No. 19-1265

In the Supreme Court of the United States

FRIENDS OF DANNY DEVITO, ET AL.,

Petitioners

v.

TOM WOLF, GOVERNOR, ET AL.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania

J. BART DELONE
Chief Deputy Attorney General
Appellate Litigation Section
Counsel of Record

Office of Attorney General
15th Floor
Strawberry Square
Harrisburg, PA 17120
(717) 712-3818
jdelone@attorneygeneral.gov

SEAN A. KIRKPATRICK
Sr. Deputy Attorney General

DANIEL B. MULLEN
Deputy Attorney General

QUESTIONS PRESENTED

(as framed by Petitioners)

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.

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.

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.

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

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

PARTIES TO THE PROCEEDING

Petitioners are: (1) Friends of Danny DeVito, a candidate committee for Pennsylvania house of representatives; (2) Kathy Gregory, a licensed real estate agent; and (3) Blueberry Hill Public Golf Course & Lounge.[1] Respondents are Pennsylvania Governor Tom Wolf and Secretary of Health Dr. Rachel Levine.

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[1] B&J Laundry, a laundromat, and Caledonia Land Company, a timber company, were also petitioners before the Pennsylvania Supreme Court. The Pennsylvania Supreme Court, however, determined that these parties' claims were moot "as their businesses have been removed from the non-life-sustaining category." Pet. App. 43-44 fn.1. Petitioners do not challenge this ruling in their petition for certiorari, waiving the issue. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992); Supreme Court Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court").

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STATEMENT OF THE CASE

This case concerns the Pennsylvania Governor's efforts to protect the health and lives of 12.8 million Pennsylvanians by arresting the spread of the COVID-19 pandemic. The police powers used by the Governor are, at their core, ancient. Quarantining individuals and property to prevent the spread of disease dates back to antiquity, and on these shores to 1647, when the Massachusetts Bay Colony began quarantining ships from the West Indies due to the threat of plague. Mark A. Rothstein, "From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine," 12 Ind. Health L. Rev. 227, 230 (2015).

Exercising these powers, the Governor temporarily closed the physical locations of some businesses to prevent the spread of the disease. Petitioners immediately brought an action to invalidate the Executive Order in its entirety so that golf courses, political action committees, and real estate agencies could remain physically open while this pandemic roiled. Since the initiation of this action, as the number of daily new cases have improved, these restrictions have largely been eliminated. Nonetheless, this petition remains.

A. Factual background.

What began as two presumptive positive cases of COVID-19 in Pennsylvania on March 6, 2020, has grown to 122,605 cases and 7,523 deaths.[2] Throughout the United States, there have been over five million confirmed cases of COVID-19, and 171,012 people have died so far during the pandemic.[3]

Because COVID-19 spreads primarily from person-to-person, medical experts, scientists, and public health officials agree that, in the absence of a vaccine, there is only one proven method of preventing further spread of the virus: limiting person-to-person interactions through social distancing.[4] Physical locations of non-life sustaining businesses presented the opportunity for unnecessary gatherings, personal contact,

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[2] "COVID-19 Data for Pennsylvania," Pa. Dept. of Health, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last visited 8/20/20)

[3] "Cases in the U.S.," Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?fbclid=IwAR2YGdSiJ1zk6mktakCLsCqjU-tEq9XsvLMK2fGG0vmHPIsAdMgl8C13cOU (last visited 8/20/20)

[4] "Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others," Center for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fprevention.html (last visited 8/13/20).

and interactions that would transmit the virus, and with it, sickness and death.

Thus, to bend the curve of the spread of the virus, on March 19, 2020, Governor Wolf issued an Executive Order temporarily closing physical locations of non-life sustaining businesses within the Commonwealth. In addition to his inherent powers under the Pennsylvania Constitution as the Commonwealth's chief executive, the Governor's Executive Order invoked three separate state statutory bases for his authority: the Emergency Management Services Code (Emergency Code), 35 Pa.C.S. § 7101 *et seq*.; the Pennsylvania Administrative Code, which outlines the powers and responsibilities of the Department of Health, 71 P.S. § 532; 71 P.S. § 1403(a); and the Disease Prevention and Control Law, 35 P.S. § 521.1 *et seq*.

Pursuant to his Executive Order, the Governor released a list identifying which businesses were considered life-sustaining and which were not. In making these classifications, the Governor relied upon: (a) the North American Industry Classification System (NAICS), which was developed by the Office of Management and Budget;[5] and (b) the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA). Further, the Governor established a "waiver" process whereby businesses originally categorized as non-life sustaining could be recategorized as

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[5] Executive Office of the President, Office of Management and Budget's North American Industry Classification Manual, https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf (2017).

life-sustaining.[6] Because of these efforts to enforce social distancing, Pennsylvania slowed the spread of the virus.[7]

Initially, the Governor's Order was scheduled to go into effect the evening of March 19.[8] The following day, however, Governor Wolf delayed the effective date of the order until March 23. Governor Wolf also expanded the list of life-sustaining businesses to include, *inter alia*, attorneys participating in essential court functions, laundromats, and timber tract operators.[9]

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[6] As explained more fully *infra*, the Pennsylvania Supreme Court concluded that the waiver process "constitute[d] an attempt to identify businesses that may have been mis-categorized as non-life-sustaining." Pet. App. 85.

[7] Pa Dept. of Health, COVID-19 Trajectory Animations, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Data-Animations.aspx (last visited 8/13/20).

[8] "All Non-Life-Sustaining Businesses in Pennsylvania to Close Physical Locations as of 8 PM Today to Slow Spread of COVID-19," Governor Wolf Press Release, https://www.governor.pa.gov/newsroom/all-non-life-sustaining-businesses-in-pennsylvania-to-close-physical-locations-as-of-8-pm-today-to-slow-spread-of-covid-19/#:~:text=Governor%20Tom%20Wolf%20today%20ordered,Gov. (3/19/20).

[9] "Waiver Extension, Revised Timing of Enforcement: Monday, March 23 at 8:00 AM," Governor Wolf Press Release, https://www.governor.pa.gov/newsroom/waiver-extension-revised-timing-of-enforcement-monday-march-23-at-800-am/ (3/20/20).

As the number of new COVID-19 cases decreased, the Commonwealth entered a process of phased reopening of closed physical locations in partnership with Carnegie Mellon University and using the Federal government's Opening Up America Guidelines.[10] Since July 3, 2020, all 67 Pennsylvania counties were moved to the least restrictive phase of this reopening process.[11] Masks are required in all public spaces, groups of up to 250 people may gather outdoors, and all businesses may reopen physical locations.[12]

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[10] "Responding to COVID-19 in Pennsylvania," Commonwealth of Pennsylvania Website, https://www.pa.gov/guides/responding-to-covid-19/#PhasedReopening (last visited 8/13/20); "Process to Reopen Pennsylvania," Governor of Pennsylvania's Website, https://www.governor.pa.gov/process-to-reopen-pennsylvania/ (last visited 8/13/20).

[11] "Gov. Wolf: Last PA County will Move to Green on July 3," Governor Wolf Press Release, https://www.governor.pa.gov/newsroom/gov-wolf-last-pa-county-will-move-to-green-on-july-3/#:~:text=Governor%20Tom%20Wolf%20announced%20today,counties%20in%20green%2C%E2%80%9D%20Gov. (6/26/20).

[12] "COVID-19 Guidance for Businesses," Governor of Pennsylvania's Website, https://www.governor.pa.gov/covid-19/business-guidance/ (last visited 8/13/20); "Process to Reopen Pennsylvania," Governor of Pennsylvania's Website, https://www.governor.pa.gov/process-to-reopen-pennsylvania/ (last visited 8/13/20).

B. Pennsylvania Supreme Court Decision.

On March 24, 2020, Petitioners filed an original action in the Pennsylvania Supreme Court pursuant to that court's King's Bench Jurisdiction, asking the court to strike down the Executive Order in its entirety.[13] Petitioners argued that: (a) Governor Wolf exceeded his statutory and constitutional authority under Pennsylvania law; (b) the Order violated the First Amendment; (c) the Order violated the Equal Protection Clause of the Fourteenth Amendment; (d) the Order constituted an unlawful taking; and (e) the Order and attendant waiver process failed to comport with Due Process.

The Pennsylvania Supreme Court unanimously rejected each of Petitioners' challenges. Pet. App. 93; *id.* at 95-96 (Saylor, C.J.) (dissenting with respect to jurisdiction, but concurring on the merits). With respect to the Governor's authority, that court held that the Emergency Code granted the Governor powers necessary to meet the needs of the Commonwealth during the COVID-19 pandemic. *Id.* at 890; *id.* at 904 (Saylor, C.J. concurring and dissenting). Further, the Pennsylvania Supreme Court determined that the power vested in the Governor by the Pennsylvania General Assembly was "firmly grounded" in the Commonwealth's inherent police power to promote public health and safety, and that the protection of millions of

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[13] The Pennsylvania Supreme Court's King's Bench authority is a sparingly used form of jurisdiction that gives it broad equitable powers to assert plenary jurisdiction over matters of public importance, even when there is no case pending in a lower court. *In re Bruno*, 101 A.3d 653, 670 (Pa. 2014).

Pennsylvanians from a deadly pandemic was the "sine qua non of a proper exercise of police power." *Id.* at 62-66.[14] Regarding Petitioners' remaining claims, that court held Petitioners failed to "establish[ ] any basis for relief based upon their constitutional challenges." *Id.* at 92.

C. Application to Enjoin the Governor's Order.

Following the Pennsylvania Supreme Court's decision, Petitioners filed an application with Justice Alito, as Circuit Justice, seeking an injunction against implementation of the Governor's Executive Order. Petitioners did not reference any of this Court's criteria for issuance of an injunction or cite any decision from this Court.

Without leave of Court, Petitioners then filed a supplemental brief in which they made the unsubstantiated claim that the COVID-19 pandemic was limited to Pennsylvania's nursing homes only. Petitioners' First Supp. Br., at 16 (05/04/20). After Respondents filed their response in opposition to the application, Petitioners filed a reply brief addressing, for the first time,

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[14] Because the Pennsylvania Supreme Court concluded that the Emergency Code provided the Governor with sufficient authority for his Executive Order, that court found it unnecessary to reach the additional state statutes raised in Petitioners' challenge. Pet. App. 62 fn.10. Petitioners nonetheless ask this Court to grant certiorari so that it can interpret those state-law provisions in the first instance. *See* Pet. for Writ of Cert., at 6.

this Court's injunction standard. Petitioners' Reply Br., at 7-14 (05/06/20).

Petitioners' application was ultimately referred to the full Court, which denied the application.

Subsequently, and again without leave of Court, Petitioners filed a second supplemental brief, reiterating their invitation for this Court to supplant the Pennsylvania Supreme Court's interpretation of Pennsylvania law. Petitioners' Second Supp. Br., at 5-8 (06/05/20). Thereafter, and yet again without leave of Court, Petitioners filed a third supplemental brief, again seeking this Court's reinterpretation of Pennsylvania law. Petitioners' Third Supp. Br., at 1-9 (07/28/20).

REASONS FOR DENYING THE WRIT

Adopting a quantity over quality approach, Petitioners raise an assortment of issues in their petition and three supplemental briefs. Petitioners' primary argument amounts to a disagreement with how the Pennsylvania Supreme Court interprets Pennsylvania law, *see* Pet. for Writ of Cert. 6-8, disagreement with that court as to the deadliness of COVID-19, *id.* at 8-9, 12-13, and disagreement with the public policy choices made by Pennsylvania health officials in combatting the pandemic, *id.* at 10-13. None of these issues are properly subject to this Court's review. Petitioners' secondary federal issues fare no better; the Pennsylvania Supreme Court properly rejected each of those issues based on well-established legal principles.

I. This Case is an Exceedingly Flawed Vehicle for This Court's Review.

There is a fundamental flaw that pervades Petitioners' request for certiorari: they do not understand the function of this Court. Petitioners' first request is for this Court to displace the Pennsylvania Supreme Court's interpretation of Pennsylvania law – something this Court lacks authority to do. Petitioners' second request is for this Court to render public policy determinations – something this Court refrains from doing.

Petitioners do not cite Supreme Court Rule 10, or even attempt to invoke any of its criteria. Nor do they identify a split in authority on any of the questions presented. It is thus difficult to imagine a less suitable vehicle for this Court's review.

A. Petitioners seek review of state law claims and invite this Court to "substitute its own interpretation" of Pennsylvania law in place of the Pennsylvania Supreme Court's.

A bedrock feature of our system of federalism is that state supreme courts are the ultimate expositors of state law. *See, e.g.*, *Wardius v. Oregon*, 412 U.S. 470, 477 (1973) ("It is, of course, true that the Oregon courts are the final arbiters of the State's own law."). "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *see also Washington State Department of Licensing v.*

Cougar Den, Inc., 139 S.Ct. 1000, 1010 (2019) ("[T]his Court is bound by the Washington Supreme Court's interpretation of Washington Law[.]").

Notwithstanding this immemorial principle, Petitioners explicitly ask this Court to supplant the Pennsylvania Supreme Court's interpretation of Pennsylvania's Emergency Code. *See* Pet. for Writ of Cert., at 6-7. Petitioners also urge this Court to interpret two other Pennsylvania statutes in the first instance, despite the Pennsylvania Supreme Court's determination that consideration of those statutes was unnecessary to render a decision. *See* Pet. App. 62 fn.10. Petitioners' invitation for this Court to second guess the Pennsylvania Supreme Court's interpretation of Pennsylvania law reflects a fundamental misapprehension of this Court's role in our system.[15]

Petitioner's misunderstanding of this Court's role cannot be separated from any part of their petition, as their preoccupation with the Pennsylvania Supreme Court's interpretation of state law permeates all of their filings with this Court. The numerous "supplemental briefs" Petitioners have filed are emblematic of their fixation on state law issues.

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[15] For the same reason, Petitioners' reliance on *Wisconsin Legislature v. Palm, et al.*, 942 N.W.2d 900 (Wis. May 13, 2020) is wholly misguided. *See* Petitioners' Third Supp. Br., at 4-5 (07/28/20). In that case, the Wisconsin Supreme Court determined that an emergency order by their governor violated *state* rulemaking procedures. *Id.* at 917. Those issues of state law were properly decided by that state's highest court—just as here.

In those briefs, Petitioners doubled – and then tripled – down on their state law claims, asking this Court to "substitute its own interpretation" of Pennsylvania's Emergency Code. *See* Petitioners' Second Supp. Br., at 5-8 (06/05/20); *see also* Petitioners' Third Supp. Br., at 1-9 (07/28/20). Indeed, their "supplemental briefs" are primarily dedicated to their state law claims. *Ibid.*[16]

Petitioners' Second Supplemental Brief relies upon *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944) in support of their view that this Court may substitute its own interpretation of Pennsylvania law. Petitioners' Second Supp. Br., at 5-6 (06/05/20). That reliance is entirely misplaced.

Demorest addressed whether a state court's disposition of Federal claims rested on adequate, independent state grounds. In such circumstances, this Court will indeed inquire whether the asserted non-Federal ground finds "fair or substantial" support in state law.

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[16] Petitioners' filing of three supplemental briefs follows a pattern. After filing their petition in the Pennsylvania Supreme Court, Petitioners submitted a total of six "supplemental filings." *See* Pa. Supreme Ct. Docket, 68 M.M. 2020. Those filings, which were improper under the Pennsylvania rules of appellate procedure, included new arguments that Petitioners failed to raise in their initial briefs, and purported to set forth "newly discovered facts" that were available to Petitioners at the outset. Petitioners have so far submitted six filings in this Court, evincing an intent to continue their practice of raising arguments on a rolling basis as they occur to them, regardless of rule or deadline.

Id., at 42 (quoting *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930)); *see also Howlett v. Rose*, 496 U.S. 356, 366 n.14 (1990) (citing *Broad River Power Co.*). But Respondents do not argue here that Petitioners' *Federal claims* rested on adequate, independent state grounds. Petitioners have apparently confused that concept with this Court's lack of authority to reinterpret final decisions on *state law questions* by state supreme courts. As emphasized in *Demorest* itself, "this Court will not inquire whether the rule applied by the state court is wrong, or substitute its own view of what should be deemed the better rule for that of the state court." *Id.* at 42. Far from supporting Petitioners' request for this Court to "substitute its own interpretation" of Pennsylvania law, *Demorest* establishes that their request is improper.

B. Petitioners' Federal arguments are fundamentally public policy disagreements with the Governor's handling of the pandemic, not legal arguments.

When Petitioners finally reference their federal claims, their arguments are not based on the law, but on their own view of what approach to public policy would be better. Petitioners ask this Court to make determinations regarding the severity of the COVID-19 pandemic and to choose the way to curtail its spread. Petitioners mistake this Court – a panel of jurists who decide questions of law – for a panel of epidemiologists who make public health determinations.

In their various filings in this Court, Petitioners – none of whom are public health experts – make the following extraordinary claims about the pandemic:

COVID-19 is a "mild disease and similar to the flu," *see* Petitioners' Second Supp. Br., at 12 (06/05/20) (internal quotation marks omitted); lockdown policies are not evidence based or effective, *see* Pet. for Writ of Cert., at 9; the pandemic is affecting Pennsylvania's nursing homes only, *see* Petitioners' First Supp. Br., at 16 (05/04/2020); and the correct policy is "voluntary" social distancing for high risk groups only, and only in those areas where the disease is most prevalent at a given moment, *see* Pet. for Writ of Cert., at 9-11.

Petitioners' comparison of COVID-19 to seasonal influenza is telling. According to Petitioners, over a 7-month period, between 24,000 and 60,000 Americans died from influenza in 2019-2020. *See* Pet. for Writ of Cert., at 12. In the last 7 months, more than 171,000 Americans have died from COVID-19. And this despite stringent mitigation and social distancing requirements being in place. COVID-19 is not the flu.

Petitioners' unscientific approach is contrary to that of public health experts, and their "strategy" for combating the pandemic reveals their lack of a rudimentary understanding of how this novel coronavirus spreads. Because a high proportion of individuals infected with the virus are asymptomatic, and the disease has an incubation period of up to 14 days, those infected with the novel coronavirus can unwittingly infect others. Pet. App. 68. As the Pennsylvania Supreme Court explained, "any location (including [Petitioners'] businesses) where two or more people can congregate" can serve as a vector for disease. *Ibid.*

More fundamentally, Petitioners' public policy prescriptions (as ill-founded as they are) are not legal

grounds for challenging the Governor's Order. It is axiomatic that this Court decides questions of law, not questions of policy. *See e.g., National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 531-32 (2012) ("We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders."); *Whitmore v. Arkansas*, 495 U.S. 149, 161 (1990) ("It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case"); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) ("[W]e do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.").

Further, where, as here, government officials "undertake to act in areas fraught with medical and scientific uncertainties * * * they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *South Bay United Pentecostal Church v. Newsom,* 140 S.Ct. 1613 (2020) (Roberts, C.J., concurring) (internal brackets, quotation marks, and citation omitted).

Even if it were this Court's function to draw epidemiological conclusions and then develop policy based on those conclusions – and it is not – that task would be considerably complicated here given the unique procedural posture of this case. As noted *supra*,

Petitioners elected to bypass the traditional judicial process and initiated an original action in the Pennsylvania Supreme Court *via* that court's sparingly used King's Bench jurisdiction. *See ante*, at 6 n.13. As a result, the Pennsylvania Supreme Court rendered a decision without the benefit of a developed record, expert testimony, or findings of fact by a trial court.[17] Petitioners thus failed to adequately develop a record upon which, if it were proper to do so, this Court could assess their claims about the pandemic or their public policy proposals for curtailing its spread.

Even if this Court were inclined to wade into fraught questions of epidemiology and public health – and it should not – this case presents an extremely poor vehicle to do so.

II. The Decision of the Pennsylvania Supreme Court Was Correct and Does Not Conflict With Any Decision From This Court Or Any State Court of Last Resort.

Petitioners' federal law challenges, though couched in legal terms, are fundamentally public policy disagreements. They do not question the basic legal frameworks for determining any of the constitutional issues they have attempted to raise. The Pennsylvania

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[17] Indeed, for this reason three Justices of the Pennsylvania Supreme Court, though concurring on the merits, would have declined to exercise King's Bench jurisdiction altogether, and, in the alternative, would have allowed for the development of a factual record at the trial court level. *See* Pet. App. 95 (Saylor, C.J. concurring and dissenting).

Supreme Court declined to enmesh itself in these public policy disputes and correctly applied those frameworks. Petitioners fail to demonstrate any conflict between that court's rulings and this Court's precedent, or precedent from any state court of last resort.

A. The Governor's Order constituted a lawful exercise of the Commonwealth's police power.

It is well-established that the Federal government generally lacks police power, which is reserved to the states under the Tenth Amendment of the United States Constitution. *See Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 165 (1919). The police power gives states the ability "to protect the lives, health, morals, comfort, and general welfare of the people[.]" *Manigualt v. Springs*, 199 U.S. 473, 480 (1905). Chief Justice John Marshal described it as "that immense mass of legislation" which includes "[i]nspection laws, *quarantine laws, health laws of every description*, as well as laws for regulating internal commerce of a State[.]" *Gibbons v. Ogden*, 22 U.S. 1, 107 (1824) (emphasis added). A state's authority in this regard extends to individuals and businesses alike. *See German Alliance Ins. Co. v. Hale*, 219 U.S. 307, 317 (1911) ("[A]ll corporations, associations, and individuals, within the jurisdiction of a state, are subject to such regulations, as the state may, in the exercise of its police power * * * prescribe for the public convenience and the general good.").

Lawton v. Steele, 152 U.S. 133, 137 (1894), holds that a state may exercise its police power when: (1) the interests of the public require government

interference; and (2) the means used are reasonably necessary to accomplish that purpose. Applying *Lawton*, the Pennsylvania Supreme Court concluded that the Governor's temporary closure of non-essential businesses constituted a lawful exercise of the Commonwealth's inherent police power. *See* Pet. App. 69-72. Specifically, the Pennsylvania Supreme Court determined that the protection of millions of Pennsylvanians from a deadly pandemic is the "sine qua non of a proper exercise of police power," and that the policy choices made by the Governor were tailored to the nature of the emergency. *Id.* at 71-72.

Petitioners do not challenge the *Lawton* framework. *See*, *e.g.*, Pet. for Writ of Cert., at 8-13. Rather, Petitioners merely disagree with the Pennsylvania Supreme Court's application of *Lawton* to the Governor's handling of the COVID-19 pandemic. But both aspects of the *Lawton* test are easily satisfied here.

In March, when the Governor first issued the Executive Order, CDC officials estimated that, without social distancing, 1.7 million Americans could have died from COVID-19.[18] Further, public health experts identified shutting down non-essential businesses as critical to enforcing social distancing. Given this stark reality, the temporary closure of Petitioners' physical business locations was both in the public's interest and

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[18] Chas Danner, "CDC's Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead," *New York Magazine*, https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html (last visited 07/30/2020).

reasonably necessary to protect that interest. *See Lawton*, 152 U.S. at 137.

This Court's post-*Lawton* decisions reinforce that the Governor's Executive Order was consistent with the Commonwealth's police powers. Following *Lawton*, this Court specifically recognized the right of a state to "protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The Court subsequently clarified that individual rights afforded by the Constitution do not encompass the "liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding state mandatory vaccination law protecting children over the religious objections of their parents). Arising in the context of a substantive due process challenge to a mandatory vaccination law, *Jacobson* is particularly instructive.

Much like Petitioners in the present case, the defendant in *Jacobson* argued that "his liberty [was] invaded" by the mandatory vaccination law, which he believed was "unreasonable, arbitrary, and oppressive." *Id.* at 26. In response, this Court emphasized that "the liberty secured by the Constitution * * * does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Ibid.* Since then, legal commentators have recognized this Court's central point: "[u]nbridled individual liberty eventually clashes with the liberty interests of others, and without some legal constraints, '[r]eal liberty for all could not exist.'" Thomas Wm. Mayo, Wendi Campbell Rogaliner, and Elicia Grilley Green, "'To Shield Thee From Diseases of the World': The Past,

Present, and Possible Future of Immunization Policy," 13 J. Health & Life Sci. L. 3, 9 (Feb. 2020) (quoting *Jacobson*, 197 U.S. at 26).[19]

In Petitioners' view, their desire to be unrestrained during a pandemic outweighs the public's interest in fighting its spread. Their absolutist view, that individuals can trample the rights of society at large, has long been rejected by this Court and was correctly rejected by the Pennsylvania Supreme Court here. Further review of that determination is unwarranted.

B. The Governor's Order is consistent with the First Amendment, as it is a content neutral time, place, and manner order.

The Pennsylvania Supreme Court correctly concluded that "the Executive Order does not violate the First Amendment to the United States Constitution." Pet. App. 92. That court recognized that states may place "content neutral" time, place, and manner

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[19] *Jacobson* has been reiterated in other contexts. *See Zucht v. King*, 260 U.S. 174 (1922) (city ordinance requiring vaccination of children before enrolling in public school did not violate the Fourteenth Amendment's equal protection clause); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding state vaccination law protecting children over the religious objections of their parents because "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death"); *Cruzan v. Missouri Dept. of Health*, 479 U.S. 261, 278-79 (1990) (citing *Jacobson*); *Kansas v. Hendricks*, 521 U.S. 346, 356-57 (1997) (quoting *Jacobson*).

regulations on speech "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). "The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill v. Colorado*, 530 U.S. 703, 726 (2000). Applying these well-settled principles here, the Pennsylvania Supreme Court determined, "[t]here is no question that the containment and suppression of COVID-19 and the sickness and death it causes is a substantial governmental interest," and that the Governor's Order is content neutral because "[i]t does not regulate speech at all, let alone based on content." Pet. App. 92.

In attempting to challenge the Pennsylvania Supreme Court's determination, Petitioners misstate the scope and effect of the Governor's Executive Order. Specifically, Petitioners assert that the Executive Order, "in tandem with the Governor's Stay-At-Home-Order,[20] prohibits all Pennsylvania businesses and

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[20] In their filings with this Court, Petitioners refer to Governor Wolf's March 23, 2020, Executive Order, which directed individuals in the worst affected counties in the Commonwealth to stay at home, except as needed to provide for and have access to life sustaining businesses and government services. Petitioners did

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." Pet. for Writ of Cert., at 36 (emphasis in original). Neither the Executive Order at issue, nor any other order by the Governor, did any such thing.

The Governor's Executive Order did not prevent live protests and rallies from occurring in Pennsylvania. Even when social distancing was not strictly adhered to, individuals were not stopped or cited for protesting. Indeed, on April 20, 2020, Petitioners' counsel spoke to a rally attended by thousands in front of the state Capitol building protesting the Governor's Executive Order, in which few protesters wore masks or abided by social distancing guidelines.[21] That same day,

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not present any challenge to that Order before the Pennsylvania Supreme Court, however, and it was not discussed in that court's decision. This case involves the Governor's March 19, 2020 Executive Order, and any challenge to the Governor's March 23, 2020 Order was not properly preserved. *See Adams v. Robertson*, 520 U.S. 83, 86-92 (1997) (*per curiam*) (dismissing appeal as improvidently granted where petitioners' Federal law claim was not presented to the state court that rendered the decision under review). Moreover, the Governor's March 23, 2020 Order expired on May 8, 2020.

[21] *See, e.g.*, Steven Marroni, *et al.*, "Protest of Gov. Wolf's coronavirus shutdown at Capitol: Recap," PennLive.com, https://www.pennlive.com/news/8d1601-protest-of-gov-wolf-s-coronavirus-shutdown-at-capitol-live-updates.html (last visited 08/12/20) (reporting on the April 20, 2020 rally); *See also* Jonathan

candidate Danny DeVito spoke to a similar rally in Pittsburgh.[22] And since the death of George Floyd, hundreds of Black Lives Matter rallies have occurred across Pennsylvania.[23] These rallies show that,

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Bergmueller, "Anti-shutdown protesters urge Gov. Wolf to re-open Pennsylvania," TheSlateOnline.com, https://www.theslateonline.com/article/2020/04/anti-shutdown-protesters-urge-gov-wolf-to-re-open-pennsylvania (last visited 08/12/20).

[22] *See, e.g.*, Jamie Martines, et al., "Protesters in Pittsburgh demand Gov. Wolf to reopen businesses amid coronavirus pandemic," Pittsburgh Tribune Review, https://triblive.com/local/pittsburgh-allegheny/protesters-gather-in-pittsburgh-demanding-gov-wolf-reopen-businesses-amid-coronavirus-pandemic/ (last visited 08/02/20).

[23] *See, e.g.*, Jeff Gammage, et al., "Black Lives Matter marches continue in Philadelphia, hundreds turn out for Breonna Taylor and Dominique 'Rem'mie' Fells," The Philadelphia Inquirer, https://www.inquirer.com/news/protest-philadelphia-floyd-trump-tulsa-transgender-march-violence-20200620.html (6/20/20); Ryan Deto, "Protest honoring George Floyd brings thousands to Downtown Pittsburgh; ends in destruction not supported by protest organizers," Pittsburgh City Paper, https://www.pghcitypaper.com/pittsburgh/protest-honoring-george-floyd-brings-thousands-to-downtown-pittsburgh-ends-in-destruction-not-supported-by-protest-organizers/Content?oid=17378981 (5/30/20); "George Floyd protests in Pennsylvania," Wikipedia, https://en.wikipedia.org/wiki/George_Floyd_protests_in_Pennsylvania (last

contrary to Petitioners' protestations on paper, their protestations in person were uninhibited by the Governor's Order.

Additionally, the Pennsylvania Supreme Court, relying on this Court's precedent, recognized that alternative avenues to communicate and assemble existed. They existed online, which in the modern age has become a quintessential forum for the exercise of First Amendment rights. *See* Pet. App. 92 (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017)).[24] They also existed through means that allow for social distancing: The Governor's Order did not limit political candidates and their supporters from speaking on television and radio. Nor did it prevent any campaign from sending out direct mailings from private residences, putting up yard signs, or speaking to the press.[25]

The Governor's Order was precisely the type of content-neutral, narrowly tailored protection of the health and safety of citizens that a state is permitted to

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visited 8/7/20) (cataloguing Black Lives Matter protests across Pennsylvania).

[24] Candidate Danny DeVito has a website (https://dannydevitopa.com), is active on Facebook, (https://www.facebook.com/DannyDeVitoPA) and on Twitter (@DannyDeVitoPA).

[25] *See e.g.*, David Murrell, "Meet Danny DeVito, the Guy Challenging Tom Wolf's Business Shutdown Order," Philadelphia Magazine, https://www.phillymag.com/news/2020/03/26/coronavirus-business-shutdown-danny-devito/ (last visited 8/2/20).

enforce. *See Hill*, 530 U.S. at 715; *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984). The Pennsylvania Supreme Court's decision was grounded in this Court's precedent and Petitioners cite no conflict or confusion among the state courts of last resort.

C. The Governor's Order is consistent with Equal Protection.

The Pennsylvania Supreme Court correctly determined that "the Executive Order [did] not violate constitutional equal protection principles." Pet. App. 90. The United States Constitution does not require state officials to treat all entities "alike where differentiation is necessary to avoid an imminent threat" to health and safety. *Jones v. N. Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies"). The Pennsylvania Supreme Court observed, for example, that "[c]ampaign offices and legislative offices are not similarly situated[,]" because when legislators use their district offices, they do so as government officials, not as candidates. In fact, it is illegal under Pennsylvania law for public officials to use their district offices for campaign purposes. Pet. App. 89.

Rather than present a meaningful challenge to the Pennsylvania Supreme Court's analysis, Petitioners attack the life-sustaining and non-life-sustaining classification of businesses as arbitrary and incapable of being understood. It was neither.

The Governor's list of life-sustaining businesses was divided among industries using the North American Industry Classification System (NAICS). *See* U.S. Census Bureau, North American Industry Classification System, https://www.census.gov/eos/www/naics/ (last visited 8/2/20). By using this highly regarded and ubiquitous classification system, the Governor ensured that similarly situated entities *would* be treated the same. Petitioners certainly understood upon which side of this divide they fell.

Petitioners' argument is, again, nothing more than a public policy disagreement with the Governor's determination as to which physical locations remained open and which were temporarily closed. Petitioners essentially argue that if they had been empowered to make these life and death decisions, they would have responded to this global crisis differently. *See e.g.*, Pet. for Writ of Cert., at 31-33. ("The Governor * * * 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.").

The Pennsylvania Supreme Court correctly recognized that with respect to such policy determinations, "[i]t is not for this Court, but rather for the Governor pursuant to the powers conferred upon him by the Emergency Code, to make determinations as to what businesses, or types of businesses, are properly placed in either category." Pet. App. 92. This Court has reached similar conclusions; "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy. * * * [I]n the local economic sphere, it is only the invidious discrimination, the

wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 27 (1989) (internal quotation marks and citations omitted); *see also*, *Whitmore v. Arkansas*, 495 U.S. 149, 161 (1990) ("It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case").

Here, during a rapidly evolving global health disaster, deference to the public policy decisions of the Commonwealth is most appropriate. The Governor's Order balanced the economic interests of the Commonwealth against the health and lives of 12.8 million Pennsylvanians. Temporarily closing certain physical locations in order to protect lives was certainly not invidious or wholly arbitrary. The health and survival of those citizens is more than a legitimate state interest; indeed, it is the most compelling of state interests. And the classifications and distinctions made to protect our citizenry were absolutely essential— not merely reasonably related—to achieving that most compelling of state interests. The Governor's Order did not violate the Equal Protection Clause and Petitioners are entitled to no further review.

D. There was no "taking" of Petitioners' properties under the Fifth and Fourteenth Amendments.

Petitioners further assert that the temporary restraint on non-essential businesses from operating at their physical locations was a taking akin to eminent domain, entitling them to just compensation pursuant

to the Fifth and Fourteenth Amendments. Pet. for Writ of Cert., at 14. It is not.[26]

As explained above, the Governor's decisions in regulating Petitioners' physical locations were made pursuant to the state's police powers—not through the power of eminent domain. And rightly so, as this Court stated in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n. 22 (1987):

> Courts have consistently held 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 imagine a different rule that would be consistent with the maxim "sic utere tuo ut alienum non laedas" (use your own property in such manner as not to injure that of another).

Id. (internal citations omitted).

In *Miller v. Schoene,* 276 U.S. 272 (1928), this Court held that Virginia was not required to compensate the owners of cedar trees under the Takings Clause, when the state had ordered those trees destroyed to prevent an agricultural disease from spreading to nearby apple

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[26] The Pennsylvania Supreme Court recognized that only one petitioner, Blueberry Hill Golf Course, had potential standing to assert a taking claim. *See* Pet. App. 74 fn.12. Blueberry Hill Golf Course has since reopened. *See* Blueberry Hill website, http://www.blueberryhillgc.com/ (last visited 8/17/20).

orchards. Here, the Governor sought to protect Pennsylvanians from a disease that threatens not plant life, but human life. If the action taken to save trees in *Miller* did not require compensation, then certainly the Governor's Order to save lives did not constitute a taking which requires compensation.

Moreover, there was not even contemplation of property being damaged or destroyed. Rather, as the Pennsylvania Supreme Court correctly recognized, the Governor's Order "results in only a temporary loss of the use of the Petitioners' businesses premises" in order to "protect the lives and health of millions of Pennsylvania citizens[.]" Pet. App. 77-79 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S 302 (2002) and *Manigault v. Springs*, 199 U.S. 473 (1905)). And as this Court recognized, "[s]tates are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976).

Petitioners cite *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), to challenge the Pennsylvania Supreme Court's conclusion that no taking had occurred. That case stands for the unremarkable proposition that government action rendering property *permanently* valueless constitutes a taking. That is not the case here, where the restrictions were by their nature temporary. Indeed, after review and consideration of public

health data, the Governor has permitted the reopening of the physical locations for all businesses.[27]

Lucas simply does not hold that all government action which temporarily restricts the use of property constitutes a taking. Quite the reverse. The Court found that there would be no taking if the state could show that the owner's use of the property would be prohibited by "principles of nuisance and property law." *Id*. at 1031-32.

Further, the Pennsylvania Supreme Court correctly observed that *Lucas* has been limited by this Court's subsequent decision in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); Pet. App. 77-79. In that case, the regional planning authority restricted development around Lake Tahoe for a total of thirty-two months while it formulated a land-use plan. This Court held that there was no taking because the controlling regulation was merely temporary. In doing so, this Court rejected "the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking." *Tahoe-Sierra Pres. Council*, 535 U.S. at 334. The Court further rejected finding a taking based merely on such things as "orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-

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[27] "COVID-19 Guidance for Businesses," Governor of Pennsylvania's Website, https://www.governor.pa.gov/covid-19/business-guidance/ (last visited 8/13/20); "Process to Reopen Pennsylvania," Governor of Pennsylvania's Website, https://www.governor.pa.gov/process-to-reopen-pennsylvania/ (last visited 8/13/20).

damaged buildings, or other areas that we cannot now foresee. Such a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power." *Id*. at 335.

The present case falls squarely under the rubric established by this Court in *Tahoe-Sierra Pres. Council* for adjudicating takings claims. *Miller* and *Keystone Bituminous Coal*, *supra*, also provide that the use of the state's police powers to promote the health, safety, and general welfare does not constitute a taking. The Pennsylvania Supreme Court's decision is entirely consistent with these precedents, and Petitioners cite no conflict or confusion among the state courts of last resort concerning them.

E. The Governor's Order comports with Due Process.

A procedural due process claim encompasses two inquiries: whether a life, liberty, or property interest entitled to due process protection is at stake and, if so, what procedures constitute due process of law in the situation at hand. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Board of Regents v. Roth*, 408 U.S. 564, 596-72 (1972). Petitioners' claimed interest in pursuing their respective business activities unimpeded is not absolute. *Cf. Jacobson*, 197 U.S. at 26 ("[P]ersons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state"). The Pennsylvania Supreme Court accepted *arguendo* the proposition that "procedural due process is required even in times of emergency[.]" Pet. App. 83. But that court went on to

correctly conclude that Petitioners received all of the process due.

This Court has consistently reiterated that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert v. Homar,* 520 U.S. 924, 930 (1997). Rather, "due process is flexible and calls for such procedural protections as the particular situation demands. * * * [N]ot all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). "[W]here a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert*, 520 U.S. at 930.

As the Pennsylvania Supreme Court rightly identified, *see* Pet. App. 81-82, "the specific dictates of due process generally requires consideration of three distinct factors[.]" *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). They are "the private interest that will be affected by the official action; * * * the risk of an erroneous deprivation of such interest through the procedures used [including] the probable value, if any, of additional or substitute procedural safeguards; and * * * the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail." *Ibid.*

Petitioners' unsupported assertion "that they were entitled to the full panoply of procedural due process rights to challenge the Executive Order (containing the list placing them in the non-life-sustaining category)

prior to its entry[,]" was correctly rejected by the Pennsylvania Supreme Court. Pet. App. 81-82. With the rapid spread of COVID-19, there was an "urgent need to act quickly to protect the citizens of the Commonwealth from sickness and death[.]" *Ibid.* Petitioners—"and every other business in the state on the non-life-sustaining list"—could not possibly be afforded pre-deprivation notice and an opportunity to be heard. *Ibid.* That would have delayed the entry of the Governor's Order "by weeks, months, or even years, an entirely untenable result[.]" *Id.* at 897-98.

On the issue of post-deprivation process, the Pennsylvania Supreme Court, faithful to the *Mathews* balancing approach, "conclude[d] that the waiver process provide[d] sufficient due process under the circumstances presented here." Pet. App. 83. This was so, according to that court, because "[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action. Indeed, deprivation of property to protect the public health and safety is '[o]ne of the oldest examples' of permissible summary action." Pet. App. 84. (quoting *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300-01 (1981)).

The Pennsylvania Supreme Court pointed out that the term "waiver process" was a misnomer, as it was not intended "to provide waivers to businesses that are not life-sustaining, but rather constitute[d] an attempt to identify businesses that may have been mis-categorized as non-life-sustaining." Pet. App. 85. That court explained that this is "an entirely proper focus of procedural due process" which, after all, "is geared toward protecting individuals from the *mistaken* deprivation of

life, liberty, or property." *Ibid.* (emphasis in original) (citing *Carey v. Piphus*, 435 U.S. 247, 259-260 (1978)).

Petitioners' allegations of unfairness and arbitrariness in the waiver process, *see* Pet. for Writ of Cert., at 26-29, is both wrong and beside the point. It is wrong because, as discussed above, the Governor's determinations as to which physical locations must close in order to protect lives was based on well-established and clear NAICS classifications. *Supra,* at p. 24-25; Pet. App. 49-50. It is beside the point because, once again, Petitioners merely disagree as a matter of public policy with the Governor's classification of golf courses, political action committees, and real estate agencies as non-life sustaining.

As part of its *Mathews* analysis, the Pennsylvania Supreme Court also emphasized that any loss of Petitioners' property rights was temporary.[28] Pet. App. 86. Accordingly, the risk that the available waiver process may have resulted in an erroneous deprivation did not "outweigh the value of additional or substitute

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[28] Petitioners seize upon Chief Justice Saylor's observation in his Concurrence and Dissent that "[w]hile the majority repeatedly stresses that such closure is temporary * * * this may in fact not be so for businesses that are unable to endure the associated revenue losses." Pet. App. 96 (*Concurring and Dissenting Opinion*). Petitioners strip this comment from all meaningful context. The Concurrence and Dissent voiced concern about the lack of a record in this instance. *Id.* at 97-98. Nothing in the existing record establishes the specific long-term effects on any business, much less Petitioners' businesses.

safeguards." This follows because more elaborate procedures cannot possibly be "provided within a realistic timeframe." *Ibid.* To have done what Petitioners claim was required would have "overwhelm[ed] an entire department of government otherwise involved in disaster mitigation." *Ibid.*

Petitioners respond to this in two ways: first by discounting the danger that prompted the Governor's Order; and second by trying to explain away the temporal urgency that the danger created. Petitioners characterize the death of tens of thousands of their fellow citizens as "staggeringly low," Pet. for Writ of Cert., at 12, demonstrating a callous disregard for the dangers of this virus and the lives it has taken. And Petitioners seek to explain away the exigency this danger created, not through legal analysis, but—again—by raising policy concerns. For example, they suggest the Governor should have met with industry leaders before issuing his Executive Order and implemented that order differently. Pet. for Writ of Cert., at 22-23. This is a public policy critique that ignores the rapid, ever-evolving nature of the present crisis, which in turn necessitated a rapid, ever-evolving response. Petitioners' policy critiques are not a subject for the courts, and are certainly not a basis for this Court's review.

Further, the absence of further appeal from a waiver denial did not render the waiver process constitutionally deficient. Federal and state statutes contemplate judicial review of certain governmental determinations under certain circumstances. *See, e.g.,* 5 U.S.C. § 702; 2 Pa.C.S. §§ 702, 704. Conceptually, such review is an element of the "due process" available in those contexts. But Petitioners' implicit assumption that

every decision or order by a government official *must* be judicially reviewable is fanciful. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). Even criminal defendants, who are obviously entitled to due process when prosecuted, do not have an absolute right, under the Constitution, to appeal. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Moreover, as the Pennsylvania Supreme Court recognized, "the summary procedure of a review of an application for a waiver meets the exigency of this disaster—social distancing." Pet. App. 44. What Petitioners envision would have required "in person testimonials, cross-examination and oral argument," which in turn would require "massive numbers of staff * * * (who would be working from home)" and "troves of telecommunication devices * * * to accomplish it." *Id*. at 44-45. "The near impossibility of such procedures contrasted with the temporary deprivation at issue here drives the conclusion that the waiver process * * * provides an adequate opportunity for [Petitioners] to make their case for reclassification." *Id.* at 45.

Accordingly, "[u]nder the circumstances of an ongoing disaster emergency, a full evidentiary proceeding is not a viable post-deprivation procedural process." *Ibid.* None of the authorities Petitioners cite, *see* Pet. for Writ of Cert., at 29-30, undercut the analysis or conclusion of the Pennsylvania Supreme Court on this issue. Certainly nothing cited suggests that there is any confusion concerning the principles on which the analysis is based.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

J. BART DeLONE
Chief Deputy Attorney General
Appellate Litigation Section
Counsel of Record

SEAN A. KIRKPATRICK
Sr. Deputy Attorney General

DANIEL B. MULLEN
Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 783-3226
Cell: (717) 712-3818
jdelone@attorneygeneral.gov

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