

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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 PA. DEPARTMENT OF HEALTH,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

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QUESTIONS PRESENTED

Whether the Order exceeded the Governor's permissible scope of his police powers and as such violated Petitioners' rights guaranteed by the U.S. Constitution.

Suggested Answers: Yes

Whether Petitioners' rights not to be deprived of life, liberty and property without due process of law and not to have their property taken without just compensation guaranteed by the Fifth and Fourteenth Amendments are violated by the Order.

Suggested Answer: Yes

Whether Petitioners' rights not to be deprived of life, liberty and property without due process of law guaranteed by the Fifth and Fourteenth Amendments are violated by this Order.

Suggested Answer: Yes

Whether Petitioners' rights to equal protection of the law guaranteed by the Fourteenth Amendment are violated by the Order.

Suggested Answer: Yes

Whether Petitioners' rights to free speech and assembly protected by U.S. Const. amend. 1 are violated by the Order.

Suggested Answer: Yes

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PETITION FOR WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

Petitioners respectfully ask that a writ of certiorari issue to review the opinion of the Pennsylvania Supreme Court in 68 MM 2020 filed on April 13, 2020.¹

OPINION BELOW

The Majority Opinion of the Pennsylvania Supreme Court, which was issued on April 13, 2020 is attached as Appendix A, and the Concurring and Dissenting Opinion, is attached as Appendix B.

¹ Pursuant to Rule 29 of the Supreme Court of the United States there is no parent or publicly held company owning 10% or more of the corporation's stock of any Petitioner.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C.S. § 1257(a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where...the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution...of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of ...the United States.

The Pennsylvania Supreme Court's Opinion is a final judgment rendered by the highest court of the Commonwealth of Pennsylvania (the "lower court"). The lower court's Opinion is not subject to further review or correction in any other state tribunal; it has terminated the litigation and is the final word or say by the final court. *See Mkt. St. R. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945). Further, in the underlying case, Petitioners challenged the Executive Order of the Governor of Pennsylvania as being repugnant to the U.S. Constitution and raised claims under U.S. Const. amends. I, V, XIV, all of which were denied by the lower court.

Further, this petition is timely because it was filed within 90 days of the date the Opinion pursuant to Supreme Court Rule 13(1).

CONSTITUTIONAL PROVISIONS & AND EXECUTIVE ORDER INVOLVED

U.S. Const. amend. XIV Sec. 1:

[Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. I:

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, and to petition the Government for a redress of grievances.

The Executive Order is attached as Appendix C.

STATEMENT OF THE CASE

On March 6 2020, the Governor issued a proclamation declaring a disaster emergency throughout the Commonwealth of Pennsylvania.² On March 19, 2020, the Governor issued an Executive Order barring any person or entity from

² <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf>

operating a place of business in Pennsylvania that is not “life-sustaining,” ordering that life sustaining businesses may remain open, but must follow, at a minimum, the social distancing practices and other mitigation measures defined by the Centers for Disease Control (CDC) (the “Order”). The Order contained a list classifying all industries as either life-sustaining or non-life-sustaining (the “List”). The Order explained that its violation could result in citations, fines, or license suspensions, forfeiture of the ability to receive any application disaster relief; prosecutions by the Department of Health, including quarantine, isolation, or other disease control measure with violators subject to fines or imprisonment and any other criminal charges that might be applicable. Petitioners are businesses or entities included on the List as non-life-sustaining and were compelled to close the physical operations of their businesses or entities.

After issuing the Order, the Governor added a “waiver” process thru which businesses and entities could submit an application to the Pennsylvania Department of Community and Economic Development (DCED) and request that they be permitted to operate. DCED received 42,380 waiver requests. So far, DCED approved 7,837 requests for a waiver, rejected 18,746, found 14,471 didn’t require one for the activity they wanted to perform. The remainder are still being

processed.³ On Wednesday, April 1, 2020, DCED announced that it was ending the waiver process for new request on April 3, 2020 at 5:00PM.⁴

DCED employees review the waiver applications and grant or deny them. The Governor provided no further administrative review and denies there is any judicial review for denials. The lower court held that the Governor, and not DCED, is reviewing and deciding the waivers and that the Governor's actions are not subject to the right of judicial review guaranteed by the Pennsylvania Constitution because the Governor is not an administrative agency. This opinion results in the denial of judicial review to at least 18,746, businesses whose waivers were denied.

Petitioners filed an Emergency Application in the Pennsylvania Supreme Court asking that court to strike down the Order as beyond the Governor's statutory authority and violative of the Petitioners' Pennsylvania and U.S. Constitutional rights by *inter alia* depriving them of the use and control of their businesses without due process of law and/or just compensation, subjecting them to a List and waiver process that was arbitrary and capricious and allowed for no judicial review and for violating their equal protection and free speech and assembly rights. The Governor countered that he has the authority under the Pennsylvania Constitution and statutes and that Petitioners' rights under the Pennsylvania and U.S. Constitution were not violated.

³ <https://www.pennlive.com/news/2020/04/gov-tom-wolf-vetoes-bill-that-could-allow-more-pa-businesses-to-reopen.html>

⁴ <https://www.pennlive.com/coronavirus/2020/04/pa-businesses-seeking-waiver-to-stay-open-through-coronavirus-closures-have-until-friday-to-apply.html?fbclid=IwAR0-yQWs1qeuf9YNDqk6wqkbo7SdHJZIHD8WjVniBX41BRsWxFKJQUA5l3s>

REASONS FOR GRANTING THE PETITION

The Order exceeded the Governor’s permissible scope of his police powers and thus violated Petitioners’ rights guaranteed by the U.S. Constitution.

The lower court found the Governor has the authority for his Order under the Emergency Management Services Act (the “Code”). 35 Pa. Cons. Stat. § 7101. However, the Code addresses “disasters,” not communicable diseases. Pennsylvania has a law for communicable diseases – the Disease Prevention and Control Law (hereinafter the “Disease Act”).⁵ But, the Disease Act does not authorize the Governor’s Order. It only empowers the Governor thru his Secretary of Health to take action against persons suspected of being infected with, or a carrier of, or likely to have been exposed to a communicable disease; not businesses let alone businesses at which no COVID-19 has been identified. And, these actions must be done through the courts, with due process rights for the person subject to them. None of that has happened in this case.

Although communicable diseases are governed by the Disease Act, the lower court chose not to analyze that Act and instead found the Governor’s power for the Order is in the Code. In order to fit the square peg into the round hole, the lower court found that the “COVID-19 pandemic” is a “natural disaster.” The Code defines natural disasters as:

Any 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.

⁵ 35 Pa. Stat. Ann. § 521.1 et seq.

35 Pa. Cons. Stat. § 7101

Viral illnesses, pandemics and epidemics do not appear in the definition and are not like the things included in the definition.

The lower court found the general phrase “other catastrophe” includes COVID-19. However, under the contextual canon of *ejusdem generis*, it cannot be included because it is not in the same kind or class as those listed. *See Norfolk & W. R. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 129, (1991). First, the subjects listed are comprised of the traditionally understood elements of nature: earth, fire, water and wind; COVID-19 is not. Second, these natural elements all can cause destruction to the state’s physical infrastructure; COVID-19 cannot. The lower court ignores the obvious commonality among the class of natural disasters listed, focuses exclusively on the last dependent clause of the definition, and concludes that anything can be a catastrophe as long as it, “involves substantial damage to property, hardship, suffering or possible loss of life.” *Majority Opinion*, Page 24. But, the lower court’s definition reduces every other word in the statutory definition preceding the word, ***other***, to mere surplusage, which violates another canon of statutory construction. *See Hibbs v. Winn*, 542 U.S. 88 (2004).

Further, the Code empowers the Governor to act only within a **disaster area**. 35 Pa. Con. Stat. § 7301 (f)(7). The Code does not define “disaster area.” Dictionaries define “disaster area,” as, “a place where a very serious accident, such as an earthquake, ***has happened***.”⁶ Yet, the lower court found, “Thus, any location

⁶ <https://dictionary.cambridge.org/us/dictionary/english/disaster-area?topic=accidents-and-disasters>

(including Petitioners' businesses) where two or more people can congregate is within the disaster area." *Majority Opinion*, Page 26. But, that definition is based upon mere speculation about a possible future event. That defies the common sense definition of a disaster area which is a place where a disaster *has occurred*. Plus the assumption the COVID-19 will spread and harm someone during that hypothetical meeting is extremely attenuated. Thus, the Order does not fit within the Code.

The lower court cited this Court for the police test:

To justify the State in thus interposing its authority in behalf of the public, it must appear, -- first, that the interests of the public . . . require such interference; and, second, that the means are *reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals*.

Lawton v. Steele, 152 U.S. 133, 137 (1894) as cited by in the *Majority Opinion* Page 27.

However, this case fails the *Lawton* test. The first prong is whether the public requires the state action (i.e. the Order). The lower court reasons the public requires the Order because COVID-19 has spread "exponentially" and the death toll is "staggering." *Majority Opinion*, Pages 27-28. And, "The reason for the drop in the death toll projection is the enforcement of social distancing mechanisms and citizen's compliance with them." *Id.* at 28. And, "The ***enforcement*** of social distancing to suppress transmission of the disease is currently the ***only*** mitigation tool." *Id.* (emphasis added).

In support of its conclusion, the lower court cites to an article appearing in Politico, a political website. However, the article stands for the opposite conclusion. It cites senior Trump Administration officials touting, "the effectiveness of the

federal government’s social-distancing *guidelines*.”¹ Those guidelines are not mandatory, statewide business closure orders. The article does not cite the “*enforcement* of social distancing mechanisms,” does not mention Pennsylvania or any other state’s business closure orders at all let alone proclaim their effectiveness.² The health officials cite the American peoples’ practice of “social distancing,” not statewide business closure orders, as the reason for the drop in death toll. The article quotes the director of the CDC, who said, that “what we’re seeing is a large majority of the American public are taking the social-distancing recommendations to heart.” Thus the evidence cited by the court does not prove that the public requires the Order and suggests voluntary compliance is what has worked. Furthermore, the social scientific data show that mass business closure and shut down orders are not an effective mitigation tool, let alone more effective than more narrowly tailored measures.³

The Order has caused significant damage to Petitioners’ businesses. The lower court stated, “We recognize the serious and significant economic impact of the closure of Petitioners’ businesses.” *Majority Opinion*, Page 30. And:

While the majority repeatedly stresses that such closure is temporary, see *id.*, this may in fact not be so for businesses that are unable to endure the associated revenue losses. Additionally, the damage to surviving businesses may be vast.

Concurring and Dissenting Opinion, Page 3. (emphasis added)

⁷ <https://www.politico.com/news/2020/04/07/trumps-top-health-officials-predict-diminished-coronavirus-death-toll-171456>

⁸ The article does reference work from home guidelines which many businesses and workers were able to figure out and do for themselves without government compulsion.

⁹ <https://www.spiked-online.com/2020/04/22/there-is-no-empirical-evidence-for-these-lockdowns/>

The Governor stated about his Order, “It is devastating the economy, no question about it.”¹⁰ A cursory review of the news shows the catastrophic consequences to the economy caused by this and similar business closure orders.¹¹ Thus, the public interest is greatly harmed by the Order.

The second prong of *Lawton* is whether the Order is reasonably necessary to achieve its purpose while not unduly oppressive. The lower court stated, “The choice made by the Respondents was ***tailored*** to the nature of the emergency and utilized a ***recognized tool***, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19.” *Majority Opinion*, Page 29. However mass, statewide business closure orders have never been implemented before, let alone determined to be effective; thus there is no basis to conclude they are a “recognized tool.” And the Order was not tailored to the emergency. If the way to reduce the spread of COVID-19 is to engage in social distancing, then the “tailored” response would have been to order businesses to engage in social distancing and close those that could not.

Another example of a reasonable order would be one that ordered social distancing for the demographic groups who are at risk of serious illness or death if they contract COVID-19 and/or for the geographical area in which the disease is most prevalent.¹² A report published by the Pennsylvania Department of Health on

¹⁰ <https://www.pennlive.com/news/2020/04/gov-tom-wolf-vetoes-bill-that-could-allow-more-pa-businesses-to-reopen.html>

¹¹ <https://www.wsj.com/articles/europe-suffers-record-collapse-in-economic-activity-11587637735>

¹² https://thehill.com/opinion/healthcare/494034-the-data-are-in-stop-the-panic-and-end-the-total-isolation?fbclid=IwAR0Ik6NVF_c6iSFmI0pHFaey7qPCX7g9nbjnxmxN_HY_MoYnt9jhnrQjMS0#.XqEl0ODZ01U.facebook

April 16, 2020 reveals that nearly eighty percent of Pennsylvanians who have contracted COVID-19 reside in only 10 of its 67 counties, over half of all COVID-19-related deaths have occurred in nursing and personal care homes, and over half of COVID-19-related hospitalizations involve individuals over the age of 65.¹³ Yet, the Governor applied his Order to all Pennsylvania businesses he deemed to be non-life-sustaining. Three of the Petitioners have their physical operations in Warren County, Pennsylvania. As of April 23, 2020, Warren County had one COVID-19 case and no deaths, yet all the non-life-sustaining businesses in Warren County were ordered closed on March 19, 2020.¹⁴ This Order is not tailored or reasonably necessary to achieve the suppression of COVID-19.

As further evidence, the Governor on April 20, 2020 announced a date, May 8, 2020, when he will begin the gradual reopening of Pennsylvania's businesses. He stated, "We'll do it by region, and that means that if we opened in Cameron County, for example, that does not mean that we're closing or ending the restrictions, [for] the things that people ought to do in Philadelphia."¹⁵ Cameron County is rural, like Warren County; Philadelphia is not. Here the Governor admits the regional

¹³ <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>

¹⁴ On April 21, 2020 the Pa Dept of Health recorded one COVID-19 death in Warren County. However the Warren County government disputes this claim. See <https://www.timesobserver.com/news/local-news/2020/04/warren-county-covid-19-death-reported-in-error/>;

The Pa Department of Health then chanced the death count back to zero. See <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>

¹⁵ <https://www.pennlive.com/coronavirus/2020/04/pa-sets-may-8-as-the-target-date-for-regional-reopening-amid-the-coronavirus-pandemic-heres-what-it-means.html>

approach is reasonable for the re-opening, but his closure Order was not regional, it was statewide.

Lastly, as previously discussed, the lower court has admitted that earlier predictions about the “staggering death toll” were wrong. *Majority Opinion*, Page 28. Thus, the death toll projections that formed the basis for the Order were wrong. Thus, the Order is unreasonable given the actual scope, scale and danger of COVID-19. Johns Hopkins University of Medicine’s Coronavirus Resource Center, as of April 13, 2020 at 7:02 a.m., reported 557,590 confirmed cases of coronavirus in the U.S. and 22,109 deaths due to COVID-19.¹⁶ Approximately 0.17 percent of America’s 330 million population has been infected by the coronavirus and 0.007 percent has died from it. That is a staggeringly low death toll. Johns Hopkins reports that with more testing the case-to-mortality ratio will be even lower. Compare the coronavirus to influenza. The CDC estimates that from Oct. 1, 2019, through April 4, 2020, there were between 39 million and 56 million flu illnesses; between 18 million and 26 million medical visits due to flu; between 410,000 and 740,000 hospitalizations due to flu; and between 24,000 and 62,000 of deaths due to flu; and that death rate exists even though we have an effective vaccine. Those flu numbers can be considered “staggering.” But, governors have never shut down tens of thousands of businesses throughout their entire state in response to the flu.

Further, the Order is unduly oppressive. As discussed previously, the lower court agrees the Order has caused serious and significant, negative economic

¹⁶ <https://www.washingtontimes.com/news/2020/apr/14/coronavirus-case-and-death-counts-in-us-ridiculous/>

impact. Yet it then states that the Order is the *sine qua non* to protecting public lives and health. *Majority Opinion*, Page 30. However, the Order cannot be absolutely necessary to protect public lives and health when the Governor exempted tens of thousands of businesses from it. Furthermore, the social scientific data prove the lower court's conclusion is wrong. See FN 9. Also, the Pennsylvania Chief Justice recognized the impairment experienced by Petitioners and those businesses on the non-life-sustaining List:

The majority opines that “[t]he protection of the lives and health of millions of Pennsylvania residents is the sine qua non of a proper exercise of police power.” *Id.* at 30. I believe, however, that greater account must be given to the specific nature of the exercise, and that arbitrariness cannot be tolerated, **particularly when the livelihoods of citizens are being impaired to the degree presently asserted.**

Concurring and Dissenting Opinion, Pages 2-3. (emphasis added)

Also, the Order is unduly oppressive because it could have been crafted and implemented in a more tailored and reasonable manner as discussed *supra*.

Lastly, this Court in *Lawton* upheld a state statute banning fishing with a net; the statute did not ban fishing. The Order does not ban business owners from operating their businesses without COVID-19 precautions; it much more broadly bans them from operating their businesses at all. Also, the lower court held there is no judicial review of any denial of a waiver even though this Court has declared in *Lawton* that there shall be judicial review of summary seizures or takings of property. *Id.* *Lawton* at 142.

Petitioners' right not to be deprived of life, liberty and property without due process of law and not to have their property taken without just compensation guaranteed by the Fifth and Fourteenth Amendments are

violated by the Order.

The Order constituted a taking of Petitioners' property without just compensation and thus violated U.S. Const. amends. V, XIV. The lower court ruled that a taking did not occur. *Majority Opinion*, Page 37. In the lower court, Petitioners cited and argued *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), in which this Court held:

...the Fifth Amendment is violated when land-use regulation **does not substantially advance legitimate state interests or denies an owner economically viable use of his land.**

Id. at 1016 (emphasis added).

And:

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property **has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.**

Id. at 1019

The Order ousted Petitioners from their place of business and prohibits them from physically operating them.¹⁷ This Court explained:

When, however, a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

Id. at 1030

¹⁷ Petitioner Blueberry Hill is not operating its restaurant and has not since the date of the Order. The lower court somehow drew the opposite conclusion. *Majority Opinion*, Page 32 FN 12. However, the pleadings contain no factual averment that Petitioner was operating the restaurant; and the Supplemental Application filed by Petitioner Blueberry avers that the restaurant is closed. *Supplemental Application for Relief*, Exhibit A, Paragraph 1. Petitioner's entire golf club and restaurant is closed by the Order.

It can still be a taking even if the taking is temporary:

The potential for future relief does not control our disposition, because whatever may occur in the future cannot undo what has occurred in the past. ... **If this deprivation amounts to a taking, its limited duration will not bar constitutional relief. It is well established that temporary takings are as protected by the Constitution as are permanent ones.**

First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 318 (1987)

Lastly, the government has the burden of proof and must:

identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the [statute] is taking nothing.

Id. Lucas at 1031-32

Respondents have not met their burden. They have not identified any laws that prohibit Petitioners from using their property as they did before the Order. Also, Respondents' fear that COVID-19 could spread at Petitioners' place of business is too speculative and remote to meet their burden:

There was nothing inherently harmful about the landowners' desired use of their properties, to build homes, and uncertainty about the stability of the area was not sufficient to deprive them of a home. A permanent ban on home construction could not be based merely on a fear of personal injury or significant property damage.

Monks v. City of Rancho Palos Verdes, 167 Cal. App. 4th 263, 299 (2008)

The lower court based its conclusion on this Court's holding in *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), which held a regulatory taking had not occurred, mainly because the government action was temporary. Yet the facts in *Tahoe-Sierra* are distinguishable. The *Tahoe-Sierra* case

involved two moratoria on residential development of a parcel of land for 32 months during which the local zoning authority was developing a comprehensive land use plan for that parcel. There is a substantial difference between not being permitted to use or even access your property at all, and not being able to utilize your property for one particular, future proposed use. Developers purchase real estate knowing they will need approvals by local or state governments before they can develop the real estate. The Petitioners had no expectation that they would be barred from using their physical business operations, which were already in lawful use on their business premises, by an executive order from the Governor.

This Court in *Tahoe-Sierra* held that a taking has occurred if a regulation “goes too far” and, “**neither a physical appropriation nor a public use has ever been a necessary component of a “regulatory taking.”** *Id.* at 325-26 (emphasis added).

The lower court held there was no taking because the Order is temporary. *Majority Opinion*, Page 36-37. However, Chief Justice Saylor held that the Majority placed too much emphasis on the temporariness of the Order:

While the majority repeatedly stresses that such closure is temporary, see *id.*, this may in fact not be so for businesses that are unable to endure the associated revenue losses. Additionally, the damage to surviving businesses may be vast. Significantly, moreover, the Supreme Court of the United States has admonished that the **impermanent nature of a restriction “should not be given exclusive significance one way or the other” in determining whether it is a proper exercise of police power.** *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 337, 122 S. Ct. 1465, 1486 (2002).

Concurring and Dissenting Opinion, Page 2. (emphasis added)

Also, the lower court noted the Order can be terminated at any time by the General Assembly. *Majority Opinion*, Page 37. However, the General Assembly passed a bill to reopen those Pennsylvania businesses; the Governor vetoed it.¹⁸ In response to the lower court's claim that the General Assembly serves as a check on the Governor's power, Chief Justice Saylor admonished, "that the Constitution serves as another." *Concurring and Dissenting Opinion*, Page 3, FN 2.

The lower court also relies upon *Nat'l Amuses., Inc. v. Borough of Palmyra*, 716 F.3d 57 (3d Cir. 2013) which held a regulatory taking had not occurred. *Majority Opinion*, Pages 36-37. The facts in *Nat'l Amusements Inc.* are distinguishable. In that case, the local government provided notice and a request to voluntarily cease operations while it inspected the property for unexploded artillery shells. Further, the parties entered into a court-approved agreement to keep open the premises for business with safety precautions. Thus, the owner did not lose the full use of his business operation and the risk of harm was being mitigated as the business continued to operate.

In the case at bar, the Governor provided no advance notice, made no request to voluntarily comply, and did not agree Petitioners could continue to operate their businesses with safety precautions. Unlike the danger involved in unexploded artillery shells, nothing dangerous has been found on the Petitioners' premises. The suggestion that COVID-19 could possibly be spread at Petitioners' physical premises and that someone could suffer serious injury or death as a result is

¹⁸ <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200420-SB613-Veto-Memo.pdf>

speculation. Mere speculation about a potential hazard is not sufficient for the government to meet its burden. *See Monks*, 167 Cal. App. 4th 263.

Petitioners' right not to be deprived of life, liberty and property without due process of law guaranteed by the Fifth and Fourteenth Amendments is violated by this Order.

Pre-Deprivation Due Process:

Petitioners were entitled to pre-deprivation due process as guaranteed by the U.S. Const. amends. V, XIV. The lower court held they were not. *Majority Opinion*, Page 40. In their Brief, the Petitioners cited to several cases in support of their claim. *See Petitioners' Brief*, Page 44.

In *Manna v. Erie*, an ordinance suspended tenants' obligation to pay rent if the city summarily found the dwelling unfit for habitation. The Pennsylvania Commonwealth Court struck down that ordinance as a violation of U.S. Const. amend. XIV. The court explained the form of due process required before the city could suspend the rent obligation, "notice of the action, a copy of the alleged violations, reasonable time to file a written response, and an opportunity for an oral appearance." *Manna v. Erie*, 27 Pa. Commw. 396, 397 (1976).

In *Fuentes*, this Court found that a Pennsylvania statute's prejudgment replevin provisions deprived the property owners of their property without due process insofar as they denied the right to prior notice and hearing before property was taken. *Fuentes v. Shevin*, 407 U.S. 67, 69 (1972).

Petitioners also cited and presented argument in their Brief of this Court's decision in *Rogin v. Bensalem Twp.*, 616 F.2d 680 (3d Cir. 1980), in which this Court

held, “Before a governmental body may deprive a landowner of a property interest, it must provide due process,” listed seven elements of due process, and held that, “Whether all or any one of these safeguards are required in a particular situation depends on the outcome of the balancing test mentioned above” *Id.* at 682 (emphasis added). In *Rogin*, the property developer received all seven elements of due process, including judicial review. *Id.* at 695. Petitioners did not receive any. Petitioners were given approximately three hours to vacate their businesses; this hardly constitutes proper notice, which is only one of the elements.¹⁹

Petitioners also cited *Nat’l Wood Preservers v. Commonwealth Dep’t of Env’tl. Res.*, 489 Pa. 221 (1980). In this case, the property owner was ordered by a state regulatory agency to abate the nuisance of toxic chemicals on his property. Prior thereto, however, the property owner was afforded a hearing before the agency and an appeal to the Commonwealth Court.

The lower court cited *Bundy v. Wetzel*, 646 Pa. 248 (2018) for the balancing test. But *Bundy* does not conclude that no pre-deprivation due process of any form is required. The lower court in *Bundy* found and upheld several forms of pre-deprivation due process due to prison inmates regarding deductions to their inmate accounts including notice and a, “meaningful (if informal) means to challenge the amount of the debt, assert an exemption, or otherwise raise an objection to the deduction scheme.” *Id.* at 252. The lower court in *Bundy* explained that providing

¹⁹ The Order was posted on the Governor’s website @5:00PM on Friday, March 19, 2020 and took effect three hours later at 8:00PM. Enforcement was to commence at 12:01AM that Saturday and then was postponed to the upcoming Monday at 8:00AM.

these forms of due process, “can potentially avoid erroneous deprivations before they occur.” *Id.* Yet, in the case at bar, the Governor provided Petitioners with no means to challenge his classification of them as non-life-sustaining, assert an objection or otherwise raise an objection pre-deprivation. And, further, DCED admits to errors in determining which industries and which businesses were placed in which categories.²⁰ And, DCED granted over seven thousand waivers meaning it initially made over seven thousand erroneous deprivations.

The lower court cites *Pa. Coal Mining Asso. v. Ins. Dep't*, 471 Pa. 437 (1977). But this case confirms that those who have a property interest are entitled to some form of pre-deprivation due process. In this case, the lower court struck down the regulation in question because it did not provide notice and the right to make written objections to proposed insurance rates prior to the rates going into effect.

The lower court cites *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). But in *Logan*, this Court held that a person’s due process rights were violated by the termination of his employment discrimination case without a hearing prior to the termination. *Id.* at 424. The *Logan* case also illustrates that federal law establishes minimum procedural requirements below which states cannot go. *Id.*

The lower court cited only one case in which this Court held that no due process in any form was required prior to a deprivation. In *Hudson v. Palmer*, 468 U.S. 517 (1984). However, this case involved a prison guard who, without

²⁰ <https://www.pennlive.com/coronavirus/2020/03/gov-wolfs-ex-business-says-its-life-sustaining-and-doesnt-need-waiver-to-stay-open-during-coronavirus-shutdown.html>

authorization, destroyed an inmate's personal property. This Court reasoned, "The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." *Id.* at 533. That case is distinguishable because the Governor issued the Order with authorization from the state (i.e. himself). Further this Court did not find a due process violation in *Hudson* because a meaningful post-deprivation remedy for the loss was available, i.e. the right of the inmate *inter alia* to sue for just compensation for the loss of his personal property. *Id.* at 534-35. However, in the case at bar, the lower court has held there is no taking and thus no right to just compensation for the Petitioners' loss of the use of their businesses.

The lower court cited this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976) for the test to determine the amount of process due:

This balancing test considers three factors: (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. *Id.*

Majority Opinion, Pages 39-40.

However, as Petitioners argued in their Brief, *Mathews* makes Petitioners' case; in *Mathews* this Court permitted an initial termination of Social Security disability benefits because the claimant had the right to assert an objection prior to any preliminary administrative action and the claimant was guaranteed an evidentiary hearing and subsequent judicial review before the termination becomes final.

Petitioners' Brief, Page 55-56. None of those facts exist in this case.

The lower court also cited *Bundy* for the proposition that “whether pre-deprivation notice is required largely depends upon the second *Mathews* factor. *Id.* at 557.” *Majority Opinion*, Page 40. However, if the second *Mathews* factor is the most important of the three factors then the Order even more clearly fails. The second *Mathews* factor is, “(2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards.” *Majority Opinion*, Pages 39 and 40. The risk of erroneous deprivation has proven to be substantial. In addition to apologizing for the mistakes he made in compiling the List and determining the categories, the Governor revised his List at least twice in the span of just hours or days to move major industries from one category to the other. See the attached chart indicating that the Governor transferred twenty-five entire industries from the non-life-sustaining List to the life-sustaining List and transferred two industries the other way. (Exhibit A). Furthermore, DCED approved over seven thousand waivers in a relatively short time. Granting the waivers indicates the businesses were apparently life-sustaining after all. Thus the facts reveal errors that were made because the Governor provided no notice or opportunity for industries or businesses to prove they are life-sustaining and/or that they can employ COVID-19 precautions before they were placed on the List and ordered to close.

The Governor issued his disaster proclamation on March 6, 2020 and his Order on March 19, 2020. Thus, he had nearly two weeks before he issued his Order to determine which industries or businesses were “life-sustaining” and “non-life-

sustaining.” During that time the Governor and his DCED could have provided notice to all Pennsylvania industries and businesses, via his website, social media and press conferences, that he intended to issue a business closure order; he could have met with industry and business leaders and received their oral or written explanation for why they were life-sustaining, and could have given all businesses an opportunity via his website to submit written explanations as to why they should be permitted to remain open. DCED was likely initially overwhelmed by the waiver requests because it did not provide this form of pre-deprivation due process; had it done so it likely would have resulted in at least over seven thousand fewer waiver applications that it granted and over fourteen thousand fewer applications that it had to review only to determine the activity was life-sustaining in the first place; and providing even this minimal form of pre-deprivation due process would have lessened the substantial disruption to thousands of businesses, critical supply lines and the Pennsylvania economy.

Even though the lower court states that the second *Mathews* factor - the “risk of erroneous deprivation together with the value of additional or substitute safeguards” it does not discuss this factor. It discusses the third factor – the “administrative burden” – and explains that in essence the Governor had to act fast to control the spread of COVID-19 so there was no time for pre-deprivation due process. *Majority Opinion*, Page 40. But, as Petitioners explain above, the Governor had ample time to provide notice and the opportunity to respond.

Post-Deprivation Due Process:

Petitioners were entitled to post-deprivation due process. The lower court agreed, but concluded the waiver process was all that was needed. *Majority Opinion*, Page 41. However, none of the cases cited by the Majority support its conclusion. The lower court cited *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). *Majority Opinion*, Page 42.

However in *Hodel*, the mine operator received much more due process than Petitioners, including the right to notice and an abatement period if the state inspector found that its activity, “creates an immediate danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.” *Id.* at 298. The owners also received the right to request temporary relief from enforcement and the state was required to respond within five days, and the right to judicial review of the state’s denial of temporary relief. Concerning immediate cessation orders, the owners received, “a prompt and adequate postdeprivation administrative hearing and an opportunity for judicial review.” *Id.* at 268. Petitioners in the case at bar received none of these protections. Further, Petitioner Blueberry Hill filed a waiver on March 23, 2020 and to date has not received a response. Also, elsewhere in its opinion the lower court used the *Lawton* test to determine the extent of the state’s police power as discussed *supra*. In *Lawton* this Court found the right of judicial review exists to challenge summary seizures or takings of property pursuant to the state’s police power. *Id. Lawton* at 142.

The lower court concludes that no Pennsylvania business or entity is entitled to anything more than the waiver because DCED does not have the time to provide additional administrative review and any such review would constitute an “administrative burden.” *Majority Opinion*, Page 44. Yet as discussed *supra*, the Governor had ample time before and afterward to provide an administrative review that includes the forms of due process afforded the property owner in *Hodel*.

This Court upheld a federal statute imposing rent control because it provided administrative and judicial review, even emergency judicial review, for the property owners objecting to the government’s rent control determinations. *Bowles v. Willingham*, 321 U.S. 503, 516 (1944). In the case at bar, contrary to the lower court’s conclusion, the waiver process is not due process. It does not include any of the elements of due process listed in *Rogin supra*, including: a non-arbitrary, reasonable standard of review, no record of the proceedings, no right to present witnesses, no right to cross-examine witnesses, no right to make oral presentations, no right to a neutral arbiter and no right to appeal. DCED gives no reason for the denial other than, “it has been determined that the business identified above must remain closed.” See a verbatim copy of a boiler plat waiver denial email from DCED.²¹

²¹ Waiver Request DENIED:

By Executive Order dated March 19, 2020, and pursuant to powers granted to him by law, Governor Tom Wolf has ordered that no person or entity shall operate a place of business that is not a life-sustaining business, regardless of whether the business is open to members of the public. The Secretary of the Pennsylvania Department of Health has issued a similar order pursuant to powers granted to her by law. These orders (the “COVID-19 Orders”) are necessary to stop the spread of the novel coronavirus COVID-19. In response to your request for an exemption from the applicability of the COVID-19 Orders, pursuant to the powers granted by law to the Governor and

The waiver process is also a case study in arbitrary and capriciousness. Arbitrary is defined as those decisions not supported by fair or substantial cause or reason.²² “Capricious” has been defined as, “Given to sudden and unaccountable changes of mood or behavior.”²³ Within hours of issuing his Order and List, the Governor changed his mind and moved dozens of industries from the nonlife-sustaining to the life-sustaining List. The Governor then changed his mind again and moved more industries to the life-sustaining List without any change in the facts.

The Governor determined that “beer, wine, and liquor stores” are non-life-sustaining, but “beer distributors” are determined to be “life-sustaining.”²⁴ And “department stores” are non-life-sustaining, but “other general merchandise stores” life-sustaining?²⁵ Initially, “Other Specialty Stores,” were placed on the closure List; then in the first revision they were placed on the life-sustaining List. So now “Other Specialty Stores,” such as candy and chocolate retailers, are considered life-sustaining. When Facebook commenters asked one of those specialty stores why it was not shut down, it replied that it qualified as a specialty food store, as it sells

Secretary of Health to cope with the present disaster emergency and to prevent and control the spread of disease, it has been determined that the business identified above must remain closed.

²² <https://dictionary.law.com/Default.aspx?typed=arbitrary&type=1>

²³ <https://thelawdictionary.org/capricious/>

²⁴ Also, beer, wine and liquor stores were on the original List as life-sustaining, but then the Governor transferred them to the non-life-sustaining List without any explanation.

²⁵ However, it appears that pursuant to the March 24, 2020 revisions (the second revisions), general merchandise stores are now determined to be life-sustaining.

“sauces, pasta and oils, biscotti,” etc.²⁶ Biscotti is life- sustaining?²⁷ There is no substantial cause or reason to put a candy store on the life-sustaining list.

Another example of the arbitrariness of the waiver process involved Petitioner Kathy Gregory; she’s a member of the Pennsylvania Realtors Association (PAR). As a real estate agent, she has been on the non-life-sustaining list since the Order was issued. On March 20, 2020, PAR applied for a waiver on behalf of its 35,000 members. After PAR submitted its waiver, the Governor stated that in making determinations, DCED is “maintaining consistency” with an advisory issued by the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA Advisory").²⁸ On March 28, 2020, CISA released a "Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response," which deems all real estate services and workers essential. Nevertheless the Governor denied PAR’s waiver request on April 11, 2020.

DCED approved a waiver requested by Wolf Home Products, which is a kitchen cabinet assembly company and is the former family business of the Governor. Media reports began to surface that Wolf Home Products was open for

²⁶ <https://www.inquirer.com/health/coronavirus/spl/pennsylvania-pa-coronavirusbusiness-shutdown-waiver-tom-wolf-joe-scarnati-20200327.html>

²⁷ The Governor may argue that the candy stores were determined to be life-sustaining because they sell water. Really? How many Pennsylvanians purchase their water supply from candy stores? Plus there is no shortage of water.

²⁸ <https://www.scribd.com/document/452553495/UPDATED-1-45pm-March-27-2020-Life-Sustaining-Business-FAQs>

business.²⁹ After the media reports surfaced DCED rescinded the waiver explaining, “the company was originally approved as supporting infrastructure. Upon further review, [the DCED] determined that the lines of business Wolf is engaging in do not meet the criteria, and their exemption will be rescinded.” *Id.* The Respondents claim:

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.”

Respondents’ Answer to Petitioners’ Emergency application for Extraordinary Relief, Page 24

Yet, the facts did not change between the granting and rescission of the waiver.

Wolf Home Products is still open, despite having its waiver rescinded; it claims it did not need the waiver in the first place. Its CEO states, “evidently there’s confusion.”³⁰ The media reports about the Order, Lists and waiver process,

The question of which businesses must close and which can stay open during the statewide coronavirus shutdown has been an ongoing point of confusion and anger since March 16, when the governor first began asking “non-essential” companies to curtail operations.

Id.

²⁹ https://www.inquirer.com/health/coronavirus/spl/pennsylvania-pa-coronavirus-business-shutdown-waiver-tom-wolf-joe-scarnati-20200327.html?_vfz=medium%253Dsharebar&fbclid=IwAR25PbeG-GNObihYIVrnkHKQI0Hoi6-CGXRpA56Y4fRCdWW-vsJEnc-aI4Q

³⁰ <https://www.spotlightpa.org/news/2020/03/pennsylvania-coronavirus-lifesustaining-wolf-home-products-waiver/>

The Chief Justice of the Pennsylvania Supreme Court, and the two other justices who joined his opinion, is concerned about arbitrariness and the need for judicial review:

I believe, however, that greater account must be given to the specific nature of the exercise, and that **arbitrariness cannot be tolerated, particularly when the livelihoods of citizens are being impaired to the degree presently asserted.**

Concurring and Dissenting Opinion, Page 3 (emphasis added).

And:

relative to the broad-scale closure of Pennsylvania business for a prolonged period -- **I don't believe the executive's determinations of propriety can go untested in the face of the present allegations of inconsistency and irrationality.**

Concurring and Dissenting Opinion, Page 3 (emphasis added).

Judicial review is a long-held critical component of due process and has been applied in cases of executive orders.

The acts of all a government department's officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual.

Chamber of Commerce of the United States v. Reich, 74 F.3d 1322, 1324 (1996)

This court has struck down agency actions under the arbitrary and capricious standard of review. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 32, (1983).³¹ Due process has continued to provide a basis for a

³¹ However, see *Dalton v. Specter*, 511 U.S. 462 (1994) for this Court's decision that judicial review of presidential actions are not subject to judicial review. However, in *Dalton*, this Court noted that case

reasonableness review of executive orders. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 431 (1935) (striking down executive order because it lacks findings and stated rationale); See *Sterling v. Constantin*, 287 U.S. 378, 388 (1932) (noting that complaint alleged that Governor’s executive orders were “arbitrary and capricious”). In *Sterling*, this Court affirmed a lower court’s order striking down a gubernatorial executive order holding, “The governor's attempt to regulate by executive order the lawful use of the properties in the production of oil was a proper subject for judicial inquiry.” *Id. Sterling* at 386. This Court focused on the executive order’s invasion of constitutional rights of those subject to it.

Where state officials, purporting to act under state authority, invade rights secured by the federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief. The Governor of the State, in this respect, is in no different position from that of other state officials. Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has exceeded the authority conferred by the State, deprive the court of jurisdiction.

Id. Sterling at 386

Petitioners’ right to equal protection of the law guaranteed by the Fourteenth Amendment is violated by the Order.

U.S. Const. amend. XIV forbids a state to deny to any person the equal protection of the laws. State classifications must not be arbitrary and must not lack rationality:

... a state statute may not be struck down as offensive of equal protection in its schemes of classification ***unless it is obviously arbitrary***, and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the

did not involve a constitutional claim, which the case at bar does, “Furthermore, the claim that the President exceeded his authority under the Act was not a constitutional claim, but a statutory one. *Id. Dalton* at 464.

claimant who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, ***its classifications lack rationality.***

McGowan v. Maryland, 366 U.S. 420, 535 (1961).

The classification scheme is obviously arbitrary and lacks rationality.

The fundamental problem with the Governor's classification scheme is the two classes – life-sustaining and non-life-sustaining – do not have any commonly understood definition and do not appear to have existed as industry or business classifications prior to the Governor's decision to employ them in his Order. In short, no one knows what they mean. Not only have the terms not appeared in any of the laws or regulations cited by the Governor, the Governor's definition of them is circular. He defines non-life-sustaining as, "businesses that are not critical to sustaining life in a pandemic."³² Thus, the system lacks rationality at its foundation. That together with the fact that the Governor has given himself the power to declare whatever industry or business he desires as life-sustaining or non-life-sustaining has led to countless examples of arbitrary and capricious actions.

In addition to deeming beer distributorships and candy shops as life-sustaining, and deeming his former family business as life-sustaining and then changing his mind, the Governor also closed all golf courses, but has permitted fishing because *inter alia*, according to him, fishing is good for one's mental health, and by implication golf is not.³³ The Governor has deemed pet stores and accounting

³² <https://www.governor.pa.gov/newsroom/gov-wolf-secretary-levine-provideupdated-guidance-stress-need-for-compliance-as-cases-rise/>

³³ <https://www.pennlive.com/sports/2020/04/is-trout-fishing-a-more-sociallydistanced-sport-than-golf-no-but-tom-wolf-probably-has-other-concerns-aboutgolfers.>

as life-sustaining, after originally classifying accounting as non-life-sustaining, and real estate services as non-life-sustaining. Yet, the Governor claimed he is maintaining consistency with CISA. But, CISA has deemed the entire real estate industry to be “essential.”

The Order arbitrarily and irrationally classifies entire industries. The Order closed the physical operations of Friends of Danny DeVito and all entities in the Business, Professional, Labor, Political or Similar Organizations class. However, the Order permits Social Advocacy Organizations to remain open. Yet, Social Advocacy Organizations and Friends of Danny DeVito all appear in the same Industry, Sector and Subsector categories of the List. The lower court concluded that Social Advocacy Groups are dissimilar from Friends of Danny DeVito, “because Social advocacy groups advocate for vulnerable individuals during this time of disaster.” *Majority Opinion*, Page 47. So, according to the Governor and the lower court, the advocacy of those groups is life-sustaining. However, Friends of Danny DeVito has been advocating for the vulnerable business owners and workers “during this time of disaster,” whose businesses and jobs have been destroyed by the Order. However, according to the Governor and the lower court, Friends of Danny DeVito’s advocacy is not life-sustaining. The two groups are similar. Yet, the Governor keeps one open and one closed. Further, Petitioner Kathy Gregory is a real estate agent and is on the non-life-sustaining List, but accountants are not.

Lastly, whether a business is life-sustaining or not, whatever that means, is wholly irrelevant to achieving the Governor's stated objective, which is to control the spread of COVID-19. This is further evidenced by the fact that DCED is granting waivers for those businesses that can prove they can operate with COVID-19 precautions. For example, the DCED granted the waiver of a real estate agency because, "it submitted 'virtual and telework operations' details with its application, explaining how the company would minimize the risk of community infections." Respondents' *Answer to Supplemental Applications for Relief*, Page 4, Thus, by the Governor's own admission, a classification scheme that would be relevant is one based upon which businesses can and cannot be operated in such a way so as to minimize the risk of community infections. Yet, this is not the classification system the Governor used in his Order. Thus, because the Order's classification system is wholly irrelevant to achieving the state's objective, it violates the equal protection clause. *Id. McGowan* at 422.

Furthermore, even though the Governor's classification system fails the rationality or rational basis test as described *supra*, an even stricter test is used when the rights involve fundamental Constitutional rights. "**Unless a classification trammels fundamental personal rights**...our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (emphasis added). The Order does not simply regulate whether Petitioners can work on Sundays, it completely deprives

them of the use and control of their private property. For nearly a century, this Court has consistently treated property as a fundamental right, forbidding the government from imposing arbitrary or irrational restrictions on its use. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Petitioners' right to free speech and assembly protected by U.S. Const. amend. I are violated by the Order.

Petitioner Friends of Danny DeVito has the right to free speech and assembly. U.S. Const. amend. I. This Court has held:

The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by the United States Constitution.

Citizens United v. FEC, 558 U.S. 310, 310 (2010).

And, “Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S.449, at 464 as cited by *Citizens United v. FEC*, 558 U.S. 310, 340. And, “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.” *Id. Citizens United* at 310. This Court has held that the First Amendment protects the right to freedom of assembly. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

The state can place restrictions on the time, place, and manner of speech and peaceful assembly, provided that constitutional safeguards are met. See *Ward v.*

Rock Against Racism, 491 U.S. 781 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Time, place, and manner restrictions are permissible so long as they “... are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.” *Id.* at 791.

The lower court held, “As to whether the Executive Order unreasonably limits alternative avenues of communication, it does not.” *Majority Opinion*, Page 49. The lower court found that:

The Executive Order does not place a restriction on supporters of DeVito Committee to assemble with each other and speak to each other, it only forecloses doing so in the physical campaign office. It does not in any respect limit the ability to speak or assemble, however, as it does not in any respect prohibit operations by telephone, videoconferencing, or on-line through websites and otherwise. In this era, cyberspace in general and social media in particular have become the lifeblood for the exercise of First Amendment rights. See *Packingham v. North Carolina*, 137 S.Ct. 1730, 1735 (2017).

Majority Opinion, Pages 49-50.

First, neither the Governor nor the lower court cited one case in which a person’s First Amendment rights were restricted to the Internet or videoconferencing and/or were prohibited at their place of business. Second, *Packingham* supports Petitioners’ claim. In *Packingham*, this Court struck down, as violative of the First Amendment, a state law prohibiting registered sex offenders from accessing certain social networking internet sites. *Id.* at 1731. In so doing, this Court reviewed the basic rule of First Amendment law:

A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. Even in the modern era, these

places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

Id.

However, the Order prohibits Petitioner, Friends of Danny DeVito, and all businesses and entities on the non-life-sustaining List, from exercising their right to free speech and assembly not only at their places of business, but at any other business or entity on the non-life-sustaining List. This is particularly oppressive for Friends of Danny DeVito, which is a candidate committee, because all “Business, Professional, Labor, Political or Similar Organizations” are on the non-life-sustaining List; this means no political events, including assemblies, forums, debates, fundraising events, and others, may be held at the physical location of any Business, Professional, Labor, Political or Similar Organizations due to the Order.

Further, in addition to the Order the Governor also issued a Stay-At-Home order that compels Pennsylvanians to stay at home except to participate in life-sustaining services.³⁴ Neither order declares speech or assembly to be “life-sustaining.” Thus, the Order, in tandem with the Governor’s Stay-At-Home Order, prohibits all Pennsylvania businesses and entities on the non-life-sustaining list and all Pennsylvanians from exercising their right to speech and assembly in streets and parks and in fact anywhere in Pennsylvania.

The lower court claims Petitioner is not burdened by these restrictions because it can engage in speech and assembly via *inter alia* videoconferencing. Yet,

³⁴ <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf>

the lower court declared it could not give Petitioners a right to a hearing because it would require *inter alia* “troves of communication devices” to accomplish it. *Majority Opinion*, Page 45. Yet the lower court claims the Petitioner can accomplish the very thing the Pennsylvania courts, with all of their taxpayer-provided resources, apparently cannot do. Limiting speech and assembly to video conferencing, websites and social media is not reasonable.

CONCLUSION

This Court should declare the Order violates the rights of Petitioners’ and all businesses and entities on the non-life-sustaining List guaranteed by the U.S. Const. amends. I, V, XIV and should strike it down.

Date: April 27, 2020

Respectfully submitted,

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VERIFICATION

I, Danny DeVito, of Friends of Danny DeVito, hereby swear or affirm that the facts contained in the foregoing document are true and correct to the best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

4/22/2020
Date



Danny DeVito
Candidate,
Friends of Danny DeVito

EXHIBIT A

After publishing the List, the Governor moved the following Industries from Non-life-sustaining to Life-sustaining:

#	Industry	NAICS #
1	Timber Tract Operations	1131
2	Forest Nurseries and Local Gathering of Forest Products	1132
3	Logging Forest	1133
4	Support activities for forestry	1153
5	Coal Mining	2121
6	Metal Ore Mining	2122
7	Nonmetallic Mineral Mining and Quarrying	2123
8	Support Activities for Mining	2131
9	Sawmills and Wood Preservation	3211
10	Veneer, Plywood, and Engineered Wood Product Manufacturing	3212
11	Other Wood Product Manufacturing	3219
12	Printing & Related Support Activities	3231
13	Glass and Glass Product Manufacturing	3272
14	Lime and Gypsum Product Manufacturing	3274
15	Lumber and Other Construction Materials Merchant Wholesalers	4233
16	Specialty Food Stores	4452
17	Other General Merchandise Stores	4523
18	Telecommunications Resellers - Except retailers selling devices at physical locations not permitted	517911
19	Insurance Carriers	5241
20	Agencies, Brokerages, and Other Insurance Related Activities - In-person sales/brokerage are prohibited.	5242
21	Insurance and Employee Benefit Funds	5251
22	Accounting, Tax Preparation, Bookkeeping, and Payroll Services	5412
23	Traveler Accommodation This category includes hotels and motels, however short term residential rentals are prohibited	7211
24	Drycleaning and Laundry Services	8123
25	Private Households	8141

After publishing the List, the Governor moved the below industries from the Life-Sustaining to the Non-Life-Sustaining:

#	Industry	NAIC #
1	Beer Wine and Liquor Stores - But kept Beer Distributorships open.	4453
2	Civic and Social Organizations	8134

APPENDIX A

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

FRIENDS OF DANNY DEVITO, KATHY	:	No. 68 MM 2020
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 PA	:	
DEPARTMENT OF HEALTH,	:	
	:	
Respondents	:	

OPINION

JUSTICE DONOHUE

Decided: April 13, 2020

Petitioners are four Pennsylvania businesses and one individual seeking extraordinary relief from Governor Wolf’s March 19, 2020 order (the “Executive Order”) compelling the closure of the physical operations of all non-life-sustaining business to reduce the spread of the novel coronavirus disease (“COVID-19”). The businesses of the Petitioners were classified as non-life-sustaining.¹ In an Emergency Application for

¹ Respondents contend that any claims of Petitioners B&J Laundry and Caledonia Land Company are moot, as their businesses have been removed from the non-life-sustaining category. Respondents’ Brief at 6 n.13. Petitioners respond that these claims are not moot, as this Court may consider moot issues of great importance when they are capable

Extraordinary Relief (the “Emergency Application”) filed on March 24, 2020, Petitioners raise a series of statutory and constitutional challenges to the Executive Order, contending that the Governor lacked any statutory authority to issue it and that, even if he did have such statutory authority, it violates various of their constitutional rights. Petitioners assert that the exercise of this Court’s King’s Bench jurisdiction is not only warranted but essential given the unprecedented scope and consequence of the Executive Order on businesses in the Commonwealth. Petitioners’ Brief at 12-13. They request further that this Court issue an order vacating or striking down the Executive Order. Respondents, Governor Tom Wolf (“Governor”) and Rachel Levine, the Secretary of the Pennsylvania Department of Health (“Secretary”) (collectively, “Respondents”) respond that the Petitioners rely on an unduly narrow interpretation of the Commonwealth’s inherent police powers and a flawed reading of the specific statutory provisions that the General Assembly enacted to supplement that power. Respondents’ Brief at 2. Respondents further argue that the Executive Order comports with all constitutional requirements. Respondents agree with Petitioners that the circumstances warrant the exercise of this Court’s King’s Bench jurisdiction and urge this Court to exercise that jurisdiction to decide the issues presented. Respondents’ Brief at 7.

of repetition yet evade review. Petitioners’ Brief at 48 n.17 (citing, *e.g.*, *Association of Pennsylvania State College and University Faculties v. PLBR*, 8 A.3d 300, 305 (Pa. 2010)). Excluding B&J Laundry and Caledonia Land Company, the claims of the remaining Petitioners adequately present the issues of public importance for which we grant King’s Bench review. The claims of Petitioners B&J Laundry and Caledonia Land Company are thus considered moot and “Petitioners” will henceforth refer to DeVito Committee, Kathy Gregory and Blueberry Hill Public Golf Course & Lounge.

For the reasons discussed in this opinion, we hereby exercise our King’s Bench jurisdiction. After consideration of the arguments of the parties, we conclude that Petitioners are not entitled to relief.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. COVID-19, and the Executive Proclamation and the Order of the Governor

A novel coronavirus began infecting humans in China in December 2019. As of March 11, 2020, the World Health Organization (“WHO”) announced that the coronavirus, which had spread into at least 144 countries including the United States, had infected at least 118,000 people, and had killed more than 4,000 people, was officially a pandemic. WHO Director-General, “WHO Director-General’s opening remarks at the media briefing on COVID-19,” World Health Organization, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>. In the midst of the emerging crisis, on March 6, 2020, Governor Wolf issued the following proclamation:

PROCLAMATION OF DISASTER EMERGENCY

WHEREAS, a novel coronavirus (now known as “COVID-19”) emerged in Wuhan, China, began infecting humans in December 2019, and has since spread to 89 countries, including the United States; and

WHEREAS, the World Health Organization and the Centers for Disease Control and Prevention (“CDC”) have declared COVID-19 a “public health emergency of international concern,” and the U.S. Department of Health and Human Services (“HHS”) Secretary has declared that COVID-19 creates a public health emergency; and **WHEREAS**, the Commonwealth of Pennsylvania (“Commonwealth”) has been working in collaboration with the CDC, HHS, and local health agencies since December 2019 to monitor and plan for the containment and subsequent mitigation of COVID-19; and

WHEREAS, on February 1, 2020, the Commonwealth’s Department of Health activated its Department Operations Center at the Pennsylvania Emergency Management Agency’s headquarters to conduct public health

and medical coordination for COVID-19 throughout the Commonwealth;
and

WHEREAS, on March 4, 2020, the Director of the Pennsylvania Emergency Management Agency ordered the activation of its Commonwealth Response Coordination Center in support of the Department of Health's Department Operations Center, to maintain situational awareness and coordinate the response to any potential COVID-19 impacts across the Commonwealth; and

WHEREAS, as of March 6, 2020, there are 233 confirmed and/or presumed positive cases of COVID-19 in the United States, including 2 presumed positive cases in the Commonwealth; and

WHEREAS, while it is anticipated that a high percentage of those affected by COVID-19 will experience mild influenza-like symptoms, COVID-19 is a disease capable of causing severe symptoms or loss of life, particularly to older populations and those individuals with pre-existing conditions; and

WHEREAS, it is critical to prepare for and respond to suspected or confirmed cases in the Commonwealth and to implement measures to mitigate the spread of COVID-19; and

WHEREAS, with 2 presumed positive cases in the Commonwealth as of March 6, 2020, the possible increased threat from COVID-19 constitutes a threat of imminent disaster to the health of the citizens of the Commonwealth; and

WHEREAS, this threat of imminent disaster and emergency has already caused schools to close, and will likely prompt additional local measures, including affected county and municipal governments to declare local disaster emergencies because of COVID-19; and

WHEREAS, this threat of imminent disaster and emergency situation throughout the Commonwealth is of such magnitude and severity as to render essential the Commonwealth's supplementation of emergency resources and mutual aid to the county and municipal governments of this Commonwealth and to require the activation of all applicable state, county, and municipal emergency response plans.

NOW THEREFORE, pursuant to the provisions of Subsection 7301(c) of the Emergency Management Services Code, 35 Pa. C.S. § 7101, et seq., I do hereby proclaim the existence of a disaster emergency throughout the Commonwealth.

Governor Wolf, "Proclamation of Disaster Emergency," (Mar. 6, 2020), Commonwealth of Pennsylvania Office of the Governor, <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf> ("Governor's Proclamation").

Thereafter, on March 19, 2020, Governor Wolf issued the following Executive Order, closing all businesses deemed to be non-life-sustaining:

**ORDER OF
THE GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA
REGARDING THE CLOSURE OF ALL BUSINESSES THAT ARE NOT
LIFE SUSTAINING**

WHEREAS, the World Health Organization and the Centers for Disease Control and Prevention ("CDC") have declared a novel coronavirus ("COVID-19") a "public health emergency of international concern," and the U.S. Department of Health and Human Services ("HHS") Secretary has declared that COVID-19 creates a public health emergency; and

WHEREAS, as of March 6, 2020, I proclaimed the existence of a disaster emergency throughout the Commonwealth pursuant to 35 Pa. C.S. § 7301(c); and

WHEREAS, I am charged with the responsibility to address dangers facing the Commonwealth of Pennsylvania that result from disasters. 35 Pa. C.S. § 7301(a); and

WHEREAS, in addition to general powers, during a disaster emergency I am authorized specifically to control ingress and egress to and from a disaster area and the movement of persons within it and the occupancy of premises therein; and suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, and combustibles. 35 Pa. C.S. § 7301(f); and

WHEREAS, in executing the extraordinary powers outlined above, I am further authorized during a disaster emergency to issue, amend and rescind executive orders, proclamations and regulations and those directives shall have the force and effect of law. 35 Pa. C.S. § 7301(b); and

WHEREAS, in addition to my authority, my Secretary of Health has the authority to determine and employ the most efficient and practical means

for the prevention and suppression of disease. 71 P.S. § 532(a), 71 P.S. 1403(a); and

WHEREAS, these means include isolation, quarantine, and any other control measure needed. 35 P.S. § 521.5.

NOW THEREFORE, pursuant to the authority vested in me and my Administration by the laws of the Commonwealth of Pennsylvania, I do hereby ORDER and PROCLAIM as follows:

Section 1: Prohibition on Operation of Businesses that are not Life Sustaining

All prior orders and guidance regarding business closures are hereby superseded.

No person or entity shall operate a place of business in the Commonwealth that is not a life sustaining business regardless of whether the business is open to members of the public. This prohibition does not apply to virtual or telework operations (e.g., work from home), so long as social distancing and other mitigation measures are followed in such operations.

Life sustaining businesses may remain open, but they must follow, at a minimum, the social distancing practices and other mitigation measures defined by the Centers for Disease Control to protect workers and patrons.

A list of life sustaining businesses that may remain open is attached to and incorporated into this Order.

Enforcement actions will be taken against non-life sustaining businesses that are out of compliance effective March 21, 2020, at 12:01 a.m.

Section 2: Prohibition on Dine-In Facilities including Restaurants and Bars

All restaurants and bars previously have been ordered to close their dine in facilities to help stop the spread of COVID-19.

Businesses that offer carry-out, delivery, and drive-through food and beverage service may continue, so long as social distancing and other mitigation measures are employed to protect workers and patrons.

Enforcement actions will be taken against businesses that are out of compliance effective March 19, 2020, at 8 p.m.^[2]

Section 3: Effective Date and Duration

This order is effective immediately and will remain in effect until further notice.

Governor Wolf, "Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses that are not Life Sustaining," (Mar. 19, 2020) <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf> ("Executive Order"). The original five page attached list of businesses deemed to be life-sustaining, or not, which as noted herein has been amended from time to time, may be found at <https://www.governor.pa.gov/wpcontent/uploads/2020/03/20200319-Life-Sustaining-Business.pdf>.

In compiling the list, the Governor used the North American Industry Classification System ("NAICS"), a code developed by the Office of Management and Budget and utilized by the U.S. Census Bureau to group similarly situated entities together for classification purposes, to serve as the basis for an initial list of business sectors. Respondents' Brief at 47 (citing U.S. Census Bureau, North American Industry Classification System, <https://www.census.gov/eos/www/naics/> (last visited 4/8/2020)). The Governor explains that he used this classification system to "ensure[] that similarly situated entities would be treated the same." *Id.* The Governor and Department of

² The Governor later revised the enforcement date to Monday, March 23, at 8 a.m. See "Waiver Extension, Revised Timing Of Enforcement: Monday, March 23 at 8:00 AM", available at <https://www.governor.pa.gov/newsroom/waiver-extension-revised-timing-ofenforcement-monday-march-23-at-800-am/>.

Community and Economic Development ("DCED") then generally conformed its categorizations of certain sectors, and businesses therein, as life-sustaining versus non-life-sustaining business to make them consistent with an advisory issued by the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA"). Gov. Tom Wolf, "Life Sustaining Business Frequently Asked Questions", DCED.PA.GOV, <https://www.scribd.com/document/452553495/UPDATED-4-00pm-April-1-2020-Life-Sustaining-Business-FAQs> (last visited Apr. 8, 2020) (citing CISA Advisory Version 1.1, as amended March 23, 2020). According to CISA, "[t]here are 16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof." CISA, "Identifying Critical Infrastructure During COVID-19," <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19> (last visited Apr. 8, 2020). The Advisory includes within each of the sectors, operations that provide essential services to the identified sectors.

By its terms, the Executive Order compels the closure of all businesses in the state deemed to be non-life-sustaining to prevent the spread of COVID-19 by limiting person-to-person interactions through social distancing.³ In issuing the Executive Order, the

³ "Social distancing is a public health practice that aims to prevent sick people from coming in contact with healthy people in order to reduce opportunities for disease transmission." OU Medicine, "Social Distancing and Stopping the Spread," <https://www.oumedicine.com/coronavirus/protecting-your-health/social-distancing> (last visited 4/9/2020). Social distancing is essential to limiting the death toll from COVID-19 because this pandemic spreads primarily through person to person contact, as many as 25% of those infected are asymptomatic, and the virus has an incubation period of up to fourteen days. The virus can remain on surfaces for days and can spread through the air within confined areas and structures. Respondents' Brief at 3-4 (citations omitted).

Governor invoked three statutory grounds for his and his administration's authority to do so: the Emergency Management Services Code (the "Emergency Code"), 35 Pa.C.S. § 7101-79a31; sections 532(a) and 1404(a) of the Administrative Code, 71 P.S. § 532; 71 P.S. § 1403(a); and the Disease Prevention and Control Law (the "Disease Act"), 35 P.S. § 521.1-521.25. The Governor, with the assistance of the DCED, determined which types of Pennsylvania businesses are "life-sustaining" and which are "non-life-sustaining." Those in the latter category were forced to shutter their physical operations⁴ under threat of criminal prosecution. A waiver process has been established for businesses to request relief.⁵ A successful request for waiver results in a business being re-categorized as life-sustaining or offering support to life-sustaining businesses.⁶

B. The Parties

Petitioner Friends of Danny DeVito ("DeVito Committee") is a Pennsylvania candidate committee with a physical business address in Carnegie (Allegheny County). It was formed to operate and administer the candidacy of Danny DeVito, a candidate for the 45th District of the Pennsylvania State House of Representatives. Emergency Application, ¶ 61. DeVito Committee complains that the district offices of the opponent for the 45th District seat in the upcoming election, the incumbent Representative Anita

⁴ The Executive Order does not preclude non-life-sustaining businesses from virtual operations, e.g., online internet activities or work-from-home arrangements.

⁵ Richard E. Coe, "Pennsylvania Grants Waivers Allowing Non-'Life-Sustaining' Businesses to Resume Operations," (Apr. 1, 2020), <https://www.natlawreview.com/article/pennsylvania-grants-waivers-allowing-non-life-sustaining-businesses-to-resume>.

⁶ Gov. Tom Wolf, "Life Sustaining Business Frequently Asked Questions", DCED.PA.GOV, <https://www.scribd.com/document/452553495/UPDATED-4-00pm-April-1-2020-Life-Sustaining-Business-FAQs> (last visited Apr. 8, 2020).

Kulik, are not subject to the Executive Order and, therefore, she retains access to her office, staff and office equipment. *Id.*, ¶ 62. DeVito Committee, however, does not have access to its office and, therefore, cannot conduct DeVito’s campaign. *Id.*, ¶ 63. It argues that this “dissimilar and unequal treatment” of candidates infringes on candidate DeVito’s right to equal protection. *Id.*, ¶ 62. If permitted to reopen the campaign office, it asserts that it “will incorporate COVID-19 prevention protocol” similar to those employed by agencies under the Governor’s jurisdiction. *Id.*, ¶ 64.

Petitioner Kathy Gregory (“Gregory”) is a licensed real estate agent with a physical business address in Bethlehem (Northampton County). *Id.*, ¶ 65. Gregory is licensed through Better Homes and Gardens R.E., a real estate brokerage franchise. *Id.*, ¶ 66. Pursuant to Pennsylvania law, she can only buy and sell real estate through her broker/franchisor. Her broker/franchisor has, however, closed the office and will not apply for a waiver, and thus she cannot apply for a waiver. *Id.*, ¶ 68-69. Gregory complains that, because the Executive Order put “Office of Real Estate Agents and Activities Related to Real Estate Agents” on the non-life-sustaining list, she cannot work at her office or from her home. *Id.*, ¶ 67. In contrast, she contends, many other professionals are permitted to work from virtual offices, and insurance agents and brokers, who are on the life-sustaining list, are permitted to continue their physical business operations. *Id.* She explains that many of her clients have sold their homes and need to depart by the end of June; thus, she needs to be able to find them replacement homes, which requires her to show clients potential properties. *Id.*, ¶ 71. If permitted to resume working, Gregory avers that she will implement the COVID-19 prevention and mitigation protocols put in place by the National Association of Realtors. *Id.*, ¶ 74.

Petitioner Blueberry Hill Public Golf Court & Lounge (“Blueberry Hill”) operates a public golf course and restaurant (now take-out only) in Russell (Warren County). *Id.*, ¶ 83; Petitioners’ Brief at 49. It avers that the Executive Order has resulted in financial harm to its business. Specifically, despite being closed for business, Blueberry Hill must expend significant sums to maintain the fairways and greens. Emergency Petition, ¶ 85. Without paying customers, Blueberry Hill does not have the income to conduct spring fertilization and pest control of the course, and it has had to lay off wait staff, cooks, and professional staff. *Id.* Blueberry Hill is unable to perform its obligations under contracts for the purchase of new or replacement equipment for the 2020 thirty-week golf season, which means it does not have the equipment necessary to perform required operations. *Id.* Because the golf course business is competitive and Blueberry Hill has been working on a slim budget for over a decade, the loss of business will compromise its ability to make its April 2020 payment on a promissory note. *Id.*, ¶¶ 87-89. Moreover, the loss of spring cash flow will undermine its efforts to save revenue for the winter months. *Id.*, ¶ 90. Citing the Governor’s and Secretary’s admonition and advice that Pennsylvanians need to be outside and breathe in fresh air, Blueberry Hill proposes to operate with COVID-19 prevention protocols in place, as are golf courses in Ohio. *Id.*, ¶¶ 91-92.

Respondents are the Governor of Pennsylvania, Tom Wolf and the Secretary of the Pennsylvania Department of Health, Rachel Levine.

C. Procedural History of the Case

This matter commenced on March 24, 2020, when Petitioners filed the Emergency Application in this Court, challenging the Executive Order which prohibited all businesses deemed non-life-sustaining from continued operation of their physical locations during the

COVID-19 pandemic. The same day, the Prothonotary of this Court issued a letter advising Respondents that an answer to the Application was due on March 26, 2020, by 4:00 p.m.

After Respondents filed their answer, Petitioners filed an ancillary application for relief on March 26, 2020, asking this Court to allow briefing and oral argument on the Application. On March 27, 2020, this Court granted the request for briefing (but not oral argument) and set an expedited briefing schedule.

In compliance with this Court's briefing schedule, Petitioners filed their brief and reproduced record on March 31, 2020, and Respondents filed their brief on April 3, 2020. In the interim, Petitioners Gregory and Blueberry Hill each filed Supplemental Applications for Relief on April 2, 2020 (the "Supplemental Applications"), requesting that this Court enter an order directing the Governor to move them from the non-life-sustaining list to the life-sustaining list. Gregory argued that she should be permitted to resume her real estate business in light of a "Memorandum on Identification of Essential Critical Infrastructure Workers During the COVID-19 Response" issued by CISA, which memorandum deemed as essential residential and real estate services. Supplemental Application of Gregory, 4/2/2020, ¶¶ 11, 12. Blueberry Hill argued that it should be permitted to resume its business based on the facts that three other states with "stay at home" orders have allowed golf courses to reopen, provided they do so with COVID-19 prevention and mitigation protocols, and Respondents have identified outdoor activities—subject to social distancing—as permissible under Pennsylvania's "stay-at-home" order. Supplemental Petition of Blueberry Hill, 4/2/2020, ¶¶ 10, 12, 13, 16. Respondents filed an answer to the Supplemental Applications on April 3, 2020.

Additionally, on April 3, 2020, and April 6, 2002, respectively, the Cities of Philadelphia and Pittsburgh filed amicus briefs on behalf of Respondents. In their amicus briefs, the Cities of Philadelphia and Pittsburgh both offer strong support for the Governor's Executive Order. The City of Philadelphia notes that given the size and density of its population, it is especially vulnerable to the rapid spread of the disease. It argues that by ordering non-life-sustaining businesses to close, it permits the City to enforce necessary social distancing restrictions. The alternative of attempting to enforce social distancing in all stores and businesses in Philadelphia would be both unsafe and impossible, as the City faces incredible barriers to maintaining sufficient personal protective equipment and manpower to safely monitor business owners' and residents' adherence to physical distancing and hygiene requirements. The City of Pittsburgh indicates that even though the southwest region of Pennsylvania has eighteen hospitals, the rapid spread of COVID-19 would likely lead to an overwhelming of the health care resources available to Pittsburghers and residents of the surrounding areas. It urges the Court to grant King's Bench jurisdiction and to act for the well-being of all of the citizenry in this time of risk and contagion.

On April 3, 2002, the Pennsylvania Association of Realtors ("PAR") filed an amicus brief on behalf of Gregory. PAR argues that it provides vital, life-sustaining services to millions of Pennsylvanians, and that the Governor has improperly prohibited the offering of these services to the public. PAR contends that while this decision was ostensibly made in conjunction with the guidance from CISA, the decision is in fact in contradiction of such guidance. According to PAR, the Governor's decision arbitrarily denies to millions of Pennsylvanians life-sustaining services that must be maintained even in time of public

health crisis. PAR indicates that the undue delay in processing waiver requests has rendered the administrative process utterly ineffective. Further, the administration's position that it has the authority to create and destroy such administrative review process at any moment and at will, thereafter leaving tens of thousands of PAR members without any avenue of administrative or even judicial relief from the shutdown of their businesses, is contrary to the Pennsylvania Constitution and risks opening the floodgates to litigation in the Unified Judicial System.

On April 13, 2020, this Court granted leave to accept the filing of an amicus brief by the Home Builders Association of Bucks and Montgomery Counties and the Home Builders Association of Chester and Delaware Counties.

D. Summary of the Arguments of the Parties

In their Emergency Application, Petitioners contend that the Governor lacks any statutory authority to issue the Executive Order and further claim that it violates their constitutional rights under the United States and Pennsylvania Constitutions. Petitioners claim that the Executive Order places businesses throughout Pennsylvania at extreme risk of financial hardship and threatens the jobs of hundreds of thousands of our citizens. Petitioners' Brief at 12 ("The severe disruption of the economy has already and will continue to create enormous dislocation and financial strain on the government, businesses and workers; over 650,000 Pennsylvanians have applied for unemployment compensation benefits since the Governor proclaimed his Order[.]"). Petitioners further argue that the Executive Order is unnecessary, as their businesses may be operated to "employ COVID-19 prevention and mitigation practices in their physical offices." Emergency Application, ¶ 25.

Respondents reject Petitioners' statutory and constitutional arguments, positing that the Pennsylvania Constitution and the above-referenced statutory enactments charge the Executive Branch of the state government with combating public health emergencies and providing it with broad powers to do so.⁷ Respondents' Brief at 8. Respondents insist that strict application of social distancing practices is the only potentially effective means for reducing the spread of the disease and saving hundreds of thousands, if not millions, of Pennsylvania lives. *Id.* Closure of businesses is one such necessary practice to advance social distancing in order to prevent and suppress transmission. The selection of which businesses to close requires that a balance be struck: close too few businesses and the disease will spread uninterrupted, while closing too many will make it impossible for people to access life-sustaining goods and services. *Id.* Striking that balance, Respondents emphasize, constitutes a proper exercise of the Commonwealth's police powers and provides any due process required under the law, and even if some due process requirement is implicated, a waiver program has been established. *Id.* at 8-9.

II. JURISDICTION

Article V, Section 2 of the Pennsylvania Constitution provides, in relevant part, that the Supreme Court "shall be the highest court of the Commonwealth and in this court

⁷ In *Civil Rights Defense Firm v. Governor Tom Wolf*, 63 MM 2020 (per curiam order dated March 22, 2020), this Court denied an Emergency Ex-Parte Application for Emergency Relief pursuant to this Court's King's Bench jurisdiction, which application was based, in part, on the same statutory authority for, and the constitutionality of, the Governor's Executive Order as advanced in the present Emergency Application. We do not agree with the Respondents' suggestion that our refusal to exercise our King's Bench authority in the former challenge has a dispositive impact on our consideration of the issues presented here. Respondents' Brief at n.15.

shall be reposed the supreme judicial power of the Commonwealth,” Pa. Const. art. V, § 2(a), and further provides that the Supreme Court “shall have such jurisdiction as shall be provided by law.” *Id.* at 2(c). The General Assembly has codified our King's Bench authority: “The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.” 42 Pa.C.S. § 502. This Court has observed that “our King's Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law.” *Commonwealth v. Williams*, 129 A.3d 1199, 1205–06 (Pa. 2015); see also *In re Bruno*, 101 A.3d 653, 670 (Pa. 2014). We may “exercise King's Bench powers over matters where no dispute is pending in a lower court.”⁸ *Williams*, 129 A.3d at 1206 (citing *In re Assignment of Avellino*, 690 A.2d 1138, 1140 (Pa. 1997)).

Both Petitioners and Respondents agree that the present action presents an issue of immense public concern and requires immediate judicial resolution. Petitioners' Brief at 13 (“As [Petitioners] challenge the Commonwealth’s ability to address the pandemic,

⁸ An action similar to this Emergency Application is pending (but stayed) in the original jurisdiction of the Commonwealth Court. While generally presenting the same legal claims, there is not an identity of the petitioners in that case with those in this action. Petitioners briefly suggest that as an alternative to granting King’s Bench jurisdiction here, we could exercise our extraordinary jurisdiction powers in 42 Pa.C.S. § 726 to assume jurisdiction of the Commonwealth Court action. Petitioners’ Brief at 13-14. Under the circumstances, we grant King’s Bench jurisdiction to decide the issue raised in the Emergency Application.

these matters present precisely the type of far reaching, public policy concerns that warrant this Court's use of its extraordinary powers."); Respondents' Brief at 7. The Respondents in fact urge this Court to exercise both our King's Bench and extraordinary jurisdiction. *Id.* We agree that this case presents issues of immediate and immense public importance impacting virtually all Pennsylvanians and thousands of Pennsylvania businesses, and that continued challenges to the Executive Order will cause further uncertainty. This Court hereby invokes its King's Bench powers to decide the statutory and constitutional challenges to the Executive Order presented in Petitioners' Emergency Application.

III. RESPONDENTS' STATUTORY AUTHORITY TO ISSUE THE EXECUTIVE ORDER

The Governor derives broad authority from our Constitution, as it vests him with "supreme executive power" and directs him to "take care that the laws be faithfully executed." Pa. Const. art IV, § 2. As the Commonwealth's chief executive officer, the Governor has primary responsibility for protecting the public safety and welfare of the people of Pennsylvania in times of actual or imminent disasters where public safety and welfare are threatened. 35 Pa.C.S. § 7301(a). As such, the Governor is vested with broad emergency management powers under the Emergency Code. The General Assembly imbedded in the Code its purposes, which include to "[r]educe vulnerability of people and communities of this Commonwealth to damage, injury and loss of life and property resulting from disasters;" to "[p]repare for prompt and efficient rescue, care and treatment of persons victimized or threatened by disaster;" to "[c]larify and strengthen the roles of the Governor, Commonwealth agencies and local government in prevention of, preparation for, response to and recovery from disasters;" to "[a]uthorize and provide for

cooperation in disaster prevention, preparedness, response and recovery” and to “[s]upplement, without in any way limiting, authority conferred by previous statutes of this Commonwealth” 35 Pa.C.S. §§ 7103(1), (2), (4), (5), (9). The Code further declares that it does not intend 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.” 35 Pa.C.S. §7104(3).

Section 7301, entitled “General authority of Governor,” clarifies the nature of the Governor’s powers and responsibilities in disaster situations. First and foremost, the Governor is “responsible for meeting the dangers to this Commonwealth and people presented by disasters.” 35 Pa.C.S. § 7301(a). He is further empowered to “issue, amend and rescind executive orders, proclamations and regulations which shall have the force and effect of law.” 35 Pa.C.S. § 7301(b). The Governor may, by proclamation or executive order, declare a state of disaster emergency, 35 Pa.C.S. § 3701(b), “upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent.” 35 Pa.C.S. § 7301(c). This state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or that emergency conditions no longer exist, but may not continue for longer than ninety days⁹ unless renewed by the

⁹ During the General Assembly’s consideration of passage of the Emergency Code in 1977, it made only one significant change to the text of section 7301(c), namely to extend the duration of the period of the Governor’s declared disaster emergency from thirty days to ninety days. The National Governors Association notes that ten states require that emergency declarations expire in less than thirty days, sixteen states do not permit emergency declarations to exceed 30 days, and just five states allow emergency declarations to last sixty days or more. See National Governors Association Center for Best Practices, *The Governor’s Guide to Homeland Security* at 14 (2007), <http://www.nga.org/files/live/sites/NGA/files/pdf/0703GOVGUIDEHS.PDF>. As such, Pennsylvania’s Governor has the authority to declare one of the longest emergency

Governor. *Id.* As a counterbalance to the exercise of the broad powers granted to the Governor, the Emergency Code provides that the General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. *Id.*

Upon the declaration of a disaster emergency, the Emergency Code vests with the Governor expansive emergency management powers, including, inter alia, to “[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency;” to “[u]tilize all available resources of the Commonwealth Government and each political subdivision of this Commonwealth as reasonably necessary to cope with the disaster emergency;” to “[t]ransfer the direction, personnel or functions of Commonwealth agencies or units thereof for the purpose of performing or facilitating emergency services;” to “[d]irect and compel the evacuation of all or part of the population from any stricken or threatened area within this Commonwealth if this action is necessary for the preservation of life or other disaster mitigation, response or recovery;” to “[c]ontrol ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein;” and to “[s]uspend or limit the sale, dispensing or

declarations of any governor in the United States. Patricia Sweeney, JD, MPH, RN, Ryan Joyce, JD, *Gubernatorial Emergency Management Powers: Testing the Limits in Pennsylvania*, 6 Pitt. J. Env'tl Pub. Health L. 149, 177 (2012).

With this revision to section 7301(c), the Emergency Code passed by unanimous votes in both chambers of the General Assembly. H. Journal, 162nd Gen. Assemb., vol. 5, at 3662-63 (Pa. Nov. 14, 1978) (190-0). S. Journal, 162nd Gen. Assemb., vol. 2, at 1167 (Pa. Nov. 15, 1978) (47-0).

transportation of alcoholic beverages, firearms, explosives and combustibles.” 35 Pa.C.S. §§ 7301(f)(1),(2),(3),(7),(8).¹⁰

The broad powers granted to the Governor in the Emergency Code are firmly grounded in the Commonwealth’s police power. *See generally Rufo v. Board of License and Inspection Review*, 192 A.3d 1113, 1120 (Pa. 2018). This Court has defined the Commonwealth’s police power as the power “to promote the public health, morals or safety and the general well-being of the community.” *Pa. Restaurant & Lodging Ass’n v. City of Pittsburgh*, 211 A.3d 810, 817 (Pa. 2019). In *Nat’l Wood Preservers, Inc. v. Dep’t of Env’tl Protection*, 414 A.2d 37, 42 (Pa. 1980), we described the police power as the state’s “inherent power of a body politic to enact and enforce laws for the protection of the general welfare,” and thus, it is both one of the “most essential powers of the government” and its “least limitable power.” *Id.* at 42- 43.

The police power is fundamental because it enables “civil society” to respond in an appropriate and effective fashion to changing political, economic, and social circumstances, and thus to maintain its vitality and order. *See, e. g., Mugler v. Kansas*, 123 U.S. 623 (1887). The police power of the state [must therefore be] ... as comprehensive as the demands of society require under the circumstances. *Comm. v. Barnes & Tucker II*, 371 A.2d 461, 467 (Pa. 1977). Of necessity, then, the police power is a broad and flexible power. *See, e. g.,*

¹⁰ As detailed in this Opinion, our analysis of the Emergency Code and our statutory construction of the provisions implicated by Petitioners leads us to conclude that it provides the authority for the Governor’s issuance of the Executive Order. Thus, we will not discuss the parties’ arguments based on the Administrative Code or the Disease Act. While we recognize the vital role played by the Secretary and her department in advising the Governor of the public health implications of COVID-19 and the most appropriate methods to suppress and contain it, we find ample support in the Emergency Code’s direct authorization of the promulgation of the Executive Order without the necessity of an interpretation of the Department of Health’s authority under the Disease Act or Administrative Code.

Berman v. Parker, 348 U.S. 26 (1954); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Id.; see also *Grime v. Dep't of Instruction*, 188 A. 337, 341 (Pa. 1936) (“[B]usiness can be regulated under the police power because of its relation to health”).

Petitioners do not challenge that there are far-reaching powers granted to the Governor under the Emergency Code. Instead, Petitioners challenge the applicability of these powers in response to a viral illness like COVID-19, and further contend that even if there is any applicability, no power has been conferred that would permit Respondents to close their businesses. Petitioners’ Brief at 21. Because consideration of Petitioners’ arguments require that we engage in statutory interpretation, we note that when doing so a court's duty is to give effect to the legislature's intent and that the best indication of legislative intent is the plain language of the statute. 1 Pa.C.S. § 1921(a); *Roverano v. John Crane, Inc.*, 2020 WL 808186, at *7 (Pa. Feb. 19, 2020); *Matter of Private Sale of Prop. by Millcreek Twp. Sch. Dist.*, 185 A.3d 282, 290-91 (Pa. 2018).

The provisions of the Emergency Code apply to “disasters.” The Emergency Code defines “disaster” as “[a] man-made disaster, natural disaster or war-caused disaster.”¹¹ 35 Pa.C.S. § 7102. Of relevance here, “natural disaster” is defined as follows:

Any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide,

¹¹ The Emergency Code defines a “man-made disaster” as “[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, such as oil spills and other injurious environmental contamination, which threatens or causes substantial damage to property, human suffering, hardship or loss of life.” 35 Pa. C.S. § 7102. A “war-caused disaster” is any “condition following an attack upon the United States resulting in substantial damage to property or injury to persons in the United States caused by use of bombs, missiles, shellfire, nuclear, radiological, chemical or biological means, or other weapons or overt paramilitary actions, or other conditions such as sabotage.” *Id.*

snowstorm, drought, fire, explosion **or other catastrophe which results in substantial damage to property, hardship, suffering or possible 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 preclude 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.” 35 Pa.C.S. § 7301(f)(7).

Petitioners contend that the COVID-19 pandemic is not a natural disaster as defined by the Emergency Code. They raise an ambiguity in the statute, thus, they argue, triggering our resort to the principles of statutory construction. Petitioners argue that although the definition uses the phrase “and other catastrophes,” because viral illness is not included in the list of applicable disasters, COVID-19 cannot be a natural disaster because it is not of the same type or kind as those on the list. Petitioners’ Brief at 15. While implicitly acknowledging that a viral illness like COVID-19 might qualify under the definition’s reference to “other catastrophes,” Petitioners insist that the Court must apply

the contextual canon of ejusdem generis (“of the same kind”), which prevents the expansion of a list of specific items to include other items not “of the same kind” as those expressly listed. *Id.* at 16-18. Respondents disagree, contending that the COVID-19 pandemic “unquestionably fits the definitions of ‘disaster’ and ‘disaster emergency’, and is precisely the circumstance that the General Assembly had in mind with it enacted the statute.” Respondents’ Brief at 15. Respondents contend that the term “other catastrophe” is expansive and is not limited by the specifically enumerated items on the list. *Id.* at 15-16.

As of this writing, 24,199 of Pennsylvania’s citizens have been confirmed by testing to have been infected with COVID-19; 524 have died. Department of Health, “COVID-19 Data for Pennsylvania,” <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last accessed 4/8/2020). COVID-19’s spread is exponential as demonstrated by the fact that there were 851 confirmed cases on March 24, 2020, the date this Application was filed. *Id.* It is beyond dispute that the COVID-19 pandemic is unquestionably a catastrophe that “results in ... hardship, suffering or possible loss of life.” The issue, then, is whether it nevertheless may not be classified as a “natural disaster” caused by unforeseen factors based upon the application of the doctrine of ejusdem generis. This Court has described the doctrine as follows:

Under the statutory construction doctrine of ejusdem generis (“of the same kind or class”), where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals, 814 A.2d 180, 184 (Pa. 2002).

We agree with Respondents that the COVID-19 pandemic qualifies as a “natural disaster” under the Emergency Code for at least two reasons. First, the specific disasters in the definition of “natural disaster” themselves lack commonality, as while some are weather related (e.g., hurricane, tornado, storm), several others are not (tidal wave, earthquake, fire, explosion). To the contrary, the only commonality among the disparate types of specific disasters referenced is that they all involve “substantial damage to property, hardship, suffering or possible loss of life.” In this respect, the COVID-19 pandemic is of the “same general nature or class as those specifically enumerated,” and thus is included, rather than excluded, as a type of “natural disaster.”

We further note that while *eiusdem generis* is a useful tool of statutory construction, such tools are used for the sole purpose of determining the intent of the General Assembly. *Eiusdem generis* must yield in any instance in which its effect would be to confine the operation of a statute within narrower limits than those intended by the General Assembly when it was enacted. See *Dep't of Assess. & Tax. v. Belcher*, 553 A.2d 691, 696 (Md. 1989) (“[T]he general words will not be restricted in meaning if upon a consideration of the context and the purpose of the particular statutory provisions as a whole it is clear that the general words were not used in the restrictive sense.”). See also *Danganon v. Guardian Protective Services*, 179 A.3d 9 (Pa. 2018) (Consumer Protection Law which has “and includes” in definition of trade and commerce interpreted broadly along with liberal interpretation of CPL as remedial legislation). By setting forth a general list of catastrophes and then including the language “other catastrophe which results in

substantial damage to property, hardship, suffering or possible loss of life,” it is clear that the General Assembly intended to **expand** the list of disaster circumstances that would provide Respondents with the necessary powers to respond to exigencies involving vulnerability and loss of life. There is nothing in the Emergency Code to indicate that the General Assembly intended in any way to narrow the operation of the statute or the Governor’s authority. To the contrary, the General Assembly’s stated goals, as set forth in the Emergency Code, were to, inter alia, “[r]educe vulnerability of people and communities of this Commonwealth to damage, injury and loss of life and property resulting from disasters,” and to “strengthen” the Governor’s role “in prevention of, preparation for, response to and recovery from disasters.” 35 Pa.C.S. § 7103(1),(4). The COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions. Its presence in and movement through Pennsylvania triggered the Governor’s authority under the Emergency Code.

Petitioners alternatively argue that even if the COVID-19 pandemic constitutes a “disaster” under the Emergency Code, the power granted to the Governor under 35 Pa.C.S. § 7301(f)(7) to “[c]ontrol ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein” does not include any ability to close their businesses. Petitioners’ Brief at 21. Petitioners contend that this provision only authorizes the Governor to act in a “disaster area,” and there have been no disasters in the areas in which their businesses are located. *Id.* at 22. We find no merit in this argument. First, Respondents correctly note that COVID-19 cases have been reported in the counties in which Petitioners’ businesses are located (Allegheny, Northampton and Warren Counties). Respondents’ Brief at 24. In fact, COVID-19 cases

have now been reported in all counties in the Commonwealth. Department of Health, “COVID-19 Data for Pennsylvania,” <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last accessed 4/8/2020). More fundamentally, Petitioners’ argument ignores the nature of this virus and the manner in which it is transmitted. The virus spreads primarily through person-to-person contact, has an incubation period of up to fourteen days, one in four carriers of the virus are asymptomatic, and the virus can live on surfaces for up to four days. Thus, any location (including Petitioners’ businesses) where two or more people can congregate is within the disaster area.

We further note that the Emergency Code provides that, upon the declaration of a disaster emergency (as occurred here), the Governor has expansive emergency management powers including to “direct and compel the evacuation of all or part of the population from any stricken or threatened area within this Commonwealth if this action is necessary for the preservation of life or other disaster mitigation, response or recovery.” 37 Pa.C.S. §§ 7301(f)(3). While the Governor took far less extreme measures with the closure of certain businesses, to the extent Petitioners are suggesting that the Governor lacked the authority to do so, this statutory authorization of a much more drastic measure disproves the point. Thus, the Executive Order’s closure of non-essential businesses in Pennsylvania is authorized by Section 7307(f)(7) of the Emergency Code.

Based on the foregoing, we conclude that the COVID-19 pandemic triggered the Governor’s authority under the Emergency Code and that as a result of the COVID-19 pandemic, the Governor had the authority under the Emergency Code to declare the entirety of the Commonwealth a disaster area.

Finally, in addition to their challenges based on the statutory language of the Emergency Code, Petitioners argue that Respondents, by ordering closure of all businesses deemed to be non-life-sustaining, have exceeded the permissible scope of their police powers. Petitioners cite the United States Supreme Court's decision in *Lawton v. Steele*, 152 U.S. 133 (1894), for the "police powers" test:

To justify the state in thus interposing its authority in behalf of the public, it must appear – First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Lawton, 152 U.S. at 137 (cited by *Nat'l Wood Preservers v. Comm. Dept. of Env'tl Res.*, 414 A.2d 37, 43 (Pa. 1980)). Petitioners make three arguments to demonstrate that Respondents exceeded their authorized police power. First, Petitioners claim that the public's interests are not served by the mass closure of businesses, as the public has an interest in continuing to receive the goods and services of these businesses. Petitioners' Brief at 24. Second, Petitioners insist that shuttering their businesses is unnecessary for the prevention of the spread of COVID-19 where the disease has not been detected at their places of business. *Id.* Third, Petitioners contend that closing their businesses was unduly burdensome to them and was, in fact "just about the most burdensome thing that can happen to a business, particularly businesses such as golf courses which cannot function anywhere but from their physical places of business." *Id.* at 24-25.

Under the exigencies created by the spread of the coronavirus and the critical interests of the public, generally, Petitioners cannot prevail in their arguments. As to the predicate requirements that the interests of the public justify the Governor's assertion of its authority, the nature of this emergency supports it. COVID-19 spreads "exponentially."

Respondents report that in Pennsylvania, from the date they filed their answer to the Emergency Application (March 26, 2020) to the date they filed their brief (April 3, 2020) the number of reported cases increased from 1,687 to 7,016 and the number of deaths increased from 16 to 90. Respondents' Brief at 2. To punctuate the point and as noted previously (*supra* at 23), as of this writing, 24,199 of Pennsylvania's citizens have been confirmed to have been infected and 524 have died. The enforcement of social distancing to suppress transmission of the disease is currently the only mitigation tool. Department of Health, "COVID-19 Data for Pennsylvania," <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last accessed 4/8/2020). Recent models for the COVID-19 pandemic predict that about 60,000 Americans will die. Peter Baker, "Trump Confronts a New Reality Before an Expected Wave of Disease and Death," *The New York Times* (Apr. 1, 2020) <https://www.nytimes.com/2020/04/01/us/politics/coronavirus-trump.html> (60,400 deaths predicted). Although a staggering death toll, it is lower than earlier predictions that between 100,000 and 240,000 Americans would die – even if the nation abided by social distancing. Respondents' Brief at 2-3 (citing Peter Baker, "Trump Confronts a New Reality Before an Expected Wave of Disease and Death." *Id.* The reason for the drop in the death toll projection is the enforcement of social distancing mechanisms and citizen's compliance with them. Quint Forgey, "Trump's top health officials predict diminished coronavirus death toll," *Politico* (Apr. 7, 2020) <https://www.politico.com/news/2020/04/07/trumps-top-health-officials-predict-diminished-coronavirus-death-toll-171456>.

Against this backdrop, Petitioners suggest that the public interest would best be served by keeping businesses open to maintain the free flow of business. Although they cite to none, we are certain that there are some economists and social scientists who support that policy position. But the policy choice in this emergency was for the Governor and the Secretary to make and so long as the means chosen to meet the emergency are reasonably necessary for the purpose of combating the ravages of COVID-19, it is supported by the police power. The choice made by the Respondents was tailored to the nature of the emergency and utilized a recognized tool, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19. See Respondents' Answer at 3.

Petitioners' second argument, namely that there is no significant risk of the spread of COVID-19 in locations where the disease has not been detected (including at their places of business), is similarly unpersuasive. As previously discussed, COVID-19 does not spread because the virus is "at" a particular location. Instead it spreads because of person-to-person contact, as it has an incubation period of up to fourteen days and that one in four carriers of the virus are asymptomatic. Respondents' Brief at 4 (citing Coronavirus Disease 2019, "Symptoms," CDC, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last accessed 4/9/2020)). The virus can live on surfaces for up to four days and can remain in the air within confined areas and structures. *Id.* (citing National Institutes of Health, "Study suggests new coronavirus may remain on surfaces for days," (Mar. 27, 2020) <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days> (last accessed 4/9/2020) and Joshua Rabinowitz and Caroline Bartman, "These Coronavirus Exposures

Might be the Most Dangerous,” The New York Times (Apr. 1, 2020) <https://www.nytimes.com/2020/04/01/opinion/coronavirus-viral-dose.html>).

Finally, Petitioners contend that their businesses should be permitted to remain open because of the burden placed on them. We recognize the serious and significant economic impact of the closure of Petitioners’ businesses. However, the question is whether it is **unduly oppressive**, thus negating the utilization of the police power. Faced with protecting the health and lives of 12.8 million Pennsylvania citizens, we find that the impact of the closure of these businesses caused by the exercise of police power is not unduly oppressive. The protection of the lives and health of millions of Pennsylvania residents is the sine qua non of a proper exercise of police power.

IV. CONSTITUTIONAL CHALLENGES

Petitioners advance five intermingled constitutional arguments in support of their claim that the Executive Order should be vacated even if the Governor was authorized to issue it. Petitioners contend that the Executive Order violates the separation of powers doctrine; that the Executive Order constitutes a taking requiring just compensation; that Petitioners were not accorded procedural due process in the compilation of the list of life-sustaining and non-life-sustaining businesses or in the waiver process and that both are arbitrary, capricious and vague; that it violates equal protection principles; and that the Executive Order interferes with DeVito Committee’s right of free speech and assembly. We address these arguments in turn.

1. Separation of Powers

The entirety of the Petitioners’ challenge to the Executive Order as a violation of the Separation of Powers Doctrine follows:

Executive orders can be classified into three permissible types: (1) proclamations for ceremonial purposes; (2) directives to subordinate officials for the execution of executive branch duties; and (3) interpretation of statutory or other law. *Markham v. Wolf*, 647 Pa. 642 (2018). Type 3 is implicated in this matter. “[A]ny executive order that, in essence, creates law, is unconstitutional.” *Id.* at 656. The governor’s comprehensive, detailed determination of which types of businesses “may continue physical operations” constitutes an attempt at legislation, which is the exclusive province of the legislative branch of government. *Id.* (“Foundationally, the legislature creates the laws. Pa. Const. art. II, § 1”). The governor, in attempting to legislate which businesses may operate from their physical locations and which may not, has violated the principles of separation of powers articulated and applied by the Pennsylvania Supreme Court in *Markham*.

Petitioners’ Brief at 37.

The Emergency Code belies Petitioners’ position. The Emergency Code specifically recognizes that under its auspices, the Governor has the authority to issue executive orders and proclamations which shall have the full force of law. 35 Pa.C.S. § 7301(b). Moreover, as previously explained, the General Assembly, by and through its enactment of the Emergency Code, specifically and expressly authorizes the Governor to declare a disaster emergency and thereafter to control the “ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein.” 35 Pa.C.S. § 7301(c), (f)(7). Inherent in that authorization is the Governor’s ability to identify the areas where movement of persons must be abated and which premises will be restricted in order to mitigate the disaster. That the Governor utilized business classifications to determine the appropriate areas and premises to be directly impacted by the disaster mitigation is likewise inherent in the broad powers authorized by the General Assembly. Accordingly, the Executive Order does not violate the Separation of Powers Doctrine.

2. Takings Without Compensation

Petitioners claim that because the Executive Order prohibits them from using their property¹² “at all,” it resulted in a taking of private property for public use without the payment of just compensation, in violation of the Fifth Amendment to the United States Constitution¹³ and Article I, Section 10 of the Pennsylvania Constitution.¹⁴ According to Petitioners, a taking need not involve a physical taking of the property to implicate the constitutional protections requiring just compensation. Petitioners’ Brief at 41. Instead,

¹² Blueberry Hill is the owner of the property upon which the business is conducted. Emergency Application, ¶ 83. While Blueberry Hill claims that it is deprived of the use of its property in total, we note that it continues to operate on a take-out basis, the restaurant located on the property. Petitioners’ Brief at 49. The record here does not establish what property interests, if any, that Petitioners DeVito Committee and/or Gregory purport to hold. Accordingly, as one petitioner (Blueberry Hill) has standing to assert a takings claim, we will proceed to consider the issue on its merits.

¹³ The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

¹⁴ Article 1, Section 10 provides:

[N]o person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

referring to the Executive Order as a government regulation, Petitioners argue that it is sufficient if a governmental regulation “deprive[s] an owner of all economically beneficial or productive use of land...” *Id.* (citing *Machipongo Land & Coal Co. v. Dept. of Env'tl. Prot.*, 799 A.2d 751, 754 (Pa. 2002)).

Respondents point out that there is a critical distinction between the exercise of the police power, as here, and takings pursuant to eminent domain. They cite to a long line of Pennsylvania cases holding that the payment of just compensation is not required where the regulation of property involves the exercise of the Commonwealth’s police power. Beginning with *Appeal of White*, 134 A. 409 (Pa. 1926), this Court made the distinction:

Under eminent domain, compensation is given for property taken, injured, or destroyed, while under the police power no payment is made for a diminution in use, even though it amounts to an actual taking or destruction of property. Under the Fourteenth Amendment, property cannot be taken except by due process of law. **Regulation under a proper exercise of the police power is due process, even though a property in whole or in part is taken or destroyed.** The conditions on which its legitimate exercise is predicated should actually exist or their happening be so likely that restraint is necessary, similar to a court issuing a restraining order for injuries done or threatened to persons or property. Likewise, there should be a reasonable and substantial relation between the thing acted on and the end to be attained[.]

Id. at 411 (emphasis added).

Following *White*, this Court in *Balent v. City of Wilkes-Barre*, 669 A.2d 309 (Pa. 1995), again indicated that where governmental regulation restricting activity on private property is implemented pursuant to an exercise of police power, rather than through the government’s power of eminent domain, no just compensation is due:

Eminent domain is the power to take property for public use. The City 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. *White's Appeal*, 287 Pa. 259, 134 A. 409 (1926). **It does not require that the City provide compensation to the property owner, even if the property is damaged or destroyed. *Id.***

Id. at 314 (emphasis added); see also *Estate of Blose ex rel. Blose v. Borough of Punxsutawney*, 889 A.2d 653, 657–58 (Pa. Commw. 2005); *Commonwealth v. Hinds*, 775 A.2d 859, 864 (Pa. Super. 2001).

The *Balent* case, however, differed in one important respect from the allegations made by Petitioners here. In *Balent*, the city of Wilkes-Barre demolished a structure that had been partially destroyed by fire. *Balent*, 669 A.2d at 311-12. While the structure was lost, the owners retained ownership of the property. Thus, unlike Petitioners' claim here, in *Balent*, there was no claim that the governmental action resulted in a loss of "all economically beneficial or productive use of land." Petitioners' Brief at 45 ("The Governor's Order ... is a restriction or interruption of the common and necessary use and enjoyment of property as it deprives Petitioners from using or operating their businesses at their physical location[.]") (citing *Andress v. Zoning Bd. of Adjustment*, 188 A.2d 77, 85 (Pa. 1963) ("[A]ny destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking for which compensation must be made to the owner of the property[.]")).

Based upon this distinction, Petitioners insist that the principle governing their claims is found in the United States Supreme Court's decision in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on

the immediately adjacent parcels. Before construction, however, the state legislature enacted a new law barring the erection of any permanent habitable structures on the parcels he had purchased. Lucas filed suit, arguing that even if the new legislation constituted a lawful exercise of the State's police power, the ban on construction deprived him of all “economically viable use” of his property and therefore effected a “taking” requiring the payment of just compensation. Noting Justice Holmes' prior opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that “if regulation goes too far it will be recognized as a taking,” *id.* at 415, the Court in *Lucas* held that generally when a regulation deprives an owner of “all economically beneficial uses” of the land, it constitutes a regulatory taking requiring the payment of just compensation. *Id.* at 1016.

We do not find that either *Balant* or *Lucas* is controlling. Instead, we rely on a subsequent Supreme Court decision, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), for our disposition. In that case, respondent Tahoe Regional Planning Agency (“TRPA”) imposed two moratoria, totaling thirty-two months, on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan for the area. Petitioners, real estate owners affected by the moratoria and an association representing such owners, filed parallel suits, later consolidated, claiming that TRPA's actions had taken all viable economic uses of their property without compensation. Rather than apply its prior decision in *Lucas*, however, the Court recognized that while the regulation in *Lucas* stated that the ban on development “was unconditional and permanent,” the regulations at issue in the case before it were merely temporary measures, which specifically stated that they would terminate. *Id.* at 329. As a result, the High Court affirmed the United States Court of Appeals for the Ninth Circuit's

decision that because the regulations had only a temporary impact on petitioners' fee interest, no categorical taking had occurred. *Id.* at 342 (noting that “the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim”). In so holding, the Court stated that “the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained,” as it would apply to numerous “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like, as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee ... which have long been considered permissible exercises of the police power, which do not entitle the individuals affected to compensation.” *Id.* at 334-35.

The United States Court of Appeals for the Third Circuit relied upon *Tahoe-Sierra* in a case involving an emergency situation bearing similarities to the present disaster crisis. In *Nat'l Amusements Inc. v. Borough of Palmyra*, 716 F.3d 57 (3d Cir. 2013), the Borough of Palmyra ordered closed for five months an open-air flea market, owned and operated by National Amusements, Inc. (“NAI”), due to safety concerns posed by unexploded munitions left behind when the site had been used as a weapons-testing facility for the United States Army. Relying on the holding in *Tahoe-Sierra*, the court of appeals categorically denied that a regulatory taking had occurred requiring the payment of just compensation:

It is difficult to imagine an act closer to the heartland of a state's traditional police power than abating the danger posed by unexploded artillery shells. Palmyra's emergency action to temporarily close the Market therefore constituted an exercise of its police power that did not require just compensation.

Id. at 63.

Applying *Tahoe-Sierra* and *Nat'l Amusements Inc.* to the present facts, we conclude that Petitioners have not established that a regulatory taking has occurred. The Executive Order results in only a temporary loss of the use of the Petitioners' business premises, and the Governor's reason for imposing said restrictions on the use of their property, namely to protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power to "protect the lives, health, morals, comfort, and general welfare of the people[.]" *Manigault v. Springs*, 199 U.S. 473, 480 (1905). We note that the Emergency Code temporarily limits the Executive Order to ninety days unless renewed and provides the General Assembly with the ability to terminate the order at any time. 35 Pa.C.S. § 7301(c). Moreover, the public health rationale for imposing the restrictions in the Executive Order, to suppress the spread of the virus throughout the Commonwealth, is a stop-gap measure and, by definition, temporary. While the duration of COVID-19 as a natural disaster is currently unknown, the development of a vaccine to prevent future outbreaks, the development of an immunity in individuals previously infected and the availability of widespread testing and contact tracing are all viewed as the basis for ending the COVID-19 disaster.¹⁵

¹⁵ See remarks by Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases:

National Institute of Allergy and Infectious Diseases, "NIH Clinical Trial of Investigational Vaccine for COVID-19 Begins," NIH (Mar. 16, 2020) <https://www.niaid.nih.gov/news-events/nih-clinical-trial-investigational-vaccine-covid-19-begins>; Peter Sullivan, "Fauci: Improved testing and tracing can help reopen country," *The Hill* (Apr. 1, 2020) <https://thehill.com/homenews/administration/490713-fauci-improved-testing-and-tracing-can-help-reopen-country>; Hayden Bird, "5 important points from Dr. Anthony Fauci's interview on 'The Daily,'" *Boston.com* (Apr. 2, 2020) <https://www.boston.com/news/health/2020/04/02/5-important-points-from-dr-faucis-interview-on-the-daily>.

3. Procedural Due Process

Petitioners next contend that they have been deprived of procedural due process.¹⁶ Petitioners claim that the Executive Order, with its list distinguishing between life-sustaining and non-life-sustaining businesses, took effect without providing them with notice and an opportunity to be heard with respect to their placement on the list. Petitioners' Brief at 40, 46. Petitioners further argue that any waiver process must accord applicants procedural due process prior to final determinations, including, e.g., the right to know the applicable standards to be applied, to present and/or cross-examine witnesses, and to the availability of an appeal from an adverse result. *Id.* at 52.

From the Petitioners' arguments, we discern three procedural due process issues for our consideration. First, were Petitioners entitled to pre-deprivation notice and an opportunity to be heard prior to the Governor's entry of the Executive Order containing the list placing them in the non-life-sustaining category requiring the closure of their physical business operations. Second, if Petitioners were not entitled to pre-deprivation due process, were they entitled to post-deprivation due process protections. Finally, if the answer to the second issue is in the affirmative, does the Governor's waiver process

¹⁶ Petitioners' brief does not indicate whether the due process claim asserted is in the nature of one for procedural due process or substantive due process. In responding to Petitioners' arguments, Respondents understood Petitioners to be asserting infringements of only their **procedural** due process rights. Respondents' Brief at 33 n.18. We agree, as Petitioners cite to cases identifying the fundamental hallmarks of procedural due process ("notice and a meaningful opportunity to be heard"), see Petitioners' Brief at 40 (citing *Harris v. City of Phila.*, 47 F.3d 1333, 1335 (3d Cir. 1995)), and the types of procedural safeguards typically available (e.g., notice, a neutral arbitrator, an opening statement, an opportunity to present and cross-examine witnesses, representation by counsel, and a decision on the record stating the reasons for the result), see *Rogin v. Bensalem Twp.*, 616 F.2d 680, 694 (3d Cir. 1980)). Accordingly, we will proceed to consider the procedural due process claims raised by Petitioners.

constitute sufficient post-deprivation due process under the circumstances presented here.

With respect to the first issue, Petitioners, without any argument or citation to authority, insist that they were entitled to the full panoply of procedural due process rights to challenge the Executive Order (containing the list placing them in the non-life-sustaining category) prior to its entry. Petitioners' Brief at 46 (“[T]he placing of Petitioners’ businesses on the non-life-sustaining list and forcing their closing constituted a deprivation of the property interests of the Petitioners, and as such the Governor was required to provide Petitioners with due process **before the taking.**”) (emphasis in original). An entity’s entitlement to procedural due process, however, cannot be determined in a static environment, since due process is “not a technical conception with a fixed content unrelated to time, place and circumstance.” *Gilbert v. Hoover*, 520 U.S. 924, 930 (1997). “[N]ot all situations calling for procedural safeguards call for the same kind of procedure,” *Commonwealth v. Batts*, 163 A.3d 410, 455 (Pa. 2017), and the “amount of due process that is due in any particular circumstance is flexible and calls for such procedural protections as the particular situation demands.” *Comm. Dep’t of Transp., Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060, 1064 (Pa. 1996).

In *In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712 (Pa. 2018), this Court recently reaffirmed that the amount of process that is due in any particular circumstance must be determined by application of the three-part balancing test first established in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Id.* at 717. This balancing test considers three factors: (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute

safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. *Id.*

In *Bundy v. Wetzel*, 184 A.3d 551 (Pa. 2018), this Court also clarified that whether pre-deprivation notice is required largely depends upon the second *Mathews* factor. *Id.* at 557. We indicated that while there is a general preference that procedural safeguards apply in the pre-deprivation timeframe, *Pa. Coal Mining Ass'n v. Ins. Dep't*, 370 A.2d 685, 692 (Pa. 1977); *Zinerman*, 494 U.S. at 127–28, the “controlling inquiry” in this regard is “whether the state is in a position to provide for pre-deprivation process.” *Id.* (citing *Hudson v. Palmer*, 468 U.S. 517, 534 (1984)); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (“[T]he necessity of quick action by the State or the impracticality of providing any pre-deprivation process' may mean that a post-deprivation remedy is constitutionally adequate.”).

Under the circumstances presented here, namely the onset of the rapid spread of COVID-19 and the urgent need to act quickly to protect the citizens of the Commonwealth from sickness and death, the Governor was not in a position to provide for pre-deprivation notice and an opportunity to be heard by Petitioners (and every other business in the state on the non-life-sustaining list). The result would have been to delay the entry of the Executive Order by weeks, months, or even years, an entirely untenable result given the duties and obligations placed on the Governor under the Emergency Code to abate the looming disaster. As such, Petitioners were not entitled to pre-deprivation notice and an opportunity to be heard.

We cannot agree, however, with Respondents' contention that Petitioners were not entitled to any procedural due process, either before or after the entry of the Executive

Order. Respondents' Brief at 35 ("Viewing the present public health emergency through a *Mathews* lens, it is apparent what balance is to be struck. ... No additional safeguards are feasible, and the countervailing public interest is beyond debate."). The Supreme Court has held that at all times, even when the country is at war, essential liberties remain in effect. *Bell v. Burson*, 402 U.S. 535, 542 (1971).

It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164–65 (1963).

While procedural due process is required even in times of emergency, we conclude that the waiver process provides sufficient due process under the circumstances presented here.¹⁷ The Supreme Court has acknowledged that a different level of process

¹⁷ We agree with Respondents' contention that an appellant may not assert a procedural due process claim if he has not availed himself of an available grievance procedure. Respondents' Brief at 32-33. In *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000), the Third Circuit held, "In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate." *Id.* at 116. The court of appeals stated that "a state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them." *Id.* (quoting *Dusanek v. Hannon*, 677 F.2d 538, 543 (7th Cir.1982)). According to the federal court, a due process violation "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Id.* (quoting *Zinerman v. Burch*, 494 U.S. 113 (1990)). If there is a process on the books that appears

may be sufficient in times of emergency. *Bell*, 402 U.S. at 542. As the High Court acknowledged in *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), “[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action. Indeed, deprivation of property to protect the public health and safety is ‘[o]ne of the oldest examples’ of permissible summary action.” *Id.* at 300–01.

The waiver process provides precisely that, namely a summary procedure that provides businesses with an opportunity to challenge the Governor’s placement of their business on the non-life-sustaining list. Seen in this light, it is clear that the term “waiver” is a misnomer in the present context. Instead, the “waiver” process is in actuality a review process that provides businesses an opportunity to challenge, and the Governor’s office to reconsider, whether the placement of a business on the non-life-sustaining list was a proper categorization. According to public announcements by the Governor, businesses categorized as non-life-sustaining may file a “waiver” application in which they can attempt to demonstrate either that they provide goods or services that are necessary to maintain operations at a business on the life-sustaining list or that they belong in one of the critical infrastructure categories outlined in the CISA. Richard E. Coe, “Pennsylvania

to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants. *Id.*

Here Gregory has not filed a waiver application. Blueberry Hill filed a waiver application on March 23, 2020, but has to date received no response. Petitioners’ Brief at 7-8 n.1. DeVito Committee filed a waiver application on March 31, 2020 and received a denial letter on April 3, 2020. Supplemental Application for Relief on behalf of DeVito Committee, ¶ 16. Because one of the Petitioners (DeVito Committee) has standing to assert a procedural due process challenge to the waiver process, we will proceed to consider the issue on its merits.

Grants Waivers Allowing Non-‘Life-Sustaining’ Businesses to Resume Operations,” (Apr. 1, 2020), <https://www.natlawreview.com/article/pennsylvania-grants-waivers-allowing-non-life-sustaining-businesses-to-resume>. This procedure establishes the criteria to defeat the categorization as a non-life-sustaining business. The “waiver” process does not exist to provide waivers to businesses that are not life-sustaining, but rather constitutes an attempt to identify businesses that may have been mis-categorized as non-life-sustaining.

The Governor’s efforts to correct mis-categorizations of certain businesses is an entirely proper focus of procedural due process. Procedural due process is geared toward protecting individuals from the **mistaken** deprivation of life, liberty or property. As the United States Supreme Court explained in *Carey v. Piphus*, 435 U.S. 247 (1978):

Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that “procedural due process rules are shaped by the risk of error inherent in the truth-finding process” *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Such rules “minimize substantively unfair or mistaken deprivations of” life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. *Fuentes v. Shevin, supra*, 407 U.S., at 81, 92 S.Ct., at 1994.

Id. at 259-60.

Petitioners contend the “waiver” process by way of a summary administrative proceeding is arbitrary and capricious because they are denied a formal hearing, at which they may, inter alia, make opening presentations, enter evidence, and present and cross-examine witnesses. Petitioners’ Brief at 52. As of the filing of the Respondents’ brief, however, more than 34,000 waiver applications have been filed, Michael Rubinkam and

Mark Scolforo, "Deadline Looms for Pennsylvania Virus-Shutdown Waivers," Associated Press (Apr. 2, 2020) <https://www.usnews.com/news/best-states/pennsylvania/articles/2020-04-02/state-sets-deadline-for-exemptions-from-wolf-shutdown-order>, and it would be impossible, given available resources, to provide the level of due process suggested by Petitioners to every applicant (or any significant percentage of them) and to reach final determinations with respect to the merits of those applications in a timeframe commensurate with the existence of the disaster so that relief could be afforded.

In this regard, we consider the appropriateness of the due process afforded in light of the fact that the loss of Petitioner' property rights are temporary and find this significant. The temporary deprivation impact effects each of the factors in the *Mathews* balancing test. While the private interest, the closure of the business, is important, the risk of erroneous temporary deprivation does not outweigh the value of additional or substitute safeguards which could not be provided within a realistic timeframe. The government interest in focusing on mitigation and suppression of the disaster outweighs the massive administrative burden of the additional procedural requirements demanded by Petitioners. These procedural requirements would overwhelm an entire department of government otherwise involved with disaster mitigation.

We make the further observation that the summary procedure of a review of an application for a waiver meets the exigency of this disaster – social distancing. As conceived by the Petitioners, due process requires in person testimonials, cross-examination and oral argument. Thus, not only would massive numbers of staff be necessary (who would be working from home) but troves of telecommunication devices

would be necessary to accomplish it. The near impossibility of such procedures contrasted with the temporary deprivation at issue here drives the conclusion that the waiver process, as designed, provides an adequate opportunity for Petitioners to make their case for reclassification. Under the circumstances of an ongoing disaster emergency, a full evidentiary proceeding is not a viable post-deprivation procedural process.¹⁸

Petitioners claim that they are entitled to judicial review of the denial of a waiver application. However, we find no basis for a right of appeal under the Pennsylvania Constitution in this circumstance. Article V, Section 9 states:

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or **from an administrative agency to a court of record or to an appellate court**, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

Pa. Const. art. V, § 9 (emphasis added). Attached to the Supplemental Application for Relief by Petitioner Kathy Gregory is a letter, on the Governor's letterhead and signed by both the Governor and Secretary Levine, granting a waiver request by another real estate

¹⁸ Our conclusion that the summary procedure for review of written requests for waiver is constitutionally adequate is not a suggestion that the procedure is not without flaws. Much of the Petitioners' written submissions to this Court reflect a frustration with the lack of transparency with the procedure. For example, why are some waivers granted and others denied? While, as described, the criteria for consideration of a re-classification are set forth in communications from the Governor, businesses that have been denied a waiver receive a form letter advising of such determination. The lack of transparency in this process, while explainable because of time constraints, has caused a level of discontent above that of owning a shuttered business. However, a lack of transparency, while perhaps a sign of lack of good government practices, does not constitute a violation of procedural due process.

brokerage company. Supplemental Application, ¶ 15 (Exhibit A). The letter was attached to the Supplemental Application to demonstrate that “[b]y the approval of this waiver, the Governor has determined that real estate services are life-sustaining.” *Id.*, ¶ 16. While it is clear that specific requests are reviewed by employees of the DCED, Respondents’ Answer at 24, the decision to grant the waiver was that of Governor Wolf and Secretary Levine and was not an administrative adjudication of the DCED.¹⁹ The grant letter does not even reference the DCED’s participation in the review process. Neither the Governor nor the Secretary is an “administrative agency.” Because Article V, Section 9 does not confer a right of appeal from an executive decision of the Governor or the Secretary, no right of appeal lies in this instance.

4. Equal Protection

Petitioners contend that the Executive Order violates the equal protection clauses of the United States and Pennsylvania Constitutions. U.S. Const. amend. XIV; Pa. Const. art. I, § 26. In *Commonwealth v. Bullock*, 913 A.2d 207 (Pa. 2006), this Court held that “[w]hile the Equal Protection Clause assures that all similarly situated persons are treated alike, it does not obligate the government to treat all persons identically.” *Id.* at 215. Petitioners contend that the Executive Order prevents DeVito Committee from using its principle place of business for operations in running Mr. DeVito’s political campaign. Petitioners’ Brief at 57. In contrast, they argue that elected officials, including the state

¹⁹ The DCED has adjudicatory bodies that make administrative determinations, including for example the State Board of Property. The work of reviewing and deciding waiver requests is, however, not the work of an adjudicatory body with the DCED, but rather that of about fifty DCED employees familiar with the NAICS code. Madasyn Lee, “Nearly 10K Pennsylvania businesses apply for closure waivers,” TribLive (Mar. 22, 2020) <https://triblive.com/local/regional/nearly-10k-pennsylvania-businesses-apply-for-closure-waivers/> .

representative against whom Mr. Devito is running, are permitted to continue to use their offices, staff, equipment and supplies at their discretion. *Id.* Mr. Devito further contends that he is similarly situated to both his political opponent and social advocacy organizations in that they all advocate for social and political causes, but elected officials and social advocacy groups are identified in the Executive Order as life-sustaining and thus are not barred from their physical place of operations. *Id.*

Campaign offices and legislative offices are not similarly situated. When legislators, like Mr. DeVito's political opponent, 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). As the Respondents correctly note, while the legislative office of Mr. DeVito's opponent remains open, albeit without public visitations, its operations are limited to serving the public during this pandemic and to voting remotely on legislation. Respondents' Brief at 57. But all **candidates'** physical offices, whether incumbent or challenger, must be closed. *Id.* The Executive Order thus does not advantage or disadvantage any candidate or campaign committee. *Id.*

Furthermore, DeVito Committee is not similarly situated to social advocacy groups. Social advocacy groups advocate for vulnerable individuals during this time of disaster. While Mr. DeVito personally may similarly advocate for worthy social and political causes, there is no indication that DeVito Committee does so nor is it the primary focus of the operation. To the contrary, in the Emergency Application, Petitioners alleged that DeVito

Committee’s political candidate committee was formed to operate and administer a political campaign, and to that end, its members meet with volunteers, supporters, potential media, vendors and other persons or parties instrumental to conducting a political campaign, as well as conducting direct mail activities, press conferences and other promotions. Emergency Application ¶¶ 61, 63.

Finally, Petitioners indicate that Blueberry Hill is similarly situated to municipal golf courses, but that the Executive Order has closed public, but not municipal, golf courses. Petitioners’ Brief at 55. As Respondents properly indicate, however, the list of life-sustaining businesses makes no distinction between public and municipal golf courses. To the extent that municipal golf courses remained open because they were subject to local control, i.e., municipal governments, Respondent cites to a growing list of municipal golf courses that are closed by reason of efforts to mitigate COVID-19. *Id.* at 45.

For these reasons, the Executive Order does not violate constitutional equal protection principles.

5. First Amendment Rights

The First Amendment to the United States Constitution states that “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. Further, 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. DeVito Committee argues the Executive Order

impinges upon these constitutional guarantees, as it interferes with the right to peacefully assemble, as it closed a “place of physical operations” they wish to use to “hold meetings and to engage in speech and advocacy.” Petitioners’ Brief at 58.

Constitutional rights to free speech and assembly, however, are not absolute, and 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); *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)); *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”). “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).

There is no question that the containment and suppression of COVID-19 and the sickness and death it causes is a substantial governmental interest. As to whether the Executive Order unreasonably limits alternative avenues of communication, it does not.

The Executive Order does not place a restriction on supporters of DeVito Committee to assemble with each other and speak to each other, it only forecloses doing so in the physical campaign office. It does not in any respect limit the ability to speak or

assemble, however, as it does not in any respect prohibit operations by telephone, video-conferencing, or on-line through websites and otherwise. In this era, cyberspace in general and social media in particular have become the lifeblood for the exercise of First Amendment rights. See *Packingham v. North Carolina*, 137 S.Ct. 1730, 1735 (2017).

Finally, “the principle inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward*, 491 U.S. at 791. Respondents argue that the Executive Order is content neutral. It does not regulate speech at all, let alone based on content. It applies to a large number of non-life sustaining businesses regardless of message, whether “campaign office, rock concerts, or haberdasheries.” Respondents’ Brief at 41. We agree. The Executive Order is tailored to meet the exigencies of COVID-19 restricting in-person gatherings to promote social distancing. It does not otherwise prohibit alternative means of communication or virtual gathering.

Accordingly, we conclude that the Executive Order does not violate the First Amendment to the United States Constitution or Article I, Sections 7 and 20 of the Pennsylvania Constitution.

V. The Supplemental Applications of Gregory and Blueberry Hill

Subsequent to the filing of the Emergency Application, Petitioners Gregory and Blueberry Hill filed supplemental applications for relief, requesting that this Court enter orders directing the Governor to move them from the non-life-sustaining list to the life-sustaining list. It is not for this Court, but rather for the Governor pursuant to the powers conferred upon him by the Emergency Code, to make determinations as to what businesses, or types of businesses, are properly placed in either category. This Court’s

grant of King's Bench jurisdiction here was expressly limited to deciding the statutory and constitutional challenges to the Executive Order presented in Petitioners' Emergency Application. See *supra* at 15. As the Supplemental Applications lack any jurisdictional basis, they are dismissed.

VI. Disposition

We grant the request to exercise our King's Bench jurisdiction. For the reasons set forth in this opinion, we conclude that Respondents had the statutory authority to issue the Executive Order and that Petitioners have not established any basis for relief based upon their constitutional challenges. The claim for relief requested in the Application, to vacate or strike the Executive Order, is therefore denied.

Justices Baer, Todd and Wecht join the opinion.

Chief Justice Saylor files a concurring and dissenting opinion in which Justices Dougherty and Mundy join.

APPENDIX B

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

FRIENDS OF DANNY DEVITO, KATHY	:	No. 68 MM 2020
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 PA	:	
DEPARTMENT OF HEALTH,	:	
	:	
Respondents	:	

CONCURRING AND DISSENTING OPINION

CHIEF JUSTICE SAYLOR

Decided: April 13, 2020

Respectfully, I would refrain from exercising discretion to grant King’s Bench jurisdiction, albeit I agree with the majority that the circumstances are extraordinary and matters of great public importance are involved. I find, however, that several material aspects of the petitioners’ claims may involve issues of disputed fact. And it also appears to me that some of the majority’s conclusions have mixed legal and factual overtones.

For these reasons -- and in light of the ongoing public health crisis -- I believe there is much to be said for treating the executive branch’s actions as presumptively

valid for now, while not foreclosing colorable challenges from moving forward in the appropriate court of original jurisdiction, *i.e.*, the Commonwealth Court. Importantly, that court, unlike this one, is organized to support orderly fact-finding. Thus, it can more appropriately administer the necessary judicial consideration in the first instance, subject to appellate review by this Court if necessary.

That said, since the merits are now being explored, I lend my support to the majority's conclusion that the present public-health crisis may properly be regarded as a "disaster emergency," triggering the Governor's special powers to respond. See Majority Opinion, *slip op.* at 23-26 (citing 35 Pa.C.S. §7102). While there are factual aspects attending the majority's reasoning on this point, I believe judicial notice can appropriately be taken concerning the severity of the current emergency and the need for strong countermeasures.

I am less confident, however, in the majority's conclusion that "summary administrative action" by the executive branch to close many businesses throughout the Commonwealth must evade judicial review as a check against arbitrariness. Majority Opinion, *slip op.* at 42. While the majority repeatedly stresses that such closure is temporary, *see id.*, this may in fact not be so for businesses that are unable to endure the associated revenue losses. Additionally, the damage to surviving businesses may be vast. Significantly, moreover, the Supreme Court of the United States has admonished that the impermanent nature of a restriction "should not be given exclusive significance one way or the other" in determining whether it is a proper exercise of police power. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 337, 122 S. Ct. 1465, 1486 (2002).

The majority opines that "[t]he protection of the lives and health of millions of Pennsylvania residents is the sine qua non of a proper exercise of police power." *Id.* at

30. I believe, however, that greater account must be given to the specific nature of the exercise, and that arbitrariness cannot be tolerated, particularly when the livelihoods of citizens are being impaired to the degree presently asserted.

To me, the majority allocates too much weight to temporariness to defeat developed allegations of a lack of due process in the executive branch's determination of which businesses must close and which must remain closed. See Majority Opinion, *slip op.* at 37-38.¹ Again, there seems to be a factual dynamic that should not be dismissed out of hand. Certainly, the executive branch may engage in *proper* exercises of police power in a disaster emergency, and a fair amount of deference to its decisions may be in order. At least short of martial law, however -- relative to the broad-scale closure of Pennsylvania business for a prolonged period -- I don't believe the executive's determinations of propriety can go untested in the face of the present allegations of inconsistency and irrationality.²

In summary, in my considered judgment, the matters raised in the emergency application for extraordinary relief -- especially those related to alleged inconsistency

¹ Such allegations include the following:

It is not clear why some businesses are on the life-sustaining list[.] For example, why are "beer, wine, and liquor stores," determined to be non-life-sustaining, but "beer distributors" are determined to be "life-sustaining?" Why are "department stores" non-life-sustaining, but "other general merchandise stores" life-sustaining?

Brief for Petitioners at 48 (footnote omitted).

² The majority observes that the General Assembly has the ability to terminate the Governor's order. See Majority Opinion, *slip op.* at 37 (citing 35 Pa.C.S. §7301(c)). Although I agree with the majority that this serves as one check on executive power, I note that the Constitution serves as another.

and arbitrariness in the waiver process -- should be left to the Commonwealth Court, in the first instance, as the court of original jurisdiction invested with fact-finding capabilities.

Justices Dougherty and Mundy join this concurring and dissenting opinion.

APPENDIX C



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR

ORDER OF

THE GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA REGARDING THE CLOSURE OF ALL BUSINESSES THAT ARE NOT LIFE SUSTAINING

WHEREAS, the World Health Organization and the Centers for Disease Control and Prevention (“CDC”) have declared a novel coronavirus (“COVID-19”) a “public health emergency of international concern,” and the U.S. Department of Health and Human Services (“HHS”) Secretary has declared that COVID-19 creates a public health emergency; and

WHEREAS, as of March 6, 2020, I proclaimed the existence of a disaster emergency throughout the Commonwealth pursuant to 35 Pa. C.S. § 7301(c); and

WHEREAS, I am charged with the responsibility to address dangers facing the Commonwealth of Pennsylvania that result from disasters. 35 Pa. C.S. § 7301(a); and

WHEREAS, in addition to general powers, during a disaster emergency I am authorized specifically to control ingress and egress to and from a disaster area and the movement of persons within it and the occupancy of premises therein; and suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, and combustibles. 35 Pa. C.S. § 7301(f); and

WHEREAS, in executing the extraordinary powers outlined above, I am further authorized during a disaster emergency to issue, amend and rescind executive orders, proclamations and regulations and those directives shall have the force and effect of law. 35 Pa. C.S. § 7301(b); and

WHEREAS, in addition to my authority, my Secretary of Health has the authority to determine and employ the most efficient and practical means for the prevention and suppression of disease. 71 P.S. § 532(a), 71 P.S. 1403(a); and

WHEREAS, these means include isolation, quarantine, and any other control measure needed. 35 P.S. § 521.5.

NOW THEREFORE, pursuant to the authority vested in me and my Administration by the laws of the Commonwealth of Pennsylvania, I do hereby ORDER and PROCLAIM as follows:

Section 1: Prohibition on Operation of Businesses that are not Life Sustaining

All prior orders and guidance regarding business closures are hereby superseded.

Enforcement actions will be taken against non-life sustaining businesses that are out of compliance effective March 21, 2020, at 12:01 a.m.

Section 2: Prohibition on Dine-In Facilities including Restaurants and Bars

All restaurants and bars previously have been ordered to close their dine-in facilities to help stop the spread of COVID-19.

Businesses that offer carry-out, delivery, and drive-through food and beverage service may continue, so long as social distancing and other mitigation measures are employed to protect workers and patrons. Enforcement actions will be taken against businesses that are out of compliance effective March 19, 2020, at 8 p.m.

Section 3: Effective Date and Duration

This order is effective immediately and will remain in effect until further notice.



GIVEN under my hand and the Seal of the Governor, at the city of Harrisburg, on this nineteenth day of March two thousand twenty, the year of the commonwealth the two hundred and forty-fourth.

Tom Wolf
TOM WOLF
Governor

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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 PA. DEPARTMENT OF HEALTH,
Respondents

CERTIFICATE OF WORD COUNT

Pursuant to Rule 33.1(h) of the Rules of this Court, I certify that the accompanying Petition for Writ of Certiorari, which was prepared using Century Schoolbook 12-point typeface, contains 8,996 words, excluding the part of the document that are exempted by Rule 33.1(d). This Certificate was prepared in reliance on the word county function of the work processing system (Microsoft Word 2016) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 27, 2020.

/s/ Marc A. Scaringi
Marc A. Scaringi, Esquire
Pa Supreme Court ID No. 88346
Attorney for Petitioners

IN THE SUPREME COURT OF THE UNITED STATES

FRIENDS OF DANNY DEVITO,	:
KATHY GREGORY,	:
B&J LAUNDRY, LLC	: No.
BLUEBERRY HILL PUBLIC GOLF	:
COURSE & LOUNGE, and	:
CALEDONIA LAND COMPANY,	:
Petitioners	: PETITION FOR WRIT OF
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	:
	:
v.	:
	:
TOM WOLF, GOVERNOR	:
AND RACHEL LEVINE,	:
SECRETARY OF PA.	:
DEPARTMENT OF	:
HEALTH,	:
Respondents	:

CERTIFICATE OF SERVICE

I, Deborah A. Black, Paralegal for Scaringi Law, do hereby certify that I served a true and correct copy of the *Petition for Writ of Certiorari*, in the above-captioned action, upon the following via electronic mail to:

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Date: **April 27, 2020**

/s/ Deborah A. Black
Deborah A. Black, Paralegal
For Marc A. Scaringi, Esquire