

IN THE SUPREME COURT OF PENNSYLVANIA

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

Petitioner

v.

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

Respondents

No. 104 M.M. 2020

**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF ON
BEHALF OF THE COMMONWEALTH PARTNERS CHAMBER OF
ENTREPRENEURS, PENNSYLVANIA MANUFACTURERS
ASSOCIATION, MANUFACTURER & BUSINESS ASSOCIATION, AND
NATIONAL FEDERATION OF INDEPENDENT BUSINESS**

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(1), the Commonwealth Partners Chamber of Entrepreneurs (“CPCE”), Pennsylvania Manufacturers Association (“PMA”), Manufacturer & Business Association (“MBA”), and National Federation of Independent Business (“NFIB”) (collectively, “Proposed *Amici Curiae*”) request leave to file the accompanying *Amici Curiae* brief for this Court’s consideration in the above-captioned matter. In support thereof, the Proposed *Amici Curia* state the following:

1. Respondents, Senator Joseph Scarnati, III, Senator Jake Corman and the Senate Republican Caucus, filed a Petition for Review on June 10, 2020, seeking Mandamus Relief that would require Governor Tom Wolf to issue an executive order or proclamation ending the state of disaster emergency pursuant to House Resolution 836 and Section 7301(c) of the Emergency Code. Governor Wolf declared the disaster emergency on March 6, 2020, which he renewed on June 3, 2020.

2. Governor Wolf filed an Application for this Court to Exercise Jurisdiction Pursuant to Its King's Bench Powers on June 12, 2020. This Court granted Governor Wolf's request on June 17, 2020.

3. The Proposed *Amici Curiae* are membership associations that represent many of Pennsylvania's largest and smallest job creators and employ tens of thousands of working people in every industry across our Commonwealth.

4. The Proposed *Amici Curiae* hold a unique perspective regarding the critical issues confronting this Court in the instant case. They and their membership have closely followed the public discourse between the General Assembly and Governor Wolf, and believe that this Court will benefit from their analysis and experience related to how these issues impact the business community and their employees.

WHEREFORE, the Proposed *Amici Curiae* respectfully requests that this Court grant it leave to file the attached *Amici Curiae* Brief.

Respectfully submitted,

/s/ Jonathan S. Goldstein

Jonathan S. Goldstein, Esquire

Attorney I.D. 201627

GOLDSTEIN LAW PARTNERS, LLC

11 Church Road

Hatfield, PA 19440

(tel) 610.949.0444

(fax) 215.257.1910

Email: jgoldstein@goldsteinlp.com

/s/ Shawn M. Rodgers

Shawn M. Rodgers, Esquire

Attorney I.D. 307598

GOLDSTEIN LAW PARTNERS, LLC

11 Church Road

Hatfield, PA 19440

(tel) 610.949.0444

(fax) 215.257.1910

Email: srodgers@goldsteinlp.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I, Shawn M. Rodgers, Esquire, hereby certify that I caused a true and correct copy of the foregoing Application for Leave to be served on or before day of June 23, 2020, via e-filing, e-mail, hand delivery and/or first-class mail, to the following individual(s), which service satisfies the requirements of Pa.R.A.P. 121.

Matthew H. Haverstick (No. 85072)
Mark E. Seiberling (No. 91256)
Joshua J. Voss (No. 306853)
Shohin Vance (No. 323551)
Kleinbard, LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 268-0140
mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com

Joshua D. Shapiro
Howard G. Hopkirk
Sean Andrew Kirkpatrick
Keli Marie Neary
15th Floor Strawberry Sq.
Harrisburg, PA 17120
hhopkirk@attorneygeneral.gov
skirkpatrick@attorneygeneral.gov
kneary@attorneygeneral.gov
josh@attorneygeneral.gov

Attorneys for Governor Wolf

Attorneys for Senator Scarnati, III, et al.

/s/ Shawn M. Rodgers
Shawn M. Rodgers, Esquire
Attorney I.D. 307598
GOLDSTEIN LAW PARTNERS, LLC
11 Church Road
Hatfield, PA 19440
(tel) 610.949.0444
(fax) 215.257.1910
Email: srodgers@goldsteinlp.com

Attorneys for Amici Curiae

Date: June 23, 2020

CERTIFICATE OF COMPLIANCE WITH RULE 127

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

/s/ Shawn M. Rodgers _____
Shawn M. Rodgers, Esquire
Attorney I.D. 307598
GOLDSTEIN LAW PARTNERS, LLC
11 Church Road
Hatfield, PA 19440
(tel) 610.949.0444
(fax) 215.257.1910
Email: srodgers@goldsteinlp.com

Attorneys for Amici Curiae

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104 MM 2020

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COMMONWEALTH OF PENNSYLVANIA

Petitioner

v.

SENATOR JOSEPH B. SCARNATI, III, et al.,

Respondents

*Transferred to the Supreme Court of Pennsylvania by Order, dated June 17, 2020
From the Commonwealth Court of Pennsylvania, No. 344 M.D. 2020*

BRIEF OF AMICI CURIAE

**Commonwealth Partners Chamber of Entrepreneurs, Pennsylvania Manufacturers
Association, Manufacturer & Business Association, and National Federation of
Independent Business**

Jonathan S. Goldstein, Esquire
Attorney I.D. No: 201627
Shawn M. Rodgers, Esquire
Attorney I.D. 307598
GOLDSTEIN LAW PARTNERS, LLC
11 Church Road
Hatfield, PA 19440
(tel) 610.949.0444
(fax) 215.257.1910

Attorneys for Amici Curiae

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STATEMENT OF INTEREST OF AMICUS CURIAE

Commonwealth Partners Chamber of Entrepreneurs (“CPCE”), Pennsylvania Manufacturers’ Association (“PMA”), Manufacturer & Business Association (“MBA”), and National Federation of Independent Business (“NFIB”) respectfully (collectively, “Amici Curiae”) submits this *amici curiae* brief¹ in support of Respondents, Senator Joseph B. Scarnati, III, Senator Jake Corman and the Senate Republican Caucus. The Amici Curiae are membership associations that represent many of Pennsylvania’s largest and smallest job creators and employ tens of thousands of working people in every industry across our Commonwealth.

To protect the interests of our members and their employees, we are jointly filing this *amici curiae* brief. While our members recognize that Pennsylvania's Emergency Code provides the Governor with broad powers to address imminent threats during a disaster emergency, they also strongly believe that broad executive powers – no matter how necessary – must be subject to the reasonable constraints provided under § 7301(c) of the Code. Unless reasonable checks and balances exist, our members’ businesses and the jobs they provide are threatened if a single authority – the Governor – can unilaterally and indefinitely shutter their operations. In the instant case, this Court must confront whether our laws place

¹ The *Amici Curiae* submit this Brief and the Application for Leave to File pursuant to Pa.R.A.P. 531(b)(1).

reasonable limits upon the Governor's emergency authority. Our members are deeply invested in the how this Court resolves this question.

No other person or entity other than the amici curiae, its members, or counsel have (i) paid in whole or in part for the preparation of this amici curiae brief or (ii) authored in whole or in part this amici curiae brief. *See* Pa. R.A.P. 531(b)(2)

SUMMARY OF THE ARGUMENT

In *Friends of Danny DeVito v. Wolf*, 2020 WL 1847100 (68 MM 2020) (Pa. 2020), this Court identified the internal mechanism contained in the Emergency Code that enables the General Assembly to end a state of disaster emergency. “As a counterbalance to the exercise of the broad powers granted to the Governor, the Emergency Code provides that the General Assembly by concurrent resolution may terminate a state of disaster emergency at any time.” *Friends of Danny DeVito*, 2020 WL 1847100 at *9 (citing 35 Pa.C.S. § 7301(c)). This Court explained that § 7301(c) provides a reasonable constraint on the broad powers bestowed upon the Governor and, by doing so, creates the checks and balances necessary to preserve the separation of powers within the Commonwealth.

This Court’s guidance spurred action by CPCE, PMA, MBA, NFIB and their members, the entire business community and workers across Pennsylvania. They rallied their resources and convinced their representatives to pass concurrent resolution HR 836 in both houses of the General Assembly, which ends the disaster emergency in this Commonwealth. In *Friends of Danny DeVito*, this Court found that the General Assembly could decide to end the disaster emergency “at any time.” *Friends of Danny DeVito*, 2020 WL 1847100 at *9. That time is now – safely, cautiously but with urgency.

The *DeVito* decision recognized that the internal procedure under § 7301(c) establishes a structural “counterbalance” to the Governor’s authority. The concurrent resolution identified in § 7301(c), accordingly, is not a “legislative act” taken by the General Assembly subject to the presentment requirement. The “counterbalance” would not function properly if the Governor were required to sign the General Assembly’s concurrent resolution before it obligates him to “issue an executive order or proclamation ending the state of disaster emergency.” 35 Pa.C.S. § 7301(c).

As this Court’s analysis of § 7301(c) in *Devito* revealed, the Emergency Code intended to impose a constraint upon the broad emergency powers entrusted to the Governor. Section 7301(c) gives the General Assembly the ability to end a declared emergency, if it determines such a decision is prudent. HR 836 comports with the internal mechanism provided under § 7301(c). This Court should apply *DeVito* to the instant case and issue a writ of mandamus compelling the Governor to terminate his March 6, 2020 disaster declaration.

ARGUMENT

I. This Court’s Decision in *Friends of Danny DeVito v. Wolf* Requires the Governor to Order the End of the COVID-19 State of Disaster.

In *Friends of Danny DeVito v. Wolf*, 2020 WL 1847100 (68 MM 2020) (Pa. 2020), this Court considered a variety of challenges to the Governor’s authority to issue an executive order, *inter alia*, declaring a state of disaster emergency across the Commonwealth of Pennsylvania, and directing all “non-essential” businesses to shutdown operations indefinitely. The Governor primarily relied upon the powers granted to him under the Emergency Code, 35 Pa.C.S. § 7301, to address threats to public safety during disaster emergencies. This Court, accordingly, undertook an extensive statutory analysis of the “General Authority of the Governor” granted by § 7301 of the Code.

Aside from defining the Governor’s broad emergency powers, the majority in *Friends of Danny DeVito* also discussed the structural limitations the Code imposed upon the Governor. This Court succinctly explained that the General Assembly retained one check against the Governor’s power. “As a counterbalance to the exercise of the broad powers granted to the Governor,” this Court expounded, “the Emergency Code provides that the General Assembly by concurrent resolution may terminate a state of disaster emergency at any time.” *Friends of Danny DeVito*, 2020 WL 1847100 at *9 (citing 35 Pa.C.S. § 7301(c)).

The business community read the words of this Court, and heeded those words. CPCE, PMA, MBA, NFIB and their members, as *Amici Curiae*, devoted their available resources to convincing their representatives in the General Assembly to end the disaster emergency and allow businesses to reopen and employees to return to work – safely, with added precautions consistent with the guidelines of public health authorities, but *now* and not at some undefined date in the future. The House and the Senate of Pennsylvania’s General Assembly each voted in favor of HR 836, a *concurrent resolution* that mandates an end to the Commonwealth’s disaster emergency. Under this Court’s own interpretation of § 7301(c), the General Assembly’s concurrent resolution HR 836 must end the current state of disaster emergency that Governor Wolf initiated by executive order on March 6, 2020.

This Court’s interpretation of § 7301(c) in *Friends of Danny DeVito* reveals that presentment to the Governor is not required for the General Assembly’s “concurrent resolution” to end the disaster emergency. The concurrent resolution referenced under the Emergency Code is not a “legislative act,” but rather an internal procedure – already passed by the General Assembly and signed by the Governor – structurally designed as a “counterbalance” like this Court described. *See Friends of Danny DeVito*, 2020 WL 1847100 at *9 (citing 35 Pa.C.S. § 7301(c)). The passage of HR 836 comports with the mechanism provided for

ending the disaster emergency under § 7301(c). “[T]he ‘legislative power’ ... was exercised not when the General Assembly [voted in favor of HR 836], but when it passed [35 Pa.C.S. § 7301(c)] which created this procedure for [ending the emergency].” *Com. v. Kuphal*, 500 A.2d 1205, 1207 (Pa. Super. 1985); *see also Costa v. Cortes*, 142 A.3d 1004, 1013–14 (Pa. Cmwlth. 2016), *aff’d*, 145 A.3d 721 (Pa. 2016) (holding that concurrent resolution by both houses of the General Assembly adhered to the procedures set forth in Pa. Const. art. XI, § 1, and therefore was not a “legislative act” requiring presentment to the Governor under Pa. Const. art. III, § 9). This Court’s decision in *Friends of Danny DeVito* recognizes the same statutory structure – the referenced “concurrent resolution” is not a “legislative act.” Otherwise, the Governor would be required to sign the “concurrent resolution,” and its passage would not serve the desired function identified in the *DeVito* decision.²

² The executive and legislative branches built this “counterbalance” into the Emergency Code when the law was enacted. The Governor suggests that it violates Article III, Section 9 of the Pennsylvania Constitution; however, he disregards one critical fact. The “counterbalance” provided by the General Assembly’s ability “[to] terminate a state of disaster emergency at any time” is essential to the structure of the Emergency Code and to § 7301(c), in particular. The General Assembly would not have passed the Emergency Code in its present form without the “counterbalance” discussed by this Court in *DeVito*. If this “counterbalance” is found to violate the Pennsylvania Constitution, it cannot be severed from the remainder of the statute. To do so would leave in effect a law that was *never* passed by either house of the General Assembly, or signed by the Governor. *See Com. v. Hopkins*, 117 A.3d 247, 257, 262 (Pa. 2015) (holding the presumption in favor of severability is rebutted where “(1) the valid provisions of the statute are so essentially and inseparably connected with the void provisions that it cannot be presumed the legislature would have enacted the remaining valid provisions without the voided ones; or (2) the remaining valid provisions standing alone are incomplete and incapable of being executed in accord with the intent of the General Assembly”).

This Court interpreted § 7301(c) of the Emergency Code in *Friends of Danny DeVito*, and concluded that the General Assembly serves an important role for preserving the separation of powers. Structurally, the General Assembly provides a “counterbalance” to the Governor’s broad authority under the Emergency Code. Without this “counterbalance,” the Governor’s emergency authority would be effectively unbridled. This Court’s decision in *Friends of Danny DeVito* reveals that was not the intent underpinning § 7301(c).

The *Amici Curiae* and a majority of both houses of the General Assembly listened to this Court’s guidance. They now ask this Court to do the same. The *DeVito* decision and § 7301(c) explain that, if the General Assembly approves a concurrent resolution, it has the authority “[to] terminate a state of disaster emergency at any time.” 35 Pa.C.S. § 7301(c).

“Thereupon, the Governor **shall issue** an executive order or proclamation ending the state of disaster emergency.” *Id.* (emphasis added). The statute provides the Governor with no discretion once the General Assembly passes the concurrent resolution. This Court recognized the Governor’s lack of discretion in *DeVito*. The *Amici Curiae*, their members, and the entire Pennsylvania business community, request that this Court apply *DeVito* to the instant case and issue a writ of mandamus compelling the Governor to terminate his March 6, 2020 disaster declaration.

CONCLUSION

For all the foregoing reasons set forth fully above, the Amicus Curiae requests that this Honorable Court apply the *DeVito* decision to the instant case and issue a writ of mandamus compelling the Governor to terminate his March 6, 2020 disaster declaration.

Respectfully submitted,

/s/ Jonathan S. Goldstein

Jonathan S. Goldstein, Esquire

Attorney I.D. 201627

GOLDSTEIN LAW PARTNERS, LLC

11 Church Road

Hatfield, PA 19440

(tel) 610.949.0444

(fax) 215.257.1910

Email: jgoldstein@goldsteinlp.com

/s/ Shawn M. Rodgers

Shawn M. Rodgers, Esquire

Attorney I.D. 307598

GOLDSTEIN LAW PARTNERS, LLC

11 Church Road

Hatfield, PA 19440

(tel) 610.949.0444

(fax) 215.257.1910

Email: srodgers@goldsteinlp.com

Attorneys for Amici Curiae

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Matthew H. Haverstick (No. 85072)
Mark E. Seiberling (No. 91256)
Joshua J. Voss (No. 306853)
Shohin Vance (No. 323551)
Kleinbard, LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 268-0140
mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com

Joshua D. Shapiro
Howard G. Hopkirk
Sean Andrew Kirkpatrick
Keli Marie Neary
15th Floor Strawberry Sq.
Harrisburg, PA 17120
hhopkirk@attorneygeneral.gov
skirkpatrick@attorneygeneral.gov
kneary@attorneygeneral.gov
josh@attorneygeneral.gov

Attorneys for Governor Wolf

Attorneys for Senator Scarnati, III, et al.

/s/ Shawn M. Rodgers
Shawn M. Rodgers, Esquire
Attorney I.D. 307598
GOLDSTEIN LAW PARTNERS, LLC
11 Church Road
Hatfield, PA 19440
(tel) 610.949.0444
(fax) 215.257.1910
Email: srodgers@goldsteinlp.com

Attorneys for Amici Curiae

Date: June 23, 2020

CERTIFICATE OF WORD COUNT

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a)(1), I hereby certify that this brief complies with the type-volume limitation set forth in Rule 2135(a)(1) and contains 1,464 words.

/s/ Shawn M. Rodgers

Shawn M. Rodgers, Esquire
Attorney I.D. 307598
GOLDSTEIN LAW PARTNERS, LLC
11 Church Road
Hatfield, PA 19440
(tel) 610.949.0444
(fax) 215.257.1910
Email: srodgers@goldsteinlp.com

Attorneys for Amici Curiae

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/s/ Shawn M. Rodgers _____
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Attorney I.D. 307598
GOLDSTEIN LAW PARTNERS, LLC
11 Church Road
Hatfield, PA 19440
(tel) 610.949.0444
(fax) 215.257.1910
Email: srodgers@goldsteinlp.com

Attorneys for Amici Curiae