

No.

In the

Supreme Court of the United States

EARL MARKEY,

Applicant,

v.

TOM WOLF,

Respondent.

**EMERGENCY APPLICATION TO STAY JUDGEMENT OF THE
PENNSYLVANIA SUPREME COURT TO DENY INJUNCTIVE
RELIEF AND STAY ENFORCEMENT OF RESPONDENT'S
STAY AT HOME ORDER PENDING TIMELY FILING AND
DISPOSITION OF PETITION FOR WRIT OF CERTIORARI**

**Directed to the Honorable Samuel A. Alito,
Associate Justice of the United States Supreme Court and
Circuit Justice for the Third Circuit**

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Applicant Earl Markey, in pro se, brings this Emergency Application to Stay Judgement of the Pennsylvania Supreme Court to Deny Injunctive Relief and Stay Enforcement of Respondent's Stay At Home Order Pending Timely Filing and Disposition of Petition For Writ of Certiorari. Alternatively, the Applicant requests this Application be treated as an Emergency Petition For Writ of Certiorari, or, as below, an application or petition for injunctive relief.

The essence of this case is the balance between the fundamental rights of the individual and compelling police interest to protect those very same individuals. Ultimately, this case turns on whether the People—each individual as the Pro Se Applicant—are “endowed by their Creator with certain unalienable Rights” or if these rights are defeasible by the States—en masse—in a crisis. See, Declaration of Independence.

BACKGROUND

The Applicant trusts this Court is aware of the COVID-19 public health crisis and will not belabor the Court's emergency review of this matter with inclusion of days old news clippings, which may or may not reflect the reality of the crisis. The pertinent facts here are the Respondent, in his capacity as Governor of Pennsylvania, issued, revised, and renewed his *Order of Governor of the Commonwealth of Pennsylvania For Individuals to Stay Home* contemporaneous with the COVID-19 crisis. See, Appendix at A79. The Applicant, who is subject to

the Respondent's Order, seeks to immediately exercise his fundamental rights by engaging in outdoor public protests¹, intrastate travel by motor vehicle to and from such protests, and recreational driving (scenic drive with members of his household) as evidenced by the Applicants declaration. See, Appendix at A26. The Applicant also challenges the Respondent's Order on grounds it is vague and cannot be enforced. As a result of the Respondent's Order, the Applicant is subject to criminal penalties and enforcement actions² if he left his home to engage in activities perceived by law enforcement officers to be outside the scope of the Order but clearly protected by the Constitutions of United States and Commonwealth of Pennsylvania. The Applicant nor any member of his household has symptoms of COVID-19, had contact with anyone known or suspected to be infected with COVID-19, or is subject to an formal quarantine or isolation order. The Applicant and all members of his household have adhered to CDC recommended social distancing practices.

OPINION BELOW

Applicant sought and was denied relief in the nature of an injunction enjoining Respondent and those acting in concert with him from implementing or enforcing any practice, policy, proclamation, regulation, rule, or interpretation relating to his *Order of Governor of the Commonwealth of Pennsylvania For*

¹ Based upon the Respondent's Answer, protest is not a violation of the order when done in conjunction with outdoor activity. The Applicant subsequently carried a sign while walking to exercise outdoors. That said, the Respondent did not provide notice that protest was allowed in conjunction with outdoor activity to the public. See, Appendix at A68.

² Such as being physically dragged by police. See, <https://www.foxnews.com/us/philadelphia-man-dragged-off-bus-not-wearing-face-mask>

Individuals to Stay Home, and imposing criminal penalties for non-compliance with the Order. The applicant alternatively sought and was also denied relief enjoining enforcement of Order insofar as it (1) restrains the Petitioner and his household members to leave home by motor vehicle to take a scenic drive, (2) restrains protests in public outdoor spaces so long as social distancing protocols are adhered to, and (3) any other activity this Court deems Constitutionally protected or travel to such activity which the Order prohibits. See, Appendix at A6.

The Supreme Court of Pennsylvania refused to exercise its King's Bench³ or Extraordinary Jurisdiction and did not address the federal Constitutional challenges raised; injunctive relief was denied summarily. See, Appendix at A102. An emergency application to stay its mandate and the Respondent's Order was filed in Supreme Court of Pennsylvania on Monday, April 27, 2020. See, Appendix at A103. This was denied summarily as well. See, Appendix at A106. Therefore, no other court or judge thereof could both stay mandate of the Court below and stay the Respondent's Order. Moreover, even if another court could do so, the very nature of confining the residents of an entire state to their homes except where authorized by the state for in excess of one month—regardless of reason—is certainly a most extraordinary circumstance anyway.

³ King's Bench power comprises "every judicial power that the people of the Commonwealth can bestow," *Stander v. Kelly*, 433 Pa. 406, 428 (1969) (Roberts, J., with Jones and Pomeroy, J.J., concurring). The Court invokes its King's Bench authority when "an issue of public importance ... requires timely intervention ... to avoid the deleterious effect arising from delays incident to the ordinary process of law." *Commonwealth v. Williams*, 634 Pa. at 302 (2015) (citing *In re Bruno*, 627 Pa. at 563 (2014)).

JURISDICTION

The Court has procedural, appellate jurisdiction under 28 U.S.C. § 1257 as the decision below is the final judgement rendered in the highest court of the Commonwealth of Pennsylvania. The Court has subject matter jurisdiction as controversy arises from violations of the United States Constitution. Further, the Court has statutory jurisdiction under 42 U.S.C. § 1983.⁴ Further, the Court also has jurisdiction to issue injunctive relief in the alternative under the All Writs Act, 28 U.S.C. § 1651(a).

REASONS FOR GRANTING THE APPLICATION

To obtain a stay pending appeal, an applicant must show (1) a reasonable probability that the Court will consider the case on the merits; (2) a fair prospect that a majority of the Court will vote to reverse the decision below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

I. There Is a Reasonable Probability That the Court Will Review This Case on the Merits and a Fair Prospect That It Will Vacate Or Reverse the Decision Below

There is, at minimum, a “reasonable probability” that the Court will set this case for consideration on the merits and a “fair prospect” that it will reverse or vacate the decision below. See *Hollingsworth*, 558 U.S. at 190. As Stay at Home orders are being enforced across the nation, the issue of what limits the

⁵ Although, the Applicant did not raise the proceeding pursuant to 42 U.S.C. § 1983, it certainly constituted “proper proceeding for redress.”

Constitution places upon these orders is almost certain to be reviewed by the Court unless such cases are rendered moot. Unfortunately, this prospect is likely as the situation with COVID-19 is dynamic, the facts are ever changing, and states can simply change orders to avoid substantive review at any point in the legal process. See, *New York State Rifle & Pistol Assoc. Inc. v. City of New York*, 590 U. S. ____ (2020). Therefore, the situation here is extraordinary; allowing for split decisions and waiting for the most suitable case to reach the Court’s docket in due course—which may never happen—would create chaos not only in the judicial system but also in the lives of ordinary Americans. Moreover, the Respondent’s Order so blatantly disregards individual fundamental Constitutional rights that the fair prospect the decision below will be vacated by this Court is an understatement. The Court must avoid the deleterious effect arising from delays incident to the ordinary process of law, immediately stay or enjoin the offending activity, and quickly set precedence that individual fundamental rights are to be protected from unconstitutional intrusions even during a pandemic crisis.

II. Respondent’s Order Violates the First, Fifth, and Fourteenth Amendments as well as Freedom of Travel Rights of the United States Constitution

A. Respondent’s Order is Vague, Arbitrary, Discriminatory and Untailored to Achieve its Purported Goal in Violation of Applicant’s Fifth and Fourteenth Amendment Rights

The Fifth Amendment to the U.S. Constitution provides, “[n]o person shall ... be deprived of life, liberty, or property, without due process of law.” The Fourteenth Amendment to the U.S. Constitution likewise, in pertinent part, provides that “[n]o

state shall ... deprive any person of life, liberty, or property, without due process of law.” In *Johnson v. United States*, 576 U.S. 591 (2015), the Court recognized a well-established precedence against vague laws, stating “[t]he prohibition of vagueness in criminal statutes ‘is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,’ and a statute that flouts it ‘violates the first essential of due process’” (citations omitted). Respondent’s Order—operating under the color of law—violates this key first tenant of due process in being unconstitutionally vague. The Respondent’s Order of April 1, 2020 provides:

All individuals residing in the Commonwealth are ordered to stay at home except as needed to access, support, or provide life-sustaining business, emergency, or government services.....A list of life-sustaining businesses that remain open is attached to and incorporated into this Order. In addition, businesses that are permitted to remain open include those granted exemptions prior to or following the issuance of this Order.

Included with the Order, Respondent provided a list of types of businesses that were considered to be “life-sustaining” and permitted these businesses to continue operations. Further, businesses could request, and many were granted waivers by the Respondent. The Respondent has not made the list public despite requests from the press, and he even refuses to share it with the state legislature without a subpoena.⁵ Since, individuals of common intelligence cannot be expected to understand the definition of “life-sustaining business”, characterize each business type on the list, be aware whether a waiver has been granted—the list of which has

⁵ https://www.inquirer.com/news/pennsylvania/spl/business-waiver-pennsylvania-audit-coronavirus-tom-wolf-20200430.html?__vz=medium%3Dsharebar

not been made public—or if a particular business was otherwise granted providence of the Respondent to operate⁶, it is entirely impossible for any individual to leave home with certainty his or her destination is a permitted destination. In the event the individual’s destination was not permitted, he or she is subject to enforcement actions immediately upon crossing the threshold of his or her residence. What more, the Respondent employs state government websites to change how the Respondent’s Order will be enforced on his whims.⁷ This vagueness is simply violative of the fundamental right of due process.

Respondent’s Order next violates the Applicant’s due process rights by avoiding judicial review—and procedural due process protections—ordinarily provided by Pennsylvania’s Counterterrorism Planning, Preparedness and Response Act. See, 35 P.S. § 2140.301(b).⁸ In *Los Angeles v. David*, 538 U.S. 715 (2003) the Court considered the procedural due process requirements of a mere parking adjudication matter and held the due process factors of “private interest”, “erroneous deprivation”, and “governmental interest” set forth in *Mathews v. Eldridge*, 424 U. S. 319 (1976) are applicable. Further, the Court, citing *Mathews*, went on to hold “by weighing these concerns, courts can determine whether a State has met the ‘fundamental requirement of due process’-‘the opportunity to be heard

⁶ The Respondent’s former business operated without a waiver until reported by the press. See, <https://www.inquirer.com/business/spl/pennsylvania-coronavirus-wolf-home-products-essential-business-life-sustaining-20200330.html>

⁷ During the pendency of the proceedings below, when the Applicant informed the Respondent, he incorrectly characterized Applicant’s argument as “patently false”, the Respondent changed the website and failed to amend his pleading. See, Appendix at A63, A92.

⁸ Below, the Applicant incorporated these arguments into arguments challenging that lack of statutory authority under any of the statutes cited in the Respondent’s Order.

“at a meaningful time and in a meaningful manner.”” *Id.* at 319. Here, the Respondent wholly disregards procedural due process under guise that the governmental interest of saving lives unquestionably outweighs any private interest—individual fundamental rights—or any consideration of erroneous deprivation. The Applicant has more protection for his private interest and from erroneous deprivation contesting a parking violation! While “stay at home” might be a seemingly auspicious term of art, in practice its broad application, lack of judicial review, or any semblance of procedural due process makes this legal contrivance much more draconian than isolation or quarantine. Further, the Respondent failed to argue how the manner in which he infringes upon those fundamental rights of Applicant is the narrowly tailored, least restrictive means of accomplishing his compelling police interests.

Relying heavily upon *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), Respondent argued below that disease control is the “zenith” of police power and those who desire to limit the use of such powers in an unconstitutional manner are of “the absolutist view that individuals can trample the collective rights of society at large.” Appendix at A52 and A55. Firstly, the Court can take judicial notice: COVID-19 is not Smallpox and there is not currently a vaccine for COVID-19. The facts in *Jacobson* are simply too distinct for it to be precedent here. Secondly, the Court has squarely rejected the notion of the collective rights of society. See, *District of Columbia v. Heller*, 554 U.S. 570 (2008). Instead, the Constitution protects each individual’s exercise of fundamental rights from being trampled by those who wield

the collective power of the people, not the opposite.

To prevent—in direct violation the Fifth and Fourteenth Amendments to the U.S. Constitution—the unlawful prosecution, fining, and seizure of people and property, the Respondent’s Order must immediately be stayed.

B. Respondent’s Order is in Violation of Applicant’s First Amendment Rights

The First Amendment to the United States Constitution provides: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. Respondent’s Order is at clear tension with the right of the people to peacefully assemble and protest. The individual fundamental right to peacefully assemble and protest is inviolate. The Respondent’s interest in reducing COVID-19 transmission must be narrowly tailored by least restrictive means of social distancing. Far from being an obstacle to assemble and protest, the Respondent’s Order must accommodate it. See, *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U.S. 357 (1997). The Respondent’s Order does exactly the opposite; it effectively bars any protest not in conjunction with a permitted outdoor activity and bars assembly outright. What more, by not clearly defining the right to protest as essential, the Respondent’s Order also effectively prohibits travel to and from Constitutionally protected activities. Below, the Respondent argued the Internet was an adequate forum for the exercise of the First Amendment and protest outside the home can be prohibited because “individuals approached too closely by a

shouting individual may respond unpredictably out of fear of contagion.” See, Appendix at A67. This argument is simply ridiculous. Further, the Respondent has failed to publicly report COVID-19 cases attributable to protests assemblies that took place in Harrisburg on April 20, 2020.⁹ To prevent—in direct violation of the First and Fourteenth Amendments to the U.S. Constitution—the unlawful prosecution, fining, and seizure of people and property, the Respondent’s Order must be stayed as to protect the fundamental individual right to peacefully assemble and protest.

C. Respondent’s Order is in Violation of Petitioner’s Freedom of Travel Rights

The “freedom to travel ... has long been recognized as a basic right under the Constitution.” *United States v. Guest*, 383 U.S. 745, 758 (1966). Although the right “finds no explicit mention in the Constitution,” it is “a necessary concomitant of the [new] stronger Union the Constitution created.” *Id.*; see *Smith v. Turner (Passenger Cases)*, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting) (“We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”). Respondent’s Order wholly abridges this right. What more, the Respondent’s farcical reliance upon *Zemel v. Rusk*, 381 U.S. 1 (1965) and *Maurer v. Boardman*, 7 A.2d 466 (Pa. 1939) to close every road and street within the state to all but life sustaining or otherwise authorized traffic is absurd. See, Appendix at A69. *Zemel* was in regard to restricting travel to Cuba, while *Maurer* regarded the

⁹ See, <https://www.npr.org/sections/coronavirus-live-updates/2020/04/20/839443177/anti-quarantine-protest-draws-crowd-in-harrisburg-pa-but-gov-keeps-stay-home-pla> See also, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (Accessed 5/7/2020).

state's "plenary power" to regulate roads. Moreover, there is no nexus between exercising freedom of travel and COVID-19 transmission—as opposed to geographical spread. COVID-19 is present in every county in Pennsylvania¹⁰ and every state in the country.¹¹ In fact, many of the cases and most of deaths from COVID-19 occur in Nursing or Personal Care Homes.¹² Again, the Respondent's interest in reducing COVID-19 transmission can be narrowly tailored by least restrictive means through six to eight feet of social distancing and emphasis on directly mitigating the spread in Nursing or Personal Care Homes, not the extreme of confining every individual to his or her home except for purposes authorized by the Respondent. To prevent—in direct violation of Freedom of Travel—the unlawful prosecution, fining, and seizure of people and property, the Governor's Order as to protect the Freedom of Travel the Respondent's Order must be immediately stayed.

III. A Stay is Necessary to Prevent Immediate and Irreparable Harm

A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate

¹⁰ See, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Coronavirus.aspx>

¹¹ See, <https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>

¹² As of midnight, May 6, 2020, 67.8 percent of the confirmed and probable COVID-19 deaths and 21.9 percent of the confirmed and probable COVID-19 cases were employees or residents of Nursing or Personal Care Homes. See, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (Accessed 5/7/2020).

their legal rights from fraud and over-reaching; that people come to believe the law—in the larger sense—cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets."

Burger, What's Wrong With the Courts: The Chief Justice Speaks Out, U.S. News & World Report (vol. 69, No. 8, Aug. 24, 1970) 68, 71 (address to ABA meeting, Aug. 10, 1970, https://en.wikipedia.org/wiki/Justice_delayed_is_justice_denied).

The late Chief Justice's words are most applicable to understanding the irreparable harm from Stay at Home Orders. Here, the confinement of the Applicant to his home¹³ is a fundamental deprivation of liberty and irreparable harm *per se*. What more, depriving Applicant the right to the enjoyment of a scenic drive, with his family, using his vehicle—property—for which no rational argument could be made that such activity risks COVID-19 transmission also constitutes immediate irreparable harm. Finally—by far most importantly—depriving the Applicant of his fundamental right to peacefully assemble, protest the Respondent's behavior, and travel to and from such assemblies during the pendency of the Order constitutes immediate and irreparable harm. This harm is the same nature as a "substantial obstacle" to an abortion a "freedom guaranteed by the Due Process clause" as well. See *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309, 1311 (1994) (Souter, J., in chambers).

¹³ Applicant asserts because of the vagueness of the Respondent's Order, its interpretation, and arbitrary enforcement; he is only safe from enforcement actions if he remains inside his home.

IV. Applicant Met the Standard for Injunctive Relief in the Alternative

Below, the Applicant correctly sought injunctive relief to stop the Respondent's unconstitutional or ultra vires acts. The standard for such relief in this Court is (1) it is "necessary or appropriate in aid of" this Court's jurisdiction; and (2) the legal rights at issue are "indisputably clear." See *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers). The jurisdictional requirement is by virtue of the Pennsylvania Supreme Court denying relief, and for all the foregoing reasons the applicant's fundamental right to travel—to leave his home—is Constitutionally protected per se and indisputably clear. Further, the applicant's fundamental right to travel to and from exercising other Constitutionally protected activities is also indisputably clear. In *McCarthy v. Briscoe*, 429 U.S. 1317 (1976), a single justice of this Court took this extraordinary action to protect the Constitutional rights of the applicant even when the lower courts failed to do so.

CONCLUSION

Immediate relief is essential to protect the Applicant while the Applicant seeks certiorari. Below the Respondent argued, "[T]he United States Supreme Court have recognized that the welfare of the people is the supreme law. And that the Commonwealth's inherent police power to protect that welfare is correspondingly broad." Appendix at A48. This could not be further from the truth.

Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of

maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

Marbury v. Madison, 5 U.S. 137 (1803).

The Constitution—not the legislature’s laws and certainly not a governor’s unilaterally fiats—is the supreme law. The Respondent’s Order subverts the Constitution and therefore must be stayed immediately. Alternatively, the Court could treat this application as an Emergency Petition For Writ of Certiorari, immediately stay or enjoin the offending activity, and quickly move to set precedence that individual fundamental rights are to be protected by the courts even during a pandemic crisis. Without immediate relief, the fundamental rights of individuals will continue to be irreparably violated until the Court has an opportunity to consider Applicant’s petition for certiorari and correct the Pennsylvania Supreme Court’s extraordinary decision to leave the Respondent Governor of Pennsylvania unconstrained by the United States Constitution.

Respectfully Submitted,

Dated: May 7, 2020

A handwritten signature in black ink, appearing to read 'Earl Markey', with a long, sweeping underline that extends to the right.

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