IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 68 MM 2020

FRIENDS OF DANNY DeVITO, KATHY GREGORY, B&J LAUNDRY, LLC, BLUEBERRY HILL PUBLIC GOLF COURSE & LOUNGE, and CALEDONIA LAND COMPANY,

Petitioners

v.

TOM WOLF, GOVERNOR and RACHEL LEVINE, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH,

Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO EMERGENCY APPLICATION FOR EXTRAORDINARY RELIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Regulations

Treatises

Other Authorities

Press Releases and News Sources

INTRODUCTION

Pennsylvania, along with 47 other States throughout the country, are currently operating under declared states of emergency due to the COVID-19 pandemic.[1] So far, 42 States, including Pennsylvania, have shut down non-essential businesses as part of their effort to enforce social distancing, which is the only way to prevent millions of deaths from this pandemic.[2] That these necessary measures have come from States, rather than the Federal government, demonstrates a bedrock feature of America's system of federalism: The United States Constitution reserves police powers for the States.

Petitioners, however, urge this Court to make Pennsylvania the first and only state in the country in which the effort to combat COVID-19 and protect the lives of

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[1] Rosie Preper, Ellen Cranley, and Sarah Al-Arshani, "Almost All US states have declared states of emergency to fight coronavirus – here's what it means for them," Business Insider, https://www.businessinsider.com/california-washington-state-of-emergency-coronavirus-what-it-means-2020-3 (last visited 4/2/20).

[2] In addition to Pennsylvania, the following states have shut down non-essential businesses: Alabama; Alaska; Arizona; California; Colorado; Connecticut; Delaware; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota, Montana; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Carolina; Ohio; Oklahoma; Oregon; Rhode Island; South Carolina; Tennessee; Texas; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin; and Wyoming. Erin Schumaker, "Here are the states that have shut down nonessential businesses," ABC News, https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806 (last visited 04/01/2020).

its citizens must yield to the short-term commercial and personal interests of a few. Their urging is based upon an unduly narrow interpretation of this Commonwealth's inherent police powers, and upon an equally flawed reading of the specific statutory provisions that the General Assembly enacted to supplement that power. Through numerous attempts to articulate a basis for elevating their narrow interests above the health and safety of their fellow-citizens, Petitioners evidence a fundamental misapprehension of this pandemic, which is matched only by their misapprehension of the law.

STATEMENT OF THE CASE

Since the Commonwealth filed its answer in this Matter on March 26, 2020, the number of COVID-19 cases in Pennsylvania has increased exponentially from 1,687 cases and 16 deaths to 7,016 cases and 90 deaths. More than 1,000 Americans are dying every day due to COVID-19, double the daily death toll of both lung cancer and influenza combined.[3] Current models for the COVID-19 pandemic predict that the *best-case* scenario for the United States is that between 100,000 and 240,000 Americans will die in the coming months – and that's only if the nation abides by

[3] Michael James, "More than 1,000 in US die in a single day from coronavirus, doubling the worst daily death toll of the flu," *USA Today*, https://www.usatoday.com/story/news/nation/2020/04/01/coronavirus-kills-1-000-single-day-u-s-double-flu/5100905002/ (last visited 4/1/20).

social distancing.[4] That is more American deaths than in the Korea and Vietnam Wars combined.[5] Without social distancing, the estimated death count goes up to 1.7 million Americans, or more than 4 times the number of American deaths during World War II.[6] We are fighting a war against an invisible enemy, and the casualty numbers will reflect that reality.

Social distancing is essential to limiting the death toll of COVID-19 because this pandemic spreads primarily though person to person contact, as many as 25% of those infected are asymptomatic,[7] and the virus has an incubation period of up to

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[4] Peter Baker, "Trump Confronts a New Reality Before an Expected Wave of Disease and Death," *The New York Times*, https://www.nytimes.com/2020/04/01/us/politics/coronavirus-trump.html (last visited 4/2/20).

[5] Factsheet: America's Wars, U.S. Department of Veterans Affairs, https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf (last visited 4/2/20).

[6] Chas Danner, "CDC's Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead," *New York Magazine*, https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html (last visited 3/20/2020).

[7] Apoorva Mandavilli, "Infected but Feeling Fine: The Unwitting Coronavirus Spreaders, *The New York Times*, https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html (last visited 4/2/20).

14 days.[8] Further, the virus can remain on surfaces for days[9] and can spread through the air within confined areas and structures.[10] Because of these realities we must assume that everyone could be infected even if showing no symptoms. Until new drugs and vaccines become available, social distancing is our only weapon against the spread of this plague.[11]

To protect the lives and health of millions of Pennsylvanians, on March 19, 2019, Pennsylvania Governor Tom Wolf issued an Executive Order temporarily prohibiting operation of non-life sustaining businesses within the Commonwealth. In addition to his inherent powers as the Commonwealth's chief executive, the Governor's Executive Order invoked three separate statutory grounds for his authority: the Emergency Management Services Code ("Emergency Code"), 35

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[8] "Coronavirus Disease 2019 (COVID-19): Symptoms of Cornoavirus," CDC Website, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited 3/25/20).

[9] "Study suggests new coronavirus may remain on surfaces for days," National Institutes of Health, https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days (last visited 4/2/20).

[10] Joshua D. Rabinowitz and Caroline R. Bartman, "These Coronavirus Exposures Might be the Most Dangerous," *The New York Times*, https://www.nytimes.com/2020/04/01/opinion/coronavirus-viral-dose.html (last visited 4/2/20).

[11] Yascha Mounk, "Cancel Everything: Social distancing is the only way to stop the coronavirus. We must start immediately," *The Atlantic Monthly*, https://www.theatlantic.com/ideas/archive/2020/03/coronavirus-cancel-everything/607675/ (last visited 3/23/20).

Pa.C.S. § 7101 *et seq.*; Sections 532(a) and 1404(a) of the Administrative Code, which outline the powers and responsibility of the Department of Health, 71 P.S. § 532; 71 P.S. § 1403(a); and the Disease Prevention and Control Law ("DPCL"), 35 P.S. § 521.1 *et seq.*

Initially, the Governor's Order was scheduled to go into effect at 8:00 PM on March 19. The following day, however, Governor Wolf delayed the timing of enforcement until Monday, March 23 at 8:00 AM.[12] Governor Wolf also expanded the list of life-sustaining businesses to include, *inter alia*, attorneys participating in essential court functions, laundromats, and timber tract operators.

On March 22, 2020, this Court entered a *per curiam* order in *Civil Rights Defense Firm, P.C., et al. v. Wolf*, 63 MM 2020, denying legal challenges by a group of lawyers and firearms sellers to the Governor's authority to enter the March 19, 2020 Executive Order. Those challenges in large part mirror the challenges presented here, namely, that the Governor lacked authority to close non-essential businesses under the Emergency Management Services Code, which empowers the Governor to "meet[ ] the dangers to this Commonwealth and people presented by disasters." 35 Pa.C.S. § 7301(a). *See Civil Rights Defense Firm v. Governor Tom*

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[12] Press Release: Waiver Extension, Revised Timing of Enforcement, Governor's Office, https://www.governor.pa.gov/newsroom/waiver-extension-revised-timing-of-enforcement-monday-march-23-at-800-am/ (last visited 3/25/2020).

Wolf, 63 MM 2020, Order dated March 22, 2020. Indeed, those assertions were unanimously rejected by the Court.

Petitioners in the present case are: (1) Friends of Danny DeVito, a Pennsylvania candidate committee; (2) Kathy Gregory, a licensed real estate agent; (3) B&J Laundry, a laundromat; (4) Blueberry Hill Public Golf Course & Lounge; and (5) Caledonia Land Company, a timber company (collectively "the Entities"). Respondents are Pennsylvania Governor Tom Wolf and Secretary of Health Dr. Rachel Levin (collectively "Commonwealth Officers"). The Entities ask this Court to invalidate Governor Wolf's order in its entirety, which would place millions of Pennsylvanians at risk for illness or death.[13]

STATEMENT OF JURISDICTION

The Entities ask this Court to exercise King's Bench jurisdiction over this matter, and to exercise extraordinary jurisdiction over a petition for review currently pending in Commonwealth Court, *see Sean Logue, PLLC v. Wolf*, 231 M.D. 2020 (Pa. Cmwlth.), which is a nearly verbatim recitation of the emergency petition for

[13] As set forth in the Commonwealth Officers' answer, B&J Laundry and Caledonia Land Company's claims are moot, and their protestation over being placed on the non-life sustaining business list for less than 24 hours before any enforcement of the Order, does not present the type of far reaching, public policy concerns that warrant this Court's use of its extraordinary powers. 42 Pa.C.S. § 726 (Court may exercise extraordinary jurisdiction over matters of "immediate public importance"); *In re Bruno*, 101 A.3d 653, 670 (Pa. 2014) (Court may invoke King's Bench authority when an issue of public importance requires timely intervention to avoid effects from delays incident to the ordinary process of law).

review filed with this Court, and involves many of the same parties. As these matters raise immediate issues of public importance, Commonwealth Officers not only agree that this Court should exercise both King's Bench and extraordinary jurisdiction, they respectfully urge the Court to do so.

This Court has broad equitable powers to assert jurisdiction over "any matter pending before any court" in this Commonwealth involving matters "of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done." 42 Pa.C.S. § 726 (extraordinary jurisdiction). Additionally, this Court may exercise its constitutional King's Bench powers independent of any statute or rule of court. As this Court stated in *In re Bruno*, 101 A.3d 653, 670 (Pa. 2014):

> In [such] instances, the Court cannot suffer the deleterious effect upon the public interest caused by delays incident to ordinary processes of law, or deficiencies in the ordinary process of law making those avenues inadequate for the exigencies of the moment. In short, King's Bench allows the Supreme Court to exercise authority commensurate with its "ultimate responsibility" for the proper administration and supervision of the judicial system.

The Commonwealth, and indeed the entire world, faces an unprecedented public health emergency. As the Entities challenge the Commonwealth's ability to address the pandemic, these matters present precisely the type of far reaching, public policy concerns that warrant this Court's use of its extraordinary powers.

SUMMARY OF ARGUMENT

When your neighbor's house is burning down, though a burden, the law requires that you allow the fire engine to block your driveway for the protection of the entire neighborhood. A pandemic is burning across the world. The only effective tool we have to fight that fire is social distancing. This Court and the United States Supreme Court have recognized that the welfare of the people is the supreme law, and the Commonwealth's inherent police powers to protect that welfare are correspondingly broad.

The Pennsylvania Constitution, the Emergency Management Services Act, the Administrative Code, and the Disease Prevention and Control Law, charge the Executive Branch with combating public health emergencies. That COVID-19 is a natural disaster warranting a disaster emergency declaration is beyond reasonable dispute. And the Department of Health is specifically charged by law to employ the most efficient and practical means for the prevention and suppression of any disease. Close too few businesses, and COVID-19 would continue to spread uninterrupted, collapsing our healthcare system. Close too many businesses, and people would be unable to access life-sustaining supplies. A balance between these two extremes was necessary, and the law empowers the Governor to craft that balance.

Striking that balance is not only consistent with Constitutional principles, but necessary to their protection. Regulation under a proper exercise of police powers

provides all the process that is due. Even if more due process were implicated, a waiver program has been established to review the classification of businesses on an individualized basis.

The Governor's Order is a content neutral time, place, and manner restriction narrowly tailored to further the substantial government interest of arresting the continued spread of COVID-19. Accordingly, it is consistent with First Amendment protections.

The Equal Protection Clause assures that all similarly situated persons are treated alike; it does not obligate the government to treat all persons identically. Under the Governor's Order, similarly situated industries are not being treated differently. But even if they were, the correct standard of review is rational basis. The health and survival of Pennsylvanians is the most compelling of government interests. And the classifications and distinctions made to protect the citizenry were absolutely essential—let alone reasonably related—to achieving that most compelling of interests.

Finally, there has been no "taking" or "seizure" of property. The Governor's Order regulates the operation of certain businesses to protect the lives of its citizens, not through eminent domain, but by its police powers. Accordingly, no compensation is due. Since the Governor's order constitutes a temporary regulation

of business activities, it is also not a seizure. Even if there were a seizure, emergencies justify the seizure of property when they presents a danger to the public.

The exponentiality increasing spread of COVID-19 may be the direst emergency of our lifetimes and the Entities' possessory interest in the uninhibited use of their buildings is heavily outweighed by the Commonwealth's compelling interest in protecting the health and lives of its citizens.

ARGUMENT

I. Governor Wolf's March 19, 2020 Order Was Lawful

A. The Commonwealth has wide latitude to address public health emergencies pursuant to its inherent police powers

It is axiomatic that the Federal government generally lacks police power, which is reserved to the States under the Tenth Amendment of the United States Constitution. *See Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 165 (1919).[14] "Because the police power is controlled by 50 different States, instead of one national sovereign, the facets of governing that touch citizens' daily lives are normally administered by smaller governments closer to the governed." *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519, 536 (2012). Thus, in reserving police powers to the States, the Framers "ensured that the powers in

[14] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." U.S. Const. Amend. X.

which 'the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and accountable than a distant federal bureaucracy." *Id.* (quoting *The Federalist* No. 45, at 293 (J. Madison)).

Chief Justice John Marshal described the State police power as "that immense mass of legislation" which includes "[i]nspection laws, *quarantine laws, health laws of every description,* as well as laws for regulating internal commerce of a State[.]" *Gibbons v. Ogden*, 22 U.S. 1, 107 (1824) (emphasis added). In short, the police power gives states the ability "to protect the lives, health, morals, comfort, and general welfare of the people[.]" *Manigault v. Springs,* 199 U.S. 473, 480 (1905). A State's authority in this regard extends to individuals and businesses alike. *See German Alliance Ins. Co. v. Hale,* 219 U.S. 307, 317 (1911) ("[A]ll corporations, associations, and individuals, within the jurisdiction of a state, are subject to such regulations, as the state may, in the exercise of its police power . . . prescribe for the public convenience and the general good").

"Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" *East N.Y. Sav. Bank v. Hahn,* 326 U.S. 230, 233 (1945); *see also Price v. Illinois*, 238 U.S. 446, 452 (1915) ("[U]nless this prohibition is palpably unreasonable and arbitrary, we are not at liberty to say it passes beyond the limits of the state's protective authority"). While a State's authority in this regard is not

unlimited, longstanding precedents from the United States Supreme Court establish that a State's police power is at its zenith when utilized to quell the spread of infectious disease.

More than a century ago, in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the High Court enunciated the framework by which individual constitutional rights are balanced with a state's need to prevent the spread of disease. Because that framework remains in place today, *see Cruzan v. Missouri Dept. of Health*, 479 U.S. 261, 278-79 (1990), a careful analysis of the Court's opinion in *Jacobson* is warranted.

At issue in *Jacobson* was the constitutionality of a Massachusetts law requiring all citizens to be vaccinated for smallpox, which was enacted after an outbreak. *Jacobson*, 197 U.S. at 12; *see also* Thomas Wm. Mayo, Wendi Campbell Rogaliner, and Elicia Grilley Green, "'To Shield Thee From Diseases of the World': The Past, Present, and Possible Future of Immunization Policy," 13 J. Health & Life Sci. L. 3, 14 (Feb. 2020). Much like the Entities in the present case, the defendant in *Jacobson* argued that "his liberty [was] invaded" by the mandatory vaccination law, which he believed was "unreasonable, arbitrary, and oppressive." *Id.* at 26.

In response, the Court enunciated why individual liberty cannot be absolute, but is instead subject to the common good and the liberty interests of others. Specifically, the Court emphasized that "the liberty secured by the Constitution . . .

does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Jacobson*, 197 U.S. at 26. The Court explained that under such an absolutist position, liberty itself would be extinguished. That "[t]here are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." *Id.*

Legal commentators have recognized the Court's central point: "[u]nbridled individual liberty eventually clashes with the liberty interests of others, and without some legal constraints, '[r]eal liberty for all could not exist.'" Mayo, Rogaliner, and Green, 13 J. Health & Life Sci. L. at 9 (quoting *Jacobson*, 197 U.S. at 26).

In striking the proper balance, the High Court recognized that police powers could be used whenever reasonably required for the safety of the public under the circumstances at issue. *Jacobson*, 197 U.S. at 28. Applying these principles, the Court in *Jacobson* determined that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members" and upheld the vaccination law. *Id.* at 27; *see also Zucht v. King*, 260 U.S. 174 (1922) (city ordinance requiring children to be vaccinated before enrolling in public school did not violate the Fourteenth Amendment's equal protection clause); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding state law vaccination protecting children over the religious objections of their parents because "[t]he right to practice

religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death").

Consistent with the United States Supreme Court's interpretation of State police powers, this Court has recognized that "the most important function of government is the exercise of the police power for the purpose of preserving the public health, safety and morals, and it is true that, to accomplish that purpose, the legislature may limit enjoyment of personal liberty and property." *Gambone v. Commonwealth*, 101 A.2d 634, 636 (Pa. 1954). Echoing *Jacobson*, this Court has held that with respect to police powers, the means by which it is employed must have "a real and substantial relation to the objects sought to be attained" under the particular circumstances. *Rufo v. Board of License and Inspection Review*, 192 A.3d 1113, 11120 (Pa. 2018) (quoting *Lutz v. Armour*, 151 A.2d 108, 110 (Pa. 1959)).

Applying this standard to a public health context, in *Application of Milton S. Hershey Medical Center of Pennsylvania State University*, 634 A.2d 159 (Pa. 1993) this Court considered whether, consistent with the Confidentiality of HIV-Related Information Act, 35 P.S. § 7601, *et seq.*, a state hospital could disclose a physician's HIV status to a patient who may have been exposed to the physician's blood. In concluding that the public interest of the hospital and the patient outweighed the physician's personal privacy interests, this Court stated as follows:

> No principle is more deeply embedded in the law than that expressed in the maxim, "Salus populi suprema lex," []

> (The welfare of the people is the supreme law), and a more compelling and consistent application of that principle than the one presented would be quite difficult to conceive.

Id. at 163 (internal citation omitted).

The Entities contend that the Commonwealth's inherent police powers do not permit the Governor to temporarily shut down the physical operation of non-essential businesses during a pandemic because it "is not reasonably necessary for the prevention of COVID-19." Entities' Br., at 24. The Entities, who plainly lack a rudimentary understanding of this pandemic, do not elaborate upon their contention in this regard. There is good reason for their failure: As detailed above, every public health expert has identified shutting down non-essential businesses to enforce social distancing as the only available option for ensuring that hundreds of thousands of at-risk Pennsylvanians do not die from COVID-19.

In the Entities' view, their desire to be unrestrained during a pandemic outweighs the public's interest in fighting its spread. Both the United States Supreme Court and this Court have flatly rejected the absolutist view that individuals can trample the rights of society at large. The Commonwealth's inherent police powers give it the right to protect its citizens against a pandemic which threatens millions.

B. The Pennsylvania Constitution, the Emergency Management Services Code, the Administrative Code, and the DPCL, give the Executive Branch responsibility for combating public health emergencies

This Court must next consider how the Commonwealth has elected to exercise its police power during public health emergencies that threaten the entire state. Critically, so long as a State is acting lawfully within those powers, they may be delegated to administrative bodies or even a single individual. *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 543 (1914) ("[I]t has become entirely settled that powers and discretion of this character may be delegated to administrative bodies, or even to a single individual"); *see also Zucht*, 260 U.S. at 176 (holding that a "state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative"). The Pennsylvania Constitution, as well as a series of statutes enacted by the General Assembly, give the Governor and the Executive Branch responsibility for decision-making during public health emergencies.

Under the Pennsylvania Constitution, the "supreme executive power" is vested in the Governor, *see* Pa. Const. Art. 4 § 2, who is also the "commander-in-chief" of the Commonwealth, responsible for its protection, *see* Pa. Const. Art. 4, § 7. In addition to these general responsibilities as the chief executive of the Commonwealth, the General Assembly has expressly supplemented and expanded the Governor's authority to address public health emergencies. Of particular

relevance here, the General Assembly enacted: (1) the Emergency Management Services Code, 35 Pa.C.S. § 7101 *et seq*.; (2) Sections 532(a) and 1404(a) of the Administrative Code, which outline the powers and responsibility of the Department of Health, 71 P.S. § 532; 71 P.S. § 1403(a); and (3) the Disease Prevention and Control Law ("DPCL"), 35 P.S. § 521.1, *et seq.*

These statutory provisions reflect the General Assembly's basic policy choice to grant the Governor broad powers to act quickly and decisively when faced with an imminent threat to the public's health. Facially, all three statutes arise out of the Commonwealth's inherent police power. *See Rufo,* 648 A.3d at 1120 ("[O]n its face the [Property Maintenance] code is an exercise of the City's police power."]). As such, the Entities bear the burden of demonstrating that these statutes, "which enjoy the presumption that they are constitutionally valid," constitute an arbitrary, unreasonable exercise of the Commonwealth's police power and have no substantial relation to the promotion of the public health, safety, morals or general welfare. *Id.* The Entities do not begin to meet this heavy burden.

Further, insofar as the scope of General Assembly's delegation of this authority to the Governor requires this Court to engage in statutory construction, this Court's analysis is guided by the Statutory Construction Act. 1 Pa.C.S. § 1501, *et seq*. Pursuant to that Act, the object of all statutory construction is to ascertain and effectuate the General Assembly's intention. 1 Pa.C.S. § 1921(a). The best indicator

of legislative intent is typically found in the plain and ordinary meaning of statutory language. *See* 1 Pa.C.S. § 1903.

Importantly, however, statutory language must not be read in isolation. Rather, it must be read with reference to the context in which it appears. 1 Pa.C.S. § 1921(a); *see also O'Rourke v. Commonwealth*, 778 A.2d 1194, 1201 (Pa. 2001); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000). This Court has repeatedly emphasized that such context includes, *inter alia*, ensuring that statutes are construed in harmony with existing law as part of a general uniform system of jurisprudence. 1 Pa.C.S. §§ 1921(c)(5) and 1932; *PECO Energy Co. v. Pennsylvania Public Utility Com'n*, 791 A.2d. 1155, 1160 (Pa. 2002); *Casey v. Pennsylvania State University*, 345 A.2d 695, 700 (Pa. 1975) (this court is bound to consider other statutes upon the same or similar subjects); *Olson v. Kucenic*, 133 A.2d 596, 598 (Pa. 1957) (a statute must be construed as an integral part of the whole structure affected and not as a separate matter having an independent meaning of its own).

To the extent there is any ambiguity in the wording of a statute, the General Assembly's intent may be ascertained by considering matters other than the statutory language, such as the occasion and necessity for the statute, the circumstances of the statute's enactment, the object the statute seeks to attain, and the consequences of a

particular interpretation. 1 Pa.C.S. § 1921(c); *see also Commonwealth v. $34,440.00 U.S. Currency*, 174 A.3d 1031, 142-43 (Pa. 2017).

With respect to the statutory framework at issue here, the General Assembly's intent is clear and unmistakable: The Governor and the Executive Branch agencies bear responsibility for navigating the Commonwealth through public health emergencies, and have wide latitude in taking the necessary and appropriate steps to do so.

1. Emergency Management Services Code

As argued in the Commonwealth Officers' answer to this emergency application, this Court has already considered, and rejected, a claim that the Governor lacked authority under the Emergency Management Services Code, which empowers the Governor to "meet[ ] the dangers to this Commonwealth and people presented by disasters." 35 Pa.C.S. § 7301(a). *See Civil Rights Defense Firm v. Governor Tom Wolf*, 63 MM 2020, Order dated March 22, 2020. The Entities ignore that ruling and seek to relitigate the same arguments already rejected by this Court.[15]

[15] Contrary to the Entities' assertion, the Commonwealth Officers do not contend that the Entities' claims are barred by *res judicata*. Instead, the Commonwealth Officers argue that the constrained interpretation of the Emergency Act proffered by the Entities here is the same interpretation this Court considered and rejected in *Civil Rights Defense Firm v. Wolf*, 63 MM 2020. While this Court was divided as to the Second Amendment issue in that case, the Court unanimously rejected the argument that the Governor lacked the authority under the Emergency Code to close non-essential businesses during the pandemic.

Recognizing that the Commonwealth would need to act swiftly and decisively when faced with an emergency, the General Assembly gave the Governor and the Executive Branch the responsibility of meeting the needs of Pennsylvanians during such times. 35 Pa.C.S. § 7301(a) ("The Governor is responsible for meeting the dangers to this Commonwealth and people presented by disasters"). The General Assembly spoke with remarkable clarity that the authority granted to the Governor under Emergency Management Services Code was designed to clarify and supplement the Governor's existing authority as the Commonwealth's chief executive, rather than curtail his ability to act. 35 Pa.C.S. § 7103(4) (purpose of the Emergency Code is to "[c]larify and strengthen the roles of the Governor . . . in prevention of, preparation for, response to and recovery from disasters"); 35 Pa.C.S. § 7103(9) (purpose of the Emergency Management Services Code is to "[s]upplement, without in any way limiting, authority conferred by previous statutes of this Commonwealth"); *see also* 35 Pa.C.S. § 7104(3) (Emergency Management Services Code is not intended to "[l]imit, modify or abridge the authority of the Governor to proclaim martial law or exercise any other powers vested in him under the Constitution, statutes or common law of this Commonwealth").

Further, the stated goals of the General Assembly were to, *inter alia*, "reduce vulnerability of people and communities of this Commonwealth to damage, injury and loss of life and property resulting from disasters," "care and treat[ ] persons

victimized or threatened by disasters," and "provide for cooperation in disaster prevention, preparedness, response and recovery." 35 Pa.C.S. § 7103(1), (2), and (5). The statute defines "disaster" as a "man-made disaster, natural disaster or war-caused disaster." 35 Pa.C.S. § 7102. A "Natural disaster" is "[a]ny hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or *other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life.*" *Id.* (emphasis added). A "Man-made disaster" is "[a]ny industrial, nuclear or transportation accident, explosion, conflagration, power failure, natural resource shortage or *other condition*, except enemy action, *resulting from man-made causes . . . which threatens or causes substantial damage to property, human suffering, hardship or loss of life." Id.* (emphasis added).

Upon finding that a disaster has occurred, the Governor is required to declare a disaster emergency, 35 Pa.C.S. § 7301(c), which the statute defines as:

> Those conditions which may by investigation made, be found, actually or likely, to:
>
> (1) affect seriously the safety, health or welfare of a substantial number of citizens of this Commonwealth or prelude the operation or use of essential public facilities;
>
> (2) be of such magnitude or severity as to render essential State supplementation of county and local efforts or resources exerted or utilized in alleviating the danger, damage, suffering or hardship faced; and

> (3) have been caused by forces beyond the control of man, by reason of civil disorder, riot or disturbance, or by factors not foreseen and not known to exist when appropriation bills were enacted.

35 Pa.C.S. § 7102 (definitions). Upon the declaration of a disaster emergency, the Governor gains broad powers, including, *inter alia*, controlling the "ingress and egress to and from a disaster area, the movement of person within the area and the occupancy of premises therein" and the power to "suspend or limit the sale" of firearms. 35 Pa.C.S. § 7301 (f)(7), (8). This declaration expires after 90 days, unless terminated sooner or renewed by official action of the Governor, or unless the General Assembly, by concurrent resolution, terminates the declaration. 35 Pa.C.S. § 7301(c).

The COVID-19 pandemic unquestionably fits the definitions of "disaster" and "disaster emergency," and is the type of circumstance that the General Assembly had in mind when it enacted this statute. The global pandemic is an unprecedented and unanticipated danger that has already resulted in substantial human suffering and caused more than 51,000 deaths worldwide thus far. If left unaddressed, 2.2 million Americans could die.[16] The Entities' argument that the global COVID-19 pandemic is somehow not a disaster emergency demonstrates an extraordinary level

[16] Nicholas Kristof, "The Best-Case Outcome for the Coronavirus, and the Worst," *The New York Times*, https://www.nytimes.com/2020/03/20/opinion/sunday/coronavirus-outcomes.html (last visited 3/25/20).

of myopathy about the effect this pandemic has had, and could have, on the citizens of the Commonwealth and our health care system if the spread of this disease is not arrested.

In support of their position, the Entities rely on the legal maxim of *ejusdem generis*, asserting that COVID-19 does not fit the statutory definitions of "disaster," "natural disaster," or "other catastrophe." Entities' Br., at 15-16. But the term "other catastrophe" is expansive and is not limited by the specific enumerated terms. Certainly, a pandemic is as much of a catastrophe as a fire or an explosion. This Court has previously recognized that such language is to be broadly construed; here to include pandemics and other types of catastrophes not specifically listed. *Accord Danganan v. Guardian Protective Services*, 179 A.3d 9 (Pa. 2018) (Consumer Protection Law which has "and includes" in definitional section interpreted broadly despite doctrine of *ejusdem generis*). The Entities attempt to distinguish *Danganan* because it dealt with the Consumer Protection Law and fixate on the definition of "person" under that law. Entities' Br., at 19-20. The import of *Danganan*, however, is that this Court interpreted the statutory use of the verb "includes" in defining "trade or commerce" expansively and indicative of "an inclusive and broader view of trade and commerce than expressed by the antecedent language." *Danganan*, 179 A.3d at 16. The use of the phrase "other catastrophe" here likewise indicates a broad

view of the catastrophes covered, expanding the list beyond those merely within the precedent examples.

The Entities alternatively argue that, even if the Governor could declare a disaster emergency to combat the pandemic, their places of business are not located within the disaster area. However, the Entities are located in Allegheny, Northampton, and Warren Counties, all of which have confirmed COVID-19 cases and both the Governor's Proclamation of Disaster Emergency and Order requiring all Pennsylvanians to stay at home include every county in the Commonwealth. More importantly, the Entities fail to comprehend that any location in the Commonwealth in which two or more people can congregate is within the disaster area. That is because the virus spreads primarily through person-to-person contact, the virus has an incubation period of up to 14 days, one in four carriers of the virus are asymptomatic, and the virus can live on surfaces for up to four days.

Assuming *arguendo* there is any ambiguity as to whether the COVID-19 pandemic meets the statutory definition of "disaster," and there is none, that ambiguity must be resolved in favor of the Governor's interpretation for several reasons:

First, consistent with the Statutory Construction Act, *see* 1 Pa.C.S. § 1921(c), this Court must consider the General Assembly's stated intent to reduce vulnerability and loss of life, and to strengthen the role of the Governor in meeting exigencies. 35

Pa.C.S. §§ 7103 and 7104. The Entities' narrow interpretation would palpably undermine the General Assembly's intent in this regard by increasing the threat posed by COVID-19.

Second, the General Assembly contemplated that it might need to reevaluate, as circumstances warrant, the Governor's emergency declaration and thus retained the ability to terminate a disaster declaration by concurrent resolution. *See* 35 Pa.C.S. § 7301(c). That the General Assembly has not availed itself of this option is telling.

Finally, with the safety of the public in the balance, the Court should give extreme deference to the Governor. As this Court said in *Lancaster County v. PLRB*, 94 A.3d 979, 986 (Pa. 2014):

> [A]n administrative agency's interpretation [of a statute] is be to given 'controlling weight unless clearly erroneous.' However, when an administrative agency's interpretation is inconsistent with the statute itself, or when the statute is unambiguous, such administrative interpretation carries little weight. Appreciating the competence and knowledge an agency possess in its relevant field, our Court [has] opined that an appellate court 'will not lightly substitute its judgment for that of a body selected for its expertise whose experience and expertise make it better qualified than a court of law to weigh facts within its field.'

Id. As the Governor's interpretation of the statute is certainly not clearly erroneous, the Emergency Application should be denied.

In response to this argument, the Entities maintain that the standard for administrative deference articulated in *Lancaster County* is limited to labor relations

matters because that was the context in which that principle was applied in that action. Entities' Br., at 26-27 (quoting *Lancaster County*, 94 A.3d 986). Contrary to the Entities' argument, however, nothing in this Court's opinion in *Lancaster County* suggests that administrative deference is limited to labor relations. Rather, agency deference is a general principle of law that applies across all areas of administrative expertise. *See Winslow-Quattlebaum v. Maryland Ins. Group*, 752 A.2d 878, 881 (Pa. 2000) (deferring to Insurance Department's interpretation of MVFRL); *Department of Public Welfare v. Forbes Health System*, 422 A.2d 480, 482 (Pa. 1980) (deferring to DPW's interpretation of medical assistance regulations).

2. Administrative Code

Subsections 532(a) and 1403(a) of the Administrative Code give the Department of Health the duty to protect the health of the People of the Commonwealth and "to determine and employ the most efficient and practical means for the prevention and suppression of disease." 71 P.S. §§ 532(a) and 1403(a). The Entities, none of whom are public health experts, believe that closing non-life-sustaining businesses is not the most efficient and practical means for preventing and suppressing COVID-19. Entities' Br., at 27. In their view, the most efficient and practical means for the prevention and suppression of COVID-19 is to determine which Pennsylvanians have the disease and quarantine only them. Emergency App, at ¶¶ 39-41. This is a fiction.

As has been widely reported, we do not have the tests or facilities necessary to evaluate every Pennsylvanian with symptoms.[17] But even if universal testing were possible, as noted *supra*, the disease has an incubation period of up to 14 days and asymptomatic individuals can infect others. Non-life sustaining businesses thus present the opportunity for unnecessary gatherings, personal contact, and interactions that will transmit the virus, and with it, sickness and death.

Accordingly, the Governor and the Secretary acted well within their authority – and indeed their obligation – under the Administrative Code to protect the health of the people of the Commonwealth and to employ the most efficient and practical means for preventing and suppressing disease. 71 P.S. §§ 532(a) and 1403(a).

The Entities alternatively argue that the Governor and the Secretary failed to satisfy the specific provisions of Subsections 532(d) and Subsections 1403(b) of the Administrative Code. The Entities rely on the principle of *generalia specialibus non deroganti*, which provides that when there is a conflict between the general and a specific statutory provision, the specific provision prevails.

Both of these Subsections permit the Department of Health to enter premises to investigate and abate nuisances. *See* 71 P.S. §§ 532(d) and 1403(b). These were

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[17] Geoff Brumifel, "To End the Coronavirus Crisis We Need Widespread Testing, Experts Say," *National Public Radio*, https://www.npr.org/sections/health-shots/2020/03/24/820157519/to-end-the-coronavirus-crisis-we-need-widespread-testing-experts-say (last visited 4/2/20).

not relied upon by the Governor, and, in any event, do not conflict with the general duty set forth in Subsections 532(a) and 1403(a) of the Administrative Code to "determine and employ the most efficient and practical means for the prevention and suppression of disease." Further, the Entities' construction of the Administrative Code would render the general powers granted to the Secretary under Subsections 532(a) and 1403(a) nugatory. Such an interpretation is contrary to the Statutory Construction Act, which provides that general provisions and specific provisions of a statute are to be construed so as to give effect to both. 1 Pa.C.S. § 1933; 1 Pa.C.S. § 1921(a).

3. Disease Prevention and Control Law ("DPCL")

The DPCL, 35 P.S. § 521.1 *et seq.*, states that the Department of Health can carry out appropriate control measures if there has been a report of disease. The Governor's Executive Order specifically invoked 35 P.S. § 521.5, which provides as follows:

> Upon the receipt by a local board or department of health or by the department, as the case may be, of a report of a disease which is subject to isolation, quarantine, *or any other control measure*, the local board or department of health or the department shall carry out the *appropriate control measures in such manner and in such place as is provided by rule or regulation*.

Id. (emphasis added). Pursuant to the rule promulgated under this Section, the Department is directed to "determine the appropriate disease control measure based on the disease or infection[.]" 27 Pa. Code § 27.60 (b).

The DPCL defines a "carrier" as "[a] person who, *without any apparent symptoms of a communicable disease*, harbors a specific infectious agent and may serve as a source of infection." 35 P.S. § 521.2(b) (emphasis added). The DPCL further defines "communicable disease" as "[a]n illness due to an infectious agent or its toxic products which is transmitted, directly or indirectly, to a well person from an infected person, . . . or through the agency of an intermediate host, vector or the inanimate environment." 35 P.S. § 521.2(c). Finally, the DPCL defines "isolation" as "[t]he separation for the period of communicability of infected persons . . . in such places and under such conditions as will prevent the direct or indirect transmission of the infectious agent . . . to other persons . . . who are suspectable or who may spread the disease to others." 35 P.S. § 521.2(e).

Recognizing that a one-size-fits-all approach to every outbreak of disease is untenable, these provisions give the Department flexibility to take appropriate measures based upon the particular needs of a given disease. Here, the only control measure available to combat the COVID-19 is to temporarily cease operations at all non-life sustaining businesses so that people cannot gather at those locations and

further spread the virus. The Secretary, in conjunction with the Governor, acted well within her broad discretion under the DPCL.

Rather than address the Secretary's authority under 35 P.S. § 521.5, the Entities instead rely on their averment that "[l]egal entities cannot become infected with COVID-19," and focus narrowly on the provisions of the DCPL that relate specifically to quarantines, arguing as follows:

> [T]his Act only empowers the Secretary or local health agencies to compel persons, who are suspected of being infected with, or a carrier of, a communicable disease and have refused without reasonable cause to be subject to a medical examination, to compel persons, suspected to have been exposed to, but not necessary[sic] infected with, the communicable disease, into quarantine or isolation.

Entities' Br., at 31-32. The Entities' argument in this regard rests on two flawed premises.

The first is that that a quarantine of individuals known to have COVID-19 is the only arrow in the Secretary's quiver when it comes to combating a pandemic. As the above provisions establish, however, the Secretary has the ability to enforce isolation of those who might spread the disease to others, *see* 35 P.S. § 521.2(b), (c), and (e), and has flexibility to develop an appropriate control measure based on the needs of the moment. 35 P.S. § 521.5; 27 Pa. Code § 27.60 (b). That is precisely what happened here.

Second, the Entities' selective reading of the quarantine provisions, which strips them of all meaningful context, and assumes that the DPCPL sets forth a rigid and inflexible definition of "quarantine." It does not.

For context, those provisions read as follows:

> (i) Quarantine. The limitation of freedom of movement of persons or animals who have been exposed to a communicable disease for a period of time equal to the longest usual incubation period of the disease in such manner as to prevent effective contact with those not so exposed. Quarantine may be complete, or, as defined below, *it may be modified or it may consist merely of surveillance or segregation*.
>
> (1) Modified quarantine is a selected, partial limitation of freedom of freedom of movement, determined on the basis of differences in susceptibility or danger of disease transmission, which is designed to meet particular situations. Modified quarantine includes, but is not limited to, the exclusion of children from school and the prohibition or the restriction of those exposed to a communicable disease from engaging in particular occupations.

35 P.S. § 521.2(i) (emphasis added). Like the other provisions of the DPCL, the provisions relating to quarantine are inherently broad and flexible, so that the Department can meet the needs required by the particulars of a given disease. Nothing in the text or purpose of the Act supports the Entities' constrained interpretation.

Turning to the Entities' averment that they should be free from the provisions of the Disease Act because "[l]egal entities cannot become infected with COVID-19," this argument is doubly absurd. First as discussed above, the Disease Act arises out of the Commonwealth's police powers, which extends to individuals and

businesses alike. *See German Alliance Ins. Co. v. Hale*, 219 U.S. 307, 317 (1911) ("[A]ll corporations, associations, and individuals, within the jurisdiction of a state, are subject to such regulations, as the state may, in the exercise of its police power . . . prescribe for the public convince and the general good"). Second, the fact that these are corporate entities has no effect on the virus's ability to attack the individuals who operate and work within them. COVID-19 spreads between individuals through personal contact, surfaces, and particles that are ejected into the air following a cough or sneeze. Enforcing social distancing is the only way to arrest further spread of the disease. It is difficult to imagine a more appropriate use of the Commonwealth's authority under the DPCL, the Emergency Act, the Administrative Code, and the general police power.

III. The Governor's Order Has Not Impaired the Entities' Claimed Right to Due Process of Law

The Entities contend that the Governor's Order has prevented them from pursuing their usual business activities and, thus, has deprived them of property without due process of law. Their contention is void of legal merit and must be rejected. Before reaching the merits of their due process argument, however, it is again necessary to mention that none of the Entities have been denied a waiver by the Governor. *See Alvin v. Suzuki*, 227 F.3d 107, 116-19 (3d Cir. 2000) (holding that appellant could not state a procedural due process claim where he failed to avail

himself of an available grievance procedure and that alleged futility did not excuse his failure to do so).

Both the United States Constitution and the Pennsylvania Constitution embody due process guarantees. The two foundational documents have been described as "'substantially equivalent' in their protective scope." *Hospital & Healthsystem Ass'n of Pa. v. Com.*, 77 A.3d 587, 281 n.15 (Pa. 2013). Federal and state due process concepts and precedents will therefore be discussed in tandem here.[18]

Determining whether the Entities have a viable procedural due process claim entails a two-part gateway inquiry: do they have a liberty or property interest entitled to due process protection and, if so, what procedures constitute "due process of law" in the situation at hand? *See, e.g., Schmidt v. Creedon,* 639 F.3d 587, 595 (3d Cir. 2011).

The Entities' argument rests on the premise that they have an unfettered right to operate their respective businesses, regardless of circumstance. This, they maintain, is a constitutionally protected property interest which has been impaired by the Governor's Order. As detailed above, the Entities' due process rights, like all rights, are not absolute. *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S.

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[18] The Entities allege infringement of their right to *procedural* due process. *See, e.g.*, Entities' Br., at 5. We respond accordingly.

11, 26 (1905) (recognizing "fundamental principle that persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state"); *see also Stull v. Reber*, 64 A. 419 (Pa. 1906). Moreover, as recognized by this Court in *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 314 (Pa. 1995), actions taken by the state pursuant to its police powers do not require *individualized* due process. As *Balent* specified, "[u]nder the Fourteenth Amendment, property cannot be taken except by due process of law. *However*, regulation under a proper exercise of the police power *is* due process, even though property in whole or in part is taken or destroyed." *Balent*, 669 A.2d at 314 (emphasis added). The Governor's Order is a "regulation" under the police power and, as such, affords all the process that is due.

Assuming for the sake of argument that due process is further implicated here, and it is not, the question becomes, "what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *National Amusements Inc. v. Borough of Palmyra*, 716 F.3d 57, 62 (3d Cir. 2013) (quoting *Gilbert v. Homar*, 520 U.S. 924, 930 (1997)). To the contrary, "due process is flexible and calls for such procedural protections as the particular situation demands. … [N]ot all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey*, 408 U.S. at 481. "[W]here 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*, 520 U.S. at 930.

In a given case, identifying "the specific dictates of due process generally requires consideration of three distinct factors[.]" *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). These include "the private interest that will be affected by the official action; … the risk of an erroneous deprivation of such interest through the procedures used [including] the probable value, if any of additional or substitute procedural safeguards; and … the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail." *Id.*

Viewing the present public health emergency through a *Mathews* lens, it is apparent what balance is to be struck. The whole point of the Governor's Order is to curtail almost all in-person (as opposed to virtual) personal and professional activity in the Commonwealth for public health and safety reasons, *except to the extent* that certain activities are life-sustaining. The Entities' activities do not meet that requirement. No additional safeguards are feasible, and the countervailing public interest is beyond debate.

Regulating businesses and limiting interpersonal contact is key to arresting the spread of the virus. Progress toward this overriding goal will be met under the Governor's Order, thus protecting public safety. That, not individual private interest,

is the paramount concern. *See National Amusements*, 716 F.3d at 62 (company's private interest in maintaining revenue from continued operation of its business was "substantially outweighed by the overwhelming government interest in protecting the public safety" from danger posed at site); *see also Catanzaro v. Weiden*, 188 F.3d 56, 63 (2d Cir. 1999) (law should not discourage officials from taking prompt action to ensure public safety).

Insofar as *any* form of pre- or post-deprivation "review" of the implementation of the Governor's Order can possibly be deemed constitutionally required (a point not conceded), the existing waiver process is adequate. Exhibits attached to the Entities' filings confirm that waiver requests will be entertained for affected businesses that contend they are in fact "life-sustaining." Specifically, "[w]hen a business completes a waiver form, a team of professionals at DCED will review each request and respond based on the guiding principle of balancing public safety while ensuring the continued delivery of critical infrastructure services and functions."[19]

In fact, the approval letter attached to the Entities' April 2, 2020 Supplemental Application regarding real estate businesses shows that the waiver process is

[19] Press Release: Waiver Extension, Revised Timing of Enforcement, Governor's Office https://www.governor.pa.gov/newsroom/waiver-extension-revised-timing-of-enforcement-monday-march-23-at-800-am/ (last visited 4/2/20).

functioning. The Brokers Realty Group Limited filed an application and, after an individualized assessment based upon the specific facts contained within its application and a risk/benefit analysis in letting that business reopen a physical location, the Governor and Secretary of Health granted a waiver. This demonstrates that the waiver process works. And despite the Entities' criticism of this process, the Constitution does not require more.[20] Businesses are entitled *at most* to a review, not necessarily to a favorable ruling.

As to due process, the Entities offer two rejoinders, but neither is persuasive. First, much of the due process portion of the Entities' brief consists of a hyperbolic attack on the Governor's Order, and the handling of waiver requests, based on a variety of nebulous, conclusory grounds, unsupported by any cogent legal argument.[21] This only amounts to venting on the Entities' part; it is not legitimate advocacy.

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[20] *Mathews* itself validated a paper-only process for arriving at certain disability-benefit-determination decisions. *See id.*, 424 U.S. at 324. *See also Pennsylvania Coal Min. Ass'n v. Ins. Dept.*, 370 A.2d 685, 691 (Pa. 1977) ("[w]hile oral proceedings may be necessary for determinations likely to turn on witness credibility, written submissions may be adequate when economic or statistical questions are at issue" (citing *Mathews*)).

[21] The Entities label the order, and the waiver process, "arbitrary, capricious, and vague;" fault the Governor for "obviously and admittedly lack[ing] a solid and substantial reason" for some determinations; accuse him of then inexplicably "changing his mind;" and suggest he has drawn irrational distinctions (and possibly even acted unethically). *See* Entities' Br., at 46, 47, 48, 49, 50, 51, 53, 54.

Second, the Entities cite *Rogin v. Bensalem Twp.*, 616 F.2d 680, 694 (3d Cir. 1980), and its list of "elements" of due process, implying that all are essential. *See* Entities' Br., at 46, 53-53. But the Entities completely gloss over *Rogin*'s explicit observation that "[w]hether all *or any one* of these safeguards are required in a particular situation depends on the outcome of the [*Mathews*] balancing test. *Id*. (emphasis added). While "an opportunity to give oral testimony" or to utilize "other trial-type procedures" may – in *some* situations – be necessary in order to comport with due process requirements, that certainly is not always the case. *See Biliski v. Red Clay Consol. School Dist. Bd. of Educ.*, 574 F.3d 214, 223 (3d Cir. 2009).

The very concept of due process is broad and flexible. What it entails varies from one situation to another. Where, as here, government officials are confronted with a vast, ever-worsening emergency that unquestionably is jeopardizing public health and safety, individual interests must give way to the greater good. This may affect the Entities' short-term business interests, but they have no right to demand the provision of individualized procedural protections that might be available under other circumstances.

IV. This Content Neutral Time, Place, and Manner Restriction Does Not Violate the First Amendment

The Friends of Danny DeVito argue the Governor's Order impinges upon their right to peacefully assemble because it closed a "place of physical operations" they wish to use to "hold meetings and to engage in speech and advocacy . . . ."

Entities' Br., at 58. They concede, however, that the right to assemble is not absolute, but must be exercised in subordination to reasonable rules and regulations adopted to safeguard the public interest. *Id.* at 59. And they do not argue that the Governor's Order prevents them from assembling or advocating through alternate means, such as the internet. These concessions are fatal to their argument.

The right to speak and assemble wherever, whenever, and however one chooses is not absolute.[22] It has long been established that "the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations." *Cox. v. State of Louisiana*, 379 U.S. 559, 574 (1965); *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985) ("protected speech is not equally permissible in all places and at all times"); *City of*

[22] The First Amendment to the United States Constitution instructs "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." U.S. Const. Amend. I.[22] Article I, Sections 7 and 20 of the Pennsylvania Constitution provide, in pertinent part, that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty" and "citizens have a right in a peaceable manner to assemble together for their common good . . . ." Pa. Const. Art. 1, §§ 7, 20.

Duquesne v. Fincke, 112 A. 130, 132 (Pa. 1920) (Article 20 does not grant "the right to assemble with others, and to speak wherever he and they choose to go").

Accordingly, states may place content neutral time, place, and manner regulations on speech and assembly "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). *See also Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 658 (10th Cir. 2006) (The right of assembly and expressive association are "'no more absolute than the right of free speech or any other right; consequently there may be countervailing principles that prevail over the right of association'") (quoting *Walker v. City of Kansas City*, 911 F.2d 80, 89 n. 11 (8th Cir. 1990)). "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

While cases examining global pandemics are limited, courts consistently uphold content neutral laws from First Amendment challenges in situations concerning far less substantial governmental interest than the life and death of Pennsylvania's citizens. For example, in *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006), a church argued that the City's denial of a zoning variance to allow operation of a daycare center violated their First

Amendment speech, assembly, and association rights because it prohibited the church from gathering together children to teach its message. The Tenth Circuit rejected this argument, concluding that "[t]he City's zoning regulations are unrelated to the suppression of speech or assembly and do not burden any more speech or associational rights than are necessary to further the City's substantial interest in regulating traffic, noise and pollution in a residential zone." *Id.* at 658.

The Governor's Order is content neutral because it does not regulate speech at all, let alone attempt to regulate speech based on content. Like the zoning ordinance in *Grace United*, the Governor's Order is wholly unrelated to the suppression of speech or assembly. It applies to a large number of non-life-sustaining businesses regardless of message, whether they be campaign offices, rock concerts, or haberdasheries.

That Order is also narrowly tailored to protecting the health and lives of Pennsylvanians, as it only prohibits in-person gatherings consistent with CDC guidance in the face of a rapidly evolving public health crisis. By its express terms, the Governor's Order does not prohibit businesses from operating on-line. And the Governor has revised the list of entities that may continue physical operations several times in response to changes on the ground and advice by experts. *See e.g.*

March 24, 2020 list allowing firearms dealers to operate pursuant to safety guidelines.[23]

Finally, the Governor's Order permits alternative forms of communication and assembly. For example, the Governor's Order does not prohibit the Friends of Danny DeVito from meeting with campaign volunteers or supporters through non-physical means, such as by telephone, video-conferencing, or web-streaming through YouTube and Facebook. The Friends of Danny DeVito can associate with whomever they chose virtually; they simply cannot do so at a single physical location where the COVID-19 virus can easily spread among them to infect the greater community. Gathering large numbers of individuals into a single room presents an ideal vehicle for the virus to infect a large number of people. Keeping those canvassing door-to-door from becoming infected in the first place will reduce that risk of exponential infection.[24]

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[23] Industry Guidance, Governor's Office, https://www.scribd.com/document/452553026/UPDATED-2-30pm-March-24-2020-Industry-Operation-Guidance (last visited 4/2/20).

[24] The Friends of Danny DeVito's attempt to compare themselves to the Governor's daily press conferences is a false equivalency. *See* Entities' Br., at 59. Those daily press conferences are necessary to keep the public apprised of developments during this national emergency, provide information for their safety, and to answer questions from the press. This is an essential function of the government. And yet even still, the press send questions via email to minimize the amount of individuals within the room. The physical offices of other state agencies and departments, including the Office of Attorney General, are closed. We continue the Commonwealth's business from our homes via telephone conferences and the

Alternative avenues of communication also continue to exist, as Candidate DeVito has a website (https://dannydevitopa.com), is active on Facebook, (https://www.facebook.com/DannyDeVitoPA) and on Twitter (@DannyDeVitoPA). The Governor's Order does not limit the Friends of Danny DeVito from promoting their candidate on television, radio, and newspapers, or through billboards, handouts, and yard signs. Nor does it prevent that campaign from sending out direct mail activities from private residences, putting up yard signs or speaking to the press. And Mr. DeVito clearly continues to have access to the press. *See* David Murrell, "Meet Danny DeVito, the Guy Challenging Tom Wolf's Business Shutdown Order," *City Life*, https://www.phillymag.com/news/2020/03/26/coronavirus-business-shutdown-danny-devito/ (last visited 4/2/20).

The United States Supreme Court itself has recognized that, in the modern era, "cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular"—has become the quintessential forum for the exercise of First Amendment rights. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997)). The

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internet. Quite the reverse of being treated the same, the Friends of Danny DeVito seek to be treated more favorably than the overwhelming majority of governmental offices.

closure of a physical location that can serve as a source of infection does not prevent the Friends of Danny DeVito from associating, campaigning, or speaking their message. Accordingly, the Governor's Order complies with the First Amendment of the U.S. Constitution and Article I, Sections 7 and 20 of the Pennsylvania Constitution.

V. The Governor's Order Does Not Violate Equal Protection

The Entities' equal protection argument misstates both the law and facts. "While the Equal Protection Clause assures that all similarly situated persons are treated alike, it does not obligate the government to treat all persons identically." *Commonwealth v. Bullock*, 913 A.2d 207, 215 (Pa. 2006). "Thus, the Clause does not prevent state legislatures from drawing classifications, so long as they are reasonable." *Id. See generally Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1088 (Pa. 2003) (affirming that equal protection precepts do not vitiate the Commonwealth's power to classify, "which necessarily flows from its general power to enact regulations for the health, safety, and welfare of the community"); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies").

The Entities' allegation that the Governor's Order treats private and public golf courses differently is untrue. The list of life-essential businesses makes no such

distinction between public and private courses, and municipal golf courses have closed in compliance with the Governor's order. *See e.g.* Dauphin Highlands, https://www.golfdauphinhighlands.com/ (last visited 3/31/20) (explaining that the course is temporarily closed); Allegheny County Municipal Parks Website, https://www.alleghenycounty.us/parks/index.aspx (last visited 3/31/20) (explaining that the North Park and South Park Golf Courses are temporarily closed); Valley Forge, Montgomery County Golf Courses, https://www.valleyforge.org/golf/book-your-tee-time/ (last visited 4/1/20) (revealing no available tee times on any of the public and private courses).

Likewise, despite the Entities' conclusory insistence, campaign offices and government offices are not similarly situated. When legislators use their district offices, they do so as government officials, not as candidates. Indeed, it is a crime for public officials to use public resources—including taxpayer funded offices, staff, or equipment—to run for reelection. *See e.g.*, 18 Pa.C.S. § 3926 (theft of services); 18 Pa.C.S. § 4113 (misapplication of government property); 65 Pa.C.S. § 1103 (conflict of interest); *Commonwealth v. Cott*, 1192 MDA 2010, 2013 WL 11283200 (Pa. Super. Mar. 4, 2013) (Ann Marie Perretta-Rosepink, who was in charge of former representative Michael Veon's district office, was convicted of participating in schemes involving the use of taxpayer money to fund political work out of public offices).

Mr. DeVito argues that he is being treated differently than his opponent, Anita Astorino Kulik. This is not true. *Representative* Kulik's district office remains open, albeit without visitations, so that she can serve the public during this pandemic and vote remotely on legislation that will help the Commonwealth navigate this emergency.[25] But all candidates' physical offices, whether incumbent or challenger, must be closed. And there are no allegations that *Candidate* Kulik's campaign office remains open. The Governor's Order does not advantage or disadvantage any candidate or committee. [26]

Finally, the Friends of Danny DeVito are not similarly situated to those social advocacy organizations whose continued operations are critical during this disaster emergency, as they serve the immediate needs of vulnerable individuals. It is for the Governor to identity such advocacy organizations. He has done so properly here.

Further, the Entities' argument reveals a misunderstanding as to how the Governor's list was compiled. The Governor's list of life-sustaining businesses is

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[25] Gillian McGoldrick, "Pa. legislature pledges transparency as it prepares to vote remotely on coronavirus relief," *The Philadelphia Inquirer,* https://www.inquirer.com/health/coronavirus/spl/pennsylvania-legislature-coronavirus-transparency-live-stream-meetings-20200323.html (last visited 3/26/20).

[26] The General Assembly enacted Act No. 12 of 2020, which delayed the primary election by five weeks. This will allow campaigns breathing space to adapt to the new reality affecting the globe.

divided among industries using the North American Industry Classification System (NAICS). The Commonwealth did not create the NAICS codes and classifications, which were developed under the auspices of the Office of Management and Budget and utilized by the U.S. Census Bureau to group similarly situated organizations and entities together for classification purposes. *See* U.S. Census Bureau, North American Industry Classification System, https://www.census.gov/eos/www/naics/ (last visited 3/31/20). By using this highly regarded and ubiquitous classification system, the Governor ensured that similarly situated entities *would* be treated the same.

But even if different NAICS categories were, somehow, similarly situated, the Governor's distinctions between different industry, commercial, and non-profit groups would still be valid. Where the challenged governmental classification does not burden fundamental rights, it is subject to rational-basis review. *Bullock,* 913 A.2d at 215. As explained above, the Governor's Order does not burden any fundamental right to speak or assemble. And a government action "that regulates merely the right to sell does not impinge on fundamental rights. Such economic regulation is to be examined under the rational basis standard . . . ." *Story v. Green*, 978 F.2d 60, 64 (2d Cir. 1992).

"Under rational basis review, a classification will be upheld so long as it bears a reasonable relationship to a legitimate state purpose." *Bullock*, 913 A.2d at 216.

"In undertaking this analysis, courts are free to hypothesize grounds the Legislature might have had for the classification." *Id.* "It bears repeating that all doubts on this question, as with all questions of constitutional validity, are resolved in favor of upholding the statute." *Id.*

With a global pandemic putting the lives of millions at risk, closing businesses and industries became a public safety necessity. Close too few businesses and COVID-19 would continue to spread uninterrupted, collapsing our healthcare system with patients. Close too many businesses and people would be unable to access life-sustaining supplies. A balance between these two extremes was necessary, and the Governor's Office chose this balance. As facts change on the ground, that list has been amended to adjust that balance. The health and survival of Pennsylvanians is the most compelling of state interests, let alone a legitimate one. And the classifications and distinctions made to protect the citizenry was absolutely essential—let alone reasonably related—to achieving that most compelling of state interests. Under any scrutiny, the Governor's Order does not violate equal protection.

VI. There Has Been No "Taking" of the Entities' Properties Under the United States or Pennsylvania Constitutions

The Entities assert that the temporary restraint on non-essential businesses from operating is a taking arising out of eminent domain, entitling them to just compensation pursuant to Article I, Sections 1 and 10 of the Pennsylvania

Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution. However, their attempt to frame compliance with the Governor's Order as a "taking" finds no basis in law.

As detailed above, the Governor's actions in restricting the Entities' operations have been made pursuant to the state's police powers—not through the power of eminent domain. This Court in *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 314 (Pa. 1995), outlined the boundaries and importance of this distinction:

> Eminent domain is the power to take property for public use. The [government] must provide just compensation for any property taken pursuant to this power. The police power, on the other hand, involves the regulation of property to promote the health, safety and general welfare of the people. It does not require that the [government] provide compensation to the property owner, even if the property is damaged or destroyed.

Id. (citing *White's Appeal*, 134 A. 409 (Pa. 1926)); *Estate of Blose*, 889 A.2d 653, 659 (Pa. Cmwlth. 2005) ("It is well-settled that the exercise of the police power is not a taking") (citing *Commonwealth v. Barnes & Tucker Co.*, 371 A.2d 461 (Pa. 1977)).

Similarly, as the United States Supreme Court stated in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n. 22 (1987):

> Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance. It is hard to imagine a different rule that would be consistent with the maxim "sic utere tuo ut alienum non

> laedas" (use your own property in such manner as not to injure that of another.).

Id. (internal citations omitted). In *Miller v. Schoene*, 276 U.S. 272 (1928), the United States Supreme Court held that Virginia was not required to compensate the owners of cedar trees under the Takings Clause for the value of the trees that the State had ordered destroyed to prevent an agricultural disease from spreading to nearby apple orchards. In *Miller*, the state's interest was protecting apple trees. In the present circumstance, the Governor seeks to protect Pennsylvania citizens from a disease that threatens not plant life, but human life. If the action taken to save trees in *Miller* did not require compensation, then certainly the Governor's Order to save lives cannot constitute a taking which requires compensation.

Moreover, here, there is not even contemplation of property being damaged or destroyed. Rather, the Governor's Order regulates the operation of certain businesses, which the law specifically permits as a proper exercise of police powers. *See National Amusements Inc. v. Borough of Palmyra,* 716 F.3d 57 (3d Cir. 2013) (temporary closure of flea market for several months to search for discarded munitions was a proper exercise of police powers and did not constitute a taking requiring compensation).

The Entities cite to *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), to support their assertions. That case stands for the unremarkable proposition that a government action that rendered property permanently valueless constituted a

taking. That is not the case here. Indeed, even under the fundamentally more severe facts in *Lucas*, the Court found that there would be no taking if the state could show that the owner's use of the property would be prohibited by "principles of nuisance and property law." *Id.* at 1031-1032.

Lucas simply does not stand for the proposition that all government action which temporarily restricts the use of property constitutes a taking. Further, *Lucas* does not overturn *Miller*, *Balent*, *Keystone Bituminous Coal*, and similar cases which provide that the use of the state's police powers to promote the health, safety and general welfare does not constitute a taking which requires the payment of compensation for lost business which may result.[27]

VII. There Was No "Seizure" of the Entities' Properties Under the United States or Pennsylvania Constitutions

In footnote 14 on page 41 of their brief, the Entities baldly assert that the Governor's Order amounts to a warrantless seizure of their properties in violation of the Fourth Amendment to the United States Constitution, and Article I, Section 8 of

[27] The Entities' reliance on *Andress v. The Zoning Bd. of Adjustment of the City of Philadelphia*, 188 A.2d 709, 716 (Pa. 1963), is also misplaced. This Court held in that case that the City of Philadelphia abused its police powers by denying a property owner a variance to build an apartment building in an area zoned only for single family dwellings. This Court made no reference to the concept of takings. There is certainly nothing in *Andress* that would support the conclusion that limitations on the use of property in response to a pandemic would constitute a taking.

the Pennsylvania Constitution. The unseriousness of this claim is revealed by the two-sentence argument, without citation to any caselaw, relegated to a footnote.

First, as discussed above, the Governor's Order constitutes a temporary regulation of business activity, not a taking nor a seizure. The Entities certainly provide no argument or support for their assertion.

Second, even if there were a seizure, and there is not, emergencies justify the seizure of property when it poses a danger to the public. *See e.g. Gardner v. McGroarty*, 68 Fed.Appx. 307, 312 (3d Cir. 2003) (holding that because building's lack of heat rendered it unfit for human habitation under the local housing codes, an "emergency" existed as a matter of law which justified the local government's seizure of the building).[28]

The exponentially increasing spread of COVID-19 may be the direst emergency of our lifetimes, and the Entities' possessory interest in the uninhibited use of their buildings is heavily outweighed by the Commonwealth's compelling interest in protecting the health and lives of its citizens.

[28] Even if this was a seizure, the Governor has the extraordinary authority to "commandeer or utilize any private, public or quasi-public property if necessary to cope with the disaster emergency." 35 Pa.C.S. § 7301(f)(4).

VIII. The Arguments Raised in the Entities' Supplemental Applications are Waived, and are Nonetheless Meritless

Since filing their brief with this Court, the Entities have submitted two supplemental applications asking the Court to consider additional facts that they neglected to raise in either their Emergency Application or their Brief. Specifically, the Entities ask this Court to consider: (a) a memorandum from the Federal Cybersecurity and Infrastructure Security Agency ("CISA") suggesting that real estate services should be considered essential; and (b) the fact that three other states allow golf courses to remain open during the pandemic.

Contrary to the Entities' averments, these are not "new facts" that have arisen since they filed their brief with this Court on March 31, 2020. The CISA Memorandum was released on March 28, 2020. Indeed, counsel for the Entities emailed Commonwealth Officials' counsel on Sunday March 29, 2020 to call attention to the CISA Memorandum. Additionally, news articles the Entities cite with respect to reporting that New York and Ohio are permitting golf courses to remain open are dated March 27, 2020 and March 30, 2020, respectively. Thus, the Entities' had the opportunity—and indeed the obligation—to raise these arguments in their initial brief to this Court. *See* Pa.R.A.P. 2111 and 2119. As they failed to do so, these arguments are waived. *See Seebold v. Prison Health Services, Inc.*, 57 A.3d 1232, 1248 n.23 (Pa. 2012) (finding waiver where appellant failed to raise argument in opening brief). The Entities have repeatedly attempted to convert the Pa.R.A.P

123 application process into a mechanism for raising arguments in series, regardless of rule or deadline. This is improper.

To the extent this Court is nonetheless inclined to consider these facts well past the point that they should have been properly presented, they carry no weight whatsoever.

The CISA Memorandum expressly states as follows:

> **This list is advisory in nature. It is not, nor should it be considered, a federal directive or standard. Additionally, this advisory list is not intended to be the exclusive list of critical infrastructure sectors, workers, and functions that should continue during the COVID-19 response across all jurisdictions. Individual jurisdictions should add or subtract essential workforce categories based on their own requirements and discretion.**

(emphasis in original).[29]

With respect to golf courses, the Governor and Secretary of Health, guided by their experts, must be permitted broad discretion in determining whether golf courses represent an unacceptable risk of COVID-19 spread. Blueberry Hill does not mention the 12 states—Illinois, Maine Massachusetts, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, Vermont, Washington and

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[29] Guidance on the Essential Critical Infrastructure Workforce, CISA Website, https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce (last visited 4/2/20).

Wisconsin—which join Pennsylvania in closing all courses.[30] Each day, more and more courses are closed as States realize the dangers present in these recreational businesses. *Id.* Further, citing to New York's lax golf course policies is perplexing, given that New York is currently the epicenter of the COVID-19 epidemic.

[30] Golf and COVID-19: Latest news on course operations, Golf Advisor, https://www.golfadvisor.com/covid-19 (last visited 4/2/20).

CONCLUSION

For these reasons, the Court should deny the application for extraordinary relief.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this brief contains 12,711 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ J. Bart DeLone

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CERTIFICATE OF SERVICE

I, J. Bart DeLone, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing brief, via electronic service, on the following:

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DATE: April 3, 2020