**No. 19A1042**

# In the Supreme Court of the United States

EARL MARKEY,
*Applicant*

*v.*

TOM WOLF, GOVERNOR OF PENNSYLVANIA,
*Respondent*

## RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION

JOSH SHAPIRO
*Attorney General*
*Commonwealth of Pennsylvania*

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

SEAN A. KIRKPATRICK
*Senior Deputy Attorney General*

DANIEL B. MULLEN
*Deputy Attorney General*

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

## TABLE OF CONTENTS

**Page**


INTRODUCTION ..... 1

STATEMENT OF THE CASE ..... 2

ARGUMENT ..... 6

I. In the absence of an underlying decision on the merits, Markey asks this Court to overturn the Pennsylvania Supreme Court's decision to decline to exercise its discretionary jurisdiction under state law. ..... 6

II. Even if there was an underlying decision on the merits subject to this Court's review, Markey failed to meet the demanding standard necessary for this Court to upend the status quo. ..... 9

III. Markey cannot establish that an injunction is necessary in aid of this Court's jurisdiction. There is no underlying decision for this Court to review. ..... 11

IV. Markey failed to establish that his legal rights are "indisputably clear," or that there is merit to any of his claims. ..... 12

A. The Governor's Order constitutes a lawful exercise of the Commonwealth's police power. ..... 13

B. The Governor's Order is not vague, arbitrary, discriminatory, or overly broad. ..... 16

C. This content neutral time, place, and manner restriction does not violate the right to protest. ..... 18

D. The Governor's Order does not violate the right to travel ..... 20

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

**Page**

**Cases**

*City of Renton v. Playtime Theatres, Inc.*,
475 U.S. 41 (1986) ..... 19

*Commonwealth v. Balph*,
3 A. 220 (Pa. 1886) ..... 8

*Cox. v. State of Louisiana*,
379 U.S. 559 (1965) ..... 19

*Cruzan v. Missouri Dept. of Health*,
479 U.S. 261 (1990) ..... 15

*Cutter v. Wilkinson*,
544 U.S. 709 (2005) ..... 6

*District of Columbia v. Brooke*,
214 U.S. 138 (1909) ..... 13

*East N.Y. Sav. Bank v. Hahn*,
326 U.S. 230 (1945) ..... 15

*Ford Motor Co., v. U.S.*,
571 U.S. 28 (2013) ..... 6

*Friends of Danny DeVito v. Wolf*,
68 MM 2020, 2020 WL 1847100 (Pa. Apr. 13, 2020) ..... 12

*Hamilton v. Kentucky Distilleries & Warehouse Co.*,
251 U.S. 146 (1919) ..... 13

*Hobby Lobby Stores, Inc. v. Sebeilus*,
568 U.S. 1401 (2020) ..... 10, 12

*In re Bruno*,
101 A.3d 635 (Pa. 2014) ..... 5,8

*Jacobson v. Massachusetts*,
197 U.S. 11 (1905) ..... 13, 14, 16

*Johnson v. United States*,
__U.S. __, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015) ..... 16

*Kiyemba v. Obama*,
559 U.S. 131 (2010) ..... 7

*Lawton v. Steele*,
152 U.S. 133 (1894) ..... 16

*Lux v. Rodrigues*,
561 U.S. 1306 (2010) ..... 10, 12

*McCarthy v. Briscoe*,
429 U.S. 1317 (1976) ..... 9

*McWilliams v. Dunn*,
582 U.S. ____, 137 S.Ct. 1790 (2017) ..... 6

*Mullaney v. Wilbur*,
421 U.S. 684 (1975) ..... 8

*Nken v. Holder*,
556 U.S. 418 (2009) ..... 9, 10

*Ohio Citizens for Responsible Energy, Inc., v. NRC*,
479 U.S. 1312 (1986) ..... 10

*Price v. Illinois*,
238 U.S. 446 (1915) ..... 15

*Prince v. Massachusetts*,
321 U.S. 158 (1944) ..... 15

*Riley v. Kennedy,*
553 U.S. 406 (2008) ..... 8

*Rostker v. Goldberg*,
448 U.S. 1306 (1980) ..... 11

*South Bay United Pentecostal Church v. Gavin Newsom*,
590 U.S. ___, ___ S.Ct.___, 2020 WL 2813056 (May 29, 2020) (Roberts, C.J. concurring) ..... 22

*Steel Co. v. Citizens for a Better Environment*,
523 U.S. 83 (1998) ..... 15

*Turner Broadcasting System, Inc. v. FCC*,
507 U.S. 1301 (1993) ..... 10, 11, 12, 16

*United States v. Guest*,
383 U.S. 745 (1996) ..... 20

*Wainwright v. Goode*,
464 U.S. 78 (1983) (per curiam) ..... 8

*Ward v. Rock Against Racism*,
491 U.S. 781 (1989) ..... 19

*Winter v. Nat. Res. Def. Council, Inc.*,
555 U.S. 7 (2008) ..... 17

*Zemel v. Rusk*,
381 U.S. 1 (1965) ..... 21

*Zucht v. King*,
260 U.S. 174 (1922) ..... 15

**Constitutional Provisions**

U.S. Const. Amend. X ..... 13

**Statutes**

28 U.S.C. § 1651 ..... 9, 10

35 P.S. § 521.5 ..... 4

42 Pa.C.S. § 721 ..... 7

42 Pa.C.S. § 761 ..... 7

71 P.S. § 536 ..... 4

**Other Authorities**

"Coronavirus Disease 2019 (COVID-19) Cases in the U.S.," CDC, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited 5/29/20). ..... 3

"COVID-19 Data for Pennsylvania," Pa. Dept. of Health, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last visited 5/3/20) ..... 3

"Stay at Home Order Guidance," https://www.scribd.com/document/452929448/03-23-20-Stay-at-Home-Order-Guidance (last visited 4/7/20) ..... 17

Thomas Wm. Mayo, Wendi Campbell Rogaliner, and Elicia Grilley Green, "'To Shield Thee From Diseases of the World': The Past, Present, and Possible Future of Immunization Policy," 13 J. Health & Life Sci. L. 3, 14 (Feb. 2020) ..... 13

Thomas Wm. Mayo, Wendi Campbell Rogaliner, and Elicia Grilley Green, "'To Shield Thee From Diseases of the World': The Past, Present, and Possible Future of Immunization Policy," 13 J. Health & Life Sci. L. 3, 9 (Feb. 2020) ..... 14

**Press Releases and News Sources**

"Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others," Center for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fprevention.html (last visited 5/2/20) ..... 3

"Process to Reopen Pennsylvania," Governor of Pennsylvania's Website, https://www.governor.pa.gov/process-to-reopen-pennsylvania/ (last visited 5/2/20) ..... 6

"Responding to COVID-19 in Pennsylvania," Commonwealth of Pennsylvania Website, https://www.pa.gov/guides/responding-to-covid-19/#PhasedReopening (last visited 5/2/20)..... 6

Anna Orso, et al., "Car-bound protesters call for a plan to reopen Philadelphia," The Philadelphia Inquirer, https://www.inquirer.com/news/philadelphia/coronavirus-protest-rally-philadelphia-reopen-businesses-city-hall-20200508.html (5/8/20) .. 18

Bart Jensen, "Anti-quarantine rally in Pennsylvania draws about 2,000 people in latest protest against coronavirus restrictions," USA Today, https://www.usatoday.com/story/news/politics/2020/04/20/coronavirus-pennsylvania-roiled-protest-against-shutdowns/5167292002/ (4/20/20)..... 18

Chas Danner, "CDC's Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead," *New York Magazine*, https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html (last visited 3/20/2020) ..... 4

Christine Vendel, "Police in Harrisburg prepare for another anti-shutdown protest Friday at the Capitol," Patriot News, https://www.pennlive.com/news/2020/05/police-in-harrisburg-prepare-for-another-anti-shutdown-protest-friday-at-the-capitol.html (5/15/20)..... 18

Jonathan Lai, *et al*., "What's allowed to be open in Pennsylvania during red, yellow and green phases?" The Philadelphia Inquirer, https://www.inquirer.com/health/coronavirus/inq/coronavirus-covid-19-what-is-open-pennsylvania-life-sustaining-business-20200403.html (5/22/20) ..... 17

Kyle Mullins, "Demonstrators in Downtown protest Wolf's stay-at-home and business shutdown orders," Pittsburgh Post-Gazette, https://www.post-gazette.com/local/city/2020/04/20/Protesters-economic-business-shutdown-orders-Downtown-Pittsburgh-Harrisburg-Wolf/stories/202004200102 (4/20/20)..... 18

Applicant is Earl Markey. Respondent is Pennsylvania Governor Tom Wolf. The Pennsylvania Office of Attorney General, on behalf of Respondent, respectfully files this memorandum in opposition to Markey's application.

## INTRODUCTION

Under Pennsylvania law, the Governor is responsible for employing the most efficient and practical means for the prevention and suppression of any disease. In the context of the COVID-19 pandemic, this required a delicate balancing, limiting certain actions to curtail the spread of a highly infectious disease. Striking that balance is not only consistent with constitutional principles, it is necessary to their protection. The balance struck here by the Governor—which has allowed public protests, access to life-sustaining businesses, organizations, government services, and inter-state travel—has worked to lower the number of COVID-19 cases in the Commonwealth.

Markey's application is remarkable, as it does not present the Court with a reviewable decision. As the Court has stated time and again, it is a court of review, not of first view. The Pennsylvania Supreme Court did not rule on the merits of Markey's claims. No court has ruled on the merits of Markey's claims. Rather, the Pennsylvania Supreme Court merely declined Markey's request to exercise extraordinary jurisdiction under *Pennsylvania law*.

This procedural ruling by the Pennsylvania Supreme Court, respectfully, is not reviewable by this Court. The Pennsylvania Supreme Court's decision not to exercise extraordinary jurisdiction is entirely discretionary under state law. And as the

highest court in the Commonwealth, that court is the ultimate expositor of state law. Markey's invitation for this Court to either address claims in the first instance or overturn a state supreme court's interpretation of state law is improper.

Further, even if this action presented this Court with a reviewable decision, Markey cannot meet the demanding standard for issuance of an injunction. That standard requires a determination both that an injunction is necessary in aid of this Court's jurisdiction, and that the legal rights at issue are indisputably clear. Markey cannot satisfy either criteria.

The Court has recognized as fundamental, that persons can be subject to certain constraints necessary to serve the general welfare, and that a state's inherent police powers to protect that welfare are correspondingly broad. The Governor's Stay-at-Home Executive Order is firmly based in well-established police powers, and is consistent with constitutional principles.

This Court should reject Markey's efforts, with no underlying decision to review, to obtain an injunction of the Governor's Stay-at-Home Order. The application should be denied.

## STATEMENT OF THE CASE

What began as two presumptive positive cases of COVID-19 in Pennsylvania on March 6, 2020, has grown to 72,282 cases and 5,567 deaths in slightly less than

three months.[1] Throughout the United States, there have been over 1.7 million confirmed cases of COVID-19, and 103,700 people have died from the pandemic.[2]

Because COVID-19 spreads primarily from person to person, medical experts, scientists, and public health officials agree that there is only one proven method of preventing further spread of the virus: limiting person-to-person interactions through social distancing.[3] Given this consensus, limiting the opportunity for unnecessary gatherings, personal contact, and interactions has limited the transmission of the virus, and with it, sickness and death.

Among the directives issued to address this pandemic, on March 23, 2020, Governor Wolf issued an executive order directing individuals residing in the worst affected counties to stay at home except as needed to both provide for and have access to life sustaining businesses and government services ("Governor's Order" or "Stay-at Home Order"). A list of life-sustaining businesses was attached and incorporated into the order. Those leaving their homes were directed to employ social distancing

---

[1] "COVID-19 Data for Pennsylvania," Pa. Dept. of Health, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last visited 6/1/20).

[2] "Coronavirus Disease 2019 (COVID-19) Cases in the U.S.," CDC, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited 6/1/20).

[3] "Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others," Center for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fprevention.html (last visited 5/27/20).

practices as defined by the Centers for Disease Control and Prevention. Additionally, individuals were expressly permitted to engage in outdoor activities.

The Governor issued this Order pursuant to his "supreme executive power" under the Pennsylvania Constitution, Pa. CONST. art IV, sec. 2, the Commonwealth's inherent police powers, and three separate state statutory grounds: the Emergency Management Services Code ("Pennsylvania Emergency Code"), 35 Pa.C.S. § 7101 *et seq*.; Sections 532(a) and 1404(a) of the Administrative Code, which outline the powers and responsibility of the Department of Health, 71 P.S. § 532; 71 P.S. § 1403(a); and the Disease Prevention and Control Law ("DPCL"), 35 P.S. § 521.1 *et seq*. Appendix 79A-80A.

As the number of COVID-19 cases increased, the Governor amended this order to encompass additional counties. As of April 1, 2020, all Pennsylvania counties were subject to the stay-at-home directive.[4]

These measures have been effective. Originally, health experts projected that, without social distancing, 1.7 million Americans could die from COVID-19.[5] Due to

---

[4] Also, on April 1, 2020, the Secretary for the Pennsylvania Department of Health issued her own order requiring citizens to stay at home or at their place of residence save for certain exceptions. "Order of the Secretary of the Pennsylvania Department of Health to Stay at Home," https://www.scribd.com/document/454418390/04-01-20-SOH-Statewide-Stay-at-Home-Order (issued 4/1/20). The Secretary invoked her authority under: Section 5 of the DPCL, 35 P.S. § 521.5; Sections 2102 and 2106 of the Administrative Code, 71 P.S. §§ 532(a) and 536; and Department regulations 28 Pa. Code §§ 27.60-27.68. Markey never references, let alone challenges, this Order.

[5] Chas Danner, "CDC's Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead," *New York Magazine*, https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html (updated 3/13/20).

the preventative measures put in place and the orders enforcing social distancing by state governments, the number of deaths so far is 100,446. While still a tragically high death toll, based on projections, mandatory social distancing measures have saved up to 1.6 American million lives.

Despite the lives saved, on April 7, 2020, Markey filed an emergency application for extraordinary relief in the Pennsylvania Supreme Court seeking that court's discretionary King's Bench jurisdiction.[6] Appendix 6A-8A. With few exceptions, Markey's application was a nearly verbatim copy-and-paste reproduction of a previous application filed in that court, *Civil Rights Defense Firm v. Wolf*, 63 MM 2020 (Pa.), regarding a different executive order. Markey argued that the Governor lacked authority under state law and that the order violated an assortment of Pennsylvania and United States Constitutional provisions.

The Pennsylvania Supreme Court denied the application for King's Bench jurisdiction in a two-sentence, per curiam order on April 20, 2020. Appendix 102A. Thereafter, Markey filed an emergency application to stay the Governor's Order pending appeal to this Court, which the Pennsylvania Supreme Court denied on May 4, 2020. Appendix 106A.

---

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

The Commonwealth is in the process of a phased reopening.[7] This carefully structured reopening, crafted in partnership with Carnegie Mellon University and using the Federal government's Opening Up America Guidelines, is data-driven and reliant upon quantifiable criteria for a targeted, evidence-based, regional approach.[8] Even with such phased reopenings, total United States COVID-19 deaths are projected to exceed 115,000 by June 20.[9]

## ARGUMENT

### I. In the absence of an underlying decision on the merits, Markey asks this Court to overturn the Pennsylvania Supreme Court's decision to decline to exercise its discretionary jurisdiction under state law.

Markey's application is uniquely inappropriate for this Court's consideration, as there is no underlying decision on the merits for this Court to review. As this Court has stated time and again, it is "a court of review, not of first view[.]" *Cutter v. Wilkinson*, 544 U.S. 709, 718 fn7 (2005); *see also McWilliams v. Dunn*, 582 U.S. ____, 137 S.Ct. 1790, 1801, (2017) ("[W]e leave it to the lower courts to decide [questions] in the first instance"); *Ford Motor Co., v. U.S.*, 571 U.S. 28, 30 (2013) ("This Court is one of final review, not of first view") (internal quotation marks omitted); *Kiyemba v.*

---

7 "Responding to COVID-19 in Pennsylvania," Commonwealth of Pennsylvania Website, https://www.pa.gov/guides/responding-to-covid-19/#PhasedReopening (last visited 5/27/20).

8 "Process to Reopen Pennsylvania," Governor of Pennsylvania's Website, https://www.governor.pa.gov/process-to-reopen-pennsylvania/ (last visited 5/27/20).

9 "Interpretation of Cumulative Death Forecasts," https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us.html (last visited 05/21/20).

*Obama*, 559 U.S. 131, 131-32 (2010) ("No court has yet ruled in this case in light of the new facts, and we decline to be the first to do so").

The Pennsylvania Supreme Court's ruling was procedural, and did not reach the merits. That determination was based upon that court's interpretation of when and how its own King's Bench powers should be exercised. The Pennsylvania Supreme Court does not, in the normal course, have original jurisdiction over civil actions against the Commonwealth and its officials. *See* 42 Pa.C.S. § 721.[10] That jurisdiction lies with the Commonwealth Court of Pennsylvania. *See* 42 Pa.C.S. § 761.[11] Two rare exceptions exist to this general jurisdictional rule.

*First*, the Pennsylvania Supreme Court may assume, at its discretion, plenary jurisdiction over a matter of immediate public importance that is pending before another court of the Commonwealth. *See* 42 Pa.C.S § 726. Here there was no matter pending before any court.

*Second*, the Pennsylvania Supreme Court may, at is discretion, employ its King's Bench jurisdiction, which allows it "to exercise power of general superintendency over inferior tribunals even when no matter is pending before a lower court." *Bd. of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010).

---

[10] "The Supreme Court shall have original but not exclusive jurisdiction of all cases of: (1) Habeas corpus[;] (2) Mandamus or prohibition to courts of inferior jurisdiction[; and] (3) Quo warranto as to any officer of Statewide jurisdiction." 42 Pa.C.S. § 721.

[11] "The Commonwealth Court shall have original jurisdiction of all civil actions or proceedings: (1) Against the Commonwealth government, including any officer thereof, acting in his official capacity . . . ." 42 Pa.C.S. § 761.

Litigants have no right to bypass the normal judicial process and seek immediate review by Pennsylvania's highest court. Rather, both the power of King's Bench and extraordinary jurisdiction are discretionary "power[s] to be exercised with extreme caution," *Commonwealth v. Balph*, 3 A. 220, 230 (Pa. 1886), and thus are "invoked sparingly," *Bd. of Revision*, 4 A.3d at 620. "The purpose of its exercise is not to permit or encourage parties to bypass an existing constitutional or statutory adjudicative process and have a matter decided by [the Pennsylvania Supreme] Court," but rather to aid that "Court in its duty to keep all inferior tribunals within the bounds of their own authority." *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014) (internal quotation marks and citations omitted).

Markey improperly invites this Court to dictate to the Pennsylvania Supreme Court when it must exercise its discretion under state law and allow extraordinary King's Bench jurisdiction over civil matters. *See* Application, at 3.[12] But as this Court has repeatedly held, a state's highest court is the final word on state law. *See, e.g., Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he views of the State's highest court with respect to state law are binding on the federal courts"); *Riley v. Kennedy,* 553 U.S. 406, 25 (2008) ("A State's highest court is unquestionably the ultimate exposito[r] of state law") (internal quotation marks omitted). Given that longstanding principle of federalism, extreme deference must be given to a state's highest court decision declining discretionary jurisdiction under state law.

---

[12] Markey admits that "[t]he Supreme Court of Pennsylvania refused to exercise its King's Bench or Extraordinary Jurisdiction and did not address the federal Constitutional challenges raised[.]" *Application*, at 3.

This is not a case where Markey was foreclosed from challenging the Governor's Order. Markey could and should have filed a case in the Commonwealth Court. The Pennsylvania Supreme Court's decision not to circumvent the normal judicial process is, respectfully, unreviewable by this Court. For this reason alone, Markey's application should be denied.

## II. Even if there was an underlying decision on the merits subject to this Court's review, Markey failed to meet the demanding standard necessary for this Court to upend the status quo.

Markey styles his filing with this Court as an application for a stay under Supreme Court Rule 23. It is clear, however, that he is actually asking this Court to halt enforcement of the Governor's Order. Markey's labeling of his filing notwithstanding, it should be construed for what it is, a request for an injunction under the All Writs Act, 28 U.S.C. § 1651(a), and Supreme Court Rule 20.1. *See McCarthy v. Briscoe*, 429 U.S. 1317, n.1 (1976) (Powell, J., in chambers) ("Although the application is styled 'Application for a partial stay * * *,' the applicants actually seek affirmative relief. I have therefore treated the papers as an application for an injunction pursuant to 28 U.S.C. 1651").

In *Nken v. Holder*, 556 U.S. 418, 428 (2009), this Court clarified that "[a]n injunction and a stay have typically been understood to serve different purposes." While an injunction is directed towards the conduct of a particular party and is a means by which a court prohibits some specified act, a stay, by contrast, "operates upon the judicial proceeding itself" by halting or postponing some portion of the proceeding, or by temporarily divesting a judicial order of enforceability. *Ibid.* Stated

another way, a stay "simply *suspends judicial alteration* of the status quo, while injunctive relief *grants judicial intervention* that has been withheld by lower courts." *Id.* at 429 (citing *Ohio Citizens for Responsible Energy, Inc., v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia J., in chambers)); *see also Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers) ("By seeking an injunction, applicants request that I issue an order *altering* the legal status quo") (emphasis added, internal brackets and quotation marks omitted).

Here, there has been no judicial alteration of the status quo; indeed, there has been no judicial action on the merits at all. Thus, a stay is not applicable in this circumstance. It is rather Markey who seeks this Court's intervention and an order altering the legal status quo—an injunction.

The only source of authority for the Court to enter an injunction is the All Writs Act, 28 U.S.C. § 1651(a). *See Hobby Lobby Stores, Inc. v. Sebeilus*, 568 U.S. 1401, 1403 (2020) (Sotomayor, J., in chambers); *Turner Broadcasting System*, 507 U.S. at 1303 (1993). An injunction is appropriate only if (1) it is "necessary or appropriate in aid of" this Court's jurisdiction, *and* (2) the legal rights at issue are "indisputably clear." *Ibid.* This Court has observed that its power to enjoin is to be used "sparingly and only in the most critical and exigent circumstances." *Ohio Citizens for Responsible Energy*, 479 U.S. at 1313; *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010); *see also*

Supreme Court Rule 20.1 (issuance of an extraordinary writ under the All Writs Act "is not a matter of right, but of discretion sparingly exercised").[13]

Though Markey's application includes a perfunctory regurgitation of the above elements, he makes no real attempt to establish either. He offers no explanation or analysis as to how these elements are satisfied here. Application, at 13. This is for good reason; Markey cannot satisfy any aspect of the demanding standard for that extraordinary and rarely granted form of relief.

## III. Markey cannot establish that an injunction is necessary in aid of this Court's jurisdiction. There is no underlying decision for this Court to review.

To establish entitlement to an injunction, an applicant must show that it is necessary in aid of this Court's jurisdiction. *See Turner Broadcasting System*, 507 U.S. at 1302. But as detailed above, there is no underlying decision for this Court to review. Also, as detailed above, this action concerns the Pennsylvania Supreme Court declining its discretionary jurisdiction under state law.

In *Hobby Lobby Stores*, this Court denied a request for an injunction, stating that "[e]ven without an injunction pending appeal, the applicants may continue their challenge to the regulations in the lower courts. Following a final judgment, they

---

[13] Even if this application could be considered a stay request, a Circuit Justice considers, *inter alia*, whether there is a "reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (citations and internal quotation marks omitted). As discussed above, there has been no decision below on the merits. The only ruling by the Pennsylvania Supreme Court was to decline to exercise its discretionary King's Bench jurisdiction based on state law. Thus, there is no basis to grant certiorari.

may, if necessary, file a petition for a writ of certiorari in this Court." *Hobby Lobby Stores*, 568 U.S. at 1404. Here, Markey has not even initiated a challenge to the Governor's Order in Pennsylvania's lower courts. Markey had the opportunity and obligation to avail himself of the normal judicial process and, if necessary, pursue an appeal. He did not do so.

## IV. Markey failed to establish that his legal rights are "indisputably clear," or that there is merit to any of his claims.

Even if there were an underlying decision for this Court to review, as noted, to warrant an injunction from this Court, an applicant must establish that their legal rights are "indisputably clear." *Turner Broadcasting System*, 507 U.S. at 1303; *Lux*, 561 U.S. at 1307-08 (applicant could not establish that his legal rights were "indisputably clear" where courts of appeals had reached divergent results on the issue). Though no court has addressed Markey's claims, as the Governor's Order is consistent with established constitutional principles, any court would have seen Markey's claims as meritless.[14]

[14] In a different action, the Pennsylvania Supreme Court upheld the power of the Governor to issue a separate Executive Order combating COVID-19. *See Friends of Danny DeVito v. Wolf*, 68 MM 2020, 2020 WL 1847100 (Pa. Apr. 13, 2020). There, the Pennsylvania Supreme Court unanimously determined that an order closing certain businesses was a valid exercise of the Commonwealth's police power, and that the order at issue was consistent with the First, Fifth, and Fourteenth Amendments to the U.S. Constitution. *Ibid.*

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

It is axiomatic that the Federal government generally lacks police power, which is reserved to the states under the Tenth Amendment. *See Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 165 (1919).[15] The authority of the states when exercising their police powers is broad and, indeed, "one of the least limitable of the powers of government." *District of Columbia v. Brooke*, 214 U.S. 138, 149 (1909).

Longstanding precedents from this Court establish that a state's police power is especially broad when utilized to quell the spread of infectious disease. More than a century ago, in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), this Court enunciated the framework by which individual constitutional rights are balanced with a state's need to prevent the spread of disease.

At issue in *Jacobson* was the constitutionality of a Massachusetts law requiring all citizens to be vaccinated for smallpox, which was enacted after an outbreak. *Jacobson*, 197 U.S. at 12. Much like Markey in the present case, the defendant in *Jacobson* argued that "his liberty [was] invaded" by the mandatory vaccination law, which he believed was "unreasonable, arbitrary, and oppressive." *Id.* at 26.

---

[15] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." U.S. Const. Amend. X.

In rejecting that argument, this Court emphasized that "the liberty secured by the Constitution * * * does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id.* Under such an absolutist position, liberty itself would be extinguished:

> There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. * * * Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

*Jacobson*, 197 U.S. at 26. Legal commentators have recognized this Court's central point: "[u]nbridled individual liberty eventually clashes with the liberty interests of others, and without some legal constraints, '[r]eal liberty for all could not exist.'" Thomas Wm. Mayo, Wendi Campbell Rogaliner, and Elicia Grilley Green, "'To Shield Thee From Diseases of the World': The Past, Present, and Possible Future of Immunization Policy," 13 J. Health & Life Sci. L. 3, 9 (Feb. 2020) (quoting *Jacobson*, 197 U.S. at 26).

The Court in *Jacobson* stated that "[a]n American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, he, though apparently free from the disease himself, may yet, in some circumstances, be held in quarantine against his will[.]" *Jacobson*, 197 U.S. at 29; *see also Compagine Francaise de Navigation a Vapeur, v. La. State Bd. of Health*, 186 U.S. 380, 385-97 (1902) (during a yellow fever outbreak, Louisiana lawfully quarantined persons suspected of having the disease and excluded healthy

individuals from entering the infected area). *Jacobson* confirmed that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members," and that individuals must "submit to reasonable regulations established by the * * * state, for the purpose of protecting the public collectively against such danger." *Id.* at 27-30.

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

In Markey's view, his desire not to be subject to any measures designed to protect society at large outweighs the public's interest in fighting the spread of a pandemic. But again, this Court has flatly rejected the absolutist view that individuals can trample the collective rights of society at large. "Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 233 (1945); *see also Price v. Illinois*, 238 U.S. 446, 452 (1915) ("[U]nless this prohibition is palpably unreasonable and arbitrary, we are

not at liberty to say it passes beyond the limits of the state's protective authority."). For this reason, police powers can be used whenever reasonably required for the safety of the public under the circumstances. *Jacobson*, 197 U.S. at 28; *see also Lawton v. Steele*, 152 U.S. 133, 137 (1894).

COVID-19 spreads primarily through person-to-person contact. As at least 25% of those infected are asymptomatic, and the virus has an incubation period of up to 14 days, people can unwittingly infect others. Because of these realities – and in the absence of a vaccine – social distancing was the Commonwealth's only weapon against the spread of this plague. Accordingly, the Governor's Order was reasonably required for the safety of the public under the circumstances. These actions are certainly not palpably unreasonable and arbitrary. In short, Markey cannot show that the Governor's order was an unreasonable exercise of his police powers, much less that his construction of the law is "indisputably clear." *See Turner Broadcasting System*, 507 U.S. at 1303.

### B. The Governor's Order is not vague, arbitrary, discriminatory, or overly broad.

A statute is unconstitutionally vague if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes[ ] or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, __U.S. __, 135 S. Ct. 2551, 2556, 192 L.Ed.2d 569 (2015) (citation omitted). Far from being vague, the Governor's Order was accompanied by a list of life-sustaining businesses, https://www.scribd.com/document/452553026/UPDATED-8-45pm-May-11-2020-Industry-Operation-Guidance (last updated 5/11/20); a three-page explanatory

guidance, "Stay at Home Order Guidance," https://www.scribd.com/document/452929448/03-23-20-Stay-at-Home-Order-Guidance (posted 4/4/20), and a website dedicated to specifying "allowable activities and travel," exceptions to the Order, and answers to frequently asked questions. *See* "Stay at Home Order," https://www.pa.gov/guides/responding-to-covid-19/#StayatHomeOrder (last visited 5/27/20). Rarely is so much guidance provided to explain exactly how an ordinary person may comply with an order.

Despite this guidance, Markey complains that the order remains vague because the Governor has not released a comprehensive list of every business that is permitted to operate a physical location. *Application*, at 6-7. But due process does not require the Commonwealth to publish a Yellow Pages. Further, Markey's extraordinary request for an injunction cannot stand upon his own bald speculation. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (In the preliminary injunction context, mere speculation about the "possibility" of injury does not suffice). Markey proffers nothing beyond his speculation as to what *might* occur. In reality, millions of Pennsylvanians of "common intelligence," *Application*, at 6, have both understood the parameters of the Governor's Order and complied with it.[16]

Markey also asserts that the Governor's Order violates due process by avoiding judicial review. *Application*, at 7. However, anyone cited for violation of the Order

---

[16] *See e.g.*, Jonathan Lai, *et al.*, "What's allowed to be open in Pennsylvania during red, yellow and green phases?" The Philadelphia Inquirer, https://www.inquirer.com/health/coronavirus/inq/coronavirus-covid-19-what-is-open-pennsylvania-life-sustaining-business-20200403.html (5/22/20) (detailing the different phases of the Commonwealth's reopening plan).

has the full panoply of judicial review provided by our judicial system. Thus, Markey's due process arguments are also meritless. Accordingly, his claims are certainly not indisputably clear.

### C. This content neutral time, place, and manner restriction does not violate the right to protest.

Markey's argument that the Governor's Order prohibits protests is belied by reality and his own filing. Even when social distancing is not strictly adhered to, individuals are not being stopped or cited for protesting.[17] Markey admits in his application that he has engaged in protest by carrying "a sign while walking in exercise outdoors." *Application*, at 2 n.1. Markey's argument that the Governor's Order has shut down protests is a fantasy.

But even if the order had the collateral effect of limiting in-person physical protests, the right to speak and assemble wherever and whenever one chooses is not absolute. It has long been established that "the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at

---

[17] *See e.g.*, Bart Jensen, "Anti-quarantine rally in Pennsylvania draws about 2,000 people in latest protest against coronavirus restrictions," USA Today, https://www.usatoday.com/story/news/politics/2020/04/20/coronavirus-pennsylvania-roiled-protest-against-shutdowns/5167292002/ (4/20/20); Anna Orso, et al., "Car-bound protesters call for a plan to reopen Philadelphia," The Philadelphia Inquirer, https://www.inquirer.com/news/philadelphia/coronavirus-protest-rally-philadelphia-reopen-businesses-city-hall-20200508.html (5/8/20); Kyle Mullins, "Demonstrators in Downtown protest Wolf's stay-at-home and business shutdown orders," Pittsburgh Post-Gazette, https://www.post-gazette.com/local/city/2020/04/20/Protesters-economic-business-shutdown-orders-Downtown-Pittsburgh-Harrisburg-Wolf/stories/202004200102 (4/20/20); Christine Vendel, "Police in Harrisburg prepare for another anti-shutdown protest Friday at the Capitol," Patriot News, https://www.pennlive.com/news/2020/05/police-in-harrisburg-prepare-for-another-anti-shutdown-protest-friday-at-the-capitol.html (5/15/20).

any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations." *Cox. v. State of Louisiana*, 379 U.S. 559, 574 (1965).

Accordingly, States may place content neutral time, place, and manner regulations on speech and assembly "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). "The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill v. Colorado*, 530 U.S. 703, 726 (2000).

The Governor's Order is content neutral; it does not regulate speech at all, let alone attempt to regulate speech based on content. It is a public health order narrowly tailored to protect the health and lives of Pennsylvanians, while allowing protests to occur both outdoors and through social media. *See Packingham v. North Carolina*, __ U.S. __, 137 S. Ct. 1730, 1735 (2017) (recognizing that, in the modern era, "cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular"—has become a quintessential forum for the exercise of First Amendment rights). The Governor's Order is precisely the content-neutral, narrowly

tailored protection of the health and safety of citizens that a State is permitted to enforce. *See Hill*, 530 U.S. at 715; *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984).

The Governor's Order is entirely consistent with the First Amendment, thus Markey certainly cannot establish that his construction of the law is indisputably clear.

**D. The Governor's Order does not violate the right to travel.**

Markey argues that the Governor's Order violates his constitutional right to travel. It does not. In support of his contention, Markey relies upon *United States v. Guest*, 383 U.S. 745, 758 (1996) a case involving Congress' authority to address racial discrimination by *private* actors, whose conduct deprived African Americans in Georgia of, *inter alia*, the right to *interstate* travel. *Id.* at 757-59. But there has been no restriction on Markey's (or anyone else's) right to engage in *interstate* travel, as the guidance issued by the Governor here expressly permits travel to-and-from other states.[18]

Markey, who is not a public health expert, makes the absurd claim that there is "no nexus between exercising freedom of travel and COVID-19 transmission[.]" *Application*, at 11. He cites no authority in support of his contention in this regard. That is understandable; it has no basis in reality and is contrary to the analysis of

[18] "Responding to COVID-19 in Pennsylvania," Commonwealth of Pennsylvania, https://www.pa.gov/guides/responding-to-covid-19/#StayatHomeOrder (last visited 6/1/20).

public health officials.[19] Unlimited travel within the Commonwealth would directly and materially interfere with the safety and welfare of the citizens of Pennsylvania, and the Nation as a whole. Temporarily limiting public access to the Commonwealth's highways was necessary to enforce social distancing and thereby preserve the safety and welfare of the Commonwealth as a whole.

It is axiomatic that the Commonwealth may limit the use of public highways for the purpose of promoting public safety pursuant to its inherent police powers. *Zemel v. Rusk*, 381 U.S. 1, 15-16 (1965) (the right to travel "does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to that area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole"). Because of the reach of the pandemic, the entire Commonwealth was a disaster area. Thus, the Commonwealth has the ability to limit access to public highways in order to combat the COVID-19 pandemic – just as it would if there were a tornado, fire, or any other type of emergency.

There is no merit to Markey's contention that the Governor's Order infringes upon his constitutional right to travel. Accordingly, he cannot establish that the legal rights he claims are indisputably clear.

---

19 "Coronavirus Disease 2019 (COVID-19): How COVID-19 Spreads," CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html (last visited 6/1/20).

* * *

As Chief Justice Roberts recently stated, when "officials undertake[ ] to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. Where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health * * *." *South Bay United Pentecostal Church v. Gavin Newsom*, 590 U.S. ___, ___ S.Ct.___, 2020 WL 2813056 (May 29, 2020) (Roberts, C.J. concurring) (internal quotation omitted). That is the circumstance presented here; the Court is being asked to second guess public policy decisions made based upon public health data and expertise. All where no court has addressed any of these issues in the first instance. The Court has been rightly reticent to enter into such matters. It should not do so here.

**CONCLUSION**

For these reasons, the Court should deny the application.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

By: */s/ J. Bart DeLone*
J. BART DeLONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section
Pa. Bar # 42540

SEAN A. KIRKPATRICK
Senior Deputy Attorney General

DANIEL B. MULLEN
Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 783-3226
Cell: (717) 439-0515
jdelone@attorneygeneral.gov

DATE: June 2, 2020