

No. 19-1265

IN THE SUPREME COURT OF THE UNITED STATES

FRIENDS OF DANNY DEVITO, KATHY GREGORY, B&J
LAUNDRY, LLC, BLUEBERRY HILL PUBLIC GOLF
COURSE & LOUNGE, and CALEDONIA LAND COMPANY,
Petitioners

v.

TOM WOLF, GOVERNOR AND RACHEL LEVINE,
SECRETARY OF PA. DEPARTMENT OF HEALTH,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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Table of Contents

The Governor Makes Another Admission That He
Does Not Have Authority for the Order Under the “Code”1-4

Wisconsin State Supreme Declared Wisconsin’s Business Closure
Order Violated Wisconsin’s Disease Act4-11

Since the Filing of the Petition the Governor and Secretary Have
Issued New Orders Restricting the Right of Business Owners to
Operate Their Businesses.....11-13

Table of Authorities

	Page(s)
<i>Camreta v. Greene</i> , 563 U.S. 692, 709 (2011).....	9
<i>Forsyth v. Hammond</i> , 166 U.S. 506 (1897).....	9
<i>Friends of Devito v. Wolf</i> , 227 A.3d 872 (Pa. 2020).....	10
<i>In re Smith</i> , 146 N.Y. 68 (1895).....	7
<i>Jew Ho v. Williamson</i> , 103 F. 10 (1900).....	7
<i>Layne & Bowler Corp. v. Western Well Works</i> , 261 U.S. 387 (1923).....	9
<i>NLRB v. Pittsburgh S.S. Co.</i> , 340 U.S. 498 (1951).....	9
<i>Upper Skagit Indian Tribe v. Lundgren</i> , 138 S. Ct. 1649 (2018).....	9, 10
<i>Wisconsin Legislature v. Palm, et al.</i> , 942 N.W.2d 900 (Wis. May 13, 2020)321 U.S. 36 (1944).....	4, 5, 6
<i>Wolf v. Scarnati</i> , No. 104 MM 2020 (July 1, 2020).....	11
 Pennsylvania State Statutes	
35 Pa. Stat. Ann. § 521.1.....	3
35 Pa. Stat. Ann § 521.2.....	6
35 Pa .Stat. § 521.2 (e).....	6
35 Pa. Stat. § 521.2 (i).....	6
35 Pa. Stat. § 521.7.....	7

35 Pa. Stat. § 521.11.....	7
35 Pa.C.S. § 7102.....	8

Wisconsin State Statutes

Wis. Stat. § 252.02.....	4
Wis. Stat. § 252.02(4).....	5

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AND NOW, come the Petitioners, by and through their attorney, Marc A. Scaringi, pursuant to Rule 15 (8) of the United States Supreme Court, who respectfully file this Second Supplemental Brief as follows:

1. On May 5, 2020, Petitioners filed a Petition for Writ of Certiorari.
2. On June 5, 2020, Petitioners filed a Supplemental Brief in Support of Petitioners' Petition for Writ of Certiorari.

**The Governor Makes Another Admission That He
Does Not Have Authority for the Order Under the "Code"**

3. In Petitioners' Supplemental Brief, they claimed that after the lower court decided the underlying case the Governor admitted that the COVID-19 viral

illness is “not like other disasters.” Petitioners’ Supplemental Brief Pages 1-5, Paragraphs 2-11.

4. The Governor’s admission contradicts his claim and the lower court’s holding in the underlying case that COVID-19 fits within the definition of “natural disaster.”

5. The lower court’s holding that COVID-19 is a natural disaster is the *sine qua non* for the Governor’s authority under the Emergency Management Services Code (the “Code”) for the subject Business Closure Order (the “Order”); if COVID-19 does not fit the definition of “natural disaster,” then the Order lacks statutory basis in the Code and is thus unlawful, invalid, and unenforceable.

6. After the filing of the Petition for Writ of Certiorari (the “Petition”), the Governor made another of the same admission.

7. On July 16, 2020, the Governor’s Deputy Press Secretary, Lyndsay Kensinger, stated, “In certain disaster emergencies, ***like a natural disaster or like the current pandemic...***”¹ (emphasis added).

8. The Governor has now made two public admissions that the COVID-19 pandemic is not a natural disaster.

9. Furthermore, in the Petition, Petitioners presented five questions of federal law decided by the lower court that conflict with relevant decisions of this

¹ <https://www.penncapital-star.com/blog/wolf-says-he-opposes-open-records-bill-despite-unanimous-support/>

Court. These five questions present compelling reasons for this Court to grant the Petition pursuant to Supreme Court Rule 10 (c).

10. However, there are additional reasons. In the lower court, Petitioners explained the Code does not provide authority for the Order and that any authority to act in response to a communicable disease is found in the Pennsylvania Disease Prevention and Control Law (the “Disease Act”), and not the Code.²

11. The lower court avoided examining the Disease Act and instead found authority for the Order in the Code.

12. To find authority in the Code, the lower court had to provide an extremely overbroad definition of what qualifies as a “disaster,” to try to fit a communicable disease into the definition of a “natural disaster,” even though it clearly does not fit, and had to reach the grossly unreasonable conclusion that anywhere in Pennsylvania where two or more people can congregate is a “disaster area.” *Majority Opinion*, Page 26.

13. The lower court’s statutory construction is not only grossly unreasonable and illogical and lacking in any legal precedent it has affirmed the single worst deprivation of the rights of Pennsylvania business owners under the U.S. Const. amends, I, V, XIV in the history of Pennsylvania. Thus, this is a matter of immense public importance, which is grounds to grant certiorari.

14. Further, no Governor in the history of the United States of America has heretofore issued a statewide business closure order for any reason let alone a

² 35 Pa. Stat. Ann. § 521.1

viral illness. Thus, this is a matter of immense public importance, which is grounds to grant certiorari.

15. Furthermore, had the lower court analyzed the Order under the Disease Act, which is the proper statute governing communicable diseases, the court could not have found that the Governor has the authority for the Order.

**Wisconsin State Supreme Declared Wisconsin’s
Business Closure Order Violated Wisconsin’s Disease Act**

16. On May 13, 2020, the Supreme Court of Wisconsin declared, in *Wisconsin Legislature v. Palm, et al.*, 942 N.W.2d 900 (Wis. May 13, 2020), that Wisconsin’s “Safer at Home” Order (Emergency Order No. 28) is unlawful, invalid, and unenforceable. Wisconsin’s “Safer at Home” Order included a business closure order similar to the Order in the case at bar.

17. The Wisconsin Supreme Court held, “We further conclude that Palm’s order...***closing businesses*** exceeded the statutory authority of Wis. Stat. § 252.02 upon which Palm claims to rely.” *Id.* at 905.³ (emphasis added).

18. In Section 2 of her “EMERGENCY ORDER #28 Safer at Home Order,” Palm ordered as follows:

Business operations a. Non-essential business and operations must cease. All for-profit and non-profit businesses with a facility in Wisconsin, except Essential Businesses and Operations as defined below, must cease all activities at facilities located within Wisconsin, except...⁴

³ Andrea Palm is the Director of Wisconsin’s Department of Health Services (DHS) and is the author of the order in question.

⁴ <https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf>

19. Palm's order is substantially similar to Section 1 of the Governor's Order:

No person or entity shall operate a place of business in the Commonwealth that is not a life sustaining business...⁵

20. According to the Wisconsin Supreme Court, Palm stated her authority to close businesses was found in the § 252.02(4), which is set forth below:

Except as provided in ss. 93.07 (24) (e) and 97.59, the department may promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, for the control and suppression of communicable diseases, for the quarantine and disinfection of persons, localities and ***things infected or suspected of being infected by a communicable disease*** ...

Wis. State. §252.02 (4) (emphasis added).

21. The Wisconsin Supreme Court, in analyzing that section, as it specifically applies to the Wisconsin business closure order, held:

...nothing in § 252.02(4) permits Palm to close "All for-profit and non-profit businesses with a facility in Wisconsin, except [those Palm defies as essential businesses and operations]."

Wis. Leg. v. Palm, 942 N.W. 2d at 916.

22. In analyzing the entire §252.02 (4), the Wisconsin Supreme Court explained, "However, Order 28 goes far beyond what is authorized in Wis. Stat. § 252.02(4)." And, "Again, this directive is not based ***on persons infected or suspected of being infected.***" *Id.* (emphasis added).

⁵ <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf>

23. In the case at bar, Petitioners in the lower court made the same arguments concerning the Order; that it was not authorized by the Disease Act because it was not limited to persons infected or suspected of being infected.

24. The precise language in the Disease Act states the Secretary of Health may only exercise her power against infected persons or those likely to have been infected.

25. More particularly, the Secretary's power of "isolation" does not apply to businesses or buildings and is defined as follows:

The separation for the period of communicability ***of infected persons*** or animals from other persons or animals...

35 P.S. § 521.2 (e) (emphasis added).⁶

26. The Secretary's power to "quarantine" does not apply to businesses and is defined as follows:

The limitation of freedom of movement ***of persons or animals who have been exposed to a communicable disease...***

35 P.S. § 521.2 (i) (emphasis added).

27. The only other government actions identified by the Disease Act are medical examination and treatment.

28. However, to compel a medical examination, the Secretary must have, "reasonable grounds to suspect any person of being ***infected with...*** any other

⁶ The Pennsylvania Secretary's power under the Disease Act is even more restricted than the Wisconsin Secretary's. The Wisconsin quarantine law pertains to "persons, localities and things..." Wis. State. §252.02 (4). The PA Disease Act pertains only to "persons or animals..." 35 P.S. § 521.2.

communicable disease, or of being a carrier.” 35 P.S. § 521.7. None of these facts existed in this case.

29 Likewise, to compel treatment, the health officer must have found that the, “...***person who is infected with***...any other communicable disease in a communicable stage ***refuses to submit to treatment*** approved by the department or by a local board or department of health...” 35 P.S. § 521.11. None of these facts existed in this case.

30. In short, the lower court transformed the Code into a quarantine law even though Pennsylvania already has a quarantine law and wrote into the Code powers the state does not have under Pennsylvania’s quarantine law and did so in a way that turned longstanding quarantine law on its head; the lower court permitted government action against individuals and businesses about which the Governor made no determination that any individual or any business subject to its Order was infected with any communicable disease. “Quarantining the healthy,” is not permitted under Pennsylvania or federal law.

31. Federal law does not permit the quarantine of individuals, businesses or geographical areas that are ***not*** infected with the communicable disease. (In *Jew Ho v. Williamson*, 103 F. 10 (1900), a federal court declared as unconstitutional a local health board’s quarantine of 12-city blocks because *inter alia* the quarantine involved people, homes and buildings in which no infection had been detected; also, *In re Smith*, 146 N.Y. 68, 76, 40 N.E. 497, 498 (1895)), a federal court of appeals affirmed a trial court’s order discharging an individual from quarantine because,

“under the Public Health Law, it is very clear that an ‘isolation of all persons and things’ is only permitted when they are ‘infected with or exposed to’ contagious and infectious diseases.”)

32. Further, because of the holding of the lower court’s holding, whenever a Governor decides that a viral illness constitutes a natural disaster, because according to the Governor it, “results in substantial damage to property, hardship, suffering or possible loss of life,” per 35 Pa.C.S. § 7102, then the Governor can declare a disaster emergency and shut down tens of thousands of businesses in Pennsylvania.

33. For example, the Pennsylvania Department of Health estimates “that five to 20 percent (600,000 to 2,400,000) of Pennsylvanians get the flu each year and 120 to 2,000 die from flu complications.”⁷ Pursuant to the lower court’s holding, over two million Pennsylvanians contracting the flu and 2,000 Pennsylvanians dying from it can constitute, “...hardship, suffering or possible loss of life” per 35 Pa.C.S. § 7102, and thus Governor can shut down all the businesses in Pennsylvania because of the flu.

34. Furthermore, under the lower court’s holding, it will take very little “...hardship, suffering or possible loss of life” to justify the next statewide business closure order. When Governor Wolf issued his Order on March 19, 2020, there were only 185 COVID-19 cases and one death in Pennsylvania.⁸

⁷ <https://www.health.pa.gov/topics/disease/Flu/Pages/2019-20-Flu.aspx>

⁸ <https://www.media.pa.gov/Pages/Health-Details.aspx?newsid=744>

35. Further, because of the lower court’s emphasis on the last clause of the definition of “natural disaster” in the Code, anything, not just viral illnesses, that causes “substantial damage to property, hardship, suffering or possible loss of life” can fit the definition of disaster and thus trigger the Governor’s power under the Code.

36. This Court has granted certiorari when the issues presented are of immense public importance and will have a far-reaching impact on the general public beyond just the parties involved in the litigation. Further, the issues in this case do not only affect the Petitioners, they affect tens of thousands of similarly situated business owners, and *inter alia* their employees, customers, suppliers, and vendors, etc. In *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951), Justice Frankfurter, who delivered the opinion of the Court, explained:

Certiorari is granted only ‘***in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, ...***’

Id., at 502 citing to *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). (emphasis added).

More recently, Justice Kagan, citing to *Forsyth v. Hammond*, 166 U.S. 506 (1897) explained:

this Court grants review ‘only when the circumstances of the case satisfy us that the importance of the question involved . . . or some matter affecting the interests of this nation . . . demands such exercise.

Camreta v. Greene, 563 U.S. 692, 709 (2011). Justice Thomas, in his dissenting opinion, which was joined by Justice Alito, in *Upper Skagit Indian Tribe v.*

Lundgren, 138 S. Ct. 1649 (2018) explained:

And most questions decided by this court will affect more than the parties 'before us'; that is one of the primary reasons why we grant certiorari.

Id., at 1657 (emphasis added).

37. The parties in the underlying case and the lower court agree this case presents a matter of immense public importance. In the underlying case, Petitioners requested the Pennsylvania Supreme Court hear this case under its King's Bench authority and the Governor agreed. ("Both Petitioners and Respondents agree that the present action presents an issue of immense public concern and requires immediate judicial resolution." *Friends of Devito v. Wolf*, 227 A.3d 872, 884 (Pa. 2020)). The lower court explained its King's Bench authority:

Our King's Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effect arising from delays incident to the ordinary processes of the law.

Id., at 884.

The lower court then agreed to accept the case under its King's Bench authority:

We agree that this case presents issues of immediate and immense public importance impacting virtually all Pennsylvanians and thousands of Pennsylvania businesses, and that continued challenges to the Executive Order will cause further uncertainty.

Id., at 884.

38. By way of further illustration, since the filing of the within Petition, public opposition to the Order and subsequent orders reached such immensity that the Pennsylvania General Assembly acted to terminate the Governor's disaster emergency declaration and thus terminate the Order.

39. On June 9, 2020, the Pennsylvania General Assembly adopted a concurrent resolution, H.R. Con. Res. 836, 2020 Gen. Assemb., Reg. Sess. 2019-20 (Pa. 2020), ordering the Governor to terminate the disaster emergency.

40. On June 12, 2020, the Governor filed in the lower court an Application for the Court to Exercise Jurisdiction Pursuant to Its King's Bench Powers and/or Powers to Grant Extraordinary Relief and requested the court to declare H.R. 836 a nullity.

41. On June 17, 2020, the lower court granted King's Bench jurisdiction.

42. On July 1, 2020, the lower court declared H.R. 836 a legal nullity because it was not presented to the Governor for his approval or veto. *Wolf v. Scarnati*, No. 104 MM 2020, 2020 Pa. LEXIS 3603, at *55 (July 1, 2020).

43. On July 8, 2020, the General Assembly presented H.R. 836 for his approval.

44. On July 14, 2020, the Governor vetoed H.R. 836.⁹

45. The General Assembly does not have the votes to override the Governor's veto. Thus, the will of a majority of the Pennsylvania General Assembly to end the Governor's disaster emergency has been denied.

**Since the Filing of the Petition the Governor and Secretary
Have Issued New Orders Restricting the
Right of Business Owners to Operate Their Businesses**

⁹ <https://www.wearecentralpa.com/news/gov-wolf-vetoes-resolution-to-end-disaster-declaration-for-covid-19/>

46. The Governor and the Secretary continue to issue executive orders restricting the rights of business owners across Pennsylvania.

47. On July 15, 2020, they issued new executive orders placing further restrictions on restaurants, wineries, breweries, private clubs, and bars on a statewide basis.¹⁰ The new executive orders reduced seating capacity of restaurants from 50% to 25%, prohibits all bar service, restricts bars to serving alcohol for on-premises consumption only in conjunction with a “meal,” and closed all nightclubs. Furthermore, the new executive order imposed the following limitations on all Pennsylvania individuals, businesses and entities, “Events and gatherings must adhere to these gathering limitations: Indoor events and gatherings of more than 25 persons are prohibited. Outdoor events and gatherings of more than 250 persons are prohibited. The maximum occupancy limit includes staff.”¹¹ Further, the Governor has again threatened, “Businesses and individuals in violation of these orders, issued pursuant to the authority granted to the Governor and the Secretary of Health under the law, ***including the Pennsylvania Disease Control and Prevention Law***, could be subject to fines, business closure or other applicable enforcement measures.”¹² (emphasis added).

¹⁰ <https://www.governor.pa.gov/wp-content/uploads/2020/07/20200715-TWW-targeted-mitigation-order.pdf>
<https://www.governor.pa.gov/wp-content/uploads/2020/07/20200715-SOH-targeted-mitigation-order.pdf>

¹¹ There are no exceptions to this statewide prohibition on indoor gatherings of more than 25 persons and outdoor gatherings of more than 250 persons, which violates all Pennsylvanians’ rights to speech and assembly guaranteed under the U.S. Const. amend. I.

¹² <https://www.governor.pa.gov/newsroom/wolf-administration-announces-targeted-mitigation-efforts-in-response-to-recent-covid-case-increases/>

48. Pennsylvania lawmakers have denounced Governor Wolf's new executive orders.¹³ Restaurant and bar owners are opposed to the Governor's new executive orders and have pledged to fight back to save their businesses.¹⁴

49. The lower court's holding in the case at bar presents a matter of immense public importance to the 12.8 million residents of Pennsylvania and the tens or hundreds of thousands of businesses, with customers, vendors, suppliers, owners, employees located in Pennsylvania and across the nation, who are subject to and harmed by these orders. This Court should grant certiorari and then reverse the decision of the lower court.

Respectfully submitted,

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¹³ <https://www.pennlive.com/news/2020/07/gop-lawmakers-denounce-gov-tom-wolfs-new-coronavirus-restrictions-on-restaurants-and-bars.html>

¹⁴ <https://local21news.com/news/local/restaurant-owners-lawmakers-to-take-action-against-gov-wolfs-executive-order>