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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.

**MOTION OF THE ILLINOIS RESTAURANT ASSOCIATION AND
RESTAURANT LAW CENTER FOR LEAVE TO FILE A BRIEF
AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE**

Pursuant to Rules 345 and 361 of the Illinois Supreme Court, the Illinois Restaurant Association and Restaurant Law Center respectfully request that this Court grant leave to file the accompanying brief *Amici Curiae* in support of Plaintiff-Appellee Fox Fire Tavern, LLC. In support of this Motion, *Amici* state as follows:

1. This matter involves a matter of critical importance to *Amici*: whether their members can continue to operate their businesses and safely serve customers indoors, or instead are categorically barred from doing so.

2. *Amicus* the Illinois Restaurant Association (“IRA”) is the leading non-profit trade organization for restaurants in Illinois that collectively represents nearly 8,000 members statewide—including restaurant operators, food service professionals, suppliers, and related industry professionals—and represents the Illinois restaurant industry. The

Illinois restaurant industry collectively includes more than 25,000 restaurant owners and operators that, prior to the pandemic, employed nearly 600,000 workers across the state. IRA is committed to supporting the restaurant industry by promoting local tourism in Illinois, 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.

3. *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, comprising over one million restaurants and employing over 15 million people. The Law Center provides courts with the industry's perspective on legal issues and highlights the wide-ranging consequences of pending cases like this one, through regular participation in *amicus* briefs on behalf of the industry and its members.

5. Together, *Amici* have a significant and strong interest in supporting and representing the state's legendary restaurant industry, including large franchises, family-run neighborhood restaurants, fine dining establishments, and fast-casual diners. Collectively, *Amici*'s members contribute billions of dollars in annual revenue to the Illinois economy and, prior to the pandemic, provided hundreds of thousands of good jobs to people across the state.

6. *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 adapted their business models where necessary, to ensure that diners and workers remains safe. *Amici*

stand ready to collaborate with federal, state, and local authorities, as they have for months, to address the extremely challenging circumstances of these times. However, a blanket ban on indoor dining—especially now, when so many restaurants are struggling to survive—is the wrong approach.

7. *Amici*, therefore, submit this brief to encourage the Court to affirm the decision below and to provide additional context to help the Court as it considers this case. In particular, *Amici* write to inform the Court of 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 that 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.

8. *Amici* respectfully state that their expertise and perspective will inform this Court on issues directly raised and/or implicated by this case.

For these reasons, *Amici* submit that the brief *Amici Curiae* submitted contemporaneously with this motion will assist the Court and respectfully requests that the Court grant leave to file this *Amici Curiae* brief.

Dated: October 30, 2020

Respectfully submitted,

JENNER & BLOCK LLP

/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

VERIFICATION BY CERTIFICATION

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, except as matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

October 30, 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

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the ILLINOIS DEPARTMENT OF PUBLIC HEALTH, and
THE KANE COUNTY HEALTH DEPARTMENT,

Defendants-Appellants.

PROPOSED ORDER

THIS CAUSE coming to be heard on the Motion of the Illinois Restaurant Association and Restaurant Law Center for Leave to File a Brief as *Amici Curiae* in Support of Plaintiff-Appellee, due notice having been given and the Court being fully advised:

IT IS HEREBY ORDERED that said motion is: ALLOWED / DENIED.

Dated:

Entered:

JUDGE

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

Counsel for Amici Curiae

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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

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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. Specifically, the Law Center 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* hereby 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, the members of *amici* 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 across the state.

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—especially now, when so many restaurants are already struggling to survive—is the wrong approach. *Amici* therefore submit this brief to encourage the Court to affirm the decision below and to provide additional context to help the Court as it considers this case. In particular, *amici* write to inform the Court of 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 that 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, Fox Fire Tavern, *amici* write separately to highlight why the decision below should be affirmed, and the very real and very harmful consequences that will result if the decision below is reversed.

Illinois restaurants are in a moment of complete crisis. Without judicial relief, by Sunday, nearly 90% of 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 indoors. The 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 the industry that means so much to so many. 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, and physically altering their premises. Some are testing and tracking, too. They are investing in new materials, new technologies, and new products to ensure they continue to safely serve their customers in the unique setting of indoor dining. The restaurant industry has done everything that has been asked and more. Meanwhile, the industry has collectively suffered billions of dollars of loss and damage as a direct result of their physical spaces being detrimentally altered and rendered non-functional for their intended purposes.

Against this backdrop, *amici* respectfully request that the Governor adjust his approach. *Amici* urge the Governor to work collaboratively with the industry rather than go beyond the authority the Legislature conferred—which grants the Governor emergency powers “for a period not to exceed 30 days,” 20 ILCS 3305/7—and impose 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 affirming the decision below and 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 addition, in 2019, the restaurant industry was the largest private sector employer in the state, employing close to 600,000 people—ten percent of Illinois’s workforce.³ Over the next decade, that number is expected to grow by seven percent.⁴

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.⁵ Indeed, 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.”⁶

² NATIONAL RESTAURANT ASSOCIATION, FACTBOOK: 2020 STATE OF THE RESTAURANT INDUSTRY 7 (Feb. 2020).

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

⁴ *Id.*

⁵ *Id.*

⁶ Press Release, Office of the Mayor City of Chicago & James Beard Foundation, *Mayor Emanuel and The James Beard Foundation Announce 2015 James Beard Awards Will Be*

Restaurants are crucial to their communities and comprise an essential part of the fabric of 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.⁷ Local, independently-owned restaurants “bring stability to the neighborhoods in which they are located.” *LMP Servs., Inc. v. City of Chicago*, 2019 IL 123123, ¶18, *cert. denied*, 140 S. Ct. 468 (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.⁸

Today, the industry is more at risk than ever before. The restaurant and hospitality industries have suffered catastrophic financial losses and unprecedented challenges. For instance, as of April, over eight million restaurant employees nationally—nearly two thirds

Held In Chicago (2015), available at <https://jbf-media.s3.amazonaws.com/archive/jbf-2013/blog/files/JBFA-Chicago-May-20.pdf>.

⁷ <https://www.restaurant.org/downloads/pdfs/research/soi/2020-state-of-the-industry-factbook.pdf> (more than 9/10 restaurants have fewer than 50 employees).

⁸ Americas Soc’y/Council of The Americas & Fiscal Pol’y Inst., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015), available at <https://www.as-coa.org/sites/default/files/ImmigrantBusinessReport.pdf>.

of the restaurant workforce—had been laid off or furloughed.⁹ By the end of April, almost 40% of all restaurants across the country were shuttered, and the restaurant and foodservice industry lost over \$80 billion in sales.¹⁰ Economists predict that those numbers will only continue to rise, and that the industry will have sustained almost \$250 billion in lost revenues by year-end.¹¹

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. When the Governor's order takes effect, nearly 90% of Illinois restaurants will be forced to cease indoor dining. For most of those restaurants, this means they will no longer be able to operate. 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 revenues.

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.¹² In Illinois alone, that would mean approximately 120,000 people out of work. The numbers for independent restaurants are even more dire.¹³ Even those restaurants that

⁹ Nat'l Restaurant Ass'n, *COVID-19 Update: The Restaurant Industry Impact Survey* (Apr. 20, 2020), available at <https://www.restaurant.org/downloads/pdfs/business/covid-19-infographic-impact-survey.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ 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. As it faces the prospect of a complete shutdown of indoor dining for a second time this year, this time there is no meaningful governmental support to help restaurants stay in business or continue to pay their employees. *Amici* and their members have asked—repeatedly. But, aid does not appear to be coming. Without it, and without the ability to continue serving customers indoors, 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.”¹⁴ Indeed, “[v]irtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains.”¹⁵ The same is true in Illinois. The Governor’s order comes at the same time the state has left restaurants “without any financial support. The funding opportunities currently available from the state of Illinois are only helping the smallest fraction of restaurant operations.”¹⁶ The state could “provide grants, waive licensing and permitting fees and delay tax payments.”¹⁷ Yet the state has not done nearly enough.

¹⁴ Press Release, Nat’l Restaurant Ass’n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020), available at <https://restaurant.org/news/pressroom/press-releases/association-statement-on-congressional-recess-with>.

¹⁵ *Id.*

¹⁶ Official Statement, Sam Toia, President and CEO, Illinois Restaurant Ass’n (Oct. 21, 2020).

¹⁷ *Id.*

The restaurant industry and Government must work together to craft workable solutions to address the pressing challenges we all face.¹⁸ 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 come out and 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 windows or rearranging indoor spaces and furniture to create pick-up areas for customers

¹⁸ The need for a lifeline from government is especially important now, when insurance companies have categorically and unreasonably denied coverage for business interruption under “all risk” commercial insurance policies.

and delivery personnel, also mounting physical barriers, partitions, and signage to direct traffic flow and keep people properly socially 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. 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 contact information for guests in the event it is needed for 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.¹⁹ These measures go beyond the recommendations for restaurants by the Centers for Disease Control and Prevention (CDC).²⁰

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 do not support shutting down restaurants.²¹ 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."²²

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 without regard to their circumstances. Whatever each individual restaurant owner's reasonable decision about how to respond,

¹⁹ 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), <https://www.chicagotribune.com/dining/ct-food-dining-restaurant-improvements-1029-20201029-u7fr3x44drhbjd4pk4w4ku7msi-story.html>.

²⁰ Centers for Disease Control and Prevention, *Daily Checklist for Managers of Restaurants and Bars*, CDC (June 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/COVID-Restaurant-Bar-manager-checklist.pdf>.

²¹ 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), <http://www.chicagotribune.com/suburbs/aurora-beacon-news/ct-abn-kane-dupage-covid-spread-restaurant-bars-st-20201028-snvxy7ia5bbcvh6dcxbrntd674-story.html>.

²² 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), <https://www.wbez.org/stories/governor-pritzker-to-suspend-indoor-dining-at-chicago-bars-and-restaurants-as-covid-19-surges/b38814bf-f6eb-47c0-8738-cd186717e398>.

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 and restaurant industry employees who need their jobs.

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 that the equities favored enjoining enforcement of the Executive Order because of the business 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, or if the disaster continued beyond 30 days. 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.

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.²³ At first, the Governor exercised his authority under the Act, as the Legislature authorized him to do. But, the Governor did not stop at the end of the legislatively authorized 30-day period. Instead, he continued to exercise his emergency authority beyond the 30-day limit—issuing nine successive emergency declarations for more than 225 consecutive days.

In those subsequent declarations, the Governor invoked the IMEAA as the legal authority for him to continue to exercise the emergency powers. But the IMEAA does not provide any such legal authority. The statute provides that the Governor shall exercise his emergency powers “for a period not to exceed 30 days,” from the date of the disaster, and does not exempt the Governor from that limit even in cases where 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 days in which the Governor was exercising emergency power, or the many months since—to provide authority for the Governor to reset, change, or extend that unambiguous 30-day window.²⁴ This Court must respect that decision and “give effect to the intent of the legislature.” *Ready v. United/Goeddecke 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.

²³ 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>.

²⁴ 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”).

Petitioner’s Memorandum in Support at 12. When it comes to statutory interpretation, it is the court’s duty “to respect not only what Congress wrote but, as importantly, what it didn’t write.” *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019). The 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.²⁵ And because the legislature did not write such a provision into the statute, 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.”) (internal citations omitted). Moreover, it would be impermissible for this Court to read the IEMAA as implicitly authorizing the Governor to extend the 30 day limit on his exercise of emergency power. Such an interpretation would not only conflict with the plain text of the statute, but it would also impermissibly engraft a new term onto the statute that the Legislature did not see fit to include. *Id.*

²⁵ 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>.

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.²⁶ Deeply rooted separation of powers principles hold that, under 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 New York*, 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

²⁶ *Clark v. Martinez*, 543 U.S. 371, 381, 125 S. Ct. 716, 724, 160 L. Ed. 2d 734 (2005).

by allowing the Governor to usurp—indefinitely—the lawmaking power that is the exclusive province of the Legislature.

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 order 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 each restaurant 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: October 30, 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: October 30, 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



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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.

NOTICE OF FILING

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on October 30, 2020, I caused the foregoing **Motion For Leave To File A Brief *Amici Curiae* In Support Of Plaintiff-Appellee and 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.

October 30, 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



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CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, certify, that on October 30, 2020, I caused the foregoing **Motion For Leave To File A Brief *Amici Curiae* In Support Of Plaintiff-Appellee** and **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 October 30, 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