

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

No. 104 MM 2020

**THE HONORABLE TOM WOLF, GOVERNOR OF THE
COMMONWEALTH OF PENNSYLVANIA,**

Petitioner,

v.

**SENATOR JOSEPH B. SCARNATI, III,
SENATOR JAKE CORMAN, and SENATE
REPUBLICAN CAUCUS,**

Respondents.

*Application to the Court to Exercise Jurisdiction Pursuant to Its King's Bench
Powers and/or Powers to Grant Extraordinary Relief*

**APPLICATION OF THE KEYSTONE RESEARCH CENTER AND
THE PENNSYLVANIA BUDGET AND POLICY CENTER FOR LEAVE
TO SUBMIT AMICI CURIAE BRIEF *NUNC PRO TUNC*
IN SUPPORT OF PETITIONER**

Dated: June 18, 2020

SAUL EWING ARNSTEIN & LEHR LLP

John F. Stoviak (I.D. No. 23471)
Amy S. Kline (I.D. No. 84690)
Albert F. Moran (I.D. No. 318683)
1500 Market Street
38th Floor, Centre Square West
Philadelphia, PA 19102
(215) 972-1095

*Counsel for Amici Curiae
The Keystone Research Center and
The Pennsylvania Budget and Policy Center*

The Keystone Research Center and The Pennsylvania Budget and Policy Center (“PBPC”) respectfully request leave to file *nunc pro tunc* the attached *Amici Curiae* Brief in support of Petitioner The Honorable Tom Wolf, Governor of Pennsylvania (the “Governor”) in this matter.

The Governor asks this Court to decide, on an emergency basis, a matter of immediate and historic public importance. Respondents seek a writ of mandamus from the Commonwealth Court that would command the Governor to issue an executive order or proclamation ending the state of disaster emergency related to the COVID-19 pandemic within the Commonwealth. In support of the Governor’s position, PBPC seeks to: (1) articulate the significant public policy concerns that flow from Respondents’ attempt to act unilaterally, and in violation of longstanding constitutional separation of powers norms, by seeking to enforce the General Assembly’s Concurrent Resolution (H.R. 836); and (2) present important context regarding the benefits of the Governor’s executive actions to date and the critical importance of maintaining them to battle the pandemic.

As discussed below and in the attached Brief, Pennsylvanians will be seriously and detrimentally impacted if Respondents prevail and the General Assembly’s Concurrent Resolution (H.R. 836) is determined to have legal effect.

I. Identity and Interest of Amici.

Launched formally in 2007 as a project of the Keystone Research Center (“KRC”),¹ PBPC is a nonpartisan, statewide policy research project that provides independent and credible analysis on state tax, budget, and related policy matters with attention to the impact of policy proposals on working families.

Since the beginning of the COVID-19 pandemic, KRC and PBPC have issued a series of detailed reports regarding the public policies needed to contain the spread of the novel coronavirus responsible for COVID-19, as well as those needed to ameliorate the burdens of the steps taken to contain the virus on Pennsylvania’s low- and moderate-income families and on the Commonwealth’s economy. These reports include, but are not limited to:

- Stephen Herzenberg and Maisum Murtaza, *Pennsylvania’s COVID 19 Economy: An Update*, June 2, 2020, available at https://www.krc-pbpc.org/research_publication/pennsylvanias-covid-19-economy-an-update/;
- Diana Polson, *Our Opportunity to Re-evaluate: Pennsylvania’s COVID-19 Policy Response and Priorities Moving Forward*, May 22, 2020, available at https://www.krc-pbpc.org/research_publication/our-opportunity-to-re-evaluate-pennsylvanias-covid-19-policy-response-and-priorities-moving-forward/;

¹ KRC is a nonpartisan 501(c)(3) organization created in 1996 to conduct research and policy analysis to promote a more prosperous and equitable Pennsylvania. Since then, it has become the leading source of independent economic analysis in Pennsylvania.

- Marc Stier, *Declaring Victory Too Soon Will Cost Too Many Lives*, April 13, 2020, available at https://www.krc-pbpc.org/research_publication/declaring-victory-too-soon-will-cost-too-many-lives/;
- Diana Polson, *A Status Update on Pennsylvania's Policy Response to COVID-19*, April 13, 2020, available at https://www.krc-pbpc.org/research_publication/a-status-update-on-pennsylvanias-policy-response-to-covid-19-economic-relief-health-care-and-worker-protections/;
- Diana Polson, *A Compendium of State Action in Response to the COVID-19 Epidemic*, April 6, 2020, https://www.krc-pbpc.org/research_publication/a-compendium-of-state-action-in-response-to-the-covid-19-epidemic/;
- Stephen Herzenberg, *The Economy Is Dropping Like a Stone—Even More Aggressive Policies Are Needed*, April 3, 2020, available at https://www.krc-pbpc.org/research_publication/the-economy-is-dropping-like-a-stone-even-more-aggressive-policies-needed/;
- Marc Stier and Diana Polson, *What Not to Do in the Face of a COVID-19 Driven Recession*, March 31, 2020, available at https://www.krc-pbpc.org/research_publication/what-not-to-do-in-the-face-of-a-covid-19-driven-recession-lessons-from-the-corbett-years/;
- Marc Stier, *The Likely Impact of COVID-19 on Pennsylvania*, March 30, 2020, available at https://www.krc-pbpc.org/research_publication/the-likely-impact-of-covid-19-on-pennsylvania/; and
- Marc Stier, *The Moral Equivalent of Wartime Equality: Public Policies in Response to the COVID-19 Pandemic in Pennsylvania*, March 16, 2020, available at https://www.krc-pbpc.org/research_publication/the-moral-equivalent-of-wartime-equality-public-policies-in-response-to-the-covid-19-pandemic-in-pennsylvania/.

PBPC has a strong interest in this matter. Notably, the Commonwealth, with bipartisan support, has taken many of the steps PBPC recommended – steps which served both to protect working families in the short term and ensure that the Pennsylvania economy recovers as quickly as possible once a measure of normality can safely be restored. Respondents, however, now threaten the status quo and all of the progress made as a result of PBPC’s efforts. More specifically, an immediate end to the state of emergency declared by the Governor will threaten many of the beneficial policies PBPC advocated for and worked to implement. This would, in turn, jeopardize the near-term safety and security of Pennsylvania’s low- and moderate-income residents and families as well as cause them long-term harm by delaying the Commonwealth’s economic recovery. PBPC seeks to submit its Brief on behalf of those individuals and families, who will bear a disproportionate and potentially life-threatening burden if the state of disaster emergency related to COVID-19 in the Commonwealth prematurely ends.

II. This Court Should Grant Leave to File the Amici Brief.

In this case, PBPC is uniquely positioned to explain the direct, material, and negative impact that the injunctive relief requested by Respondents would have on Pennsylvania’s most vulnerable citizens, both in the short term and the long term. The Governor’s March 6, 2020 and June 3, 2020 Proclamations of Disaster Emergency (the “Emergency Orders”) created a comprehensive series of

protections for the public and phased reopening plan to ensure the safety of Pennsylvania's citizens. While Pennsylvania, and the United States more broadly, remain in the throes of a historic and devastating pandemic, Respondents seek to terminate the Governor's Emergency Orders and thereby jeopardize the vulnerable individuals and families PBPC has endeavored to help through its policy advocacy and, indeed, Pennsylvania's entire citizenry.

As discussed below and in the proposed *Amici* Brief, the PBPC has a unique data-driven perspective on the deleterious impact that Respondents' requested relief would have on public health. While the briefing of the Governor and Respondents focus heavily on technical constitutional arguments, PBPC seeks to speak to the human implications of this dispute and amplify the substantial, widespread, devastating, and irreversible injuries that will be suffered by Pennsylvanians if Respondents prevail and the Emergency Orders are terminated. Accordingly, PBPC respectfully submits that its proposed Brief will assist the Court in deciding this matter and should be considered.

Further, PBPC states that no party or counsel for a party authored PBPC's proposed Brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of that Brief.

While PBPC recognizes that the June 17, 2020 deadline for *amicus* briefs has passed, PBPC's proposed Brief should be considered *nunc pro tunc*. PBPC

was unable to retain counsel prior to the deadline, and, in any event, neither party will be prejudiced by granting PBPC leave to file its proposed Brief *nunc pro tunc*.

WHEREFORE, The Keystone Research Center and The Pennsylvania Budget and Policy Center respectfully request that this Court grant leave to file their *Amici Curiae* Brief (attached), and enter any such other and further relief as this Court deems just and equitable.

Respectfully submitted,

Dated: June 18, 2020

SAUL EWING ARNSTEIN & LEHR LLP

/s/ John F. Stoviak

John F. Stoviak (PA I.D. No. 23471)

Amy S. Kline (PA I.D. No. 84690)

Albert F. Moran (PA I.D. No. 318683)

1500 Market Street

Centre Square West, 38th Floor

Philadelphia, PA 19102

(215) 972-1095

John.Stoviak@saul.com

Amy.Kline@saul.com

Albert.Moran@saul.com

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(215) 972-1095

*Counsel for Amici Curiae
The Keystone Research Center and The
Pennsylvania Budget and Policy Center*

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The Keystone Research Center and The Pennsylvania Budget and Policy Center (“PBPC”) respectfully submit this Brief as *amici curiae* in support of Petitioner, The Honorable Tom Wolf, Governor of Pennsylvania’s (the “Governor”), in this matter.

INTRODUCTION

The Governor has acted decisively and effectively to protect the health and welfare of the people of Pennsylvania from the consequences of the COVID-19 pandemic. His Proclamation of Disaster Emergency dated March 6, 2020 and subsequent Amendment to Proclamation of Disaster Emergency dated June 3, 2020 (collectively, the “Emergency Orders”) have allowed, and continue to allow, the Commonwealth to address three significant problems described below. While notable progress has been made with respect to all three problems, COVID-19 remains a fierce and uncompromising enemy, and the protections implemented by and through the Governor’s Emergency Orders remain necessary to protect the health and welfare of all Pennsylvanians, and particularly those of few means. As such, the Governor needs continued latitude to take action to stem the tide of the pandemic. Respondents’ efforts to enforce the General Assembly’s Concurrent Resolution (H.R. 836) would negate the progress made to date and jeopardize the health and welfare of Pennsylvania’s citizens. This Court should reject those efforts and declare the Concurrent Resolution to be a legal nullity.

The first, and most immediate, problem that continues to face the Commonwealth is reducing the potential exponential growth of COVID-19 infections, which in turn reduces suffering and deaths and prevents hospitals from being overwhelmed. Despite a rapid spread of the virus and a tragic loss of life, the Governor's Emergency Orders, which closed nonessential businesses and required Pennsylvanians to stay at home, have slowed the rate of infections. But the virus remains a profound threat. Thus, while the Governor has begun to reopen Pennsylvania, he is doing so cautiously, with a watchful eye toward preventing a resurgence of COVID-19 cases. These efforts must be maintained, or else the Commonwealth may well be quickly overrun, and the dramatic efforts taken and sacrifices made over the last three months will have been in vain.

The second problem facing the Commonwealth relates to managing both government agencies and the private sector to provide the necessary equipment and resources, including human resources, to deal with the health crisis. The initial challenge – mobilization – has been overcome. The ongoing challenge is maintaining these resources, such that they can be rapidly deployed in a targeted manner should COVID-19 cases spike either locally or statewide. If Respondents prevail, it will be extraordinarily difficult, if not impossible, to muster and redeploy these resources with the urgency needed to defeat a resurgence of the virus. The Emergency Orders therefore must remain in effect.

The third problem facing the Commonwealth involves minimizing the consequences of the business closures made necessary by the effort to contain the disease to Pennsylvanians and to the Pennsylvania economy. The goals here were, and are, to limit the economic distress of Pennsylvania families and businesses and, by doing so, allow an economic recovery to begin as quickly as possible once the economy could reopen safely. The Emergency Orders, and the related laws enacted with bipartisan support that gave the Governor additional powers, have enabled the Commonwealth to take actions that have reduced economic distress and kept the Pennsylvania economy from falling even deeper into recession. They also made the Commonwealth eligible for a great deal of support from the Federal government. State and federal actions taken pursuant to the Emergency Orders are enabling families to more quickly resume their normal level of consumption helping the Commonwealth's economy recover. Respondents, however, seek to move far too quickly, and thereby hazard losing all of the progress made to date.

Despite the progress made over the past three months, COVID-19 continues to pose a major threat. Indeed, as can be seen from the striking recent rise in COVID-19 cases and deaths in states that have reopened too soon, the pandemic is far from over. The virus remains among us, and like all Americans, the vast majority of Pennsylvanians are not immune to it. Herd immunity has not been

achieved, and the timeline for a potential vaccine remains highly uncertain. Thus, a spike in cases and additional waves of infection remain possible, if not probable.

Pennsylvania must not let down its guard too soon, and it must be prepared to expeditiously reinstitute painful regulations on its citizens' daily lives and our economy. The threat of resurgence also means that the Commonwealth must for the time being, and perhaps again in the future, have the capacity to deploy resources not just to provide healthcare to those who need it but to test as many people as possible and trace the contacts of those who test positive. Finally, to ensure that the suffering of low- and moderate-income families is minimized and our economic recovery is as vigorous as possible, the Commonwealth must, for now, keep in place regulations that relieve economic distress. The Governor's Emergency Orders recognize and accomplish all of these critical needs.

The immediate end to the state of emergency declared by the Governor would threaten the well-being of Pennsylvanians now and into the future. Respondents' requested relief should therefore be denied.

STATEMENT OF INTEREST¹

Launched formally in 2007 as a project of the Keystone Research Center ("KRC"),² PBPC is a nonpartisan, statewide policy research project that provides

¹ No Counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PBPC, its employees, or its counsel made a monetary or other contribution to the brief's preparation or submission. The parties were notified of PBPC's intention to file this brief.

independent and credible analysis on state tax, budget, and related policy matters with attention to the impact of policy proposals on working families.

Since the beginning of the COVID-19 pandemic, KRC and PBPC have issued a series of detailed reports regarding the public policies needed to contain the spread of the novel coronavirus responsible for COVID-19, as well as those needed to ameliorate the burdens of the steps taken to contain the virus on Pennsylvania's low- and moderate-income families and on the Commonwealth's economy. These reports include, but are not limited to:

- Stephen Herzenberg and Maisum Murtaza, *Pennsylvania's COVID 19 Economy: An Update*, June 2, 2020, available at https://www.krc-pbpc.org/research_publication/pennsylvanias-covid-19-economy-an-update/;
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² KRC is a nonpartisan 501(c)(3) organization created in 1996 to conduct research and policy analysis to promote a more prosperous and equitable Pennsylvania. Since then, it has become the leading source of independent economic analysis in Pennsylvania.

[update-on-pennsylvanias-policy-response-to-covid-19-economic-relief-health-care-and-worker-protections/;](#)

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- Marc Stier, *The Moral Equivalent of Wartime Equality: Public Policies in Response to the COVID-19 Pandemic in Pennsylvania*, March 16, 2020, available at [https://www.krc-pbpc.org/research_publication/the-moral-equivalent-of-wartime-equality-public-policies-in-response-to-the-covid-19-pandemic-in-pennsylvania/.](https://www.krc-pbpc.org/research_publication/the-moral-equivalent-of-wartime-equality-public-policies-in-response-to-the-covid-19-pandemic-in-pennsylvania/)

PBPC has a strong interest in this matter. Notably, the Commonwealth, with bipartisan support, has taken many of the steps PBPC recommended – steps which served both to protect working families in the short term and ensure that the Pennsylvania economy recovers as quickly as possible once a measure of

normality can safely be restored. Respondents, however, now threaten the status quo and all of the progress made as a result of PBPC's efforts. More specifically, an immediate end to the state of emergency declared by the Governor will threaten many of the beneficial policies PBPC advocated for and worked to implement. This would, in turn, jeopardize the near-term safety and security of Pennsylvania's low- and moderate-income residents and families as well as cause them long-term harm by delaying the Commonwealth's economic recovery. PBPC submits this Brief on behalf of those individuals and families, who will bear a disproportionate and potentially life-threatening burden if the state of disaster emergency related to COVID-19 in the Commonwealth prematurely ends.

ARGUMENT

I. This Court Should Grant the Application for Relief.

A. The Governor Must Continue to Have Latitude to Act Quickly and Decisively in the Public Interest and Should Not Be Unilaterally Undermined by the General Assembly.

While PBPC fully concurs with the Governor's arguments regarding the fundamental constitutional problems that arise from Respondents' position, public policy reasons also favor the conclusion that an end to the state of emergency should come through the Governor and the General Assembly working together, as is contemplated through the Pennsylvania Constitution's presentment procedure for legislative actions, rather than through political fiat.

There can be no serious question that both the Commonwealth and the country (and the world) are in the grips of a historic medical disaster caused by COVID-19. *See, e.g., In re Abbott*, 954 F.3d 772, 792 (5th Cir. 2020) (describing COVID-19 as a “massive and rapidly-escalating threat”); *United States v. Calvert*, No. 19-40068-03-HLT, 2020 WL 1847754, at *3 (D. Kan. Apr. 13, 2020) (“These are unprecedented times, and the COVID-19 pandemic poses serious health risks”). “The virus has killed hundreds of thousands, infected millions, and disrupted the lives of nearly everyone on the planet.” *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *2 (N.D. Ill. May 3, 2020). The pandemic’s near-term impacts continue to manifest each day, and its long-term impacts cannot be known due to the numerous outstanding questions regarding the potency and longevity of the virus as well as the potential for an effective vaccine.

Significant political and legal controversies typically arise from social crises, and this situation is no different. The Commonwealth’s elected branches are fractured over how best to respond to the crisis – while a majority of the General Assembly seeks to unilaterally terminate the Governor’s disaster declaration and reopen the Commonwealth, the Governor seeks to follow a more cautious path of a phased reopening. Respondents have devised a gambit to impose their will on the Governor – the chief executive – as well as Pennsylvania’s nearly 13 million citizens. But this crisis presents precisely the type of controversy that requires the

interbranch cooperation to enact law that the Pennsylvania Constitution demands. Allowing Respondents to end the state of emergency through an unprecedented fiat would only “breed more chaos.” *Cf. Curtin v. Virginia State Bd. of Elections*, No. 1:20-cv-00546, 2020 WL 2817052, at *5 (E.D. Va. May 29, 2020).

Courts around the country have noted the serious consequences of the unmitigated spread of COVID-19. For example, the Northern District of California, in granting the release of an immigrant held in detention, stated:

COVID-19 spreads “easily and sustainably” from person to person, infected people can spread it (even if they are asymptomatic), and COVID-19 can survive on surfaces for days. . . .

There is no approved vaccine to prevent infection. Instead, to control the virus, the CDC (the Centers for Disease Control and Prevention) recommends that people stay at least six feet away from each other (a practice called “social distancing”), stay at home, wash their hands often, disinfect surfaces, and cover their mouths and nose with a cloth face cover when around others.

Doe v. Barr, No. 20-CV-02141-LB, 2020 WL 1820667, at *2 (N.D. Cal. Apr. 12, 2020) (citations omitted). Similarly, in reversing a trial court’s entry of a temporary restraining order barring enforcement of the Texas Governor’s emergency response to the pandemic, the Fifth Circuit stated:

[O]ur nation faces a public health emergency caused by the exponential spread of COVID-19, the respiratory disease caused by the novel coronavirus SARS-CoV-2. As of April 6, 2020, over 330,000 cases have been confirmed across the United States, with over 8,900

dead.³] The virus is “spreading very easily and sustainably” through the country, with cases confirmed in all fifty states, the District of Columbia, and several territories. Over the past two weeks, confirmed cases in the United States have increased by over 2,000%.

In re Abbott, 954 F.3d at 779. Under such circumstances, the Fifth Circuit held that states may “restrict, for example, one’s right to peaceably assemble, to publicly worship, to travel, and even to leave one’s home.” *Id.* at 778.

The Commonwealth’s chief executive, the Governor, is best equipped to lead the Commonwealth’s emergency response to the pandemic and must have latitude to do so. To be sure, the Governor can – and should – consult with the General Assembly to enact emergency policy, but these decisions must center around the fact that “[t]he public has a critical interest in preventing the further spread of the coronavirus.” *Castillo v. Barr*, No. 20-00605, 2020 WL 1502864, *6 (C.D. Cal. Mar. 27, 2020); *see also Bent v. Barr*, No. 19-cv-06123, 2020 WL 1812850, *7 (N.D. Cal. Apr. 9, 2020) (“Given that additional burdens on the health system in this crisis may lead to a greater number of deaths among the public, public health considerations cannot be ignored . . .”).

To allow the General Assembly to override the chief executive’s response to a crisis would constitute a foray by this Court into a judgment of policymaking

³ As of the date of this filing, over 2.1 million people have been confirmed positive for COVID-19 in the United States, with over 118,000 dead, an increase of over 1.7 million positive cases and nearly 110,000 deaths since April 6, 2020. *See Coronavirus in the U.S.: Latest Map and Case Count*, New York Times, available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

wisdom. This would be inappropriate; when public welfare requires emergency government action, courts have routinely upheld such actions. *South Bay United Pentecostal Church v. Newsom*, No. 19A1044, 590 U.S. ____ (May 29, 2020) (“Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect. When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad.”) (citations and text alterations omitted); *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 3249062, at *5 (7th Cir. June 16, 2020) (“[W]e do not evaluate orders issued in response to public-health emergencies by the standard that might be appropriate for years-long notice-and-comment rulemaking.”); *Calvary Chapel of Bangor v. Mills*, No. 20-cv-00156-NT, 2020 WL 2310913, *10 (D. Me. May 9, 2020) (“Upsetting the careful balance being drawn by Maine’s Governor at this time would have an adverse effect on the public interest.”); *see also Cassell*, 2020 WL 2112374, at *15 (“Preventing enforcement of the latest stay-at-home order would pose serious risks to public health. The record reflects that COVID-19 is a virulent and deadly disease that has killed thousands of Americans and may be poised to devastate the lives of thousands more.”).

Pennsylvanians will suffer if this Court commands the Governor to rescind the Emergency Orders. This Court has the ability, and indeed the obligation, to

prevent such harm. Thus, this Court should deny Respondents' requested relief and declare H.R. 836 a legal nullity.

B. The Public Would be Seriously and Materially Harmed if the State of Disaster Emergency Related to COVID-19 Ends Now.

Respondents do not appear to question the Governor's declaration that the COVID-19 pandemic constituted a disaster over the past three months, but instead suggest that, at some unspecified point in time, the pandemic simply ceased to be a disaster. However, as explained below, the Commonwealth continues to face three problems arising from the COVID-19 pandemic, and the continued operation of the Governor's Emergency Orders is necessary to definitively solve these problems and thereby protect the health and welfare of all Pennsylvanians.

1. Keeping the Curve Flat.

The Commonwealth continues to face the challenge of preventing the exponential growth of COVID-19 infections. Doing so not only reduces distress and death caused by the disease but ensures that hospitals are not overwhelmed by a caseload far beyond their capacity, which would lead to additional deaths. The Governor's Emergency Orders, together with laws that govern the Department of Health, have made possible the stay-at-home and business closure orders that have mitigated the even greater health disaster that COVID-19 might have created.

It is difficult to estimate how many cases and deaths were prevented by the business closure and stay-at-home orders. Though a recent study found that

shutdown orders across the United States prevented 60 million cases of COVID-19.⁴ Using a 4% rule of thumb for estimating the Pennsylvania impact of a national situation, that would mean that the Governor's health and safety orders prevented 2.4 million cases of COVID-19 in the Commonwealth. (This likely underestimates the actual number because Pennsylvania has the tenth highest caseload in the country, accounting for 5% of all U.S. cases.) If the percentage of people who died as a result of COVID-19 were equal to the national case mortality rate of 5%, another 131,000 Pennsylvanians would have died by now but for the Governor's decisive actions. Notably, these estimates do not take into account the impact of 2.4 million additional cases in a state that has only 14,395 hospital beds and 1,098 ICU beds.

If the Governor's Emergency Orders are terminated now, the Commonwealth faces a significant risk of an increase in the rate of infections, which could overwhelm the hospital system and realize the worst case scenario that the Governor and Pennsylvania's first responders have worked to prevent. By way of brief example, without the requirement that Pennsylvania residents limit gatherings, Pennsylvania hospitals and healthcare resources risk being quickly overwhelmed. While decisive action has flattened the infection curve and avoided

⁴ Joel Achenbach and Laurie Meckler, *Shutdowns Prevented 60 Million Coronavirus Infections in the U.S., Study Finds*, Washington Post, June 8, 2020, available at <https://www.washingtonpost.com/health/2020/06/08/shutdowns-prevented-60-million-coronavirus-infections-us-study-finds/>.

the disastrous impacts seen by New York City and various European counties, the situation remains precarious; now is no time to relent.

2. The Ability to Quickly and Effectively Leverage the Commonwealth's Resources.

Initially, the challenge facing the Commonwealth was the mobilization of its public and private sector resources to respond to the health crisis. The Governor's Emergency Orders were critical to that effort.

Because the virus remains a threat, demobilization at this critical juncture through a premature end to the state of emergency is inappropriate and dangerous. For example, the Emergency Orders allowed the Commonwealth to sidestep the strictures of the Procurement Code and quickly purchase medical supplies for testing and treatment of COVID-19 from whatever supplier made them available. Indeed, PBPC recalls that even very recently, its usual contacts at government offices were unavailable because they were mobilized to – in their words – “search for PPE anywhere we can find it.”

The Emergency Orders also enabled the Commonwealth to change various rules in order to make more trained medical staff available, including:

- giving nurses broader prescribing authority;
- allowing certified nurse practitioners to practice with a broader range of doctors and beyond their scope of their specialty;

- permitting students about to graduate from registered nursing programs to move more quickly into medical practice;
- suspending continuing education requirements for nurse midwives;
- waiving requirements for out-of-state medical doctors and osteopaths to practice in Pennsylvania, allowing doctors with institutional licenses to practice at more than two locations, and allowing retired doctors to easily reactivate their licenses;
- allowing pharmacists to assist with COVID-19 testing and monitoring; and
- expanding access to telehealth from out-of-state healthcare providers, and allowing mental health and substance abuse providers to provide care through telehealth.

Revocation of the declaration of emergency would end all of these temporary regulations, reducing the supply of medical personnel in the Commonwealth. Revocation of the declaration of emergency would also end the Pennsylvania Emergency Management Agency's legal authority to assign other agencies to respond to the disaster. For example, the National Guard would not be allowed to support long-term care facilities.

Ending the declaration of emergency prematurely would undermine the capacity of the Commonwealth's health system to provide necessary and emergency treatment now and, even more importantly, if the number of COVID-19 cases begins to rise again. The threat of resurgence also means that the

Commonwealth must continue to have the capacity to leverage resources to provide healthcare to those who need it, and to test as many individuals as possible and trace the contacts of those who test positive.

3. The Ongoing Effort to Minimize Economic Distress and Safely Achieve a Full Recovery.

The third problem posed by the COVID-19 epidemic was to minimize the consequences to Pennsylvanians and the Commonwealth's economy of the business closures made necessary by the effort to contain the disease. The goal here was to limit the economic distress of Pennsylvania families and businesses and, by doing so, allow an economic recovery to begin as quickly as possible once the Commonwealth could safely reopen.

The Governor's Emergency Orders and laws passed to date gave the Governor powers that have enabled the Commonwealth to take concrete actions that have reduced economic suffering. These include:

- Changes to unemployment compensation eligibility requirements that waived the one week waiting period, expanded access to unemployment compensation, and gave employers relief from charges associated with their employees losing their jobs. The impact of expanded unemployment on the Pennsylvania economy should not be underestimated – it is critical to keeping businesses that are open alive. Even a small change, such as giving one million unemployed Pennsylvanians an additional week of the federal government's \$600 bonus unemployment, adds \$600 million to consumption in the Commonwealth.

- The deadline for applying for property tax relief has been extended from July 1 to December 31, while rebates are being distributed early.
- The Commonwealth applied for U.S. Department of Agriculture waivers to provide more meals for children eligible for school lunch programs.
- Under the disaster declaration, the Department of Human Services exempted families from ChildCareWorks copays if they were not working or utilizing care while maintaining their enrolled status, and it allowed non-attendance to not count against the number of allowed “missed days” of care. Child care providers that have been closed due to COVID are still being paid under rules promulgated pursuant to the declaration of emergency. This will allow them to stay in business after the emergency ends.

The declaration of emergency has given the Commonwealth authority to issue emergency allotments for SNAP, providing over \$100 million in 100 percent federally funded SNAP payments per month.

Waivers issued by DHS have simplified procedures for securing various social benefits by eliminating face-to-face interviews and extending timeframes to complete paperwork. This has kept vital benefits flowing to people who need them while protecting recipients and staff from exposure to COVID-19.

The declaration of emergency has also made the Commonwealth eligible for Federal disaster relief to cover costs related to the pandemic. A premature end to the emergency would risk additional Federal aid, and any loss would not only

create immediate costs, but could potentially set back the economic recovery Pennsylvanians desperately need.

Changes in state regulations and benefits allowed by declaration of emergency and Federal aid have reduced the economic distress of millions of Pennsylvanians. Notably, this also aids in ongoing economic recovery. The various benefits provided families during the last few months have allowed them to keep purchasing some goods and services from the businesses that remain open. That has kept the Commonwealth from falling even deeper into a recession. Moreover, by preventing them from falling deeper into an economic crisis, the benefits received by families will help them more quickly resume their normal level of consumption as businesses reopen, spurring an economic recovery as Pennsylvanians move forward.

To ensure that the suffering of low- and moderate-income families is minimized, and Pennsylvania's economic recovery is as vigorous as possible, the Commonwealth must keep in place the regulations and processes implemented by the Governor and retain its eligibility for federal disaster relief.

4. The Continuing Threat.

Despite the stresses of moving quickly in highly uncertain conditions and some inevitable setbacks, the Commonwealth has so far met these three challenges. Death and suffering have been severe but far less than they might have been. The

Commonwealth's healthcare system has been stressed, but not overwhelmed. The economy has suffered, but actions taken by the Governor and the courts have protected many people's homes, warded off severe deprivation, and kept parts of the Pennsylvania economy alive.

But the threat of COVID-19 has not ended. As can be seen from the striking rise in COVID-19 cases and deaths in states that have reopened too soon, caseloads could rise again.⁵ The virus remains among us, and the vast majority of Pennsylvanians are not immune to it. Indeed, there is uncertainty about whether infection will provide immunity.⁶ Many epidemiologists predict a second wave of the disease later in the year and, if an effective vaccine is not developed early in 2021, perhaps third and fourth waves.⁷ Accordingly, the Commonwealth must not let its guard down too soon. At this critical moment, revoking the emergency declaration could lead to delays in action that could cost lives.

⁵ See *Coronavirus in the U.S.: Latest Map and Case Count*, New York Times, available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

⁶ Preetika Rana, *Why Fully Recovering from Coronavirus Might Take Longer Than Expected*, Wall Street Journal, May 13, 2020, available at https://www.wsj.com/articles/can-you-get-covid-19-twice-11589388593?mod=e2fb&fbclid=IwAR0TXjZpBgoKvV70DDbs01Za_tYLo8uVY20QLg5MgVwixh6-WGzVxfCdrj4.

⁷ Richard McGahe, *The Economy's Reopening Could Cause a Second Covid Wave, Models Show*, Forbes, June 9, 2020, available at <https://www.forbes.com/sites/richardmccahey/2020/06/09/the-economy-is-reopening-heres-what-the-models-say-comes-next/#6690c0bb705f>.

CONCLUSION

The Governor's Emergency Orders provide greatly needed protections from a healthcare crisis in Pennsylvania. Mandamus relief in the form of ending the COVID-19 state of emergency would endanger the health and welfare of all Pennsylvanians, and particularly Pennsylvania's low- and moderate-income citizens. Aside from failing to appreciate the separation of powers concerns that are essential in times of crisis, Respondents ignore the serious negative implications their requested relief would have, namely, eliminating the very public health and other emergency protections are stemming the tide of COVID-19.

In slowly but steadily reducing the burden of the declaration of emergency on Pennsylvania businesses and families, the Governor has acted in the best interest of Pennsylvanians. He needs the continued flexibility provided by the Emergency Orders to meet immediate needs and respond quickly to new challenges. The immediate end to the emergency declared by the Governor would threaten the well-being of Pennsylvanians now and into the future.

We live in the circumstance imagined by a Constitution that creates a single executive who can move, as the Federalist Papers put it in describing the Presidency, "with dispatch" when necessary. And it is the circumstance imagined in the laws under which the Governor declared an emergency that allow the General Assembly to end a state of emergency against the will of the Governor, but

only by overriding his veto of a Concurrent Resolution. This longstanding process works, and this Court should not depart from it.

For all of the reasons set forth above and by Petitioner, this Court should grant Petitioner's Application.

Respectfully submitted,

Dated: June 18, 2020

SAUL EWING ARNSTEIN & LEHR LLP

/s/ John F. Stoviak

John F. Stoviak (PA I.D. No. 23471)

Amy S. Kline (PA I.D. No. 84690)

Albert F. Moran (PA I.D. No. 318683)

1500 Market Street

Centre Square West, 38th Floor

Philadelphia, PA 19102

(215) 972-1095

John.Stoviak@saul.com

Amy.Kline@saul.com

Albert.Moran@saul.com

Counsel for Amici Curiae

The Keystone Research Center and

The Pennsylvania Budget and Policy Center

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains 4,539 words within the meaning of Pa. R. App. P. 531. In making this certificate, I have relied on the word count of the word-processing system used to prepare the Brief.

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

Dated: June 18, 2020

/s/ John F. Stoviak
John F. Stoviak, Esquire
PA I.D. No. 23471

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2020, the undersigned served two copies of the foregoing Application and accompanying *Amici Curiae* Brief upon the following counsel of record and other required parties by electronic service and via United States First-Class Mail:

J. Bart DeLone, Esq.
Chief Deputy Attorney General
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120

Counsel for Petitioner

Matthew H. Haverstick, Esq.
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
mhaverstick@kleinbard.com

Counsel for Respondents

Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Ave.
Suite 2100
P.O. Box 69185
Harrisburg, PA 17106
CommCourtFiling@pacourts.us

/s/ John F. Stoviak
John F. Stoviak, Esquire
PA I.D. No. 23471

Date: June 18, 2020