



2-20-0623

E-FILED
Transaction ID: 2-20-0623
File Date: 11/4/2020 3:54 PM
Jeffrey H. Kaplan, Clerk of the Court
APPELLATE COURT 2ND DISTRICT

No. 2-20-0623, 02-20-0627

**IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT**

FOX FIRE TAVERN, LLC, d/b/a FoxFire, an Illinois Limited Liability Company,

Plaintiff-Appellee,

v.

GOVERNOR JAY ROBERT PRITZKER, in his official capacity,
the ILLINOIS DEPARTMENT OF PUBLIC HEALTH, and
THE KANE COUNTY HEALTH DEPARTMENT,

Defendants-Appellants.

Appeal from the Circuit Court for the
Sixteenth Judicial Circuit, Kane County, Illinois,
No. 20 CH 000348
The Honorable Kevin T. Busch, Judge Presiding.

**BRIEF OF *AMICI CURIAE* ILLINOIS RESTAURANT ASSOCIATION AND
RESTAURANT LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLEE**

Gabriel K. Gillett
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
ggillett@jenner.com

Counsel for Amici Curiae

POINTS AND AUTHORITIES

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

 20 ILCS 3305/7..... 4

ARGUMENT 5

I. The Restaurant Industry Is Critical To The Illinois Economy And Faces Unprecedented Hardship..... 5

 A. Restaurants Drive Millions In Revenue And Employ Hundreds Of Thousands Across The State, But Are Now Fighting to Survive..... 5

 Nat’l Restaurant Ass’n, *Factbook: 2020 State of the Restaurant Industry* (Feb. 2020)..... 5, 6

 Nat’l Restaurant Ass’n, *Illinois Restaurant Industry at a Glance* (2019)..... 5

 Press Release, *Mayor Emanuel and The James Beard Foundation Announce 2015 James Beard Awards Will Be Held In Chicago* (2015)..... 5

LMP Servs., Inc. v. City of Chicago, 2019 IL 123123 (2019) 6

 Americas Soc’y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015) 6

 Nat’l Restaurant Ass’n, *COVID-19 Update: The Restaurant Industry Impact Survey* (Apr. 20, 2020) 6, 7

 Danny Klein, *It Will Take Years for the Restaurant Industry to Recover*, FSR MAGAZINE (June 2020) 7

 Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, REST. BUS. (June 11, 2020)..... 7

 Nat’l Restaurant Ass’n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020) 8

 Official Statement, Sam Toia, President and CEO, Illinois Restaurant Ass’n (Oct. 21, 2020)..... 8

B. Restaurants Have Risen To The Occasion, Adapting Their Business Models And Adopting Countless Measures To Operate Safely Indoors.....	9
Phil Vettel & Adam Lukach, <i>Chicago Restaurants Spent Thousands on Air Filtration and Other Safety Measures for Indoor Dining—Only to be Left Out in the Cold</i> , CHI. TRIB. (Oct. 29, 2020)	10
Centers for Disease Control and Prevention, <i>Daily Checklist for Managers of Restaurants and Bars</i> (June 27, 2020).....	11
Sarah Freishtat, <i>Gov. Pritzker tied COVID-19 cases to restaurants and bars in Kane, DuPage counties. Local health department data is unclear.</i> , CHI. TRIB. (Oct. 28, 2020).....	11
Tom Arnold & Mariah Woelfel, <i>Gov. JB Pritzker Suspends Indoor Dining In Chicago As COVID-19 Surges, But Mayor Lori Lightfoot Questions Decision</i> , WBEZ (Oct. 27, 2020).....	11
II. The Decision Below Should Be Affirmed And Benefit Restaurateurs Statewide.....	12
A. The Legislature Expressly Granted The Governor Emergency Powers “For A Period Not To Exceed 30 Days.”	12
20 ILCS 3305/7.....	12
Office of the Governor, <i>Gov. Pritzker Issues Disaster Proclamation to Build on State’s COVID-19 Response, Unlock Additional Federal Resources</i> (March 9, 2020)	13
NY Bill No. A09953 (Mar. 2, 2020).....	13
<i>Ready v. United/Goedecke Servs., Inc.</i> , 232 Ill. 2d 369 (2008)	13
<i>Virginia Uranium, Inc. v. Warren</i> , 139 S. Ct. 1894 (2019).....	14
Timothy Eggert and Sarah Mansur, <i>Clay Co. judge overrules Pritzker’s emergency orders</i> , CHICAGO L. BULL. (July 2, 2020).....	14
<i>Droste v. Kerner</i> , 217 N.E.2d 73 (Ill. 1966)	14
<i>People v. Bywater</i> , 861 N.E.2d 989 (Ill. 2006).....	14

B. Permitting The Governor To Issue Successive Disaster Declarations Beyond 30 Days Raises Serious Constitutional Concerns.....	14
<i>Clark v. Martinez</i> , 543 U.S. 371 (2005).....	14
<i>Alexander v. Dir., Dep’t of Agric.</i> , 111 Ill. App. 3d 927 (3d Dist. 1983).....	15
<i>Clinton v. City of New York</i> , 524 U.S. 417 (1998).....	15
<i>Collins v. Bd. of Trs. of Firemen’s Annuity & Benefit Fund of Chicago</i> , 155 Ill. 2d 103 (1993)	15
U.S. Const. amend. XIV, § 1	15
Ill Const. 1970, art. 1, § 2	15
C. The Executive Orders Are Invalid As To Restaurants Statewide.....	16
<i>Ill. Health Maint. Org. Guar. Ass’n v. Dep’t of Ins.</i> , 372 Ill. App. 3d 24 (1st Dist. 2007)	16
<i>Vill. of Northbrook v. Cannon</i> , 61 Ill. App. 3d 315 (1st Dist. 1978)	16
CONCLUSION.....	17

INTEREST OF *AMICI CURIAE*¹

Amicus the Illinois Restaurant Association (“IRA” or the “Association”) is a non-profit trade organization founded over one hundred years ago to promote, educate, and improve the restaurant industry in Illinois. Headquartered in Chicago, the Association has nearly 8,000 members statewide—including restaurant operators, food service professionals, suppliers, and related industry professionals—and represents the Illinois restaurant industry that includes more than 25,000 restaurant owners and operators, and has employed nearly 600,000 workers across the state. The Association supports the restaurant industry by promoting local tourism, providing food service education and training programs, providing analysis on topics of the day, providing networking opportunities, hosting culinary events, and advocating for its members’ interests.

Amicus the Restaurant Law Center (the “Law Center”) is a public policy organization affiliated with the National Restaurant Association, the world’s largest foodservice trade association. The industry is comprised of over one million restaurants and other foodservice outlets employing over fifteen million people. Restaurants and other foodservice providers are the nation’s second-largest private-sector employers. The Law Center provides courts with the industry’s perspective on legal issues significantly impacting it and highlights the potential industry-wide consequences of pending cases like this one, through regular participation in *amicus* briefs on behalf of the industry.

¹ *Amici* certify that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money intended to fund preparation or submission of this brief, and no person other than *Amici* and their counsel contributed money intended to fund preparation or submission of the brief.

Amici represent a broad and diverse group of restaurant owners and operators in Illinois. They comprise a diverse cross section of the state's legendary restaurant industry: from large national outfits with hundreds of locations and millions in revenue, to small single-location, family-run neighborhood restaurants and bars; from independently owned fine dining establishments to fast-casual franchises. Together, *amici's* members are the lifeblood of the state and are vital to its economy and culture. Collectively, *amici's* members contribute billions of dollars in annual revenue to the Illinois economy and have employed hundreds of thousands in good jobs across the state. *Amici* have a paramount interest in this case, which has wide-ranging implications for the restaurant and hospitality industry.

The number one priority of the restaurant industry is to provide a safe and healthy environment for guests and employees. The industry has faithfully and diligently followed applicable guidelines, and, where necessary, adapted their business models and adopted countless new measures to ensure that diners and workers remains safe. *Amici* stand ready to continue to collaborate with federal, state, and local authorities, as they have for months, to address the extremely challenging circumstances of these times.

A blanket ban on indoor dining is the wrong approach. That is especially true now, when so many restaurants are struggling to survive after investing millions to stay open, as outdoor dining becomes impossible, and without government aid forthcoming. *Amici* therefore submit this brief to encourage the Court to affirm the decision below and to provide additional context as the Court considers this case. In particular, *amici* write to highlight the critical importance of the restaurant and hospitality industry in Illinois; the dire economic challenges the industry is currently facing—including as a result of the

shutdown orders that have harmed their businesses; and why it is absolutely critical to the survival of the restaurant industry to allow restaurants across the state to continue to operate their businesses safely and serve guests indoors. In addition, *amici* hope this brief encourages stakeholders across the state, including the Governor and other officials, to develop a more reasonable and pragmatic approach that protects the livelihood of restaurant industry workers and restaurateurs across Illinois.

SUMMARY OF ARGUMENT

To complement the arguments made by Plaintiff-Appellee, *amici* write separately to highlight why the decision below should be affirmed, and the very real and very harmful consequences for the restaurant industry if the decision below is reversed.

Illinois restaurants are in a moment of complete crisis. Without judicial relief, all Illinois restaurants will be closed down for indoor service. For the vast majority of these restaurants, that means they will no longer be able to sustain their operations, even though they have done everything asked of them and more. Where possible, restaurants have even adapted their operations and physically altered their premises to serve customers safely. Restaurants that close are unlikely to *ever* open again. We will have permanently lost countless of the treasured places and spaces that make this state so great.

At a time when thousands of restaurant and hospitality businesses have been forced to shutter—regretfully putting hundreds of thousands of their employees out of work—every level of government should be working together to protect this important industry. Since March, *amici* and their members have worked with Government leaders to develop and implement workable responses and restrictions to address these challenging times. Restaurant operators and their employees are masking, sanitizing, and cleaning. Where

possible, they have expanded outdoor dining. Some are testing and tracking, too. They have invested millions in new materials, new technologies, and new products to ensure they continue to safely serve customers in the unique setting of indoor dining. The restaurant industry has done everything that has been asked and more. Yet it faces another shutdown—this time without the necessary government aid to keep its workers employed and its businesses afloat, and without the ability to shift operations outside.

Against this backdrop, *amici* respectfully urge the Governor to adjust his approach and work collaboratively with the industry. Instead, the Governor has gone beyond the authority the Legislature conferred—which grants him emergency powers “for a period not to exceed 30 days,” 20 ILCS 3305/7—and imposed an illegal blanket order that closes indoor dining at all restaurants statewide regardless of the circumstances. Affirming the decision below will not only reaffirm the importance of separation of powers and respect the Legislature’s authority, but also direct the path forward that works for all stakeholders.

Amici cannot overemphasize the importance of the outcome of this case to their members. By allowing restaurants to continue to operate safely indoors, this Court can help ensure that restaurants across the state can survive and continue to safely serve customers, employ workers, and help our state through these unprecedented times. By reversing the decision below, however, this Court will leave thousands of restaurants, as well as their employees and customers, out in the cold with no prospect for relief. *Amici* urge this Court to affirm.

ARGUMENT

I. The Restaurant Industry Is Critical To The Illinois Economy And Faces Unprecedented Hardship.

A. Restaurants Drive Millions In Revenue And Employ Hundreds Of Thousands Across The State, But Are Now Fighting To Survive.

The restaurant and foodservice industry is the lifeblood of the Illinois economy. In 2019, the industry accounted for an estimated \$32 billion dollars of sales across nearly 26,000 locations in Illinois.² In 2019, the restaurant industry was also the largest private sector employer in the state, employing close to 600,000 people—ten percent of Illinois’s workforce. Over the next decade, that number is expected to grow by seven percent.³

Consumer spending at restaurants has a multiplier effect too. Every dollar spent at table-service restaurants—the businesses most threatened by the ban on indoor dining—returns \$1.93 to the state’s economy, not to mention the positive impact on the state’s tax revenue.⁴ A single restaurant can support the livelihood of dozens of employees, suppliers, purveyors, and related businesses like hotels.

Restaurants have even become a source of tourism in Illinois. The “ability to attract and grow businesses, create thriving communities, and lure more than 48 million tourists a year [is] a testament to the diversity and quality of Chicago’s incredible restaurants.”⁵

Restaurants are crucial to their communities and comprise an essential part of the fabric of

² Nat’l Restaurant Ass’n, *Factbook: 2020 State of the Restaurant Industry* 7 (Feb. 2020).

³ Nat’l Restaurant Ass’n, *Illinois Restaurant Industry at a Glance* (2019), <https://restaurant.org/downloads/pdfs/state-statistics/illinois.pdf>.

⁴ *Id.*

⁵ Press Release, *Mayor Emanuel and The James Beard Foundation Announce 2015 James Beard Awards Will Be Held In Chicago* (2015), <https://jbf-media.s3.amazonaws.com/archive/jbf-2013/blog/files/JBFA-Chicago-May-20.pdf>.

this state. That is particularly true of the many small restaurants—often family- or immigrant-owned—that make up the vast majority of the industry.⁶ Restaurants “bring stability to the neighborhoods in which they are located.” *LMP Servs., Inc. v. City of Chicago*, 2019 IL 123123, ¶18 (2019). Restaurants “pay property taxes and have a vested interest in seeing that their neighborhoods continue to grow and thrive so that their own businesses will flourish.” *Id.* Small, local restaurants “are a vibrant part of the community and bring a long-term sense of cohesiveness and identity to the area.” *Id.*

The restaurant industry remains a shining example of upward mobility. Eight in ten restaurant owners say their first job in the industry was an entry-level position. Even more restaurant managers say the same. And restaurants are a source of opportunity with more minority managers and women managers than any other industry. Restaurants also provide opportunity for immigrants to the United States—not only for employment, but also business ownership.⁷

Today, the industry is more at risk than ever before. Restaurants have suffered catastrophic financial losses and faced unprecedented challenges. As of April, over eight million restaurant employees nationally—nearly two thirds of the restaurant workforce—had been laid off or furloughed.⁸ By May, almost 40% of all restaurants across the country

⁶ Nat’l Restaurant Association, *2020 State of the Restaurant Industry Factbook*, <https://www.restaurant.org/downloads/pdfs/research/soi/2020-state-of-the-industry-factbook.pdf>.

⁷ Americas Soc’y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015), <https://www.as-coa.org/sites/default/files/ImmigrantBusinessReport.pdf>.

⁸ Nat’l Restaurant Ass’n, *COVID-19 Update: The Restaurant Industry Impact Survey* (Apr. 20, 2020), <https://www.restaurant.org/downloads/pdfs/business/covid19-info-graphic-impact-survey.pdf>.

were shuttered, and the industry lost over \$80 billion in sales.⁹ Economists predict those numbers will only continue to rise, and the industry will have sustained almost \$250 billion in lost revenues by year-end.¹⁰

Illinois has not been spared. After close to eight months of scrambling to make ends meet, most Illinois restaurants are in significant debt and unable to pay their bills. Under the Governor's orders, all Illinois restaurants will be forced to cease indoor dining. For most of those restaurants, this means they will no longer be able to operate—and will close *permanently*. Though much has been made about options such as takeout, delivery, and curbside pickup, for most restaurants those alternatives provide only a small fraction of normal revenue and can only sustain a small fraction of normal operations. So too with outdoor dining, which is exceedingly difficult if not physically impossible in many places, and is not practical during the winter.

Illinois restaurants are in a moment of crisis. A majority of Illinois restaurateurs say it is unlikely their restaurants will be in business six months from now if business continues at current levels. Conservatively, researchers estimate 20% of restaurants will close nationwide.¹¹ In Illinois alone, that would mean approximately 120,000 people out of work. The numbers for independent restaurants are even more dire.¹² Even those restaurants that

⁹ *Id.*

¹⁰ *Id.*

¹¹ Danny Klein, *It Will Take Years for the Restaurant Industry to Recover*, FSR MAGAZINE (June 2020), <https://www.fsrmagazine.com/consumer-trends/it-will-take-years-restaurant-industry-recover>.

¹² Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, REST. BUS. (June 11, 2020), <https://www.restaurantbusinessonline.com/financing/report-85-independent-restaurants-could-close-due-pandemic>.

remain open will be forced to lay off dedicated team members whose livelihoods depend on guests dining on-site. As winter rapidly approaches, indoor dining is a crucial lifeline for restaurant owners, operators, employees, and customers.

The restaurant industry is teetering on the edge of a cliff. When forced to shut down in March, some of the damage was blunted by unprecedented government aid and by expanding outdoor operations. But now, outdoor dining is all but over and meaningful support to stay in business and pay employees is not coming from the state or federal government. Without aid, and without the ability to continue serving customers either indoors or outdoors, restaurants will be out of options and out of business.

As the National Restaurant Association put it, “the future for restaurants across the country is a lot more uncertain because Congress has walked away without passing the relief needed to survive the winter.”¹³ “Virtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains.”¹⁴ The same is true in Illinois. The Governor’s order comes at the same time the state has left restaurants with insufficient support. “The funding opportunities currently available from the state of Illinois are only helping the smallest fraction of restaurant operations.”¹⁵ The state could “provide grants, waive licensing and permitting fees and delay tax payments.”¹⁶ Yet the state has not done nearly enough.

¹³ Nat’l Restaurant Ass’n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020), <https://restaurant.org/news/pressroom/press-releases/association-statement-on-congressional-recess-with>.

¹⁴ *Id.*

¹⁵ Official Statement, Sam Toia, President and CEO, Ill. Rest. Ass’n (Oct. 21, 2020).

¹⁶ *Id.*

The restaurant industry and Government must work together to craft workable solutions to address the pressing challenges we all face.¹⁷ Restaurants are merely asking the Governor to work collaboratively to support the industry and come up with a way to allow restaurants to continue what they have been doing for months—providing first-class service in a safe setting to the people who want to enjoy the restaurant experience in person. Restaurants are asking for a fighting chance. The future of restaurants as we know them—and the hundreds of thousands of employees and millions of customers they support—depends on it.

B. Restaurants Have Risen To The Occasion, Adapting Their Business Models And Adopting Countless Measures To Operate Safely Indoors.

Faced with these very challenging times, restaurants and hospitality companies have been doing their level best to respond reasonably and appropriately to executive orders and the most up-to-date scientific evidence. Throughout, the paramount focus of the industry has been the safety of their employees, customers, and communities.

When executive shutdown orders initially issued in mid-March, restaurants adapted as best they could given these unprecedented circumstances and suffering millions in lost revenue as a result of the physical loss and damage the orders caused. Some restaurants created carry-out and delivery businesses where they did not have them before, despite the fact that takeout, delivery, and curbside pickup equate to only a small fraction of normal revenue for a typical restaurant. Others drastically expanded that service, installing extra

¹⁷ The need for a lifeline from government is especially important now, when insurance companies have categorically and unreasonably denied coverage under “all risk” commercial insurance policies for business interruption caused by restaurants’ physical spaces being detrimentally altered and rendered non-functional for their intended purposes.

windows or rearranging indoor spaces and furniture to create pick-up areas for customers and delivery personnel, also mounting physical barriers, partitions, and signage to direct traffic flow and keep people properly distanced. Still other restaurants opted to remain closed, reasonably concluding that they could not operate under their circumstances.

When permitted to resume limited capacity outdoor dining, restaurants rose to the occasion again. Many removed tables and chairs to limit capacity and allow for social distancing. Some even converted sections of parking lots or nearby streets into outdoor seating areas, or expanded outdoor operations where possible. Faced with unprecedented challenges, the industry's owners, operators, and employees lived up to their well-deserved reputation of creativity and flexibility in devising ways to safely serve customers and provide best-in-class service to their communities.

In addition, restaurants have made remarkable strides to ensure that dining indoors is as safe as possible. This has included mandating that, among other things, all customers who dine-in and carry out always wear masks unless seated and eating. Many restaurants have also started recording guests' contact information for possible contact tracing efforts later. Restaurants have implemented rigorous sanitization measures with an emphasis on constant handwashing, cleaning, and disinfection of the restaurant, as well as educating employees to stay home if they are sick and testing staff regularly. Even more, some restaurants have made significant investments to install medical-grade air filters, ultraviolet lights to sanitize, and to purchase large quantities of PPE for customers and employees alike.¹⁸ These measures go beyond the recommendations for restaurants by the Centers for

¹⁸ Phil Vettel & Adam Lukach, *Chicago Restaurants Spent Thousands on Air Filtration and Other Safety Measures for Indoor Dining—Only to be Left Out in the Cold*, CHI. TRIB. (Oct. 29, 2020).

Disease Control and Prevention.¹⁹

In spite of the industry’s efforts to undertake these measures to provide safe indoor service, the restaurant industry has been unfairly targeted for additional shutdowns. *Amici* believe in science and support efforts to gather data to guide how to best respond to the continuing challenges facing our communities. But existing data and statistics, which are unreliable and inconsistent, do not support shutting down restaurants.²⁰ Chicago Mayor Lori Lightfoot has expressed concern about implementing new restrictions. “If the governor’s order goes into effect,” she explained, “it’s really effectively shutting down a significant portion of our economy, at a time when those same businesses are really hanging on by a thread.”²¹

Through it all, each restaurant has done its best to serve customers and employees. Even if not every restaurant is able to operate indoors due to their unique circumstances, that does not justify forcing every restaurant to close. Whatever each individual restaurant owner’s reasonable decision about how to respond, one thing is clear: there is no scientific data-driven reason to impose a blanket categorical bar on indoor dining at precisely the time that the restaurant industry is meeting the need to provide such services in a safe manner to the benefit of its customers and employees who need their jobs.

¹⁹ Centers for Disease Control and Prevention, *Daily Checklist for Managers of Restaurants and Bars* (June 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/COVID-Restaurant-Bar-manager-checklist.pdf>.

²⁰ See, e.g., Sarah Freishtat, *Gov. Pritzker tied COVID-19 cases to restaurants and bars in Kane, DuPage counties. Local health department data is unclear.*, CHI. TRIB. (Oct. 28, 2020). *Amici* have repeatedly asked for complete information but have been repeatedly rebuffed.

²¹ Tom Arnold & Mariah Woelfel, *Gov. JB Pritzker Suspends Indoor Dining In Chicago As COVID-19 Surges, But Mayor Lori Lightfoot Questions Decision*, WBEZ (Oct. 27, 2020).

II. The Decision Below Should Be Affirmed And Benefit Restaurateurs Statewide.

The Circuit Court correctly enjoined enforcement of Executive Order 2020-61 as it relates to allowing restaurants to continue to serve customers safely indoors. The Court concluded that under the Illinois Emergency Management Act (IEMAA), the Governor cannot issue successive disaster proclamations. Moreover, the court found the equities favored enjoining enforcement of the Executive Order because of the harm that would result from its implementation. That decision is correct.

A. The Legislature Expressly Granted The Governor Emergency Powers “For A Period Not To Exceed 30 Days.”

First, the decision below is faithful to the plain text of the IEMAA. The Act provides that “[i]n the event of a disaster . . . the Governor shall have and may exercise [emergency powers] for a period not to exceed 30 days.” 20 ILCS 3305/7. The Legislature did not include any exceptions to its clear temporal limit on the Governor’s authority to act in the case of an emergency. Nor did the Legislature authorize the Governor to extend an emergency beyond the prescribed 30-day limit in special cases, if the disaster continued beyond 30 days, or if some facts related to the disaster changed. In short, the Legislature made clear that after a disaster, the Governor has 30 days—and not more than 30 days—to use the emergency powers granted to him by the Legislature or secure some additional legislative authorization.

Here, the Governor has gone beyond the authority the Legislature conferred. On March 9, 2020, the Governor issued a proclamation declaring a disaster and invoking his

powers under the IEMAA.²² But when the legislatively authorized 30-day period ended, the Governor continued to exercise his emergency authority by issuing nine successive emergency declarations for more than 225 consecutive days.

In those subsequent declarations, the Governor invoked the IMEAA as the legal authority to continue to exercise the emergency powers. But the IMEAA does not provide any such authority. The statute provides that the Governor shall exercise his emergency powers “for a period not to exceed 30 days,” without exceptions if the disaster continues beyond 30 days or where aspects of the disaster change over time. And, the Legislature (unlike other states) has not sought to amend the IMEAA—which it certainly could have done during the 30-day period allowed by statute, or the many months since—to provide authority for the Governor to reset, change, or extend that unambiguous 30-day window.²³ This Court must respect that decision and “give effect to the intent of the legislature.” *Ready v. United/Goedecke Servs., Inc.*, 232 Ill. 2d 369, 375 (2008).

To justify issuing one disaster declaration after another in perpetuity, the Governor’s brief notes that “the General Assembly has amended IEMAA at least 11 times and never added any language to stop governors” from successive proclamations. Petitioner’s Memorandum in Support at 12. When it comes to statutory interpretation, it is the court’s duty “to respect not only what [the Legislature] wrote but, as importantly, what it didn’t write.” *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019). The

²² Office of the Governor, *Gov. Pritzker Issues Disaster Proclamation to Build on State’s COVID-19 Response, Unlock Additional Federal Resources*, ILLINOIS.GOV (March 9, 2020), <https://www2.illinois.gov/Pages/news-item.aspx?ReleaseID=21220>.

²³ See, e.g., NY Bill No. A09953 (Mar. 2, 2020) (permitting the governor to “issue by executive order any directive necessary to respond to a state disaster emergency”).

Legislature here, despite ample opportunity, did not expressly write the statute to allow the Governor to issue successive proclamations—not even after a judge held the Governor lacked such authority months ago.²⁴ Because the Legislature did not write such a provision into the statute, or give the Governor other authority, the court cannot do so itself.

Asking this court to introduce a provision “not found in a statute” amounts to asking the court impermissibly “to inject provisions” into the IEMAA, which it cannot do, “however desirable or beneficial they may be.” *Droste v. Kerner*, 217 N.E.2d 73, 79 (Ill. 1966); *see also People v. Bywater*, 861 N.E.2d 989, 994 (Ill. 2006) (noting that statutory interpretation “is not a tool to be utilized by courts attempting to remedy apparent oversights by rewriting statutes in ways that contravene their clear and unambiguous language.”). It is the province of the Legislature to make that policy judgment, not this Court. Crossing that line by reading the IEMAA as implicitly authorizing the Governor to extend the 30-day limit on his exercise of emergency power would not only conflict with the plain text of the statute, but would also impermissibly engraft a new term onto the statute that the Legislature did not see fit to include.

B. Permitting The Governor To Issue Successive Disaster Declarations Beyond 30 Days Raises Serious Constitutional Concerns.

In addition, reading the statute to permit the executive to issue successive emergency declarations—thereby circumventing the express 30-day limit—would raise serious constitutional concerns that this Court should endeavor to avoid. *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Deeply rooted separation of powers principles hold that, under

²⁴ Timothy Eggert and Sarah Mansur, *Clay Co. judge overrules Pritzker’s emergency orders*, CHICAGO L. BULL. (July 2, 2020), <https://www.chicagolawbulletin.com/judge-finds-gov-pritzker-s-executive-orders-are-unconstitutional-20200702>.

the non-delegation doctrine, the “[t]he General Assembly cannot delegate its general legislative power” to the executive. *Alexander v. Dir., Dep’t of Agric.*, 111 Ill. App. 3d 927, 932 (3d Dist. 1983).

Here, allowing the Governor to issue successive declarations would blur the lines between the legislature and the executive branch and risk upsetting the careful balance enshrined in the Illinois Constitution. That balance must be respected, even where the legislature and executive have the best of intentions in shifting power among themselves. *See Clinton v. City of N.Y.*, 524 U.S. 417 (1998).

If the IEMAA were construed as allowing the Governor to issue successive emergency declarations, then the 30-day limit that the Legislature placed on the Governor’s emergency authority—a limit imposed for the very purpose of enforcing separation of powers and ensuring that state emergencies remain *limited* exceptions to that fundamental separation—would effectively be nullified. This would contravene the cardinal principle of statutory construction: “no word or paragraph should be interpreted so as to be rendered meaningless.” *Collins v. Bd. of Trs. of Firemen’s Annuity & Benefit Fund of Chicago*, 155 Ill. 2d 103, 111 (1993). More fundamentally, it would violate the non-delegation principle by allowing the Governor to usurp—indefinitely—the lawmaking power that is the exclusive province of the Legislature.²⁵

²⁵ Especially now that the Governor’s orders have statewide effect, targeting restaurants also violates due process and equal protection, as existing data does not provide a rational basis for arbitrarily and unfairly singling out the industry, especially after operators invested millions to stay open and as outdoor dining becomes untenable. *See* U.S. Const. amend. XIV, § 1; Ill Const. 1970, art. 1, § 2.

C. The Executive Orders Are Invalid As To Restaurants Statewide.

If this Court affirms, as it should, all similarly situated restaurants across the state of Illinois should reap the benefit without having to take independent legal action.

“Collateral estoppel is an equitable doctrine that precludes a party from relitigating an issue decided in a prior proceeding.” *Ill. Health Maint. Org. Guar. Ass’n v. Dep’t of Ins.*, 372 Ill. App. 3d 24, 34 (1st Dist. 2007). As Illinois courts make clear, the central purpose of collateral estoppel is to promote fairness and judicial economy by avoiding the relitigation of identical issues. *Id.* In Illinois, collateral estoppel may apply to the government. *See Vill. of Northbrook v. Cannon*, 61 Ill. App. 3d 315, 322 (1st Dist. 1978). Thus, if the decision below is affirmed here, that decision should be entitled to collateral estoppel effect elsewhere. In other words, if the executive orders are unenforceable as to Fox Fire, they are unenforceable as to all restaurants.

Even without collateral estoppel, courts across this state should treat the decision below as persuasive. The facts and law here are the same as elsewhere across the state: all restaurants have been forced to shut down under the same invalid executive orders, and they are all struggling to survive. If the Governor’s orders exceed his lawful authority as to Fox Fire, they exceed that authority as to every other restaurant as well. To force each restaurant to independently re-litigate the issues, and make the same legal arguments, would violate core principles of fairness and judicial economy. And it would be particularly cruel here, where restaurants in the state would be required to expend precious time and money in court rather than focusing on serving their customers, employees, and communities. For all of these reasons, a favorable decision for Fox Fire should apply with equal force to the other similarly situated restaurants across in Illinois.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to affirm the judgment below.

Dated: November 4, 2020

Respectfully submitted,

/s/ Gabriel K. Gillett

Gabriel K. Gillett
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
ggillett@jenner.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 345(b) and 307(d). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 4,493 words.

Dated: November 4, 2020

/s/ Gabriel K. Gillett

Gabriel K. Gillett
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
ggillett@jenner.com

Counsel for Amici Curiae



2-20-0623

No. 2-20-0623, 02-20-0627

E-FILED
Transaction ID: 2-20-0623
File Date: 11/4/2020 3:54 PM
Jeffrey H. Kaplan, Clerk of the Court
APPELLATE COURT 2ND DISTRICT

**IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT**

FOX FIRE TAVERN, LLC, d/b/a FoxFire, an Illinois Limited Liability Company,

Plaintiff-Appellee,

v.

GOVERNOR JAY ROBERT PRITZKER, in his official capacity,
the ILLINOIS DEPARTMENT OF PUBLIC HEALTH, and
THE KANE COUNTY HEALTH DEPARTMENT,

Defendants-Appellants.

NOTICE OF FILING

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on November 4, 2020, I caused the foregoing **Brief *Amici Curiae* In Support Of Plaintiff-Appellee** to be electronically submitted with the Clerk of the Illinois Appellate Court, Second Judicial District by using the Odyssey eFileIL system.

November 4, 2020

Respectfully Submitted,

/s/ Gabriel K. Gillett

Gabriel K. Gillett
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
ggillett@jenner.com

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, certify, that on November 4, 2020, I caused the foregoing **Brief *Amici Curiae In Support Of Plaintiff-Appellee*** to be submitted to the Clerk of the Illinois Appellate Court, Second Judicial District by using the Odyssey eFileIL system. Pursuant to Second District Local Rule 101, and upon acceptance of the electronic brief for filing, I certify that I will cause five copies of the file-stamped **Brief of *Amici Curiae In Support Of Plaintiff-Appellee*** to be transmitted to the Court via UPS overnight delivery, postage prepaid within 5 days of that notice date.

I further certify that on November 4, 2020, I caused one copy of the above-named motion and brief to be served upon counsel of record listed below via electronic mail to the following:

Kevin L. Nelson
Myers, Earl & Nelson, P.C.
17 North Sixth Street
Geneva, Illinois 60134
(630) 208-0300
Attorney No. 20086
Kevin@menlawoffice.com
Counsel for Plaintiff-Appellee

Erin Brady
Kane County State's Attorney
37W777 Route 38, Suite 300
St. Charles, IL 60175
(630) 232-3500
BradyErin@co.kane.il.us
Counsel for Defendant-Appellants

Thomas Verticchio
Sarah Hunger
Jonathan Sheffield
Evan Siegel
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, IL 60601
(312) 814-3000
TVerticchio@atg.state.il.us
SHunger@atg.state.il.us
JSheffield@atg.state.il.us
ESiegel@atg.state.il.us
Counsel for Defendant-Appellants

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Gabriel K. Gillett
Gabriel K. Gillett
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
ggillett@jenner.com

Counsel for Amici Curiae