

**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

**RESPONDENTS' ANSWER TO THE
PETITION FOR EXTRAORDINARY RELIEF**

JOSH SHAPIRO
Attorney General

KELI NEARY
*Executive Deputy Attorney General
Civil Law Division*

BY: J. BART DELONE
*Chief Deputy Attorney General
Chief, Appellate Litigation Section*

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 712-3818
FAX: (717) 772-4526

CLAUDIA TESORO
Senior Deputy Attorney General

DATE: May 18, 2020

SEAN A. KIRKPATRICK
Senior Deputy Attorney General

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE.....	2
STATEMENT OF JURISDICTION.....	6
ARGUMENT	7
I. The Governor’s Order is Authorized by the Emergency Code and Does Not Violate the Separation of Powers.	7
II. The Governor’s Order Comports with Substantive Due Process.....	14
CONCLUSION	20
CERTIFICATE OF COUNSEL	21
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

Cases	Page
<i>Alexander v. Whitman</i> , 114 F.3d 1392 (3d Cir. 1997).....	15
<i>Centre Concrete Co. v. AGI</i> , 559 A.2d 516 (Pa. 1989)	12
<i>Clay v. Advanced Computer Applications</i> , 559 A.2d 917 (Pa. 1989)	13
<i>Collins v. City of Harker Heights, Tex.</i> , 503 U.S. 115 (1992).....	16
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833 (1998).....	17, 19
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986).....	15
<i>Desi’s Pizza, Inc. v. City of Wilkes-Barre</i> , 321 F.3d 411 (3d Cir. 2003).....	16
<i>Fort Bend Cty., Texas v. Davis</i> , 139 S. Ct. 1843 (2019)	13
<i>Friends of Danny DeVito v. Wolf</i> , __ A.3d ___, 2020 WL 1847100 (Pa. April, 13, 2020)	passim
<i>Heffner v. Murphy</i> , 745 F.3d 56 (3d Cir. 2014).....	17, 18
<i>Hunterson v. DiSabato</i> , 308 F.3d 236 (3d Cir. 2002).....	18
<i>In re Bruno</i> , 101 A.3d 653 (Pa. 2014)	6
<i>Markham v. Wolf</i> , 190 A.3d 1175 (Pa. 2018)	8, 9, 10

<i>Nicholas v. Pennsylvania State University</i> , 227 F.3d 133 (3d Cir. 2000).....	15, 16
<i>Nixon v. Commonwealth</i> , 839 A.2d 277 (Pa. 2003)	15, 16, 17
<i>Pa. Restaurant & Lodging Ass’n v. City of Pittsburgh</i> , 211 A.3d 810 (Pa. 2019)	8
<i>Parker v. Children’s Hospital</i> , 394 A.2d 932 (Pa. 1978)	13, 18
<i>Reno v. Flores</i> , 507 U.S. 292 (1993)	16
<i>Rufo v. Board of License and Inspection Review</i> , 192 A.3d 1113 (Pa. 2018)	10
<i>Shapp v. Butera</i> , 348 A.2d 910 (Pa. Cmwlt. 1975)	9
<i>United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa.</i> , 316 F.3d 392 (3d Cir. 2003).....	18
<i>Warner v. Wolf</i> , 297 MD 2020 (Pa. Cmwlt.).....	7
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	16
<i>Werner v. Zazyczny</i> , 681 A.2d 1331 (Pa. 1996)	10
Constitutional Provisions	
U.S. CONST. amend. XIV	15
Pa. Const. art. I, § 1	15
Pa. Const. art. V	13, 14

Pennsylvania Statutes

8 P.S. § 19412

24 P.S. § 15-1501.83

35 P.S. § 1680.414, 11

35 Pa.C.S. § 71013

35 Pa.C.S. § 73018, 9

35 Pa.C.S. § 73024, 10

41 P.S. § 1014, 11

43 Pa.C.S. § 96213

68 P.S. § 250.1014, 11

68 P.S. § 398.14, 11

Federal Statutes

15 U.S.C. § 90584, 14

15 U.S.C. §90584

42 U.S.C. § 1997e12

42 U.S.C. § 2000e-513

Other Authorities

“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 5/3/20)2

“COVID-19 Data for Pennsylvania,” Pa. Dept. of Health,
<https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last visited 5/3/20).....2

Factsheet: America’s Wars, U.S. Department of Veterans Affairs,
https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf (last
visited 5/2/20).....2

Press Releases and News Sources

“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%2Fc
oronavirus%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).3

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

“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).....5

Matt Egan, “Goldman Sachs issues warning about US unemployment,” CNN,
[https://www.cnn.com/2020/05/13/economy/jobs-unemployment-rate-goldman-
sachs/index.html](https://www.cnn.com/2020/05/13/economy/jobs-unemployment-rate-goldman-sachs/index.html) (5/13/20).....5

Susannah Luthi, “U.S. on pace to pass 100,000 Covid-19 deaths by June 1, CDC
director says,” Politico, [https://www.politico.com/news/2020/05/15/us-on-pace-
to-pass-100-000-covid-19-deaths-by-june-1-cdc-director-says-261468](https://www.politico.com/news/2020/05/15/us-on-pace-to-pass-100-000-covid-19-deaths-by-june-1-cdc-director-says-261468) (5/15/20).
.....2

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.

Unhappy with this order, a group of landlords filed the instant petition for extraordinary relief asking this Court to invalidate the Governor's Order so that they may begin forcing people out of their homes. In making this extraordinary request, the Landlords make a series of legally baseless arguments. Their argument that the Governor lacks authority under the Commonwealth's police power to issue his Order ignores this Court's very recent ruling in *Friends of Danny DeVito v. Wolf*, __ A.3d ___, 2020 WL 1847100 (Pa. April, 13, 2020). Their argument that this Order somehow violates substantive due process is equally baseless. The petition should be denied.

STATEMENT OF THE CASE

What began as two presumptive positive cases of COVID-19 in Pennsylvania on March 6, 2020, has grown to 62,234 cases and 4,418 deaths in Pennsylvania in little more than two months.¹ Throughout the United States, there have been 1.5 million confirmed cases of COVID-19, and more than 88,000 people have died from this pandemic so far.² Models project that even with enforced social distancing and a carefully structured phased reopening, more than 100,000 Americans will have died from COVID-19 by June 1st.³

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.⁴ Given this consensus, anything that presents

¹ “COVID-19 Data for Pennsylvania,” Pa. Dept. of Health, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last visited 5/17/20).

² “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=IwAR2YGdSiJ1zk6mktakCLsCqjUtEq9XsvLMK2fGG0vmHPIsAdMgl8C13cOU> (last visited 5/17/20).

³ Susannah Luthi, “U.S. on pace to pass 100,000 Covid-19 deaths by June 1, CDC director says,” Politico, <https://www.politico.com/news/2020/05/15/us-on-pace-to-pass-100-000-covid-19-deaths-by-june-1-cdc-director-says-261468> (5/15/20).

⁴ “Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others,” Center for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019->

the opportunity for personal contact and interactions can transmit the virus, and with it, sickness and death.

On March 6, 2020, Governor Tom Wolf signed an emergency disaster declaration pursuant to the Emergency Management Services Code (Emergency Code), 35 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. On April 1, 2020, the Governor issued an Order for Individuals to Stay at Home. Eight days later, the Secretary of Education, Pedro Rivera, ordered the closure of all schools within Pennsylvania for the 2019-2020 school year pursuant to 24 P.S. § 15-1501.8.

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. Exhibit B to Petition at 12. Notably, however, this Court took “judicial notice that certain filings, charges, and acts relating to dispossession will remain subject to temporary restraints

[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/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).

on account of other directives, including provisions of the federal Coronavirus Aid, Relief, and Economic Security Act. *See* 15 U.S.C. § 9058.” *Id.*

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.*

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[.]” Order, Exhibit A to the Petition. 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 . . .” *Id.* “[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[.]” *Id.*

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 Officers).

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 14.7%.⁵ The Commonwealth is in the process of a phased reopening,⁶ crafted in partnership with Carnegie Mellon University and using the Federal government’s Opening Up America Guidelines.⁷ The Landlords seek to upend this carefully planned process by removing protections that keep Pennsylvanians in their homes

⁵ Matt Egan, “Goldman Sachs issues warning about US unemployment,” CNN, <https://www.cnn.com/2020/05/13/economy/jobs-unemployment-rate-goldman-sachs/index.html> (5/13/20).

⁶ “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).

⁷ “Process to Reopen Pennsylvania,” Governor of Pennsylvania’s Website, <https://www.governor.pa.gov/process-to-reopen-pennsylvania/> (last visited 5/2/20).

and, instead, forcing them to relocate and/or into homelessness. 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 risk and prolonging the pandemic's effects on our economy.

STATEMENT OF JURISDICTION

The Landlords ask this Court to exercise King's Bench jurisdiction over this matter. As this matter raises immediate issues of public importance, Commonwealth Officers agree that this Court should exercise King's Bench jurisdiction.

This Court may exercise its constitutional King's Bench powers independent of any statute or rule of court. As this Court stated in *In re Bruno*, 101 A.3d 653, 670 (Pa. 2014):

In [such] instances, the Court cannot suffer the deleterious effect upon the public interest caused by delays incident to ordinary processes of law, or deficiencies in the ordinary process of law making those avenues inadequate for the exigencies of the moment. In short, King's Bench allows the Supreme Court to exercise authority commensurate with its "ultimate responsibility" for the proper administration and supervision of the judicial system.

The Commonwealth, and indeed the entire world, faces the worst public health disaster since 1918 and worst economic disaster since 1929. As the Landlords challenge the Commonwealth's ability to address the pandemic and its effects, these

matters present precisely the type of far reaching, public policy concerns that warrant this Court's use of its extraordinary powers.⁸

ARGUMENT

I. The Governor's Order is Authorized by the Emergency Code and Does Not Violate the Separation of Powers.

Much of what the Landlords challenge here with respect to the Governor's authority was addressed and resolved by this Court slightly more than a month ago in *Friends of Danny DeVito v. Wolf*, __ A.3d ___, 2020 WL 1847100 (Pa. April, 13, 2020). In that action, as here, petitioners asserted that the Governor lacked authority to issue executive orders as violative of separation of powers. This Court rejected that assertion in that action. It should do so here.

In *Friends of Danny DeVito*, this Court pointed out that "first and foremost the Governor is responsible for meeting the dangers to this Commonwealth and people presented by disasters." *Id.* at *9. And that, in meeting these responsibilities, he is empowered "to issue and rescind executive orders, proclamations, and regulations which shall have the force and effect of law." *Id.* This Court also specifically held that the Governor's expansive emergency management powers

⁸ A landlord and attorney filed a separate challenge to the Governor's Order in the Commonwealth Court, raising similar claims. *See Warner v. Wolf*, 297 MD 2020 (Pa. Cmwlth.). More actions by landlords and lenders may be forthcoming. This demonstrates the need for this Court to exercise its King's Bench authority and resolve these important public policy issues now.

included the ability 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[.]” *Id.* (quoting 35 Pa.C.S. § 7301(f)).

This Court emphasized that the broad powers granted to the Governor 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)). And that the police power is one of the most essential powers of the government and one of its least limitable. *Id.*

Petitioners in *Friends of Danny DeVito* challenged that power by, *inter alia*, asserting that the Governor’s Executive Order violated separation of powers. Specifically, they asserted that any executive order that creates law is unconstitutional. And that the Governor’s comprehensive executive order “constitute[d] an attempt at legislation, which is the exclusive province of the legislative branch of government.” *Id.* at *14. In support of these assertions, petitioners cited to *Markham v. Wolf*, 190 A.3d 1175, 1182 (Pa. 2018).

Rejecting the separation of powers challenge, this Court correctly 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” 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.’” *Id.* at 15 (quoting 35 Pa.C.S. § 7301(f)(7)).

The Landlords attempt to escape *Friends of Danny DeVito* by making a series of legally baseless assertions: (1) that the Governor’s Order is not grounded in the Commonwealth’s broad police powers; (2) that this Order usurps the Legislature by creating new law; (3) that the Order usurps this Court’s authority; and (4) that the Order somehow conflicts with this Court’s April 28, 2020 order.

First, like the petitioners in *Friends of Danny DeVito*, the Landlords, also citing *Markham*, attempt to improperly cabin and reduce the Governor’s authority. They argue that executive orders may only fall within three categories: “(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.” Petition at ¶ 16 (emphasis added). In making this argument, however, the Landlords misstate *Markham* and ignore 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.” *Id.* (citing *Werner v. Zazyczny*, 681 A.2d 1331, 1336 (Pa. 1996) (“[O]nly executive orders that have been authorized by the Constitution or promulgated pursuant to statutory authority have the force of law”).

The Governor’s Order clearly falls within this third category, as it was issued under authority explicitly granted to the Governor by the General Assembly. With the declaration of a disaster emergency, the Emergency Code 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). This Court held that “[t]he broad powers granted to the Governor in the Emergency Code are firmly grounded in the Commonwealth’s *police power*.” *Friends of Danny DeVito*, 2020 WL 1847100 at *10 (emphasis added) (citing *Rufo v. Board of License and Inspection Review*, 192 A.3d 1113, 1120 (Pa. 2018)).

Under the Loan Interest Protection Law, 41 P.S. § 101, *et seq.*, and the Homeowners Emergency Assistance Act, 35 P.S. § 1680.41, *et seq.*, notice must be provided to debtors before a foreclosure action may be commenced. Likewise, under 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.*, notice must be provided to tenants before they may be evicted from their homes. In his Order, the Governor stayed issuance of these notices for 60 days, temporarily suspending the initiation of foreclosures and evictions under these laws. The Governor determined that this temporarily suspension 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[.]” Order, Exhibit A. The Landlords’ suggestion that these actions do not arise out of the Commonwealth’s police powers is directly contrary to this Court’s explicit determination.

Second, the Landlords argue that the Governor’s Order violates the separation of powers doctrine because it usurps the authority of the General Assembly to create new law. Petition at ¶¶ 19, 36. This is precisely the argument rejected by this Court in *Friends of Danny DeVito*, 2020 WL 1847100 at *14-15. It should be rejected here as well.

As detailed above, the Governor’s Order is exactly what the General Assembly authorized the Governor to issue in exactly this type of emergency. The statutes listed above have not been amended or repealed; instead, certain provisions of the statutes have been temporarily suspended for 60 days to provide temporary housing for disaster victims—exactly what the Emergency Code authorizes. As this Court noted in *Friends of Danny DeVito*, 2020 WL 1847100 at *13, “any location . . . where two or more people can congregate is within the disaster area.” Any resident expelled from their home during this global pandemic, therefore, is a disaster victim.

Third, the Landlords argue that the Governor’s Order somehow usurps this Court’s authority. Petition at ¶ 28. It does nothing of the sort. The Order controls the actions of landlords and lenders, not courts. The Order does not interfere with any judicial proceedings already in process; it merely temporarily suspends the ability of lenders and landlords to issue foreclosure and eviction notices, which must occur prior to the initiation of new foreclosure and eviction lawsuits.

This does not infringe upon this Court’s authority, as preconditions to suit are common in our law. For example, a prisoner must exhaust administrative remedies before filing suit about the conditions of his or her confinement in federal court. 42 U.S.C. § 1997e(a). 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 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).

As these examples demonstrate, preconditions to filing suit—even ones that delay actions for up to a year—do not usurp this Court’s authority. 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.” *Id.* The Governor’s Order does not foreclose bringing evictions and foreclosures; it merely extends the time on statutory preconditions, after which

lenders and landlords may commence foreclosure and eviction actions. None of these actions usurp the Court's powers under Article V of the Pennsylvania Constitution.

Fourth, 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." Exhibit B to Petition 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 sit in harmony.

In issuing the Order, the Governor did precisely 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 Comports with Substantive Due Process.

The Landlords' substantive due process claim fares no better, as it has no legal basis. The Landlords' argument evidences no appreciation of the narrowness of the substantive due process concept and no understanding of how, when applicable, such a claim may be established.

Both the United States and Pennsylvania Constitutions embody due process guarantees. *See* U.S. CONST. amend. XIV; Pa. CONST. art. I, § 1.⁹ These two foundational documents have been described as “‘substantially equivalent’ in their protective scope.” *Hospital & Healthsystem Ass’n of Pa. v. Com.*, 77 A.3d 587, 281 n.15 (Pa. 2013).

While the Due Process Clause of the Fourteenth Amendment “speaks to the adequacy of state procedures,” the clause “also has a substantive component.” *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139 (3d Cir. 2000). In accordance with the substantive due process rubric, certain governmental actions are prohibited “regardless of the fairness of the procedures used to implement them.” *Alexander v. Whitman*, 114 F.3d 1392, 1402 (3d Cir. 1997) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). Similarly, as with some Fourteenth Amendment claims, issues relating to the rights protected under Article I, section I of the Pennsylvania Constitution are subject to a “substantive due process analysis.” *Nixon v. Commonwealth*, 839 A.2d 277, 286 (Pa. 2003).

⁹ The federal Due Process Clause states, “nor shall any State deprive any person of life, liberty, or property without due process of law[.]” In Pennsylvania, Pa. Const. art. I, § 1 states “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.”

Crucially, and “[a]s a general matter, the [Supreme] Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended.” *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). Accord *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Rhetoric aside, the Landlords’ challenge to the Governor’s Order fails to implicate substantive due process principles as they have evolved under federal and state law.

The analysis of any substantive due process claim “must begin with a careful description of the asserted right[.]” *Reno v. Flores*, 507 U.S. 292, 302 (1993). To be protected, the “asserted right” must be “fundamental,” that is to say, the underlying right must arise from the Constitution itself, not from state law. *Id.* See also, e.g., *Desi’s Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 427 (3d Cir. 2003); *Nicholas*, 227 F.3d at 140-142.

However important to any person, the right to hold a certain job—or, by extension, to carry on a private business—is not deemed “fundamental” for substantive due process purposes. See *Nicholas*, 227 F.3d at 142-143 (interest in tenured public employment is not fundamental); *Nixon*, 838 A.2d at 288. Here, by the Landlords’ own account, the substantive “right” they seek to vindicate derives *only* from the Landlord and Tenant Act of 1951. See Petition at ¶¶ 31-36. In other words, the Landlords assert a state-law statutory right to proceed with evictions of

delinquent tenants whenever they see fit as a business matter, regardless of any other relevant, societal circumstances. That inwardly-focused, purely economic right cannot serve as a basis for a substantive due process claim.

Even assuming, *arguendo*, that the Landlords' averments could be forced into a substantive-due-process framework, any such claim would still fail as a matter of law. When applicable, substantive due process principles limit what the government can do in both its legislative and executive capacities. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). The Governor's Order has attributes of both executive action (in that the Governor is the Chief Executive of the Commonwealth) and legislation (in that the order at issue is a legally binding official pronouncement). Somewhat different analytical standards apply when legislation is challenged, compared to when executive action is challenged, but whichever way this Order is viewed, there is no substantive due process rationale for invalidating it.

In Pennsylvania, the alleged abridgement of important, but non-fundamental, rights are subject to rational basis review. *See Nixon*, 839 A.2d at 287. *See also Heffner v. Murphy*, 745 F.3d 56, 79 (3d Cir. 2014) (legislative enactment will not infringe substantive due process rights as long as there is a rational basis for the enactment). "Under rational basis review, a statute withstands a substantive due process challenge if the State identifies a legitimate state interest that the legislature could rationally conclude was served by the statute." *Heffner*, 745 F.3d at 79

(citation and internal quotation marks omitted). Under this deferential standard, there need not be “mathematical precision in the fit between justification and means.” *Id.* at 80. “Policy decision[s] about where lines should be drawn . . . [are] not legally relevant under substantive due process jurisprudence.” *Id.* at 83.

Courts do not second-guess the wisdom of policy choices. *Parker*, 394 A.2d at 937 (“The legislature must be respected in its attempt to exercise the State’s police power and the power of judicial review must not be used as a means by which the courts might substitute its judgment as to public policy for that of the legislature”). What the Landlords are really questioning is the underlying rationale for the Governor’s Order: to foster residential security and stability for Pennsylvanians in the face of today’s public health and economic disaster. This is unquestionably rational, even if temporarily disruptive to the Landlords’ businesses. This is so no matter how vehemently they disagree with the policy choices that gave rise to the Order.

Viewing the Landlords’ substantive due process claim as one concerning executive action is even more unavailing. “[E]xecutive action violates substantive due process only when it shocks the conscience[.]” *United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa.*, 316 F.3d 392, 399-400 (3d Cir. 2003). Decisions or actions do not rise to this level even if they are arbitrary and capricious. *See Hunterson v. DiSabato*, 308 F.3d 236, 248 (3d Cir. 2002). Rather, “only the most

egregious official conduct” meets the demanding shock-the-conscience standard. *Lewis*, 523 U.S. at 846. To shock the conscience, official action must be egregiously wrong, abusive, oppressive, “intended to injure in some way unjustifiable by any government interest.” *Id.* at 849.

Whatever potential impact the Governor’s Order may have on the Landlords’ individual business interests, issuance of that Order cannot be deemed conscience-shocking. To the contrary, given the enormous public health and economic challenges confronting the Commonwealth, if the Governor had *not* taken decisive action to prevent migration and homelessness in the face of this ongoing public health and economic crisis, that would have been conscience-shocking.

CONCLUSION

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

Respectfully submitted,

JOSH SHAPIRO
Attorney General

KELI NEARY
Executive Deputy Attorney General
Civil Law Division

By: */s/ J. Bart DeLone*

J. BART DeLONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section
Pa. Bar # 42540

CLAUDIA TESORO
Senior Deputy Attorney General

SEAN A. KIRKATRICK
Senior Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 712-3818
FAX: (717) 772-4526

DATE: May 18, 2020

CERTIFICATE OF COUNSEL

I hereby certify that this brief contains 4,228 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

J. BART DeLONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section

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:

Lee A. Stivale, Esq.
STIVALE LAW OFFICES, PLLC

Bradley S. Dornish, Esq.
Mary Elizabeth Dornish, Esq.
DORNISH LAW OFFICES, PC

/s/ J. Bart DeLone

J. BART DeLONE
Chief Deputy Attorney General

DATE: May 18, 2020