

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

FRIENDS OF DANNY DEVITO, *et al.*,

Petitioners

v.

**TOM WOLF, GOVERNOR, AND
RACHEL LEVINE, SECRETARY OF
PA DEPARTMENT OF HEALTH,**

Respondents

No. 68 MM 2020

**GOVERNOR WOLF AND SECRETARY LEVINE'S ANSWER TO
THE EMERGENCY APPLICATION FOR EXTRAORDINARY RELIEF**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE.....	2
ARGUMENT	6
I. B&J Laundry and Caledonia Land Company’s Claims are Moot	9
II. The Governor’s March 19, 2020 Executive Order was Lawful.....	10
A. The Governor is empowered by the Emergency Management Services Code to close certain businesses during a disaster	13
B. The Administrative Code and Disease Prevention and Control Law Enable the Secretary of Health to Combat the Pandemic through the Most Efficient and Practical Means.....	18
III. The Waiver Procedure Comports with Due Process	21
IV. This Content Neutral Time, Place, and Manner Order Does Not Violate the First Amendment	25
V. The Entities’ Scattershot References to Certain Legal Concepts Present No Legal Claims	29
CONCLUSION.....	31
CERTIFICATE OF COUNSEL	32
CERTIFICATE OF SERVICE	33

TABLE OF AUTHORITIES

Cases	Page
<i>Alvin v. Suzuki</i> , 227 F.3d 107 (3d Cir. 2000).....	21
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	18
<i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975).....	26
<i>Casey v. Pa. State Univ.</i> , 345 A.2d 695 (Pa. 1975).....	11, 17
<i>City of Renton v. Playtime Theatres, Inc.</i> , 475 U.S. 41 (1986).....	26
<i>Civil Rights Defense Firm, P.C., et al. v. Wolf</i> , 63 MM 2020 (Pa.).....	5, 6, 9, 13
<i>Commonwealth v. Cott</i> , 1192 MDA 2010, 2013 WL 11283200 (Pa. Super. Mar. 4, 2013).....	28
<i>Commonwealth v. D’Amato</i> , 856 A.2d 806 (Pa. 2004).....	29
<i>Commonwealth v. Wholaver</i> , 177 A.3d 136 (Pa. 2018):.....	30
<i>Conestoga Nat. Bank of Lancaster v. Patterson</i> , 275 A.2d 6 (Pa. 1971).....	23
<i>Danganan v. Guardian Protective Services</i> , 179 A.3d 9 (Pa. 2018).....	16
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<i>Food and Drug Admin. v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	11

<i>Grime v. Dep’t of Instruction</i> , 188 A. 337 (Pa. 1936)	12
<i>Hospital & Healthsystem Ass’n of Pa. v. Com.</i> , 77 A.3d 587 (Pa. 2013)	21
<i>In re Bruno</i> , 101 A.3d 653 (Pa. 2014)	9
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<i>Nat’l Wood Preservers, Inc. v. Dep’t of Env’t’l Protection</i> , 414 A.2d 37 (Pa. 1980)	12, 13
<i>Nicholas v. Pennsylvania State University</i> , 227 F.3d 133 (3d Cir. 2000)	22
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<i>Olson v. Kucenic</i> , 133 A.2d 596 (Pa. 1957)	12

<i>Pa. Restaurant & Lodging Ass’n v. City of Pittsburgh</i> , 211 A.3d 810 (Pa. 2019)	12
<i>Peco Energy Co. v. Pa. Pub. Utility Comm’n</i> , 791 A.2d 1155 (Pa. 2002)	11, 17
<i>Pennsylvania Coal Min. Ass’n v. Ins. Dep’t</i> , 370 A.2d 685 (Pa. 1977)	25
<i>Pittsburgh Palisades Park, LLC v. Commonwealth</i> , 888 A.2d 655 (Pa. 2005)	9
<i>Server v. Commonwealth, Department of Environmental Resources</i> , 514 A.3d 656 (1986)	10
<i>Shapp v. Butera</i> , 348 A.3d 910 (Pa. Cmwlth. 1975)	10
<i>Stull v. Reber</i> , 64 A. 419 (Pa. 1906)	12
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989)	26
Constitutional Provisions	
Pa. Const. art. I, § 11	22
U.S. Const. amend. I	26
U.S. Const. amend. XIV	21
Statutes	
1 Pa.C.S. § 1921	11
1 Pa.C.S. § 1932	11
1 Pa.C.S. § 1933	21
2 Pa.C.S. § 101	25
18 Pa.C.S. § 3926	28

18 Pa.C.S. § 4113.....	28
35 P.S. § 521.1	18
35 P.S. § 521.2	20
35 P.S. § 521.5	19
35 P.S. 521.1	3, 11
35 Pa.C.S. § 7101.....	3, 11
35 Pa.C.S. § 7102.....	13, 14, 16
35 Pa.C.S. § 7103.....	13, 17
35 Pa.C.S. § 7301.....	passim
42 Pa.C.S. § 726.....	6, 9
65 Pa.C.S. § 1103.....	28
71 P.S. § 1	18
71 P.S. § 1403	4, 11, 19, 20
71 P.S. § 532	4, 11, 19, 20
Senate Bill 422, Printer’s Number 1608.....	29

Rules

Pa.R.A.P. 123	29
Pa.R.A.P. 2119	25, 29
Pa.R.A.P. 3309.....	6

Treatises

Pennsylvania Appellate Practice, 20A West’s Pa. Prac., Appellate Practice § 3309:1.....	6
Pennsylvania Appellate Practice, 20A West’s Pa. Prac., Appellate Practice § 3309:2.....	29

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INTRODUCTION

The Commonwealth, and indeed the entire world, is in the midst of an unprecedented public health emergency due to the spread of Coronavirus Disease 2019 (COVID-19). What began as two presumptive positive cases of COVID-19 in Pennsylvania on March 6, 2020, has grown to 1,687 cases and 16 deaths in less than three weeks. Because COVID-19 spreads mainly from person-to-person, medical experts, scientists, and public health officials agree that there is only one proven method of preventing further spread of the virus: limiting person-to-person interactions through social distancing. In light of this consensus, Governor Wolf entered an Executive Order proclaiming the existence of a disaster emergency throughout the Commonwealth and ordering that all non-life sustaining businesses temporarily cease operations. The Governor had legal authority to issue the Order, which is necessary to attempt to protect the lives of millions of at-risk Pennsylvanians.

Petitioners nonetheless seek to have the Executive Order invalidated in its entirety so that golf courses, political action committees, and real estate agents can be fully operable during a pandemic. Their petition, which is largely duplicative of claims already considered and rejected by this Court, constructs a fantasy-world in which there is no pandemic, and their private pecuniary interests are paramount. Through this disruptive time, the vast majority of businesses have behaved

responsibly in shouldering their economic burdens during this public health emergency. In contrast, Petitioners make reckless demands with no basis in law or reality. This Court should reject Petitioners' effort to put their livelihoods ahead of the lives of their fellow citizens.

STATEMENT OF THE CASE

On the eve of the new year, researchers in China identified a new disease caused by a novel coronavirus that had infected dozens of people, now known as COVID-19. On January 20, 2020, cases of COVID-19 were confirmed in Japan, South Korea, and Thailand. The very next day, the first case was confirmed in the United States. Ten days later, the World Health Organization declared a global health emergency.

Over the last three months, COVID-19 swept the globe.¹ As of yesterday, 464,026 cases of COVID-19 have been reported worldwide, resulting in 21,152 deaths.² One recent Center for Diseases Control (CDC) projection estimated that COVID-19 could infect between 160 million and 214 million Americans and kill

¹ Derrick Bryson Taylor, "A Timeline of the Coronavirus," *The New York Times*, <https://www.nytimes.com/article/coronavirus-timeline.html> (last visited 3/20/2020).

² COVID-19 daily report, 3/25/2020, Pa. Dept. of Health, <https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/COVID-19%20Situation%20Reports/20200325nCoVSituationReportExt.pdf> (last visited 3/26/20).

anywhere from 200,000 to 1.7 million people.³ That model also suggested that a U.S. epidemic could lead to the hospitalization of anywhere from 2.4 million to 21 million people.⁴ Depending on the timing, that burden could devastate the U.S. health care system, as U.S. hospitals only have a capacity of 925,000 beds and fewer than 100,000 beds for critically ill patients.⁵

Medical experts, scientists, and public health officials agree that there is only one proven method of preventing further spread of the virus: limiting person-to-person interactions through social distancing.⁶ Accordingly, to protect the lives and health of millions of Pennsylvanians, Governor Wolf declared a disaster emergency and, on March 19, 2020, issued an Executive Order closing all non-life sustaining businesses throughout the Commonwealth to prevent the spread of COVID-19. The Governor's Executive Order invoked three separate statutory grounds for his authority: the Emergency Management Services Code, 35 Pa.C.S. § 7101 *et seq.*; Sections 532(a) and 1404(a) of the Administrative Code; and the Disease Prevention

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

⁴ *Id.*

⁵ *Id.*

⁶ Yascha Mounk, "Cancel Everything: Social distancing is the only way to stop the coronavirus. We must start immediately," *The Atlantic Monthly*, <https://www.theatlantic.com/ideas/archive/2020/03/coronavirus-cancel-everything/607675/> (last visited 3/23/20).

and Control Law (“DPCL”), 35 P.S. § 521.1 *et seq.* Sections 532(a) and 1404(a) of the Administrative Code, which outline the powers and responsibility of the Department of Health, 71 P.S. § 532; 71 P.S. § 1403(a).⁷

In accordance with the general powers the Governor maintains as the executive, and specific powers granted him under, *inter alia*, 35 Pa.C.S. § 7301(b) and (f), he ordered that all non-life sustaining businesses cease operations. The Governor outlined in detail those businesses considered life-sustaining and those that are not.⁸ This Order specifically does not apply to virtual or telework operations so long as social distancing and other mitigation measures are followed. Because violation of the Order risks the health and lives of Pennsylvanians, the Order permits enforcement actions against such violators.

Initially, the Governor’s Order was scheduled to go into effect at 8:00 PM on March 19. The following day, however, Governor Wolf delayed the timing of

⁷ Other states have enacted similar measures to close businesses to mitigate the spread of COVID-19, including, New York, New Jersey, Ohio, Maryland, Nevada, Kentucky, Connecticut, Illinois, Washington, and California.

⁸ The Governor’s Order references a list of business separated by industry as commonly used by the U.S. Bureau of Labor Statistics. *See* Industries by Supersector and North American Industry Classification System (NAICS) Main Code, U.S. Bureau of Labor Statistics https://www.bls.gov/iag/tgs/iag_index_naics.htm (last visited 3/20/2020). Business already know which sector they occupy and the corresponding NAICS code. Additionally, the Pennsylvania Department of Community and Economic Development provides resources to assist businesses. COVID-19 Business Resources, <https://dced.pa.gov/resources/> (last visited 3/20/2020).

enforcement until Monday, March 23 at 8:00 AM.⁹ Governor Wolf also expanded the list of life-sustaining businesses to include, *inter alia*, attorneys participating in essential court functions, laundromats, and timber tract operators.

On March 22, 2020, this Court entered a *per curiam* order in *Civil Rights Defense Firm, P.C., et al. v. Wolf*, 63 MM 2020, denying legal challenges by a group of lawyers and firearm sellers to the Governor's authority to enter the March 19, 2020 Executive Order. With respect to the attorney-petitioners, this Court determined that their claims were moot because the Governor added a proviso to the Order allowing attorneys to participate in essential court functions. *Id.* With respect to the firearms sellers, the Court rejected their argument that the Governor exceeded his authority under 35 Pa.C.S. § 7301(a). *Id.*

Petitioners in the present case are: (1) Friends of Danny DeVito, a Pennsylvania candidate committee; (2) Kathy Gregory, a licensed real estate agent; (3) B&J Laundry, a laundromat; (4) Blueberry Hill Public Golf Course & Lounge; and (5) Caledonia Land Company, a timber company (collectively "the Entities"). Respondents are Pennsylvania Governor Tom Wolf and Secretary of Health Dr. Rachel Levine (collectively "Commonwealth Officers").

⁹ Press Release: Waiver Extension, Revised Timing of Enforcement, Governor's Office, <https://www.governor.pa.gov/newsroom/waiver-extension-revised-timing-of-enforcement-monday-march-23-at-800-am/> (last visited 3/25/2020).

Like the petitioners in *Civil Rights Defense Firm, P.C., et al. v. Wolf*, 63 MM 2020, the Entities here challenge the Governor’s legal authority to proclaim the existence of a disaster emergency throughout the Commonwealth pursuant to the statutory power granted to him under 35 Pa.C.S. § 7301(a). The Entities urge this Court vacate the Executive Order *in toto*.¹⁰

ARGUMENT

Initially, before addressing the Entities’ discrete legal arguments, it is necessary to address an error that permeates their entire filing with this Court. The Entities maintain that they are not located within the “disaster area,” *see* Emergency App., at ¶¶ 37-38, that there is no disease at their physical locations, *see* Emergency App., at ¶¶ 54-60, and that there are many counties in the Commonwealth with no confirmed COVID-19 cases, *see* Emergency App., at ¶ 41. These contentions betray

¹⁰ The Entities style their filing with this Court as an application for extraordinary relief. The Entities do not reference any other pending matter, but it is worth noting that many of the same parties filed a nearly identical document in the Commonwealth Court on the day before as the instant application at Docket No. 231 M.D. 2020. An application for extraordinary jurisdiction under 42 Pa.C.S. § 726 and Pa.R.A.P. 3309 is not a means of commencing a new action. *See* Pennsylvania Appellate Practice, 20A West’s Pa. Prac., Appellate Practice § 3309:1. Rather, it enables this Court to assume plenary jurisdiction over a matter pending before another Court. *See In re Dauphin County Fourth Investigating Grand Jury*, 943 A.2d 929, 932 n.3 (Pa. 2007). To the extent the Entities seek to have this Court exercise extraordinary jurisdiction over that case, it does not appear that they effectuated service of their Application upon the Commonwealth Court, as required by Pa.R.A.P. 3309(a).

a misapprehension of how the virus spreads and how the Commonwealth has been affected thus far.

COVID-19 is rapidly spreading throughout the world via person-to-person contact. Since the Commonwealth confirmed its first case of COVID-19, positive cases continue to rise, and as of March 26, 2020, the Commonwealth has 1,687 positive cases of COVID-19 and 16 deaths from the virus.¹¹

Exposure is possible by touching a contaminated surface or object then touching one's mouth, nose, or eyes.¹² Further, there is evidence of asymptomatic spread,¹³ and that the incubation period without symptoms may last up to two

¹¹ This is an increase of 560 cases since yesterday. COVID-19 Pennsylvania Overview, Pa. Dept. of Health, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Coronavirus.aspx> (last visited 3/26/20).

¹² “Coronavirus Disease 2019 (COVID-19): How to Protect Yourself,” CDC Website, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html> (last visited 3/25/20).

¹³ David Stanway, “China’s symptom-free coronavirus carriers raise fears of new wave of infections,” *Reuters*, <https://www.reuters.com/article/us-health-coronavirus-china-asymptomatic/explainer-chinas-symptom-free-coronavirus-carriers-raise-fears-of-new-wave-of-infections-idUSKBN21C0P2> (last visited 3/25/20).

weeks.¹⁴ Because of this, Germany banned groups of more than two people in an attempt to arrest the spread of this disease.¹⁵

Multiple areas of the United States are experiencing this “community spread” of COVID-19. By way of example, in Allegheny County the first confirmed coronavirus cases were on March 14. This means that for as long as two weeks before then, those individuals were walking throughout the community, interacting with others, and unknowingly spreading the disease. Indeed, less than two weeks later, there are now 133 confirmed cases in Allegheny County, 20 of which required hospitalization, and two of which resulted in death.¹⁶

The Entities are located in Allegheny, Northampton, and Warren Counties, all of which have confirmed COVID-19 cases.¹⁷ Non-life sustaining businesses in

¹⁴ “Coronavirus Disease 2019 (COVID-19): Symptoms of Coronavirus,” CDC Website, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited 3/25/20).

¹⁵ Katrin Bennhold, *et al.*, “Germany Bans Groups of More Than 2 to Stop Coronavirus as Merkel Self-Isolates,” *New York Times*, <https://www.nytimes.com/2020/03/22/world/europe/germany-coronavirus-budget.html> (last visited 3/25/20).

¹⁶ “COVID-19,” Allegheny County Website, <https://www.alleghenycounty.us/Health-Department/Resources/COVID-19/COVID-19.aspx> (last visited 3/26/20).

¹⁷ COVID-19 Testing in Pennsylvania as of 3/25/2020, Pa. Dept. of Health, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last visited 3/26/20).

infected communities present the opportunity for unnecessary gatherings, personal contact, and interactions that will transmit the virus.

I. B&J Laundry and Caledonia Land Company’s Claims are Moot

Two of the Entities, B&J Laundry and Caledonia Land Company, acknowledge that they are no longer on the list of non-life sustaining businesses. *See* Emergency App. at pg. 19 n.4; *see also id.* at ¶ 90. They nonetheless seek an advisory opinion from this Court with respect to the Governor’s act of placing them on the non-life sustaining list for less than 24 hours before any enforcement of the Order. This Court has a longstanding prohibition against deciding moot issues, which would result in impermissible advisory opinions. *See Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 659 (Pa. 2005). Consistent with this principle, this Court declined to reach the attorney-petitioners’ claims in *Civil Rights Defense Firm, P.C., et al. v. Wolf*, 63 MM 2020, concluding that their claims were moot once the Governor’s Order was updated to permit attorneys to perform essential court functions. Similarly, B&J Laundry and Caledonia Land Company’s claims are moot now that both are on the list of life-sustaining businesses.¹⁸

¹⁸ To the extent B&J Laundry and Caledonia Land Company seek redress for economic harm they purportedly suffered by being on the list of non-life sustaining businesses for less than 24 hours, such claims do not present the type of far reaching, public policy concerns that warrant this Court’s use of its extraordinary powers. 42 Pa.C.S. § 726 (Court may exercise extraordinary jurisdiction over matters of “immediate public importance”); *In re Bruno*, 101 A.3d 653, 670 (Pa. 2014) (Court may invoke King’s Bench authority when an issue of public importance requires

II. The Governor’s March 19, 2020 Executive Order was Lawful

This Court has identified three types of orders that a Governor may promulgate: (1) formal or ceremonial proclamations; (2) directives to subordinate agencies and officials for the execution of the duties of the executive branch of government; and (3) orders implementing existing constitutional or statutory law. *Shapp v. Butera*, 348 A.3d 910, 913 (Pa. Cmwlth. 1975); *see also Markham v. Wolf*, 190 A.3d 1176, 1183 (Pa. 2019) (stating that the *Shapp* construct “serves as a useful tool to consider the contours of executive power”). *Server v. Commonwealth, Department of Environmental Resources*, 514 A.3d 656, 659 (1986). Orders promulgated under category three, which are authorized by statute and are intended to implement or supplement that statute, have the force of law. *Department of Health v. North Hills Passavant Hospital*, 674 A.2d 1141, 1146 (Pa. Cmwlth. 1996).

Contrary to the Entities’ contention that Governor Wolf’s March 19, 2020 Executive Order violated separation of powers by infringing upon the General Assembly, *see* Emergency App., at ¶¶ 106-109, the Governor’s order was expressly authorized by the General Assembly. Indeed, the Governor’s Executive Order invoked three separate statutory grounds for his authority to act: (1) the Emergency

timely intervention to avoid effects from delays incident to the ordinary process of law).

Management Services Code, 35 Pa.C.S. § 7101 *et seq.*; (2) Sections 532(a) and 1404(a) of the Administrative Code, which outline the powers and responsibility of the Department of Health, 71 P.S. § 532; 71 P.S. § 1403(a); and (3) the Disease Prevention and Control Law (“DPCL”), 35 P.S. 521.1 *et seq.* Collectively, these statutes reflect that the General Assembly has made the basic policy choice to grant the Governor broad powers to act quickly and decisively when faced with an imminent threat to the public’s health.

Though the Businesses Entities attack all three asserted grounds in their Emergency Application, and all three statutes will be discussed *seriatim*, it is important that these statutes not be viewed in a vacuum. To determine the General Assembly’s intent, statutory language is not to be read in isolation; it must be read with reference to the context in which it appears. *O’Rourke v. Commonwealth*, 778 A.2d 1194, 1201 (Pa. 2001); *see also* 1 Pa.C.S. § 1921(a); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000).

This Court has repeatedly emphasized that such context includes, *inter alia*, ensuring that statutes are construed in harmony with existing law as part of a general uniform system of jurisprudence. 1 Pa.C.S. §§ 1921(c)(5) and 1932; *PECO Energy Co. v. Pennsylvania Public Utility Com’n*, 791 A.2d. 1155, 1160 (Pa. 2002); *Casey v. Pennsylvania State University*, 345 A.2d 695, 700 (Pa. 1975) (this court is bound to consider other statutes upon the same or similar subjects); *Olson v. Kucenic*, 133

A.2d 596, 598 (Pa. 1957) (a statute must be construed as an integral part of the whole structure affected and not as a separate matter having an independent meaning of its own). This statutory framework arises from the Commonwealth's inherent police power.

The police power is one of the “most essential powers of the government.” *Nat'l Wood Preservers, Inc. v. Dep't of Env't'l Protection*, 414 A.2d 37, 42 (Pa. 1980). It has been defined 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), or as the “inherent power of a body politic to enact and enforce laws for the protection of the general welfare.” *Nat'l Wood Preservers, Inc.*, 414 A.2d at 42. The police power is “fundamental” “because it enables ‘civil society’ to respond in an appropriate and effective fashion” to changing circumstances relative to the general welfare, including threats to the public health, and “thus to maintain its vitality and order.” *Id.*; *see also Grime v. Dep't of Instruction*, 188 A. 337, 341 (Pa. 1936) (“business can be regulated under the police power because of its relation to health”); *Stull v. Reber*, 64 A. 419, 421 (Pa. 1906) (finding vaccination of school children constitutional “because the state’s police powers enabled schools to take reasonable measures to regulate the health of the students to prevent injury to self or others by containing the spread of a

contagious disease”). Therefore, this power “is the state’s least limitable power.” *Nat’l Wood Preservers, Inc.*, 414 A.2d at 43.

A. The Governor is empowered by the Emergency Management Services Code to close certain businesses during a disaster

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

Recognizing that extraordinary times require extraordinary measures to save lives, the General Assembly enacted the Emergency Management Services Code in order to, *inter alia*, “reduce vulnerability of people and communities of this Commonwealth to damage, injury and loss of life and property resulting from disasters”; “care and treat[] persons victimized or threatened by disasters”; and “strengthen the roles of the Governor . . . in prevention of, preparation for, response to and recovery from disasters.” 35 Pa.C.S. § 7103. “The Governor is responsible for meeting the dangers to this Commonwealth and people presented by disasters.” 35 Pa.C.S. § 7301(a).

This statute defines “disaster” as a “man-made disaster, natural disaster or war-caused disaster.” 35 Pa.C.S. § 7102. A “Natural disaster” is “[a]ny hurricane,

tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or **other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life.**” *Id.* (emphasis added). A “Man-made disaster” is “[a]ny industrial, nuclear or transportation accident, explosion, conflagration, power failure, natural resource shortage or **other condition**, except enemy action, **resulting from man-made causes . . . which threatens or causes substantial damage to property, human suffering, hardship or loss of life.**” *Id.* (emphasis added).

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

Those conditions which may by investigation made, be found, actually or likely, to:

- (1) affect seriously the safety, health or welfare of a substantial number of citizens of this Commonwealth or prelude the operation or use of essential public facilities;
- (2) be of such magnitude or severity as to render essential State supplementation of county and local efforts or resources exerted or utilized in alleviating the danger, damage, suffering or hardship faced; and
- (3) have been caused by forces beyond the control of man, by reason of civil disorder, riot or disturbance, or by factors not foreseen and not known to exist when appropriation bills were enacted.

35 Pa.C.S. § 7102 (definitions). Upon the declaration of a disaster emergency, the Governor gains broad powers, including, *inter alia*, controlling the “ingress and

egress to and from a disaster area, the movement of person within the area and the occupancy of premises therein” and the power to “suspend or limit the sale” of firearms. 35 Pa.C.S. § 7301 (f)(7),(8). This declaration expires after 90 days, unless renewed by the Governor. 35 Pa.C.S. § 7301(c).

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 when it enacted this statute. The global pandemic is an unprecedented and unanticipated danger that has already resulted in substantial human suffering and caused more than 18,000 deaths worldwide thus far. If left unaddressed, 2.2 million Americans could die.¹⁹ The Entities’ argument that the global COVID-19 pandemic is somehow not a disaster emergency demonstrates an extraordinary level of myopathy about the effect this pandemic could have on the citizens of the Commonwealth and our health care system if the spread of this disease is not arrested.

In support of their position, the Entities rely on the legal maxim of *ejusden generis*, asserting that COVID-19 does not fit the statutory definitions of “disaster,” “natural disaster,” or “other catastrophe.” But the term “other catastrophe” is

¹⁹ Nicholas Kristof, “The Best-Case Outcome for the Coronavirus, and the Worst,” *The New York Times*, <https://www.nytimes.com/2020/03/20/opinion/sunday/coronavirus-outcomes.html> (last visited 3/25/20).

expansive and is not limited by the specific enumerated terms. Certainly, a pandemic is as much of a catastrophe as a fire or an explosion. This Court has previously recognized that such language is to be broadly construed; here to include pandemics and other types of catastrophes not specifically listed. *Accord Danganan v. Guardian Protective Services*, 179 A.3d 9 (Pa. 2018) (Consumer Protection Law which has “and includes” in definitional section interpreted broadly despite doctrine of *ejusden generis*).

More to the point, COVID-19 clearly amounts to a “disaster emergency”, as it unquestionably affects the safety, health, and welfare of a substantial number of Pennsylvanians, is severe in the extreme, and has been caused by unforeseen factors. 35 Pa.C.S. § 7102 (definitions). On that basis alone, a declaration of disaster emergency was warranted, necessitated, and proper.

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

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

expertise make it better qualified than a court of law to weigh facts within its field.’

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

Further, the Emergency Management Services Code is part of a comprehensive regulatory framework. The specific powers granted to the Governor under 35 Pa.C.S. § 7301(f)(7) and (f)(8) must be considered in the broader context of the powers granted to him to proclaim and respond to a disaster emergency. *See* 35 Pa.C.S. § 7103 (outlining the purposes of the Emergency Services Management Code as “reduc[ing] the vulnerability and people and communities of this Commonwealth to damage, injury and loss of life and property resulting from disasters.”); *see generally Peco Energy Co. v. Pa. Pub. Utility Comm’n*, 791 A.2d 1155, 1160 (Pa. 2002); *Casey v. Pa. State Univ.*, 345 A.2d 695, 700 (Pa. 1975).

The Entities argue that if Section 7301(f)(7) grants the Governor the authority to regulate and forcibly close non-life sustaining businesses, then Section 7301(f)(8), prohibiting the sale, dispensing and transportation of alcoholic beverages, firearms, explosives, and combustibles in commerce, is rendered surplusage. But this analysis is fatally flawed. Section 7301(f)(7) and (f)(8), read together, as they must be, gives the Governor the authority to tailor his response to the emergency presented. The Governor’s response here is directed, not at the sale of certain goods, but toward the

congregating of people who, together, can widely transmit COVID-19 to one another.

There is another reason for the Judiciary to defer to the Executive in these circumstances. *Baker v. Carr*, 369 U.S. 186, 210 (1962), outlines the boundaries of when an issue falls within the political question doctrine. Pursuant to that doctrine, it is appropriate under the separation of powers to attribute finality to the actions of the political branches when there is a lack of satisfactory criteria for a judicial determination. One broad area the U.S. Supreme Court outlined, of particular relevance to natural disasters, concerned the dates and duration of hostilities. There, the U.S. Supreme Court recognized “[d]ominant is the need for finality in the political determination, for emergency natures demand a prompt and unhesitating obedience.” *Baker*, 369 U.S. at 213-214. That is the circumstance presented here.

B. The Administrative Code and Disease Prevention and Control Law Enable the Secretary of Health to Combat the Pandemic through the Most Efficient and Practical Means

In tandem with the Emergency Management Services Code, the Administrative Code, 71 P.S. § 1 *et seq.*, and the Disease Prevention and Control Law (DPCL), 35 P.S. § 521.1 *et seq.*, provide additional specific powers to the Department of Health. Specifically, Subsections 532(a) and 1403(a) of the Administrative Code give the Department of Health the duty to protect the health of the people of the Commonwealth and “to determine and employ the most efficient

and practical means for the prevention and suppression of disease.” 71 P.S. §§ 532(a) and 1403(a). The DPCL likewise empowers the Department of Health to carry out appropriate control measures if there has been a report of disease. 35 P.S. § 521.5 (allowing the Department of Health, after the report of a disease “which is subject to isolation, quarantine, or any other control measure,” to “carry out the appropriate control measure...”). Each of these statutes were referenced in the Governor’s Order, as the Governor is working closely with the Secretary and the Department of Health in their battle against the pandemic.

It is perplexing, therefore, why the Entities would argue that statutes specifically designed to combat the spread of disease are not relevant to the COVID-19 pandemic currently spreading across the Commonwealth. Clearly the Department of Health is a necessary soldier in this war, and has worked closely with the Governor’s Office and other Commonwealth and federal agencies in combatting the pandemic. At bottom, the Entities merely disagree with the necessary actions taken by the Commonwealth. The Entities, none of whom are public health experts, believe that closing non-life-sustaining businesses is not the most efficient and practical means for preventing and suppressing COVID-19. Emergency App. at ¶¶ 39-41. In their view, the most efficient and practical means for the prevention and suppression of COVID-19 is to determine which Pennsylvanians have the disease and quarantine only them. *Id.* This is a fiction.

As has been widely reported, we do not have tests or facilities necessary to evaluate every Pennsylvanian with symptoms.²⁰ But even if universal testing were possible, as noted *supra*, the disease has an incubation period of up to 14 days and asymptomatic individuals can infect others. Non-life sustaining businesses present the opportunity for unnecessary gatherings, personal contact, and interactions that will transmit the virus, and with it, sickness and death.

Accordingly, the Governor and the Secretary acted well within their authority – and indeed their obligation – under Commonwealth law to protect the health of the people of the Commonwealth and to employ the most efficient and practical means for preventing and suppressing disease. The Governor and the Secretary have broad authority in making these decisions, which may be overturned only for an abuse of authority not found here. *See Lutz v. Dep’t of Health*, 156 A. 235, 237 (Pa. 1931).²¹

²⁰ “To End The Coronavirus Crisis We Need Widespread Testing, Experts Say,” National Public Radio (NPR) <https://www.npr.org/sections/health-shots/2020/03/24/820157519/to-end-the-coronavirus-crisis-we-need-widespread-testing-experts-say> (last visited 3/25/20).

²¹ The Entities also argue that the Governor and the Secretary abused their authority under the Administrative Code and the DPCL by failing to satisfy other provisions of those statutes. Emergency App., at ¶¶ 42- 53, 56-60. (citing 71 P.S. §§ 532(d) and 1403(b) and 35 P.S. § 521.2). The Entities rely on the principle of *generalia spcialibus non deroganti*, which provides that when there is a conflict between a general and a specific statutory provision, the specific provision prevails. However, the Entities ignore another equally fundamental principle that statutes must be interpreted to avoid such conflict. Such statutes, shall be construed if

III. The Waiver Procedure Comports with Due Process

The Entities aver, very broadly, that – by virtue of the Governor’s Order – they have been deprived of their Due Process rights. *See* Emergency App, at ¶¶ 11-15, 20, 117. It is worth pointing out, in the first instance, that none of the Entities in this case have availed themselves of the waiver process established by the Governor, and therefore cannot prevail in a Due Process challenge to the adequacy of the procedure. *See Alvin v. Suzuki*, 227 F.3d 107, 116-19 (3d Cir. 2000) (holding that appellant could not state a procedural due process claim where he failed to avail himself of an available grievance procedure, and that alleged futility did not excuse his failure to do so). Nonetheless, the waiver process establishes a constitutionally adequate post-deprivation procedure.

Both the United States Constitution and the Pennsylvania Constitution embody due process guarantees, and have been described as “‘substantially equivalent’ in their protective scope.” *Hospital & Healthsystem Ass’n of Pa. v. Com.*, 77 A.3d 587, 281 n.15 (Pa. 2013).²²

possible so that effect may be given to all provisions. 1 Pa.C.S. § 1933. That is the circumstance here.

²² The Federal Due Process clause states “. . . nor shall any State deprive any person of life, liberty, or property without due process of law[.]” U.S. CONST. amend. XIV. In Pennsylvania, two provisions potentially come into play. One, under Pa. Const. art. I, § 1, bestows vested rights (“all men are born equally free and independent and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and

The Entities repeatedly question the Governor’s Order on *procedural* grounds,²³ arguing that they were not afforded advance notice and a hearing before the Order took effect, *see* Emergency App., at ¶ 11, or provided an opportunity to secure a waiver or pursue an appeal thereafter, *see* Emergency App., at ¶¶ 13-15.

In *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), the High Court acknowledged that “due process is flexible and calls for such procedural protections as the particular situation demands. ... [N]ot all situations calling for procedural safeguards call for the same kind of procedure.” Indeed, even before *Morrissey*, this Court had specifically observed that “[p]rocedural due process does not require

protecting property and reputation, and of pursuing their own happiness”). The other, Pa. Const. art. I, § 11, confers remedies (“courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law”).

²³ Though these clauses can have a substantive component, the Entities’ challenge to the Governor’s Order clearly fails to implicate substantive due process. This is so because the right to hold a certain job or carry on a private business – while important – is not deemed “fundamental” for substantive due process purposes. *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 142-143 (3d Cir. 2000) (interest in tenured public employment is not fundamental); *Nixon v. Commonwealth*, 839 A.2d 277, 288 (Pa. 2003). Even if substantive due process were implicated, and it is not, the alleged abridgement of important, but non-fundamental, rights is only subject to rational basis review. *See Nixon*, 839 A.2d at 287. Given the present emergency circumstances in Pennsylvania (not to mention nation-wide), the measures required under the Governor’s Order, to protect health and safety of all Pennsylvanians, are unquestionably rational, even if burdensome for business. For this reason alone, the Entities could not rely on the concept of substantive due process as a basis for the instant challenge.

notice and a hearing in every conceivable situation[.]” *Conestoga Nat. Bank of Lancaster v. Patterson*, 275 A.2d 6, 8-9 (Pa. 1971).

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

The Entities appear to believe that they are constitutionally entitled to a specific waiver process and some sort of opportunity to “appeal” any business closure necessitated by the Governor’s Order. That is not the law.

Viewing the present public health emergency through a *Mathews* lens, it is apparent what balance is to be struck. The Entities do have private interests in maintaining their individual business operations, but it cannot be said that those interests have been “erroneously deprived.” The whole point of the Governor’s Order is to curtail almost all personal and professional activity in the Commonwealth for public health and safety reasons, *except to the extent* that certain activities are life-sustaining.

As detailed above, as experts have emphasized, and as public reporting has confirmed, closing businesses and limiting interpersonal contact is key to arresting the spread of the virus. Insofar as *any* form of pre- or post-deprivation “review” of the implementation of the Governor’s order can possibly be deemed constitutionally required (a point not conceded), the existing waiver process is adequate. As the exhibits attached to the application confirm, waiver requests will be entertained for businesses that contend they are in fact “life-sustaining.” Specifically, “[w]hen a business completes a waiver form, a team of professionals at DCED will review each request and respond based on the guiding principle of balancing public safety while ensuring the continued delivery of critical infrastructure services and functions.”²⁴ Despite Entities’ criticism of this waiver process, the Constitution does not require more. The Entities are entitled *at most* to a review, not necessarily to a favorable ruling.

Beyond their attack on the allegedly inadequate waiver option, the Entities suggest, more generally, that they are somehow categorically entitled to “notice and hearing” and “an appeal process” upon issuance of “any adverse decision.” Emergency App., at ¶¶ 11, 13, 15. These grandiose contentions cannot be squared

²⁴ Press Release: Waiver Extension, Revised Timing of Enforcement, Governor’s Office, <https://www.governor.pa.gov/newsroom/waiver-extension-revised-timing-of-enforcement-monday-march-23-at-800-am/> (last visited 3/25/20).

with *Mathews*, which itself validated a paper-only process for arriving at certain disability-benefit-termination decisions. *See id.* at 324; *see also Pennsylvania Coal Min. Ass'n v. Ins. Dep't*, 370 A.2d 685, 691 (Pa. 1977) (“[w]hile oral proceedings may be necessary for determinations likely to turn on witness credibility, written submissions may be adequate when economic or statistical questions are at issue” (citing *Mathews*)). Furthermore, the Entities’ unspoken assumption – that any and all governmental decisions must be subject to “appeal” is unwarranted. As a matter of Pennsylvania law, not every action or decision by a governmental entity is administratively appealable. *See generally Administrative Agency Law*, 2 Pa.C.S. § 101, *et seq.* Therefore, the Due Process claim fails.

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

On page 7 of the Emergency Application, the Entities baldly allege that the Governor’s Order violates the First Amendment. The Application, however, does not discuss or explain how the Executive Order infringes upon these rights. This claim is, therefore, not sufficiently developed to warrant relief. *See Pa.R.A.P.* 2119(a). To the extent this claim is raised by the Friends of Danny DeVito, a Pennsylvania candidate committee, it is likewise meritless.

The First Amendment to the United States Constitution instructs “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of

the people peaceably to assemble.” U.S. Const. amend. I.²⁵ The right to speak wherever, whenever, and however one chooses is not absolute. States may place “content neutral” time, place, and manner regulations on speech “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). “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).

Here, the Governor’s Order does not regulate speech at all, let alone attempt to regulate speech based on the message. The Governor closed certain non-life sustaining physical locations in order to arrest the continued and accelerating spread of a global pandemic that has already sickened over 1,000 Pennsylvanians. It does not prevent any candidate committee from speaking, proclaiming their message, or supporting their candidate.

For example, the Governor’s Order does not prohibit the Friends of Danny DeVito from meeting with campaign volunteers or supporters through non-physical means, such as by telephone, video-conferencing, or web-streaming through

²⁵ The Amendment is applicable to the Commonwealth through the Fourteenth Amendment. *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975).

YouTube or Facebook. Alternative avenues of communication clearly continue to exist, as Candidate DeVito has a website (<https://dannydevitopa.com>), is active on Facebook, (<https://www.facebook.com/DannyDeVitoPA>) and on Twitter (@DannyDeVitoPA). The Governor's Order does not limit his committee's ability to promote him on television, radio, and newspapers, or through billboards, handouts, and yard signs. Nor does it prevent that campaign from sending out direct mail activities from private residences, putting up yard signs or speaking to the press.

In short, the closure of a physical location that can serve as a source of infection does not prevent the Friends of Danny DeVito from campaigning or speaking their message.²⁶

The Friends of Danny DeVito argues that his opponent, Representative Anita Astorino Kulik, is being treated differently because she is permitted to keep her district office open. Emergency App., at ¶ 62. This is, of course, a false equivalency.

²⁶ For similar reasons, the Governor's Order also does not violate the freedom to associate—a claim the Entities baldly assert but do not discuss or support in their Emergency Application. The Friends of Danny DeVito can associate with whomever they chose virtually, by telephone, or at their private residences (though the latter is unwise). They simply cannot do so in a single physical location where the COVID-19 virus can easily spread among them to infect the greater community. Clearly, individuals going door-to-door canvassing for their candidate presents an ideal vehicle for the virus to infect a large number of people, including elderly citizens sheltering at home. Keeping those canvassers from becoming infected in the first place will reduce that risk of exponential infection.

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

Representative Kulik’s district office remains open, albeit without visitations, so that she can serve the public during this pandemic and vote remotely on legislation that will help the Commonwealth navigate this emergency.²⁷ There are no allegations that *Candidate Kulik’s campaign* offices remain open. All candidates in Pennsylvania are in the same boat as a large majority of their voters. Mr. DeVito is not being treated differently. For this reason, and to protect voters, the General Assembly is in the process of delaying the primary election by five weeks. *See*

²⁷ Gillian McGoldrick, “Pa. legislature pledges transparency as it prepares to vote remotely on coronavirus relief,” *The Philadelphia Inquirer*, <https://www.inquirer.com/health/coronavirus/spl/pennsylvania-legislature-coronavirus-transparency-live-stream-meetings-20200323.html> (last visited 3/26/20).

Senate Bill 422, Printer's Number 1608. This will allow campaigns breathing space to adapt to the new reality affecting the globe. The Governor's Order does not advantage or disadvantage any candidate or committee.

Finally, as discussed in detail above, the Governor's Order promotes the substantial governmental interest of protecting citizens from the spread of this pandemic. Protecting the health and safety of the citizenry is a quintessential governmental duty. As a candidate for public office, Mr. DeVito should understand that his first duty should be to the people in his community—who right now need protecting from infection.

V. The Entities' Scattershot References to Certain Legal Concepts Present No Legal Claims

An application for extraordinary relief must comply with Pa.R.A.P. 123(a), which provides that an application for relief “shall state with particularity the grounds on which it is based.” *See also* Pennsylvania Appellate Practice, 20A West's Pa. Prac., Appellate Practice § 3309:2. Further, pursuant to Pa.R.A.P. 2119(a), parties must support their arguments with pertinent discussion and citation to authority. Many of the arguments raised in the Entities' Emergency Application utterly fail to meet these basic requirements, and are so undeveloped as to be the “functional equivalent of no argument at all.” *Commonwealth v. D'Amato*, 856 A.2d 806, 814 (Pa. 2004). Those issues must be deemed waived. *Id.*

Though the gravamen of their Application for extraordinary relief is that the Governor lacked statutory authority to declare a disaster emergency, the Entities also make passing references to: (a) the prohibition against unreasonable seizures under the Fourth Amendment to the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution; (b) the right to protection of their private property under the Fifth Amendment to the United States Constitution; (c) the right to free speech and association under the First Amendment to the United States Constitution; (d) the Inherent Rights of Mankind; (e) equal protection under the law. Emergency App., at pgs. 7, 17. The Entities fail to elaborate on their contentions in this regard, beyond these bald stand-alone references to these legal concepts.

As this Court stated recently in *Commonwealth v. Wholaver*, 177 A.3d 136 (Pa. 2018):

Aggregating [] undeveloped claims does not transform them into claims worthy of this Court's intervention. Having failed to offer a developed argument for any specific instance of prosecutorial misconduct and having failed to raise a persuasive contention of cumulative prejudice, Appellant's arguments fail. This issue, therefore, warrants no further consideration.

Id. at 160-61.

Because the Entities fail to offer anything resembling a developed argument concerning these ancillary concepts, the Commonwealth Officers are unable to

meaningfully respond to their contentions. Therefore, this Court should not reach those issues.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this brief contains 7,076 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the answer.

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

/s/ J. Bart DeLone

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CERTIFICATE OF SERVICE

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

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J. BART DeLONE
Chief Deputy Attorney General

DATE: March 26, 2020