

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

**PRIVATE PROPERTIES, *et al.*,**

**Petitioners**

**v.**

**TOM WOLF, Governor of the  
Commonwealth of Pennsylvania, JOSH  
SHAPIRO, Attorney General of  
Commonwealth of Pennsylvania,**

**Respondents**

**No. 90 MM 2020**

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**RESPONDENTS' BRIEF**

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## INTRODUCTION

As the Commonwealth continues to respond to the ravages of COVID-19, the worst public health disaster since 1918, which in turn has caused the worst economic disaster since 1929, Governor Wolf recognized that both the public health and economic effects of the pandemic would be far worse if a mass of Pennsylvanians suddenly became homeless. To prevent this, on May 7, 2020, the Governor issued an executive order pursuant to his authority under the Emergency Management Services Code, temporarily suspending the issuance of new eviction and foreclosure notices by landlords and lenders for 60 days.

In response to this order, a group of landlords filed the instant petition for extraordinary relief asking this Court to invalidate the Governor's Order. Despite the economic distress caused by the pandemic and the inherent danger of the pandemic itself, the Landlords seek the ability to force people from their homes without delay. The Landlords' argument that the Governor lacks authority under the Commonwealth's police power to issue his Order is directly contrary to this Court's very recent ruling in *Friends of Danny DeVito v. Wolf*, \_\_ A.3d \_\_\_, 2020 WL 1847100 (Pa. April, 13, 2020). Their arguments that this Order somehow violates separation of powers and substantive due process are equally baseless. The petition should be denied.

## **STATEMENT OF THE QUESTIONS INVOLVED**

Pursuant to this Court's May 27, 2020 Order, the questions involved are:

- I. Whether the Executive Order of May 7, 2020, as amended on May 21, 2020, violates the Separation of Powers Doctrine?
  
- II. Whether the Executive Order of May 7, 2020, as amended on May 21, 2020, violates the property owners' right to Substantive Due Process?

## STATEMENT OF THE CASE

### **Procedural History.**

Petitioners filed the instant Petition for Extraordinary Relief pursuant to the Court's King's Bench jurisdiction challenging the Governor's Order. Petitioners are landlords and a landlord association (collectively the Landlords). Respondents are Governor Tom Wolf and Attorney General Josh Shapiro (collectively Commonwealth Officials). The Commonwealth Officials filed a response, agreeing that King's Bench jurisdiction was appropriate, but that the Governor's Order did not violate constitutional protections. The Landlords filed a reply brief.

This Court granted King's Bench jurisdiction on May 27, 2020, and ordered the parties to file supplemental briefing under an expediated schedule. The Commonwealth Officials respectfully submit this brief in opposition to the Landlords' petition.

### **Statement of Facts**

What began as two presumptive positive cases of COVID-19 in Pennsylvania on March 6, 2020, has grown to 73,405 cases and 5,742 deaths in little less than three months.<sup>1</sup> Throughout the United States, there have been 1.8 million confirmed

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<sup>1</sup> "COVID-19 Data for Pennsylvania," Pa. Dept. of Health, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last visited 6/3/20).

cases of COVID-19, and more than 106,202 people have died from this pandemic so far.<sup>2</sup> Models project that even with enforced social distancing and a carefully structured phased reopening, the total United States COVID-19 deaths may exceed 115,000 by June 20, 2020.<sup>3</sup>

Because COVID-19 spreads primarily 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.<sup>4</sup> Given this consensus, anything that presents the opportunity for personal contact and interactions can transmit the virus, and with it, sickness and death.

On March 6, 2020, Governor Wolf signed an emergency disaster declaration pursuant to the Emergency Management Services Code (Emergency Code), 35

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<sup>2</sup> “Cases in the U.S.,” Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?fbclid=IwAR2YGdSiJ1zk6mktakCLsCqjU-tEq9XsvLMK2fGG0vmHPIsAdMgl8C13cOU> (last visited 6/3/20)

<sup>3</sup> “Interpretation of Cumulative Death Forecasts,” Center for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us.html> (last visited 05/21/20).

<sup>4</sup> “Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others,” Center for Disease Control and Prevention, [https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fprevention.html](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fprevention.html) (last visited 5/2/20).

Pa.C.S. § 7101, *et seq.* To protect the lives and health of millions of Pennsylvanians, on March 19, 2020, the Governor issued an Executive Order temporarily closing physical locations of non-life sustaining businesses within the Commonwealth.

This Court likewise moved quickly, closing physical court locations, extending filing deadlines, and, pertinent to this action, suspending the eviction, ejectment, or displacement of individuals from a residence. On April 28, 2020, this Court extended that suspension of dispossession until May 11, 2020. Landlords’ Br., Appendix B at p. 12. Notably, however, this Court took “judicial notice that certain filings, charges, and acts relating to dispossession will remain subject to temporary restraints on account of other directives, including provisions of the federal Coronavirus Aid, Relief, and Economic Security Act. *See* 15 U.S.C. § 9058.” *Ibid.*

On May 7, 2020, the Governor issued an executive order (the Governor’s Order) suspending for 60 days certain preconditions for foreclosure and eviction actions under the Loan Interest Protection Law, 41 P.S. § 101, *et seq.*, the Homeowners Emergency Assistance Act, 35 P.S. § 1680.41, *et seq.*, the Landlord and Tenant Act of 1951, 68 P.S. § 250.101, *et seq.*, and the Manufactured Home Community Rights Act, 68 P.S. § 398.1 *et seq.* May 7, 2020 Order.<sup>5</sup>

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<sup>5</sup> A copy of the May 7, 2020 Order is attached as Appendix C to Landlords’ brief. A copy can also be found online at <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200507-TWW-dispossession-of-property-order.pdf>.

The Governor issued this Order pursuant to his authority under the Emergency Code, 35 Pa.C.S. § 7302, after concluding that “the movement and/or displacement of individuals residing in Pennsylvania from their homes or residences during the current stage of the disaster emergency constitutes a public health danger to the Commonwealth in the form of unnecessary movement that increases the risk of community spread of COVID-19[.]” May 7, 2020 Order. The Governor also found that this Order was necessary because “certain filings . . . relating to the dispossession of property remain subject to temporary restraints on account of other directives, including the . . . Coronavirus Aid, Relief and Economic Security Act (CARES Act, P.L. 116-136; *See also* 15 U.S.C. § 9058), or Orders issued by local courts . . . .” *Ibid.* “[T]he CARES Act and other existing federal law and rules involving consumer protections related to single-family mortgages and certain multifamily dwellings creates confusion and uncertainty for the residents of the Commonwealth as to who has eviction and foreclosure protections related to COVID-19 remediations[.]” *Ibid.*

On May 21, 2020, the Governor amended his Executive Order to specify that the Order only applies to evictions and foreclosures due to lack of payment or because a tenant has overstayed a lease. May 21, 2020 Order.<sup>6</sup>

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<sup>6</sup> A copy of the May 21, 2020 Order was *not* attached to the Landlords’ brief. A copy can also be found online at <https://www.governor.pa.gov/wp->

The COVID-19 pandemic, in addition to being a public health disaster, has had a disastrous effect on the national economy. Unemployment currently stands at 23.9%.<sup>7</sup> The Commonwealth is in the process of a phased reopening,<sup>8</sup> crafted in partnership with Carnegie Mellon University and using the Federal government’s Opening Up America Guidelines.<sup>9</sup> The Landlords seek to upend the Commonwealth’s carefully planned process for reopening by prematurely removing protections that keep Pennsylvanians in their homes. This will force many economically insecure Pennsylvanians to relocate and possibly become homeless. A sudden increase in migration and homelessness will jeopardize the decrease in COVID-19 cases Pennsylvanians have fought hard to achieve, placing the health and lives of millions of Pennsylvanians at additional risk and prolonging the pandemic’s effects on our economy.

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<content/uploads/2020/05/20200521-TWW-amendment-to-dispossession-of-property-order.pdf>.

<sup>7</sup> Lance Lambert, “Over 40 million Americans have filed for unemployment during the pandemic—real jobless rate over 23.9%,” Fortune.com <https://fortune.com/2020/05/28/us-unemployment-rate-numbers-claims-this-week-total-job-losses-may-28-2020-benefits-claims-job-losses/> (5/28/20)

<sup>8</sup> “Responding to COVID-19 in Pennsylvania,” Commonwealth of Pennsylvania Website, <https://www.pa.gov/guides/responding-to-covid-19/#PhasedReopening> (last visited 5/2/20).

<sup>9</sup> “Process to Reopen Pennsylvania,” Governor of Pennsylvania’s Website, <https://www.governor.pa.gov/process-to-reopen-pennsylvania/> (last visited 5/2/20).

## SUMMARY OF ARGUMENT

The Landlords' challenges to the Governor's Order ignore the language of the Emergency Code and this Court's holding in *Friends of Danny DeVito*. Subsection 7302 of the Emergency Code explicitly grants the Governor the authority to temporarily modify any requirement of a statute necessary to provide temporary housing for disaster victims. 35 Pa.C.S. § 7302(a)(3). That is precisely what the Governor has done here. As this Court recognized in *Friends of Danny DeVito*, given the nature of this pandemic, the entire Commonwealth is within the disaster area. And the Governor's broad authority to issue executive orders under the Emergency Code is firmly grounded in the Commonwealth's police power. Much of the Landlords' challenge, though couched in the law, amounts to a public policy disagreement with elected officials. This Court was right to reject such policy disputes in *Friends of Danny DeVito* and should do so here.

The Governor's Order does not violate the separation of powers. The General Assembly specifically authorized the Governor's actions through the Emergency Code. The structure of the Landlord and Tenant Act remains unchanged; the Governor's Order only temporarily modifies the timeframe for initiating eviction proceedings in order to provide housing continuity for disaster victims.

Similarly, the Governor's Order does not deny access to or regulate the operation of courts. The Landlord and Tenant Act already grants tenants a certain

number of days to leave a property before the landlord may file suit. Such prerequisites to suit do not impinge upon the judiciary. They are, in fact, replete throughout laws. The Governor's Order merely extends the notice timelines in that Act, staying the ability of landlords from initiating new eviction proceedings for 60 days. The Order directs landlords, not the courts. By its terms, the Order does not affect any eviction proceedings already in progress. The Order also does not conflict with this Court's April 28, 2020 Order, which explicitly recognized that evictions might still remain subject to temporary restraints.

Finally, the Governor's Order does not implicate substantive due process. The Landlords have not been foreclosed from dispossessing delinquent tenants; they are only required to wait for a period of time before moving forward. Such a short-term, temporary delay in the exercise of the Landlords' ability to commence legal proceedings against some tenants, in the midst of a pandemic, is substantially related to an important governmental interest and satisfies intermediate scrutiny. The Order is also consistent with property rights, which is reviewed under rational basis. Whatever the potential impact the Order may have on the Landlords' economic self-interest, given the enormous public health and economic challenges confronting the Commonwealth, issuance of the Order was certainly rational.

The petition should be denied.

## ARGUMENT

### I. The Governor's Order Is Authorized by the Emergency Code.

When the Landlords were granted leave to file supplemental briefing, they had the opportunity to illuminate their legal claims. They did not. As a threshold matter, to the extent the Landlords present any developed argument with respect to the Governor's authority, that argument is directly contrary to this Court's decision in *Friends of Danny DeVito v. Wolf*, \_\_ A.3d \_\_\_, 2020 WL 1847100 (Pa. April, 13, 2020).

In that action, this Court held that the Emergency Code authorizes the Governor to combat the COVID-19 pandemic on behalf of the Commonwealth. *Id.* at \*12-13. This Court confirmed that the Governor's expansive emergency management powers included the specific ability to "issue and rescind executive orders, proclamations, and regulations which shall have the force and effect of law." *Id.* at \*9 (quoting 35 Pa.C.S. § 7301(b)). That the Emergency Code expressly authorizes the Governor to "[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business . . . if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency[.]" *Ibid.* (quoting 35 Pa.C.S. § 7301(f)).

Of particular relevance here, the Emergency Code specifically grants the Governor the authority to “temporarily suspend or modify for not to exceed 60 days any . . . requirement of statute or regulation within this Commonwealth when by proclamation the Governor deems the suspension or modification essential to provide temporary housing for disaster victims.” 35 Pa.C.S. § 7302(a)(3). That is exactly what the Governor did when he issued the order in question.

Under the relevant statute at issue here, the Landlord and Tenant Act of 1951, 68 P.S. § 250.101, *et seq.*, notice must be provided to tenants before they may be evicted from their homes.<sup>10</sup> In his Order, the Governor stayed issuance of these notices for 60 days, temporarily extending the notice requirement for the initiation of evictions. The Governor determined that this extension was necessary because “the movement and/or displacement of individuals residing in Pennsylvania from their homes or residences during the current stage of the disaster emergency constitutes a public health danger to the Commonwealth in the form of unnecessary movement that increases the risk of community spread of COVID-19[.]” Governor’s Order, at p. 2.

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<sup>10</sup> The Governor’s Order modifies the notice timelines of four statutes: the Landlord and Tenant Act of 1951, 68 P.S. § 250.101, *et seq.*, the Loan Interest Protection Law, 41 P.S. § 101, *et seq.*, the Homeowners Emergency Assistance Act, 35 P.S. § 1680.41, *et seq.*, and the Manufactured Home Community Rights Act, 68 P.S. § 398.1, *et seq.* The Landlords only seek an injunction as to the first statute. Landlords’ Br., at 44.

The Landlords make the remarkable claim that the Governor’s Order is neither grounded in the Commonwealth’s police powers nor any specific law. Landlords’ Br., at 21. They further maintain that, to the extent the Governor has authority to suspend statutes, that authority is limited to “regulatory” statutes only. Landlords’ Br., at 13. The Landlords are wrong, as they ignore the plain text of the Emergency Code granting the Governor authority to stay or modify “*any . . . requirement of statute or regulation within this Commonwealth . . . to provide temporary housing for disaster victims.*” 35 Pa.C.S. § 7302(a)(3) (emphasis added). The statutory language makes explicitly clear that the Governor’s powers to modify statutes to prevent homelessness are not limited to regulatory statutes over Commonwealth agencies.

As to the Governor’s authority being grounded in the Commonwealth’s police powers, the Landlords also ignore this Court’s holding in *Friends of Danny DeVito*. In that case, this Court emphasized that “[t]he broad powers granted to the Governor in the Emergency Code are firmly grounded in the Commonwealth’s police power . . . ‘to promote the public health, morals or safety and the general well-being of the community.’” *Id.* at \*10 (quoting *Pa. Restaurant & Lodging Ass’n v. City of Pittsburgh*, 211 A.3d 810, 817 (Pa. 2019)). That the police power is one of the “most essential powers of the government” and one of its least limitable. *Ibid.* And that “[t]he protection of the lives and health of millions of Pennsylvania residents is the

*sine qua non* of a proper exercise of police power.” *Id.* at \*14. The Landlords’ suggestion that the Governor’s authority does not arise out of the Commonwealth’s police powers is directly contrary to this Court’s explicit determination.

Next, the Landlords contend that the Governor’s Order is invalid as it extends the relevant statutory provisions for a period of time beyond the Governor’s original declaration of a disaster emergency. The Landlords conflate Subsection 7301(c), which permits the Governor to declare a disaster emergency for 90 days (subject to renewal thereafter), 35 Pa.C.S. § 7301(c), with Subsection 7302(a)(3), which permits the Governor to suspend a statute or regulation in order to provide temporary housing for disaster victims, 35 Pa.C.S. § 7302(a)(3). There is no requirement in the Emergency Code that the time period of a disaster emergency, and the time period in which the Governor suspends a statute, must begin on the same day or overlap entirely. The Governor can act to provide housing for disaster victims at any time during a declared disaster emergency, thereby starting the 60-day clock under Subsection 7302(a)(c). In arguing otherwise, the Landlords ask this Court to engraft a requirement onto Subsection 7302(a)(3) that the General Assembly did not see fit to include.

That the General Assembly did not include such a requirement makes perfect sense. If a flood or a fire destroys a community over the course of days or even weeks, the initiation of a disaster emergency may be separated in time from the

subsequent impact on housing. That impact can last for weeks or months after the emergency has abated.

Further, the Landlords' brief is replete with public policy disputes, rather than legal challenges to the Governor's Order: they maintain that the Governor's Order wrongly distinguishes between evictions for monetary and non-monetary evictions, Landlords' Br., at 16, 37-38; they assert that the Governor's Order *should* distinguish between commercial, industrial, and residential property owners, Landlords' Br., at 16, 37-38; they admonish the Governor for invoking his authority under Subsection 7302(a)(c) when the Commonwealth is in the process of reopening parts of its economy, Landlords' Br., at 33; and they suggest that the Commonwealth itself should build temporary housing in the midst of a pandemic, Landlords' Br., at 31.

That the Landlords would have written the Executive Order differently is not a legal basis for invalidating the Governor's Order. Rather, the Landlords' argument in this regard presents a public policy dispute over the Governor's policy decisions. "Whether a statute is wise or whether it is the best means to achieve the desired result are matters left to the legislature, and not the courts." *Khan v. State Bd. of Auctioneer Examiners*, 842 A.2d 936, 947 (Pa. 2004). As this Court correctly determined in *Friends of Danny DeVito*, "[i]t is not for this Court, but rather for the Governor pursuant to the powers conferred upon him by [the legislature through] the Emergency Code to make determinations as to what businesses, or types of

businesses, are properly placed in either category.” *Id.* at \*24. These types of policy arguments were correctly rejected in *Friends of Danny DeVito*. They should be rejected here.

In issuing the Order, the Governor did exactly what the General Assembly authorized him to do during a disaster emergency—temporarily suspend certain statutory provisions to provide housing for disaster victims and prevent mass homelessness during a global pandemic.

## **II. The Governor’s Order Does Not Implicate the Separation of Powers.**

Far from the Governor’s Order implicating the Separation of Powers, it is an example of how the three branches of government properly function in concert. The General Assembly enacted the Emergency Code granting the Governor specific authority to temporarily modify statutes during a disaster. And the courts continue to process cases pursuant to those modified statutes. As we now discuss, the Landlords’ separation of powers argument is without merit.

### **A. The Governor’s Order does not encroach upon legislative prerogatives.**

The Landlords maintain that the Executive Order is tantamount to an amendment to the Landlord and Tenant Act and therefore violates separation of powers principles by encroaching upon legislative functions. They are wrong. The General Assembly specifically authorized the Governor’s actions through the Emergency Code. Further, the structure of the statute at issue remains unchanged.

The Governor's Order simply modifies the timeframe for initiating eviction proceedings to provide housing continuity for disaster victims.

Citing *Markham v. Wolf*, 190 A.3d 1175 (Pa. 2018), the Landlords also distort the three categories of executive orders to include “*interpretation* of statutory or other law.” Landlords’ Br., at 18 (emphasis added). This is not what *Markham* states and this argument wholly ignores this Court’s holding in *Friends of Danny DeVito*.

Without adopting the tripartite classification created by the Commonwealth Court in *Shapp v. Butera*, 348 A.2d 910 (Pa. Cmwlth. 1975), this Court in *Markham* nevertheless accepted *arguendo* that executive orders could be identified as “(1) formal or ceremonial orders, usually issued as proclamations; (2) directives to subordinate executive agency officials or employees; and (3) those that *implement* existing constitutional or statutory law.” *Markham*, 190 A.3d at 1183 (emphasis added). Under the *Shapp* construct, “only the third category of executive orders—those *implementing* existing constitutional or statutory law—are legally enforceable.” *Ibid.* (emphasis added).

The Governor's Order clearly falls within this third category, as it was issued under authority explicitly granted to the Governor by Subsection 7302 of the Emergency Code. This Court in *Friends of Danny DeVito* determined that “[t]he Emergency Code specifically recognizes that under its auspices, the Governor has the authority to issue executive orders and proclamations which shall have the full

force of law.” *Id.* at \*15. And “specifically and expressly authorizes the Governor to declare a disaster emergency and thereafter to control the ‘ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein.” *Ibid.* (quoting 35 Pa.C.S. § 7301(f)(7)). This Court further noted that “any location . . . where two or more people can congregate is within the disaster area.” *Id.* at \*13. Thus, any resident expelled from their home during this global pandemic is a disaster victim, and the Governor acted well within his authority under the Subsection 7302(a)(3) to protect such victims by temporarily suspending new eviction notices.

For the same reasons this Court rejected the separation of powers argument in *Friends of Danny DeVito*, it should do so here.

**B. The Governor’s Order does not deny access to or regulate the operation of courts.**

The Landlords spend a large portion of their brief restating a principle about which there is no dispute: that this Court possesses “the supreme judicial power of the Commonwealth[.]” Pa. CONST. art. V, § 2. The Landlords spend a similar portion of their brief attempting by brute force to suggest that the Governor’s Order conflicts with that principle. It does not.

Contrary to the Landlords’ repeated conclusory statements, the Governor’s Order does *not* deny access to courts<sup>11</sup> or regulate the operation of courts.<sup>12</sup> It also does not interfere with any judicial proceedings already in process.<sup>13</sup> As discussed above in detail, the Governor’s Order merely temporarily suspends the ability of landlords to issue eviction notices, a power explicitly granted the Governor by the Emergency Code.

Under Subsection 501 of the Landlord and Tenant Act, a landlord who wishes to evict a tenant must first give proper written notice to the tenant of their intention to do so. 68 P.S. § 250.501. The Act defines how much time a landlord must give tenants to leave: 15 days for tenants under a lease of less than a year; 30 days under a lease for more than a year; and 10 days if the tenant fails to pay rent. 68 P.S. § 250.501(b). Subsection 501 “establishes the essential prerequisite that a landlord seeking to repossess real property provide the tenant with a notice to quit.” *Assouline v. Reynolds*, 219 A.3d 1131, 1138 (Pa. 2019); *see also, Williams v. Guzzardi*, 875 F.2d 46, 53 n.13 (3d Cir. 1989) (notice requirement is “a prerequisite to invoking the judicial procedures of the Act”).

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<sup>11</sup> Landlords’ Br., at 9, 15-16, 18, 20, 23, 25, 30-31, 33, 37-38, 41, 44.

<sup>12</sup> Landlords’ Br., at 22, 34, 39, 41, 43.

<sup>13</sup> Landlords’ Br., at 15-16, 39-40, 43.

In his Order, the Governor only stayed the Landlords' ability to issue these notices for 60 days, temporarily suspending the initiation of new evictions under this law:

Commencing on May 11, 2020, *the notice requirement* mandated by the Landlord and Tenant Act of 1951 [(Act)]. . . [is] stayed for 60 days, thereby tolling the ability to *commence* the timelines necessary for the *initiation* of eviction proceedings. All eviction proceedings requiring compliance with the [Act] . . . cannot *commence* for 60 days until July 10, 2020. All eviction timelines must be computed with a start date of July 10, 2020, at which point any previously delivered . . . notices will be deemed delivered and any eviction proceedings may *commence*.

Governor's Order, § 2 (emphasis added). Thus, under its plain language, the Governor's Order does not interfere with any judicial proceedings already in process. The Order controls the actions of landlords, not courts.

The Governor took this action because "the movement and/or displacement of individuals residing in Pennsylvania from their homes . . . during the current stage of the disaster emergency constitutes a public health danger to the Commonwealth in the form of unnecessary movement that increases the risk of community spread of COVID-19[.]" Governor's Order, p. 2. The Governor's modification of a statutory notice requirement, not to exceed 60 days, after deeming such modification essential

to provide temporary housing for disaster victims, is exactly the authority granted to him by the Emergency Code. 35 Pa.C.S. § 7302(a)(3).<sup>14</sup>

As discussed above, the Governor’s Order does not dictate what a court must do, but rather what a landlord must do before filing suit. Such prerequisites to suit are common in our law. For example, the Public Works Contractors’ Bond Law of 1967 requires a 90-day waiting period before a supplier may sue a general contractor for failure to pay. *See* 8 P.S. § 194(a); *Centre Concrete Co. v. AGI*, 559 A.2d 516 (Pa. 1989). Prior to filing a lawsuit under Title VII of the Civil Rights Act of 1964, a plaintiff must file a charge of discrimination with the Equal Employment

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<sup>14</sup> The Landlords’ reliance on *Zauflik v. Pennsbury Sch. Dist.*, 72 A.3d 773 (Pa. Cmwlth. 2013), is misplaced. *First*, it is not a case about the regulation of the practice of law, as claimed by the Landlords. Landlords’ Br., at 22. That case involved a separation of powers challenge to the statutory cap of the Tort Claims Act, which the petitioner argued amounted to “a legislative invasion of the judiciary’s power of remittitur.” *Id.* at 785. *Second*, far from supporting the Landlords’ argument, this case does the exact opposite. The Commonwealth Court determined that placing a statutory cap on damages did *not* intrude upon the judiciary, as the General Assembly had constitutional authority to establish such caps. *Id.* at 786. This Court affirmed that decision. *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1129-30 (Pa. 2014).

The Landlords’ reliance on *Forester v. Hansen*, 901 A.2d 548 (Pa. Super. 2006), is equally perplexing. Landlords’ Br., at 35. That Superior Court cases did not squarely address separation of powers at all, except noting in dicta in a footnote that the Commonwealth Court had previously struck a venue statute under the separation of powers doctrine. 901 A.2d at 552 n.3. The Superior Court, however, further noted that it was “not bound by any decision of the Commonwealth Court” and applied the venue statute regardless. *Id.* More to the point, a statute controlling venue is not equivalent to the temporary extension of the eviction notice timeline during a disaster. The former controls the actions of the court; the latter does not.

Opportunity Commission (EEOC) and receive a right to sue letter. *See* 42 U.S.C. § 2000e-5(e), (f)(1); *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1846 (2019). Likewise, for Pennsylvania Human Relations Act (PHRA) claims, the Pennsylvania Human Relations Commission (PHRC) has “exclusive jurisdiction” for one year to investigate or conciliate the matter, and only if the one-year period expires or the PHRC dismisses the charges may the complainant file suit. *See* 43 Pa.C.S. § 962(c)(1); *Clay v. Advanced Computer Applications*, 559 A.2d 917, 919 (Pa. 1989).

The Landlord and Tenant Act itself requires that landlords wait a certain number of days after serving notice before they may initiate eviction proceedings. 68 P.S. § 250.501(b). Under the Landlords’ theory, all of these statutory preconditions to suit would constitute an invalid intrusion upon the operations of the courts. But they cite to no case holding that a precondition to suit violates the separation of powers. And for good reason; not only does no such case exist, but the law is to the contrary.

As explained by this Court in *Parker v. Children’s Hospital*, 394 A.2d 932, 936 (Pa. 1978), “a requirement that the claimant must first seek redress through a statutorily created administrative remedy before seeking relief in the courts does not usurp the powers vested in the courts under Article V where that enactment provides for an appeal to the courts *De novo*.” This Court went on to state, “[a]s a corollary it also follows that the powers vested in the chief executive officer to implement the

administrative process does not represent an improper delegation of judicial functions to a non-judicial officer.” *Ibid.* Likewise here, the Governor’s Order only extends the eviction notice timelines in the Landlord and Tenant Act to combat a public health emergency—powers explicitly granted to him by the Emergency Code.

The Landlords make the claim that the Governor’s Order prohibits evictions where the tenant has waived the notice requirement. Landlords’ Br., at 15, 38-39, 43. This is incorrect. Because the Order only extends the notice timeline, it does not impact evictions where the tenant has waived his or her right to receive a notice. *See* 68 P.S. § 250.501(e). Again, the Order does not attempt to regulate the operations of the courts.

Finally, the Governor’s Order does not conflict with this Court’s April 28, 2020 order. In that order, this Court explicitly took “judicial notice that certain filings, charges, and acts relating to dispossession will remain subject to *temporary restraints on account of other directives*, including provisions of the federal Coronavirus Aid, Relief, and Economic Security Act. *See* 15 U.S.C. § 9058.” Appendix B at 12 (emphasis added). Accordingly, this Court recognized that the Governor, under the broad powers granted to him by the Emergency Code, may temporarily restrain dispossession. Far from conflicting, these two orders are in harmony.

In issuing the Order, the Governor did precisely what the Emergency Code authorized him to do during a disaster emergency—temporarily modify certain statutory provisions to provide housing for disaster victims and prevent mass homelessness during a global pandemic. The Governor’s Order does not foreclose bringing evictions; it merely extends the time of a statutory precondition to suit, after which landlords may commence eviction. None of these actions usurp the Court’s powers under Article V of the Pennsylvania Constitution.

### **III. The Governor’s Order Does Not Implicate Substantive Due Process.**

In the substantive due process section of their brief, the Landlords assert violations of two Pennsylvania constitutional provisions.<sup>15</sup> *First*, they contend that the Governor’s Order has deprived them of their right of access to the courts under Pa. CONST. art. I, § 11 (the remedies provision).<sup>16</sup> Landlords’ Br., at 25-26. *Second*, the Landlords contend that the Governor’s Order has deprived them of their right to

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<sup>15</sup> Like the litigants in *Hospital & Healthsystem Ass’n of Pa. v. Commonwealth*, 77 A.3d 587, 600 (Pa. 2013), the Landlords’ “present advocacy intermixes” two different constitutional concepts, which are analytically distinct.

<sup>16</sup> In pertinent part, Pa. CONST. art. I, § 11 provides that “All 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[.]”

acquire, possess, and protect “property” under Pa. CONST. art. I, § 1 (the vested rights provision).<sup>17</sup> Landlords’ Br., at 26-32. These points will be addressed in turn.

But first, the Landlords’ brief also includes extended, citation-heavy, but relatively unfocused arguments. They pluck language from decisions by this Court that have nothing to do with substantive due process principles.<sup>18</sup> In addition, they inexplicably insert a few off-point United States Supreme Court citations.<sup>19</sup> None of the extraneous citations assists this Court in reviewing the Governor’s Order. Therefore, those arguments warrant no further discussion.

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<sup>17</sup> Pa. CONST. art. I, § 1 provides that “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 protecting property and reputation, and of pursuing their own happiness.”

<sup>18</sup> See *Rothrock v. Rothrock Motor Sales, Inc.*, 883 A.2d 511 (Pa. 2003) (employee prevailed on wrongful discharge claim); *Commonwealth v. Burnsworth*, 669 A.2d 883 (Pa. 1995) (equal protection challenge to criminal sentencing statute rejected); *Pa. Northwestern Distributors, Inc. v. Zoning Hearing Bd. of Twp. of Moon*, 584 A.2d 1372 (Pa. 1991) (zoning ordinance resulted in unconstitutional taking); *In re: Martorano*, 346 A.2d 22 (Pa. 1975) (civil contempt proceeding against grand jury witness).

<sup>19</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003) (state statute criminalizing homosexual sodomy violated due process); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (conviction for violation of housing ordinance overturned because definition of “family” was inconsistent with federal substantive due process precedents); *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating age-based statutory distinction between male and female beer purchasers); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (inmates’ entitlement to procedural due process in prison disciplinary proceedings).

**A. The Governor’s Order does not deny access to courts.**

Because “the reach of the remedies clause” has been curtailed in the past, this Court has determined “that the right to a remedy is not a fundamental right.” *Yanakos v. UPMC*, 218 A.3d 1214, 1222 (Pa. 2019).<sup>20</sup> Thus, a statutory scheme (or other enactment) that allegedly infringes on this right is subject to intermediate scrutiny, which means “it must be substantially or closely related to an important governmental interest.” *Id.* at 1225.

What the Landlords challenge here is a temporary extension of the notice requirement for initiating evictions. The Landlords suggest that because of this temporary extension, the courts are not “open” to them, and they cannot secure a “remedy” to which they are entitled. As detailed above, there has been no denial of access here.

This Court addressed an analogous situation in *Sottlemeyer v. Sottlemeyer*, 329 A.2d 892 (Pa. 1974). Like this case, *Sottlemeyer* only involved a timing issue. There,

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<sup>20</sup> The Landlords quote *Ayala v. Philadelphia Bd. of Public Ed.*, 305 A.2d 877, 882 (Pa. 1973), where this Court observed that “[i]t is fundamental to our common law system that one may seek redress for every substantial wrong.” That comment, however, does not mean the right to seek redress trumps everything else. *Ayala* (which was not a substantive due process decision as such) abrogated governmental immunity, but immunity was legislatively restored a few years later. Since then, statutory limitations on the right to sue governmental parties have frequently been upheld. *See, e.g., Zauflik v. Pennsbury School Dist.*, 104 A.3d 1127-29 (Pa. 2014). Such rulings make sense precisely because, *inter alia*, the “right to a remedy” under Pa. CONST. art. I, § 11 is important but not fundamental.

without employing the term “intermediate scrutiny,” this Court upheld Pennsylvania’s one-year residency requirement for individuals seeking a divorce. *Sottlemeyer*, 329 A.2d at 901. If the fixed, one-year delay in being able to vindicate one’s right to dissolve a marriage (unquestionably a fundamental right) was constitutionally acceptable in that case, then the 60-day extension at issue here (impacting an important but not fundamental right) is certainly permissible.

Allowing the extension is closely related to the important governmental interest in keeping people in their homes to the greatest extent possible during the present pandemic. There can be no greater adverse effect on the public than the additional, unnecessary deaths of its members. Measured against the short-term delay in the Landlords’ ability to pursue their economic self-interest, the Governor’s Order furthering the manifestly important state interest of curtailing the spread of COVID-19 certainly satisfies intermediate scrutiny.

**B. The Governor’s Order is consistent with property rights.**

By its terms, Pa. CONST. art. I, § 1, the basis for the Landlords’ broader substantive due process argument, affords all people “indefeasible” property rights. On this score, the Landlords’ contentions draw upon a larger body of caselaw, but their bottom-line position is still unsustainable.

Less than three weeks ago, this Court had occasion to recap existing substantive due process precedents. *See Ladd v. Real Estate Commission*, --- A.3d -

-- , 2020 WL 2532285 (Pa. May 19, 2020). As explained therein, at \*8-10, the seminal case in this area was *Gambone v. Commonwealth*, 101 A.2d 634 (Pa. 1954), which held, in light of Pa. CONST. art. I, § 1, that a law restricting social and economic rights “must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained.” *Gambone*, 101 A.2d at 637.

Relying on *Gambone* (and other authorities), substantive due process law evolved further in *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003). *Nixon* elaborated on the scope of Pa. CONST. art. I, § 1, explaining that the constitutional right to possess property and pursue happiness encompasses a right to pursue a chosen occupation. *Nixon*, 839 A.2d at 288. In contrast to other rights, however (such as the rights to privacy, marry, or procreate), the right to engage in a particular occupation, though important, is *not* fundamental. *Id.* at 287-288.

More recently in *Germantown Cab Co. v. Philadelphia Parking Auth.*, 206 A.3d 1030, 1043 (Pa. 2019), this Court, citing *Nixon*, decided that a business owner’s property right to lawfully operate his or her taxicabs in Pennsylvania was also not fundamental. Accordingly, statutes which affect such property rights are to be reviewed under rational basis. *Ibid.*

*Ladd* confirms that the right to pursue one’s business interests “is not absolute and its exercise remains subject to the General Assembly’s police powers, which it

may exercise to preserve the public health, safety, and welfare.” 2020 WL 2532285 at \*8 (citing *Gambone*). By the same token, the Governor may exercise statutorily-conferred emergency powers when circumstances warrant, as they do now. See *Friends of Danny DeVito*, 2020 WL 1847100 at \*8.

Governmental actions that are alleged to violate substantive due process are subject to “means-end review.” *Ladd*, 2020 WL 2532285 at \*9 (citing *Nixon*, 839 A.2d at 286-87). That is to say, the reviewing court must weigh the right infringed upon against the interest sought to be achieved by the governmental action. *Ibid.* In so doing, the court will scrutinize “the relationship between the law (the means) and that interest (the end).” *Ibid.* Where, as here, the “right allegedly infringed” is not fundamental, rational basis review of the challenged action is required. *Ibid.*

Pennsylvania’s version of the applicable rational basis test has been expressed as follows:

[A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The question whether any particular statutory provision is so related to the public good and so reasonable in the means it prescribes as to justify the exercise of the police power, is one for the judgment, in the first instance, of the law-making branch of the government, but

its final determination is for the courts.

*Gambone*, 101 A.2d at 637. *Accord Khan*, 842 A.2d at 946 (quoting *Gambone*); *Ladd*, 2020 WL 2532285 at \*9 (same).

Contrary to the Landlords’ assertion, the arguably more rigorous intermediate scrutiny standard does not apply in this situation. Landlords’ Br., at 31. *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718 (Pa. 2003), and *Nat’l Land & Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1965), cited by the Landlords, do not say otherwise. Unlike this case, they concerned zoning ordinances. But *Realan Valley* confirms that such ordinances—like the Governor’s Order—are enacted “to protect or preserve the public health, safety, morality and welfare.” 838 A.2d at 727. If a zoning ordinance is challenged, a reviewing court must weigh both the “reasonableness” of the questioned restriction, and any resulting effect on the landowner. As a practical matter, that is comparable to the form of means-end review prescribed in *Ladd* and its substantive due process predecessors. Thus, the only question is whether the Governor’s Order was an appropriate and rational response to the COVID-19 pandemic. It was.

Given, as noted above, that the Governor’s Order certainly satisfies intermediate scrutiny, it necessarily and easily satisfies rational basis. “[I]t is undeniable that the police power may be constitutionally exercised even where it impairs certain property rights or requires that new costs or burdens be associated

with that property.” *McSwain v. Commonwealth*, 520 A.2d 527, 529 (Pa. Cmwlth. 1987). The Landlords’ short-term economic self-interest must yield to society’s interest in confronting the enormous public health and economic challenges facing the Commonwealth.

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

I hereby certify that this brief contains 6,708 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 response, via electronic service, on the following:

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