

IN THE
**SUPREME COURT OF
PENNSYLVANIA**

Docket No.

EARL MARKEY

Petitioner

vs.

GOVERNOR TOM WOLF

Respondent

**PETITIONER'S EMERGENCY, *EX PARTE* APPLICATION FOR
EXTRAORDINARY RELIEF PURSUANT TO THE COURT'S KING'S
BENCH JURISDICTION**

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April 7, 2020

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I. INTRODUCTION

Petitioner, in pro se, hereby move pursuant to Rule 3309 of the Pennsylvania Rules of Appellate Procedure for emergency, *ex parte* relief in the nature of an emergency preliminary injunction enjoining Pennsylvania Governor Tom Wolf and those acting in concert with him from implementing or enforcing any practice, policy, proclamation, regulation, rule, or interpretation relating to his *Order of Governor of the Commonwealth of Pennsylvania For Individuals to Stay Home*, and imposing criminal penalties for non-compliance with the Order. Alternatively, the Court enjoin enforcement of Order insofar as it (1) restrains the Petitioner and his household members to leave home by motor vehicle to take a scenic drive, (2) restrains protests in public outdoor spaces so long as social distancing protocols are adhered to, and (3) any other activity this Court deems Constitutionally protected or travel to such activity which the Order prohibits. The petitioner incorporates a copy of the Order by judicial notice.

II. STATEMENT OF JURISDICTION

Pursuant to Article V, Section 2 of the Pennsylvania Constitution, this Court “shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth.” Section 2 further provided that

the Supreme Court “shall have such jurisdiction as shall be provided by law.” *Id.* at

2(c). The Court’s broad power and jurisdiction is confirmed by statute

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. The Supreme Court shall also have and exercise the following powers:

(1) All powers necessary or appropriate in aid of its original and appellate jurisdiction which are agreeable to the usages and principles of law.

(2) The powers vested in it by statute, including the provisions of this title.

42 Pa.C.S. § 502.10.

The Court’s King’s Bench power comprises “every judicial power that the people of the Commonwealth can bestow,” *Stander v. Kelly*, 433 Pa. 406, 428 (1969) (Roberts, J., with Jones and Pomeroy, J.J., concurring), and is “a trust for the people of Pennsylvania[,]” *Chase v. Miller*, 41 Pa. 403, 411 (1862). The Court therefore “would be remiss to interpret the Court's supervisory authority at King’s Bench in narrow terms, contrary to precedent and the transcendent nature and purpose of the power.” *Commonwealth v. Williams*, 634 Pa. 290, 304 (2015); *In re Bruno*, 627 Pa. 505, 578 (2014).

The Court may assume King’s Bench jurisdiction over a matter even where no action is pending before any lower court. *In re Bruno*, 627 Pa. at 562; Standard

Pa. Practice § 2:134. The Court invokes its King’s Bench authority when “an issue of public importance ... requires timely intervention ... to avoid the deleterious effect arising from delays incident to the ordinary process of law.” *Williams*, 634 Pa. at 302 (citing *In re Bruno*, 627 Pa. at 563). This emergency, *ex parte* Petition readily meets this standard.

The issue raised is of immense public importance, as the Governor has overstepped his statutory and constitutional authority and seeks to impose criminal penalties upon those, including, but not limited to, Petitioner, who do not comply. In fact, as specified in the Order, “[e]nforcement of this Order will commence immediately for all counties covered under my prior Order directing “Individuals to Stay at Home” first issued March 23, 2020, as amended. Enforcement of this Order will commence at 8:00 PM Wednesday, April 1, 2020, for all other counties.” While an official state website claims citations will not be issued. See, <https://www.pa.gov/guides/responding-to-covid-19/#StayatHomeOrder>. Petitioner is aware the Pennsylvania State Police as well as other law enforcement agencies have nevertheless enforced the Order by issue summary citations. See, <https://www.pennlive.com/news/2020/04/york-county-woman-faces-200-ticket-from-state-police-under-gov-wolfs-stay-at-home-order.html>.

III. STATEMENT OF QUESTIONS INVOLVED

1. Whether this Court, should issue an emergency, *ex parte* injunction enjoining Governor Tom Wolf from implementing or enforcing any practice, policy, proclamation, regulation, rule, or interpretation relating to his Order of April 1, 2020, directing individuals to stay-at-home and imposing criminal for non-compliance with the Order.

Suggested Answer in the *Affirmative*

IV. BASIS FOR EMERGENCY, *EX PARTE* RELIEF

As specified *supra* and *infra*, unless this Court issues an emergency, *ex parte* injunction enjoining Governor Tom Wolf from implementing or enforcing his Order of April 1, 2020, until such time as an evidentiary hearing can be held by this Court, Petitioner and those similarly situated will be subjected to criminal prosecution and fine in direct violation of the law and their constitutional rights. Therefore, to maintain the status quo, and provide this Court with ample time to consider and fully address the arguments of the Parties, it is necessary that an emergency, *ex parte* injunction issue to protect a manifest injustice from occurring.

V. STATEMENT OF FACTS

Procedural Background

The Petitioner respectfully defers to Court's judicial notice regarding the COVID-19 pandemic. As this matter is brought on the King's Bench, there is no procedural history.

Facts Specific to Petitioner

Petitioner Earl Markey is an individual, adult resident of Bucks County, PA who has no symptoms of COVID-19. Declaration of Earl Markey at ¶ 1 and 4. Petitioner would like to leave his home by motor vehicle to take a scenic drive his household members. Id. at ¶ 2. Further, Petitioner would also like to engage in protests in public outdoor spaces. Id. at ¶ 3. Petitioner believes the Order prohibits these protected activities. Id. at ¶ 5.

VI. ARGUMENT

- A. Petitioner Can Show that (1) an injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury will result from refusing the injunction than from granting it; (3) the injunction restores the parties to the status quo ante; (4) the petitioners' right to relief is clear; (5) the injunction is reasonably suited to abate the offending activity; and (6) the injunction will not adversely affect the public interest.

The prerequisites of a preliminary injunction are:

- (2) the injunction is necessary to prevent immediate and irreparable harm

that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest.

SEIU Healthcare Pennsylvania v. Commonwealth, 628 Pa. 573, 584 (2014) (citing *Warehime v. Warehime*, 580 Pa. 201 (2004)).

a. Petitioners' Right to Relief is Clear

As discussed *infra*, the Petitioner's right to relief is clear under multiple legal bases. Consistent with the constitutional avoidance doctrine and this Court's holding in *Mt. Lebanon v. Cty. Bd. of Elections of Allegheny Cty.*, 470 Pa. 317, 322 (1977)(declaring that courts in this Commonwealth should decide matters on nonconstitutional grounds, where possible, prior to reviewing the constitutional grounds), Petitioners first address statutory infirmities of the Order of April 1, 2020, and thereafter, the constitutional infirmities.

a. **Governor Wolf Lacks the Statutory Authority to Issue and Enforce a Stay-at-Home Order**

1. No Statutory Authority Exists For a Stay-at-Home Order

Pursuant to 35 Pa.C.S. § 7301, in order for a Governor to declare a disaster emergency, there first must be a “disaster.” 35 Pa.C.S. § 7102 defines the term “disaster” to mean “[a] man-made disaster, natural disaster, or war-caused disaster.” Continuing through the terms, the General Assembly defined “natural disaster” to include “[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.” Notably absent from the definition of a “natural disaster” is anything pertaining to plague, disease, viruses, *etc.* In fact, all of the enumerated disasters speak to weather-related events, save for explosions, and pursuant to 1 Pa.C.S. § 1932, must be read in *pari materia*. Taking the words in context, there is nothing to suggest that the General Assembly sought to include a plague, disease, virus or pandemic in the term “natural disaster.” Perhaps more importantly, at the time of the enactment of Emergency Management Services Code, 35 Pa.C.S. § 7101, *et seq.*, 1978, Nov. 26, P.L. 1332, the General Assembly was acutely aware of how to draft a statute pertaining to or otherwise including

“disease” as reflected by its enactment of the Department of Health’s powers in the Administrative Code of 1923, 71 P.S. §§ 532(a), 1403(a), and the Disease Prevention and Control Law of 1955, 35 P.S. § 521.1, *et seq.*, 1956, April 23, P.L. 1510. More recently, in enacting the Counterterrorism Planning, Preparedness and Response Act, 35 P.S. § 2140.101, *et seq.*, 2002, Dec. 16, P.L. 1967, No. 227, the General Assembly once again displayed its ability, when it so desires, to regulate an “outbreak of a contagious disease or epidemic.” Specifically, pursuant to 35 P.S. § 2140.301(a),

In the case of an actual or suspected outbreak of a contagious disease or epidemic due to an actual or suspected bioterrorist or biohazardous event, the Governor, in consultation with the Secretary of Health, may temporarily isolate or quarantine an individual or groups of individuals through a written order if delay in imposing the isolation or quarantine through judicial proceedings currently available to the department and local health departments would significantly jeopardize the department's ability to prevent or limit the transmission of a contagious or potentially contagious disease to others. This subsection shall not require a declaration of disaster emergency by the Governor in order to be effective.

While the Counterterrorism Planning, Preparedness and Response Act provides the Department of Health with limited authority to isolate or quarantine an individual or group, it does not confer upon the Governor nor the Department of Health such broad authority to place every individual in the Commonwealth under such isolation or quarantine. Moreover, section 2140.301(b) mandates the necessary action to be taken by the Department of Health to ensure judicial review is provided within 24 hours. It is unconscionable for the Governor to

employ the term of art “stay-at-home” to sidestep the due process protections afforded when quarantined or isolated.

The object of statutory construction is to ascertain and effectuate legislative intent. 1 Pa.C.S. § 1921(a). “In pursuing that end, we are mindful that the statute’s plain language generally provides the best indication of legislative intent.”

Commonwealth v. McClintic, 589 Pa. 465, 472 (2006). To that end, as the General Assembly is acutely aware of how to enact legislation pertaining to plagues, diseases, epidemics, viruses, *etc.* and has not included such in enacting Emergency Management Services Code, nor conferred authority to usurp judicial review of isolation or quarantine by calling it “stay at home”, the Governor’s Order of April 1, 2020 is *ultra vires* and must be enjoined.

b. **Governor Wolf’s Order Violates Article 1, Sections 1, 8, 20, 25, and Article V, Section 10, of the Pennsylvania Constitution and the First, Fifth, and Fourteenth Amendments as well as Freedom of Travel Rights of the United States Constitution**

1. Governor Wolf’s Order is Vague, Arbitrary, Discriminatory and Untailored to Achieve its Purported Goal in Violation of Petitioners’ Article 1, Section 1 and Fifth and Fourteenth Amendment Rights

Article 1, Section 1 of the Pennsylvania Constitution provides:

All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law.” The Fourteenth Amendment to the U.S. Constitution likewise, in pertinent part, provides that “[n]o state shall ... deprive any person of life, liberty, or property, without due process of law.”

As declared by this Court, a “statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *Pennsylvania State Bd. of Pharmacy v. Cohen*, 448 Pa. 189, 200 (1972) (quotation and citations omitted). More importantly, “(n)o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” *Id.* (quotations and citations omitted). The requirement that statutes be sufficiently definite applies whether the statute prohibits conduct or requires the doing of an act. *Commonwealth v. Mayfield*, 574 Pa. 460, 467 (2003).

Governor Wolf’s Order violates this key first tenant of due process in being unconstitutionally vague.

The Governor’s Order of April 1, 2020 provides:

All individuals residing in the Commonwealth are ordered to stay at home except as needed to access, support, or provide life-sustaining business, emergency, or government services[...]A list of life-sustaining businesses that remain open is attached to and incorporated into this Order. In addition, businesses that are permitted to remain open include those granted exemptions prior to or following the issuance of this Order.

Included with the Order, Governor Wolf provided a list of types of businesses that were considered to be “life sustaining” and therefore permitted to remain open for business. Despite this, businesses were nevertheless granted

exemptions by the Commonwealth. Individuals of common intelligence cannot be expected to decipher the web of business types as provided – without definition – by the Governor pursuant to his Order nor reasonably be aware of whether of every business has or has not been granted a waiver to operate.

This tenant is further violated by claims on the official Commonwealth website stating citations will not be issued. See, <https://www.pa.gov/guides/responding-to-covid-19/#StayatHomeOrder>. While law enforcement arbitrarily issuing citations. See, <https://www.pennlive.com/news/2020/04/york-county-woman-faces-200-ticket-from-state-police-under-gov-wolfs-stay-at-home-order.html>.

Governor Wolf’s Order next violates the petition’s due process right by avoiding judicial review as required by 35 P.S. § 2140.301(b). While “Stay at home” might be a seemingly auspicious term of art, in practice its broad application and lack of judicial review makes it is much more draconian than isolation or quarantine.

To prevent – in direct violation of Article 1, Section 1 of the Pennsylvania Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution – the unlawful prosecution, fining, and seizure of people and property, the Governor’s Order must be enjoined.

2. Governor Wolf's Order is in Violation of Petitioners' Article 1, Section 20 and the First Amendment Rights

Article 1, Section 20 of the Pennsylvania Constitution ⁸ provides:

The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.

The First Amendment to the United States Constitution provides:

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.

Governor Wolf's Order is at clear tension with the right of the people to peacefully assemble and protest. While the Commonwealth might be permitted to implement social distancing measures to mitigate the spread of COVID-19, these rights nevertheless endure. The Commonwealth's interest in reducing COVID-19 transmission can be narrowly tailored by least restrictive means through social distancing. *See, Schenck v. Pro-Choice Network of Western N. Y.*, 519 U.S. 357 (1997). To prevent – in direct violation of Article 1, Section 20 of the Pennsylvania Constitution and the First and Fourteenth Amendments to the U.S. Constitution – the unlawful prosecution, fining, and seizure of people and property, the Governor's Order must be enjoined as to protect the right to peacefully assemble and protest.

3. Governor Wolf's Order is in Violation of
Petitioner's Freedom of Travel Rights

The “freedom to travel ... has long been recognized as a basic right under the Constitution.” *United States v. Guest*, 383 U.S. 745, 758 (1966). Although the right “finds no explicit mention in the Constitution,” it is “a necessary concomitant of the [new] stronger Union the Constitution created.” *Id.*; see *Smith v. Turner (Passenger Cases)*, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting) (“We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”). Governor Wolf’s Order wholly abridges this right. Moreover, there no nexus between exercising freedom of travel and COVID-19 transmission. Again, the Commonwealth’s interest in reducing COVID-19 transmission can be narrowly tailored by least restrictive means through social distancing. To prevent – in direct violation of Freedom of Travel– the unlawful prosecution, fining, and seizure of people and property, the Governor’s Order as to protect the Freedom of Travel.

ii. *An Injunction is Necessary to Prevent Immediate and Irreparable Harm*

Pennsylvania law does not require a person to be prosecuted to find that he has suffered irreparable harm. *See, City of Erie v. Northwestern Food Council*, 322 A.2d 407, 411-12 (Pa. Cmwlth. 1974) (quoting *Harris-Walsh, Inc. v. Borough of Dickson City*, 216 A.2d 329, 331 (Pa. 1966) (holding that petitioner was not required to undergo criminal prosecution before availing himself of an equitable remedy)); *see also, Arsenal Coal Co. v. Com., Dep't of Env'tl. Res.*, 505 Pa. 198 (1984). Threats to fundamental rights, including the right to be free of threat of prosecution for lawful activity, constitute immediate and irreparable harm and warrant a preliminary injunction. *See, Pa. State Educ. Ass'n ex rel. Wilson v. Commonwealth Dep't of Cmty. & Econ. Dev., Office of Open Records*, 981 A.2d 383, 386 (Pa. Cmwlth. Ct. 2009) (granting a preliminary injunction to prevent public disclosure of employees' home addresses, a threat to their protected privacy

rights), *aff'd*, 606 2 A.3d 558 (Pa. 2010). As stated in *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1180 (Pa. Cmwlth. 2016), “the violation of an express statutory provision constitutes *per se* irreparable harm and a preliminary injunction may issue where the other necessary elements are met.” (citing *Council 13, American Federation of State, County and Municipal Employees, AFL–CIO v. Casey*, 595 A.2d 670, 674 (Pa. Cmwlth. 1991)).

iii. Greater Injury Will Result From Refusing the Injunction Than Granting It

As Petitioners are under threat of criminal prosecution and civil penalties for non-compliance with the Order of April 1, 2020, there simply cannot be any greater injury than the refusal to grant an injunction, as Petitioner are facing threats of prosecution and fines including for otherwise lawful conduct.

iv. Status Quo

“The *status quo ante* to be preserved by a preliminary injunction is the last actual, peaceable, lawful, noncontested status which preceded the pending controversy.” *Dillon v. City of Erie*, 83 A.3d 467, 470 n. 1 (Pa. Cmwlth. 2014).

In this case, there can be no dispute that the last noncontested status existed immediately prior to the enforcement of the Order of April 1, 2020.

v. *The Injunction is Reasonably Suited to Abate the Offending Activity*

As Petitioner only seek to enjoin the Order of April 1, 2020, which has caused the harm complained of herein, there can be no dispute that an injunction is reasonable suited to abate the offending activity.

vi. *The Injunction will not Adversely Affect the Public Interest*

As the public policy of the Commonwealth does not favor unconstitutional or *ultra vires* acts, an injunction furthers public policy. *See, Commonwealth v. Davidson*, 595 Pa. 1, 45 (2007) (Baer, J., concurring and dissenting) (citing *Cmwlth. v. Hughes*, 468 Pa. 502, 510 (1976)).

VII. CONCLUSION

For the foregoing reasons, Petitioners respectfully initially request that this Court issue an emergency, *ex parte* injunction enjoining Pennsylvania Governor Tom Wolf and those acting in concert with him from implementing or enforcing any practice, policy, proclamation, regulation, rule, or interpretation relating to his Order of April 1, 2020. Alternatively, the Court enjoin enforcement of Order insofar as it (1) restrains the Petitioner and his household members to leave home

by motor vehicle to take a scenic drive, (2) restrains protests in public outdoor spaces so long as social distancing protocols are adhered to, and (3) any other activity this Court deems Constitutionally protected and travel to such activity which the Order prohibits. The Commonwealth's interest in reducing COVID-19 transmission must be narrowly tailored by least restrictive means necessary, not by any means conceivable. Thereafter, Petitioners respectfully request that this Court issue a final preliminary injunction, of the same nature, after the Parties have opportunity to be heard.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'Earl Markey', written in a cursive style.

Date: April 7, 2020

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215-740-3243
earlmarkey@earlmarkey.com

CERTIFICATE OF SERVICE

I, Earl Markey, hereby certify that I caused a copy of the foregoing to be filed and served upon the following person by first class United States mail:

Governor Tom Wolf
Office of the Governor
508 Main Capitol Building
Harrisburg, PA 17120

Joshua Shapiro
Pennsylvania Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Respectfully Submitted,



Date: April 7, 2020

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CERTIFICATE OF COMPLIANCE

I 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.



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IN THE SUPREME COURT OF PENNSYLVANIA

EARL MARKEY	:
	:
Petitioner	:
v.	:
	:
GOVERNOR TOM WOLF	: Docket No.
Respondent	:

DECLARATION OF EARL MARKEY

I, Earl Markey, am competent to state and declare the following based on my personal knowledge:

1. I am an adult resident of Bucks County, Pennsylvania.
2. I would like to leave home by motor vehicle to take a scenic drive with my household members.
3. I would like to engage in protests in public outdoor spaces while adhering to social distancing protocols. I would like to publicly protest the Pennsylvania Department of Health for continued release of misleading COVID-19 data (namely, not evenly distributing age ranges).
4. I do not have any symptoms of COVID-19.
5. I believe such activities are protected by the Pennsylvania and United States Constitution but are prohibited by Governor Wolf's Stay Home Order.

I, Earl Markey, verify that all the information contained herein is true and correct to the best of my information, knowledge and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: April 7, 2020



Earl Markey

IN THE SUPREME COURT OF PENNSYLVANIA

EARL MARKEY :
 :
 :
 Petitioner :
 v. :
 :
 :
 GOVERNOR TOM WOLF : Docket No.
 Respondent :

ORDER

AND NOW, this _____ day of April, 2020, upon consideration of Petitioner's *Emergency, Ex Parte Application for Extraordinary Relief Pursuant to the Court's King's Bench Jurisdiction*, it is hereby **GRANTED**. Pennsylvania Governor Tom Wolf and those acting in concert with him are hereby **ENJOINED** from implementing or enforcing any practice, policy, proclamation, regulation, rule, or interpretation relating to his *Order of Governor of the Commonwealth of Pennsylvania For Individuals to Stay Home* of April 1, 2020.

A rule is issued on Governor Wolf to show cause why this injunction should not be made permanent, by April _____, 2020. Petitioner shall file a response, if any, to Governor Wolf's filing within 24 hours of receipt of the Governor's filing.
