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

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO U.S. SUPREME COURT RULE 15 (6)

Respectfully submitted,
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COUNTER-STATEMENT OF THE CASE

Respondents state, "Quarantining individuals and property to prevent the spread of disease dates back to antiquity…" This is an admission that the Executive Order is a quarantine order. Thus, the lower court, in reviewing the purported basis for the Executive Order, improperly ignored the Disease Prevention and Control Act (the "Disease Act"), Pennsylvania's quarantine law.[1] Yet, the Executive Order clearly exceeds the authority of the Disease Act, and thus the application of it upon the Petitioners violated their rights guaranteed by the U.S. Constitution.

Federal and Pennsylvania law do not permit the quarantine of things ***not*** infected with the communicable disease. In *Jew Ho v. Williamson*, 103 F. 10 (Cir. Ct. 1900), a federal court declared as unconstitutional a local health board's quarantine because it applied to people, homes and buildings in which no infection had been detected. The Court presented an excerpt from *Lawton v. Steele*, 152 U.S. 133, 137 (1894):

> The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Jew Ho v. Williamson, at 20

More recently, the Third Circuit Court of Appeals explained about *Jew Ho*:

> *In Jew Ho v. Williamson,* 103 F.10 (C.C.D. Cal. 1900), the court found that sealing off an entire section of San Francisco to prevent the spread of the bubonic plague was 'unreasonable, unjust, and oppressive.' Id. at 26. Such an overbroad order, the court declared, was 'not in harmony with the declared purpose' of preventing the spread of the disease.

Hickox v. Christie, 205 F. Supp. 3d 579, 592 (D.N.J. 2016)

[1] 35 Pa. Stat. Ann. § 521.1

This Executive Order went far beyond the one struck down in *Jew Ho*. The Third Circuit in *Hickox* did rule against the plaintiff, however the court's rationale for that decision is instructive:

> The facts do not suggest arbitrariness or unreasonableness as recognized in the prior cases—i.e., application of the quarantine laws to a person (or, more commonly, vast numbers of persons) who had no exposure to the disease at all.

Id. at 593

The Third Circuit distinguished *Jew Ho* and *In re Smith* for the same reasons Petitioners raise them in the case at bar – Respondents made no determination that the Petitioners were infected or exposed to COVID-19. Further, the Third Circuit set forth the factors why it concluded the governor had good cause to quarantine the plaintiff in that case in that *inter alia, "*Exposure, or at least the risk of exposure, was conceded." *Id.* That is not the case in the case at bar. In *In re Smith*, 146 N.Y. 68 (1895), the 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." *Id.* at 76.

Also, current Federal quarantine statutes and regulations reveal the same thing: public health officials can only act against individuals they believe are infected with a communicable disease. *See* 42 U.S.C.S. §§ 264(d)(1); 42 C.F.R. §70.3; 42 C.F.R. § 70.5; 42 C.F.R. §70.6; 42 C.F.R. § 70.14(a)(3); 42 C.F.R. §70.16(c).

Respondents' data reveal that of the 122,605 cases, only 7,523 have resulted in deaths – that's a death rate for those infected of .06 percent. Further, the death rate compared to 12.8 million Pennsylvanians is .00058 percent. The Department of Health (DOH) website, as of August 18, 2020, reveals 5,064 deaths in Pennsylvania's nursing homes compared to 7,499 total deaths.[2] If one removes the nursing home deaths, the overall death rate is .00019 percent.

Respondents claim that "only one proven method of preventing further spread of the virus….[is] through social distancing." Respondents' Brief Page 2. However, Respondents did not issue an order compelling social distancing, Respondents issued an order closing the physical operations of businesses.

[2] https://www.health.pa.gov/topics/disease/coronavirus/Pages/LTCF-Data.aspx

In addition to the current restrictions mentioned by Respondents, there is also a 75% occupancy restriction for all businesses, a 50% occupancy limit for all entertainment facilities, hair salons, gyms and spas, a 25% occupancy limit for restaurants, bars and wineries, nightclubs are completely shut down, no more than 25 people may gather indoors anywhere in Pennsylvania and a universal mandatory mask order for all who patronize, attend, visit or work in any business, entity or school and in all "public spaces."[3]

Counter-Argument I A

Respondents state, "Petitioners' first request is for this Court to displace the lower court's interpretation of Pennsylvania law – something this Court lacks authority to do." Respondents' Brief Page 9. Respondents cite to *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019), which did hold that this Court is bound by the Washington Supreme Court's interpretation of Washington law. However, in that case, this Court performed its own examination and interpretation of the state statute and considered construing the state statute differently from the manner than the Washington Supreme Court did to determine whether it would make sense. *Id.* at 1010.

Likewise, Petitioners in the case at bar urge this Court to construe the Emergency Management Services Code (the "Code") differently than the lower court because its construction improperly converts a state law designed to address tornadoes and hurricanes into a quarantine law.[4] The state's power to act against communicable disease is more circumscribed than it is to act against disasters. Yet, its holding that the Executive Order is authorized by the Code gives the Governor free rein to operate in the field of communicable diseases in contravention of these longstanding state and federal restrictions.

Also, this Court has demonstrated a willingness to independently review state court determinations of state law. Chief Justice Rehnquist, in a concurring opinion, analyzed the Florida Supreme Court's interpretation of Florida state law and held:

> What we would do in the present case is precisely parallel: Hold that the Florida Supreme Court's interpretation of the Florida

[3] https://www.governor.pa.gov/plan-for-pennsylvania/#Phase2Reopening

[4] 35 Pa. Cons. Stat. Ann. § 7101 (West)

> election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.

Bush v. Gore, 531 U.S. 98, 115 (2000)

And:

> To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

Id.

In that some concurring opinion, Chief Justice Rehnquist characterized the Florida Supreme Court's interpretation of state election law as "absurd." *Id.* at 119. Petitioners argue the lower court's interpretation of the Code has impermissibly distorted it beyond what a fair reading required, in violation of Petitioners' U.S. Constitutional rights.

Counter-Argument I B

Defendants argue this case is beyond the reach of this Court because it is a mere policy dispute. However, when the government's "policies" take the form of actions that impact the peoples' rights protected by the U.S. Constitution, then the Court must examine those "policies" to determine their constitutionality. This has been the role of this Court since at least *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Counter-Argument II A

Respondents point out that, "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)." Respondents' Brief Page 18. However, *Jacobson* is entirely in apt.

Jacobson is about vaccinations, not a statewide business closure order. The *Jacobson* vaccinations were free; whereas the Executive Order had devastating financial consequences on those subjected to it. In *Jacobson*, the state did not compel vaccination, it simply imposed a fine for refusal; whereas the Executive Order shut down Petitioners'

businesses. In *Jacobson*, the Court took judicial notice of the longstanding scientifically-proven effectiveness of vaccinations; whereas Respondents have presented no evidence that the Executive Order is effective in suppressing COVID-19, let alone a longstanding, scientifically-proven effectiveness. Respondents cite to no prior cases involving business closure orders let alone cases recognizing they are a recognized tool. Just because another governor orders the closure of businesses a few days prior does not make that order a "recognized tool."

In *Jacobson*, the Court determined the efficacy of the smallpox vaccination and the absence of another reasonable means to protect public health; whereas in the case at bar, the lower court was not presented with evidence as to the efficacy of the Executive Order and could have concluded there are other, more reasonable means that could have been used to protect public health. The Court in *Jacobson* held that individuals subject to mandatory public health actions by the state are entitled to judicial review, which the lower court denied to the Petitioners in the case at bar. As discussed *supra* when the Executive Order is properly viewed as the quarantine order that it is, it cannot survive the *Lawton* test.

This Court did affirm a state supreme court's determination that the state health board could prohibit healthy individuals from entering a locality subject to a quarantine order. *Compagnie Francaise De Nav. A Vapeur v. La. State Bd. of Health*, 186 U.S. 380 (1902). However, the state law that authorized the action pertained only to, "any parish, town or city, or any portion thereof, [that] shall become infected with any contagious or infectious disease…" *Id.* at 384. In the case at bar, the Disease Act only permits the quarantine of infected persons, not localities. The Executive Order applied to the entire state and did so without any determination that those subject to it were infected. Further, the Louisiana law did not prohibit owners from operating their businesses at their physical locations and did not prohibit residents from leaving their homes; the local health ordinance, emanating from Louisiana state law, simply prohibited the plaintiff in the case from disembarking passengers into a port that was infected with a communicable disease. In that case, the Court was examining actions against the bubonic plague, which was an illness exponentially more dangerous than COVID-19, and did so over two hundred years ago when medical knowledge and our hospital system were far inferior than they are today.

Counter-Argument II B

The Governor claims his, "Executive Order did not prevent live protests and rallies from occurring in Pennsylvania." Respondents' Brief Page 21. However, the text of the Executive and Stay-At-Home Orders did. That the Governor did not charge the Petitioners for violating his orders does not make them constitutional. (*See Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) and *Steffel v. Thompson*, 415 U.S. 452, 454 (1974)).

This Court has held, "time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). However, the, "ample alternative channels" element is not a substitute for the "narrowly tailored" requirement; the former is in addition to the latter.

The lower court, speaking of the Executive Order, held:

> It does not in any respect limit the ability to speak or assemble, however, as it does not in any respect prohibit operations by telephone, video-conferencing, or on-line through websites and otherwise. In this era, cyberspace in general and social media in particular have become the lifeblood for the exercise of First Amendment rights. *See Packingham v. North Carolina*, 137 S.Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017).

Friends of Devito v. Wolf, 227 A.3d 872, 903 (Pa. 2020)

However, on its face, the Executive Order prohibits the ability to speak and assemble at the location of every non-life-sustaining entity even if there are telephones or computers there. Second, the lower court assumed, without any evidence, Petitioners could re-establish their communications systems somewhere other than the place of their physical operations. Yet, ironically, the lower court ruled Petitioners have no right to a post-deprivation hearing because, "Thus, not only would massive numbers of staff be necessary (who would be working from home) but troves of telecommunication devices would be necessary to accomplish it." *Id.* at 900.

The lower court also cited to *Packingham*, 137 S. Ct. 1730, 198 L. Ed. 2d 273. However, in that case this Court held,

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context.

Id. at 1735

By "spatial context," this Court meant a physical space, not cyberspace.

The Executive Order permitted the media, churches, beer distributorships, accounting offices, among many others, to continue to use their physical operations for speech and assembly, but prohibited Petitioners.

Counter-Argument II C

Respondents' counter that the Governor's list of life-sustaining and non-life-sustaining businesses did not treat similarly treated businesses differently because it, "was divided among industries using the North American Industry Classification System (NAICS)." Respondents' Brief Page 25. However, the NAICS has nothing to do with whether a business is life-sustaining or non-life-sustaining. Further, these terms, which have never appeared before in the law, have no common definition. They can mean whatever the decider wants them to mean. That is why we have arbitrary and irrational results such as accounting firms being kept open, but real estate offices being closed, and social advocacy organizations' offices being kept open, but campaign offices being closed.

This classification system is also not related to the Governor's goal of suppressing COVID-19. That's because the system is not based upon determining which businesses cannot practice social distancing, which is the tool the Governor has identified as necessary to combat the spread of COVID-19, and then closing them.

The Governor claims, "Temporarily closing certain physical locations in order to protect lives was certainly not invidious or wholly arbitrary." Respondents' Brief Page 26. So, the Governor had to close real estate offices to save our lives, but beer distributorship could remain open? The Governor argues, "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." Respondents' Brief Page 26. It was essential that we have access to large quantities of beer to protect our lives? These claims are absurd.

Counter-Argument II D

Respondents cite *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). But those facts are dissimilar to those of this case. To equate operating a real estate office with the dangers inherent in operating a coal mine is silly. Further, the Governor did not identify an "illegal activity" or "public nuisance" at Petitioners' business locations or that Petitioners were using their property to harm others. Respondents also cite *Miller v. Schoene*, 276 U.S. 272 (1928). However, Petitioners are not trees, let alone infected trees.

Regarding *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), Respondents claim, "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." Respondents' Brief Page 28. But, the Governor has not even attempted to show that Petitioners' use of their property could be prohibited by nuisance and property law. Respondents point out that in *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002), this Court states, "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-damaged buildings, or other areas that we cannot now foresee.'" Those are not the facts of this case.

Counter-Argument II E

Respondents claim Petitioners have no right to judicial review. They cite *Cafeteria & Rest. Workers Union v. McElroy, 367* U.S. 886 (1961). However, equating the Department of the Navy denying a civilian access to real property owned and operated by the Department to an Executive Order prohibiting private property owners from possessing their own property is absurd. Respondents also cite to *Jones v. Barnes*, 463 U.S. 745 (1983) in which this Court held that a criminal defense client does not have a Constitutional right to compel his attorney to raise on appeal every claim that the client desires. Petitioners are not criminal defendants; and, unlike the criminal clients in that case, they did not get the right to appeal at all.

The lower court found it would be too difficult for the courts to provide Petitioners with, "'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. Friend of Danny Devito,* at 44-45. First, the lower court cites to no evidence in the record to support this conclusion. Second, the lower court rejected the idea that hearings could occur with social distancing, which reveals the court misunderstood social distancing to mean no in-person activity instead of what it actually means, which is to maintain six feet of distance between and among individuals. So, according to the lower court beer distributorships could operate with social distancing, but the courts could not. Thus, one's right to beer is secure, but one's right to due process and judicial review is denied.

Conclusion

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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