

No. _____

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 SUPREME COURT CLERK

IN THE
 SUPREME COURT OF ILLINOIS

DARREN BAILEY,)	Motion for Direct Appeal Under
	)	Illinois Supreme Court Rule 302(b)
Plaintiff-Respondent,	)	and/or Supervisory Order under
	)	Illinois Supreme Court Rule 383
and)	
)	
THE HONORABLE JUDGE	)	On Appeal from the Circuit Court
MICHAEL D. McHANEY,	)	for the Fourth Judicial Circuit,
	)	Clay County, Illinois, No. 2020 CH
Respondent,	)	6, to the Appellate Court of Illinois,
	)	Fifth Judicial District, No. 5-20-
v.	)	0148
)	
GOVERNOR JAY ROBERT)	
PRITZKER, in his official capacity,	)	The Honorable
	)	MICHAEL D. McHANEY,
Defendant-Petitioner.	)	Judge Presiding.

**PETITIONER’S EMERGENCY MOTION FOR DIRECT APPEAL UNDER
 ILLINOIS SUPREME COURT RULE 302(b) AND/OR SUPERVISORY
 ORDER UNDER ILLINOIS SUPREME COURT RULE 383**

Petitioner J.B. Pritzker, in his official capacity as Governor of the State of Illinois, requests leave under Illinois Supreme Court Rule 302(b) for a direct appeal to this Court and/or supervisory relief under Illinois Supreme Court Rule 383 in this case, which involves the important question of the Governor’s authority to manage the COVID-19 crisis. The circuit court entered a temporary restraining order (“TRO”) that prevents the Governor from enforcing or entering any executive order against Respondent Darren Bailey “forcing him to isolate and quarantine in

his home.” SR 243.¹

As detailed below, the Governor exercised his authority under the Illinois Emergency Management Agency Act (“Act”), 20 ILCS 3305/1, *et seq.* (2018), and the Illinois Constitution to issue two proclamations recognizing that a COVID-19 disaster exists and to enter 29 executive orders to combat the spread of COVID-19 and protect people throughout Illinois. The circuit court’s TRO rested on the erroneous conclusion that the Governor’s emergency powers lapsed 30 days after the first proclamation. Because COVID-19 has killed over 2,000 Illinois residents and continues to infect more, and because the circuit court’s ruling threatens the Governor’s authority to protect the public from the virus, the public interest requires an expeditious and definitive determination of this appeal by this Court.

Accordingly, the Governor requests that this Court permit a direct appeal in this case under Rule 302(b). Alternately, the Governor requests that this Court exercise its supervisory authority under Rule 383 to summarily reverse the circuit court’s TRO. Under either scenario, given the urgency of the COVID-19 crisis and the accompanying need for a prompt resolution of the scope of the Governor’s authority to protect Illinois and its residents from the virus, the Governor requests that this Court either expedite briefing and resolution of this motion or stay enforcement of the TRO and further circuit court proceedings pending resolution of this motion.

¹ The three-volume supporting record filed with this motion is cited as SR____.

BACKGROUND

A. The COVID-19 Pandemic

Since the World Health Organization declared the outbreak of COVID-19 to be a global health emergency on January 30, 2020,² COVID-19 has continued to spread worldwide. The United States has, by far, the most COVID-19 cases of any country: 1,013,168 cases as of April 29, 2020.³ Medical experts have cautioned that while measures such as social distancing have significantly slowed the spread of COVID-19 in the United States, the threat of the virus has not passed.⁴ Rather, social distancing has reduced the number of expected deaths from COVID-19 over the next few months from around 200,000 to 60,000.⁵

COVID-19 has spread to nearly every county in Illinois, including Clay County, where Bailey resides.⁶ The crisis remains full-blown. As of April 29, 2020,

² Derrick Bryson Taylor, *How the Coronavirus Pandemic Unfolded: A Timeline*, N.Y. Times, Apr. 28, 2020, <https://www.nytimes.com/article/coronavirus-timeline.html>. Unless otherwise noted, all hyperlinks were last visited April 29, 2020.

³ *Coronavirus Resource Center*, John Hopkins Univ. & Med., <https://coronavirus.jhu.edu/map.html> (updated Apr. 29, 2020).

⁴ 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>.

⁵ Dan Keemahill et al., *Fauci Lowers U.S. Coronavirus Death Forecast to 60,000, Saying Social Distancing is Working*, MSN News, Apr. 10, 2020, <https://www.msn.com/en-us/news/politics/fauci-lowers-us-coronavirus-death-forecast-to-60000-says-social-distancing-is-working/ar-BB12oHEl>.

⁶ *Coronavirus (COVID-19) Resp.*, State of Ill., <https://coronavirus.illinois.gov/s/> (updated Apr. 29, 2020).

COVID-19 had infected 50,355 Illinois residents and killed 2,215.⁷ And on April 28, 2020, the day after Bailey received a TRO, 144 people died from COVID-19: the highest daily toll yet.⁸ Further, in many ways, Illinois's sparsely populated counties, like Clay County, are the most vulnerable to COVID-19 because rural areas lack the hospital infrastructure necessary to treat the overwhelming number of patients that have been and could be infected, particularly if no aggressive measures are taken.⁹ And, while the COVID-19 infection rate has begun to decrease in some parts of the State, the life-or-death challenge for rural Illinois is only just beginning. In fact, Jasper County, next door to Clay County, suffers from one of the highest per capita infection rates in Illinois outside Chicago and its suburbs, and its number of confirmed cases has been nearly doubling every day.¹⁰ Given these concerns, the Clay County Health Department recommends that residents stay at home and recently warned that "[i]t is likely that the number of

⁷ *Id.*

⁸ Tina Sfondeles, *Record-high 144 People Die in Illinois From COVID-19 as State Toll Surpasses 2,000*, Chicago Sun Times, Apr. 28, 2020, <https://chicago.suntimes.com/coronavirus/2020/4/28/21240216/illinois-pritzker-coronavirus-cases-deaths-high-april-28>.

⁹ 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/>; Eric Scigliano, *'It Really Is the Perfect Storm': Coronavirus Comes for Rural America*, Politico, Apr. 15, 2020, <https://www.politico.com/news/magazine/2020/04/15/coronavirus-rural-america-covid-19-186031>.

¹⁰ *COVID-19 Statistics*, Ill. Dep't. Pub. Health, <http://dph.illinois.gov/covid19/covid19-statistics> (updated Apr. 28, 2020); *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (updated Apr. 29, 2020).

COVID-19 positive cases in Clay County will increase as testing becomes more available and as the virus makes its way into our community.”¹¹

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) (2018). The Act defines a “disaster” as “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.” 20 ILCS 3305/4 (2018). Under Section 7 of the Act, the Governor may proclaim that such a disaster exists and then exercise his emergency powers for a period of 30 days. 20 ILCS 3305/7 (2018). These powers include, among other things, authority to use “all available resources of the State government” and its political subdivisions, and to “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. In fact, under the Act, Illinois governors have issued multiple and often successive proclamations regarding the same disaster. Over the last decade, Governors Quinn, Rauner, and Pritzker have issued such disaster proclamations: in 2009 to address the H1N1 virus; and in 2011, 2017, and 2019 to

¹¹ Clay Cty. Health Dep’t., <https://www.healthdept.org/>.

respond to flooding. SR 214-33. In May 2019, when Governor Pritzker issued a second flooding disaster declaration, extending his emergency authority by 30 days, Bailey himself celebrated these efforts. SR 237.

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

On March 9, 2020, the Governor proclaimed the COVID-19 pandemic a disaster in Illinois pursuant to his power under Section 7 of the Act. SR 10-13. 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. Because the pandemic persisted, on April 1, 2020, the Governor issued a second disaster proclamation, recognizing that “circumstances surrounding COVID-19 constitute a continuing public health emergency under Section 4 of the [Act].” SR 23-25.

The Governor’s authority to proclaim successive disasters, as many Illinois governors have done before him, has enabled him to protect the health and lives of Illinois residents as the pandemic persists. For example, by proclaiming a disaster and then executing an emergency plan, the State was able to apply for and receive significant federal funds, *see* 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 (2018). Additionally, the disaster proclamation enabled the Governor to suspend provisions of the Illinois Procurement Code that, if in place, would both put the State at a significant competitive disadvantage to other States in purchasing critically necessary materials (such as ventilators, personal protective equipment

for healthcare workers and testing supplies) and make it impossible to receive these materials and supplies in time to make a difference in the response effort. And the disaster proclamation also allowed the Governor to “prohibit increases in the prices of goods and services,” 20 ILCS 3305/7(14) (2018), build overflow capacity for additional hospital beds, 20 ILCS 3305/7(4) (2018), and rely on the Illinois National Guard for assistance, 20 ILCS 3305/7(13) (2018).

To date, the Governor has issued 29 Executive Orders responding to various aspects of the emergency — including closing schools, waiving liability for health care workers and volunteers, ceasing evictions for residential and non-residential properties, expanding telehealth access, altering notary and witness guidelines to allow critical life decisions to be finalized in a time of social distancing, and more.¹² Although Bailey’s theory would seemingly void all actions that the State is able to take when there exists a disaster proclamation, he focuses on just one aspect of the Governor’s emergency response — referred to as the “stay-at-home” order. Issued on March 20, 2020, as part of Executive Order 2020-10, and extended through Executive Order 2020-18 to April 30, 2020, that order permits Illinoisans, including Bailey, to leave their homes for health and safety purposes, for necessary supplies and services, for outdoor activity, for certain types of work, and to take care of others, but asks them otherwise to stay at home to slow the spread of COVID-19.

SR 14-22.

¹² See Exec. Orders Nos. 2020-3 to 2020-31, *available at* <https://www2.illinois.gov/sites/coronavirus/Resources/Pages/ExecutiveOrders.aspx>.

Since the start of the COVID-19 crisis in Illinois, the Governor has held daily press briefings and issued frequent press releases.¹³ In these briefings, the Governor has described the public health data on which he is relying as he takes steps to slow the spread of COVID-19 and ensure that our health care system will have the capacity to treat patients needing care. That data includes extensive modeling to analyze and show the impact of the stay-at-home order. The State's modeling shows that without the initiation of the stay-at-home order in March, deaths would be roughly 14 times higher; and that lifting the stay-at-home order would increase deaths exponentially — to the point that the more than 2,000 current total deaths could be a daily occurrence.¹⁴ The modeling likewise shows that the State will stay under its ventilator, ICU bed, and hospital bed capacity with the stay-at-home order in place, but would far exceed that capacity if there were no stay-at-home order, or if it were lifted.¹⁵

Because the threat of the virus has not passed, and because the stay-at-home order has proven a critical safeguard in protecting Illinois residents, on April 23, 2020, the Governor announced his intention to issue another disaster proclamation and further extend the stay-at-home directive through May 30, 2020.¹⁶

¹³ See Office of Governor, Newsroom, <https://www2.illinois.gov/sites/gov/newsroom/Pages/default.aspx> (videos of press conferences).

¹⁴ Office of the Governor, *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>.

¹⁵ Ill. Dep't of Pub. Health, *COVID-19 Hospital Resource Utilization*, <https://www.dph.illinois.gov/covid19/hospitalization-utilization> (updated Apr. 26, 2020).

¹⁶ *Gov. Pritzker Announces*, *supra* note 14.

D. Procedural History

Bailey is a resident of Clay County, Illinois, SR 5, and an elected member of the Illinois House of Representatives for the 109th District. On April 23, 2020, he filed suit in his personal capacity against the Governor. SR 2. He sought a declaration that the Governor’s emergency powers “lapsed” after April 8, 2020, and an injunction preventing the Governor from enforcing the March 20, 2020 stay-at-home order against him. SR 6-8. He then filed a motion for a TRO and preliminary injunction. SR 37-40.

On April 27, 2020, after briefing by both parties 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.” SR 243. The court also enjoined the governor from issuing further executive orders to this effect regarding Bailey. *Id.* That same day, the Governor filed an interlocutory appeal under Rule 307(d) to the Illinois Appellate Court, Fifth Judicial District. SR 315-20.

DISCUSSION

I. This Court should permit an expedited direct appeal in this case under Rule 302(b).

Under Rule 302(b), this Court may permit direct appeals in cases in which “the public interest requires prompt adjudication by the Supreme Court.” There are at least three reasons why the public interest necessitates direct, prompt review in this case — including expedited briefing and decision by this Court or, alternately, a stay of the TRO and subsequent proceedings in the circuit court pending resolution

of the direct appeal. First, this case involves the important and urgent question of the Governor's authority to respond to an ongoing public health crisis. Second, the circuit court's TRO rests on an erroneous interpretation of the Act and ignores the Governor's independent authority under the Illinois Constitution to take the actions that Bailey challenged. Third, the TRO disrupts the status quo, and the balance of harms, including the public interest, weighs heavily against it.

A. The public interest requires prompt and definitive resolution by this Court of the scope of the Governor's authority to manage an ongoing public health emergency.

This matter necessitates direct, prompt review by this Court because it involves the Governor's authority to address an ongoing public health emergency. This Court has long held that measures to manage a public health emergency, particularly one involving the "the spread of dangerous communicable diseases," present questions of "supreme importance not only to the individuals involved, but to the citizens of the State of Illinois and to the State itself." *People ex rel. Baker v. Strautz*, 386 Ill. 360, 363-64 (1944); see *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 427 (1922) ("Among all the objects sought to be secured by governmental laws none is more important than the preservation of public health."). This case, which involves the Governor's efforts to manage the ongoing spread of an unprecedented, deadly, and easily transmitted virus, presents such a question of "supreme importance" and thus requires direct review. Indeed, this Court has permitted direct review because of the importance of the issues involved in less urgent situations where there was a contaminant spreading in the State, such as where a

circuit court enjoined a company from polluting Lake Michigan. *See Metro. Sanitary Dist. of Greater Chi. v. U.S. Steel Corp.*, 41 Ill. 2d 440, 441 (1968). Direct review is even more critical here, where the contamination is not only fast moving and deadly, but also harming residents statewide.

Moreover, the importance of this matter is heightened because the Governor's authority to manage the emergency has been restrained by the circuit court, presenting serious concerns regarding the separation of powers. *See, e.g., People ex rel. Smith v. Jenkins*, 325 Ill. 372, 377 (1927) ("Neither the court nor the Legislature has the power so to limit the authority conferred on the Governor by the Constitution."). In other cases presenting similar separation of powers concerns, this Court has permitted direct review, including where a plaintiff challenged the validity of an executive order. *See, e.g., Ill. State Emp. Ass'n v. Walker*, 57 Ill. 2d 512, 515 (1974). Likewise, this Court has permitted direct review in many cases where a plaintiff sought to enjoin the Governor from taking an action or to compel him to take an action. *See, e.g., Desnick v. Dep't of Prof'l Reg.*, 171 Ill. 2d 510, 516 (1996); *People ex rel. Sklodowski v. State*, 162 Ill. 2d 117, 123 (1994); *Chi. Nat'l League Ball Club, Inc. v. Thompson*, 108 Ill. 2d 357, 362 (1985); *Lunding v. Walker*, 65 Ill. 2d 516, 518 (1976); *People ex rel. AFSCME v. Walker*, 61 Ill. 2d 112, 113 (1975) (per curiam). Here, the circuit court's order similarly restrains the Governor's authority and thus calls out for direct review from this Court.

The fact that this case involves an important question is enough to justify direct review. But prompt review by this Court is also crucial here because there is

no time for this case to proceed first through the normal appellate process: the circuit court's order threatens the Governor's ability to manage the COVID-19 crisis, and therefore immediately endangers the public health. While the circuit court order on its face pertains specifically to Bailey, the implications extend far beyond Bailey and jeopardize the health of Illinois residents throughout the State in several ways.

To begin, because TROs require a showing of likelihood of success on the merits, *see Kalbfleisch ex rel. Kalbfleisch v. Columbia Cmty. Unit Sch. No. 4*, 396 Ill. App. 3d 1105, 1113 (5th Dist. 2009), the TRO was premised on a finding that Bailey is likely to show that the Governor lacks the ability to issue multiple proclamations for a single, ongoing disaster. As such, the TRO threatens the legitimacy of the Governor's actions taken under his authority triggered by the second disaster proclamation, his intended third proclamation, and any other future necessary proclamations as the pandemic persists. As noted, if the Governor cannot proclaim that a disaster continues to exist, he will be unable to exercise certain emergency authority under the Act. *See supra* pp. 5-7. Moreover, without a disaster proclamation, the State risks losing its federal disaster funding, may be unable to procure vital supplies for COVID-19 testing and personal protective equipment (including masks, gowns, and gloves) for medical personnel and first responders, and will be prevented from working closely with hospitals to ensure that they are prepared for increases in critically ill patients. *See supra* pp. 6-7.

Further, the TRO carries severe practical repercussions for the other branches of government. If the Governor's authority is undermined, then the General Assembly will likely have to convene to separately address the current crisis, risking the health of its members and staff. Likewise, the judicial branch, including this Court, referenced the Governor's successive disaster proclamations and continued exercise of emergency powers in numerous court orders issuing precautions during this crisis.¹⁷ To safeguard court staff and the public, this Court has continued and curtailed all non-essential court matters (including trials) and extended the deadlines for most appellate filings, and appellate courts have closed some clerks' offices, suspended many oral arguments, and generally restricted public access to court buildings.¹⁸

¹⁷ See, e.g., Orders, M.R. 30370, *In re Illinois Courts Response to COVID-19 Emergency/Impact on Post-Judgment Proceedings* (Apr. 24, 2020), <https://courts.illinois.gov/SupremeCourt/Announce/2020/042420.pdf>, *Impact on Trials* (Apr. 7, 2020), <http://illinoiscourts.gov/SupremeCourt/Announce/2020/040720-1.pdf> (amending orders of Apr. 3, and Mar. 20, also taken in view of Governor's disaster proclamation), *Extending Suspension of Paper Copies Requirement* (Apr. 2, 2020), <https://courts.illinois.gov/SupremeCourt/Announce/2020/040220-1.pdf>, *Guidelines to Protect Health and Safety of Court Patrons, Staff, Judges, and Public* (Mar. 17, 2020) <https://courts.illinois.gov/SupremeCourt/Announce/2020/031720-3.pdf>.

¹⁸ See, e.g., Orders, M.R. 30370, *In re Illinois Courts Response to COVID-19 Emergency: Supreme Court Filing Deadlines* (Mar. 24, 2020), <https://courts.illinois.gov/SupremeCourt/Announce/2020/032420-1.pdf>, *Appellate Court Filing Deadlines* (Mar. 24, 2020), <http://illinoiscourts.gov/SupremeCourt/Announce/2020/032420-2.pdf>, Admin. Order., *Oral Arguments Suspended* (4th Dist. Apr. 2, 2020), https://courts.illinois.gov/Administrative/covid/040220-4Dist_AO.pdf; Notice, *Clerk's Office Closed* (3rd Dist. Mar. 30, 2020), https://courts.illinois.gov/Administrative/covid/033020-3Dist_MM.pdf; Press Release, *Modified Procedures while Court Remains Open* (1st Dist., Mar. 18, 2020), https://courts.illinois.gov/Administrative/covid/031820-1App_PR.pdf; Press

Additionally, the TRO has already sparked similar challenges, and allowing it to stand will inevitably lead to widespread uncertainty about the State's ability to deal with the present crisis. After the TRO was entered, Bailey's counsel said the issue "is going to start cascading around the state."¹⁹ He did not wait long to fulfill his own prediction, because he is now representing State Representative John Cabello in a putative class action on behalf of all Illinois citizens filed in Winnebago County, which challenges the Governor's authority to address the COVID-19 crisis.²⁰ Cabello's complaint alleges, among other things, that the Governor has no statutory or constitutional authority to issue executive orders to confront the pandemic, and that his existing orders violate due process rights.²¹ Furthermore, on April 29, 2020, a *pro se* individual filed an emergency action in federal district court, claiming that the stay-at-home order and subsequent corresponding orders violate his rights under the First, Second, Fifth, and Fourteenth Amendments to

Release, *Modified Procedures while Court Remains Open* (2d Dist., Mar. 17, 2020), https://courts.illinois.gov/Administrative/covid/031720-2App_PR.pdf; Press Release, *Modified Procedures while Court Remains Open* (4th Dist., Mar. 17, 2020), https://courts.illinois.gov/Administrative/covid/031720-4app_PR.pdf; Press Release, *Modified Procedures while Court Remains Open* (5th Dist., Mar. 17, 2020), https://courts.illinois.gov/Administrative/covid/031720-5App_PR.pdf.

¹⁹ *Rep. Cabello to File Suit Challenging Pritzker's Stay-at-home Order*, My Stateline News, Apr. 28, 2020, <https://www.mystateline.com/news/local-news/rep-cabello-to-file-suit-challenging-pritzkers-stay-at-home-order/>.

²⁰ Complaint, *Cabello v. Pritzker*, No. 2020 CH 0000210 (17th Judicial Circuit, Circuit Ct., Winnebago Cty., Apr. 29, 2020).

²¹ *Id.*

the United States Constitution.²² He seeks a TRO, preliminary injunction, and permanent injunction restraining the Governor from enforcing the stay-at-home order and subsequent corresponding orders, and a declaration that the stay-at-home order is unconstitutional.²³ Additional similar lawsuits will likely follow in Illinois courts, which are already minimizing operations, and lead to a patchwork of conflicting orders when concerted guidance is needed.

Even individuals who do not file lawsuits may believe that the stay-at-home directive, and the Governor's other public safety directives issued to address the COVID-19 crisis, do not apply to them. Given that COVID-19 continues to spread, this would jeopardize the health of Illinois residents statewide as well as the healthcare and other essential workers who are fighting to help them. For example, if Bailey is or becomes infected, he could cause an outbreak in his community that would overwhelm local hospitals and inflict unnecessary pain and suffering, especially since his district has among the lowest numbers of ventilators and emergency room beds in the State.²⁴ Similar scenarios have played out across the country.²⁵ And, as noted, such outbreaks will overwhelm the State's hospital

²² See Complaint, *James Thompson v. Pritzker*, No. 20-CV-2853 (N.D. Ill. Apr. 29, 2020).

²³ *Id.* at 19-20.

²⁴ *COVID-19 Hospital Resource Utilization*, *supra* note 15.

²⁵ 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*

system: the State has been able to manage its ventilator, ICU bed, and hospital bed capacity with the stay-at-home order in place, but its hospitals will be overrun if the stay-at-home order is lifted,²⁶ and the daily death toll — which reached an all-time high on April 28, 2020²⁷ — will further skyrocket.²⁸

In light of these significant, time-sensitive, life-or-death public health concerns, and the potential restraint on the Governor's necessary authority to manage them given the circuit court's TRO, the public's interest in a definitive determination by this Court regarding the scope of the Governor's authority to manage the COVID-19 crisis cannot wait while this case proceeds through the normal appellate process. The public interest, therefore, heavily favors direct review under Rule 302(b) in this case.

B. The circuit court was incorrect as a matter of law.

To obtain a TRO, a plaintiff must establish (1) a protected right, (2) irreparable harm if injunctive relief is not granted, (3) that an alternative remedy would be inadequate, and (4) that there is a likelihood of success on the merits. *Kalbfleisch*, 396 Ill. App. 3d at 1113. Accordingly, the circuit court's TRO rested on the conclusion that Bailey was likely to succeed on the merits, which, as

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).

²⁶ *COVID-19 Hospital Resource Utilization*, *supra* note 15.

²⁷ *Record-high 144 People Die*, *supra* note 8.

²⁸ *Gov. Pritzker Announces Modified Stay at Home Order*, *supra* note 14.

detailed below, is incorrect as a matter of law. This error requires direct review, because while not all legally erroneous decisions justify direct review, the decision below cannot stand given the dire public health consequences explained above.

Generally, a circuit court's decision to grant a TRO is reviewed for an abuse of discretion. *AFSCME v. Ryan*, 332 Ill. App. 3d 965, 967 (1st Dist. 2002). Courts apply *de novo* review, however, to questions of law, including on review of an interlocutory injunction. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 63 (2006); *Kalbfleisch*, 396 Ill. App. 3d at 1112. Here, the TRO raises a question requiring statutory and constitutional interpretation — whether the Governor has authority under the Act and the Illinois Constitution to issue a second disaster proclamation and corresponding executive orders — that should be reviewed *de novo*. See *Gregg v. Rauner*, 2018 IL 122802, ¶ 23; *Hayashi v. Ill. Dep't of Fin. & Prof'l Reg.*, 2014 IL 116023, ¶ 16.

Bailey claimed that the Governor's emergency powers to address the COVID-19 crisis ended on April 8, 2020, 30 days after his first disaster proclamation. SR 5-6. He argued in the circuit court that the Governor lacked authority to issue the second disaster proclamation because Section 7 of the Act limits the Governor to one proclamation per disaster. SR 32, 35-36. As a matter of statutory construction, Bailey was incorrect, because the Act's plain language authorizes the Governor to issue multiple proclamations for a continuing disaster. Alternately, the Governor has independent constitutional authority to issue these proclamations and exercise this emergency authority.

1. The Act authorizes the Governor to issue multiple disaster proclamations.

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. “The most reliable indicator of legislative intent is the statutory language, given its plain and ordinary meaning.” *Id.* In determining the plain meaning of a provision, courts consider the statute as a whole, interpreting relevant phrases “in light of other relevant provisions of the statute.” *People ex rel. Madigan v. Wildermuth*, 2017 IL 120763, ¶ 17. And courts cannot “depart from the plain language of a statute by reading in exceptions, limitations, or conditions conflicting with the expressed legislative intent.” *Whitaker*, 2020 IL 124792, ¶ 16. As detailed below, the plain text of the Act authorizes the Governor to issue a disaster proclamation whenever a disaster “exists,” and it contains no limit on the number of such proclamations. Bailey’s contrary reading attempts to read a requirement into the Act, and it ignores the legislative intent.

Section 4 defines a disaster as the “occurrence or threat of widespread or severe damage, injury or loss of life or property resulting from any natural or technological cause,” such as an “epidemic” or a “public health emergenc[y].” 20 ILCS 3305/4 (2018). In turn, Section 7 of the Act provides that “[i]n the event of a disaster, as defined in Section 4, the Governor may, by proclamation declare that a disaster exists.” 20 ILCS 3305/7 (2018). “Upon such proclamation, the Governor shall have and may exercise for a period not to exceed 30 days the following

emergency powers.” *Id.* The Act contains no limitation on the number of proclamations that the Governor may issue. *See id.*

The Act, then, unambiguously establishes one requirement for a disaster proclamation: that a disaster “exists.” The Governor may then proclaim a disaster and exercise his authority for a period of 30 days. A disaster existed when the Governor issued his disaster proclamations on March 9 and April 1, 2020, as COVID-19 was continuing to infect and kill individuals across the world and throughout Illinois on those dates. *See* SR 10-13, 23-25. The Governor thus complied with the sole requirement of Section 7 in issuing each of his proclamations, which in turned triggered his emergency powers for 30 days following each proclamation.

Other sections of the Act confirm this plain reading of Section 7. *See Wildermuth*, 2017 IL 120763, ¶ 17. For example, the Act’s “Limitations” section contains no limit on the Governor’s authority to issue more than one proclamation per disaster. *See* 20 ILCS 3305/3 (2018). Moreover, the General Assembly limited a political subdivision’s ability to “continue[] or renew[]” local disaster declarations, 20 ILCS 3305/11(a) (2018), but chose not to limit similarly the Governor’s ability to continue or renew declarations. And, as noted, it has not amended this Act even though several Governors have issued multiple proclamations for a single disaster. *See Piolet Bros. Trading v. Pollution Control Bd.*, 110 Ill. App. 3d 752, 756 (5th Dist. 1982).

Neither Bailey nor the circuit court doubted that COVID-19 qualifies as a disaster under the Act, or that the Governor's first proclamation was valid. SR 34-35, 309. Instead, ignoring the plain language of Section 7, Bailey argued that the Act does not authorize the second proclamation because, otherwise, the 30-day limit in Section 7 would be without meaning. SR 35-36. But Bailey's position impermissibly seeks to read into the statute a requirement that the legislature did not enact, *see Whitaker* 2020 IL 124792, ¶ 16, and it ignores that Section 7's 30-day requirement ensures that, if the Governor seeks to exercise his emergency powers for a period of time longer than 30 days, he must determine that an emergency continues to exist. The Governor has abided by this requirement in both proclamations. SR 10-13, 23-25. The Governor has also publicly acknowledged that he intends to issue a new disaster proclamation on May 1, 2020, which, consistent with Section 7 of the Act, will be in effect only for 30 subsequent days. SR 4, 35. And when the COVID-19 pandemic no longer "exists" in Illinois, the Governor will be unable to proclaim a disaster and exercise his emergency powers under Section 7.

Accordingly, this Court should decline Bailey's invitation to read a requirement into the statute where none exists and where doing so would contravene the legislature's intent.

2. The Governor has independent constitutional authority to issue the stay-at-home directive in any event.

Bailey's challenge fails for the alternative reason that the Governor has independent authority under the Illinois Constitution to protect public health in the

event of a crisis. The Act recognizes that it does not “[l]imit, modify, or abridge the authority of the Governor to . . . exercise any other powers vested in the Governor under the constitution.” 20 ILCS 3305/3(d) (2018). As explained below, that independent constitutional power authorized the Governor to issue the second disaster proclamation and corresponding executive orders, particularly when, because of safety concerns, the General Assembly has not convened to deal with the crisis in a timely manner.

As an initial matter, 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.” *Robertson*, 302 Ill. at 427; see *People v. Adams*, 149 Ill. 2d 331, 339 (1992); *Vill. of Glencoe v. Metro. Sanitary Dist. of Greater Chi.*, 23 Ill. App. 3d 868, 872 (1974); *Strautz*, 386 Ill. at 364. And 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.” *Robertson*, 302 Ill. at 427.

The Governor plays a critical role in exercising the State’s police power to protect public health. The Illinois Constitution states that the Governor “shall have the supreme executive power, and shall be responsible for the faithful execution of the laws.” Ill. Const. art. V, § 8. This grant of authority to the Governor must be interpreted in accordance with the purposes for which the Illinois Constitution was adopted, see *Wolfson v. Avery*, 6 Ill. 2d 78, 88-89 (1955), chief among which is “to provide for the health, safety and welfare of the people,” Ill. Const., preamble.

Moreover, the Governor’s police power is especially justified in an emergency where the General Assembly has not prohibited the Governor from taking the actions at issue here. The United States Supreme Court has long recognized that “[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, *to act on a sudden emergency*, or to prevent an irreparable mischief, by *summary measures*, which are *not found in the text of the laws.*” *The Apollon*, 22 U.S. 362, 366-67 (1824) (Story, J.) (emphasis added). The alternative would mean that the State could do nothing to protect the people from an unanticipated threat to their safety; the State would be paralyzed to act at the very time when its founding purpose — “to provide for the health, safety and welfare of the people” — is of the highest necessity. Ill. Const., preamble. This is an absurd and untenable outcome. *See People ex rel. Giannis v. Carpentier*, 30 Ill. 2d 24, 29 (1964) (“The constitution should whenever possible be construed to avoid such irrational, absurd, or unjust consequences.”).

As described, the COVID-19 crisis presents a public health emergency requiring immediate and comprehensive action. In this circumstance, where urgent action is needed to protect the public health from serious harm, that action is not expressly prohibited by a valid legislative enactment, and, because of the pandemic, the General Assembly has not convened to deal with the crisis in a timely manner, the Governor’s actions are a valid and essential exercise of the State’s police power. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

C. The TRO disrupts the status quo and contradicts the balance of equities.

This Court should permit a direct appeal for the additional reason that the order disrupts the status quo, and the balance of equities counsels against the order. A TRO is “a drastic remedy which may issue only in exceptional circumstances.” *Cty. of Boone v. Plote Constr., Inc.*, 2017 IL App (2d) 160184, ¶ 28 (internal quotations omitted). Even where the elements of a TRO are met, courts will not issue a TRO if it will unsettle the status quo or if the balance of equities weighs against granting relief. *See Makindu v. Ill. High Sch. Ass’n*, 2015 IL App (2d) 141201, ¶¶ 31, 46-47. Here, the district court abused its discretion in granting a TRO because it disrupted the status quo and the potential harm to the public is far greater than that to Bailey.

First, the TRO, which may continue up to 30 days, *see* SR 243, upends the status quo. “A [TRO] 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 of City of Chi.*, 224 Ill. 2d 481, 483 (2007). Here, the status quo was compliance with the Governor’s stay-at-home directive, which has been in effect since March 20, 2020, and is similar to directives in place in the majority of the United States.²⁹ The directive applies statewide, and no other individual has been granted a judicial exemption from its requirements.

²⁹ Sarah Mervosh, et al., *See Which States Cities Have Told Residents to Stay at Home*, N.Y. Times, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (updated Apr. 20, 2020).

With this TRO, Bailey is an outlier, but the TRO signals to Illinois residents that the status quo is *not* to stay at home, inviting noncompliance and threatening the public health. That is not the purpose of a TRO.

Second, the balance of equities counsels against entering a TRO here. The court may deny injunctive relief where the potential harm to the defendant from granting relief outweighs the potential harm to the plaintiff if relief is not entered. *Kalbfleisch*, 396 Ill. App. at 1119. In conducting this analysis, “the court should also consider the effect of the injunction on the public.” *Id.* In this case, the entry of the TRO harms the Governor and the public far more than its dissolution would harm Bailey.

Bailey alleges that he “is being irreparably harmed each and every day beyond April 8, 2020 in which he continues to be subjected to” the March 20, 2020 Executive Order. SR 7; *see* SR 38. He claims that the order limits his constitutionally protected freedoms because it “ordered him to stay at home, or at his place of residence, as well as limited his ability to travel within the state.” SR 3. He does not identify any specific harm that he has incurred because of the stay-at-home directive. In fact, he is not required to stay at home at all times. The Executive Order allows individuals to leave their residences for essential activities, including travel for health and safety needs, personal or family supplies and services, and outdoor activities. SR 15-16. And, as an elected member of the Illinois General Assembly, Bailey is a “governmental employee,” so when working as such he is “categorically exempt” from the Executive Orders. SR 16-17. Because

the Executive Order does not prevent Bailey from leaving his home for essential or work-related activities, the harm to him is not only not irreparable, but also it is modest at best.

By contrast, the harm to the Governor and the public is severe. As detailed above, the TRO rests on a finding that the Governor likely lacks statutory authority to maintain emergency powers as the COVID-19 crisis persists, and ignores his authority under the Illinois Constitution. It has also generated other suits that attack the validity of the Governor's response to the pandemic. It thus harms his ability to protect the other branches of Illinois government who have been relying on his emergency authority, the residents of Illinois who have been staying at home in order to protect themselves and each other during this crisis, and the Illinois residents, including medical providers and other essential workers, who cannot stay at home. As noted, without the stay-at-home order, the death toll will skyrocket, and Illinois hospitals will be overrun. While it may be stressful and frustrating to remain mostly at home, the modest harm to Bailey is shared by many, fully justified in the circumstances, and pales in comparison to the dire public consequences that the TRO carries.

II. This Court should at least grant the Governor supervisory relief.

The Court may alternatively exercise its supervisory authority to summarily reverse the circuit court's TRO. This Court has "[g]eneral administrative and supervisory authority over all courts" in Illinois. Ill. Const. art. VI, § 16. This Court's supervisory authority is "unlimited in extent and hampered by no specific

rules.” *Vasquez Gonzalez v. Union Health Servs., Inc.*, 2018 IL 123025, ¶ 16.

Supervisory relief is warranted if the normal appellate process will not afford adequate relief and, among other reasons, the dispute involves a matter of importance to the administration of justice or intervention is necessary to keep an inferior tribunal from acting beyond the scope of its authority. *Id.* ¶ 17.

Because the circuit court’s ruling that Bailey is likely to succeed on the merits was incorrect as a matter of law, because Bailey is not irreparably harmed by the continuation of the status quo, and because a balancing of the equities weighs against a TRO, this Court may in an exercise of its supervisory authority summarily reverse the circuit court’s order.

Whether this Court chooses to allow a direct appeal or grant supervisory relief and summarily reverse, however, prompt resolution by this Court is critical. Accordingly, the Court should expedite briefing of this motion, directing Bailey to respond by Friday, May 1, 2020, and issue a decision, without further briefing and an oral argument, as soon thereafter as is feasible. Or, in the alternative, the Court should exercise its supervisory authority and stay enforcement of the TRO pending its resolution of this motion and any direct appeal.³⁰ As set forth above, allowing the TRO to stand pending this Court’s review of its propriety would have serious implications concerning the Governor’s authority to act and to the health of Illinois residents. As a result of the exercise of the critical emergency powers that flow

³⁰ The circuit court denied the Governor’s request for a stay of the TRO pending appeal. SR 310.

from the proclamation of an ongoing disaster, the Governor and, more importantly, the millions of Illinoisans who have responded to the stay-at-home order by sacrificing for the common good, have saved lives, protected our healthcare system from becoming overburdened, and slowed the progression of the virus. Allowing the TRO to undermine this disaster response risks lives throughout the State.

CONCLUSION

Whereas, Defendant-Petitioner J.B. Pritzker, in his official capacity as Governor of the State of Illinois, respectfully requests that this motion for direct appeal under Illinois Supreme Court Rule 302(b) and/or supervisory relief under Illinois Supreme Court Rule 383, including the request for expedited briefing and argument or stay of the TRO's enforcement pending resolution of this motion, be granted.

Respectfully submitted,

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No. _____

IN THE
SUPREME COURT OF ILLINOIS

DARREN BAILEY,)	Motion for Direct Appeal Under
	)	Illinois Supreme Court Rule 302(b)
Plaintiff-Respondent,	)	and/or Supervisory Order under
	)	Illinois Supreme Court Rule 383
and)	
)	
THE HONORABLE JUDGE	)	On Appeal from the Circuit Court
MICHAEL D. McHANEY,	)	for the Fourth Judicial Circuit,
	)	Clay County, Illinois, No. 2020 CH
Respondent,	)	6, to the Appellate Court of Illinois,
	)	Fifth Judicial District, No. 5-20-
v.	)	0148
)	
GOVERNOR JAY ROBERT)	
PRITZKER, in his official capacity,	)	The Honorable
	)	MICHAEL D. McHANEY,
Defendant-Petitioner.	)	Judge Presiding.

ORDER

THIS CAUSE COMING TO BE HEARD on motion of Defendant-Petitioner for direct appeal pursuant to Illinois Supreme Court Rule 302(b) and/or supervisory relief under Illinois Supreme Court Rule 383, due notice having been given, and the Court being fully advised,

IT IS HEREBY ORDERED that that the motion for direct appeal is GRANTED / DENIED;

it is further ORDERED that the motion for supervisory relief is GRANTED / DENIED; and

it is further ORDERED that the circuit court's TRO is summarily REVERSED AND VACATED / the TRO is STAYED pending appeal; and

it is further ORDERED the briefing schedule in this case is EXPEDITED,

with the briefs due on _____.

ENTER: _____
JUSTICE

DATED: _____

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 29, 2020, I electronically filed the foregoing Emergency Motion with the Clerk of the Illinois Supreme Court by using the Odyssey eFileIL system.

I further certify that another 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

I further certify that another participant in this appeal, named below, is not a registered service contact on Odyssey eFileIL system, and thus I have caused the foregoing document to be mailed by First-Class Mail, postage prepaid, by having it placed in the U.S. Mail at 100 West Randolph St., Chicago, Illinois 60601, on April 29, 2020, before 5:00 p.m. and addressed to:

The Honorable Michael D. McHaney
Clay County Courthouse
111 Chestnut
Louisville, IL 62858

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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