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Paul Palazzolo
7th Judicial Circuit
Sangamon County, IL
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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 DISMISS
FOXFIRE'S SECOND AMENDED COMPLAINT

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INTRODUCTION

The Governor and Illinois Department of Public Health ("IDPH") respectfully move the Court pursuant to 735 ILCS 5/2-615 to dismiss with prejudice all five counts of the second amended complaint filed by Fox Fire Tavern, LLC ("FoxFire"). Counts I through IV remain unchanged from the original and first amended complaints. As the Court and FoxFire previously agreed, these counts must be dismissed with prejudice pursuant to the appellate court's binding opinion in *Fox Fire Tavern, LLC v. Pritzker*, 2020 IL App (2d) 200623.

Count V, by contrast, is materially different from its counterpart in the first amended complaint. It no longer purports to plead a standalone "reasonableness" cause of action. Instead, FoxFire substitutes four new theories why the Illinois Constitution supposedly was violated by the Governor's executive orders temporarily suspending indoor dining during the height of the Covid-19 pandemic. None is sufficient to state a viable cause of action:

- FoxFire's separation of powers theory fails because in granting emergency powers to the Governor, the Illinois Emergency Management Agency Act, 20 ILCS 3305 ("Emergency Management Act"), adequately identifies (1) the persons or activities potentially subject to regulation, (2) the harm sought to be prevented, and (3) the general means available to prevent the identified harm. The statute is therefore a constitutional delegation of lawmaking authority to the executive.

- FoxFire's substantive due process and equal protection theories fail because indoor dining is particularly associated with the spread of the dangerous Covid-19 disease. Temporarily suspending indoor dining during a surge of Covid-19 cases is therefore rationally related to the legitimate state interest of protecting the public health and safety.

- FoxFire's procedural due process theory fails because the constitution does not require the Governor to provide predeprivation process under these circumstances.

For all these reasons, Count V should be dismissed with prejudice.

BACKGROUND

Covid-19 is a novel acute respiratory illness that continues to infect and claim the lives of people in Illinois and across the world. Almost 1.4 million Illinois residents have tested positive

and more than 23,200 have died since the dangerous disease first arrived in the State last year. An initial surge of cases peaked in the late spring of 2020 and tapered off over the summer. But a second and more deadly surge began to spread across Illinois in the early fall. At the beginning of October, IDPH reported around 2,000 new cases per day; by the end of the month, that figure had soared to almost 8,000 new cases per day. Many days in November and early December saw more than 10,000 new cases reported per day.[1]

The Emergency Management Act grants the Governor broad emergency powers during a disaster like the Covid-19 pandemic. *See Fox Fire*, 2020 IL App (2d) 200623 ¶¶ 21–36. On October 21, 2021, the Governor exercised those powers to issue Executive Order 2020-61 ("EO61"), which FoxFire challenges here.[2] EO61 notes the Governor "work[ed] with experts [at IDPH to] put forward a deliberate plan that utilizes several layers of mitigation steps to combat a resurgence of COVID-19 and prevent uncontrollable spread." 44 Ill. Reg. 17833. "[T]hat plan described two scenarios that would cause the State to institute more restrictive public health measures and impose additional mitigations in [one of the State's eleven Covid-19 health] region[s]: first, a sustained increase in the 7-day rolling average (7 out of 10 days) in the positivity rate, coupled with either (a) a sustained 7-day increase in hospital admissions for a COVID-like illness, or (b) a reduction in hospital capacity threatening surge capabilities (ICU

[1] The figures cited in this paragraph are available at IDPH's website "Coronavirus Disease 2019 (Covid-19) in Illinois," https://bit.ly/3ieRk5R. The Court may take judicial notice of information from public documents and government websites. *In re Linda B.*, 2017 IL 119392 ¶ 31 n.7; *Leach v. Dep't of Employment Sec.*, 2020 IL App (1st) 190299 ¶ 44; ILL. R. EVID. 201(b)(2).

[2] As in prior complaints, FoxFire also challenges IDPH's "Resurgence Mitigation Measures of October 20, 2020 (and their progeny)." It's unclear what FoxFire means by this. It claims these "Resurgence Mitigation Measures" are attached to the amended complaint as Exhibit F, but that document is actually a Kane County Health Department press release. Regardless, indoor dining was temporarily suspended at FoxFire's establishment not because of an IDPH directive but rather by means of the Governor's executive orders issued pursuant to his statutory and constitutional authority.

capacity or medical/surgical beds under 20%); or second, three consecutive days averaging greater than or equal to an 8% positivity rate (7 day rolling average)." *Id.* EO61 further notes "the current spread of COVID-19 in . . . Region 8, comprised of Kane and DuPage counties, has triggered the second of these scenarios as the region[ ] ha[s] averaged greater than or equal to an 8% COVID-19 positivity rate (7 day rolling average) for three consecutive days." *Id.*

Due to these worsening Covid-19 metrics in Kane and DuPage counties, EO61 imposed numerous public health restrictions designed to protect residents from the deadly disease. As relevant here, EO61 required all bars and restaurants to "suspend indoor on-premises consumption." 44 Ill. Reg. 17834 ¶ 1(a)(2). The Governor concluded it was "necessary to take [these] additional measures consistent with public health guidance to slow and stop the spread of COVID-19," to "preserv[e] public health and safety throughout the entire State of Illinois, and to ensure that our healthcare delivery system is capable of serving those who are sick." *Id.* at 17833. EO61 and its temporary suspension of indoor dining in Kane and DuPage counties remained in effect through February 6, 2021. Executive Order 2021-01, 45 Ill. Reg. 1238; Executive Order 2020-74, 44 Ill. Reg. 20211; Executive Order 2020-71, 44 Ill. Reg. 18800.

The mitigations imposed in Kane and DuPage counties were guided by the Governor's Restore Illinois plan and specifically its Resurgence Mitigation component. The three tiers of increasingly restrictive Resurgence Mitigations were imposed on a regional basis in response to various Covid-19 metrics like local test positivity and area hospitalization rates. As Covid-19 cases began to rise again in the fall of 2020, the Resurgence Mitigations allowed the Governor to tailor his response in order to achieve the public health goal of stopping or slowing the spread.[3]

[3] Also subject to judicial notice, information about the Restore Illinois plan and its Resurgence Mitigation component is available at the Governor's Covid-19 website, https://bit.ly/3wbCJiI.

FoxFire operates a bar and restaurant in Kane County. *Second Amended Verified Complaint for Declaratory Judgment and Injunctive Relief* ¶ 2 (June 1, 2021) ("Complaint"). Counts I through IV of the second amended complaint are unchanged from the first amended complaint. The Court and the parties previously agreed those counts should be dismissed with prejudice pursuant to the appellate court's binding opinion in *Fox Fire*, 2020 IL App (2d) 200623 ¶ 36. *Memorandum and Order on Defendants' Motion to Dismiss Count V of Fox Fire's Amended Complaint* at 1 (Apr. 7, 2021); *Docket Entry* (Apr. 28, 2021).[4]

FoxFire's revised Count V is titled "Seeking a Finding that EO 61, [IDPH's] Resurgence Mitigation Measures of October 20, 2020, and their progeny, violate the Illinois Constitution." Complaint at 13. FoxFire alleges the Governor violated the constitution in three different ways:

- He allegedly "circumvented basic separation of powers principle and improperly endowed himself with indefinite legislative authority, instead of a temporary emergency power," by "renew[ing] his indoor dining closure order for months on end beyond the initial 30 days," *id.* ¶ 80(b);

- He allegedly used an "arbitrary and unreasonable method to protect the public health from 'the spread of COVID-19'" because he had "no direct evidence pointing to FoxFire as a COVID-19 exposure setting" but rather had "contradictory data in hand demonstrating that Kane County restaurants were one of the least dangerous exposure setting categories," *id.* ¶ 80(c); and

- He allegedly "interfered with FoxFire's property rights and business interest without providing – and in fact actively contesting – basic due process protections," *id.* ¶ 80(a).

LEGAL STANDARD

The Governor respectfully moves the Court pursuant to 735 ILCS 5/2-615 to dismiss all counts of FoxFire's second amended complaint with prejudice. A motion to dismiss under

[4] Counts I and II assert the Governor lacked authority to issue EO61 because his powers under the Emergency Management Act last only 30 days per disaster—a period that has long since lapsed with respect to the Covid-19 pandemic. Complaint ¶¶ 41–56. Counts III and IV assert IDPH lacked authority to suspend indoor dining at FoxFire's premises under the Department of Public Health Act, 20 ILCS 2305, because IDPH did not follow the statutory procedures. *Id.* ¶¶ 57–71.

Section 2-615 "attacks the legal sufficiency of the complaint," *Reynolds v. Jimmy John's Enters., LLC*, 2013 IL App (4th) 120139 ¶ 26, and is proper where "it clearly appears that the plaintiff cannot prove any set of facts that will entitle it to relief," *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166 ¶ 61. Dismissal with prejudice is appropriate where an amendment could not cure the pleading deficiencies. *Vogt v. Round Robin Enters., Inc.*, 2020 IL App (4th) 190294 ¶ 29. "In ruling on [a Section 2-615] motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *Mount Zion State Bank & Trust v. Consol. Commc'ns, Inc.*, 169 Ill. 2d 110, 115 (1995). "[A] court cannot accept as true mere conclusions of law or fact unsupported by specific factual allegations." *Grant v. State*, 2018 IL App (4th) 170920 ¶ 12.

ARGUMENT

1. Counts I through IV Should Be Dismissed with Prejudice Pursuant to the Appellate Court's Binding Opinion in *Fox Fire*.

The Court and the parties previously agreed Counts I through IV of the first amended complaint must be dismissed with prejudice pursuant to *Fox Fire*, 2020 IL App (2d) 200623 ¶ 36, which holds the Emergency Management Act "allow[s] the Governor to issue successive disaster proclamations stemming from an ongoing disaster." *Memorandum and Order on Defendants' Motion to Dismiss Count V of Fox Fire's Amended Complaint* at 1 (Apr. 7, 2021); *Docket Entry* (Apr. 28, 2021). Those counts remain unchanged in the second amended complaint. They should again be dismissed with prejudice.

2. Count V Should Be Dismissed with Prejudice Because It Does Not Allege a Violation of the Illinois Constitution.

FoxFire's revised Count V alleges EO61 violates multiple provisions of the Illinois Constitution. FoxFire's new allegations do not present a viable cause of action.[5]

A. The Emergency Management Act's Grant of Powers to the Governor Is Not an Unconstitutional Delegation of Lawmaking Authority.

First, FoxFire alleges the Governor "circumvented basic separation of powers principle and improperly endowed himself with indefinite legislative authority, instead of a temporary emergency power," by "renew[ing] his indoor dining closure order for months on end beyond the initial 30 days." Complaint ¶ 80(b). Citing Article II, Section 1 of the Illinois Constitution—which provides "[t]he legislative, executive and judicial branches are separate" and "[n]o branch shall exercise powers properly belonging to another"—FoxFire asserts "[t]he police power to promulgate laws and regulations to protect the public health resides in the legislative branch, and is not traditionally an executive power." *Id.* ¶¶ 73, 74. On the basis of these allegations, FoxFire appears to contend the Emergency Management Act's grant of powers to the Governor—which indisputably authorize him to temporarily suspend indoor dining, 20 ILCS 3305/7(8), (12), so long as Covid-19 remains a "disaster" within the meaning of the statute, *Fox Fire*, 2020 IL App (2d) 200623 ¶ 36—constitute an unconstitutional delegation of lawmaking authority to the executive branch.

FoxFire's separation of powers theory is contrary to Illinois law. "Statutes carry a strong presumption of constitutionality." *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 146 (2003). "The

[5] By pleading multiple theories of relief in one count, FoxFire violates the Code of Civil Procedure, which requires "[e]ach separate cause of action upon which a separate recovery might be had [to] be stated in a separate count." 735 ILCS 5/2-603(b). "[N]either the court nor the parties 'should be placed in the position of trying to decipher a count to determine if there is more than one theory of relief in the count and, if so, how many.'" *Law v. Yanni*, 2015 IL App (2d) 150108 ¶ 28.

party challenging the constitutionality of a statute bears the burden of rebutting this presumption and clearly establishing a constitutional violation." *Russell v. Dep't of Natural Res.*, 183 Ill. 2d 434, 441 (1998). "Courts have a duty to sustain legislation whenever possible and to resolve all doubts in favor of constitutional validity." *McAlister v. Schick*, 147 Ill. 2d 84, 90 (1992).

The Illinois Constitution's "separation of powers provision does not create rigid boundaries prohibiting every exercise of functions by one branch of government which ordinarily are exercised by another." *Pucinski v. Cty. of Cook*, 192 Ill. 2d 540, 547 (2000). The General Assembly may constitutionally confer "authority or discretion as to the execution of the law" on the executive branch, *City of Evanston v. Wazau*, 364 Ill. 198, 205 (1936), and it may also constitutionally authorize the executive branch "to do many things which [the legislative branch] might properly but cannot understandingly or advantageously do itself," *People ex rel. Chi. Dryer Co. v. City of Chicago*, 413 Ill. 315, 320 (1952).

To comply with the separation of powers provision, the General Assembly need only "provide[ ] sufficient standards to guide the [executive branch] in the exercise of [these] functions." *E. St. Louis Fed'n of Teachers v. E. St. Louis Sch. Dist. No. 189 Fin. Oversight Panel*, 178 Ill. 2d 399, 423 (1997). "Absolute criteria whereby every detail necessary in the enforcement of a law is anticipated need not be established by the General Assembly. The constitution merely requires that intelligible standards be set to guide the [executive branch official] charged with enforcement, and the precision of the permissible standard must necessarily vary according to the nature of the ultimate objective and the problems involved." *Hill v. Relyea*, 34 Ill. 2d 552, 555 (1966) (cleaned up).

Courts apply a three-part test to evaluate delegation challenges. "To be a proper delegation of legislative authority, the statute in question must identify three factors: (1) the

persons or activities potentially subject to regulation; (2) the harm sought to be prevented; and (3) the general means available to the administrator to prevent the identified harm." *E. St. Louis*, 178 Ill. 2d at 423. Here, the Emergency Management Act's grant of powers to the Governor passes constitutional muster. *See JL Props. Grp. B, LLC v. Pritzker*, 2021 IL App (3d) 200305 ¶¶ 99–101 (McDade, J., concurring); *accord Casey v. Lamont*, No. SC 20494, 2021 WL 1181937, at *9–*17 (Conn. Mar. 29, 2021) (upholding similar Connecticut law against delegation challenge and citing Covid-19 delegation cases from other states).

The requirement that the statute identify the persons or activities potentially subject to regulation "is subject to practical limitations stemming from the complexity of the regulated subject." *Franciscan Hosp. v. Town of Canoe Creek*, 79 Ill. App. 3d 490, 494 (3d Dist. 1979). Thus, the General Assembly need only do what "is practical to define the scope of the legislation." *Stofer v. Motor Vehicle Cas. Co.*, 68 Ill. 2d 361, 372 (1977). This is not an onerous requirement. *E.g., In re Application for Judgment*, 167 Ill. 2d 161, 179 (1995) ("residents of governmental units and persons involved in the tax extension process"); *United Consumers Club, Inc. v. Attorney General*, 119 Ill. App. 3d 701, 712 (1st Dist. 1983) ("persons engaged in trade or commerce"); *Midwest Petroleum Marketers Ass'n v. City of Chicago*, 82 Ill. App. 3d 494, 502 (1st Dist. 1980) ("self-service dispensing of gasoline"); *Franciscan Hosp.*, 79 Ill. App. 3d at 494 (residents "whose resources are insufficient to meet the costs of necessary care").

The Emergency Management Act is clear that it potentially regulates those persons, businesses, and activities that are affected by, connected to, or located within the area of a disaster. It carefully prescribes what constitutes a "disaster," 20 ILCS 3305/4, how the Governor may invoke his emergency powers, *id.* § 7, and what the Governor may do with them, *id.* § 7(1)–(14). Each of the powers specifies a category of people, *id.* § 7(8) (those within a disaster area);

activities, *id.* § 7(3) (organization of State government); or both, *id.* § 7(12) (sellers and sale of good or services), that are potentially subject to regulation. Given the complexities of responding to a disaster, the General Assembly did all that was practical to define the statute's scope. *See Friendship Facilities, Inc. v. Region 1B Human Rights Auth.*, 167 Ill. App. 3d 425, 430 (3d Dist. 1988) ("It is unrealistic to expect the legislature to list each eligible person under the Act.").

The General Assembly was also clear about the harm it sought to prevent. It recognized "the possibility of the occurrence of disasters of unprecedented size and destructiveness" and determined it was therefore "necessary" to grant defined emergency powers to the Governor "in order 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). This purpose justifies the Governor's possession of emergency powers, animates his exercise of those powers, and provides the Court a standard against which to adjudicate the statutory limitations on those powers. *See, e.g., Heisterkamp v. Pacheco*, 2016 IL App (2d) 150229 ¶ 10 (statutes must be interpreted in view of expressed legislative purpose). It is consistent with the types of harm identified in constitutional delegations of legislative authority. *E.g., Application for Judgment*, 167 Ill. 2d at 179 ("avoidance of inefficiency and delay in extending and collecting taxes"); *Allen v. Ill. Cmty. Coll. Bd.*, 315 Ill. App. 3d 837, 846 (5th Dist. 2000) ("community college failing to adhere to the 'standards of scholarship'"); *Friendship Facilities*, 167 Ill. App. 3d at 430 ("safeguard the rights of disabled persons"); *accord Stofer*, 68 Ill. 2d at 373 (recognizing General Assembly "may use somewhat broader, more generic language" in identifying such harm).

Finally, the General Assembly specified the general means available to the Governor to "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). Those means are the powers set forth in Section 7(1)–7(14) of the Emergency Management Act, which provides significantly more detail than is constitutionally required. *E.g., S. 51 Dev. Corp. v. Vega*, 335 Ill. App. 3d 542, 553 (1st Dist. 2002) (authorization to promulgate rules and regulations is sufficient). Although the Governor's powers under the statute are broad, the law recognizes the executive branch "may validly exercise discretion to accomplish in detail that which is authorized in general terms." *Boles Trucking, Inc. v. O'Connor*, 138 Ill. App. 3d 764, 778 (4th Dist. 1985). After all, "[t]he point of delegating a task to the executive branch is to allow the executive to efficiently accomplish a particular objective using its experience and expertise when the legislative branch could not perform the task with the same expertise or efficiency." *AFSCME, Council 31 v. State*, 2015 IL App (1st) 133454 ¶ 26.

The General Assembly detailed the types of actions the Governor may take during a disaster but also recognized he will be better positioned to determine the precise response required under the challenging circumstances presented by an emergency affecting public health or safety. The statute therefore provides the Governor necessary discretion as to when and how to employ measures like, for example, controlling "the movement of persons" within a disaster area, 20 ILCS 3305/7(8), or regulating the use of services, *id.* § 7(12). This discretion is cabined by the overarching purpose for the General Assembly's grant of authority—to "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). The Emergency Management Act's powers are thus consistent with the "general means" identified in other statutes found sufficient to constitute a constitutional delegation. *E.g., E. St. Louis*, 178 Ill. 2d at 424 ("suspension from duty without pay, removal from office, or termination of employment"); *Vill. of Riverwoods v. Dep't of*

Transp., 77 Ill. 2d 130, 136–37, 142 (1979) ("allocation of water" to political subdivisions on basis of "[p]opulation, business and economic projections and requirements"); *Maun v. Dep't of Prof'l Regulation*, 299 Ill. App. 3d 388, 400–01 (4th Dist. 1998) ("suspension or revocation of a medical license or visiting professor permit, or being placed on probationary status"); *Friendship Facilities*, 167 Ill. App. 3d at 431 ("power to enter and inspect the premises"); *Roque v. Quern*, 90 Ill. App. 3d 1015, 1021 (1st Dist. 1980) ("implementation of a comprehensive drug program"); *Midwest Petroleum*, 82 Ill. App. 3d at 502 ("some type of price regulation").

The Emergency Management Act's grant of powers to the Governor adequately identifies (1) the persons or activities potentially subject to regulation, (2) the harm sought to be prevented, and (3) the general means available to the Governor to prevent the identified harm. It is therefore a constitutional delegation of lawmaking authority. Count V of FoxFire's second amended complaint should be dismissed with prejudice to the extent it asserts a violation of the Illinois Constitution's separation of powers provision.

B. EO61's Temporary Suspension of Indoor Dining Is Not a Violation of Substantive Due Process or Equal Protection.

Count V also alleges EO61's temporary suspension of indoor dining was an "arbitrary and unreasonable method to protect the public health from 'the spread of COVID-19.'" Complaint ¶ 80(c). FoxFire asserts "[u]pon information and belief, the data [the Governor and IDPH] possessed during the promulgation of EO61 demonstrated that Kane County restaurants are one of the least dangerous exposure categories pertaining to COVID-19 within said county." *Id.* ¶ 78. FoxFire also asserts "upon information and belief, neither [the Governor nor IDPH] possess any data specifically identifying FoxFire as a known exposure site." *Id.* ¶ 79. And FoxFire contends EO61 "impose[s] classifications on Bars and Restaurants, discriminating and otherwise restricting said businesses." *Id.* ¶ 75.

In (apparent) support of this theory, FoxFire cites Article I, Section 2 of the Illinois Constitution, which provides "[n]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." Complaint ¶ 73. Given these allegations, it is unclear whether FoxFire intends to assert a substantive due process theory or an equal protection theory. Either way, Count V fails to state viable cause of action.

1. Legal Standard

Substantive due process bars arbitrary governmental action that infringes upon a protected interest. *Wingert ex rel. Wingert v. Hradisky*, 2019 IL 123201 ¶ 29.[6] The standard of review depends on whether the challenged action affects a fundamental right. *People v. Pepitone*, 2018 IL 122034 ¶ 14. FoxFire is a corporate entity, Complaint ¶ 1, and corporate entities do not have fundamental rights, *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995). Moreover, even individuals do not have a fundamental right to pursue a profession or trade, *Hayashi v. IDFPR*, 2014 IL 116023 ¶ 29, or sell food and drinks for indoor, onsite consumption, *see People v. Avila-Briones*, 2015 IL App (1st) 132221 ¶ 72 (substantive due process "protects only those fundamental rights 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'") (citations omitted). Because EO61 does not affect a fundamental right, rational basis review applies to any substantive due process challenge. *People v. Rizzo*, 2016 IL 118599 ¶ 45.

[6] The Illinois Constitution's guarantees of substantive due process and equal protection are identical to its federal counterpart's. *E.g., Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673 ¶ 92. Thus, the Governor and IDPH cite cases interpreting these provisions of both constitutions. *See id.* ("we find no state grounds for disregarding federal precedent when interpreting our state constitution's due process and equal protection clauses").

"When applying the rational basis test, [the court's] inquiry is twofold: [it] must determine whether there is a legitimate governmental interest behind the [government action] and, if so, whether there is a reasonable relationship between that interest and the means the governing body has chosen to pursue it." *LMP Servs., Inc. v. City of Chicago*, 2019 IL 123123 ¶ 17. A substantive due process plaintiff "bears the burden of proving by clear and affirmative evidence that the [government action is] arbitrary, capricious, and unreasonable [ ]; that there is no permissible interpretation that justifies its adoption; or that it does not promote the safety and general welfare of the public." *Id.* "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.* Rational basis review is "highly deferential," meaning the government action must be upheld "[i]f there is any conceivable set of facts to show a rational basis for the statute." *People v. Johnson*, 225 Ill. 2d 573, 585 (2007). But "judgments made by the legislature in crafting a statute 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).

As for equal protection, it "requires that the government treat similarly situated individuals in a similar manner." *Jacobson v. Dep't of Public Aid*, 171 Ill. 2d 314, 322 (1996). "It does not preclude the State from . . . draw[ing] distinctions between different categories of people, but it does prohibit the government from according different treatment to persons who have been placed . . . into different classes on the basis of criteria wholly unrelated to the purpose of the legislation." *Id.* Because EO61 does not affect a fundamental right, and because FoxFire does not contend its restrictions are based on suspect categories like race or national origin, "the highly deferential rational basis test" applies. *In re A.A.*, 181 Ill. 2d 32, 37 (1998).

Rational basis review of an equal protection claim is similar to rational basis review of a substantive due process claim. The government's classification is "presumed to be constitutional and will be upheld if it is rationally related to a legitimate state interest." *LaSalle Nat'l Bank v. City of Highland Park*, 344 Ill. App. 3d 259, 281 (2d Dist. 2003). "[A]ny rational basis will suffice, even one that was not articulated at the time the disparate treatment occurred." *Srail v. Vill. of Lisle*, 588 F.3d 940, 946–47 (7th Cir. 2009); *see also Dotty's Cafe v. Ill. Gaming Bd.*, 2019 IL App (1st) 173207 ¶ 34. The Governor is not required to "produce evidence to sustain the rationality of the classification. Instead, there is a weighty burden on the challenger, who must negative every basis which might support the law because it should be upheld if there is any reasonably conceivable set of facts supporting the classification." *AFSCME*, 2015 IL App (1st) 133454 ¶ 32 (cleaned up). A "court may [even] hypothesize reasons for the" regulation. *Jones v. City of Calumet City*, 2017 IL App (1st) 170236 ¶ 29. Ultimately, "plaintiff bears the burden of demonstrating that [a challenged classification] furthers no legitimate public interest." *Miller v. Dept. of Prof'l Regulation*, 276 Ill. App. 3d 133, 145 (2d Dist. 1995).

"Rational-basis review tolerates overinclusive classifications, underinclusive ones, and other imperfect means-ends fits." *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1010 (7th Cir. 2019); *see also In re Estate of Muldrow*, 343 Ill. App. 3d 1148, 1154 (1st Dist. 2003). A classification is not "invalidated simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked"; instead, the government "may choose to address itself to what it perceives to be the most acute need." *Chi. Nat'l League*, 108 Ill. 2d at 367 (cleaned up). "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *City of Chicago v. Shalala*, 189 F.3d 598, 606 (7th Cir. 1999) (cleaned up); *see*

also Ill. Collaboration on Youth v. Dimas, 2017 IL App (1st) 162471 ¶ 80. "In cases involving economic and social regulation, so long as distinctions are conceivably rational, the recourse of a disadvantaged [person] lies in the democratic process." *Lamers Dairy Inc. v. U.S. Dep't of Agriculture*, 379 F.3d 466, 476 (7th Cir. 2004).

2. FoxFire's Substantive Due Process and Equal Protection Theories Fail to Clear Threshold Hurdles.

The Court should dismiss FoxFire's substantive due process and equal protection theories without proceeding to rational basis review because each theory fails to clear a threshold hurdle. Binding appellate court precedent holds a substantive due process challenge to executive action is actionable only if it implicates a fundamental right. *The Bigelow Grp., Inc. v. Rickert*, 377 Ill. App. 3d 165, 179–80 (2d Dist. 2007). This limitation recognizes "the fundamental differences between substantive due process review of an executive, as opposed to a legislative, action. When a plaintiff challenges the validity of a legislative act, substantive due process typically demands that the act be rationally related to some legitimate government purpose. In contrast, when a plaintiff challenges a non-legislative state action, [courts] must look, as a threshold matter, to whether the property interest being deprived is fundamental under the Constitution. ***If the interest is not fundamental, the governmental action is entirely outside the ambit of substantive process***." *Id.* at 180 (cleaned up and emphasis added); *see Karabetsos v. Vill. of Lombard*, 386 Ill. App. 3d 1020, 1022 (2d Dist. 2008); *Hillcrest Prop., LLP v. Pasco Cty.*, 915 F.3d 1292, 1293 (11th Cir. 2019) ("executive action never gives rise to a substantive-due-process claim unless it infringes on a fundamental right"); *Nicholas v. Penn. State Univ.*, 227 F.3d 133, 142 (3d Cir. 2000). Here, FoxFire challenges executive action that does not affect a fundamental right. That means it fails at the outset to state a substantive due process claim.

FoxFire's equal protection claim also founders early. "As a threshold matter, . . . it is axiomatic that an equal protection claim requires a showing that the individual raising it is similarly situated to the comparison group." *People v. Masterson*, 2011 IL 110072 ¶ 25; *see In re Vincent K.*, 2013 IL App (1st) 112915 ¶ 53 (equal protection "plaintiff must allege that there are other people similarly situated to him"). A comparison group is "similarly situated only when [it is] in all relevant respects alike" the plaintiff. *In re Destiny P.*, 2017 IL 120796 ¶ 15. "When a party bringing an equal protection claim fails to show that he is similarly situated to the comparison group, his equal protection challenge fails." *In re M.A.*, 2015 IL 118049 ¶ 25. That's because "different treatment of unlike groups does not support an equal protection claim." *In re Derrico G.*, 2014 IL 114463 ¶ 92; *see e.g., Quinn v. Bd. of Educ.*, 2018 IL App (1st) 170834 ¶ 88 (affirming dismissal of equal protection claim because "Plaintiffs have alleged no facts showing that Chicago is like any other district in the state"); *Dudycz v. City of Chicago*, 206 Ill. App. 3d 128, 134–35 (1st Dist. 1990) (affirming dismissal of equal protection claim because allegations did "not establish [plaintiff] and these other legislators were, in fact, similarly situated so that he was entitled to be treated in the same manner"). Here, FoxFire does not allege any facts showing there are other businesses that are in all relevant respects alike bars and restaurants. Its failure to even identify a comparison group means it does not state a viable equal protection claim.

3. Temporarily Suspending Indoor Dining Is Rationally Related to the Legitimate State Interest of Slowing or Stopping the Spread of the Dangerous Covid-19 Disease.

Beyond these threshold pleading failures, EO61 plainly passes highly deferential rational basis review. *Johnson*, 225 Ill. 2d at 585; *A.A.*, 181 Ill. 2d at 37. Under that test, FoxFire's challenges to EO61 must be rejected if there is any ***conceivable*** set of facts to show a rational basis for the Governor's action. *People ex rel. Lumpkin v. Cassidy*, 184 Ill. 2d 117, 124 (1998);

AFSCME, 2015 IL App (1st) 133454 ¶ 32. These facts may be hypothesized, *Jones*, 2017 IL App (1st) 170236 ¶ 29, or "based on rational speculation unsupported by evidence or empirical data," *Arangold*, 204 Ill. 2d at 147, and need not appear in the complaint, *Dotty's Cafe*, 2019 IL App (1st) 173207 ¶¶ 15, 33–57; *DeWoskin v. Loew's Chi. Cinema, Inc.*, 306 Ill. App. 3d 504, 511–12, 519–23 (1st Dist. 1999). The question is not whether the Court agrees with the Governor's actions or "whether [they were] the best means of achieving [the Governor's] goal," *LMP Servs.*, 2019 IL 123123 ¶ 17. Rather, the Court must ask whether FoxFire carried its burden to plead the Governor's actions "further[ ] no legitimate public interest." *Miller*, 276 Ill. App. 3d at 145.

FoxFire fails to carry its burden because reasonably conceivable facts establish a rational basis for the Governor to temporarily suspend indoor dining at the height of the Covid-19 pandemic. As discussed above, the disease has infected almost 1.4 million Illinois residents and killed more than 23,200. When the Governor issued EO61 last fall, a second and more deadly surge of Covid-19 was spreading across the State. And at that time, no vaccine or treatment was available. The only surefire way to protect people from Covid-19 was to prevent infection. Slowing the spread of the deadly virus was crucial for public health and safety.

According to the Centers for Disease Control ("CDC"), the virus that causes Covid-19 is transmitted primarily by exposure to infectious respiratory fluids, including by inhaling respiratory droplets and aerosol particles. People release respiratory fluids during exhalation—while breathing, speaking, coughing, or sneezing—in the form of droplets across a spectrum of sizes. The smallest of these droplets can remain suspended in the air for minutes to hours. Once infectious droplets and particles are exhaled, they move outward from the source. The risk for infection decreases with increasing distance from the source and increasing time after exhalation. On the other hand, the risk for infection increases when exposure occurs in an enclosed space

with inadequate ventilation (which allows droplets to linger longer in the air), when the infectious person is producing increased exhalation of respiratory fluids (for instance, by raising one's voice to be heard in a crowded restaurant or bar), or when there is prolonged exposure to these conditions (meaning more than 15 minutes).[7] Each of these increased risk factors is associated with indoor dining. And it is not feasible to dine or drink while wearing a face covering, which otherwise could potentially reduce exposure to respiratory droplets and ameliorate some of these risk factors. So it's no surprise that studies from the CDC and elsewhere show indoor dining at restaurants and bars is closely linked to the spread of Covid-19.[8] Recognizing this, the CDC classifies indoor dining as the riskiest activity for bars and restaurants.[9]

Faced last fall with a heightened public health emergency caused by the worsening Covid-19 pandemic and a surge of potentially deadly infections, the Governor reasonably determined that halting the spread of this dangerous disease required him to take certain emergency measures. He "work[ed] with experts [at IDPH to] put forward a deliberate plan that

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[7] This information is taken from the CDC's website titled "Scientific Brief: SARS-CoV-2 Transmission," https://bit.ly/359IfpT. The Court may take judicial notice of information from public documents and government websites. *Linda B.*, 2017 IL 119392 ¶ 31 n.7; *Leach*, 2020 IL App (1st) 190299 ¶ 44; ILL. R. EVID. 201(b)(2). To be clear, the Governor does not ask the Court to take judicial notice that Covid-19 spreads in the way described. Rather, the Governor appropriately asks the Court to take judicial notice that our nation's leading public health agency—charged with protecting the public health and safety through the control and prevention of infectious diseases—has published this information on its website and that the information reflects the CDC's understanding of how Covid-19 spreads.

[8] CDC, "Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥18 Years in 11 Outpatient Health Care Facilities — United States, July 2020," https://bit.ly/37OOUbO ("Adults with positive SARS-CoV-2 test results were approximately twice as likely to have reported dining at a restaurant than were those with negative SARS-CoV-2 test results."); Benedict Carey, "Limiting Indoor Capacity Can Reduce Coronavirus Infections, Study Shows," N.Y. TIMES (Nov. 10, 2020), https://nyti.ms/3lNSCGQ ("'Restaurants were by far the riskiest places, about four times riskier than gyms and coffee shops . . . .'").

[9] CDC, "Considerations for Restaurant and Bar Operators," https://bit.ly/3ixvUUE.

utilizes several layers of mitigation steps to combat a resurgence of COVID-19 and prevent uncontrollable spread." EO61, 44 Ill. Reg. 17833. Among these steps was the temporary suspension of indoor dining in any health region where case counts, hospital admissions, or test positivity rates exceeded certain thresholds. *Id.* at 17834 ¶ 1(a)(2). The CDC, our nation's leading public health agency, has identified indoor dining at restaurants and bars as an activity closely linked to the spread of Covid-19. It has also identified factors associated with an increased risk of Covid-19 transmission—including prolonged exposure in an enclosed space where people are unable to wear masks and raising their voices—each of which is present in indoor dining. All this goes to show there is a "reasonable relationship" between the Governor's decision to temporarily suspend indoor dining and his legitimate goal of slowing the spread of Covid-19 and preventing unnecessary deaths in Illinois. *See LMP Servs.*, 2019 IL 123123 ¶ 17. EO61 protected the people of this State from a known means of spreading a dangerous disease.

FoxFire does not carry its burden to plead the temporary suspension of indoor dining in Kane County during the height of the Covid-19 pandemic "furthers no legitimate public interest." *Miller*, 276 Ill. App. 3d at 145. It relies on two conclusory allegations, both made on information or belief. Complaint ¶¶ 78–79. First, it asserts the Governor lacks "any data specifically identifying FoxFire as a known exposure site." *Id.* ¶ 79. Whether or not this is true, it is certainly irrelevant. Neither substantive due process nor equal protection requires the government to have evidence in hand that shows a regulation rationally related to a legitimate state interest will apply only to people or businesses where the problem the State seeks to solve is actually present. To the contrary, judgments necessarily made by government officials in crafting regulation "are not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Arangold*, 204 Ill. 2d at 147. And in any

event, whether Covid-19 exposure was documented at a particular location in the past is not the only (or even a useful) indicator of whether that location presents a risk of future exposure.

FoxFire's second allegation falls short for the same reason. It says the Governor possessed data "during the promulgation of EO61 demonstrat[ing] that Kane County restaurants are one of the least dangerous exposure categories pertaining to COVID-19 within said county." Complaint ¶ 78. What are these other "exposure categories," what people or businesses comprise them, and exactly how much more "dangerous" are they compared to restaurants? FoxFire does not say—and since we don't know what these "exposure categories" are, it's unclear whether they were also addressed in EO61 (which imposes restrictions on people and businesses beyond just bars and restaurants). FoxFire's allegation is nothing more than a barebones assertion—a "conclusion[ ] of fact unsupported by allegations of specific facts"—which the Court must ignore in evaluating the Governor's motion to dismiss. *See Hensler v. Busey Bank*, 231 Ill. App. 3d 920, 924 (4th Dist. 1992).

Regardless, FoxFire's theory reduces to the proposition that the Illinois Constitution forbids the Governor to suspend indoor dining at restaurants to slow the spread of Covid-19 unless he also suspends every other activity that presents an equal or greater risk of spreading the disease. But neither substantive due process nor equal protection requires a regulation to be the best or most efficient means of tackling the problem at hand. *LMP Servs.*, 2019 IL 123123 ¶ 17; *Ill. Collaboration*, 2017 IL App (1st) 162471 ¶ 80. These constitutional guarantees merely require the regulation to bear a rational relationship to the problem they seek to address. FoxFire's allegation concedes some people caught Covid-19 at a Kane County restaurant. Complaint ¶ 78. The Governor's temporary suspension of indoor dining was a rational effort to

prevent additional infections at Kane County restaurants. That is enough to show the Governor's decision to take that step complied with substantive due process and equal protection.[10]

C. The Illinois Constitution Did Not Require the Governor to Provide Predeprivation Process to FoxFire Before Implementing EO61.

Finally, Count V alleges the Governor "interfered with FoxFire's property rights and business interest without providing – and in fact actively contesting – basic due process protections." Complaint ¶ 80(a). A procedural due process claim "governs the methods by which a protected interest may be deprived." *In re Perona*, 294 Ill. App. 3d 755, 760 (4th Dist. 1998). FoxFire does not specify the procedural protections it thinks the Governor was constitutionally required to provide before he could suspend indoor dining in Kane County.

Due process is a "flexible" concept that only "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see People v. Stoecker*, 2020 IL 124807 ¶ 17. In determining the amount and type of process required, courts consider three factors: (1) "the private interest that will be affected by the official action," (2) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail," and (3) "the risk that the plaintiff will suffer an erroneous deprivation through the procedure used and the probable value if any of additional procedural safeguards." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see Hayashi*, 2014 IL 116023 ¶ 40. "Procedural due process rules are meant to

[10] Relatedly, the Equal Protection Clause does not require the Governor to "choose between [regulating] against all evils of the same kind or not [regulating] at all." *Chi. Nat'l League Ball Club, Inc. v. Thompson*, 108 Ill. 2d 357, 367 (1985). The Illinois Constitution allows him to take an incremental approach. *See People v. Rhoads*, 110 Ill. App. 3d 1107, 1117 (1st Dist. 1982) (no equal protection violation where government "doesn't go 'far enough' in eliminating a particular evil or mischief").

protect persons not from the deprivation, but from the mistaken or unjustified deprivation." *E. St. Louis*, 178 Ill. 2d at 415.

FoxFire apparently wanted the Governor to provide a predeprivation hearing[11] to every bar and restaurant in Kane County (and beyond) before issuing EO61 and temporarily suspending indoor dining. This argument fails for two reasons. First, the State's interest in preserving the public health under the emergency conditions wrought by Covid-19—and particularly during the exponential surge in cases experienced last fall—overwhelms FoxFire's interest in a predeprivation hearing. Due process does not "require a hearing in every instance a government action impairs a private interest." *Shushunov v. IDFPR*, 2017 IL App (1st) 151665 ¶ 23. The additional process FoxFire demands would substantially interfere with the Governor's interest in protecting the public from Covid-19. The U.S. Supreme "Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *see Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981) ("deprivation of property to protect the public health and safety is one of the oldest examples of permissible summary action"); *RBIII, L.P. v. City of San Antonio*, 713 F.3d 840, 844 (5th Cir. 2013) (predeprivation hearing not required "where the State acts to abate an emergent threat to public safety"); *WWBITV, Inc. v. Vill. of Rouses Point*, 589 F.3d 46, 50 (2d Cir. 2009) (same).

Just so here. It would take years if not decades for the Governor to provide a predeprivation hearing to every bar and restaurant in Kane County (plus the bars and restaurants

[11] FoxFire does not allege it lacks an adequate postdeprivation hearing, and this suit demonstrates one is available. *E.g., San Geronimo Caribe Project, Inc. v. Acevedo-Vilá*, 687 F.3d 465, 490 (1st Cir. 2012) (postdeprivation opportunity to challenge exercise of emergency powers in court satisfies constitution).

in other parts of the State subject to similar executive orders at the same time). This caseload would quickly overwhelm the judicial resources of every court in the State, not to mention the executive branch officials required to prosecute those actions. It imposes an impossible requirement on an executive confronted with a public health emergency like Covid-19, which requires collective action measured in days or even hours. The rigid procedures FoxFire demands would fatally undermine the Governor's urgent public health prerogatives and are far more "burdensome [and] elaborate [than is] constitutionally required." *Rosewell v. Chi. Title & Tr. Co.*, 99 Ill. 2d 407, 412 (1984). For this reason alone, due process does not require the Governor to provide them. *See, e.g., Zevallos v. Obama*, 793 F.3d 106, 116 (D.C. Cir. 2015) (predeprivation process not required where it would "cripple" the government's ability to act effectively); *Patel v. Midland Mem. Hosp. & Med. Ctr.*, 298 F.3d 333, 340 (5th Cir. 2002) (similar); *Harris v. City of Akron*, 20 F.3d 1396, 1404 (6th Cir. 1994) (similar).

FoxFire's procedural due process theory also fails because the Due Process Clause does not require procedures that "would be an exercise in futility." *Mackey v. Montrym*, 443 U.S. 1, 16 (1979). The Governor's temporary suspension of indoor dining relied on solid medical guidance and was effective because it required Illinois residents and businesses to take collective action. Covid-19 is highly contagious and can be transmitted by people who are asymptomatic, and bars and restaurants are at an increased risk of becoming transmission vectors for Covid-19. And last fall's surge in cases could have crippled Illinois's strained hospital resources and caused needless suffering and death. The sensible solution to slow the spread of Covid-19 was to temporarily suspend indoor dining at bars and restaurants in any health region experiencing worsening metrics.

For this reason, the Governor's executive orders suspending indoor dining necessarily apply to every bar and restaurant in those health regions. There is no risk that FoxFire suffered an erroneous deprivation. And there is no benefit FoxFire could have derived from the additional hearing it seeks because there is no showing it could have made that would undermine the applicability of EO61 to its establishment. *See Chinnock v. Turnage*, 995 F.2d 889, 893 (9th Cir 1993) (lack of hearing "could not possibly violate [plaintiff's] constitutional rights" where it could not have altered outcome). The medically sound logic underlying the temporary suspension of indoor dining is not susceptible to individual differentiation. FoxFire is being treated the same as every other bar and restaurant in its health region—and necessarily so in view of the Governor's public health objectives. *See Dibble v. Quinn*, 793 F.3d 803, 811 (7th Cir. 2015) (due process does not require a hearing where "decision does not depend on factors related to the individual"). There would be no point to the hearing FoxFire demands—and due process does not require a purposeless hearing. "Pointless process is never due." *Doe ex rel. Doe v. Todd Cty. Sch. Dist.*, 625 F.3d 459, 464 (8th Cir. 2010); *see also Fowler v. Benson*, 924 F.3d 247, 259 (6th Cir. 2019) (similar). FoxFire fails to state a viable procedural due process claim.

D. FoxFire's Constitutional Rights Must Yield to the Governor's Emergency Measures to Address the Covid-19 Public Health Crisis.

Substantive flaws aside, none of the constitutional theories in Count V is actionable because the Governor's temporary suspension of indoor dining was designed to promote the public health and halt the spread of a deadly disease during a global pandemic of unprecedented magnitude. "Neither the Fourteenth Amendment to the Federal Constitution ***nor any provision of our State Constitution*** was designed to interfere with the police power of the state to enact and enforce laws for the protection of the health, peace, morals, and general welfare of the people." *People v. Anderson*, 355 Ill. 289, 295–96 (1934) (emphasis added). "It has been almost

universally held in this country that the constitutional guaranties . . . ***must yield to the statutes and ordinances designed to promote the public health*** as a part of the police powers of the State." *Spalding v. Granite City*, 415 Ill. 274, 278–79 (1953) (emphasis added); *accord In re Covid-19 Litig.*, No. 2020-MR-589, slip op. at 7 (Ill. 7th Jud. Cir. Ct. Dec. 1, 2020) ("[U]nless the action taken by the [Governor] bears 'no real or substantial relation' to the protection of public health, or is 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law,' neither this Court, nor any vocal citizen . . . has the authority to second guess the policy decisions made by the executive in responding to the [Covid-19] emergency.").

This principle of Illinois law is mirrored in federal law.[12] "[W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail [federal] constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *In re Abbott*, 954 F.3d 772, 784–85 (5th Cir. 2020) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)). During the recent pandemic, the federal principle has been applied "repeatedly . . . to uphold stay-at-home orders meant to check the spread of Covid-19" against constitutional challenges. *Cassell v. Snyders*, 458 F. Supp. 3d 981, 993 (N.D. Ill. 2020).

Numerous Illinois courts have ruled that federal constitutional rights must yield to the restrictions imposed in the Governor's Covid-19 executive orders because the pandemic is a "public health crisis" that "continues to threaten the residents of Illinois" "and because [the Governor's public health measures] undoubtedly advance[ ] the government's interest in

[12] The Court should follow these federal authorities pursuant to "the 'limited lockstep' approach for interpreting cognate provisions of our state and federal constitutions." *Hope Clinic*, 2013 IL 112673 ¶ 47.

protecting Illinoisans from the pandemic." *Id.* at 994; *see H's Bar, LLC v. Berg*, No. 20-cv-1134-SMY, 2020 WL 6827964, at *4 (S.D. Ill. Nov. 21, 2020) ("EO63's requirement that restaurants and bars cease indoor service until the positivity rate declines has a real and substantial relationship to preventing the spread of COVID-19. As such, this Court concludes that the claimed deprivation of Plaintiff's federal constitutional rights would be permissible under *Jacobson*, and therefore, the likelihood that Plaintiff will succeed on the merits of those claims is negligible at best."); *Williams v. Trump*, 495 F. Supp. 3d 673, 681–82 (N.D. Ill. 2020); *Vill. of Orland Park v. Pritzker*, 475 F. Supp. 3d 866, 880–82 (N.D. Ill. 2020); *Ill. Republican Party v. Pritzker*, 470 F. Supp. 3d 813, 820–21 (N.D. Ill. 2020); *Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 2468194, at *3 (N.D. Ill. May 13, 2020).

There is no dispute that the Governor's executive order temporarily suspending indoor dining in Kane County was "designed to promote the public health." *Spalding*, 415 Ill. at 279. And Illinois law is clear that "no provision of our State Constitution was designed to interfere with" actions like the Governor's that are intended to protect "the health, peace, morals, and general welfare of the people." *Anderson*, 355 Ill. at 296. FoxFire cannot prevail on its constitutional challenges to EO61.

CONCLUSION

For these reasons, the Governor and IDPH respectfully move the Court pursuant to 735 ILCS 5/2-615 to dismiss with prejudice all five counts of FoxFire's second amended complaint.

Dated: July 1, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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