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IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

NO. 68 MM 2020

FRIENDS OF DANNY DEVITO, KATHY GREGORY, B&J LAUNDRY, LLC, BLUEBERRY HILL PUBLIC GOLF COURSE & LOUNGE, and CALEDONIA LAND COMPANY,

Petitioners

V.

TOM WOLF, GOVERNOR AND RACHEL LEVINE, SECRETARY OF PA. DEPARTMENT OFHEALTH,

Respondents

BRIEF ON BEHALF OF PETITONERS IN SUPPORT OF THEIR EMERGENCY APPLICATION FOR EXTRAORDINARY RELIEF

Marc A. Scaringi, Esquire
Supreme Court ID No. 88346
Brian C. Caffrey, Esquire
Supreme Court ID No. 42667
Attorneys for Petitioners
Scaringi Law
2000 Linglestown Road, Suite 106
Harrisburg, PA 17110
marc@scaringilaw.com
brian@scaringilaw.com
717-657-7770 (o)
717-657-7797 (f)

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(1) Statement of Jurisdiction

This Court has jurisdiction to hear this matter pursuant to its King's Bench authority as set forth in 42 Pa. Cons. Stat. § 502 and Pa.R.A.P. 3309 and its extraordinary jurisdiction pursuant to 42 Pa. Cons. Stat. § 726.

(2) Order or other Determination in Question

The Executive Order dated Thursday, March 19, 2020 issued by Pennsylvania Governor Thomas W. Wolf ordering the closure of the physical operations of all Pennsylvania businesses that are not life-sustaining (hereinafter "Order").

(3) Statement of Both the Scope of Review and the Standard of Review

The scope of review under King's Bench and extraordinary jurisdiction is plenary. The standard of review De Novo.

(4) Statement of the Questions Involved

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Suggested Answer: Yes

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Suggested Answer: No

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Suggested Answer: No

I. <u>Does the Order Violate the Pennsylvania and U.S. Constitutions</u>?

Suggested Answer: Yes

J. <u>Does the Waiver Process Violate the Pennsylvania and U.S. Constitutions</u>?

Suggested Answer: Yes

K. **<u>Does the Order Violate the Equal Protection Clause of the 14th Amendment to the United States Constitution</u>?**

Suggested Answer: Yes

L. <u>Does the Order Violate Petitioner Friends of Danny DeVito's Right to Assembly Protected by the U.S. Const. amend. 1, and Pa. Const. art. I, §§ 7, 20</u>.

Suggested Answer: Yes

(5) <u>Statement of the Case</u>

The Governor's Order compelled the closure of the physical operations of all Pennsylvania businesses that he deemed to be non-life-sustaining. The Governor determined which Pennsylvania businesses are "life-sustaining" and which are "non-life sustaining" and placed all Pennsylvania businesses into one of those two categories. The Governor placed all five of the Petitioners' businesses on the original list of non-life-sustaining businesses; as such all Petitioners were forced to close their physical operations and were banned from entering or using their physical operations under threat of criminal prosecution. Subsequently, the Governor moved two of the Petitioners to the life-sustaining list. The Governor established a waiver process for businesses to request relief from his Order by being re-categorized as life-sustaining so that they could re-open their physical operations. Two of the Petitioners filed the waiver application; neither has received

a response to date.[1] The Petitioners, through their Emergency Application for Extraordinary Relief filed on March 24, 2020, are challenging the Governor's statutory authority for the Order and claim the Order, the list and the waiver process violate the Petitioners' constitutional rights under the U.S. and Pennsylvania Constitutions.

(6) Summary of Argument

A. This Court Does Have the Authority under Either King's Bench or through Extraordinary Jurisdiction to Hear this Case and Grant the Requested Relief.

The Pennsylvania Constitution provides that the Supreme Court "shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth [and] shall have such jurisdiction as shall be provided by law." Pa. Const. art. V, § 2. The Judicial Code provides:

> The Supreme Court of Pennsylvania . . . shall be the highest court of this Commonwealth and in it shall be reposed the supreme judicial power of the Commonwealth.

42 Pa. Cons. Stat. § 501. The Code further provides:

> 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] Petitioner Blueberry Hill filed is waiver on March 23, 2020; Petitioner Friends of Danny DeVito filed its waiver on March 31, 2020.

(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. Cons. Stat. § 502.

In *Commonwealth v. Williams*, 634 Pa. 290 (2015), the issue was whether Governor Wolf exceeded his constitutional authority when he issued a temporary reprieve to a death-row inmate pending receipt of a report from the Pennsylvania Task Force and Advisory Committee on Capital Punishment. *Id.* at 293. The District Attorney of Philadelphia filed an Emergency Petition for Extraordinary Relief Under King's Bench Jurisdiction, requesting that the Court invoke either its King's Bench authority or its extraordinary jurisdiction pursuant to 42 Pa. Con. Stat. § 726 to determine whether the governor's reprieve violated Pa. Const. art. IV, § 9. *Id*. at 296. The Court rejected the proposition that the case before it was insulated from King's Bench review "because it involve[d] a constitutional challenge to the exercise of the executive reprieve power, rather than a challenge to an action taken by a lower tribunal or judge." *Id*. at 303. The Court stated that it had "never adopted such a narrow view of the King's Bench authority and we decline the invitation of the Governor . . . to do so in the instant case." *Id.* Governor Wolf had urged this Court in *Williams* to decline to exercise its King's Bench authority, claiming that that authority "encompasse[d] only the

superintendency of inferior judicial tribunals and officers, and not executive actions." *Id*. at 300. This Court observed, "King's Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law," adding that "[t]he exercise of King's Bench authority is not limited by prescribed forms of procedure or to action upon writs of a particular nature," and that the Court may "even exercise King's Bench powers over a matter where no dispute is pending in a lower court." *Id*. at 302. The Court concluded that it properly invoked King's Bench jurisdiction. *Id*. at 303.

This Court recently had occasion to elaborate in detail the scope and breadth of its King's Bench jurisdiction in *In re Bruno*, 627 Pa. 505 (2014). *Bruno* involved the suspension of Magisterial District Judge Mark A. Bruno. *Id.* at 627. The issue was whether this Court had the power to act and order the interim suspension of a sitting jurist charged with a felony for conduct while on the bench, and "particularly whether such authority exists given the formal disciplinary process available, as vested in the Judicial Conduct Board…and Court of Judicial Discipline." *Id.* at 515-16.

Bruno had filed a petition in this Court to vacate order to suspend him without pay. The Court requested briefing and argument on three constitutional

issues.[2] The Court traced the history of its King's Bench jurisdiction, and thoroughly discussed that jurisdiction as well as the Court's "extraordinary jurisdiction." The Court observed:

> In addition to its general powers of adjudication, supervision and administration, the Supreme Court also has "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."

Id. at 555. Additionally,

> Section 726 addresses the Court's extraordinary jurisdiction to take cognizance, sua sponte or upon petition of a party, of any matter pending before an inferior tribunal "involving an issue of immediate public importance."

Id. at 556 (citing 42 Pa. Cons. Stat. § 726). "Derived from the continuing authority at King's Bench, the Court possesses 'every judicial power that the people of the Commonwealth can bestow under the Constitution of the United States,' whether enumerated in the Constitution or residual." *Id*. at 557 (citation omitted). The Court may assume King's Bench authority to exercise supervisory power, even when no matter is pending before a lower court. *Id*. at 556. This Court has noted that the abiding authority at King's Bench "is a large charter…[A]s it is a trust for the

[2] Whether the Court had jurisdiction to order interim suspension of jurists; whether the CJD had exclusive jurisdiction to order interim suspension of jurists, or whether its jurisdiction is concurrent with the Court's jurisdiction; and if both tribunals act, which order is supreme.

people of Pennsylvania, judges have no right, from motives of ease and convenience, to surrender, weaken, or obscure, by judicial refinements, one single one of the powers granted." *Id*. at 561(quoting *Chase v. Miller*, 41 Pa. 403 (1862). "By its 'supreme' nature… [the] authority of this Court at King's Bench 'is very high and transcendent.'" *Id*. at 561-62 (citing *Commonwealth v. Chimenti*, 510 Pa. 149 (Pa. 1986)). "The Court long ago warned against any judicial inclination to narrow that authority, lest the members of the Court abandon their duty to exercise the power they hold in trust for the people." (citing *Chase*, supra).

The people of this Commonwealth, as well as hundreds of thousands of businesses that employ millions of those people, are the subject of the Governor's Order. As a direct result, hundreds of thousands of Pennsylvanians have been furloughed or laid off from their jobs, with the result that families have been deprived of their income, and businesses have shut down or are suffering significant financial distress. The existence of hundreds of thousands of businesses, as well as the economy of this state, are in jeopardy as a direct result of this Order. The severe disruption of the economy has already and will continue to create enormous dislocation and financial strain on the government, businesses and workers; over 650,000 Pennsylvanians have applied for unemployment

compensation benefits since the Governor proclaimed his Order; and Pennsylvania has more unemployment filings than any state in the United States.[3]

In these circumstances, Petitioners and the citizens and businesses of the Commonwealth need the Court to "minister justice to all persons" in this Commonwealth. The Order is unprecedented in the history of Pennsylvania. This case is based on a comprehensive allocation of rights to businesses, some who may, and most who may not access their businesses, with no definition or criteria for what constitutes "life-sustaining" activity. If anything ever has, this Order has created "an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law." For the Commonwealth as a whole, this Order is far more consequential than the reprieve in *Williams* or the suspension in *Bruno*. Petitioners submit that exercise of the Court's King's Bench jurisdiction is not only appropriate, but imperative.

A similar matter is pending, though stayed, in the Commonwealth Court. Thus, assumption by the Court of authority in this case is also justified by the Court's extraordinary jurisdiction under § 726, to assume plenary jurisdiction in a

[3] https://www.phillyvoice.com/file-unemployment-pennsylvania-paid-sick-leave-philadelphia-jobs-coronavirus-covid-19/

case "involving an issue of immediate public importance." *See* 42 Pa. Con. Stat. § 726.

B. <u>The Emergency Management Services Code Does Not Provide the Governor with the Authority for his Order</u>.

The Governor bases the legal authority for his Order on his, "responsibility to address dangers, facing the Commonwealth of Pennsylvania that result from disasters. 35 Pa. Cons. Stat. 7301 (a)." The Governor claims COVID-19 is a "disaster."[4] However, this statute, the Emergency Services Management Act (the "Code") only applies to "disasters," and COVID-19, is not a disaster as defined by the Code.[5] The Code defines disasters as, "A man-made disaster, natural disaster or war-caused disaster." 35 Pa. Cons. Stat. § 7102.

The Code defines a *man-made disaster* as:

> Any industrial, nuclear or transportation accident, explosion, conflagration, power failure, natural resource shortage or other condition, except enemy action, **<u>resulting from man-made causes</u>**, such as oil spills and other injurious environmental contamination, which threatens or causes substantial damage to property, human suffering, hardship or loss of life.

Id.

[4] The Department of Health defines COVID-19 as, "Coronavirus (COVID-19) is a new virus that causes respiratory illness in people and is extremely contagious. Symptoms include fever, cough, shortness of breath, and diarrhea." https://www.health.pa.gov/topics/disease/coronavirus/Pages/Coronavirus.aspx
[5] 35 Pa. Cons. Stat. § 7101.

COVID-19 is a viral illness. Viral illness does not appear in the definition of "disaster." It does not appear anywhere in the Code; neither does "disease." What does appear in the Code's definition of disaster are conditions caused by man such as accidents, oil spills, explosions and the like. However, viral illness is not like any of these conditions. Thus, COVID-19 does not fit within the definition of man-made disasters.

COVID-19 is also not a *natural disaster* as defined by the Code either. The Code defines a natural disaster as:

> Any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life.

Id.

Viral illness does not appear on this list and it is not like "catastrophes" on the list. A viral illness is not of the same kind or class as a hurricane, tornado or storm. In short, COVID-19 does not explode factories, burn down buildings, flood cities, make roads impassable, wash away bridges and the like. It does not cause destruction to the physical infrastructure of Pennsylvania.

Using the canons of statutory construction and interpretation, the term "disaster" cannot be expanded so as to include viral illnesses such COVID-19. Under the contextual canon of ejusdem generis, the general words following an enumeration of particular are to be limited by reference to the preceding particular

enumeration. Thus the general words in the statutory definition for disasters above, "other conditions" for man-made and "other catastrophe" for natural, are limited to the particular words that appear prior thereto. Regarding *natural disaster*, the addition of the words, "or other catastrophe" may not expand the list of disasters or catastrophes to any viral illness because viral illness is not like any of the listed catastrophes that precede those words. The same argument applies to *man-made disasters*. The types of conditions which are included in this definition are limited to the types that precede the words ***or other condition***. A viral illness is not like those conditions. Thus, the Code does not apply to COVID-19.

This rule of statutory construction has long been applied by this Court to limit the kinds or classes of things in statutory definitions to the same kinds or classes of things that appear expressly in the statute:

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

*Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals, 57*2 Pa. 240, 241 (2002) (IOGAP)

In IOGAP, the Supreme Court held that oil and gas rights are not like "real estate" or "land" and thus are not included in either definition. This Court held that:

> We agree with [property owners] that the general term "real estate" set forth in Section 201 ***is limited by the terms further listed therein***. As provided by Section 1903(b) of The Statutory Construction Act, when examining an act

> of legislation: General words shall be construed to take their meanings and be restricted by preceding particular words. 1 Pa.C.S. § 1903(b). This concept is known as the statutory construction doctrine of ejusdem generis.

Id., at 246 (brackets and emphasis added).

And, this Court further held:

> Here, as the General Assembly saw fit to enumerate the types of "real estate" that are properly the subject of taxation, ***this Court is not at liberty to expand the items authorized for taxation beyond those subjects***. Thus, we agree with Appellants that the trial court improperly concluded that oil and gas rights come within the general term "all real estate" set forth in Section 201.

Id., at 246-47 (emphasis added).

This Court held that oil and gas are unlike the other objects identified in the statute, namely "real estate" and "land":

> All of the subjects of taxation mentioned in Pa. Stat. Ann. tit. 72 § 5020-201 of the Pennsylvania General County Assessment Law (1933, as amended), constitute either land, as in a typical layperson's understanding (i.e., surface rights), or one of various types of physical improvements permanently affixed to such a "lot of ground." ***Oil and gas rights, by contrast, are quite unlike any of the other objects specifically identified in § 201***. Thus, the dissimilarity between the nature of oil and gas and those items that the general assembly sees fit to enumerate as the proper subject of taxation militates against the conclusion that such terms are encompassed within the general term "lands" listed therein

Id., 241 (emphasis added)

This Court has also held that drinks are not subject to regulation under the Act of May 13, 1909, P.L. 520, as amended, which is generally referred to as the General Food Law, because drinks did not appear in the statute's definition of food and

drinks are not food. *Cott Bev. Corp. v. Horst*, 380 Pa. 113 (1955). Thus, using the canons of statutory construction one concludes that a viral illness is not a disaster under the Code.

This Court should also construe the Code narrowly. The Governor has warned business owners and workers that if they enter their physical business premises and thus violate his Order, they will be subject to criminal prosecution. Thus, the Code section cited by the Governor as giving authority for his Order and threat of prosecution should be subject to strict construction pursuant to 1 Pa. Con. Stat. § 1928 (b)(1) for penal provisions.

In his Answer to the Emergency Application for Extraordinary Relief (Answer), the Governor characterizes COVID-19 as a "pandemic." But pandemics and epidemics are not listed in the definition of disasters subject to the Code; further, those words do not appear anywhere in the Code. Pandemics and epidemics are the spread of communicable diseases over large geographical areas; the spread of communicable disease is the subject for the Disease Prevention and Control Law of 1955 (the "Disease Act").[6] Had the General Assembly intended to include viral illness or disease in the definition of disaster in the Code it would have. The General Assembly knows how to write statutes addressing disease and the spread of communicable diseases, and it has done so in the Disease Act.

[6] 35 Pa. Stat. Ann. § 521.1 et seq.

In the Governor's Answer he cites *Danganan v. Guardian Prot. Servs.*, 645 Pa. 181 (2018) for the proposition that the definition of disaster should be interpreted broadly so as to include disease. However, applying *Danganan* to this case does not lead to that conclusion. The issue in *Danganan* was whether the Unfair Trade Practices and Consumer Protection Law ("UTPCPL") applied to non-Pennsylvania resident persons.[7] This Court held that the UTPCPL applies to non-Pennsylvania resident persons as well as Pennsylvania-resident persons. It did not include in the definition of "persons" things that were not a person. This Court did not add to the definition of persons. This Court held:

> Respecting the specific terms employed by the UTPCPL, we agree with Appellant's observation that the plain language definitions of "person" and "trade" and "commerce" evidence no geographic limitation or residency requirement relative to the Law's application.

Id. at 193.

This Court examined the words "person," "trade" and "commerce" in the text of the statute and concluded these words did not include geographic limitations. Thus, this Court refused to apply any. This Court also explained that the "inclusive" and "broader" language about directly or indirectly affecting the people of Pennsylvania could not be interpreted as to exclude non-Pennsylvanians. Neither the holding in *Danganan* nor its rationale leads to the conclusion that disaster can

[7] 73 Pa. Stat. Ann. § 201-1

be interpreted to mean a thing or condition that is not listed in its definition and is not in the same kind or class as the disasters listed in the definition.

In his Answer, the Governor states, "it is important that these statutes not be viewed in a vacuum. To determine the General Assembly's intent, statutory language is not to be read in isolation; it must be read with reference to the context in which it appears." *Answer,* Page 12. Petitioners are not reading the statutes in a vacuum or isolation and are in fact reading the language in the context in which it appears. The Governor who is not reading the statutory language in the context in which it appears. For example, the language of the Code makes no reference to viral illness, disease, pandemics or epidemics and does not make any provisions for countering the spread of communicable disease such as mandatory medical examinations, quarantines and isolation as the Disease Act does. Yet, even though nothing about communicable diseases appears in the Code, the Governor argues it is the Code that gives him the authority he is employing to address COVID-19.

The Governor further argues, "This Court has repeatedly emphasized that such context includes, *inter alia*, ensuring that statutes are construed in harmony with existing law as part of a general uniform system of jurisprudence." *Answer,* Page 2. Yet, the two statutes are not in *pari materia*; the Code relates to disasters; the Disease Act relates to the spread of viral illnesses. These are not the same things or class of things. The General Assembly intended for the Disease Act to

regulate viral illnesses such as COVID-19 and for the Code to regulate disasters. Further, even if the two statutes are in *pari materia*, neither statute read alone or together gives the Governor the authority he claims.

The Governor also poses the following argument in support of its claim that COVID-19 is a disaster:

> The Entities' argument that the global COVID-19 pandemic is somehow not a disaster emergency demonstrates an extraordinary level of myopathy about the effect this pandemic could have on the citizens of the Commonwealth and our health care system if the spread of this disease is not arrested.

Answer, Page 15

The question is not why don't Petitioners believe that COVID-19 is a pandemic? (Petitioners have not claimed that COVID-19 is not a pandemic). The question is whether COVID-19 or pandemics are the subject of the Code or the Disease Act. Furthermore, it is not just the Petitioners who argue that communicable diseases such as COVID-19 are to be regulated under the Disease Act, the General Assembly does as well because it wrote that act to address communicable diseases.

Assuming for the sake of argument that a viral illness can constitute a disaster as defined in the Code, which the Petitioners deny, the Code does not empower the Governor to close Petitioners' businesses. Importantly, the Code empowers the Governor to act only within a **disaster area**. The Governor specifically references in his Order his power under the Code to, "Control ingress and egress to and from a ***disaster area***, the movement of persons within the area

and the occupancy of premises therein." 35 Pa. Con. Stat. § 7301 (f)(7) (emphasis added). However, the Petitioners' principal places of business are not located within a disaster area in that no disasters have occurred there. There is no report of COVID-19 in the place of the Petitioners' businesses. And, neither the Governor's Proclamation of Disaster Emergency of March 6, 2020 nor his Order declare Petitioners' businesses as "disaster areas."

C. The Governor Does Not Have the Authority under the Police Power for his Order.

The Governor also claims he has authority for his Order under the Commonwealth's police power, "to promote the public health, morals or safety and the general well-being of the community." *Answer*, Page 12. Petitioners do not claim the Commonwealth does not have police power. Yet, neither statute gives the Governor the power he claims. And, the Governor can only act to enforce laws passed by the General Assembly or through powers granted to him by the Pennsylvania Constitution.

Although the Governor lists a series of cases in support of the Commonwealth's police power none of the cases listed empower the Governor to act in the manner in which he did through his Order. The Governor cites *Nat'l Wood Preservers v. Commonwealth Dep't of Envtl. Res.*, 489 Pa. 221 (1980), in which this Court upheld an executive branch agency's statutory authority to compel a property owner to abate toxic chemicals on his property that had

contaminated the public water supply. But unlike that case, in the case at bar, no agency has examined the Petitioners' property and determined that a public health nuisance appears thereon, let alone has asked Petitioners' to abate the nuisance. The same is true for all the police power cases cited by the Governor. No police power case cited by the Governor has a court approving an extra-judicial action by an executive branch agency let alone one that involves no examination and finding of a public health nuisance at the property in question.

Assuming for the sake of argument that the Code or Disease Act gives the Governor the authority for his Order, which Petitioners deny, the Order does not satisfy the police power test. This Court has cited the Supreme Court of the United States for the police powers test:

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

Lawton v. Steele, 152 U.S. 133, 137 (1894) as cited by *Nat'l Wood Preservers v. Commonwealth Dep't of Envtl. Res.*, 489 Pa. 221, 234 (1980) (emphasis added)

Applying this test to the case at bar, one should easily reach the conclusion that the Governor's Order has violated the constitutional rights of Petitioners and all other businesses closed by it. There was no finding that COVID-19 was detected on the

Petitioners' place of business or that Petitioners' failed to abate COVID-19.[8] So, first, the interest of the public do not require the Governor to order that the Petitioners' businesses be shut down; and the public has an interest in continuing to receive the services and products of Petitioners and all businesses closed by the Order. Second, shutting down the entire physical operations of Petitioners' businesses to abate COVID-19 that was not detected there is not reasonably necessary for the prevention of the spread of COVID-19. The failure of Governor to satisfy this element is made even more evident by the fact that he changed his mind with respect to Petitioners' B&J Laundry, LLC and Caledonia Timber Company; by transferring their industries from the non-life-sustaining to life-sustaining list he permitted them reopen without either of those Petitioners having to prove that they have done anything to prevent the spread of COVID-19. Third, shutting down the entire physical operations of Petitioners is unduly burdensome to them as detailed in their factual averments set forth in their Application. Lastly, the Governor directed his Order not just at the Petitioners, but on all businesses he determined to be non-life-sustaining, which has no precedent under any police

[8] Even if one takes the position that there existed a public health nuisance on the Petitioners' property in the form of the ***potential*** that COVID-19 could appear there and then be spread by persons at the Petitioners' place of business, all of which amounts to an extremely attenuated claim to justify the closure of the entire physical operations of business, there was no finding that the Petitioners' failed to put into place COVID-19 protocol.

power case. And, generally speaking shutting down the entire physical operations of a business or any entity is just about the most burdensome thing that can happen to a business, particularly businesses such as golf courses which cannot function anywhere but from their physical place of operations.

Lastly, all of the cases cited by the Commonwealth concern challenges to legislation or municipal/home rule ordinances as improper, unconstitutional assumptions of police power. Petitioners in the case at bar are not claiming the Code or the Disease Act are improper, unconstitutional assumptions of police power. Petitioners claim the Governor's Order has no lawful basis in the Code or the Disease Act or any common law police power; the Governor is acting beyond his authorized police power.

D. Petitioners' Claim That the Code Does not Authorize the Governor's Order is Not Precluded by a Prior Case Filing by Other Parties.

The Governor argues that, "This Court has already considered, and rejected, a claim that the Governor lacked authority under the Emergency Management Services Code…" and that, "The Entities ignore that ruling and seek to relitigate the same arguments already rejected by this Court." *Answer,* Page 13. The Governor is referring to the Civil Rights Defense Firm, P.C. et al v. Wolf at 64 MM 2020. The Governor provides no legal explanation for this position in his *Answer*. Yet neither the doctrine of res judicata or collateral estoppel apply to

preclude Petitioners from challenging the statutory basis of the Governor's action because Petitioners herein were not parties to either of the above-cited cases.

The Governor also argues this Court should give "extreme deference" to his interpretation of the Code and Disease Act. *Answer*, Page 16. The Governor cites *Lancaster County v. Pa. Labor Rels. Bd.*, 94 A.3d 979 (Pa. 2014):[9]

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

Answer, Page 16 and 17.

However, the Commonwealth omits the remainder of that cite, which appears directly after the last sentence cited by the Commonwealth:

> Moreover, ***this high level of deference is especially significant in the complex area of labor relations.*** Additionally, with respect to the specific issue of bargaining unit determinations, deference to the ***Pennsylvania Labor Relations Board's reasonable and longstanding construction of a statute is appropriate***. Policy matters are to be left largely to the Board.

Id., Lancaster Cty. v. Pa. Labor Rels. Bd., at 73.

The case at bar is not in the area of "complex labor relations." This case presents a simple legal matter; the spread of communicable diseases are subject to the

[9] The word "extreme" does not appear in the cited case.

Disease Act and not the Code. Further, in the case at bar, unlike in *Lancaster Cty. v. Pa. Labor Rels. Bd.,* there is no longstanding construction of the Code by executive branch agencies that applies to diseases or that the Code or the Disease Act give the Governor the power he claims. There are no reported cases in which the courts interpret the Code or the Disease Act as conferring upon the Governor the power he claims. By applying *Lancaster County v. PLRB*, to the statutes in question and the facts of this case, one concludes that the Governor's interpretation of the statutes is inconsistent with the statutes themselves; again, the statutes are unambiguous: disasters are subject to the Code, diseases to the Disease Act. As such, the Governor's interpretation carries little weight.

E. The Administrative Code Does Not Provide the Governor With the Authority for his Order.

The Governor also cites 71 Pa. Stat. Ann. § 532 (a) and 71 Pa. Stat. Ann. § 1403 (a) of the Administrative Code for the power of the Secretary of Health, "to determine and employ the most efficient and practical means for the prevention and suppression of disease." First, the Order is clearly not the "most efficient and practical" means as evidenced by the multiple revisions to the closure list, the mass confusion it caused, the need for thousands of waivers and the continued and heightened spread of the disease notwithstanding the Order. Second, if the most effective and practical means of preventing the spread of a viral illness was to order the closure of all non-life-sustaining businesses in Pennsylvania, then surely

the General Assembly would have considered and added that awesome and unprecedented power to the Administrative Code or the Disease Act considering the significant consequences stemming from it. But, it did not. Third, the General Assembly has already considered how best to address the spread of communicable diseases in the Disease Act and provided no power to the Governor to *en masse* shut down hundreds of thousands of businesses. Fourth, the Governor wants this Court to believe that the General Assembly intended to give the Governor the power to shut down every business in Pennsylvania without even mentioning it in the Administrative Code or Disease Act? That's an absurd and unreasonable interpretation of these statutes.

The canons of statutory construction state, "That the General Assembly does not intend a result that is absurd…or unreasonable." 1 Pa. Con. Stat. § 1922 (1). The Governor may argue, "That the General Assembly intends to favor the public interest as against any private interest." 1 Pa. Con. Stat. § 1922 (5). And, that the Governor's interpretation of these statutes is in the public interest. But, the Governor has not targeted one or any private interest that has offended any statute let alone a public health law. And, the public has a great interest in having its businesses open and workers working and earning income to provide for themselves and their families and to keep our economy functioning.

Furthermore, by applying the canons of statutory construction, one concludes that the General Assembly did not give the Governor power he claims. 71 Pa. Stat. Ann. § 532 (a) sets forth a broad and general power, but does not specifically empower the Secretary to close the physical operations of businesses or prohibit private property owners from accessing their physical premises. The more particular and relevant power is set forth in 71 Pa. Stat. Ann. § 532 (d):

> If the owner or occupant of any premises, ***whereon any nuisance detrimental to the public health exists***, ***fails to comply with any order of the department for the abatement or removal thereof***, to enter upon the premises, to which such order relates, and abate or remove such nuisance, as may now or hereafter be provided by law.

Id. (emphasis added).

This section only gives the Secretary the power to enter upon the Petitioners' premises, if a nuisance detrimental to the public health exists on the premises. Neither the Governor nor the Secretary have presented evidence that a public health nuisance exists on the premises of the Petitioners. Furthermore, this section only applies if a public health nuisance exists on the premises and the Petitioners have failed to abate it. Neither condition exists in the case at bar. Also, the power of entry onto the premises is limited to abating the public health nuisance. Lastly the power to enter premises is not the same thing as the power to shut them down. Thus, the Secretary has no statutory power to control the Petitioners' property or prohibit them from accessing and using their physical business operations.

Under the *generalia specialibus non derogant* canon, if there is a conflict between a general and a specific statutory section, the specific prevails. The specific section is 71 Pa. Stat. Ann. § 532 (d), which requires the Governor or Secretary to identify a public health nuisance existing on the premises of Petitioners' businesses and that the Petitioners have failed to abate it. Thus, 71 Pa. Stat. Ann. § 532 (d), the more specific section, prevails over the Governor's interpretation of 71 Pa. Stat. Ann. § 532 (a), which is the more general. And, because the elements of 71 Pa. Stat. Ann. § 532 (d) do not exist in this case, section (d) does not apply and does not give the Governor the power he claims. The Governor's Order also cites 71 Pa. Stat. Ann. §1403 (a) for his and the Secretary's power to order the closure of all non-life sustaining businesses. 71 Pa. Stat. Ann. §1403 (a) is a near verbatim copy of 71 Pa. Stat. Ann. § 532 (a).

The Governor fails to cite 71 Pa. Stat. Ann. § 1403 (b). This is the more specific power:

> The Secretary of Health shall cause examination to be made of ***nuisances*** or ***questions affecting the security of life and health in any locality***, and for that purpose the secretary, and any person authorized by him so to do, may, without fee or hindrance, ***enter***, examine and survey all grounds, vehicles, apartments, buildings, and places within the State, and all persons so authorized by him shall have the powers and authority conferred by law upon constables.

Id. (emphasis added).

This section confers upon the Secretary the power to enter and survey property within the Commonwealth, but only for the examination to be made of nuisances or questions affecting the security of life or health at that place; and does not give her power to order the closure of the physical operations of a business. None of those elements necessary to establish the Secretary's power under 71 Pa. Stat. Ann. § 1403 (b) exist in this matter. In any event, under the *generalia specialibus non derogant,* the same result occurs with regard to these two statutory provisions. 71 Pa. Stat. Ann. § 1403 (b) is more specific than 71 Pa. Stat. Ann. §1403 (a). The elements for 71 Pa. Stat. Ann. §1403 (b) do not exist in this case; thus it does not apply to this case. Furthermore, the Governor's use of the two general sections ignores the two specific sections of those same statutes and as such renders the more specific sections surplusage which violates 1 Pa. Con. Stat. § 1921 (a), which states that, "Every statute shall be construed, if possible, to give effect to all its provisions."

F. <u>The Disease Act Does Not Provide the Governor with the Authority for his Order</u>.

The Governor also bases his authority for his Order on the Disease Act.[10] However this Act only empowers the Secretary or local health agencies to compel persons, who are suspected of being infected with, or a carrier of, a communicable

[10] 35 Pa. Stat. Ann. § 521.1 et seq.

disease and have refused without reasonable cause to be subject to a medical examination, to compel persons, suspected to have been exposed to, but not necessary infected with, the communicable disease, into quarantine or isolation. All of this must be done through the courts, with due process rights for the person subject to the governmental action, and by Court order. None of that has happened in this case. The Governor claims the power for his Order is found in the Disease Act's "other control measures." However, even if his Order is an "other control measure," it still must be exercised through the courts, either pre or post-enforcement, and with those affected by it having their due process rights protected. None of that has occurred in this case.[11]

The Governor states in his Order that his or the Secretary's means of enforcing the Disease Act include "isolation, quarantine, and any other control measure needed, 35 Pa. Stat. Ann. § 521.5." However, this statute does not apply to the facts of this case:

> Upon the receipt by a local board or department of health or by the department, as the case may be, ***of a report of a disease*** which is subject to isolation, quarantine, or any other control measure, the local board or department of health or the department shall carry out the appropriate

[11] The Governor, in his *Answer*, makes the following claim, "It is perplexing, therefore, why the Entities would argue that statutes specifically designed to combat the spread of disease are not relevant to the COVID-19 pandemic currently spreading across the Commonwealth." *Answer* Page 19. However, Petitioners do not claim the Disease Act is not relevant in combatting the spread of COVID-19; Petitioner argue the Disease Act does not give the Governor the power he claims.

> control measures in such manner and in such place as is provided by rule or regulation.

Id. (emphasis added)

Neither the Governor nor the Secretary have presented any evidence that there has been a report of a disease at Petitioners' place of business; nor have they cited any rule or regulation that gives them the power they claim. In order not to run afoul of the previously recited statutory construction canon against interpretations that lead to unreasonable or absurd results, this section cannot be interpreted to empower the Governor to exercise a control measure on a business in Warren County because of a report of disease in Harrisburg, PA.

Further, the Disease Act, and its quarantine, isolation and "control measures," apply to infected persons or animals, not the physical premises of businesses:

> (e) Isolation. The separation for the period of communicability ***of infected persons or animals*** from other persons or animals in such places and under such conditions as will prevent the direct or indirect transmission of the infectious agent from infected persons or animals to other persons or animals who are susceptible or who may spread the disease to others.

35 Pa. Stat. Ann. 521.2 (emphasis added).

Petitioners, with the exception of Gregory, are all legal entities and not persons, let alone infected persons. Legal entities cannot become infected with COVID-19. Further, this provision empowers the Secretary to separate the infected persons, not un-infected persons. Neither the Secretary nor the Governor has any evidence that

the Petitioners, even if they are considered to be persons, are infected with COVID-19 and as such should be separated from their principal place of business.

The Disease Act's quarantine section applies to persons or animals who have been exposed to a communicable disease:[12]

> (i) Quarantine. The limitation of freedom of movement of persons or animals ***who have been exposed to a communicable disease*** for a period of time equal to the longest usual incubation period of the disease in such manner as to prevent effective contact with those not so exposed. Quarantine may be complete, or, as defined below, it may be modified, or it may consist merely of surveillance or segregation.

Id. (emphasis added).

Again, Petitioners are not persons or animals, let alone persons or animals. Further, neither the Governor nor the Secretary has presented evidence that any of the Petitioners have been exposed to a communicable disease and that any owners or workers at their place of business have COVID-19. In short, the Disease Act applies to persons or animals and empowers the Governor and/or health officials in certain circumstance to quarantine or isolate infected or exposed persons or animals. It does not empower the Governor to shut down the Petitioners' businesses or deny them access to their places of work.

Furthermore, when the Disease Act is enforced against a person, through involuntary medical examination, it is only after the health agency has determined

[12] But only with a Court Order and due process of law.

the person subject to the action is suspected of being infected with, or a carrier of, a communicable disease and has refused an examination without reasonable cause. In order to protect due process, the health agency must file a petition and seek a court order imposing the medical examination, quarantine or isolation by court order. Due process rights apply such as notice, hearing and the right to counsel either pre or post deprivation. Yet, in the case at bar, neither the Governor nor his Secretary of Health have filed a petition in any court seeking to compel a person to undergo a medical examination, be subject to quarantine or isolation. Nevertheless the Governor has ordered hundreds of thousand if not millions of Pennsylvanians out of their places or work and has banned them from returning.

In his Answer, the Governor avoids any analysis of the Disease Act and simply makes broad claims of his purported limitless power when he declares a disaster emergency. "The Governor and the Secretary have broad authority in making these decisions, which may be overturned only for an abuse of authority not found here. *See Lutz v. Dep't of Health,* 156 A. 235, 237 (Pa. 1931)."[13] However, *Lutz v. Dep't of Health,* does not support the Governor's Order. It involves a pig farmer who was allowing pig waste to get into a stream which was a

[13] It's true that the Governor has the authority to declare a disaster emergency. But that authority does not include his Order or his ignoring of the limits set forth in the Code and the Disease Act and his ignoring the due process rights of those Pennsylvanians affected by his Order.

tributary of the Schuylkill River. The local health agency took the pig farmer to court for refusing to abate the public health nuisance. The court found the pig farm to constitute a public health nuisance and ordered the farmer to clean it up. The court's decision was upheld by this Court. This pig farm case has nothing to do with the facts of this case (although it does illustrate the property owner has due process rights prior to the enforcement action). No health agency has examined or inspected Petitioners' business let alone found a public health nuisance there. Petitioners have no nuisance to abate and have not been told to abate any health nuisance at their business and have refused. Lastly, the public health agency did not order the pig farmer to shut down his farming operation, evict him from it and prohibit him from accessing it, which is what the Governor's Order does.

The Governor claims his Order is authorized by the Disease Act because it is one of the "other control measures." The Disease Act does not define "other control measures," but does require a report of a disease and that the other control measures be carried out, "in such manner and in such place as is provided by rule or regulation." 35 Pa. Stat. Ann. § 521.5 The Governor has not cited any rule or regulation authorizing his statewide business closure "control measure." As previously argued, if the General Assembly intended for "control measures" to include shutting down hundreds of thousands of businesses *en masse* and causing mass unemployment and economic dislocation surely the General Assembly would

have considered and written that power into the statute. And, in any event, due process still must apply to "control measures" that deprive individuals or businesses of constitutional rights.

G. The Governor's Order Violates the Separation of Powers Doctrine.

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

H. This Case Does Not Present a Political Question and is Judiciable

The Governor claims that this Court should defer to him concerning the Commonwealth's response to COVID-19 because this matter is a political question and cites *Baker v. Carr*, 369 U.S. 186, 210 (1962). *Answer,* Page 18. In *Baker v.*

Carr, the Supreme Court of the United States held that the issue of legislative apportionment was not a political claim and was thus a justiciable issue. In any event, the case at bar is not about when a war is over or when it starts or whether the legislative apportionment decisions are subject to judicial review. If the Governor cites *Baker* for the proposition that courts cannot determine what a disaster is, then claim has no merit. The answer is in the Code; the Code defines it. It is simply a matter of interpreting the statutes cited. Also, the Governor's argument that the Judiciary is unable to make determinations in these matters also lacks merit considering it is the Judiciary that hears petitions and issues orders involving actions by the Secretary of Health or local health agencies pursuant to their authority under the Disease Act regarding compulsory medical testing, quarantine and isolation. Furthermore, even if this case presents a difficult question, the Court still should answer it:

> Nor is the difficulty of articulating standards an appropriate ground upon which a court may abdicate its duty and authority to interpret the Pennsylvania Constitution. Mesivtah, 44 A.3d at 7 ("ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary, and in particular with this Court").

Robinson Twp. v. Commonwealth, 623 Pa. 564 (2013).

Furthermore, this Court has held:

> The Pennsylvania Supreme Court will not refrain from resolving a dispute which involves only an interpretation of the laws of the Commonwealth, for the resolution of such disputes is its constitutional duty. The need for courts to fulfill their role of enforcing constitutional limitations is particularly acute

> where the interests or entitlements of individual citizens are at stake. The political question doctrine is disfavored when a claim is made that individual liberties have been infringed. Any concern for a functional separation of powers is, of course, overshadowed if the statute impinges upon the exercise of a fundamental right. Furthermore, a statute is not exempt from a challenge brought for judicial consideration simply because it is said to be the Pennsylvania General Assembly's expression of policy rendered in a polarized political context. The political question doctrine does not exist to remove a question of law from the judiciary's purview merely because another branch has stated its own opinion of the salient legal issue. Whatever the context may have been, it produced legislation; and it is the legislation that is being challenged.

Id. at 584.

This case involves the interpretation of the laws of Commonwealth, the interest of individual citizens is at stake, individual liberties have been infringed, and the Governor's Order infringes on fundamental rights. Thus, this Court should decide this case.

I. The Order Constitutes a Taking of Petitioners' Property without Compensation and Due Process of Law and Thus Violates the U.S. Const. amends. V, XIV and Pa. Const. art I § § 1, 10.

Petitioners all have the constitutional right to own, use and operate their "business operations" and the real property upon which it is situate and the personal property contained therein. Apparently, the Governor agrees, "The Entities do have private interests in maintaining their individual business operations." *Answer,* Page 23. Petitioners' right to own, use and operate their businesses is a property interest among others. Petitioners' property rights are protected by the Pennsylvania and U.S. Constitutions. This Court has held:

> Our State and Federal Constitutions ordain, protect and guarantee the ownership and use of private property. United States Constitution Amendment V; Article I, §§ 1, and 10 of the Constitution of Pennsylvania.

Andress v. Zoning Bd. of Adjustment, 410 Pa. 77, 83, (1963)

The Governor's Order deprives Petitioners of their right of ownership, use and enjoyment of their property. This Court has held in a case involving a corporation objecting to a municipal ordinance:

> Individuals have the right to enjoy private property. Pa. Const. art. I, § 1. Any governmental exercise of police power to interfere with this right must be reasonable to comply with federal due process requirements. U.S. Const. amends. V, XIV.

Bac, Inc. v. Bd. of Supervisors, 534 Pa. 381, 383 (1993)

"The fundamental requirements of due process are notice and a meaningful opportunity to be heard." *Harris v. City of Phila.*, 47 F.3d 1333, 1335 (3d Cir. 1995). However, the Governor's Order, which he claims is pursuant to his "police power," took effect without notice and a hearing prior to its pronouncement and as such violated Pa. Const. art. I, § 1 and U.S. Const. amends. V, XIV.

But, the Governor's Order is much more than a denial of Petitioners' right to use their property in a certain way, like denying a zoning variance to a property owner who wishes to build a factory in a residential area. The Governor's Order denies Petitioners' the right to use their property at all. So, this case is not only the deprivation of the Petitioners' property rights without due process; this case is an

actual government taking of private property without due process and just compensation.[14]

The Governor states he has closed Petitioners' businesses in the public interest of preventing the spread of COVID-19. However, under the U.S. Const. amend. V, the government cannot take private property for public use without notice, a hearing and just compensation. Pa. Const. art. I, §10 of the Pennsylvania Constitution also prohibits the taking of private property for public use without just compensation. *See Machipongo Land & Coal Co. v. Dep't of Envtl. Prot.*, 799 A.2d 751 (Pa. 2002). Furthermore, the government's actual, physical taking of the property is not required to implicate the Fifth Amendment or Article 1 Section10. A government regulation (in this case the Order) that deprives an owner of the productive use of his property can be a taking:

> Regulations that deprive an owner of all economically beneficial or productive use of land are takings unless the use constitutes a public nuisance or unless the regulations are caused by the nature of the use and the owner could have expected that the government might prohibit it.

Machipongo Land & Coal Co. v. Dep't of Envtl. Prot., 569 Pa. 3, 9, 799 A.2d 751, 754 (2002)

[14] Also, under the U.S. Const. amend. IV and the Pa. Const. art I § 8 the government can only seize property with a warrant upon probable cause. The Governor has not requested or been issued warrants by the courts to seize Petitioners' property.

In this case, the Order deprives the Petitioners of all productive use of their physical business operations which are situate on land that they either own or lease. Petitioners' use of their property does not create a public nuisance. To the extent the Governor makes the attenuated claim that said use could potentially create a public nuisance through the possible exposure or spread of COVID-19, such a claim must be proven in court, prior to the deprivation. Further, any such risk can more than adequately contained by the Petitioners adopting the COVID-19 protocol recommended by the Secretary of Health for all life-sustaining businesses he has kept open such as candy shops beer distributorships, accountants offices and others. Lastly, Petitioners could never have expected to lose the use of their property to an Order by the Governor.

According to the Supreme Court of the United States, the case at bar presents a categorical takings case:

> As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests ***or denies an owner economically viable use of his land***.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016, 112 S. Ct. 2886, 2893-94, 120 L. Ed. 2d 798, 813 (1992). (emphasis added).

In *Lucas*, the Supreme Court of the United States held:

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

Lucas, 505 U.S. at 1019, 112 S. Ct. at 2895, 120 L. Ed. 2d at 815

In the case at bar, the Petitioners were in essence evicted from the real property upon which their physical business operations are situate and threatened with criminal prosecution if they returned. The *Lucas* Court explained that when the regulation eliminates all economically viable uses of the property that constitutes a taking even in the face of the state's police power. *Id.* at 1027, 112 S. Ct. at 2899, 120 L. Ed. 2d at 820. The Court explained:

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

Id. at 1030, 112 S. Ct. at 2901, 120 L. Ed. 2d at 822.

This Court has effected a *de facto* taking of the Petitioner's real property without compensation. The Governor may claim the taking is not "permanent" or the Petitioners could receive a waiver and be permitted to reopen. However, the Court states:

> The potential for future relief does not control our disposition, because whatever may occur in the future cannot undo what has occurred in the past. The Beachfront Management Act was enacted in 1988. S. C. Code Ann. § 48-39-250 et seq. (Supp. 1990). It may have deprived petitioner of the use of his land in an interim period. § 48-39-290(A). ***If this deprivation amounts to a taking, its limited duration will not bar constitutional relief. It is well established that temporary takings are as protected by the Constitution as are permanent ones.***

First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 318, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987)

And, "U.S. amend. XIV due process protections apply to any significant deprivation of property, whether temporary or permanent." *Manna v. Erie*, 27 Pa. Commw. 396, *Manna v. Erie*, 366 A.2d 615, 616 (Pa. Commw. Ct. 1976). And, "A temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment, and must be preceded by a fair hearing." *Fuentes v. Shevin*, 407 U.S. 67, 69, 92 S. Ct. 1983, 1988, 32 L. Ed. 2d 556, 564 (1972). Further, "…the constitutional guaranties of due process apply to administrative proceedings." *Allgeier v. Johnson*, 421 Pa. 342, 219 A.2d 593 (1966).

This Court has also held that there need not be an actual physical taking, to constitute a deprivation or taking of private property. An interruption of the common and necessary use and enjoyment of property may also constitute a government taking:

> Article I, § 1 of the Constitution of Pennsylvania provides: "All men … have certain inherent and indefeasible rights, among which are those … of acquiring, possessing and protecting property …this inherent and indefeasible right of ownership and possession of private property includes the right to use property, otherwise the right would be meaningless. In Miller v. Beaver Falls, 368 Pa., supra, the Court said (pages 196, 197-198): "The governing principle is accurately stated in 20 Corpus Juris, 566, 'There need not be an actual, physical taking***, but any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking for which compensation must be made to the owner of the property***.'"

Andress, 410 Pa. at 84-85 (emphasis added).

The Governor's Order constitutes a physical taking, as explained herein. However, if it is not an actual physical taking, it is a restriction or interruption of the common and necessary use and enjoyment of property as it deprives Petitioners from using or operating their businesses at their physical location and the taking has occurred without a hearing and just compensation.

J. The Governor's Order With its Listing of Non-Life-Sustaining and Life-Sustaining Businesses & its Waiver Process Denies Petitioners the Protection of their Property and Due Process under the Law and is Arbitrary, Capricious and Vague and Thus Violates the U.S. Const. amends. V, XIV and Pa. Const. art. I §§ 1, 10.

The List

Before the Governor ordered the closure of all non-life-sustaining businesses, the Governor strongly urged certain businesses he determined to be "non-essential" to close. Shortly thereafter and on March 19, 2020, the Governor ordered the closure of all "non-life-sustaining" businesses and permitted all "life-sustaining" businesses to "continue physical operations." The Governor then, within a few hours, revised his list of life-sustaining and non-life sustaining businesses. On March 24, 2020, the Governor revised his list again. Yet, these categories have no basis in the law cited by the Governor; no statute cited by the Governor in support of his Order uses these terms or categories.

In any event, the placing of Petitioners' businesses on the non-life-sustaining list and forcing their closing constituted a deprivation of the property interests of the Petitioners, and as such the Governor was required to provide Petitioners with due process ***before the taking***. The courts have identified the following as elements of due process, which must occur before the taking:

> (1) notice of the basis of the governmental action; (2) a neutral arbiter; (3) an opportunity to make an oral presentation; (4) a means of presenting evidence; (5) an opportunity to cross-examine witnesses or to respond to written evidence; (6) the right to be represented by counsel; and (7) a decision based on the record with a statement of reasons for the result. Whether all or any one of these safeguards are required in a particular situation depends on the outcome of the balancing test mentioned above.

Rogin v. Bensalem Twp., 616 F.2d 680, 694 (3d Cir. 1980).

None of the above factors were even attempted to have been satisfied by the Governor before he placed Petitioners' on the non-life-sustaining list.

Furthermore, the Governor's act of determining the categories and which business fits within which of the two categories is arbitrary, capricious and vague. "Arbitrary" has been defined as, "Not supported by fair, solid, and substantial cause, and without reason given." *Treloar v. Bigge*, L. R. 9 Exch. 155 as cited in Black's Law Dictionary.[15] "Capricious" has been defined as, "Given to sudden and unaccountable changes of mood or behavior."[16]

[15] https://thelawdictionary.org/arbitrary/
[16] https://thelawdictionary.org/capricious/

The Governor's categories are arbitrary because they are not supported by fair, solid and substantial cause and there was no reason given for them. This is evidenced by the fact that the Governor, within hours of issuing his closure Order and list, changed his mind and moved several business categories from the non-life-sustaining to the life-sustaining list? How can a business category be declared non-life-sustaining and then a few hours later be declared life-sustaining when the facts did not change? The Governor then changed his mind again on March 24, 2020 and moved more business categories to the life-sustaining list without any change in the facts.

Two Petitioners, B& Laundry, LLC and Caledonia Timber Company, appeared on the original non-life sustaining list even though B&J Laundry, LLC performs laundromat services which cleans clothing upon which COVID-19 may be able to spread and Calendonia harvests pulp wood used to make toilet paper, tissues and paper towels that are critical in preventing the spread of COVID-19. So the Governor obviously and admittedly lacked a solid and substantial reason for placing these businesses on the non-life-sustaining list; this is evidenced by the Governor, soon thereafter and without any new facts, changing his mind and moving these business categories to life-sustaining. Will the Governor change his

mind again and put Petitioners' timber and laundromat businesses back on the non-life-sustaining list and order, again, their immediate closure?[17]

It is not clear why some businesses are on the life-sustaining list? For example, why are, "beer, wine, and liquor stores," determined to be non-life-sustaining, but "beer distributors" are determined to be "life-sustaining?" Why are "department stores" non-life-sustaining, but "other general merchandise stores" life-sustaining?[18] Initially, "Other Specialty Stores," were placed on the closure list; then in the first revision they were placed on the life-sustaining list. So now "Other Specialty Stores," such as candy and chocolate retailers, are considered life-sustaining. According to media reports, when Facebook commenters asked one of those candy and chocolate stores why it was not shut down, the business replied that it qualified as a specialty food store, as it sells "sauces, pasta and oils, biscotti,

[17] These Petitioners' claims are not moot, This Court has held, "Generally, courts will not address a moot case. However, 'we have reviewed moot matters, in our discretion, when the issue presented is one of great public importance or is one that is capable of repetition, yet evading review." See *Association of Pennsylvania State College and University Faculties v. PLRB*, 607 Pa. 461, 8 A.3d 300, 305 (Pa. 2010); *Pap's A.M. v. City of Erie*, 571 Pa. 375, 812 A.2d 591, 600-01 (2002) as cited *In re Stevenson*, 615 Pa. 50, 62, 40 A.3d 1212, 1219 (2012).

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

etc."[19] Biscotti is life-sustaining?[20] This is not a solid and substantial reason to put a candy store on the life-sustaining list.

"Vagueness" has been defined as, "A law that can be voided as it is unclear or is lacking a thing that makes it precise."[21] Does "Other Amusement and Recreation Industries" include public golf courses? Petitioner Blueberry Hill cannot be sure. Blueberry Hill operates a restaurant on premises. Does Blueberry Hill's restaurant qualify as a "Full-service Restaurant" or a "Limited-Service Eating Place." In either case take-out is permitted. But the restaurant is located on the golf course premises, which must be closed, because it is apparently a non-life-sustaining business. So can Blueberry Hill operate the restaurant or not?

Government actions that are deemed to be arbitrary, capricious and/or vague have been determined to violate the Pennsylvania and U.S. Constitutions. For example, courts have the power to strike down school board decisions that are "arbitrary, capricious and prejudicial to the public interest." *See Flynn-Scarcella v. Pocono Mt. Sch. Dist.*, 745 A.2d 117, 118 (Pa. Commw. Ct. 2000). According to Fynn-Scarcella, when a decision is based on random or convenient selection or

[19] https://www.inquirer.com/health/coronavirus/spl/pennsylvania-pa-coronavirus-business-shutdown-waiver-tom-wolf-joe-scarnati-20200327.html
[20] The Governor may argue that the candy stores were determined to be life-sustaining because they sell water. Really? How many Pennsylvanians purchase their water supply from candy stores? Plus there is no shortage of water.
[21] https://thelawdictionary.org/void-for-vagueness/

choice rather than on reason or nature, then that decision is defined as arbitrary. The Governor's actions in devising the list, devising the categories, deciding which business is in which category, and then changing his mind with regard to some businesses and moving them from one category to the other not only has caused mass confusion and disturbance throughout Pennsylvania, but it is also arbitrary and capricious.

Yet, the Governor claims that Petitioners have no right to a pre or post-deprivation review by the courts. Furthermore, the Governor offers a constitutionally infirm remedy to the deprivation:

> Insofar as any form of pre- or post-deprivation 'review' of the implementation of the Governor's order can possibly be deemed constitutionally required (a point not conceded), the existing waiver process is adequate.

Answer, Page 24.

And

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

Answer, Page 23.

First, the Governor cites *Conestoga Nat'l Bank v. Patterson* for the above proposition even though this Court held in that case:

> The court held that the procedural due process rights of notice, a hearing, the opportunity to present evidence, and access to the application and supporting data of the proposed branch should have been provided to appellants,

> protesting banks, because the process was judicial in nature and involved substantial property rights.

Conestoga Nat'l Bank v. Patterson, 442 Pa. 289, 291, 275 A.2d 6, 7 (1971)

If the executive branch's decision to deny a bank's request for a branch office is entitled to judicial review, then certainly the executive branch's decision to shut down the entire physical operations of Petitioners' business is subject to judicial review.

The Waiver Process

Although the Governor has changed his mind as to the industries of two of the Petitioners and moved them from non-life-sustaining to life-sustaining, he has not changed his mind as to the others. Petitioner Gregory, a real estate agent, has been on the non-life-sustaining list from the beginning and because the Order prohibits all real estate services she cannot work even virtually from home. The Governor responds that Petitioner Gregory can apply for a waiver; however, Petitioner Gregory's real estate broker will not re-open the brokerage because real estate is on the non-life-sustaining list and Petitioner Gregory's license is legally only permitted to be utilized through her broker. In any event, on March 28, 2020, the Department of Homeland Security Cybersecurity and Infrastructure Security Agency (CISA) released a "Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response," which deems as essential to

the COVID-19 response, "Residential and commercial real estate services, including settlement services."[22] Nevertheless, the Governor claims that

> In making waiver determinations, the Department of Community and Economic Development (DCED) is maintaining consistency with an advisory issued by the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA Advisory") entitled "Identifying Critical Infrastructure During COVID-19."[23]

He clearly is not.

The Governor implemented a waiver process where businesses that find themselves in the non-life-sustaining category can apply for a waiver to the Department of Community & Economic Development (DCED), an executive branch agency under the jurisdiction of the Governor. But the waiver process suffers from the same constitutional defects as the Governor's life-sustaining and non-life-sustaining lists because the waiver process is arbitrary, capricious and vague. The waiver process does not include a non-arbitrary, reasonable standard of review, no record of the proceedings, no right to present witnesses, no right to cross-examine witnesses, no right to make oral presentations, no right to a neutral arbiter and no right to appeal. There is no reason for the denial other than, "it has been determined that the business identified above must remain closed." See a

[22] https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce

[23] https://www.scribd.com/document/452553495/UPDATED-1-45pm-March-27-2020-Life-Sustaining-Business-FAQs

verbatim copy of a waiver denial email from DCED.[24] The waiver denial takes the form of an email which fails to include any information on any right to appeal the decision. And, the denial notice appears to be an entirely boilerplate message.

Courts have identified the following as elements of due process, which must occur ***before the deprivation***:

> (1) notice of the basis of the governmental action; (2) a neutral arbiter; (3) an opportunity to make an oral presentation; (4) a means of presenting evidence; (5) an opportunity to cross-examine witnesses or to respond to written evidence; (6) the right to be represented by counsel; and (7) a decision based on the record with a statement of reasons for the result. Whether all or any one of these safeguards are required in a particular situation depends on the outcome of the balancing test mentioned above.

Rogin, 616 F.2d at 694.

None of the above criteria has been met prior to the Order. Most if not all are not met in the waiver process.

The media have exposed the arbitrary and capricious nature of the review.

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[24] Waiver Request DENIED:
By Executive Order dated March 19, 2020, and pursuant to powers granted to him by law, Governor Tom Wolf has ordered that no person or entity shall operate a place of business that is not a life-sustaining business, regardless of whether the business is open to members of the public. The Secretary of the Pennsylvania Department of Health has issued a similar order pursuant to powers granted to her by law. These orders (the "COVID-19 Orders") are necessary to stop the spread of the novel coronavirus COVID-19.
In response to your request for an exemption from the applicability of the COVID-19 Orders, pursuant to the powers granted by law to the Governor and Secretary of Health to cope with the present disaster emergency and to prevent and control the spread of disease, it has been determined that the business identified above must remain closed.

According to media reports, the Governor approved a waiver requested by The Wolf Company/Wolf Home Products, which is a kitchen cabinet assembly company and is the former family business of the Governor. Media reports began to surface that The Wolf Company was open for business.[25] After the media reports surfaced, the Governor reversed himself and rescinded the waiver he had previously granted to his former family business. According to that media report, the Governor explained the reason for his about face:

> the company 'was originally approved as supporting infrastructure. Upon further review, [the DCED] determined that the lines of business Wolf is engaging in do not meet the criteria, and their exemption will be rescinded.'

Rogin, 616 F.2d at 694

One wonders what criteria were considered and what further review occurred. The Governor claims:

> Specifically, '[w]hen a business completes a waiver form, a team of professionals at DCED will review each request and respond based on the guiding principle of balancing public safety while ensuring the continued delivery of critical infrastructure services and functions.'

Answer, Page 24

[25] https://www.inquirer.com/health/coronavirus/spl/pennsylvania-pa-coronavirus-business-shutdown-waiver-tom-wolf-joe-scarnati-20200327.html?__vfz=medium%3Dsharebar&fbclid=IwAR25PbeG-GNObihYIVrnkHKQI0Hoi6-CGXRpA56Y4fRCdWW-vsjEnc-aI4Q

Yet, the facts did not change between the granting and rescission of the waiver. It is more likely that the Governor changed his mind due to media reports exposing the fact that he had granted his former company a waiver while denying waivers to thousands of other business owners. In any event, Wolf Company/Wolf Home Products is still open, despite having its waiver rescinded, because it claims it is a life-sustaining business and did not need the waiver in the first place. Its CEO states, "evidently there's confusion."[26] The Governor disagrees and says it must close. The media reports about the Governor's Order, lists and waiver process, "The question of which businesses must close and which can stay open during the statewide coronavirus shutdown has been an ongoing point of confusion and anger since March 16, when the governor first began asking "non-essential" companies to curtail operations." *Id.*

Furthermore, the Governor claims that business owners are not entitled to judicial review of the denial of their waiver. *Answer,* Page 23. The Governor cites *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) for that proposition. However *Mathews* actually makes Petitioners' case. In *Mathews* the Supreme Court of the U.S. held that an evidentiary hearing was not required prior to the initial

[26] https://www.spotlightpa.org/news/2020/03/pennsylvania-coronavirus-life-sustaining-wolf-home-products-waiver/

termination of Social Security disability benefits but that was because among others factors:

> the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, ***but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of the terminated individual's claim becomes final***.

Id. at 323

Yet, in the case at bar, and unlike the facts in *Mathews*, the Governor did not permit any Petitioner or business owner in Pennsylvania the right to assert their claim for why their business or industry should not be placed on the non-life-sustaining list before the Governor placed them on the list and shut them down. Further, the Governor does not allow for an evidentiary hearing or judicial review before he places a business on the non-life-sustaining list or denies its waiver. Lastly, the Governor claims no business owner placed on the non-life-sustaining list or denied a waiver has the right to judicial review.

K. The Governor's Order Violates the Equal Protection Clause of the 14th Amendment to the United States Constitution.

The Fourteenth Amendment of the Constitution of the United States expressly forbids a state to deny to any person within its jurisdiction the equal protection of the laws. *Lynch v. Torquato*, 343 F.2d 370 (3d Cir. 1965). Sections of the Pennsylvania Constitution have been construed as having the same force and

effect as the equal protection clause of the Fourteenth Amendment. See, also, Pa. Const. art. I, § 26, art. III, § 32.

The Governor's Order prohibits Petitioner Friends of Danny DeVito from using and operating his campaign from his principal place of operations. In fact, the Order prohibits all: Business, Professional, Labor, Political or Similar Organizations from doing do. However, the Order permits Social Advocacy Organizations and elected officials to continue using their physical operations. Social Advocacy Organizations and Friends of Danny DeVito all appear in the same Industry, Sector and Subsector categories of the Governor's list. Thus, they should be treated similarly. Elected officials such as state representatives do not appear anywhere on the list and thus all are continued to operate at the physical offices even though many other professions and all the Business, Professional, Labor and Political Organizations are prohibited.

Social Advocacy Organizations and elected officials, including the state representative that candidate Danny DeVito is attempting to gain the right to campaign against in the general election, all advocate for social and political causes thus continue to enjoy their unfettered First Amendment rights to free association and assembly and are permitted to use their offices, staff, equipment and supplies located therein to do so; yet political organizations such as Friends of Danny DeVito do not enjoy that right due to the Governor's Order. The essence of

the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. *Commonwealth v. Albert,* 758 A.2d 1149, No. 1 W.D. Appeal Docket 1998, 2000 Pa. LEXIS 2364 (Pa. Sept. 27, 2000). The Order does not treat political organizations similarly to Social Advocacy Organizations or Elected Officials. Another example of unequal treatment among persons or classes involved Petitioner Blueberry Hill, which is a public, but non-municipal golf course. The Governor's Order has closed Blueberry Hill, but not municipal golf courses, because it apparently does not cover municipalities.

L. Order Violates Petitioner Friends of Danny DeVito Right to Assembly Protected by the U.S. Const. amend. 1, and Pa. Const. art. I, §§ 7, 20.

"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." Pa. Const. art. I, § 20. Friends of Danny DeVito uses its place of physical operations to hold meetings and to engage in speech and advocacy to promote the campaign of candidate Daniel DeVito in the upcoming primary elections and political and social issues of public interest. For example, Petitioner has a grievance against the Governor for issuing the within Order and wishes to be able to access and use his physical operation location in order to meet with others

and advocate that grievance. The Order prohibits the candidate committee, its candidate and supporters from conducting meetings at the place of physical operations as such the Order denies Friends of Danny DeVito the right to free assembly. Court recognize this right:

> Peaceable assemblage is the keystone in the arch of liberty; it is a constituent part of all liberties; without it there can be no freedom of religion, freedom of speech, freedom of petition, or freedom of elections.

Commonwealth v. Vuletich, 42 Pa.D.&C. 208, 208 (C.P. Beaver 1941).

And:

> No one in the United States or in Pennsylvania has the power to veto peaceable public assemblage in a public or private hall, or places where such assemblage does not interfere with or abridge the rights and liberties of others; and police power cannot be stretched to include such veto.

Id. at 208.

Petitioner recognizes that, "However, the constitutional rights of freedom of assembly and petition are not in their nature absolute, and they must be exercised in subordination to reasonable rules and regulations adopted to safeguard the public interest." *Heard v. Rizzo*, 281 F. Supp. 720 (E.D. Pa. 1968), aff'd, 392 U.S. 646, 88 S. Ct. 2307, 20 L. Ed. 2d 1358 (1968). However, Petitioner can employ the same COVID-19 prevention and mitigation protocol for its meetings as the Governor and Secretary do for their press conferences and other meetings.

(7) Requested Relief Sought

Petitioners request this Court vacate or strike down the Governor's Order as beyond his statutory authority, a violation of the separation of powers and/or a violation of the Petitioners' constitutional rights.

Respectfully submitted,

/s/ Marc A. Scaringi
Marc A. Scaringi, Esq.
Supreme Court ID No. 88346
Brian C. Caffrey, Esq.
Supreme Court ID No. 42667
Scaringi Law
2000 Linglestown Road, Suite 106
Harrisburg, PA 17110
marc@scaringilaw.com
brian@scaringilaw.com
717-657-7770 (o)
717-657-7797 (f)

March 31, 2020

CERTIFICATE OF COUNSEL

I hereby certify that this brief contains 13,535 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 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.

/s/ Marc A. Scaringi

Marc A. Scaringi, Esquire
Scaringi Law

IN THE SUPREME COURT OF PENNSYLVANIA

FRIENDS OF DANNY DEVITO GREGORY, B&J LAUNDRY, LLC BLUEBERRY HILL PUBLIC GOLF COURSE & LOUNGE, and CALEDONIA LAND COMPANY, Petitioners v. TOM WOLF, GOVERNOR AND RACHEL LEVINE, SECRETARY OF PA. DEPARTMENT OF HEALTH, Respondents	: : : : : : : : : : : : : : : : : : :	No. 68 MM 2020

CERTIFICATE OF SERVICE

I, Deborah A. Black, Paralegal for Scaringi Law, do hereby certify that I served a true and correct copy of ***Petitioners' Brief in Support of their Emergency Application for Extraordinary Relief***, in the above-captioned action, upon the following via PACfile System, to:

J. Bart DeLone
Chief Deputy Attorney General
Pennsylvania Office of Attorney General
Appellate Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
jdelone@attorneygeneral.gov

Keli Marie Neary, Esquire
Executive Deputy Attorney General
PA Attorney Civil Law Division
Pennsylvania Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
kneary@attorneygeneral.gov

Karen Masico Romano, Esquire
Chief Deputy Attorney General
Pennsylvania Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
kromano@attorneygeneral.gov

Gregory George Schwab, Esquire
Pennsylvania Office of General Counsel
Governor's Office of General Counsel
333 Market St 17th Fl.
Harrisburg, PA 17126-0333
grschwab@pal.gov

Date: March 31, 2020

/s/ *Deborah A. Black*
Deborah A. Black, Paralegal
For Marc A. Scaringi, Esquire and
Brian C. Caffrey, Esquire