No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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 OF HEALTH,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

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

Counsel of Record for the Petitioners

QUESTIONS PRESENTED

Whether the Order exceeded the Governor's permissible scope of his police powers and as such violated Petitioners' rights guaranteed by the U.S. Constitution.

Suggested Answers: Yes

Whether Petitioners' rights not to be deprived of life, liberty and property without due process of law and not to have their property taken without just compensation guaranteed by the Fifth and Fourteenth Amendments are violated by the Order.

Suggested Answer: Yes

Whether Petitioners' rights not to be deprived of life, liberty and property without due process of law guaranteed by the Fifth and Fourteenth Amendments are violated by this Order.

Suggested Answer: Yes

Whether Petitioners' rights to equal protection of the law guaranteed by the Fourteenth Amendment are violated by the Order.

Suggested Answer: Yes

Whether Petitioners' rights to free speech and assembly protected by U.S. Const. amend. 1 are violated by the Order.

Suggested Answer: Yes

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PETITION FOR WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

Petitioners respectfully ask that a writ of certiorari issue to review the opinion of the Pennsylvania Supreme Court in 68 MM 2020 filed on April 13, 2020.[1]

OPINION BELOW

The Majority Opinion of the Pennsylvania Supreme Court, which was issued on April 13, 2020 is attached as Appendix A, and the Concurring and Dissenting Opinion, is attached as Appendix B.

[1] Pursuant to Rule 29 of the Supreme Court of the United States there is no parent or publicly held company owning 10% or more of the corporation's stock of any Petitioner.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C.S. § 1257(a):

> **Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where…the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution…**of the United States, **or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution** of …the United States.

The Pennsylvania Supreme Court's Opinion is a final judgment rendered by the highest court of the Commonwealth of Pennsylvania (the "lower court"). The lower court's Opinion is not subject to further review or correction in any other state tribunal; it has terminated the litigation and is the final word or say by the final court. *See Mkt. St. R. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945). Further, in the underlying case, Petitioners challenged the Executive Order of the Governor of Pennsylvania as being repugnant to the U.S. Constitution and raised claims under U.S. Const. amends. I, V, XIV, all of which were denied by the lower court.

Further, this petition is timely because it was filed within 90 days of the date the Opinion pursuant to Supreme Court Rule 13(1).

CONSTITUTIONAL PROVISIONS & AND EXECUTIVE ORDER INVOLVED

U.S. Const. amend. XIV Sec. 1:

[Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Executive Order is attached as Appendix C.

STATEMENT OF THE CASE

On March 6 2020, the Governor issued a proclamation declaring a disaster emergency throughout the Commonwealth of Pennsylvania.[2] On March 19, 2020, the Governor issued an Executive Order barring any person or entity from

[2] https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf

operating a place of business in Pennsylvania that is not "life-sustaining," ordering that life sustaining businesses may remain open, but must follow, at a minimum, the social distancing practices and other mitigation measures defined by the Centers for Disease Control (CDC) (the "Order"). The Order contained a list classifying all industries as either life-sustaining or non-life-sustaining (the "List"). The Order explained that its violation could result in citations, fines, or license suspensions, forfeiture of the ability to receive any application disaster relief; prosecutions by the Department of Health, including quarantine, isolation, or other disease control measure with violators subject to fines or imprisonment and any other criminal charges that might be applicable. Petitioners are businesses or entities included on the List as non-life-sustaining and were compelled to close the physical operations of their businesses or entities.

After issuing the Order, the Governor added a "waiver" process thru which businesses and entities could submit an application to the Pennsylvania Department of Community and Economic Development (DCED) and request that they be permitted to operate. DCED received 42,380 waiver requests. So far, DCED approved 7,837 requests for a waiver, rejected 18,746, found 14,471 didn't require one for the activity they wanted to perform. The remainder are still being

processed.[3] On Wednesday, April 1, 2020, DCED announced that it was ending the waiver process for new request on April 3, 2020 at 5:00PM.[4]

DCED employees review the waiver applications and grant or deny them. The Governor provided no further administrative review and denies there is any judicial review for denials. The lower court held that the Governor, and not DCED, is reviewing and deciding the waivers and that the Governor's actions are not subject to the right of judicial review guaranteed by the Pennsylvania Constitution because the Governor is not an administrative agency. This opinion results in the denial of judicial review to at least 18,746, businesses whose waivers were denied.

Petitioners filed an Emergency Application in the Pennsylvania Supreme Court asking that court to strike down the Order as beyond the Governor's statutory authority and violative of the Petitioners' Pennsylvania and U.S. Constitutional rights by *inter alia* depriving them of the use and control of their businesses without due process of law and/or just compensation, subjecting them to a List and waiver process that was arbitrary and capricious and allowed for no judicial review and for violating their equal protection and free speech and assembly rights. The Governor countered that he has the authority under the Pennsylvania Constitution and statutes and that Petitioners' rights under the Pennsylvania and U.S. Constitution were not violated.

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[3] https://www.pennlive.com/news/2020/04/gov-tom-wolf-vetoes-bill-that-could-allow-more-pa-businesses-to-reopen.html

[4] https://www.pennlive.com/coronavirus/2020/04/pa-businesses-seeking-waiver-to-stay-open-through-coronavirus-closures-have-until-friday-to-apply.html?fbclid=IwAR0-yQWs1qeuf9YNdqk6wqkbo7SdHJZIHD8WjVniBX41BRsWxFKJQUA5l3s

REASONS FOR GRANTING THE PETITION

The Order exceeded the Governor's permissible scope of his police powers and thus violated Petitioners' rights guaranteed by the U.S. Constitution.

The lower court found the Governor has the authority for his Order under the Emergency Management Services Act (the "Code"). 35 Pa. Cons. Stat. § 7101. However, the Code addresses "disasters," not communicable diseases. Pennsylvania has a law for communicable diseases – the Disease Prevention and Control Law (hereinafter the "Disease Act").[5] But, the Disease Act does not authorize the Governor's Order. It only empowers the Governor thru his Secretary of Health to take action against persons suspected of being infected with, or a carrier of, or likely to have been exposed to a communicable disease; not businesses let alone businesses at which no COVID-19 has been identified. And, these actions must be done through the courts, with due process rights for the person subject to them. None of that has happened in this case.

Although communicable diseases are governed by the Disease Act, the lower court chose not to analyze that Act and instead found the Governor's power for the Order is in the Code. In order to fit the square peg into the round hole, the lower court found that the "COVID-19 pandemic" is a "natural disaster." The Code defines natural disasters 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.

[5] 35 Pa. Stat. Ann. § 521.1 et seq.

35 Pa. Cons. Stat. § 7101

Viral illnesses, pandemics and epidemics do not appear in the definition and are not like the things included in the definition.

The lower court found the general phrase "other catastrophe" includes COVID-19. However, under the contextual cannon of *ejusdem generis*, it cannot be included because it is not in the same kind or class as those listed. *See Norfolk & W. R. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 129, (1991). First, the subjects listed are comprised of the traditionally understood elements of nature: earth, fire, water and wind; COVID-19 is not. Second, these natural elements all can cause destruction to the state's physical infrastructure; COVID-19 cannot. The lower court ignores the obvious commonality among the class of natural disasters listed, focuses exclusively on the last dependent clause of the definition, and concludes that anything can be a catastrophe as long as it, "involves substantial damage to property, hardship, suffering or possible loss of life.'" *Majority Opinion*, Page 24. But, the lower court's definition reduces every other word in the statutory definition preceding the word, ***other***, to mere surplusage, which violates another canon of statutory construction. *See Hibbs v. Winn*, 542 U.S. 88 (2004).

Further, the Code empowers the Governor to act only within a **disaster area**. 35 Pa. Con. Stat. § 7301 (f)(7). The Code does not define "disaster area." Dictionaries define "disaster area," as, "a place where a very serious accident, such as an earthquake, ***has happened***."[6] Yet, the lower court found, "Thus, any location

[6] https://dictionary.cambridge.org/us/dictionary/english/disaster-area?topic=accidents-and-disasters

(including Petitioners' businesses) where two or more people can congregate is within the disaster area." *Majority Opinion*, Page 26. But, that definition is based upon mere speculation about a possible future event. That defies the common sense definition of a disaster area which is a place where a disaster *has occurred*. Plus the assumption the COVID-19 will spread and harm someone during that hypothetical meeting is extremely attenuated. Thus, the Order does not fit within the Code.

The lower court cited this Court for the police 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 in the *Majority Opinion* Page 27.

However, this case fails the *Lawton* test. The first prong is whether the public requires the state action (i.e. the Order). The lower court reasons the public requires the Order because COVID-19 has spread "exponentially" and the death toll is "staggering." *Majority Opinion,* Pages 27-28. And, "The reason for the drop in the death toll projection is the enforcement of social distancing mechanisms and citizen's compliance with them." *Id.* at 28. And, "The ***enforcement*** of social distancing to suppress transmission of the disease is currently the **only** mitigation tool." *Id.* (emphasis added).

In support of its conclusion, the lower court cites to an article appearing in Politico, a political website. However, the article stands for the opposite conclusion. It cites senior Trump Administration officials touting, "the effectiveness of the

federal government's social-distancing ***guidelines***."[1] Those guidelines are not mandatory, statewide business closure orders. The article does not cite the "***enforcement*** of social distancing mechanisms," does not mention Pennsylvania or any other state's business closure orders at all let alone proclaim their effectiveness.[2] The health officials cite the American peoples' practice of "social distancing," not statewide business closure orders, as the reason for the drop in death toll. The article quotes the director of the CDC, who said, that "what we're seeing is a large majority of the American public are taking the social-distancing recommendations to heart." Thus the evidence cited by the court does not prove that the public requires the Order and suggests voluntary compliance is what has worked. Furthermore, the social scientific data show that mass business closure and shut down orders are not an effective mitigation tool, let alone more effective than more narrowly tailored measures.[3]

The Order has caused significant damage to Petitioners' businesses. The lower court stated, "We recognize the serious and significant economic impact of the closure of Petitioners' businesses." *Majority Opinion*, Page 30. And:

> While the majority repeatedly stresses that such closure is temporary, see id., this may in fact not be so for businesses that are unable to endure the associated revenue losses. Additionally, the damage to surviving businesses may be vast.

Concurring and Dissenting Opinion, Page 3. (emphasis added)

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7 https://www.politico.com/news/2020/04/07/trumps-top-health-officials-predict-diminished-coronavirus-death-toll-171456

8 The article does reference work from home guidelines which many businesses and workers were able to figure out and do for themselves without government compulsion.

9 https://www.spiked-online.com/2020/04/22/there-is-no-empirical-evidence-for-these-lockdowns/

The Governor stated about his Order, "It is devastating the economy, no question about it."[10] A cursory review of the news shows the catastrophic consequences to the economy caused by this and similar business closure orders.[11] Thus, the public interest is greatly harmed by the Order.

The second prong of *Lawton* is whether the Order is reasonably necessary to achieve its purpose while not unduly oppressive. The lower court stated, "The choice made by the Respondents was ***tailored*** to the nature of the emergency and utilized a ***recognized tool***, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19." *Majority Opinion,* Page 29. However mass, statewide business closure orders have never been implemented before, let alone determined to be effective; thus there is no basis to conclude they are a "recognized tool." And the Order was not tailored to the emergency. If the way to reduce the spread of COVID-19 is to engage in social distancing, then the "tailored" response would have been to order businesses to engage in social distancing and close those that could not.

Another example of a reasonable order would be one that ordered social distancing for the demographic groups who are at risk of serious illness or death if they contract COVID-19 and/or for the geographical area in which the disease is most prevalent.[12] A report published by the Pennsylvania Department of Health on

[10] https://www.pennlive.com/news/2020/04/gov-tom-wolf-vetoes-bill-that-could-allow-more-pa-businesses-to-reopen.html
[11] https://www.wsj.com/articles/europe-suffers-record-collapse-in-economic-activity-11587637735
[12] https://thehill.com/opinion/healthcare/494034-the-data-are-in-stop-the-panic-and-end-the-total-isolation?fbclid=IwAR0Ik6NVF_c6iSFmI0pHFaey7qPCX7g9nbjnxmxN_HY_MoYnt9jhnrQjMS0#.XqEl0ODZ01U.facebook

April 16, 2020 reveals that nearly eighty percent of Pennsylvanians who have contracted COVID-19 reside in only 10 of its 67 counties, over half of all COVID-19-related deaths have occurred in nursing and personal care homes, and over half of COVID-19-related hospitalizations involve individuals over the age of 65.[13] Yet, the Governor applied his Order to all Pennsylvania businesses he deemed to be non-life-sustaining. Three of the Petitioners have their physical operations in Warren County, Pennsylvania. As of April 23, 2020, Warren County had one COVID-19 case and no deaths, yet all the non-life-sustaining businesses in Warren County were ordered closed on March 19, 2020.[14] This Order is not tailored or reasonably necessary to achieve the suppression of COVID-19.

As further evidence, the Governor on April 20, 2020 announced a date, May 8, 2020, when he will begin the gradual reopening of Pennsylvania's businesses. He stated, "We'll do it by region, and that means that if we opened in Cameron County, for example, that does not mean that we're closing or ending the restrictions, [for] the things that people ought to do in Philadelphia."[15] Cameron County is rural, like Warren County; Philadelphia is not. Here the Governor admits the regional

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[13] https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx

[14] On April 21, 2020 the Pa Dept of Health recorded one COVID-19 death in Warren County. However the Warren County government disputes this claim. See https://www.timesobserver.com/news/local-news/2020/04/warren-county-covid-19-death-reported-in-error/;

The Pa Department of Health then chanced the death count back to zero. See https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx

[15] https://www.pennlive.com/coronavirus/2020/04/pa-sets-may-8-as-the-target-date-for-regional-reopening-amid-the-coronavirus-pandemic-heres-what-it-means.html

approach is reasonable for the re-opening, but his closure Order was not regional, it was statewide.

Lastly, as previously discussed, the lower court has admitted that earlier predictions about the "staggering death toll" were wrong. *Majority Opinion,* Page 28. Thus, the death toll projections that formed the basis for the Order were wrong. Thus, the Order is unreasonable given the actual scope, scale and danger of COVID-19. Johns Hopkins University of Medicine's Coronavirus Resource Center, as of April 13, 2020 at 7:02 a.m., reported 557,590 confirmed cases of coronavirus in the U.S. and 22,109 deaths due to COVID-19.[16] Approximately 0.17 percent of America's 330 million population has been infected by the coronavirus and 0.007 percent has died from it. That is a staggeringly low death toll. Johns Hopkins reports that with more testing the case-to-mortality ratio will be even lower. Compare the coronavirus to influenza. The CDC estimates that from Oct. 1, 2019, through April 4, 2020, there were between 39 million and 56 million flu illnesses; between 18 million and 26 million medical visits due to flu; between 410,000 and 740,000 hospitalizations due to flu; and between 24,000 and 62,000 of deaths due to flu; and that death rate exists even though we have an effective vaccine. Those flu numbers can be considered "staggering." But, governors have never shut down tens of thousands of businesses throughout their entire state in response to the flu.

Further, the Order is unduly oppressive. As discussed previously, the lower court agrees the Order has caused serious and significant, negative economic

[16] https://www.washingtontimes.com/news/2020/apr/14/coronavirus-case-and-death-counts-in-us-ridiculous/

impact. Yet it then states that the Order is the *sine qua non* to protecting public lives and health. *Majority Opinion,* Page 30. However, the Order cannot be absolutely necessary to protect public lives and health when the Governor exempted tens of thousands of businesses from it. Furthermore, the social scientific data prove the lower court's conclusion is wrong. See FN 9. Also, the Pennsylvania Chief Justice recognized the impairment experienced by Petitioners and those businesses on the non-life-sustaining List:

> The majority opines that "[t]he protection of the lives and health of millions of Pennsylvania residents is the sine qua non of a proper exercise of police power." Id. at 30. I believe, however, that greater account must be given to the specific nature of the exercise, and that arbitrariness cannot be tolerated, ***particularly when the livelihoods of citizens are being impaired to the degree presently asserted.***

Concurring and Dissenting Opinion, Pages 2-3. (emphasis added)

Also, the Order is unduly oppressive because it could have been crafted and implemented in a more tailored and reasonable manner as discussed *supra.*

Lastly, this Court in *Lawton* upheld a state statute banning fishing with a net; the statute did not ban fishing. The Order does not ban business owners from operating their businesses without COVID-19 precautions; it much more broadly bans them from operating their businesses at all. Also, the lower court held there is no judicial review of any denial of a waiver even though this Court has declared in *Lawton* that there shall be judicial review of summary seizures or takings of property. *Id. Lawton* at 142.

Petitioners' right not to be deprived of life, liberty and property without due process of law and not to have their property taken without just compensation guaranteed by the Fifth and Fourteenth Amendments are

violated by the Order.

The Order constituted a taking of Petitioners' property without just compensation and thus violated U.S. Const. amends. V, XIV. The lower court ruled that a taking did not occur. *Majority Opinion*, Page 37. In the lower court, Petitioners cited and argued *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), in which this Court held:

> …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.***

Id. at 1016 (emphasis added).

And:

> 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.***

Id. at 1019

The Order ousted Petitioners from their place of business and prohibits them from physically operating them.[17] This 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

[17] Petitioner Blueberry Hill is not operating its restaurant and has not since the date of the Order. The lower court somehow drew the opposite conclusion. *Majority Opinion*, Page 32 FN 12. However, the pleadings contain no factual averment that Petitioner was operating the restaurant; and the Supplemental Application filed by Petitioner Blueberry avers that the restaurant is closed. *Supplemental Application for Relief*, Exhibit A, Paragraph 1. Petitioner's entire golf club and restaurant is closed by the Order.

It can still be a taking even if the taking is temporary:

> 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. … ***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 (1987)

Lastly, the government has the burden of proof and must:

> identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the [statute] is taking nothing.

Id. Lucas at 1031-32

Respondents have not met their burden. They have not identified any laws that prohibit Petitioners from using their property as they did before the Order. Also, Respondents' fear that COVID-19 could spread at Petitioners' place of business is too speculative and remote to meet their burden:

> There was nothing inherently harmful about the landowners' desired use of their properties, to build homes, and uncertainty about the stability of the area was not sufficient to deprive them of a home. A permanent ban on home construction could not be based merely on a fear of personal injury or significant property damage.

Monks v. City of Rancho Palos Verdes, 167 Cal. App. 4th 263, 299 (2008)

The lower court based its conclusion on this Court's holding in *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), which held a regulatory taking had not occurred, mainly because the government action was temporary. Yet the facts in *Tahoe-Sierra* are distinguishable. The *Tahoe-Sierra* case

involved two moratoria on residential development of a parcel of land for 32 months during which the local zoning authority was developing a comprehensive land use plan for that parcel. There is a substantial difference between not being permitted to use or even access your property at all, and not being able to utilize your property for one particular, future proposed use. Developers purchase real estate knowing they will need approvals by local or state governments before they can develop the real estate. The Petitioners had no expectation that they would be barred from using their physical business operations, which were already in lawful use on their business premises, by an executive order from the Governor.

This Court in *Tahoe-Sierra* held that a taking has occurred if a regulation "goes too far" and, "***neither a physical appropriation nor a public use has ever been a necessary component of a "regulatory taking."*** *Id.* at 325-26 (emphasis added).

The lower court held there was no taking because the Order is temporary. *Majority Opinion*, Page 36-37. However, Chief Justice Saylor held that the Majority placed too much emphasis on the temporariness of the Order:

> While the majority repeatedly stresses that such closure is temporary, see id., this may in fact not be so for businesses that are unable to endure the associated revenue losses. Additionally, the damage to surviving businesses may be vast. Significantly, moreover, the Supreme Court of the United States has admonished that the ***impermanent nature of a restriction "should not be given exclusive significance one way or the other" in determining whether it is a proper exercise of police power.*** Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 337, 122 S. Ct. 1465, 1486 (2002).

Concurring and Dissenting Opinion, Page 2. (emphasis added)

Also, the lower court noted the Order can be terminated at any time by the General Assembly. *Majority Opinion,* Page 37. However, the General Assembly passed a bill to reopen those Pennsylvania businesses; the Governor vetoed it.[18] In response to the lower court's claim that the General Assembly serves as a check on the Governor's power, Chief Justice Saylor admonished, "that the Constitution serves as another." *Concurring and Dissenting Opinion,* Page 3, FN 2.

The lower court also relies upon *Nat'l Amuses., Inc. v. Borough of Palmyra*, 716 F.3d 57 (3d Cir. 2013) which held a regulatory taking had not occurred. *Majority Opinion,* Pages 36-37. The facts in *Nat'l Amusements Inc.* are distinguishable. In that case, the local government provided notice and a request to voluntarily cease operations while it inspected the property for unexploded artillery shells. Further, the parties entered into a court-approved agreement to keep open the premises for business with safety precautions. Thus, the owner did not lose the full use of his business operation and the risk of harm was being mitigated as the business continued to operate.

In the case at bar, the Governor provided no advance notice, made no request to voluntarily comply, and did not agree Petitioners could continue to operate their businesses with safety precautions. Unlike the danger involved in unexploded artillery shells, nothing dangerous has been found on the Petitioners' premises. The suggestion that COVID-19 could possibly be spread at Petitioners' physical premises and that someone could suffer serious injury or death as a result is

[18] https://www.governor.pa.gov/wp-content/uploads/2020/04/20200420-SB613-Veto-Memo.pdf

speculation. Mere speculation about a potential hazard is not sufficient for the government to meet its burden. *See Monks*, 167 Cal. App. 4th 263.

Petitioners' right not to be deprived of life, liberty and property without due process of law guaranteed by the Fifth and Fourteenth Amendments is violated by this Order.

Pre-Deprivation Due Process:

Petitioners were entitled to pre-deprivation due process as guaranteed by the U.S. Const. amends. V, XIV. The lower court held they were not. *Majority Opinion*, Page 40. In their Brief, the Petitioners cited to several cases in support of their claim. See *Petitioners' Brief,* Page 44.

In *Manna v. Erie*, an ordinance suspended tenants' obligation to pay rent if the city summarily found the dwelling unfit for habitation. The Pennsylvania Commonwealth Court struck down that ordinance as a violation of U.S. Const. amend. XIV. The court explained the form of due process required before the city could suspend the rent obligation, "notice of the action, a copy of the alleged violations, reasonable time to file a written response, and an opportunity for an oral appearance." *Manna v. Erie*, 27 Pa. Commw. 396, 397 (1976).

In *Fuentes*, this Court found that a Pennsylvania statute's prejudgment replevin provisions deprived the property owners of their property without due process insofar as they denied the right to prior notice and hearing before property was taken. *Fuentes v. Shevin*, 407 U.S. 67, 69 (1972).

Petitioners also cited and presented argument in their Brief of this Court's decision in *Rogin v. Bensalem Twp.*, 616 F.2d 680 (3d Cir. 1980), in which this Court

held, "Before a governmental body may deprive a landowner of a property interest, it must provide due process," listed seven elements of due process, and held that, "Whether all or any one of these safeguards are required in a particular situation depends on the outcome of the balancing test mentioned above" *Id.* at 682 (emphasis added). In *Rogin*, the property developer received all seven elements of due process, including judicial review. *Id*. at 695. Petitioners did not receive any. Petitioners were given approximately three hours to vacate their businesses; this hardly constitutes proper notice, which is only one of the elements.[19]

Petitioners also cited *Nat'l Wood Preservers v. Commonwealth Dep't of Envtl. Res.*, 489 Pa. 221 (1980). In this case, the property owner was ordered by a state regulatory agency to abate the nuisance of toxic chemicals on his property. Prior thereto, however, the property owner was afforded a hearing before the agency and an appeal to the Commonwealth Court.

The lower court cited *Bundy v. Wetzel*, 646 Pa. 248 (2018) for the balancing test. But *Bundy* does not conclude that no pre-deprivation due process of any form is required. The lower court in *Bundy* found and upheld several forms of pre-deprivation due process due to prison inmates regarding deductions to their inmate accounts including notice and a, "meaningful (if informal) means to challenge the amount of the debt, assert an exemption, or otherwise raise an objection to the deduction scheme." *Id.* at 252. The lower court in *Bundy* explained that providing

[19] The Order was posted on the Governor's website @5:00PM on Friday, March 19, 2020 and took effect three hours later at 8:00PM. Enforcement was to commence at 12:01AM that Saturday and then was postponed to the upcoming Monday at 8:00AM.

these forms of due process, "can potentially avoid erroneous deprivations before they occur." *Id.* Yet, in the case at bar, the Governor provided Petitioners with no means to challenge his classification of them as non-life-sustaining, assert an objection or otherwise raise an objection pre-deprivation. And, further, DCED admits to errors in determining which industries and which businesses were placed in which categories.[20] And, DCED granted over seven thousand waivers meaning it initially made over seven thousand erroneous deprivations.

The lower court cites *Pa. Coal Mining Asso. v. Ins. Dep't*, 471 Pa. 437 (1977). But this case confirms that those who have a property interest are entitled to some form of pre-deprivation due process. In this case, the lower court struck down the regulation in question because it did not provide notice and the right to make written objections to proposed insurance rates prior to the rates going into effect.

The lower court cites *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). But in *Logan*, this Court held that a person's due process rights were violated by the termination of his employment discrimination case without a hearing prior to the termination. *Id.* at 424. The *Logan* case also illustrates that federal law establishes minimum procedural requirements below which states cannot go. *Id.*

The lower court cited only one case in which this Court held that no due process in any form was required prior to a deprivation. In *Hudson v. Palmer*, 468 U.S. 517 (1984). However, this case involved a prison guard who, without

[20] https://www.pennlive.com/coronavirus/2020/03/gov-wolfs-ex-business-says-its-life-sustaining-and-doesnt-need-waiver-to-stay-open-during-coronavirus-shutdown.html

authorization, destroyed an inmate's personal property. This Court reasoned, "The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." *Id.* at 533. That case is distinguishable because the Governor issued the Order with authorization from the state (i.e. himself). Further this Court did not find a due process violation in *Hudson* because a meaningful post-deprivation remedy for the loss was available, i.e. the right of the inmate *inter alia* to sue for just compensation for the loss of his personal property. *Id.* at 534-35. However, in the case at bar, the lower court has held there is no taking and thus no right to just compensation for the Petitioners' loss of the use of their businesses.

The lower court cited this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976) for the test to determine the amount of process due:

> This balancing test considers three factors: (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. *Id.*

Majority Opinion, Pages 39-40.

However, as Petitioners argued in their Brief, *Mathews* makes Petitioners' case; in *Mathews* this Court permitted an initial termination of Social Security disability benefits because the claimant had the right to assert an objection prior to any preliminary administrative action and the claimant was guaranteed an evidentiary hearing and subsequent judicial review before the termination becomes final. *Petitioners' Brief,* Page 55-56. None of those facts exist in this case.

The lower court also cited *Bundy* for the proposition that "whether pre-deprivation notice is required largely depends upon the second *Mathews* factor. *Id.* at 557." *Majority Opinion*, Page 40. However, if the second *Mathews* factor is the most important of the three factors then the Order even more clearly fails. The second *Mathews* factor is, "(2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards." *Majority Opinion*, Pages 39 and 40. The risk of erroneous deprivation has proven to be substantial. In addition to apologizing for the mistakes he made in compiling the List and determining the categories, the Governor revised his List at least twice in the span of just hours or days to move major industries from one category to the other. See the attached chart indicating that the Governor transferred twenty-five entire industries from the non-life-sustaining List to the life-sustaining List and transferred two industries the other way. (Exhibit A). Furthermore, DCED approved over seven thousand waivers in a relatively short time. Granting the waivers indicates the businesses were apparently life-sustaining after all. Thus the facts reveal errors that were made because the Governor provided no notice or opportunity for industries or businesses to prove they are life-sustaining and/or that they can employ COVID-19 precautions before they were placed on the List and ordered to close.

The Governor issued his disaster proclamation on March 6, 2020 and his Order on March 19, 2020. Thus, he had nearly two weeks before he issued his Order to determine which industries or businesses were "life-sustaining" and "non-life-

sustaining." During that time the Governor and his DCED could have provided notice to all Pennsylvania industries and businesses, via his website, social media and press conferences, that he intended to issue a business closure order; he could have met with industry and business leaders and received their oral or written explanation for why they were life-sustaining, and could have given all businesses an opportunity via his website to submit written explanations as to why they should be permitted to remain open. DCED was likely initially overwhelmed by the waiver requests because it did not provide this form of pre-deprivation due process; had it done so it likely would have resulted in at least over seven thousand fewer waiver applications that it granted and over fourteen thousand fewer applications that it had to review only to determine the activity was life-sustaining in the first place; and providing even this minimal form of pre-deprivation due process would have lessened the substantial disruption to thousands of businesses, critical supply lines and the Pennsylvania economy.

Even though the lower court states that the second *Mathews* factor - the "risk of erroneous deprivation together with the value of additional or substitute safeguards" it does not discuss this factor. It discusses the third factor – the "administrative burden" – and explains that in essence the Governor had to act fast to control the spread of COVID-19 so there was no time for pre-deprivation due process. *Majority Opinion*, Page 40. But, as Petitioners explain above, the Governor had ample time to provide notice and the opportunity to respond.

Post-Deprivation Due Process:

Petitioners were entitled to post-deprivation due process. The lower court agreed, but concluded the waiver process was all that was needed. *Majority Opinion*, Page 41. However, none of the cases cited by the Majority support its conclusion. The lower court cited *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). *Majority Opinion*, Page 42.

However in *Hodel*, the mine operator received much more due process than Petitioners, including the right to notice and an abatement period if the state inspector found that its activity, "creates an immediate danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources." *Id.* at 298. The owners also received the right to request temporary relief from enforcement and the state was required to respond within five days, and the right to judicial review of the state's denial of temporary relief. Concerning immediate cessation orders, the owners received, "a prompt and adequate postdeprivation administrative hearing and an opportunity for judicial review." *Id.* at 268. Petitioners in the case at bar received none of these protections. Further, Petitioner Blueberry Hill filed a waiver on March 23, 2020 and to date has not received a response. Also, elsewhere in its opinion the lower court used the *Lawton* test to determine the extent of the state's police power as discussed *supra*. In *Lawton* this Court found the right of judicial review exists to challenge summary seizures or takings of property pursuant to the state's police power. *Id. Lawton* at 142.

The lower court concludes that no Pennsylvania business or entity is entitled to anything more than the waiver because DCED does not have the time to provide additional administrative review and any such review would constitute an "administrative burden." *Majority Opinion*, Page 44. Yet as discussed *supra*, the Governor had ample time before and afterward to provide an administrative review that includes the forms of due process afforded the property owner in *Hodel*.

This Court upheld a federal statute imposing rent control because it provided administrative and judicial review, even emergency judicial review, for the property owners objecting to the government's rent control determinations. *Bowles v. Willingham*, 321 U.S. 503, 516 (1944). In the case at bar, contrary to the lower court's conclusion, the waiver process is not due process. It does not include any of the elements of due process listed in *Rogin supra*, including: 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. DCED gives no reason for the denial other than, "it has been determined that the business identified above must remain closed." See a verbatim copy of a boiler plat waiver denial email from DCED.[21]

[21] 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

The waiver process is also a case study in arbitrary and capriciousness. Arbitrary is defined as those decisions not supported by fair or substantial cause or reason.[22] "Capricious" has been defined as, "Given to sudden and unaccountable changes of mood or behavior."[23] Within hours of issuing his Order and List, the Governor changed his mind and moved dozens of industries from the nonlife-sustaining to the life-sustaining List. The Governor then changed his mind again and moved more industries to the life-sustaining List without any change in the facts.

The Governor determined that "beer, wine, and liquor stores" are non-life-sustaining, but "beer distributors" are determined to be "life-sustaining.""[24] And "department stores" are non-life-sustaining, but "other general merchandise stores" life-sustaining?[25] 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. When Facebook commenters asked one of those specialty stores why it was not shut down, it replied that it qualified as a specialty food store, as it sells

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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.

[22] https://dictionary.law.com/Default.aspx?typed=arbitrary&type=1

[23]https://thelawdictionary.org/capricious/

[24] Also, beer, wine and liquor stores were on the original List as life-sustaining, but then the Governor transferred them to the non-life-sustaining List without any explanation.

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

"sauces, pasta and oils, biscotti," etc.[26] Biscotti is life- sustaining?[27] There is no substantial cause or reason to put a candy store on the life-sustaining list.

Another example of the arbitrariness of the waiver process involved Petitioner Kathy Gregory; she's a member of the Pennsylvania Realtors Association (PAR). As a real estate agent, she has been on the non-life-sustaining list since the Order was issued. On March 20, 2020, PAR applied for a waiver on behalf of its 35,000 members. After PAR submitted its waiver, the Governor stated that in making determinations, DCED is "maintaining consistency" with an advisory issued by the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA Advisory").[28] On March 28, 2020, CISA released a "Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response," which deems all real estate services and workers essential. Nevertheless the Governor denied PAR's waiver request on April 11, 2020.

DCED approved a waiver requested by 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 Wolf Home Products was open for

[26] https://www.inquirer.com/health/coronavirus/spl/pennsylvania-pa-coronavirusbusiness-shutdown-waiver-tom-wolf-joe-scarnati-20200327.html

[27] 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.

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

business.[29] After the media reports surfaced DCED rescinded the waiver explaining, "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." *Id*. The Respondents claim:

> 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."

Respondents' Answer to Petitioners' Emergency application for Extraordinary Relief, Page 24

Yet, the facts did not change between the granting and rescission of the waiver. Wolf Home Products is still open, despite having its waiver rescinded; it claims it did not need the waiver in the first place. Its CEO states, "evidently there's confusion."[30] The media reports about the 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.

[29] https://www.inquirer.com/health/coronavirus/spl/pennsylvania-pa-coronavirus-business-shutdown-waiver-tom-wolf-joe-scarnati-20200327.html?__vfz=medium%253Dsharebar&fbclid=IwAR25PbeG-GNObihYIVrnkHKQI0Hoi6-CGXRpA56Y4fRCdWW-vsjEnc-aI4Q

[30] https://www.spotlightpa.org/news/2020/03/pennsylvania-coronavirus-lifesustaining-wolf-home-products-waiver/

The Chief Justice of the Pennsylvania Supreme Court, and the two other justices who joined his opinion, is concerned about arbitrariness and the need for judicial review:

> I believe, however, that greater account must be given to the specific nature of the exercise, and that ***arbitrariness cannot be tolerated, particularly when the livelihoods of citizens are being impaired to the degree presently asserted***.

Concurring and Dissenting Opinion, Page 3 (emphasis added).

And:

> relative to the broad-scale closure of Pennsylvania business for a prolonged period -- ***I don't believe the executive's determinations of propriety can go untested in the face of the present allegations of inconsistency and irrationality.***

Concurring and Dissenting Opinion, Page 3 (emphasis added).

Judicial review is a long-held critical component of due process and has been applied in cases of executive orders.

> The acts of all a government department's officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual.
>
> *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1324 (1996)

This court has struck down agency actions under the arbitrary and capricious standard of review. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 32, (1983).[31] Due process has continued to provide a basis for a

[31] However, see *Dalton v. Specter*, 511 U.S. 462 (1994) for this Court's decision that judicial review of presidential actions are not subject to judicial review. However, in *Dalton,* this Court noted that case

reasonableness review of executive orders. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 431 (1935) (striking down executive order because it lacks findings and stated rationale); See *Sterling v. Constantin*, 287 U.S. 378, 388 (1932) (noting that complaint alleged that Governor's executive orders were "arbitrary and capricious"). In *Sterling,* this Court affirmed a lower court's order striking down a gubernatorial executive order holding, "The governor's attempt to regulate by executive order the lawful use of the properties in the production of oil was a proper subject for judicial inquiry." *Id. Sterling* at 386. This Court focused on the executive order's invasion of constitutional rights of those subject to it.

> Where state officials, purporting to act under state authority, invade rights secured by the federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief. The Governor of the State, in this respect, is in no different position from that of other state officials. Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has exceeded the authority conferred by the State, deprive the court of jurisdiction.

Id. Sterling at 386

Petitioners' right to equal protection of the law guaranteed by the Fourteenth Amendment is violated by the Order.

U.S. Const. amend. XIV forbids a state to deny to any person the equal protection of the laws. State classifications must not be arbitrary and must not lack rationality:

> … a state statute may not be struck down as offensive of equal protection in its schemes of classification ***unless it is obviously arbitrary***, and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the

did not involve a constitutional claim, which the case at bar does, "Furthermore, the claim that the President exceeded his authority under the Act was not a constitutional claim, but a statutory one. *Id. Dalton* at 464.

> claimant who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, ***<u>its classifications lack rationality</u>***.

McGowan v. Maryland, 366 U.S. 420, 535 (1961).

The classification scheme is obviously arbitrary and lacks rationality.

The fundamental problem with the Governor's classification scheme is the two classes – life-sustaining and non-life-sustaining – do not have any commonly understood definition and do not appear to have existed as industry or business classifications prior to the Governor's decision to employ them in his Order. In short, no one knows what they mean. Not only have the terms not appeared in any of the laws or regulations cited by the Governor, the Governor's definition of them is circular. He defines non-life-sustaining as, "businesses that are not critical to sustaining life in a pandemic."[32] Thus, the system lacks rationality at its foundation. That together with the fact that the Governor has given himself the power to declare whatever industry or business he desires as life-sustaining or non-life-sustaining has led to countless examples of arbitrary and capricious actions.

In addition to deeming beer distributorships and candy shops as life-sustaining, and deeming his former family business as life-sustaining and then changing his mind, the Governor also closed all golf courses, but has permitted fishing because *inter alia*, according to him, fishing is good for one's mental health, and by implication golf is not.[33] The Governor has deemed pet stores and accounting

[32] https://www.governor.pa.gov/newsroom/gov-wolf-secretary-levine-provideupdated-guidance-stress-need-for-compliance-as-cases-rise/

[33] https://www.pennlive.com/sports/2020/04/is-trout-fishing-a-more-sociallydistanced-sport-than-golf-no-but-tom-wolf-probably-has-other-concerns-aboutgolfers.

as life-sustaining, after originally classifying accounting as non-life-sustaining, and real estate services as non-life-sustaining. Yet, the Governor claimed he is maintaining consistency with CISA. But, CISA has deemed the entire real estate industry to be "essential."

The Order arbitrarily and irrationally classifies entire industries. The Order closed the physical operations of Friends of Danny DeVito and all entities in the Business, Professional, Labor, Political or Similar Organizations class. However, the Order permits Social Advocacy Organizations to remain open. Yet, Social Advocacy Organizations and Friends of Danny DeVito all appear in the same Industry, Sector and Subsector categories of the List. The lower court concluded that Social Advocacy Groups are dissimilar from Friends of Danny DeVito, "because Social advocacy groups advocate for vulnerable individuals during this time of disaster." *Majority Opinion*, Page 47. So, according to the Governor and the lower court, the advocacy of those groups is life-sustaining. However, Friends of Danny DeVito has been advocating for the vulnerable business owners and workers "during this time of disaster," whose businesses and jobs have been destroyed by the Order. However, according to the Governor and the lower court, Friends of Danny Devito's advocacy is not life-sustaining. The two groups are similar. Yet, the Governor keeps one open and one closed. Further, Petitioner Kathy Gregory is a real estate agent and is on the non-life-sustaining List, but accountants are not.

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Lastly, whether a business is life-sustaining or not, whatever that means, is wholly irrelevant to achieving the Governor's stated objective, which is to control the spread of COVID-19. This is further evidenced by the fact that DCED is granting waivers for those businesses that can prove they can operate with COVID-19 precautions. For example, the DCED granted the waiver of a real estate agency because, "it submitted 'virtual and telework operations' details with its application, explaining how the company would minimize the risk of community infections." Respondents' *Answer to Supplemental Applications for Relief,* Page 4, Thus, by the Governor's own admission, a classification scheme that would be relevant is one based upon which businesses can and cannot be operated in such a way so as to minimize the risk of community infections. Yet, this is not the classification system the Governor used in his Order. Thus, because the Order's classification system is wholly irrelevant to achieving the state's objective, it violates the equal protection clause. *Id. McGowan* at 422.

Furthermore, even though the Governor's classification system fails the rationality or rational basis test as described *supra*, an even stricter test is used when the rights involve fundamental Constitutional rights. "***Unless a classification trammels fundamental personal rights***…our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (emphasis added). The Order does not simply regulate whether Petitioners can work on Sundays, it completely deprives

them of the use and control of their private property. For nearly a century, this Court has consistently treated property as a fundamental right, forbidding the government from imposing arbitrary or irrational restrictions on its use. See *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926).

Petitioners' right to free speech and assembly protected by U.S. Const. amend. I are violated by the Order.

Petitioner Friends of Danny DeVito has the right to free speech and assembly. U.S. Const. amend. I. This Court has held:

> The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by the United States Constitution.

Citizens United v. FEC, 558 U.S. 310, 310 (2010).

And, "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.,* 551 U.S.449, at 464 as cited by *Citizens United v. FEC*, 558 U.S. 310, 340. And, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." *Id. Citizens United* at 310. This Court has held that the First Amendment protects the right to freedom of assembly. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

The state can place restrictions on the time, place, and manner of speech and peaceful assembly, provided that constitutional safeguards are met. *See Ward v.*

Rock Against Racism, 491 U.S. 781 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Time, place, and manner restrictions are permissible so long as they "… are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Id.* at 791.

The lower court held, "As to whether the Executive Order unreasonably limits alternative avenues of communication, it does not." *Majority Opinion*, Page 49. The lower court found that:

> The Executive Order does not place a restriction on supporters of DeVito Committee to assemble with each other and speak to each other, it only forecloses doing so in the physical campaign office. It does not in any respect limit the ability to speak or assemble, however, as it does not in any respect prohibit operations by telephone, videoconferencing, or on-line through websites and otherwise. In this era, cyberspace in general and social media in particular have become the lifeblood for the exercise of First Amendment rights. See Packingham v. North Carolina, 137 S.Ct. 1730, 1735 (2017).

Majority Opinion, Pages 49-50.

First, neither the Governor nor the lower court cited one case in which a person's First Amendment rights were restricted to the Internet or videoconferencing and/or were prohibited at their place of business. Second, *Packingham* supports Petitioners' claim. In *Packingham*, this Court struck down, as violative of the First Amendment, a state law prohibiting registered sex offenders from accessing certain social networking internet sites. *Id.* at 1731. In so doing, this Court reviewed the basic rule of First Amendment law:

> A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. Even in the modern era, these

> places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

Id.

However, the Order prohibits Petitioner, Friends of Danny DeVito, and all businesses and entities on the non-life-sustaining List, from exercising their right to free speech and assembly not only at their places of business, but at any other business or entity on the non-life-sustaining List. This is particularly oppressive for Friends of Danny DeVito, which is a candidate committee, because all "Business, Professional, Labor, Political or Similar Organizations" are on the non-life-sustaining List; this means no political events, including assemblies, forums, debates, fundraising events, and others, may be held at the physical location of any Business, Professional, Labor, Political or Similar Organizations due to the Order.

Further, in addition to the Order the Governor also issued a Stay-At-Home order that compels Pennsylvanians to stay at home except to participate in life-sustaining services.[34] Neither order declares speech or assembly to be "life-sustaining." Thus, the Order, in tandem with the Governor's Stay-At-Home Order, prohibits all Pennsylvania businesses and entities on the non-life-sustaining list and all Pennsylvanians from exercising their right to speech and assembly in streets and parks and in fact anywhere in Pennsylvania.

The lower court claims Petitioner is not burdened by these restrictions because it can engage in speech and assembly via *inter alia* videoconferencing. Yet,

[34] https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf

the lower court declared it could not give Petitioners a right to a hearing because it would require *inter alia* "troves of communication devices" to accomplish it. *Majority Opinion*, Page 45. Yet the lower court claims the Petitioner can accomplish the very thing the Pennsylvania courts, with all of their taxpayer-provided resources, apparently cannot do. Limiting speech and assembly to video conferencing, websites and social media is not reasonable.

CONCLUSION

This Court should declare the Order violates the rights of Petitioners' and all businesses and entities on the non-life-sustaining List guaranteed by the U.S. Const. amends. I, V, XIV and should strike it down.

Respectfully submitted,

Date: April 27, 2020

/s/ *Marc A. Scaringi*

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

VERIFICATION

I, Danny DeVito, of Friends of Danny DeVito, hereby swear or affirm that the facts contained in the foregoing document are true and correct to the best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

4/22/2020
Date

Danny DeVito
Candidate,
Friends of Danny DeVito

EXHIBIT A

After publishing the List, the Governor moved the following Industries from Non-life-sustaining to Life-sustaining:

#	**Industry**	**NAICS #**
1	Timber Tract Operations	1131
2	Forest Nurseries and Local Gathering of Forest Products	1132
3	Logging Forest	1133
4	Support activities for forestry	1153
5	Coal Mining	2121
6	Metal Ore Mining	2122
7	Nonmetalic Mineral Mining and Quarrying	2123
8	Support Activities for Mining	2131
9	Sawmills and Wood Preservation	3211
10	Veneer, Plywood, and Engineered Wood Product Manufacturing	3212
11	Other Wood Product Manufacturing	3219
12	Printing & Related Support Activities	3231
13	Glass and Glass Product Manufacturing	3272
14	Lime and Gypsum Product Manufacturing	3274
15	Lumber and Other Construction Materials Merchant Wholesalers	4233
16	Specialty Food Stores	4452
17	Other General Merchandise Stores	4523
18	Telecommunications Resellers - Except retailers selling devices at physical locations not permitted	517911
19	Insurance Carriers	5241
20	Agencies, Brokerages, and Other Insurance Related Activities - In-person sales/brokerage are prohibited.	5242
21	Insurance and Employee Benefit Funds	5251
22	Accounting, Tax Preparation, Bookkeeping, and Payroll Services	5412
23	Traveler Accommodation This category includes hotels and motels, however short term residential rentals are prohibited	7211
24	Drycleaning and Laundry Services	8123
25	Private Households	8141

After publishing the List, the Governor moved the below industries from the Life-Sustaining to the Non-Life-Sustaining:

#	**Industry**	**NAIC #**
1	Beer Wine and Liquor Stores - But kept Beer Distributorships open.	4453
2	Civic and Social Organizations	8134