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

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

Respectfully submitted,

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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 Third Supplemental Brief as follows:

Procedural History

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 thereof.

3. On July 28, 2020, Petitioners filed a Second Supplemental Brief in support thereof.

4. On August 21, 2020, Respondents filed a Brief in Opposition.

5. On August 31, 2020, Petitioners filed a Reply thereto.

6. On September 9, 2020, this Court ordered that the Petition be distributed for conference on September 29, 2020.

New Case: *County of Butler, et al, v. Thomas W. Wolf*, et al

7. Since the Petitioners' last filing in this matter, a new case has been decided by a federal court involving the same Business Closure Order (BCO) and the same Defendants and which is directly on point to certain claims raised in the case before this Honorable Court.

8. On September 14, 2020, Judge William S. Stickman, IV, Judge of the United States District Court for the Western District of Pennsylvania issued an opinion, in *Cty. of Butler v. Wolf*, Civil Action No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 167544 (W.D. Pa. Sep. 14, 2020), declaring that some of the executive orders, including the instant BCO, issued by the Respondents, violate the U.S. Constitution.

Equal Protection

9. The Federal District Court declared that the BCO violates *inter alia* the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

10. The Petitioners in the case at bar have also challenged the constitutionality of the same BCO as violative of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

11. In *Cty. of Butler*, plaintiffs claimed the BCO and its classification of industries into life-sustaining and non-life-sustaining violated the Equal Protection Clause.

12. In the case at bar, Petitioners made the same claim, which the lower court denied, and have presented this claim to this Court for its review.

13. In *Cty. of Butler*, the court examined the equal protection claim under the following test:

> To prevail upon such a claim, the plaintiff must demonstrate: 1) the defendant treated him differently than others similarly situated, 2) the defendant did so intentionally, and 3) there was no rational basis for the difference in treatment. *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d. Cir. 2006)

Id. at *94-95

14. That court analyzed the facts and found that the furniture and appliance retailer plaintiff is similarly situated to Walmart, the only difference is the extent of their offerings, and stated, "However, in essence, they are the same – retailers selling consumer goods." *Id*. at *95.

15. Likewise, Petitioners in the case at bar have argued, for example, that Petitioner Kathy Gregory, a real agent whose industry was on the non-life-sustaining list, is in essence similarly situated to accounting and insurance agencies, whose industries were on the life-sustaining list.[1] They are in essence the same – professionals selling professional services.

[1] Actually, the original iteration of the BCO deemed accounting and insurance services as non-life-sustaining and closed them, and then in some subsequent revisions Respondents changed their mind and deemed them to be life-sustaining – thus establishing the arbitrariness of the classification system.

16. Respondents deemed Friends of Danny DeVito and all entities they classified as, "Business, Professional, Labor, Political or Similar Organizations" as non-life-sustaining, yet classified Social Advocacy Organizations as life-sustaining. Yet, Social Advocacy Organizations and Friends of Danny DeVito all appear in the same Industry, Sector and Subsector categories of the BCO's List.

17. The lower court concluded that Social Advocacy Groups are dissimilar from Friends of Danny DeVito because, "Social advocacy groups advocate for vulnerable individuals during this time of disaster." *Friends of Devito v. Wolf*, 227 A.3d 872, 901 (Pa. 2020).[2]

18. Yet, Friends of Danny Devito also advocates for vulnerable individuals during the COVID-19 pandemic particularly those businesses and entities that were shut down and whose owners and employees became unemployed. Friends of Danny DeVito has advocated against the BCO and the Respondents' COVID-19 response publicly and by filing the within lawsuit against Respondents. The lower court dismissed or ignored this advocacy, or perhaps it disagreed with the content of the advocacy, which is generally impermissible under a First Amendment claim, which Petitioners also brought in the case at bar.

19. The lower court did not perform a review on the merits of Petitioners' equal protection claims because it determined Petitioners were not similarly situated with those industries, businesses or entities Petitioners claimed they were.

[2] However, even if the type of advocacy were relevant to an Equal Protection Clause challenge there is no basis to conclude that all or even any of the entities determined to be included within the Social Advocacy Groups actually advocate for vulnerable individuals during disaster.

20. Petitioners argue they are similarly situated and that similarly situated does not mean identical or similarly situated for all purposes, as the Federal District Court in *Cty. of Butler* found.

21. Further, the lower court erred in failing to conduct an analysis on the merits of Petitioners' equal protection claim; as Giovonna Shay, Associate Professor of Law, Western New England College School of Law, explains, "similarly situated is not a threshold hurdle to equal protection analysis on the merits in cases involving facial classifications."[3]

22. Further, Professor Shay explains, "similarly situated" means similarly situated with respect to the purpose of the law:

> In cases regarding express categories, no matter the level of equal protection scrutiny applied, the focus of the "similarly situated" analysis is substantially the same as the key inquiry of equal protection review: Does the legislative classification bear a close enough relationship to the purpose of the statute?

Id. at 588.

In support of her explanation she cites to *City of Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432, 439-40 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). It is true that, for example, Petitioner Kathy Gregory, who sells real estate, provides a different type of service than insurance agents who sell insurance and accountants who sell accounting services. But those differences are not rationally related to the purpose of the BCO.

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[3] Giovonna E. Shay, *Similarly Situated,* 18 Geo. Mason L. Rev. 581, at 588 (2011), Western New England University School of Law Legal Studies Research Paper No. 11-15, Available at SSRN: https://ssrn.com/abstract=1798124.

The purpose of the BCO is to combat the ravages of COVID-19; in relation to the BCO's purpose, the identified professional services businesses are similarly situated.

23. This Court has held:

> the classification must be reasonable, not arbitrary, and must rest upon some ground of difference ***having a fair and substantial relation to the object of the legislation***, so that all persons similarly circumstanced shall be treated alike.

F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (emphasis added).

24. The lower court held the BCO was issued for, "the purpose of combating the ravages of COVID-19." *Id*. *Friends of Devito v. Wolf*, at 891; that was its object.

25. Thus, the proper analysis is whether the classification into the two categories rests upon a ground of difference having a fair and substantial relation to the object of combatting the ravages of COVID-19.

26. The BCO does not. More particularly, the Respondents have declared that social distancing is the tool by which the BCO is combating COVID-19. Thus, a classification that rests upon a ground of difference having a fair and substantial relation to combatting COVID-19 would be one that differentiated between those businesses that could employ social distancing and those that could not.

27. But, that is not what the Respondents did; they based their classification on the following ground of difference: which industries, and thus businesses, are life-sustaining and which are non-life-sustaining. However, these terms, which the Respondents simply made up out of whole cloth, as the Federal

District Court found, not only have no objective definition, they have nothing to do with social distancing or combatting the spread of COVID-19.

28. First, these terms have no objective definition. And because the definition of the terms that were used to determine the two classes or categories are incapable of an objective definition that constitutes a fatal flaw to the classification system. According to the Federal District Court:

a. "The record shows the Defendants never had a set definition in writing for what constituted a 'life-sustaining' business. Rather, their view of what was, or was not, 'life-sustaining' remained in flux." *Id. Cty. of Butler,* at *73.

b. The Defendants did not even write down their definition for life-sustaining. The Federal District Court cited to the trial transcript, "I'm not sure that we wrote down anywhere what 'life-sustaining meant.'" *Id.* at *85.

c. "The explanation for how Defendants' policy team chose which businesses were 'life-sustaining' and which were 'non-life-sustaining' is circuitous at best." *Id.* at *86.

d. "Essentially, a class of business is 'life-sustaining' if it is on the list because it is 'life-sustaining.'" *Id.* at *87.

e. "Finally, the record shows that the definition of 'life-sustaining' continued to change, even after the waiver process closed." *Id.* at *74.

f. "To add to the arbitrary nature of the list of 'life-sustaining' businesses being the definition of what is, in fact, 'life-sustaining' is the fact

that the list of what businesses are considered 'life-sustaining' changed ten times between March 19, 2020 and May 28, 2020." *Id*. at *87.

29. The lack of a definition of these terms is a key reason why the Federal District Court found, "The manner in which Defendants, through their policy team, designed, implemented, and administered the business closure is ***shockingly arbitrary***." *Id*. at *89 (emphasis added).

30. The Federal District Court explains that, "The Court outlined at length above the facts of record demonstrating that Defendants' determination as to which businesses they would deem 'life-sustaining' and which would be deemed 'non-life-sustaining' was an arbitrary, *ad hoc* process that they were never able to reduce to a set, objective and measureable definition." *Id*. at *97.

31. The Federal District Court held, "The Equal Protection Clause cannot countenance the exercise of such raw authority to make critical determinations where the government could not, at least, 'enshrine a definition somewhere.'" *Id*. at *97.

32. Second, the classification system does not have a fair and substantial relation to the object of the BCO.

33. The Federal District Court cited to this Court which held, "The State may not rely on a classification ***whose relationship to an asserted goal is so attenuated*** as to render the distinction arbitrary and or irrational." *Id*. at *95 citing to *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (emphasis added).

34. The Federal District Court held, "Finally, the record shows the Defendants' shutdown of 'non-life-sustaining' businesses did not rationally relate to Defendants' stated purpose." *Id. Cty. of Butler*, at *97-98.

35. As explained above, in the instant case, the closure of those businesses on the non-life-sustaining list including, *inter alia,* real estate agencies and political committees, is not rationally related to combatting the ravages of COVID-19. For example, the BCO prohibits Petitioner Danny DeVito from sitting alone in his own empty office, while the offices of Social Advocate Organizations and the offices of Members of the Pennsylvania General Assembly were permitted to remain open fully occupied by staff and Members and with people coming into and out of the offices and coming into contact with staff members and Members – all of which could spread COVID-19. Further, the BCO prohibits Petitioner Kathy Gregory from sitting alone in her office whereas accounting and insurance firms across Pennsylvania were permitted to remain open, fully staffed and permitted to receive visitors, vendors, clients and anyone else – all of which could spread COVID-19.

36. An order that was rationally related to its object of combatting the spread of COVID-19, may have been one that determined which businesses could impose social distancing and which could not, closing those that could not. But, that is not what the BCO did. This failure by Respondents to design a BCO that is rationally related to its own purpose or object is put into sharp relief when it came time for Respondents to design their "ReOpen Plan." According to the Federal District Court, "As to the business closures, the Governor's office based reopening

decisions, 'upon whether a business created a high-risk for transmission of COVID-19.'" *Id*. at *9 n.6. At least that factor, whether a business created a high-risk for transmission, may be rationally related to the ReOpen plan's object; yet, classifications into life-sustaining and non-life-sustaining simply were not rationally related to the BCO's purpose or object.[4]

37. Analyzing the BCO properly, meaning determining whether its different treatment (the two categories of life-sustaining and non-life-sustaining and keeping open the life-sustaining and closing the non-life-sustaining) of similarly situated entities is rationally related to its object of combatting the ravages of COVID-19, it is clear the BCO does not and thus fails the Equal Protection Clause claim.

Statutory Basis

38. In the case at bar, Respondents claimed that their statutory authority for the BCO came from *inter alia* the Pennsylvania Disease Prevention and Control Law (the "Disease Act").[5]

39. Respondents wrote onto the face of the BCO that their authority for it includes, *inter alia*, "WHEREAS, these means include isolation, quarantine, and

[4] The Respondents eventually transferred all the Industries in which Respondents placed all Petitioners, except Friends of Danny Devito, from non-life-sustaining to life-sustaining; the Respondents moved some Industries, Sectors or Subsectors, like those of Petitioner Caledonia Land Company and Petitioner B&J Laundromat, from non-life-sustaining to life-sustaining within hours or days of the issuance of the original BCO. Respondents moved Petitioner Blueberry Hill's golf course Industry, Sector or Subsector, and Petitioner Gregory's real estate Industry, Sector or Subsector from non-life-sustaining to life-sustaining over a month after the issuance of the BCO. In any event, this proves that the classification system was not rationally-related to the BCO's purpose.

[5] 35 Pa. Stat. Ann. § 521.1

any other control measure needed. 35 P.S. § 521.5." Respondents cite to the Disease Act.

40. Petitioners challenged that claim arguing the BCO does not satisfy the Disease Act because *inter alia* the Disease Act only authorizes quarantine of individuals, not businesses, and only individuals who are infected or who have been likely exposed, and that traditional pre or post infringement due process protections apply, but were not afforded in the case at bar.

41. However, the lower court ignored Petitioners' claim that the BCO is not authorized by the Disease Act because, Petitioners contend, there is no way any court could conclude that the BCO satisfied the elements necessary to be issued pursuant to the Disease Act and the lower court wanted to find that there was a statutory basis for the BCO.

42. This is why the lower court had to find the statutory basis in the Emergency Management Services Code (the "Code"), a statute that has nothing to do with communicable diseases, and to which the lower court had to apply overly broad definitions, which defy the canons of statutory construction and the intent of the Pennsylvania General Assembly, to the terms "natural disaster" and "disaster area," in order to try to make the BCO fit within the Code.[6]

43. In the case at bar, we are in the incongruous position in which the appropriate statute that empowers government to combat communicable diseases, the Disease Act, is cited as a basis of authority by the Respondents in the case at

[6] 35 Pa.C.S. § 7101

bar, was ignored by the lower court, and yet in the very similar *Cty. of Butler* case, the Respondents then disavow it as a basis for their authority for the same BCO.

44. In *Cty. of Butler*, the Respondents, admitted that their Stay-At-Home Order was not a quarantine or isolation order. That is because neither it nor the BCO satisfied the elements necessary for the state to issue quarantine, isolation or other control measures orders. Instead, the Respondents came up with a completely new term for their orders, something called a "Public Health Mitigation," which has no definition or statutory basis anywhere, including the Code. *Id. Cty. of Butler*, at *63. Thus, it appears the Respondents have abandoned their claim that the statutory authority for the BCO comes from the Code, which is where the lower court based the Respondents' statutory authority for the BCO.

45. The Federal District Court analyzed the Respondents Stay-At-Home Order, which was similar to the BCO in that it imposed broad lockdowns and closures, against the Disease Act. The Court found that the Stay-At-Home Order is not authorized by the Disease Act because it does not apply only to those who have been infected or likely exposed to a communicable disease and may only apply for the period of time equal to the longest incubation period, which in this case is two weeks, and as such the order exceeded that limit.

46. Further, the Federal District Court explained, "Even if the lockdown effectuated by the stay-at-home order could be classified as a quarantine, it would nevertheless far exceed the traditional understanding of a state's quarantine power." *Id.* at *63 n.20. The Court cites to a Wake Forest Journal of Law and Policy

article in which the author states, "State quarantine power, although broad, is subject to significant constitutional restraints." *Id*. at *63 n.20. And, "At a minimum these include the requirement that quarantine be imposed only when it is necessary for public health (or is the least-restrictive alternative) and only when it is accompanied by procedural due process protections, including notice, the right to a hearing before an independent decision-maker either before or shortly after confinement, the right to counsel, and the requirement that the state prove its case with clear and convincing evidence." *Id*. at *63 n.20.

47. The BCO satisfied none of these requirements for lawful quarantine orders or any orders under the Disease Act.

48. In essence, Respondents have admitted in *Cty. of Butler* that their BCO is not authorized by the Disease Act, even though they pleaded that it was before the lower court in the case at bar; and by classifying their BCO as a "Public Health Mitigation," Respondents seem to have abandoned their claim that the BCO was authorized by the Code, which authorizes no such thing. Further, the Disease Act is the proper statute through which to analyze the BCO because it is in essence or substance a quarantine order – it restricts the liberty of movement of people subject to it – but fails to satisfy the elements necessary to make it a lawful quarantine order because *inter alia* it is not limited to only those who are infected or likely to have been exposed to COVID-19. Finding its authorization in the Code, as the lower court did in the case at bar, should not exempt it from being analyzed as it

truly is – an unlawful quarantine order. As such, it should be declared unconstitutional.

Police Powers

49. The lower court, in holding that the BCO satisfied the police power test, held:

> The choice made by the Respondents was tailored to the nature of the emergency and utilized ***a recognized tool, business closures***, to enforce social distancing to mitigate and suppress the continued spread of COVID-19.

Id. Friends of Devito v. Wolf, at 891 (emphasis added).

50. To the contrary, mass statewide business closure orders have never been used as a tool before in the Pennsylvania or in the United States of America. No historical evidence of mass, statewide business closure orders were presented to the lower court.

51. The Federal District Court, in *Cty. of Butler,* found that the Respondents Stay-At-Home Order and BCO were unprecedented in American history and law, just as Petitioners have argued in the case at bar.

52. In *Cty. of Butler*, Respondents pointed out, apparently via newspaper clippings, that on October 4, 1918 the Pennsylvania Health Commissioner imposed an order which closed, "all public places of entertainment, including theaters, moving picture establishments, saloons and dance halls and prohibit[ed] all meetings of every description until further notice." *Id. Cty. of Butler*, at *64.

53. However, that order applied only to indoor places of entertainment and was directed at restricting large, indoor gatherings in that industry. The BCO

affected exponentially greater numbers and types of businesses by closing all non-life-sustaining industries, including entire industries having nothing to do with entertainment including all of the Petitioner's businesses and including industries that include Petitioner Caledonia Land Company, a timber management company, and Petitioner Blueberry Hill, a golf course, whose activities are mostly carried-on outdoors. Further, no prior executive order had ever classified all industries as life-sustaining and non-life-sustaining and closed all non-life-sustaining.

54. In footnote 43 of its Opinion, the Federal District Court explained, "During the 1918-1919 flu pandemic, some American cities closed schools, churches and theaters, banned large gatherings and funerals and restricted store hours. But none imposed stay at home orders or closed all non-essential businesses. No such measures were imposed during the 1957 flu pandemic, the next deadliest one; even schools stayed open." *Id.* at *64 n.24.

55. The Federal District Court found that recent pandemic decision-making guidance from the Centers for Disease Control and Prevention (CDC) contain no recommendations, "that even approximate the imposition of statewide (or even community wide) stay at home orders or the closure of all 'non-life-sustaining' businesses." *Id.* at *65. Thus, contrary to any assertions, the Respondents were not carrying-out CDC recommendations by classifying all Pennsylvania businesses and entities as life-sustaining and non-life-sustaining and ordering the closure of all non-life-sustaining businesses and entities.

Procedural Due Process

56. In *Cty. of Butler*, the Federal District Court did not adjudicate plaintiffs' procedural due process claim.

57. However, it made findings that bear directly upon Petitioners' Procedural Due Process Claim, which was denied by the lower court, and has been raised by Petitioners in this Honorable Court.

58. Petitioners claim that the Respondents' waiver process, whereby businesses on the non-life-sustaining list can request a waiver to be permitted to reopen is insufficient due process because the definitions of life-sustaining and non-life-sustaining are arbitrary, circuitous and unascertainable making it difficult if not impossible to determine how they can satisfy the definition and be deemed life-sustaining, and because the waiver process was woefully inadequate in providing the traditional due process guarantees.

59. The Federal District Court agrees:

> But to the extent that Defendants were exercising raw government authority in a way that could (and did) critically wound or destroy the livelihoods of so many, the people of the Commonwealth at least deserved an objective plan, ***the ability to determine with certainly how the critical classifications were to be made, and a mechanism to challenge an alleged misclassification. The arbitrary design, implementation and administration of the business shutdowns deprived the Business Plaintiffs and their fellow citizens of all three.***

Id. at *90 (emphasis added).

60. Further, the risk of erroneous deprivation of Petitioners' interests is great considering, as the Federal District Court found, the Respondents did not even write down their definition of life-sustaining, whatever the definition was it

kept changing even during the waiver process, and in total the definition changed ten times.

61. A hallmark of procedural due process is that the procedures are fair so that the government's decisions are not arbitrary and unreasonable. That there is no ascertainable, workable definition of the standard the Respondents used to determine whether to grant or deny waiver applications renders the procedure unfair.

62. It is clear that there was no definition and there was no actual, objective criteria utilized in deciding waiver requests. For example, the waiver request by the Pennsylvania Association of Realtors, which Petitioner Gregory was a member, was denied on April 11, 2020, even though Respondents had previously declared that they were acting in conformity with of the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA Advisory"), which stated on March 28, 2020, that all real estate services are essential and should be open. Then, after denying PAR's waiver request, Respondents changed their mind and moved the entire real estate industry to life-sustaining. Petitioner Blueberry Hill, a golf course, filed a waiver on March 23, 2020 and never received a response; yet over a month later Respondents changed their mind and declared golf courses to be life-sustaining and permitted them to reopen.

63. With no actual, objective standards, definition and criteria used to develop the classifications and decide the wavier requests, the waiver process turned out to be one based upon the caprice and whims of those administering it.

That and the lack of the traditional tools of due process is the definition of an unfair process.

Standard of Review

64. The Federal District Court in *Cty. of Butler* stated that the lower court in the case at bar, "addressed some of the federal constitutional issues presented in this case and the court reviewed those issues through a more deferential standard." *Id*. at *32 n.13.

65. The Federal District Court decided, however, to review the constitutional challenges before it using the "ordinary" three-tiered structure of strict scrutiny, intermediate scrutiny and rational basis. It stated, "Ordinary constitutional scrutiny will be applied." *Id*. at *32

66. The Federal District Court cited to this Court which declared:

> "[t] Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of power of the States were determined in light of emergency, and they are not altered by emergency." Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934).

Id. at *32.

67. Petitioners argue that, like the Federal District Court did in *Cty. of Butler*, that ordinary three-tiered constitutional scrutiny, instead of a deferential

standard used by the lower court, should be applied.

Respectfully submitted,

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