

**April 29, 2020**

**ATTORNEY GENERAL KWAME RAOUL ISSUES STATEMENT ON OPENING BRIEF FILED IN 5TH DISTRICT APPELLATE COURT**

**Chicago** — Attorney General Kwame Raoul issued the following statement upon filing a [petition](#) and [opening brief](#) in Bailey v. Pritzker. The brief was filed today in the 5th District Appellate Court.

“Earlier this week, the 4th Judicial Circuit Court held that the threat to public safety that is posed by COVID-19 is outweighed by Mr. Bailey’s interest in not complying with the Governor’s stay-at-home order.

“We continue to assert that Mr. Bailey has failed to articulate the irreparable harm he is personally experiencing or how that harm outweighs the unprecedented threat to public health and safety. Using the authority of his office granted by the Illinois Constitution and the Illinois General Assembly, Gov. Pritzker has implemented emergency measures that have saved lives during a crisis that has cost Illinois so much. In fighting the threat to public safety, Gov. Pritzker has not exceeded his authority under the law by taking emergency action for longer than 30 days.

“There is no question that the COVID-19 pandemic has forever changed our state, and government must balance the critical need to save lives with the economic hardships being felt by residents throughout Illinois. Governors have historically renewed disaster declarations to meet the challenges of disasters that last longer than 30 days without objection, and a pandemic should be no different.

“I am asking the appellate court to address this mistaken circuit court decision now. In addition, I believe that it is paramount for the Illinois Supreme Court to take up this matter immediately because continued uncertainty surrounding this question will lead to additional actions — as we have seen today — that threaten the Governor’s ability to save lives.”

No. 5-20-\_\_\_\_\_

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH JUDICIAL DISTRICT

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DARREN BAILEY,	)	Interlocutory Appeal from the Circuit
	)	Court of the Fourth Judicial Circuit,
Plaintiff-Respondent,	)	Clay County, Illinois
	)	
v.	)	
	)	No. 2020CH6
GOVERNOR J.B. PRITZKER,	)	
in his official capacity,	)	The Honorable
	)	MICHAEL D. McHANEY,
Defendant-Petitioner.	)	Judge Presiding.

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**DEFENDANT’S RULE 307(d) PETITION FOR REVIEW OF  
TEMPORARY RESTRAINING ORDER**

Pursuant to Illinois Supreme Court Rule 307(d), Defendant-Petitioner Governor J.B. Pritzker requests that this court grant the petition and reverse and vacate the temporary restraining order (“TRO”) entered by the circuit court on April 27, 2020.

1. On March 9, 2020, the Governor proclaimed the COVID-19 pandemic a disaster in Illinois pursuant to his power under the Illinois Emergency Management Agency Act, 20 ILCS 3305/1 *et seq.* (“Act”), and the Illinois Constitution. SR2 ¶ 1; SR12. He then entered a series of executive orders designed to stop the spread of COVID-19 and enhance the availability of testing and treatment for the disease, including EO-2020-10, which directs individuals to remain at home except for essential activities. SR14-22. On April 1, 2020, the Governor issued a second disaster proclamation, recognizing that “circumstances

surrounding COVID-19 constitute a continuing public health emergency,” SR24, as well as EO-2020-18, which continued the stay-at-home directive, SR26-30. Because COVID-19 continues to infect individuals across the State, on April 23, 2020, the Governor announced his intention to issue another disaster proclamation and further extend the relevant stay-at-home directives for an additional 30 days, through May 30. SR4 ¶ 20.

2. On April 23, 2020, Plaintiff-Respondent Darren Bailey—a resident of Clay County, Illinois, and an elected member of the Illinois House of Representatives for the 109th District—filed suit in his personal capacity against the Governor. SR2. He sought a declaration that the Governor’s emergency powers lapsed 30 days after the initial disaster proclamation and an injunction preventing the Governor from enforcing the stay-at-home order against him. SR4-8. He then filed a motion for a TRO and preliminary injunction. SR37.

3. On April 27, 2020, the circuit court entered a TRO enjoining the Governor from “in anyway enforcing the March 20 Executive Order against Darren Bailey forcing him to isolate and quarantine in his home” and from “entering any further Executive Orders against Darren Bailey forcing him to isolate and quarantine in his home.” SR242; *see also* SR307-10. The court further held that the TRO “shall remain in full force and effect until a date to be agreed upon by the parties, not to exceed 30 days from [April 27, 2020], wherein a preliminary injunction will be heard on that date.” SR242.

4. On April 27, 2020, the Governor filed a timely notice of interlocutory appeal from that order. SR315.

5. This court should reverse and vacate the circuit court’s order of April 27, 2020, because Bailey did not satisfy the grounds to obtain a TRO. Specifically, Bailey failed to demonstrate a likelihood of success on the merits of his claims. Indeed, the basis of his lawsuit—that the Governor’s emergency powers lapsed 30 days after the Governor issued his initial proclamation—is wrong as a matter of law. The Act does not limit the number of disaster proclamations the Governor may issue. The only statutory requirement for such a proclamation is that a disaster “exists.” 20 ILCS 3305/7. And each proclamation triggers a new 30-day period under which the Governor may exercise emergency powers. *Id.* Alternatively, the Governor’s actions were a lawful exercise of his constitutional authority to protect the public health in an emergency.

6. The circuit court further erred in granting a TRO for several additional reasons: Bailey failed to show, as he was required to do, that he would suffer irreparable harm; any harm to him pales in comparison to the harm to the public and to the Governor; and the TRO disrupts, rather than preserves, the status quo. Indeed, the purported injury suffered by Bailey is extremely modest when compared to the significant harm the public will suffer if the Governor’s authority to enter the emergency orders is undercut by judicial order, and if Bailey and others cease compliance with those orders.

7. In support of this petition, the Governor submits and incorporates herein a memorandum in support.

WHEREFORE, Defendant-Petitioner Governor J.B. Pritzker asks that this court grant the petition, and reverse and vacate the TRO entered by the circuit court on April 27, 2020.

Respectfully submitted,

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No. 5-20-\_\_\_\_\_

IN THE  
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GOVERNOR J.B. PRITZKER,	)	
in his official capacity,	)	The Honorable
	)	MICHAEL D. McHANEY,
Defendant-Petitioner.	)	Judge Presiding.

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**PROPOSED ORDER**

THIS CAUSE COMING TO BE HEARD on petition of Defendant-Petitioner Governor J.B. Pritzker for relief under Illinois Supreme Court Rule 307(d), due notice having been given, and the Court being fully advised,

IT IS HEREBY ORDERED that that the petition is GRANTED / DENIED;  
and,

it is further ORDERED that the circuit court's April 27, 2020 temporary restraining order is REVERSED AND VACATED.

ENTER: \_\_\_\_\_  
JUSTICE

\_\_\_\_\_

JUSTICE

\_\_\_\_\_

JUSTICE

DATED: \_\_\_\_\_

SARAH HUNGER, Deputy Solicitor General  
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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 29, 2020, I electronically filed the foregoing **Defendant's Rule 307(d) Petition For Review Of Temporary Restraining Order** and accompanying **Proposed Order** with the Clerk of the Illinois Appellate Court, Fifth District, by using the Odyssey eFileIL system.

I further certify that the other participant in this appeal, named below, is not a registered service contact on the Odyssey eFileIL system, and thus was served by transmitting a copy from my e-mail address to the e-mail address of record indicated below on April 29, 2020.

Thomas G. DeVore  
tom@silverlakelaw.com

Under penalties, as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Sarah A. Hunger  
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Defendant-Petitioner.	)	Judge Presiding.

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**DEFENDANT’S MEMORANDUM IN SUPPORT OF RULE 307(d)  
PETITION FOR REVIEW OF TEMPORARY RESTRAINING ORDER**

Faced with the unprecedented and ongoing public health emergency created by COVID-19, Governor Pritzker exercised authority under the Illinois Emergency Management Agency Act, 20 ILCS 3305/1 *et seq.* (“Act”), and the Illinois Constitution to issue two emergency disaster proclamations and 29 executive orders to combat COVID-19 and protect residents throughout Illinois. Relevant here, two of those orders, EO-2020-10 issued March 20, 2020, and EO-2020-18 issued April 1, 2020, direct Illinois residents to remain at home except for essential activities. This community-based approach—which relies on short-term personal sacrifice for long-term greater good—is essential to slow the spread of COVID-19 and protect Illinois residents. By responding to this call, Illinoisans throughout the State have slowed the progression of the virus, protected our healthcare system from becoming overburdened, and saved lives.



Representative Bailey, however, obtained a personal exemption from these collective efforts based on the theory that the Governor cannot issue successive disaster proclamations under section 7 of the Act. But his request—besides being dangerous—is flawed as a matter of law. It rests on an erroneous reading of the Act and ignores the Governor’s independent authority under the Illinois Constitution to take the actions Bailey challenged. It also contradicts the longstanding practice by numerous governors of issuing multiple and often successive emergency disaster proclamations that have allowed them to continue exercising emergency powers for the duration of the disaster. The circuit court’s temporary restraining order (“TRO”), which is premised on Bailey’s faulty legal theory, should be vacated on this ground alone.

Furthermore, the TRO should be dissolved for the independent reason that it improperly disrupts the status quo and places undue weight on the personal harm to Bailey as compared with the immense public health crisis that will occur should Bailey and others cease compliance with the Governor’s orders.

## **BACKGROUND**

### **A. The COVID-19 Pandemic**

Since the World Health Organization (“WHO”) declared COVID-19 to be a global health emergency on January 30, 2020,<sup>1</sup> COVID-19 has continued to spread. The United States now has the most COVID-19 cases of any country—1,012,517 as

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<sup>1</sup> Derrick Bryson Taylor, *How The Coronavirus Pandemic Unfolded: A Timeline*, N.Y. Times, <https://www.nytimes.com/article/coronavirus-timeline.html>.

of April 28<sup>2</sup>—a number touching nearly every Illinois county, including Clay County, where Bailey resides.<sup>3</sup> Also, as of April 28, COVID-19 has infected 48,102 Illinois residents and killed 2,125.<sup>4</sup> Medical experts have cautioned that while measures such as social distancing have significantly slowed the virus’s spread, its threat has not passed.<sup>5</sup>

In many ways, Illinois’s sparsely populated counties, like Clay, are the most vulnerable to COVID-19 because rural areas lack the hospital infrastructure necessary to treat the overwhelming number of patients that could be infected, particularly absent aggressive measures.<sup>6</sup> While the infection rate has begun to decrease in some parts of the State, the life-or-death challenge for rural Illinois is just beginning. Next door to Clay, Jasper County suffers from one of the highest per capita rates in Illinois outside Chicago and its suburbs, and its number of cases has been nearly doubling every day.<sup>7</sup> Given these concerns, the Clay County Health

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<sup>2</sup> Hopkins University & Medicine, *Corona Virus Resource Center*, <https://coronavirus.jhu.edu/map.html>. All websites were last visited April 28, 2020.

<sup>3</sup> *Coronavirus (COVID-19) Resp.*, State of Illinois, <https://coronavirus.illinois.gov/s/>.

<sup>4</sup> *Id.*

<sup>5</sup> Nicole Chavez et al., *Fauci Says Coronavirus Hospitalizations are Dropping Because Social Distancing Is Working*, CNN, Apr. 9, 2020, <https://www.cnn.com/2020/04/09/health/us-coronavirus-thursday/index.html>.

<sup>6</sup> Jennifer Olsen, *Rural America Needs Help from the Rest of the Country to Face COVID-19*, Time (Apr. 23, 2020), <https://time.com/5825708/rural-america-covid-19-pandemic/s>

<sup>7</sup> Illinois Department of Public Health, *COVID-19 Statistics*, <http://dph.illinois.gov/covid19/covid19-statistics>; *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

Department recently warned that “[i]t is likely that the number of COVID-19 positive cases in Clay County will increase.”<sup>8</sup>

### **B. The Governor’s Emergency Powers**

The Act aims to “insure that this State will be prepared to and will adequately deal with any disasters, preserve the lives and property of the people of this State and protect the public peace, health, and safety in the event of a disaster[.]” 20 ILCS 3305/2(a). It defines “disaster” as a “an occurrence or threat of widespread or severe damage, injury or loss of life or property resulting from any natural or technological cause, including [an] epidemic . . . [and] public health emergencies.” *Id.* 3305/4. Under section 7, the Governor may proclaim that such a disaster “exists” and exercise his emergency powers under that proclamation for 30 days. *Id.* 3305/7. These powers include, among other things, authority to use “all available resources of the State government” and its political subdivisions, and “control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein.” *Id.*

The Act does not limit the number of proclamations that the Governor may issue for a single disaster. Past governors have issued multiple and often successive proclamations for the same disaster. In the last decade alone, Governors Quinn, Rauner, and Pritzker have issued such disaster proclamations: in 2009 to address the H1N1 virus; and in 2011, 2017, and 2019 in response to flooding. SR214-33. In fact, in May 2019, when Governor Pritzker issued a second flooding disaster

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<sup>8</sup> Clay County Health Department, <https://www.healthdept.org/>.

declaration, extending his emergency authority by 30 days, his efforts were celebrated by Bailey himself. SR235-37.

### **C. The Governor’s Response to the COVID-19 Pandemic**

On March 9, 2020, the Governor proclaimed the COVID-19 pandemic a disaster based on his section 7 power and his authority under the Illinois Constitution. SR2 ¶ 1; SR12. He then entered executive orders meant to stop the spread of COVID-19 and enhance the availability of testing and treatment. He closed restaurants to dine-in service, bars, and public and private schools; suspended nonessential business, evictions, and gatherings larger than 10 people; ordered social distancing in public places; and required residents to stay at home except for essential activities. SR14-22.<sup>9</sup>

Under the stay-at-home order, “individuals may leave their residence . . . to perform any” of the enumerated “Essential Activities,” including travel for health and safety needs, personal or family supplies and services, outdoor activities, and to transport others relating to those activities. SR15-16 ¶ 5. As an elected official, Bailey is a “governmental employee,” and when working as such is “categorically exempt from” the Executive Orders. SR17-18 ¶¶ 10, 12.

The order was initially set to expire on April 7, 2020. SR14. Because the pandemic persisted, on April 1, the Governor took two steps to extend the order. First, he issued a second disaster proclamation, recognizing that “circumstances

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<sup>9</sup> See also Executive Order Nos. 2020-05 ,2020-07, 2020-10, available at <https://www2.illinois.gov/sites/coronavirus/Resources/Pages/ExecutiveOrders.aspx>.

surrounding COVID-19 constitute a continuing public health emergency under Section 4 of the [Act].” SR24. Second, he issued Executive Order 2020-18, which extended the stay-at-home provisions of Executive Order 2020-10 through April 30, 2020. SR26-30. COVID-19, however, continues to infect individuals across the State, and is not expected to peak in Illinois until early May.<sup>10</sup> Thus, on April 23, the Governor stated his intention to issue another disaster proclamation and further extend the stay-at-home order for an additional 30 days, through May. SR4 ¶ 20.

The Governor’s use of his continued authority has enabled him to take other critical measures beyond issuing a stay-at-home order. For example, by proclaiming a disaster and executing an emergency plan, the State was able to apply for and receive significant federal funds, 44 C.F.R. § 206.35(c)(1), which will be at risk if Illinois is no longer under a disaster proclamation. Similarly, the disaster proclamation allowed the State to access the Disaster Response and Recovery Fund. *See* 15 ILCS 30/0.01 *et seq.* The disaster proclamation enabled the Governor to suspend provisions of the Illinois Procurement Code that would have put the State at a competitive disadvantage in purchasing necessary materials, including masks, ventilators, and testing supplies, and would have seriously delayed the arrival of those emergency purchases. 20 ILCS 3305/7(1). And the

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<sup>10</sup> Joe Mahr, *Illinois officials say the state is hitting its COVID-19 peak — and that’s actually good news*, Chi. Tribune (Apr. 24, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-illinois-governor-projection-20200424-wd2bk4r4fbajxsjzbzwcgdz2fiu-story.html>.

disaster proclamation allowed the Governor to “prohibit increases in the prices of goods and services,” *id.* 3305/7(14), build overflow capacity for hospital beds, *id.* 3305/7(4), and call on the National Guard for assistance, *id.* 3305/7(13). All of these actions rely on the Governor’s authority to proclaim that COVID-19 continues to constitute a disaster.

#### **D. Procedural History**

Bailey, a Clay County resident, SR5 ¶ 23, is an elected member of the Illinois House of Representatives. On April 23, 2020, he filed this action in his personal capacity. SR2. He sought a declaration that the Governor’s emergency powers lapsed 30 days after the initial disaster proclamation and an injunction prohibiting enforcement of the stay-at-home order against him. SR4-8. He also sought a TRO and preliminary injunction. SR37.

After briefing and a hearing, the circuit court entered a TRO enjoining the Governor from “in anyway enforcing the March 20 Executive Order against Darren Bailey forcing him to isolate and quarantine in his home” and from “entering any further Executive Orders against Darren Bailey forcing him to isolate and quarantine in his home.” SR242; *see also* SR307-10. The court further held that the TRO “shall remain in full force and effect until a date to be agreed upon by the parties, not to exceed 30 days from [April 27, 2020], wherein a preliminary injunction will be heard on that date.” SR242.

## DISCUSSION

### I. A TRO Is An Extraordinary Remedy Designed To Preserve The Status Quo.

“A temporary restraining order is an emergency remedy issued to maintain the status quo while the court is hearing evidence to determine whether a preliminary injunction should issue.” *Delgado v. Bd. of Election Comm’rs*, 224 Ill. 2d 481, 483 (2007). To obtain relief, a plaintiff must establish (1) a protected right, (2) irreparable harm if injunctive relief is not granted, (3) an alternative remedy would be inadequate, and (4) a likelihood of success on the merits. *Jacob v. C & M Video, Inc.*, 248 Ill. App. 3d 654, 664 (5th Dist. 1993). The balance of hardships must also weigh in favor an injunction. *S. Ill. Med. Bus. Assocs. v. Camillo*, 190 Ill. App. 3d 664, 672 (5th Dist. 1989). When balancing these equities, courts “should also consider the effect of the injunction on the public.” *Kalbfleisch ex rel. Kalbfleisch v. Columbia Cmty. Unit Sch. No. 4*, 396 Ill. App. 3d 1105, 1119 (5th Dist. 2009).

In general, a circuit court’s decision to grant a TRO is reviewed for abuse of discretion. *AFSCME v. Ryan*, 332 Ill. App. 3d 965, 967 (1st Dist. 2002). But *de novo* review applies to aspects of the appeal that present questions of law. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 63 (2006). The merits questions presented here are matters of statutory and constitutional interpretation, which are questions of law subject to *de novo* review. *Gregg v. Rauner*, 2018 IL 122802 ¶ 23; *Hayashi v. Ill. Dep’t of Fin. & Prof’l Reg.*, 2014 IL 116023 ¶ 16.

## **II. Bailey Failed To Show That He Is Likely To Succeed On The Merits.**

The circuit court erred in granting Bailey a TRO because the basis of his case—that the Governor’s emergency powers lapsed 30 days after the Governor issued his initial proclamation—is wrong as a matter of law.

### **A. The Governor’s Disaster Proclamations And Ongoing Exercise Of Emergency Powers Are Valid Under Section 7.**

The primary objective of statutory interpretation “is to ascertain and give effect to the legislature’s intent.” *Whitaker v. Wedbush Secs., Inc.*, 2020 IL 124792 ¶ 16 (citations omitted). “The most reliable indicator of legislative intent is the statutory language.” *Id.* Section 7 grants the Governor the authority to declare that a “disaster exists” in certain circumstances, including during a public health emergency or epidemic. 20 ILCS 3305/7. If the Governor determines that a disaster exists and issues a disaster proclamation, he may exercise “emergency powers” for a 30-day period thereafter; specifically: “[u]pon such proclamation, the Governor shall have and may exercise for a period not to exceed 30 days the following emergency powers[.]” *Id.* The plain text of section 7 contains no limitation on the number of proclamations the Governor may issue to address a particular disaster. On the contrary, section 7 establishes a single criterion necessary: that a disaster “exists.”

Here, the Governor concluded that a disaster existed on March 9, and issued his first proclamation. SR2 ¶ 1; SR12. On April 1, in issuing a second proclamation, the Governor concluded that a disaster still existed. SR24. By issuing proclamations on those dates, the Governor properly exercised the



“emergency powers” conferred by section 7 for “a period not to exceed 30 days” after each issuance. 20 ILCS 3305/7.

Nonetheless, Bailey argued—and the circuit court agreed—that the Governor has acted unlawfully because the 30-day period is triggered by the disaster’s initial date. That is belied by the Act’s plain text, which ties the period to the issuance of a proclamation (not the disaster). *Id.* Nor does allowing successive disaster proclamations “render the 30-day limitation meaningless.” SR36 ¶ 37. The 30-day limitation requires the Governor to make the periodic determination that a “disaster” still in fact “exists.” 20 ILCS 3305/7. The Governor has not purported to exercise emergency powers indefinitely; he has issued disaster proclamations for 30-day periods. But if the factual circumstances change—as every Illinoisan hopes they will—the Governor may no longer be able to reasonably conclude that a disaster still exists. At that point, the Governor’s emergency powers would expire 30 days after issuance of the most recent disaster proclamation.

Several other sections of the Act confirm that the circuit court’s reading was flawed. Like section 7, section 3—which outlines the Act’s limitations—contains no restrictions on the Governor’s authority to issue more than one proclamation per disaster. 20 ILCS 3305/3. By contrast, section 11(a), which authorizes local officials to declare disasters in their areas and exercise emergency powers for short periods, expressly provides that the declaration of local disaster “*shall not be continued or renewed* for a period in excess of 7 days except by or with the consent of the governing board of the political subdivision.” *Id.* 3305/11(a) (emphasis added).

Thus, when the General Assembly wanted to require legislative approval for a renewal or extension of emergency powers, it explicitly said so.

And in two other sections, the General Assembly granted itself an express oversight role. *Id.* 3305/6, 3305/9 (specifying that the General Assembly must be involved in certain aspects of emergency management). The fact that the General Assembly did not do the same in section 7 demonstrates that it intended to grant the Governor the authority to issue disaster proclamations and use his emergency powers without the limitations suggested by Bailey.

Furthermore, accepting the conclusion that the Governor's emergency powers lapsed on April 8 would produce unjust and harmful results contrary to the Act's stated purpose. The theory that the Governor is permitted only a single, 30-day proclamation per disaster, if applied more broadly, threatens to nullify the emergency actions the Governor has taken since April 8. *Id.* Accepting Bailey's argument means COVID-19 would once again begin its exponential spread throughout the State, resulting in the inevitable loss of many lives. That cannot be the result the General Assembly intended.

Finally, although the General Assembly has amended the Act at least 11 times—most recently in 2018—it has not added any language to stop Illinois governors from maintaining their practice of issuing multiple or successive disaster proclamations when the disaster continues to exist.<sup>11</sup> Nor has the General

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<sup>11</sup> See P.A. 88-606; P.A. 92-73; P.A. 94-733; P.A. 98-465; P.A. 98-756; P.A. 99-36; P.A. 100-508; P.A. 100-444; P.A. 100-587; P.A. 100-863; P.A. 100-1179.

Assembly convened in recent weeks to pass legislation indicating that the Governor has acted outside of his lawful authority. On the contrary, as a result of the COVID-19 crisis, the General Assembly has cancelled its previously cancelled sessions.

The interpretation of a statute by the “agency charged with enforcement” of it—here, our governors—“is entitled to great weight.” *Pielet Bros. Trading v. Pollution Control Bd.*, 110 Ill. App. 3d 752, 756 (5th Dist. 1982). And “[s]uch a construction is even more persuasive if consistent, long-continued, and in conjunction with legislative acquiescence on the subject.” *Id.* “Such acquiescence appears where the legislature, presumably aware of the administrative interpretation in question, has amended other sections of the act since that interpretation but left untouched the sections subject to the administrative interpretation in question.” *Id.* This precisely describes the circumstances here. The longstanding practice of Illinois Governors—who have regularly renewed disaster proclamations under the Act with the General Assembly’s knowledge and acquiescence—confirms that the circuit court here was legally wrong.

**B. The Governor’s Continuing Exercise of Emergency Powers Is Independently Valid Under the Illinois Constitution.**

Even if the Act did not give the Governor statutory authority to act as he did, Bailey has no likelihood of success on the merits because the Governor has independent, inherent authority under the Illinois Constitution to protect the public health in a crisis. Our Constitution vests in the Governor the State’s “supreme executive power.” Ill. Const. art. V, § 8. And in the extraordinary circumstances

now prevailing in the State, the Governor’s constitutional authority allows him to take immediate measures necessary to protect the public health, particularly when the General Assembly has not convened because of the very crisis that needs to be addressed. Indeed, in the Act itself, the General Assembly recognized that the Governor’s authority under the Act was in addition to his independent authority “under the constitution, statutes, or common law of this State.” 20 ILCS 3305/3(d).

The State has long possessed police power “to preserve the public health,” which includes the power “to pass and enforce quarantine, health, and inspection laws to prevent the introduction of disease.” *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 427 (1922). Illinois courts have refrained from interfering with this power “except where the regulations adopted for the protection of the public health are arbitrary, oppressive and unreasonable.” *Id.*

Regarding the Executive Branch specifically, Justice Story, writing for a unanimous Supreme Court, recognized that “[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, . . . to act on a sudden emergency . . . by summary measures, which are not found in the text of the laws.” *The Apollon*, 22 U.S. (9 Wheat.) 362, 366-67 (1824) (Story, J.). Our Constitution is written in broad outlines, *People v. Lawton*, 212 Ill. 2d 285, 301 (2004), and its provision giving the Governor the State’s “supreme executive power,” Ill. Const. art. V, § 8, must be interpreted in view of “the purpose[s] sought to be accomplished,” *Wolfson v. Avery*, 6 Ill. 2d 78, 88–89 (1955), chief among which are “to provide for the health, safety and welfare of the people,” Ill. Const., preamble.

Critically, the General Assembly did not *prohibit* the Governor from taking the actions that Bailey challenged. Bailey argued that the authority given to the Governor by section 7 of the Act lapsed on April 8, SR34, not that the Act *affirmatively prohibits* the Governor from taking action apart from that 30-day grant of authority. And, as noted, the Act explicitly states that the power it confers on the Governor is in *addition to*, not *exclusive of*, the Governor’s other legal powers, including his power “under the constitution.” 20 ILCS 3305/3(d). Thus, the Governor’s independent constitutional powers are fully intact. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

In short, if the General Assembly has not given the Governor sufficient statutory authority to fulfill the State’s paramount responsibility to protect public health and safety in the face of the current crisis—which has led the General Assembly to cancel previously scheduled sessions—his inherent constitutional power must of necessity supply that authority. Otherwise, the State would be paralyzed at the very time when fulfilling its founding purpose is most urgently needed.

### **III. Bailey Did Not Establish That His Alleged Injury Outweighs The Harm To The Governor And The Public.**

Merits aside, the circuit court erred in granting a TRO because Bailey did not show that he would “suffer greater harm without the injunction” than the Governor and the public would suffer if it issued. *Gannett Outdoor of Chi. v. Baise*, 163 Ill. App. 3d 717, 724 (1987). The failure is critical because the purpose of preliminary injunctive relief is to “prevent a threatened wrong or continuing injury and preserve

the status quo with the least injury to the parties concerned.” *In re Marriage of Jawad*, 326 Ill. App. 3d 141, 154 (2d Dist. 2001). “Accordingly, even when a plaintiff can raise a fair probability about the likelihood of success and the plaintiff probably will continue to endure irreparable harm, denying injunctive relief may still be appropriate to preserve the status quo.” *Guns Save Life, Inc. v. Raoul*, 2019 IL App (4th) 190334 ¶ 68, appeal denied, No. 125633, 2020 WL 1488364 (Ill. 2020).

Any injury suffered by Bailey is minimal when compared to the significant public harm if the Governor’s authority to issue the emergency orders is undercut by judicial order. On Bailey’s side, although he claims that the stay-at-home directive limits his constitutionally protected freedoms, he does not identify any specific harm he has incurred because of it. His employment activities are not restricted—he is “categorically exempt” from the stay-at-home directive when performing his role as an elected official. SR17-18 ¶¶ 10, 12. As for his personal travel, any hardships associated with staying at home except for health and safety, for necessary supplies and services, for outdoor activity, for work, and to take care of others pale in comparison to the illness and death that would ensue if Bailey were permitted to upend the State’s emergency response.

Indeed, as detailed above, the public health consequences from the order the circuit court entered could be devastating. Even if the circuit court’s order has no legal or practical effect beyond Bailey, the public health risks would still far outweigh the harm to Bailey associated with staying at home. Because COVID-19 is a highly contagious virus that can be spread by asymptomatic persons, a single

infected individual could unknowingly spread the virus to many members of his community in a short period.<sup>12</sup> If Bailey is or becomes infected, he could cause an outbreak in his community that would ultimately overwhelm local hospitals and inflict unnecessarily pain and suffering. *Supra* p. 3. Similar scenarios have played out across the country.<sup>13</sup>

But as a practical matter, the harm caused by the circuit court’s order will not be limited to Bailey and those he could infect. The effectiveness of the COVID-19 response is dependent on every person deciding to sacrifice individual desires for the greater good. Illinois residents have met this challenge with resolve, and, as a result, the number of infections and deaths is far fewer than would have otherwise occurred.<sup>14</sup> But orders like the circuit court’s inject uncertainty into the need to comply with the Governor’s directives. Such a disruption could undo much of the progress already made. In fact, relaxing restrictions now could trigger a second

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<sup>12</sup> Sigal Samual, “How you can keep thousands of people from getting coronavirus, in one GIF,” Vox (Mar. 26, 2020), <https://www.vox.com/future-perfect/2020/3/26/21193851/coronavirus-covid-19-staying-home-social-distancing>.

<sup>13</sup> *See, e.g.*, Ellen Barry, *Days After a Funeral in a Georgia Town, Coronavirus ‘Hit Like a Bomb’*, N.Y. Times, Mar. 30, 2020, <https://www.nytimes.com/2020/03/30/us/coronavirus-funeral-albany-georgia.html> (after two funerals in rural Georgia county, coronavirus “tor[e] through” town to make “one of the most intense clusters of the coronavirus in the country”); Farah Stockman & Kim Barker, *How a Premier U.S. Drug Company Became a Virus ‘Super Spreader’*, N.Y. Times, Apr. 12, 2020, <https://www.nytimes.com/2020/04/12/us/coronavirus-biogen-boston-superspreader.html> (company’s leadership meeting spread virus to six states, D.C., and three countries).

<sup>14</sup> *See, e.g.*, *Gov. Pritzker Announces Modified Stay at Home Order Will Be Extended Through May to Continue Progress* (Apr. 23, 2020), <https://www2.illinois.gov/Pages/news-item.aspx?ReleaseID=21459>.

wave of infections and deaths. And, under Bailey's interpretation of the law, the Governor would be powerless to respond to it. A second spike in infections and deaths would likewise have a disastrous effect on efforts to resume normal economic activity.

Furthermore, other Illinois residents are following Bailey's lead and seeking their own judicial exemption from the Governor's stay-at-home order.<sup>15</sup> If courts comply, the effectiveness of Illinois's response to COVID-19 will be significantly diminished and place those who do not have the luxury of staying at home—including medical professionals and other essential workers—in harm's way. In addition, if a court holds that the Governor cannot proclaim that a disaster continues to exist, he will lose emergency authority under the Act, which has allowed him to take such measures as preventing evictions for residential tenants and small businesses, preventing price gouging for critical supplies, and maintaining social distancing. *See supra* p. 5. Moreover, without a disaster proclamation, the State risks losing its federal disaster funding, may be unable to procure vital supplies, and will be prevented from using emergency powers to work closely with hospitals to ensure that they are prepared for increases in critically ill patients. *See supra* pp. 6-7.

Finally, the circuit court's order should be reversed for the independent reason that it failed to account for the disruption of the status quo and reliance

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<sup>15</sup> *See, e.g.*, Complaint, *Cabello v. Pritzker*, No. 2020 CH 0000210 (17th Judicial Circuit, Circuit Ct., Winnebago Cty., Apr. 29, 2020); Complaint, *James Thompson v. Pritzker*, No. 20-CV-2853 (N.D. Ill. Apr. 29, 2020).



interests involved. When the Governor acted weeks ago, no one challenged it. In fact, numerous elected officials have publicly commended the Governor's actions.<sup>16</sup> And, as noted, the legislature—acknowledging the reality of the emergency situation—has canceled previously scheduled sessions. Similarly, the judicial branch has relied on the Governor's exercise of his emergency powers to, among other things, continue trials. Prudence thus counseled against pulling the rug out from under the Governor's recent orders where they were being relied on by so many public and private actors. Illinoisans have been working together to prevent the sickness and death of our families, friends, and neighbors, our health care workers and emergency responders, and the vulnerable among us. The circuit court's TRO threatens our collective efforts and puts the lives of our fellow Illinoisans at great risk.

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<sup>16</sup> See, e.g., *Statement from Illinois House Republican Leader Jim Durkin on 'Stay At Home' Extension and Order Changes*, Apr. 23, 2020, <https://repdurkin.com/statement-from-illinois-house-republican-leader-jim-durkin-on-stay-at-home-extension-and-order-changes/>; Ryan Denham, *Sen. Brady: Key To Restarting Economy Is More COVID-19 Testing*, WGLT.org, Mar. 27, 2020, <https://www.wglt.org/post/sen-brady-key-restarting-economy-more-covid-19-testing#stream/0>.

## CONCLUSION

Defendant-Petitioner Governor Pritzker requests that this court grant the petition, reverse and vacate the circuit court's entry of a temporary restraining order, and grant any other relief deemed appropriate.

Respectfully submitted,

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April 29, 2020

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 29, 2020, I electronically filed the foregoing **Defendant's Memorandum In Support Of Rule 307(d) Petition For Review Of Temporary Restraining Order** with the Clerk of the Illinois Appellate Court, Fifth District, by using the Odyssey eFileIL system.

I further certify that the other participant in this appeal, named below, is not a registered service contact on the Odyssey eFileIL system, and thus was served by transmitting a copy from my e-mail address to the e-mail address of record indicated below on April 29, 2020.

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Under penalties, as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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