

**IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS**

IN RE: COVID-19 LITIGATION

No. 2020 MR 589

Hon. Raylene D. Grischow

**GOVERNOR AND IDPH'S MOTION TO RECONSIDER OR, IN THE ALTERNATIVE,
TO CERTIFY FOR IMMEDIATE APPEAL PURSUANT TO RULE 308(a)**

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INTRODUCTION

After the Appellate Court held in *Fox Fire Tavern, LLC v. Pritzker*, 2020 IL App (2d) 200623, that Fox Fire Tavern, LLC (“FoxFire”) was unlikely to succeed on the merits of its existing claims, FoxFire amended its complaint to add a fifth count: that Executive Order 2020-61 and subsequent executive orders issued by the Governor to combat the Covid-19 pandemic are “arbitrary and unreasonable.” *First Amended Verified Complaint for Declaratory Judgment and Injunctive Relief* ¶ 76 (Dec. 31, 2020) (“Amended Complaint”); *see also id.* ¶¶ 73–79. FoxFire did not identify a statutory or constitutional cause of action under which it believed it was entitled to relief and did not plead an unconstitutional deprivation of rights; rather, it simply insisted it was entitled to relief as long as it could show an executive order issued by the Governor is “arbitrary and unreasonable.” Defendants moved to dismiss Count V. The Court denied the motion, holding that FoxFire would be entitled to relief, notwithstanding its failure to plead a statutory or constitutional cause of action, “if the defendants’ implementation of the business shutdowns and/or restrictions were arbitrary and unreasonable.” *Memorandum and Order on Defendants’ Motion to Dismiss Count V of Fox Fire’s Amended Complaint* at 4–5 (Apr. 7, 2021) (“Order”).

Defendants respectfully ask the Court to reconsider its ruling or, in the alternative, certify two dispositive legal questions for immediate appeal under Supreme Court Rule 308(a) and stay proceedings pending resolution of that appeal. The Court’s holding rests on the premise that FoxFire may obtain relief from an otherwise lawful executive order without having to plead *any* statutory or constitutional cause of action. Even if judicial review is available in this context, moreover, FoxFire’s claim should be evaluated using the rational-basis test that applies to substantive due process claims in which no fundamental right is at stake. The Court should

reconsider its Order and hold either that FoxFire has failed to plead a cause of action or that FoxFire's claim fails on the merits, because the executive orders at issue are rationally related to a legitimate governmental interest.

In the alternative, the Court should certify the following two legal questions for an immediate appeal under Rule 308(a): (1) whether an executive order issued under the Illinois Emergency Management Agency Act, 20 ILCS 3305 ("Emergency Management Act"), may be set aside if it is "arbitrary and unreasonable," even where a plaintiff fails to plead a statutory or constitutional cause of action; and (2) if so, whether rational-basis review governs any such challenge to such an order. Principles of judicial economy would be best served by obtaining answers to these questions from the Appellate Court.

ARGUMENT

I. Reconsideration of the Court's Order Is Appropriate.

"The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law." *Malcome v. Toledo, Peoria & W. Ry.*, 349 Ill. App. 3d 1005, 1008 (4th Dist. 2004). Here, the Order rests on multiple errors that, taken together, authorize an unprecedented degree of judicial interference in policy questions committed by the General Assembly to the Governor's discretion. The Court should grant reconsideration.

A. Absent a Statutory or Constitutional Cause of Action, an Executive Order Issued Under the Emergency Management Act May Not Be Set Aside as "Arbitrary and Unreasonable."

The Court's Order rests on its holding that an otherwise lawful executive order issued under the Emergency Management Act may be set aside upon a showing that the order is

“arbitrary and unreasonable,” even absent a statutory or constitutional cause of action. Order 4–5. That holding is incorrect.

1. Illinois law does not permit parties to assert a freestanding “arbitrary and unreasonable” claim when challenging discretionary official action. The Appellate Court’s decision in *The Bigelow Group, Inc. v. Rickert*, 377 Ill. App. 3d 165 (2d Dist. 2007), makes that clear. The plaintiffs in *Bigelow*, like FoxFire, challenged an official action (there, the decision of a county tax collector) on the ground that, among other things, it was arbitrary and unreasonable and so constituted “an abuse of his official discretion.” *Id.* at 171. The Appellate Court categorically rejected the argument that a party could obtain relief from a “discretionary official act” simply by contending that it was “arbitrary and capricious because [the official’s] reasons for implementing it are unsound.” *Id.* “Whatever the phrase means in other contexts,” the court explained, “‘arbitrary or capricious’ abuse of executive power in the context of review of official discretion must be understood to refer only to *illegal conduct*.” *Id.* at 175 (emphasis added). *Bigelow* thus forecloses any argument that Illinois law recognizes a freestanding “arbitrary and unreasonable” claim.

Instead, under *Bigelow*, a plaintiff challenging an act committed to the discretion of the executive branch, like an executive order issued under the Emergency Management Act, can obtain relief only by establishing that the order is “illegal,” 377 Ill. App. 3d at 175—that is, that it violates some independent statutory or constitutional guarantee. But FoxFire makes no such claim in Count V of its amended complaint. FoxFire does not cite in Count V any statute or constitutional provision, state or federal, that it believes the challenged executive orders have violated. Rather, it simply alleges that these orders are “arbitrary and unreasonable.” Amended Complaint ¶ 76. Under *Bigelow*—and consistent with basic principles of judicial review—that is

insufficient. FoxFire has not pleaded a cause of action. Count V should have been dismissed on that basis alone.

The Court appears to have drawn a contrary conclusion from *Bigelow* regarding the existence of a freestanding “arbitrary and unreasonable” cause of action from the Appellate Court’s opinion in *Fox Fire*, 2020 IL App (2d) 200623. *See* Order at 4. But *Fox Fire* rests on no such holding. Indeed, the Appellate Court in *Fox Fire* emphasized that “[c]ourts should refrain from considering the wisdom behind any adopted methods to combat the spread of disease.” 2020 IL App (2d) 200623 ¶ 20. And although the Appellate Court referred to courts’ authority to review “regulations that prove to be arbitrary or unreasonable,” *id.*, it did not hold, or even imply, that a party could obtain such review in the absence of a statutory or constitutional cause of action. *See id.* (describing the merits of the executive order as “not before” the court). Nor could it, given *Bigelow*’s express holding that, at least in reviewing exercises of discretionary authority, “the judiciary must limit itself to infringing on official discretion only where that discretion can be shown to have violated the law.” 377 Ill. App. 3d at 174. The Court appears to have read Justice McLaren’s separate opinion in *Fox Fire* to “inform the parties” about the contours of a freestanding cause of action. *See* Order at 4 (citing *Fox Fire*, 2020 IL App (2d) 200623 ¶ 50 (McLaren, J., specially concurring)). But Justice McLaren’s separate opinion is not the law. *See People v. Brown*, 2018 IL App (1st) 160924 ¶ 18 (“While we consider and respect the views of our colleagues [expressed in concurring and dissenting opinions], these are not binding authorities.”). And even if the factors identified by Justice McLaren were relevant to a

judicial inquiry, they are not relevant here, where FoxFire has pleaded no recognized cause of action.¹

By disregarding *Bigelow*, the Court contravened the rule that “[i]t is the absolute duty of the circuit court to follow the decisions of the appellate court.” *In re A.A.*, 181 Ill. 2d 32, 36 (1998). And as a result of doing so, the Court’s decision has significant consequences, both for the separation of powers and for the Governor’s ability to confront the current pandemic and future emergencies. The Court’s expansive holding—that a cause of action is stated simply by alleging the Governor’s actions in response to a declared disaster are “arbitrary and unreasonable,” Amended Complaint ¶¶ 76, 78, and as a result “it is within the province of [the judicial branch] to determine” whether those actions are in fact “arbitrary and unreasonable,” Order at 5—violates the separation-of-powers principle enshrined in the Illinois Constitution, which declares that “[t]he legislative, executive and judicial branches are separate” and that “[n]o branch shall exercise powers properly belonging to another.” Ill. Const. art. II, § 1. This principle prohibits “the judicial department [from] tak[ing], as its own, discretionary powers vested in an executive officer.” *People v. Sales*, 195 Ill. App. 3d 160, 162 (2d Dist. 1990). Put differently, “[a] court cannot substitute its discretion for that of executive officers in matters belonging to the proper jurisdiction of the officers.” *People ex rel. Woll v. Graber*, 394 Ill. 362, 371 (1946). But the Court anticipates doing exactly that in analyzing Count V: It proposes to independently evaluate the evidence linking indoor dining and the spread of Covid-19; resolve the public-health question whether a temporary suspension of indoor dining in Kane County last October was a

¹ The same is true of Justice Gorsuch’s dissent in *Gundy v. United States*, 139 S. Ct. 2116 (2019), on which the Court also relied, *see* Order at 3. Like Justice McLaren’s concurrence, Justice Gorsuch’s dissent is not the law. And *Gundy* is inapposite in any event, because FoxFire does not raise a nondelegation claim in Count V—or, for that matter, any constitutional claim at all.

reasonable means to slow the spread of the virus; decide whether FoxFire is correct that other, unspecified options would have been equally as effective; substitute these conclusions for the Governor's; and in doing so determine whether the Governor's "implementation of the business shutdowns and/or restrictions were arbitrary and unreasonable." Order 4–5. The Court's inquiries will thus "interfere with" the discretion the General Assembly conferred upon the Governor when exercising his authority under the Emergency Management Act and therefore will "offend[] the principle of separation of powers." *Bigelow*, 377 Ill. App. 3d at 173.

The Court's expansion of judicial authority will also hamper a governor's ability to respond to this and future emergencies. Under the Court's ruling, anyone may obtain judicial review of an executive order issued by a governor under the Emergency Management Act solely on the basis of a conclusory allegation that the order is "arbitrary and unreasonable." And a court reviewing such a claim will be empowered to assess whether such executive order is in fact "arbitrary and unreasonable" based on the assertion that "[the Governor's] reasons for implementing it are unsound." *Bigelow*, 377 Ill. App. 3d at 171. Superintending the Governor's decision making in times of emergency in this way will hamstring the Governor's ability to respond to those emergencies—not only the Covid-19 pandemic, but also future disasters. As the Seventh Circuit observed, courts cannot fairly expect to "evaluate orders issued in response to public-health emergencies by the standard that might be appropriate for years-long notice-and-comment rulemaking." *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 347 (7th Cir. 2020). But that is what the Court's Order permits: It will license judicial micromanagement of a wide range of decisions committed to the executive. And it will apply not only to the present pandemic but to all contexts governed by the Emergency Management Act. Illinois law does not permit this result.

Finally, as drafted, the Court’s Order also runs afoul of the State’s sovereign immunity. The General Assembly conferred “exclusive jurisdiction” on the Court of Claims to hear any claims “founded upon any law of the State of Illinois” or regulations promulgated by its agencies. 705 ILCS 505/8(a). Although the “officer suit” exception to sovereign immunity permits circuit courts to adjudicate claims against officers for prospective relief where “a ***plaintiff alleges*** that the State officer’s conduct violates statutory or constitutional law or is in excess of his or her authority,” *Parmer v. Madigan*, 2018 IL 122265 ¶ 22 (emphasis added), FoxFire does not allege in Count V that the Governor’s actions violate any statutory or constitutional provisions. The Court’s Order thus also contravenes basic principles of sovereign immunity.

2. The Court also appeared to read the Supreme Court’s decision in *County of Will v. Pollution Control Board*, 2019 IL 122798, to authorize it to “set aside” an executive order issued under the Emergency Management Act if it finds the order is “clearly arbitrary, unreasonable, or capricious.” Order at 4. But *County of Will* stands only for the unremarkable proposition that administrative action may be reviewed under traditional administrative-law principles when such review is ***expressly authorized*** by statute. Here, the plain language of the Emergency Management Act does not authorize such review, so *County of Will* and the cases on which it relies are inapposite.

County of Will concerns judicial review of action taken by the Pollution Control Board pursuant to the Environmental Protection Act. 2019 IL 122798 ¶ 9. That statute directs the Board to adopt certain regulations for the treatment of demolition debris and uncontaminated soil, *see* 415 ILCS 5/22.51(f)(1), 22.51a(d)(1), and permits “[a]ny person adversely affected or threatened by any rule or regulation of the Board [to] obtain a determination of the validity or application of

such rule or regulation by petition under subsection (a) of Section 41 of this Act for judicial review of the Board’s final order adopting the rule or regulation,” *id.* 5/29(a). In *County of Will*, the State and Will County challenged certain rules adopted by the Board by filing a petition for review in the Appellate Court pursuant to Supreme Court Rule 335, which sets out the procedure “for a **statutory** direct review of orders of an administrative agency,” Ill. S. Ct. R. 335 (emphasis added). *See County of Will*, 2019 IL 122798 ¶ 32. The Appellate Court and the Supreme Court applied the “familiar” arbitrary-and-capricious standard applicable in the context of administrative review, *id.* ¶ 44, and held that the Board did not act arbitrarily or capriciously, *id.* ¶ 74; *see also id.* ¶ 43 (“We do not judge the wisdom of a decision by the Board, only whether it is arbitrary and capricious.”).

The Emergency Management Act looks nothing like the Environmental Protection Act or similar statutes that authorize judicial review of administrative actions. The Environmental Protection Act, and statutes like it, expressly authorize expansive judicial review of such actions. *See, e.g.*, 415 ILCS 5/29(a) (permitting “[a]ny person adversely affected or threatened” by agency action to seek review of that action). As the Appellate Court explained in *Bigelow*, when the General Assembly includes language authorizing judicial review in a statute, it chooses to “simultaneously decrease the [agency’s] discretion and demonstrate legislative intent to involve the judiciary in the [agency’s] decision[s],” *Bigelow*, 377 Ill. App. 3d at 175. But the Emergency Management Act contains no such language. Nor does the Emergency Management Act adopt the provisions of the Administrative Review Law, 735 ILCS 5/3-102. In fact, the Act references judicial review only once—in Section 7(4)(b), which describes a circumstance not relevant here. 20 ILCS 3305/7(4)(b) (authorizing the director of the Illinois Emergency Management Agency to initiate litigation when the Governor has taken possession of property for and on behalf of the

State but the amount of “just compensation” cannot be determined). This provision shows that, when enacting the Emergency Management Act, the General Assembly knew how to provide for judicial review when it wanted it to occur and was precise about the scope of judicial review it wished to authorize. *See Running Central, Inc. v. Pritzker*, No. 2020 CH 105, slip op. at 4–5 (Ill. 7th Jud. Cir. Ct. Sangamon Cty. May 21, 2020) (“The General Assembly demonstrated it was capable of creating limits [relating to executive discretionary powers in the Emergency Management Act] when it believed such limitations were appropriate.”).

The absence of any language authorizing judicial review of the Governor’s exercise of his discretionary powers under the Emergency Management Act outside of a single limited circumstance not applicable here thus demonstrates the General Assembly’s intent that the judiciary not superintend the Governor’s use of those powers in the manner it might oversee an administrative agency. As the Appellate Court explained in *Bigelow*, “***without direction from the legislature to examine [an official] decision more closely, a court may overturn the decision only where it does not comport with the law because it contravenes a statute or constitution.***” 377 Ill. App. 3d at 175 (emphasis added). The Court should have applied that principle here: Because the Emergency Management Act does not expressly authorize judicial review, an executive order issued under it is reviewed only for “evidence of illegality,” *id.*, not merely for the correctness of its reasoning as neither arbitrary nor unreasonable. Because FoxFire pleaded no statutory or constitutional error and the Emergency Management Act does not authorize judicial review of discretionary orders, *County of Will* does not authorize the Court to “inquire further into the propriety of the reasoning behind the” executive orders at issue. *Id.*

In short, Defendants respectfully submit that the Court misread the governing legal principles in holding that an otherwise lawful executive order issued under the Emergency

Management Act may be set aside upon a showing that the order is “arbitrary and unreasonable,” absent FoxFire having pleaded a statutory or constitutional cause of action. Order at 4–5. Illinois law does not recognize a freestanding cause of action to challenge the alleged “arbitrary and unreasonable” conduct of state officials, and the Emergency Management Act does not authorize courts to review the Governor’s actions as they might an administrative agency. The Court should reconsider its Order and hold that FoxFire failed to state a claim in Count V.²

B. If Judicial Review Is Available Even Absent a Cause of Action, the Court Should Evaluate the Executive Orders Under Rational-Basis Review, and Uphold Them.

For all the above reasons, the Court does not need to evaluate the merits of Count V, because FoxFire may not obtain review of the executive orders at issue simply by alleging that they are “arbitrary and unreasonable.” But if the Court holds that judicial review is available in such a circumstance, it should evaluate the executive orders under rational-basis review—the standard applicable to substantive due process claims in which no fundamental right is at stake. Applying that standard, the Court should dismiss Count V on the merits without further factual development, because the executive orders are rationally related to the Governor’s vital interest in protecting the public health of the people of Illinois.

As the Supreme Court has explained, the Illinois Constitution confers a substantive due process right that generally “bars arbitrary governmental action that infringes upon a protected interest.” *LMP Servs., Inc. v. City of Chicago*, 2019 IL 123123 ¶ 17. But the scope of judicial review in substantive due process cases is circumscribed, at least where the challenged conduct

² And as suggested by the Defendants in the draft order they submitted to the Court, if FoxFire believes that it has a statutory or constitutional cause of action to allege, it can be given the opportunity to do so through the filing of a second amended complaint.

does not implicate fundamental rights. *Id.* Courts in such cases employ the most deferential standard possible, rational-basis review:

When applying the rational basis test, our inquiry is twofold: we must determine whether there is a legitimate governmental interest behind the legislation and, if so, whether there is a reasonable relationship between that interest and the means the governing body has chosen to pursue it. The party challenging a legislative enactment as failing rational basis review bears the burden of proving by clear and affirmative evidence that the enactment constitutes arbitrary, capricious, and unreasonable legislative action; that there is no permissible interpretation that justifies its adoption; or that it does not promote the safety and general welfare of the public. Further, when determining whether a legislative enactment survives rational basis review, courts do not consider the wisdom of the enactment or whether it is the best means of achieving its goal.

Id. (citations omitted). Importantly, under the rational-basis test, the judgments made by the legislature (or, in this case, the Governor) “are not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 147 (2003).

Here, even presuming that FoxFire may proceed on a freestanding “arbitrary and unreasonable” claim, such a claim would necessarily be governed by the rational-basis test. Although FoxFire has not pleaded **any** constitutional claim, Count V could be read to invoke the concerns implicated by substantive due process protections. *See LMP Servs.*, 2019 IL 123123 ¶ 17 (substantive due process principles “bar[] arbitrary governmental action that infringes upon a protected interest”). As Defendants have explained, *Governor and IDPH’s Motion to Dismiss FoxFire’s Amended Complaint* at 7–8 (Jan. 13, 2021), FoxFire lacks a viable substantive due process claim for multiple reasons. But, at the very least, any substantive due process claim that FoxFire alleged arising out of limitations placed on its ability to permit indoor dining plainly would not implicate a fundamental right. *See, e.g., People v. Avila-Briones*, 2015 IL App (1st) 132221 ¶ 72 (fundamental rights are those that are “deeply rooted in this Nation’s history and

tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed”). As a result, even if review were available on a freestanding “arbitrary and unreasonable” theory, a court evaluating such a claim would simply ask “whether there is a reasonable relationship between” the executive orders challenged here and a legitimate governmental interest. *LMP Servs.*, 2019 IL 123123 ¶ 17. If there is, the orders must be sustained.

The executive orders plainly pass the “highly deferential” rational-basis test, *People v. Johnson*, 225 Ill. 2d 573, 585 (2007). Under that test, “[i]f there is *any conceivable set of facts* to show a rational basis for the [challenged action], it will be upheld.” *Id.* (emphasis added). There was certainly such a rational basis for the Governor to issue the executive orders at issue here. Covid-19 has infected over 31 million people in the United States and has caused the death of over 565,000.³ At the time of the executive orders at issue here, there was no vaccine or treatment available. Given the dangers associated with airborne spread of Covid-19, the federal Centers for Disease Control classified indoor dining of the kind FoxFire intended to offer as a “highest risk” activity.⁴ Faced with this unprecedented and ongoing public health emergency, the Governor reasonably determined that halting the spread of Covid-19 required him to take certain emergency measures, including imposing limitations on indoor dining. That decision withstands rational-basis review: The Governor’s decision was driven by the “legitimate” (indeed, compelling) interest in protecting the health and safety of Illinois residents, and there is a “reasonable relationship” between the challenged orders and that goal. *LMP Servs.*, 2019 IL

³ See Johns Hopkins Univ., *Coronavirus Resource Center, Global Map*, coronavirus.jhu.edu/map.html.

⁴ Centers for Disease Control and Prevention, *Considerations for Restaurant and Bar Operators* (Dec. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html>.

123123 ¶ 17. The question is thus not whether the court agrees with the Governor’s actions or even “whether [they were] the best means of achieving [the Governor’s] goal,” *id.*; it is simply whether “any conceivable set of facts” could justify the order, *Johnson*, 225 Ill. 2d at 585. It is self-evident that the orders withstand this review.

Thus, even if the Court declines to reconsider its holding that the executive orders are subject to judicial review absent a statutory or constitutional cause of action, it should hold that the “highly deferential” rational-basis review applies. *Johnson*, 225 Ill. 2d at 585. And to the extent the Court’s Order envisions future proceedings on Count V under the rational-basis test, the Court should reconsider that decision: Under that standard, official action “may be based on rational speculation unsupported by evidence or empirical data,” and is “not subject to courtroom fact-finding.” *Arangold*, 204 Ill. 2d at 147. The Court should simply apply the deferential rational-basis test and dismiss Count V on the merits, because the executive orders plainly are rationally related to the legitimate—indeed, critical—governmental interest of protecting the health and welfare of Illinois residents.

II. In the Alternative, the Court Should Certify Two Questions of Law for an Immediate Appeal Under Supreme Court Rule 308(a).

If the Court declines to reconsider its ruling, it should certify the following questions of law for an immediate appeal under Supreme Court Rule 308(a): (1) whether an executive order issued under the Emergency Management Act may be set aside if it is “arbitrary and unreasonable,” even where a plaintiff does not plead a statutory or constitutional cause of action; and (2) if so, whether rational-basis review governs any such challenge to such an order.

Rule 308(a) permits the Court to certify an order for interlocutory appeal if (a) it “involves a question of law as to which there is substantial ground for difference of opinion” and

(b) “an immediate appeal from the order may materially advance the ultimate termination of the litigation.” Both conditions are met here.

First, at least if the Court concludes that the authorities cited above do not resolve the questions on which Defendants seek certification, there exists “substantial ground for difference of opinion” on these questions. The Supreme Court has explained that this requirement is met “in instances where the question of law had not been directly addressed by the appellate or supreme court.” *Rozsavolgyi v. City of Aurora*, 2017 IL 121048 ¶ 32. Neither the Appellate Court nor the Supreme Court has specifically addressed the circumstances under which courts may review executive orders issued under the Emergency Management Act. Nor has either court specifically considered whether a freestanding “arbitrary and unreasonable” cause of action exists under the Emergency Management Act. And if such a cause of action exists, neither court has addressed the applicable level of judicial scrutiny. Although Defendants’ view is that *Bigelow* and other authorities substantially resolve these questions, if the Court disagrees, it should certify these questions for appeal.

And an immediate appeal would “materially advance the ultimate termination of the litigation.” Count V is FoxFire’s sole remaining cause of action. If the Appellate Court agrees with Defendants’ position, then their motion to dismiss that cause of action must be granted and this litigation will terminate. *See In re Estate of Kleine*, 2015 IL App (2d) 150063 ¶ 13 (“We find that resolution of this issue could materially advance the litigation because, if we answer in the negative, defendants’ motion to dismiss should have been granted.”); *Ewing v. Liberty Mut. Ins. Co.*, 130 Ill. App. 3d 716, 717–19 (5th Dist. 1985) (finding “an immediate appeal may materially advance the ultimate termination of the litigation” where question of law was whether a cause of

action existed). The Court should thus certify the questions of law identified above for an immediate appeal pursuant to Rule 308(a).

Finally, the Court should also exercise its authority under Rule 308(f) to stay proceedings in the circuit court pending the Appellate Court's resolution of the certified questions. A stay will benefit both parties by preserving the status quo. With so much uncertainty surrounding the existence of FoxFire's purported cause of action, not to mention the nature of the burden FoxFire has to shoulder if its cause of action exists, there is a serious likelihood that further proceedings in the circuit court would impose wasteful and unnecessary burdens on both sides. And there is no immediate urgency to resolving FoxFire's Count V because it challenges the Governor's *past* exercise of Emergency Management Act powers—namely, his executive orders temporarily suspending indoor dining in Kane County from October 2020 through January 2021. A stay pending resolution of the Rule 308(a) appeal would therefore promote judicial economy and conserve resources without prejudice to FoxFire.

CONCLUSION

The Court should reconsider its Order denying Defendants' motion to dismiss Count V and hold either that FoxFire has no cause of action or that, applying rational-basis review, Count V fails on the merits. Alternatively, it should certify the questions set out above for immediate appeal under Rule 308(a) and stay proceedings pending resolution of that appeal.

Dated: April 21, 2021

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I hereby certify the statements set forth in this certificate of service are true and correct and I have caused a copy of the foregoing to be served upon the following lawyers via the email addresses noted below on April 21, 2021:

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