No. 19-1265

IN THE

Supreme Court of the United States

FRIENDS OF DANNY DEVITO, *et al.*,

Petitioners,

v.

TOM WOLF, GOVERNOR OF PENNSYLVANIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

BRIEF OF *AMICI CURIAE* COUNTY OF BUTLER, COUNTY OF FAYETTE, COUNTY OF GREENE AND COUNTY OF WASHINGTON IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

County of Butler ("Butler County"); County of Fayette ("Fayette County"); County of Greene ("Greene County"); and, County of Washington ("Washington County (hereinafter collectively the "Amici") file this Brief as an *Amici Curiae* in support of the Court granting Petitioners' Petition for a Writ of Certiorari.

County of Butler is a Fourth Class County of the Commonwealth of Pennsylvania with general administrative office located at 124 West Diamond Street, Butler, Pennsylvania 16001; County of Fayette is a Fourth Class County of the Commonwealth of Pennsylvania with general administrative offices located at 61 East Main Street, Third Floor, Uniontown, Pennsylvania 15401; County of Greene is a Sixth Class County of the Commonwealth of Pennsylvania with general administrative offices located at 10 East High Street, Waynesburg, Pennsylvania 15370; and County of Washington is a Fourth Class County of the Commonwealth of Pennsylvania with general administrative offices located at 100 West Beau Street, Washington, Pennsylvania 15301.

These Counties are political subdivisions of the Commonwealth of Pennsylvania and, as such, are generally responsible for the affairs, legislation and

1. No Counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, or their counsel made a monetary contribution to the brief's preparation or submission. The parties were timely notified of *amici curiae's* intention to file this brief. Petitioners and Respondents gave their consent.

general laws applicable to their respective geographical areas, including all matters related to the health, safety, welfare, and economic well-being of their residents. Further, each elected official of these Counties has taken a solemn oath to support, obey and defend the Constitution of the United States of America.

Each of the aforesaid Amici are affected by Respondents' Orders, as the Orders impact their respective authority to govern their respective geographical areas.

SUMMARY OF THE ARGUMENT

"I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power." *Thomas Jefferson, Letters of Thomas Jefferson*

Petitioners' Petition for Writ of Certiorari, if granted, would provide the Court with the opportunity to address the constitutional limitations on the use of Executive Orders to deprive the citizens of the Commonwealth of Pennsylvania of the free exercise of their constitutional rights. All the states have implemented to a greater or lesser extent restrictions upon their citizens in response to the COVID-19 virus. The Commonwealth of Pennsylvania, by and through, its Governor and the exercise of the Governor's authority to issue executive orders; and, its Secretary of Health and the exercise of the Secretary's authority to issue orders, has substantially restricted the rights of its citizens under the Constitution of the United

States of America, including, but not limited to, the rights enumerated in the First, Fourth, Fifth and Fourteenth Amendments.

The Court's prior jurisprudence provides some legal guidance to address the unique circumstances associated with the COVID-19 world-wide pandemic. However, the unprecedented nature of this pandemic in modern society has been used to justify extraordinary limitations upon the rights of its citizens which engender fundamental constitutional issues that cannot be adequately addressed by the Court's existing jurisprudence. As such, the Court's review of this matter is essential to protect and preserve the constitutional rights of the citizens of the Commonwealth of Pennsylvania and the United States of America.

"They who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." *Benjamin Franklin, Memoirs of the life & writings of Benjamin Franklin*

Wherefore, the good citizens of the Commonwealth of Pennsylvania, by and through the aforesaid Amici submit the within Brief of Amici Curiae in support of Petitioners' Petition for Writ of Certiorari and implore this Honorable Court to grant the relief sought therein.

ARGUMENT

A. Respondents' Orders violate the Substantive Due Process provisions of the United States Constitution.

The Fourteenth Amendment to the Constitution forbids a state from depriving anyone of life, liberty, or property without due process of law. Without a deprivation of life, liberty or property, there can be no due process claim. *See Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); *Finley v. Giacobbe*, 79 F.3d 1285, 1296 (2d Cir.1996); *Federico v. Board of Educ.*, 955 F.Supp. 194, 198-99 (S.D.N.Y.1997).

The substantive component of the Due Process Clause guarantees that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 847 (1992) (*quoting Whitney v. California,* 274 U.S. 357, 373 (1927)). Although the "outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects" have not been defined, *id.* at 848, certain protected liberties fall within the ambit of protection. Thus, those to whom the Amendment applies have a right to be free from bodily restraint but also the right . . . to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [their] own conscience[s], and generally enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. *Board of*

Regents v. Roth, 408 U.S. 564, 572 (1972) (*quoting Meyer v. Nebraska,* 262 U.S. 390, 399 (1923)).

In determining whether a plaintiff has a viable substantive due process claim, courts must be mindful of the Supreme Court's commands in addressing the interplay of constitutional and state tort law. *Boyanowski v. Capital Area Intermediate Unit,* 215 F.3d 396, 400 (3d Cir. 2000). First, the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis,* 424 U.S. 693, 701 (1976). Second, it must be remembered that "[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 unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992). In *Brozusky v. Hanover Township*, 222 F.Supp.2d 606 (M.D.Pa.2002), the Court stated, "Consistent with its reluctance to expand the concept of substantive due process, the Supreme Court refused to sanction liability against a municipal defendant on the theory that it had a " 'custom and policy of deliberate indifference toward the safety of its employees.' " *Collins*, 503 U.S. at 117. *Id.* at 611.

When examining the conduct of governmental entities and officials, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense . . ..'" *County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1992). The Supreme Court has "for half a century now . . . spoken of the cognizable level of executive abuse of power as that

which shocks the conscience." *Id.* Determining whether the challenged action rises to this level has been described as a "threshold" question in a challenge to governmental action. *Id.* at 847 n.8. The Third Circuit held that the "shocks the conscience" standard applies to substantive due process claims. *United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392 (3d Cir. 2003). "Since *Lewis* our cases have repeatedly acknowledged that executive action violates substantive due process only when it shocks the conscience…" *Id.* at 399, 400.

In this case, it is clear that the Governor's actions "shocks the conscious." One should be shocked to learn that the Governor of Pennsylvania ordered that all businesses of a certain type or character were ordered to be closed, or the business location closed, unless such business was a "life-sustaining" business. The Governor decided by fiat what was life-sustaining and what was not life-sustaining. The Governor offered no guidance relative to the proclamation, and did not see fit to submit such classification to the General Assembly for guidance and approval.

What is more, the classifications imposed by the Governor are shocking when one considers the similarity of the business activity between some life-sustaining business activity and some non-life-sustaining business activity.

Recently, the Governor announced a phased reopening plan using a three-phase matrix and announced that the Business Shutdown Order would be relaxed in some counties within the Commonwealth, not including Butler, Washington and Greene Counties, beginning

May 8, 2020 (the "April Announcement"). Four of Butler County's neighboring Counties with similar population characteristic will be allowed to partially reopen as of May 8, 2020, but Butler, Fayette, Washington and Greene Counties cannot reopen as the Business Shutdown Order will remain in effect.

The Governor announced that he was partnering with Carnegie Mellon University to create a data-driven tool to aid in decisions to reopen counties. The Respondents do not set forth with particularity what factors are considered, and provide citizens no means to challenge or appeal the Governor's decision. The Respondents' classification of what counties may reopen on May 8, 2020, is arbitrary and capricious.

The Business Shutdown Order, and the April Guidelines issued by Respondents, constitute arbitrary, capricious, irrational and abusive conduct that interferes with Petitioners' liberty and property interests protected by the due process clause of the Fourteenth Amendment to the United States Constitution.

As described herein, (in the section concerning Equal Protection), the Governor's intention of phased easing of restrictions on a county-by-county basis constitutes official policy, custom and practice of the Commonwealth of Pennsylvania. And, such stated intention shocks the conscience. Indeed, a matter as arbitrary as the placement of a county line will determine whether one citizen of the Commonwealth is permitted to pursue that citizen's livelihood and be free to pursue their lawful employment as they shall determine and be free of governmental interference.

The Governor's arbitrary designation of county lines to determine which citizens of this Commonwealth are able to engage in their occupations and, therefore, earn income to provide for their families, is unconstitutional and a violation of the substantive due process clause of the Fourteenth Amendment.

B. Respondents' actions violate the Procedural Due Process provisions of the United States Constitution.

The Fourteenth Amendment to the United States Constitution forbids a state from depriving anyone of life, liberty, or property without due process of law.

The Business Shutdown Order and subsequent April guidance on easing of the Stay at Home Order provided by Respondents, do not provide due process protections set forth herein. The Governor's shut down of the waiver review process with the Department of Community and Economic Development ("DCED"), without any explanation, constitutes an unexplained inconsistency and is arbitrary and capricious.

"… the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. *Fuentes v. Shevin, et al.*, 407 U.S. 67, 81, 92 S.Ct. 1983, 32 Ed.2d 556 (1972); citing, *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122, 31 L.Ed.2d 424.

The Court has consistently recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Fuentes v. Shevin, et al.*, 407 U.S. 67, 81, 92 S.Ct. 1983, 32 Ed.2d 556 (1972); citing, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 -172, 71 S.Ct. 624, 647, 95 L.Ed. 817 (Frankfurter, J., concurring).

It is clear that the Petitioners have a fundamental property right to use and enjoy land in which they hold an interest. *Horne v. Department of Agriculture,* 576 U.S. 350, 135 S. Ct. at 2426, L.Ed.2d 388 (2015). Government actors must provide adequate due process procedures before a citizen can be divested of fundamental rights, such as property rights. *Locan v. Zimmerman Brush Co.,* 455 U.S. 422, 432-33 (1982); *Vitek v. Jones,* 445 U.S. 480, 495-96 (1980) *Tillman v. Lebanon County Correctional Facility,* 221 F.3d 410, 421 (3rd Cir. 2000). The procedural due process claim of private interests must be weighed against the burdens of providing procedures on the government. *Rogin v. Bensalem Township,* 616 F.2d 680, 693-694 (3rd Cir. 1980).

Procedural due process analysis requires consideration of whether the following has been provided: notice of the governmental action; a neutral arbiter; an opportunity to make an oral presentation; a means of presenting evidence; the ability to cross-examine witnesses and respond to written evidence; the right to representation by legal counsel; and, a decision based on the record with a statement of the reasons in support of the decision. Id. at 694.

The Governor argues that the nature of the COVID-19 pandemic justified the need for quick action. White this may be true, it is also true that the Governor's initial business closure Order occurred on March 19, 2020. As of the date of the submission of this Brief, after May 13, 2020, the Governor has provided none of the elements listed herein in order to safeguard procedural due process. It has been more than forty-six (46) days with seemingly no effort at all from the Governor to provide the citizens of the Commonwealth of Pennsylvania even a modicum of due process relative to the closure of their business property and, indeed, taking of their property.

It is well settled law that "a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Fuentes v. Shevin, et al.*, 407 U.S. 67, 84, 92 S.Ct. 1983, 32 Ed.2d 556 (1972); citing, *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349.

The Governor has argued that the waiver process instituted by the Order ameliorates the due process violations. This is simply not the case given the fact that the waiver request was to be submitted *after* the taking took place. There was no guidance provided as to how the waiver requests were going to be evaluated; no in person hearing; no neutral arbiter; and, no means to cross examine witnesses because the process did not even contemplated the witness testimony. Finally, the waiver process lacked written decisions supported by reasoned opinons based upon the record created during the proceedings.

At its core, procedural due process requires notice of allegations and an opportunity to respond to those allegations. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

For the same reasons, the Governor's stated intentions concerning the easing of restrictions in "yellow" counties leaves no recourse for the citizens left in the "red" counties, even notwithstanding the fact that individuals and businesses in the "red" counties are just as capable as businesses in the "yellow" counties of following the Centers for Disease Control ("CDC') guidelines and the Governor's guidelines relative to social distancing. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois*, 405 U.S. 645, 647, 92 S.Ct. 1208. 31 L.Ed.2d 551 (1972).

"But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action." Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 513-514, 45 S.Ct. 571, 573-574, 69 L.ed.1070 (1925); citing, Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131. L.R.A. 1916D,543, Ann. Cas. 1917B,283; *Truax v. Corrigan,* 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L. R. 375; *Terrace v. Thompson,* 263 U.S. 197, 44 S.Ct. 68 L.Ed. 255.

These actions by the Governor are wholly inadequate and in direct violation of the procedural due process rights required by the United States Constitution. Accordingly,

the Petitioners' Petition for a Writ of Certiorari should be granted by this Hoborable Court.

C. Respondents' Orders work as a taking of private property by the Commonwealth of Pennsylvania.

In their Response to Petitioners' Application to Stay, Respondents argue that a taking has not occurred and cite to *Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)*, as authority for the legal proposition that "a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance. It is hard to image a different rule that would be consistent with the maxim 'sic utere tuo ut alienum non laetas' (use your own property in such manner as not to injure that of another)." *Respondents' Response, p. 22*.

In *Keystone Bituminous*, the Court addressed the issue of whether a Subsidence Act's regulation of coal mining with the intent to eliminate subsidence of the surface constituted an unconstitutional taking because of the Act's impact on the commercial practicability of such mining. As part of the Court's analysis, the *Keystone Bituminous* Court reviewed several cases involving the use of police powers to abate public nuisances and other illegal activities. Respondents' reliance upon *Keystone Bituminous* and, more importantly, Respondents' willingness to equate Petitions' lawful business operations to public nuisances and illegal activity demonstrates the flawed rationale behind the Governor's Order.

Unlike the established connection between coal mining and surface subsidence in *Keystone Bituminous*,

the Governor's Order prohibits Applicants' legal business operations with no evidence that the business operations are or might be the source of past or future COVID-19 infections. To the contrary, Respondents' simply presume, based solely upon the geographic location of Petitioners' business operations, that Petitioners, Petitioners' business operations and employees are public nuisances and, as such, the Governor unilaterally declared such business operations to be illegal. There is no evidence to establish that any of the Petitioners or any of the Petitioners' employees are infected with the COVID 19 virus. Further, there is no evidence to establish that due to the nature of Petitioners' business operations, Petitioners and/or their employees are more likely than the employees of life-sustaining businesses or the general population to transmit the COVID-19 virus. The Petitioners in this case are not responsible for the transmission or increased infection rate of the COVID-19 virus in the Commonwealth. Further, Respondents' Orders demonstrate that the COVID-19 virus will continue to be transmitted even if Petitioners' businesses are closed by the Commonwealth.

In further support of its Response, Respondents cite to *Miller v. Schoene*, 276 U.S. 272 (1928), in which the Court held that the Commonwealth of Virginia was not required to compensate a property owner under the Taking Clause for the destruction of diseased cedar trees. The Commonwealth ordered the diseased cedar trees to be destroyed to prevent the potential spread of the disease to other trees in the area. Respondent asserts "If the action to save trees in *Miller* did not require compensation, then certainly the Governor's Order to save lives cannot constitute a taking which requires compensation." *Respondents' Response, p. 23.*

Respondents' reliance upon *Miller* and, more importantly, Respondents' failure to distinguish between diseased trees and the operation of Petitioners' businesses, demonstrates the flawed rationale used to support the Governor's Order. First, unlike the cedar trees at issue in *Miller,* there is no evidence to indicate that Petitioners or Petitioners' employees are infected with the COVID-19 virus. Secondly, Respondents' reliance upon *Miller* illustrates the arbitrary and capricious nature of Respondents' Order. Respondents have presumed, based solely upon the geographic location of Petitioners' business operations, that Petitioners and Petitioners' employees are more likely to be infected with the COVID 19; and, as such, are more likely to transmit the COVID-19 virus to others. Thirdly, unlike the Virginia statute relied upon in *Miller*, which required evidence that the subject trees were or might be the source (host plant) of the communicable disease, the Governor's Order prohibits Petitioners' business operations with no evidence that the business operations are or might be the source of past or future COVID-19 infections. Infection rates have increased and vary throughout the Commonwealth despite the Governor's Commonwealth-wide Orders regulating business and non-business activities. Fourth, the activities of Petitioners' business operations are no more likely to result in the further transmission of the COVID-19 virus than the business activities of businesses designated as "life-sustaining" businesses by the Governor. The COVID-19 virus does not distinguish between "life-sustaining" and "non-life-sustaining" business activities. Finally, unlike the destruction of infected trees, the Governor's Order acknowledges that the full or partial closure of businesses which might very well destroy the businesses, will not eliminate the transmission of the COVID-19 virus.

In addition to *Miller*, Respondents rely heavily upon *Tahoe-Sierra Preservation Council, Inc., et al., v. Tahoe Regional Planning Agency, et. al.,* 122 S.Ct. 1465, 535 U.S. 302, 152 L.Ed.2d 517 (2002). The *Tahoe-Sierra* Court held that the government's decision to restrict development surrounding Lake Tahoe for a period of thirty-two (32) months, while land use restrictions were being implemented, did not constitute a taking because the nature of the restriction did not cause a diminution in the value of the property. Respondents' reliance upon the temporary nature of the restrictions in *Tahoe-Sierra* is misplaced. Unlike the property interest at issue in *Tahoe-Sierra*, which merely involved the temporary delay in the development of owner's interest in real property, the Governor's Orders adversely impact all aspects of Petitioners' on-going business operations.

Further, it is relevant to note that Respondents have effectively acknowledged that the Governor's Orders have resulted in the loss of the use of Petitioners' business operations. As cited by Respondents, "the Pennsylvania Supreme Court recognized that the Governor's Order 'results in only a temporary loss of the use of the Applicants' businesses premises' in order to 'protect the lives and health of millions of Pennsylvania citizens[.]" *Respondents' Response, p. 23, citing the Majority Opinion, at 35-37.*

To characterize Respondents' Orders as merely involving the temporary loss of one's interest in real property is factually inaccurate. As the *Tahoe-Sierra* Court acknowledged, the "regulatory taking analysis outside the context of a physical or other per se taking is more complex." *Tahoe-Sierra*, 535 U.S. at 322 N, 17,

122 S.Ct. 1465. "Regulatory takings jurisprudence ... is characterized by 'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances.'" *Id.* at 321, 122 S.Ct. 1465 (citations omitted). As articled in *Tahoe-Sierra*, 535 U.S. at 322 N, 17, 122 S.Ct. 1465, there is no set formula for evaluating regulatory takings claims, courts typically consider whether the restriction has risen to the level of a compensable taking under the multi-factor balancing test articulated in *Penn Central,* 438 U.S. at 124, 98 S.Ct. 2646; *Lingle,* 544 U.S. at 538–39, 125 S.Ct. 2074 (citations omitted).

Unlike the facts in *Tahoe-Sierra*, s' return on its business investment has not been merely delayed. Respondents' Orders are more analogous to the Virginia statute in *Miller*. Like the cedar trees, Applicants' businesses are in the process of being destroyed.

Like the Pennsylvania Supreme Court, Respondents assume that Petitioners own the real property, equipment and fixtures within their businesses. However, many businesses impacted by Respondents' Orders lease most, if not all, of the real property, equipment and fixtures necessary to operate their businesses. In either event, Petitioners have incurred tremendous financial costs associated with purchasing or leasing an appropriate physical structure to meet business needs; the purchase or lease of equipment for the operation of the business; the purchase of product to be used in the operation of the business; the screening, hiring and training the business' employees; the marketing of the business; and, the arduous process of establishing a customer base sufficient to sustain the business. All of which are necessary to realize

a profit or return on Petitioners' business investment and all of which have been taken by Respondents' Orders in violation of the Taking Clause of the Fifth Amendment.

D. Respondents' Orders violate the Equal Protection provisions of the United States Constitution.

Under the Equal Protection clause, Section I of the Fourteenth Amendment, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Const. Amend. XIV, § I; *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). The purpose of the Equal Protection Clause of the Fourteenth Amendment is to secure every person within a state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073 (2000). Generally, to state a claim based on the Equal Protection clause, a plaintiff must allege that he is a "member of a protected class, was similarly situated to members of an unprotected class, and was treated differently from the unprotected class." *Shuman v. Penn Manor School District,* 2004 WL 1109506, *7 (E.D. Pa 2004).

The first issue in the Equal Protection analysis is the determination of which standard of review applies to Petitioners' claim. "It is generally accepted by both the courts and commentators that in cases involving equal protection challenges that Supreme Court applies three levels of review in ruling on the validity of the challenged statute. The three tiers of review are the rational basis test, intermediate or 'middle-tier' scrutiny and strict

scrutiny." *Brown v. Heckler,* 589 F.Supp. 985, 989 (E.D. Pa. 1984) (citations omitted). In general, the term "heightened scrutiny" refers to either level of review above rational basis. *Brown supra at* 989.

The Court uses a strict scrutiny standard if a classification impermissibly interferes with the exercise of a fundamental right, such as the right to vote or procreate, or if a suspect class is disadvantaged. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976). A suspect class is one that is "saddled with disabilities, or subjected to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313-314 (1976). Racial or ancestral minorities as well as alienage have qualified as classes or groups which clearly qualify as suspect, requiring strict scrutiny. *Brown*, at 989. "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 101, 83 S.Ct. 1175,1180, 10 L.Ed.2d 224 (1963); citing, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957).

Under strict scrutiny, the government has the burden of proving that the suspect classifications "are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

If the plaintiff is not a member of a suspect class and there is no claimed interference with a fundamental

right, the Court should analyze the claim under a rational basis standard. *Sellers v. School Board of Manassas Virginia,* 141 F.3d 524 (4th Cir. 1988). This test provides a presumption of constitutionality and only requires that the law or action have a legitimate purpose and a rational relationship to the fulfillment of that purpose. *Brown, supra.*

Intermediate, or middle-tier scrutiny, falls somewhere between rational basis and strict scrutiny. The Supreme Court articulated the standard by stating that the challenged law must be "substantially related" to "important governmental objectives." *Craig v. Boren,* 429 U.S. 451 (1976). Previous Supreme Court cases have established that classifications that distinguish between males and females are subject to this middle-tier scrutiny under the Equal Protection clause. *Craig*, 429 U.S. at 457; *Reed v. Reed,* 404 U.S. 71, 75 (1971). Gender classifications must serve important governmental objections and must be substantially related to those objectives in order to withstand constitutional challenge. *Craig,* at 457.

These different standards of equal protection review set different bars for the magnitude of the governmental interest that justifies the statutory classification. Heightened scrutiny demands that the governmental interest served by the classification be "important," see, *e.g., Virginia, supra,* at 533, 116 S.Ct. 2264, whereas rational basis scrutiny requires only that the end be "legitimate," see, *e.g., Nordlinger v. Hahn,* 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992). Strict scrutiny requires that the government interest be "compelling." *Adarand, supra*, at 227.

"The most important difference between heightened scrutiny and rational basis review, of course, is the required fit between the means employed and the ends served. Under heightened scrutiny, the discriminatory means must be "substantially related" to an actual and important governmental interest. Under rational basis scrutiny, the means need only be "rationally related" to a conceivable and legitimate state end." *Tuan Anh Nguyen v. I.N.S.*, 533 US 53, 77 (2001) (citations omitted). Strict scrutiny requires that the means be "narrowly tailored" to further a compelling governmental interest. *Adarand, supra*, at 227.

Here, it is clear that the Governor's actions in initially closing what he deemed to be "non-life sustaining" businesses was a violation of the Equal Protection Clause, no matter what level of scrutiny is used. Likewise, the Governor's stated intention to open up some counties to "yellow" status (easing of the shutdown restrictions), but not other counties, is a violation of Equal Protection.

1. Life Sustaining v. Non-Life Sustaining

The Governor's actions in his business classification system are arbitrary and irrational. There has never been such a classification of business activity before and Respondents' attempts to classify such categories is nothing more than *ipse dixit*. That is, the classification of business types literally put some people out of business because of the random classification. For example, the Governor decided that an accounting practice was "life-sustaining" and, therefore, that business was permitted to continue to operate from the office location. On the contrary, most law firm services were determined by the

Governor to be "non-life-sustaining." Accordingly, the Governor determined that it was more important, for example, for an accountant to prepare financial documents than an attorney to prepare financial documents. Or, more specifically, more important for an accountant to perform such services at the accountant's business location than for an attorney to do the same thing from the attorney's business location.

Moreover, the Governor's arbitrary and irrational classification in this example completely ignores the "social distancing" aspect of this classification, something that is one stated intention of the Governor's stay at home order. Indeed, the Governor's Order provides that an accounting firm of dozens, if not hundreds, of employees were permitted to continue to work from their regular location while a sole practitioner attorney who performs similar type services, was required to "telework" or telecommute. Such distinctions are the very definition of arbitrary and irrational classifications.

Finally, it is also important to note that many of the businesses that the Governer classified as non-life-sustaining can only be carried on at the location of the business. In other words, that business cannot be operated by "tele-work" or tele-commuting means. For example, the Governor declared that business in the field of real estate agents and brokers are not life sustaining and, therefore, must be closed in order to advance the Governor's goal of "social distancing." However, that classification itself is arbitrary and irrational as a realtor would be perfectly capable of carrying on a real estate practice with very limited client contact, e.g. one to two customers visiting or viewing a vacant piece of real estate, while maintaining

a six-foot distance, while wearing a mask, and while not touching. On the contrary, a title insurance company, closing a real estate transaction on the same type of property that the realtor is prohibited from showing, are legally permitted to congregate in offices, coming into close contact with others, in order to finalize a real estate transaction.

One must surely agree that shelter from the elements is necessary to sustain life. Likewise, the act of facilitating the acquisition of shelter is necessary to sustain life. However, the act of hiring a realtor to assist in the acquisition of shelter is not life sustaining, according to the Governor. This is not rational - indeed it seems to be the very definition of arbitrary action.

2. The Governor's plan to ease restrictions is arbitrary and irrational.

On May 1, 2020, the Governor announced plans to begin easing stay at home restrictions previously implemented. Said plan would ease the restrictions on some counties, and not others. The easing of restrictions in some counties, and not in other counties, is not rational and is an arbitrary exercise of the Governor's executive power.

The Respondents' plan is nothing more than an arbitrary decision-making tool that relies on the speculations of the Respondents. Here, the Governor has announced a plan to designate some counties as "yellow" and intends to permit some businesses to re-open, with social distancing guidelines. The designation of these counties is based upon an arbitrary county line

demarcation. As such, there inevitably will be some businesses that will re-open in the "yellow" county while the same type of business, across the county line in a "red" county, will continue to be subject to the Governor's closure order. This is arbitrary and irrational. Customers in need of the services to be supplied by these businesses will naturally, and be required to, frequent the business in the yellow county because the business in the red county will remain closed. This would mean that only the business in the yellow county would be available to residents of all counties. How the Governor's stated goal of social distancing or slowing the spread of the virus is advanced by this artificial demarcation is left unstated.

Counsel for the Governor in its response to Petitioners' Motion for Stay terms these decisions "policy decisions" as opposed to legal decisions. This argument is a fine distinction for a lawyer to make in a brief, but is of little comfort to the individual whose business is located in a red county and happens to be across a county line from a competing business in a yellow county. The individual, with the same type of business, with the same number of employees, with the same number of would be customers, with the same health considerations in place, and with all other factors being equal, is left feeling that he is not being treated the same as his business competitor. And, he is not because of the Governor's arbitrary and irrational designations.

For these reasons, this Court should grant the Petitioner's Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth herein, *Amici Curiae* hereby asks this Honorable Court to grant Petitioners' Petition for Writ of Certiorari.

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