 only

authorizes exceptions “as expressly provided in this constitution.” Defendants fail to point to *any* constitutional provision. Why? Because there isn’t any.

So, the only legal two-stepping remaining for the Governor would be via a common-law created delegation. Our Supreme Court, contrary to the exceedingly plain language of Article III, Section 2<sup>1</sup>, has directed that this provision “does not mean” what it says in keeping “all three branches... completely separate, with no overlap of functions or powers.” *Judicial Attorneys Ass’n v Michigan*, 459 Mich 291, 296; 586 NW2d 894 (1998). Instead, a delegation of the exercise of tasks (not powers) can be undertaken ***IF*** “sufficient standards and safeguards” which both “direct” and “check” “the exercise of delegated power.” *Blue Cross & Blue Shield v Milliken*, 422 Mich 1, 51; 367 NW2d 1 (1985). That “if” is the basis of this case; the condition has not been met. This constitutional obligation is the “standards test.” *Westervelt v Natural Resources Comm’n*, 402 Mich 412, 439; 263 NW2d 564 (1978). The Court’s job is well-defined: “a court is to determine whether the legislation expressly contains or contains by reference “standards” which are “as reasonably precise as the subject matter requires or permits.” *Id.* at 440. This advises a sliding scale—the more tasks/authority delegated, the more defined the standards must be as to avoid a lack of “constitutional accountability.” *Id.* at 439. If the Legislature has placed a proper standard, the delegatee “cannot follow its own uncircumscribed will.” *Id.* at 441. Notwithstanding all that, Legislature “may not delegate or abdicate ‘law-making’ or ‘legislative’ power.” *Id.* at 440.

---

<sup>1</sup> The Supreme Court has provided that the Constitution does not mean what it says when concluding “while art 3, § 2, of the constitution provides for strict separation of power, this has not been interpreted to mean that the branches must be kept wholly separate.” *Soap & Detergent Ass’n v Natural Resources Comm’n*, 415 Mich 728, 751-752; 330 NW2d 346 (1982).

**II. Neither “emergency” statute meets this constitutional standard—but especially violative is the EPGA.**

When applying this “standards test” to the EPGA and the EMA, both come up short. Under the EPGA, the delegatee of the power (i.e. the governor) is authorized to “promulgate reasonable orders, rules, and regulations<sup>2</sup> as he or she considers necessary” and not what the Legislature as proscribed “to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1). This language clearly is not a sufficient limiting standard under *Westervelt* or *Blue Cross* but is actually an authorization of the “uncircumscribed will” of the Executive. This clearly fails the standards test.

The EPGA also provides that the orders, rules, and regulations “promulgate[d]” by the governor be “reasonable,” but then leaves it entirely to Governor Whitmer to self-decide, by her own uncircumscribed will in violation of *Westervelt* and *Blue Cross*, whether she is being “reasonable.” MCL 10.31(1). That too clearly fails the standards test.

The EMA is better drafted but is substantively no better. Declared states of disaster or emergency “shall continue until the governor finds that the threat or danger has passed, the [disaster or emergency] has been dealt with to the extent that [disaster or emergency] conditions no longer exist, or until the declared state of [disaster or emergency] has been in effect for 28 days.” MCL 30.403(3)-(4). There is no provided limiting standard to establish when the threat or danger has passed or been dealt with except upon the

---

<sup>2</sup> Interestingly here, the Governor has interpreted “reasonable orders, rules, and regulations” to mean the ability to amend statutes. That power of statutory amendment was never provided under the EPGA. We must assume it was not intended. *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712; 664 NW2d 193 (2003) (applying “the doctrine of *expressio unius est exclusio alterius*, the expression of one thing suggests the exclusion of all others”). If that was the intent of the Legislature, the statute is clearly unconstitutional.

“uncircumscribed will” of Governor Whitmer. The only legally delineated limit was the 28 days’ time period and Governor Whitmer blatantly ignored that limitation altogether. Clip of April 20, 2020 Press Conf, <<https://www.youtube.com/watch?v=RFK1fQJ5RN4>>. As such, the EMA violates the non-delegation doctrine “standards test” too.

**III. The statutes’ standards are not “reasonably precise as the subject matter requires.”**

In response to the *Application*, Defendants point out the standards must be “as reasonably precise as the subject matter requires or permits” citing *State Conserv. Dep’t v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976). MUFL agrees. Here, with the Executive exercising vast, immense, and colossal amounts of liberty-restricting powers on it and its members never before seen in our State’s nearly two century history, the applicable prescribed standard necessarily must be higher and more greatly defined—not less. Yet, Defendants incorrectly point to a far lower standard from an extremely minor subject-matter issue (see *Klammer v Dep’t of Transportation*, 141 Mich App 253, 262; 367 NW2d 78 (1985)<sup>3</sup>) to support the extraordinary invasion of government power or impingement on the liberties and freedoms of the members of Michigan United for Liberty and the 10 million person population of Michigan. It is true—as Defendants contend—that emergencies are inherently unpredictable. But that just means that the Legislature must provide a specified range of tasks that can be undertaken or otherwise setup an appropriate “check” of the exercise of powers under *Blue Cross*—something it has

---

<sup>3</sup> Under such a theory, a governor can keep an entire state population of nearly 10 million under self-created autocratic rule without real limits because a prior panel of this Court held that a retirement board may continue an “engineering aide” in government employment for such periods as the retirement board may determine to be “necessary.” The issues of this case are too great for the non-stare decisis holding (see *People v Green*, 260 Mich App 710, 720 fn5; 680 NW2d 477 (2004)) that *Klammer* is cited for by Defendants.

completely failed to do under the EPGA and insufficiently failed to do under the EMA.<sup>4</sup> Likelihood of success on the merits is easily established here under Article III, Section 2; *Westervelt*; and *Blue Cross*.

**IV. Substantial harm is self-evident and established as a matter of law.**

Defendants also incorrectly suggest that the members of Michigan United for Liberty are not suffering substantial harm under a unilateral executive branch operating by fiat which has curtailed vast enjoyed liberties and freedoms. The prohibitions are unprecedented. Our Constitution is not a grant of power but is a “limitation” upon those who exercise power. See *In re Brewster St Housing Site*, 291 Mich 313, 333; 289 NW 493 (1939). Yes, the Legislature in enacting emergency laws “can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States.” *Attorney General v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936). But delegating its power to the Executive, without sufficient standards and safeguards” to both “direct[] and check[] the exercise of delegated power,” is something the Legislative Branch is strictly prohibited from doing, *Blue Cross*, 422 Mich at 51, and the Governor is barred from utilizing it, Const 1963, Art III, § 2. The members of Michigan United for Liberty are directly constantly and currently suffering from the unconstitutional actions of Governor

---

<sup>4</sup> Undoubtedly, the State will argue “what is a governor to do in times of crisis when the current laws are believed to be ill-equipped to handle the emergency?” The Constitution, again, provides the answer. For “disasters occurring in this state caused by enemy attack on the United States,” the Legislature can take immediate steps. Const 1963, Art IV, § 39. For anything else, “the governor may convene the legislature on extraordinary occasions.” Const 1963, Art V, § 15. At this session, the governor can provide “information as to the affairs of the state and recommend measures he [or she] considers necessary or desirable.” Const 1963, Art V, § 17. If there is a concern about the safety of legislators, “the governor may convene the legislature at some other place when the seat of government becomes dangerous from any cause.” Const 1963, Art V, § 16. While in that session and with the approval of People’s representatives, the Legislature can enact any needed new laws or amend incompatible ones to aid in the response to the extraordinary occasion or crisis. Upon such passage, the governor must then “take care” that these new and amended laws “be faithfully executed.” Const 1963, Art V, § 8.

Whitmer, the unconstitutional delegation of authority to the Executive by the Legislature, and being denied representation by their elected representatives in the two houses of the Michigan Legislature. That is easily substantial harm which is irreparable for lack of any recognized damages remedy under the separation of powers clause (see *Jones v Powell*, 462 Mich 329, 335-337; 612 NW2d 423 (2000) and *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987)), while a "loss of a constitutional right," even if temporarily, "constitutes irreparable harm which cannot be adequately remedied by an action at law." *Garner v Mich State Univ*, 185 Mich App 750, 764; 462 NW2d 832 (1990).

As a final note, MUFL has attached the relevant portion of the transcript of a bench ruling on the hearing for a recent trial-level temporary restraining order on a similar set of improper executive orders within Illinois.<sup>5</sup> The parallels are uncanny. It highlights the absurdity of what is going unchecked and what improperly happens when one branch "rules" by unilateral fiat.

*THE COURT: Since the inception of this insanity, the following regulations, rules or consequences have occurred: I won't get COVID if I get an abortion but I will get COVID if I get a colonoscopy. Selling pot is essential but selling goods and services at a family owned business is not. Pot wasn't even legal and pot dispensaries didn't even exist in this state until five months ago and, in that five months, they have become essential but a family-owned business in existence for five generations is not.*

*A family of six can pile in their car and drive to Carlyle Lake without contracting COVID but, if they all get in the same boat, they will.*

*We are told that kids rarely contract the virus and sunlight kills it, but summer youth programs, sports programs are cancelled.*

---

<sup>5</sup> The current shutdown order, Executive Order No. 2020-96 which is available at [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-529860--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-529860--,00.html). The first one, Executive Order No. 2020-21, was issued March 24, 2020, which is available at [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-522626--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html)

*Four people can drive to the golf course and not get COVID but, if they play in a foursome, they will.*

*If I go to Walmart, I won't get COVID but, if I go to church, I will.*

*Murderers are released from custody while small business owners are threatened with arrest if they have the audacity to attempt to feed their families.*

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

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

*Our economy is shut down because of a flu virus with a 98 percent plus survival rate.*

*Doctors and experts say different things weekly. The defendant cites models in his opposition. The only thing experts will agree on is that all models are wrong and some are useful. The Centers for Disease Control now says the virus is not easily spread on surfaces.*

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

*When laws do not apply to those who make them, people are not being governed, they are being ruled.*

***Make no mistake, these executive orders are not laws. They are royal decrees.***

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

**Exhibit A, pp. 75-78.** We wholeheartedly agree and ask that this Court does too.

As the Plaintiff's counsel aptly noted in *Mainer*,

If the standard by which the court is being asked to rule on this matter is protecting the public and if that's the standard that courts across this state and nation will continue into the future, protecting the public at all costs no matter what the law says, what a world our children might find ourselves in when they're our age.

**Id. at 69.** That's the Executive's troubling and unsustainable position—protecting the public at all costs no matter what our Constitution requires. It is just flat wrong and it must be stopped. The Court is asked to immediately do so; reversal is required.

### RELIEF REQUESTED

The Court of Claims erred in not granting the preliminary injunction entitled to Plaintiff-Appellant Michigan United for Liberty. This Court is requested to immediately grant leave on this *Application*, reverse the lower court's erroneous decision, and remand with instructions for the Court of Claims to issue the preliminary injunction against the Governor. Yet our Constitution, *not fear*, guide our future just as it has successfully done in the past.

Date: May 27, 2020

RESPECTFULLY SUBMITTED

/s/ Philip L. Ellison  
OUTSIDE LEGAL COUNSEL PLC  
PHILIP L. ELLISON (P74117)  
Attorney for Plaintiff/Appellant  
PO Box 107  
Hemlock, MI 48626  
(989) 642-0055

/s/ Matthew E. Gronda  
MATTHEW E. GRONDA (P73693)  
Attorney for Plaintiff/Appellant  
PO Box 70  
St. Charles, MI 48655  
(989) 249-0350

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

3  
4 JAMES MAINER, in his individual )  
capacity and on behalf of all )  
5 citizens similarly situated, and )  
HCL DELUXE TAN, LLC, an Illinois )  
6 limited liability company, on )  
its behalf and on behalf of all )  
7 businesses similarly situated, )  
 )  
8 Plaintiffs, )  
 )  
9 vs. ) NO. 20-CH-10  
 )  
10 GOVERNOR JAY ROBERT PRITZKER, )  
in his official capacity, )  
11 )  
 )  
12 Defendant. )

13  
14 REPORT OF PROCEEDINGS of the hearing held  
15 before the Honorable MICHAEL D. MCHANEY on the 22nd day  
16 of May, 2020.

17 APPEARANCES: MR. THOMAS DeVORE  
18 MR. ERIK HYAM  
On behalf of the Plaintiffs  
19 MR. THOMAS VERTICCHIO  
on behalf of the Defendant  
20

21  
22 PREPARED BY: LORI SIMS  
23 Certified Shorthand Reporter  
24 No. 084-003424  
25



RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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 unequivocal 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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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.

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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.

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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.

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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.

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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.

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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.

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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.

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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,

RECEIVED by MCOA 5/27/2020 10:21:43 PM

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

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

RECEIVED by MCOA 5/27/2020 10:21:43 PM

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

RECEIVED by MCOA 5/27/2020 10:21:43 PM