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Case No. 5=20=0148

APPEAL TO THE APPELLATE COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF ILLINOIS

FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, CLAY COUNTY, ILLINOIS

DARREN BAILEY, Plaintiff-Appellee, vs. GOVERNOR JAY ROBERT PRITZKER, In his official capacity, Defendant-Appellant.	)	No. 2020CH6 The Honorable MICHAEL D. McHANEY, Judge Presiding.

LEGAL MEMORANDUM AMICUS CURIAE IN SUPPORT OF DEFENDANT, GOVERNOR JAY ROBERT PRITZKER

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ARGUMENT

I. NATIONAL CASES

Amicus would urge that in Illinois the Governor has the emergency power to enter successive Executive Orders on a single disaster and there are no statutory limitations when, the conditions that gave rise to the emergency continue to exist.

In order to aid the Court in its determination, we will discuss cases involving gubernatorial power in other states in the United States outside of Illinois.

In *National Tax-Limitation Committee v. Schwarzenegger*, 8 Cal.Rptr. 3d 4, 113 Cal.App. 4th 1266 (3rd Dist., 2003), the Court addressed the question of whether or not the Governor of California had a duty that could be` attacked by a writ of mandamus to terminate a state of emergency. *National Tax-Limitation Committee v. Schwarzenegger,* at 12. In so holding, in that case, the Court ruled that the Governor was entitled to exercise his discretion in determining whether or not the current conditions warranted termination of a state of emergency, *Id* at 13 but that the Court could review that determination where the claim was that the emergency had ended. Therefore, when the conditions that gave rise to the emergency order still exist, the Court should not assume any authority to make such a determination. Such decision rests in the discretion of the Governor.

Further, the Court there stated:

> "...the Governor was empowered under the Act to proclaim a state of emergency only upon finding: (1) that a rapid, unforeseen shortage of energy had cause the existence of conditions of disaster or of extreme peril to the safety of persons and property within the state; (2) that the energy shortage required extraordinary measures beyond the authority vested in the California Public Utilities Commission; and (3) that local authority was inadequate to cope with the emergency. If there is no longer an energy shortage, and no longer any conditions of disaster or of extreme peril to the safety of persons and property within the state resulting from the previously existing shortage, then one of the requisite

> conditions for declaring the state of emergency in the first place has ceased to exist, and it would be an unreasonable exercise of discretion for the Governor to make any choice other than to terminate the state of emergency." *National Tax-Limitation Committee v. Schwarzenegger,* at 18.

Naturally, in situations of whether or not emergent conditions still exist there will be differing opinions. The California Court also addressed that possibility when it stated "...if reasonable minds could differ, based on the evidence, as to whether there is still a shortage or whether conditions of disaster or extreme peril still exist, the Governor's determination must prevail." *Id* at 19.

Here, Governor Pritzker is vested with enumerated powers by the Illinois Emergency Management Act, which includes the power to control the ingress and egress to and from a disaster area and the movement of persons within the area, and the occupancy of the premises therein. 20 ILCS 3305/2(a)(2) and 20 ILCS 3305/2(7)(8).

Plaintiff-Appellee argues that the intent of the legislature in the Illinois Emergency Management Act was to only **allow** one order pertaining to the disaster pursuant to the 30 day limitation in the statute. PLAINTIFF'S COMPLAINT PAGE 5, PARAGRAPH E, R 8; PLAINTIFF'S SUPPLEMENTAL BRIEF PAGE 5, PARAGRAPHS 31 AND 36, R 40-41. Plaintiff-Appellee's logic is seriously flawed. It would make logical sense for an emergency order issued in the event of a disaster by the Governor of the State of Illinois to automatically terminate 30 days after the issuance of the Order, but nothing in the statute precludes a subsequent order if the conditions that gave rise to the declaration of disaster are still present. However, Plaintiff-Appellee fails to recognize the distinction between an automatic termination and an ongoing disaster. Plaintiff-Appellee admits in his brief that the conditions that gave rise to the first disaster proclamation established on March 9, 2020 are the same conditions that existed and still exist when the second proclamation was issued on April 1, 2020. BRIEF IN SUPPORT OF DARREN BAILEY'S

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF, PAGE 4, SECTION 2; RECORD ON APPEAL, PAGE 39.

The disaster is ongoing. There is still an emergent condition in the State of Illinois. Here, just as in *National Tax-Limitation Committee v. Schwarzenegger,* the determination of whether or not the conditions still exist that gave rise to the proclamation of a disaster rests in the discretion of the Governor. Therefore, because the emergent conditions are still present, the authority granted to the Governor of the State of Illinois under the Illinois Emergency Management Act to issue emergency orders is still vested in Governor Pritzker, and does not automatically terminate 30 days after the issuance of the order.

In *Cougar Business Owners Association v. State of Washington*, (involving the Mt. St. Helens volcano) the Washington Supreme Court there also confirmed that a Governor has wide discretion and authority with respect to executive orders and their duration when it applies to matters of disaster and public safety. In that case, the Governor of the State of Washington issued a disaster proclamation and several executive orders that restricted access to certain areas. The disastrous conditions in that instance lasted several months from April through October. There, just as in this case, the Court acknowledged that the conditions at that time created "a statewide threat to life and property when she issued the declaration of emergency in April. Upon the advice of experts she imposed restricted zones…the Governor subsequently determined that it was necessary to extend the restricted areas due to the increased danger." *Cougar Business Owners Association v. State of Washington,* 97 Wn.2d 466, 470, 647 P.2d 481, 483 (1982). Governor Ray stated in an affidavit that she weighed the advice of federal, state, and local officials as well as the scientific community. She made her decision by exercising her best judgment based on the information available to her. ***Id.*** The

Washington Supreme Court concluded that the Governor's actions were entirely discretionary. *Id* at 471, 483. In coming to their conclusion, the Washington Supreme Court looked to their previous case *Evangelical United Brethren Church of Adna v. State*, 67 Wash.2d 246, 407 P.2d 440 (1965). That case created the framework for characterizing an action as discretionary. The *Evangelical* test includes the following criteria: (1) In an area affected by a disaster, the preservation and maintenance of life, health, property, and the public peace is a basic governmental policy; (2) in the case of a volcano, the establishment of a restricted zone of entry around the mountain during a period of uncertain eruptions is essential to the realization and accomplishment of that policy; (3) the decision of whether a particular area or town should be included within the restricted access zone requires the exercise of basic policy evaluation, judgment, and expertise; (4) the Governor possess the requisite constitutional and statutory authority to restrict access to certain localities for the protection of the public; and (5) the Governor made a conscious decision to include the Town of Cougar within the area of the red zone because of her concern that it was exposed to danger from Mount St. Helens. *Id* at 472, 440.

Applying the *Evangelical* test here, Governor Pritzker has met all five criteria. First, it is clear the State of Illinois is affected by the COVID-19 pandemic, and the preservation and maintenance of life and health of the citizens of Illinois is a basic governmental policy. Second, establishing restrictions on ingress and egress into and around the state, as well as restrictions on people gathering is essential to the realization and accomplishment of that policy. Third, the decision of what areas of the state should be included requires the exercise of basic policy evaluation, judgment, and expertise. Fourth, the Governor of the State of Illinois possess the requisite constitutional and statutory authority to restrict access to for the protection of the public, as vested by the

Illinois Emergency Management Act, and the Illinois Constitution of 1970. Finally, the decision to issue and extend a shelter in place order was a conscious decision made by the Governor after carefully considering all information available to him, and after consulting Federal, State, and local officials and scientists.

In *Cougar*, just as we have discussed here, the Washington Supreme Court followed the same logic that the California court followed in *National Tax-Limitation Committee v. Schwartzeneggar,* supra, and that **is the logic** we are urging the Court to find here. That logic is that the state of emergency declared by the Governor shall cease to exist upon the issuance of a proclamation of the governor declaring the emergency terminated. *Cougar* at 473, 485.

Further, here, just as in *Cougar*, the Court opined that the statutory power given to the Governor by the legislature to be able to declare emergencies and issue emergency executive orders is evidence of the legislature's clear intent **was** to delegate that power to the governor to use their discretion. *Id* at 474, 486.

Diving further into the parallels of the *Cougar* case and this case, the waters **were are** muddy as to when an emergency or disaster is over. Again, the Washington Supreme Court followed the only logic that makes sense in that order will be restored when the conditions that led the Governor to declare a state of emergency no longer exists. *Id* at 476, 486. The Washington Supreme Court reiterated that the Governor's discretion is the same in determining both the start and end of the disaster. *Id.*

It is clear the overarching theme in determining whether or not a Governor is acting within the purview of their authority is couched in the equally paramount considerations of public health and discretion. Here, Governor Pritzker has reiterated and the Plaintiff-Appellee has admitted that the same exact conditions which led the Governor to declare the proclamation of disaster are the same conditions that exist today.

Therefore, the decision of whether or not to extend or modify the Emergency Executive Order is in the discretion of the Governor, as it is necessary for the protection of the public health.

II. QUARANTINE BY THE DEPARTMENT OF PUBLIC HEALTH

Plaintiff argues in support of his claim that the Department of Public Health can quarantine or isolate. Plaintiff's Supplemental Brief, page 3 Record page 50. However we note that 20 ILCS 2305/2(c) provides that any such order by the Department of Public Health expires within 48 hours without the consent of the person or the Department filing a court petition and obtaining an order. This would mean that the Department would be filing thousands or tens of thousands of petitions in the court for persons unwilling to consent. Under the circumstances currently existing at which Plaintiff's complaint is directed, such an approach is if not impossible, certainly impractical as no doubt there would not be enough Assistant Attorneys General in the state to accomplish such a feat.

Nothing in the statute indicates that the legislature's grant of authority is exclusive so as to preempt any constitutional power of an Illinois Governor. The Public Health statute must be read in conjunction with the statute regarding emergency powers and there is no conflict.

We would note that the IDPH Plan, Exhibit 1 to Plaintiff's Supplemental Brief page 33; R 93 appears to indicate that in the Department's view, the overall authority for direction and control within Illinois of the response to a pandemic influenza outbreak rests with the governor, pursuant to Article V of the Illinois Constitution of 1970.

III. PRACTICAL APPLICATION OF PLAINTIFF'S RULE

It appears to Amicus that the rule for which Plaintiff advocates is that the Governor's power under the emergency statute is limited to a single executive order per disaster. The folly of such a rule is readily apparent.

In the event of many potential disasters, the assumption by the Plaintiff that every the disaster is a single event or occurrence is juvenile.

For example, a prison riot. Obviously dealing with such a situation could require multiple executive orders over an extended period and even renewal of a particular order at the end of thirty days. It is not a pleasant thought but if the rioters take hostages and there is a standoff or other extreme action, there is no way to predict how long the emergency could continue.

Another example is earthquake. True there has been no serious earthquake in Clay County since 1811, but the New Madrid fault hasn't gone away and there have been multiple quivers in Illinois in the lifetime of the Amicus. Construing the emergency power to allow only one order or to preclude multiple or successive orders if the disaster is continuing and long term does not make a lot of sense.

The Mount St Helens volcano in *Cougar Business Owners Association v. State of Washington,* 97 Wn.2d 466, 470, 647 P.2d 481, 483 (1982) is just such an example. Obviously our citizens are not likely to suffer from a volcano situated in Illinois but an extended emergency could be created in Illinois due to ash and weather from a volcano anywhere in the world were it sufficiently large.

Another type of long term emergency is a serious drought which could affect water resources for farmers, municipalities and individuals. A drought could continue for months or even years.

Finally, the unthinkable possibility of a nuclear attack, explosion or incident of state wide contamination. Would Plaintiff argue that the Governor is limited to only one order, cannot enter multiple orders, cannot renew an order after 30 days or cannot modify an order? Perhaps contemplating such a painful situation best illustrates the fallacy of the logic of the Plaintiff in interpreting the two statutes.

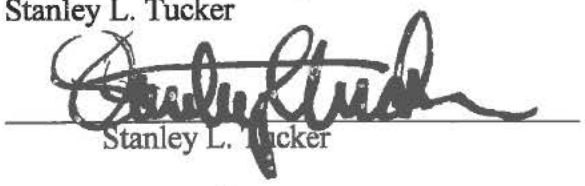
IV. THE NATURE OF THE THREAT

We must keep in mind what we are dealing with in this case. We note that there are lessons from history. Without citing statistics on the corona epidemic, we should note that the Spanish Flu influenza epidemic (influenza A H1N1) in 1918 is thought to have killed as many as 17 million persons world wide. There is an entire litany of epidemics throughout recorded history during the last 2000 years. Unchecked, no one can predict how extensive the loss of life may be with corona.

CONCLUSION

We join the Governor in asking that the TRO be dissolved and the case dismissed.

Respectfully submitted,
Stanley L. Tucker



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Certificate of Service

The undersigned certifies that three copies of the foregoing brief were served upon the Clerk of the Fifth Judicial District of Illinois, and the attorneys of record of all parties to the above cause by e-filing, herein as follows:

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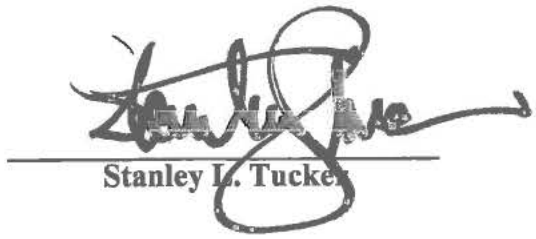

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