COVID-19 and CONSTITUTIONAL ISSUES

American Inns of Court
The Hay-Sell Pittsburgh Chapter

Thursday, November 19, 2020
5:30 p.m. to 6:30 p.m.
Zoom Videoconference

Pupilage Group Leader
Michael K. Feeney, Esq. / Matis Baum O'Connor

Pupilage Group Members
Ben Bratman, Esq. / University of Pittsburgh School of Law
Joseph DeMenno, Esq. / Evoqua Water Technologies
Nicholas J. Bell, Esq. / Buchanan Ingersoll & Rooney P.C.
James Baker, Esq. / Allegheny County Office of the Public Defender
Robert Karlavage, Esq.
Michael J. Ozdinec, Esq. / Ozdinec & Witzel, LLC
Stanley Stein, Esq. / Stanley M. Stein, P.C.

Featured Guest Speakers

(in order of appearance)

Karen Mascio Romano, Esq.

Attorney Romano currently serves as Chief Deputy Attorney General for the Civil Litigation Section at the Pennsylvania Office of Attorney General. She oversees a team of 28 attorneys across the Commonwealth who defend the Commonwealth agencies and employees in civil rights, employment, and constitutional matters. A native of Steubenville, OH, Ms. Romano is a 1998 graduate of Duquesne University's Palumbo-Donahue School of Business and a 2001 graduate of Duquesne Law. Following graduation, Ms. Romano practiced in the area of insurance defense at both a private firm and multinational insurance company in Pittsburgh until relocating to Harrisburg in December 2013. She briefly returned to private practice until joining the Office of Attorney General in February 2016. In her free time, Ms. Romano enjoys travel, reading, Food Network, Pittsburgh sports, and spending time with her husband and son.

Charles "Chip" Becker, Esq.

Attorney Becker is an attorney at Kline & Specter, P.C., where he has primary responsibility for the firm's post-trial and appellate practice. He also works with firm lawyers on case and claim selection, venue and dispositive motions, in limine motions, trial strategy, settlement, and other issues as they arise in the firm's cases. Mr. Becker is a Fellow of the American Academy of Appellate Lawyers, whose members are committed to advancing professionalism in the appellate courts and the administration of justice. He serves on the Supreme Court of Pennsylvania's Commission on Judicial Independence, which promotes understanding about the rule of law and the role of the judiciary in civil society. He serves on the adjunct faculty of the University of Pennsylvania Law School, having taught appellate advocacy for several years and now teaching state constitutional law. He served three terms on the Supreme Court of Pennsylvania's Appellate Courts Procedural Rules Committee and is the immediate past president of the Third Circuit Bar Association. Mr. Becker also has been active in continuing legal education programs and has co-authored several book chapters. A graduate of Williams College and Yale Law School, Mr. Becker served as a law clerk for the Honorable Sandra L. Lynch of the U.S. Court of Appeals for the First Circuit.

John C. Conti, Esq.

Attorney Conti is President and Chief Executive Officer at Dickie, McCamey & Chilcote, P.C. He chairs the firm's Executive Committee and Medical Malpractice Defense Group. Mr. Conti is also admitted to practice in California and serves as the Managing Attorney of the firm's Los Angeles office. He is a Fellow of the American College of Trial Lawyers who specializes in the representation of hospitals and other health care providers, primarily in connection with the defense of professional negligence suits and related litigation. In over 35 years of practice, Mr. Conti has represented virtually every major health care institution in the region. This representation has included matters in Pennsylvania, Ohio, West Virginia, and California. In 2005, Mr. Conti was appointed Adjunct Professor at the University of Pittsburgh School of Law where he taught a course on expert witnesses until 2014. He has also served as an expert witness in bad faith litigation. He is a licensed airplane pilot, holding multi-engine, instrument, and glider certifications.

Program Agenda

I. Introductions & Overview
Michael Feeney, Esq.
(5:30 to 5:35)

II. County of Butler, et al., v. Thomas W. Wolf, et al.

- Overview of Governor Wolf's Orders & Description of Plaintiffs' Claims
  Professor Ben Bratman
  (5:35 to 5:45)

- Overview of Governor Wolf's Response & Status of Appeal to Third Circuit
  Karen Romano, Esq.
  (5:45 to 5:55)

- Other Pennsylvania Constitutional Challenges to COVID-19 Orders
  Karen Romano, Esq.
  (5:55 to 6:05)

III. Allegheny County Emergency Orders & Convention Center Courtrooms
Stanley Stein, Esq.
(6:05 to 6:10)

IV. Bayles v. Children's Hospital of Pittsburgh

- Overview of Plaintiffs'/Petitioners' Position
  Charles Becker, Esq.
  (6:10 to 6:20)

- Overview of Defendants'/Respondents' Position
  John Conti, Esq.
  (6:20 to 6:30)

Written Materials

I. County of Butler, et al., v. Thomas W. Wolf, et al.

- Wolf Administration COVID-19 Announcements: Protecting The Health Care System, New Traveler Testing Order, Strengthened Masking Order, Recommendations For Colleges And Universities (11/17/20)
- Butler v. Wolf: PowerPoint by Professor Ben Bratman
- Butler v. Wolf: Plaintiffs' Brief in Support of Complaint for Declaratory Judgment (7/9/20)
- Butler v. Wolf: Defendants' Brief in Opposition to Plaintiffs' Complaint for Declaratory Judgment (7/9/20)
- Butler v. Wolf: Plaintiffs' Post Hearing Brief in Support of Civil Action Seeking Declaratory Judgment (8/3/20)
- Butler v. Wolf: Defendants' Post Hearing Brief in Opposition to Plaintiffs' Complaint for a Declaratory Judgment (8/19/20)
- Butler v. Wolf: Reply Brief in Support of Complaint for Declaratory Judgment (8/24/20)
- Butler v. Wolf: Opinion (9/14/20)

II. Allegheny County Emergency Orders & Convention Center Courtrooms

- Amended Emergency Operations Plan (8/31/20)
- Amended Emergency Operations Plan (9/15/20)
- *Allegheny County Prepares Convention Center for Jury Selection Amid Pandemic*, Pittsburgh Post-Gazette, Mick Stinelli (11/12/20)

III. Bayles v. Children's Hospital of Pittsburgh

- *Lawyers Press Pa. Supreme Court to Set in Motion COVID-Delayed Med Mal Case*, The Legal Intelligencer, P.J. D'Annuzio (11/11/20)
- Bayles v. CHP: Application for Extraordinary Relief Under 42 Pa.C.S. § 726 (11/6/20)
- Amended Emergency Operations Plan (11/13/20)
- Bayles v. CHP: Praecipe for Discontinuance (11/16/20)

Wolf Administration COVID-19 Announcements: Protecting The Health Care System, New Traveler Testing Order, Strengthened Masking Order, Recommendations For Colleges And Universities

11/17/2020

Harrisburg, PA– As Pennsylvania experiences a resurgence of COVID-19 cases with significantly higher daily case counts than in the spring and hospitalizations on the rise, the Wolf Administration has identified four new mitigation efforts, which Secretary of Health Dr. Rachel Levine announced today.

“It is our collective responsibility to protect our communities and our most vulnerable Pennsylvanians from COVID-19 and to continue to work together to get through this pandemic. These targeted mitigation efforts, combined with existing ones, are paramount to saving lives and protecting our economy,” Gov. Wolf said. “The administration will continue to monitor the risks posed by COVID-19 across the commonwealth and will reinstate or institute new targeted mitigation tactics as necessary.”

The efforts announced today include:

Protecting Our Health Care System Dr. Levine issued a memorandum (https://gcc02.safelinks.protection.outlook.com/?url=https://www.governor.pa.gov/wp-content/uploads/2020/11/20201117-SOH-Memorandum-for-Hospital-Leaders.pdf&data=04%7c01%7cgalberigi%40pa.gov%7cbfae0a3bd3234baccfa508d88b251518%7c418e284101284dd59b6c47fc5a9a1bde%7c0%7c0%7c637412339155828101%7cUnknown%7cTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7c1000&sdata=/6Nm3emQE9JZWA%2B9uAcioQy%2BpDFqjNTEL%2BgsKdAsSg8%3D&reserved=0) to acute care hospitals outlining expectations to care for Pennsylvanians who need care during the pandemic.

Hospitals are to work through the established health care coalitions and other partnerships to prepare for how they will support one another in the event that a hospital becomes overwhelmed during the pandemic. Hospitals should also be working to move up elective procedures necessary to protect a person’s health and prepare to suspend them if our health care system becomes strained.

Restrictions on elective surgeries put into effect in March and lifted in April were to help with both PPE and bed capacity and were considered successful.

Hospitalizations are increasing, as are ICU patients, and according to modeling from the Institute of Health Metrics and Evaluation, which does not take into account hospitalizations from influenza, Pennsylvania will run out of intensive care beds in December if ICU admissions continue at the current rate.

The same modeling indicates we will have sufficient medical-surgical beds with some uncertainty as to capacity from region to region.

Traveler Testing Dr. Levine issued an order (https://gcc02.safelinks.protection.outlook.com/?url=https://www.governor.pa.gov/wp-content/uploads/2020/11/20201117-SOH-Travel-Mitigation-Order.pdf&data=04%7c01%7cgalberigi%40pa.gov%7cbfae0a3bd3234baccfa508d88b251518%7c418e284101284dd59b6c47fc5a9a1bde%7c0%7c0%7c637412339155828101%7cUnknown%7cTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7c1000&sdata=%2BpsI1jVaHyZtgkSLJ9NO7G109VXKyZXRZelhowSQzLs%3D&reserved=0) requiring anyone who visits from another state to have a negative COVID-19 test within 72 hours prior to entering the commonwealth.

If someone cannot get a test or chooses not to, they must quarantine for 14 days upon arrival in Pennsylvania.

Pennsylvanians visiting other states are required to have a negative COVID-19 test within 72 hours prior to their return to the commonwealth or to quarantine for 14 days upon return to Pennsylvania.

This order, which takes effect on Friday, November 20, does not apply to people who commute to and from another state for work or medical treatment.

Strengthened Masking Order

Dr. Levine first issued a masking order on April 15. The order signed today (https://gcc02.safelinks.protection.outlook.com/?url=https://www.governor.pa.gov/wp-content/uploads/2020/11/20201117-SOH-Universal-Face-Coverings-Order-Update.pdf&data=04%7c01%7cgalberigi%40pa.gov%7cbfae0a3bd3234baccfa508d88b251518%7c418e284101284dd59b6c47fc5a9a1bde%7c0%7c0%7c637412339155838060%7cUnknown%7cTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7c1000&sdata=h6GVV7Tg/jc8XDbGq0PzXCqdlU6u1Gdl5rkHIcDrylw%3D&reserved=0) strengthens this initial order with these inclusions:

Masks are required to be worn indoors and outdoors if you are away from your home.
When outdoors, a mask must be worn if you are not able to remain physically distant (at least 6 feet away) from someone not in your household the entire time you are outdoors.
When indoors, masks will now be required even if you are physically distant from members not in your household. This means that even if you are able to be 6 feet apart, you will need to wear a mask while inside if with people other than members of your household.
This order applies to every indoor facility, including homes, retail establishments, gyms, doctors' offices, public transportation, and anywhere food is prepared, packaged or served.

Colleges and Universities

The departments of Health and Education (https://gcc02.safelinks.protection.outlook.com/?url=https://www.education.pa.gov/Schools/safeschools/emergencyplanning/COVID-19/SchoolReopeningGuidance/PSAdultEdGuidance/COVID19TestingGuidelines/Pages/default.aspx&data=04%7c01%7cgalberigi%40pa.gov%7cbfae0a3bd3234baccfa508d88b251518%7c418e284101284dd59b6c47fc5a9a1bde%7c0%7c0%7c637412339155838060%7cUnknown%7cTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7c1000&sdata=e9mCGU1W1fdTWsYGHuGhn7QZbv48eL3EkhgNDfiTSpY%3D&reserved=0) issued recommendations for colleges and universities to implement a testing plan for when students return to campus following the holidays.

These recommendations include establishing routine protocols for testing.

Colleges and universities should have adequate capacity for isolation and quarantine and should be prepared to enforce violations of established policies such as mask wearing and physical distancing.

Every college and university should test all students at the beginning of each term, when returning to campus after a break and to have regular screening testing throughout the semester/term.

"We must remain united in stopping COVID-19," Dr. Levine said. "Wear a mask, wash your hands, stay apart and download the COVID Alert PA app. If you test positive, please answer the call of the case reviewer and provide information that can help protect others. It's the selfless, right thing to do."

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# # #

County of Butler v. Wolf, ___ F. Supp. 3d ___, *2020 WL 5510690 (W.D. Pa Sept 14, 2020) (Stickman, J.)*

Hay-Sell Inn of Court, Thu, Nov 19, 2020

The claims . . . .

- Limits on gatherings of people: 1st Amendment right of assembly
- Stay-at-home order: 14th Amendment substantive due process–right to intrastate travel
- Closure of "non-life-sustaining" businesses: 14th Amendment substantive due process—right to engage in one's chosen profession; *and* 14th Amendment Equal Protection Clause
- [Two other claims dismissed as inappropriate for declaratory relief]

Why did court rule that none of this was moot?

moot

Level of Scrutiny - Ordinary or Extraordinary?

Limits on Gatherings of People – 1st Am

% capacity for commercial establishments

vs.

Number of people for political, social, cultural, educational, religious gatherings

Stay-at-home Order – 14th Am due process (right to intrastate travel)

- "Defendants' orders subjected every Pennsylvanian to a lockdown where he or she was involuntarily committed to stay at home unless he or she was going about an activity approved as an exception by the orders. Even in the most recent, and currently applicable, iteration of Defendants' orders, while the operation of the stay-at-home provisions is 'suspended,' it is not rescinded and may be re-imposed at any time at the sole discretion of Defendants. . . . When in place, the stay-at-home order requires a *default* of confinement at home . . . . This broad restructuring of the default concept of liberty of movement in a free society eschews any claim to narrow tailoring."

Stay-at-home Order – 14th Am due process (right to intrastate travel), cont.

- "In addition, the lack of narrow tailoring is highlighted by the fact that broad, open-ended population lockdowns have *never* been used to combat any other disease. In other words, in response to *every* prior epidemic and pandemic (even more serious pandemics, such as the Spanish Flu) states and local governments have been able to employ other tools that did not involve locking down their citizens."

Closure of "non-life-sustaining" businesses – 14th Am due process (right to engage in one's chosen profession)

- "[T]he classification of 'life-sustaining' was never formally reduced to an objective definition in writing and Defendants' list of business types that they considered to be 'life-sustaining' remained in flux, changing ten times . . . ."
- "Defendants eliminated the ability of a business to obtain a waiver as of April 3, 2020."

Closure of "non-life-sustaining" businesses – 14th Am due process (right to engage in one's chosen profession), cont.

- "The manner in which Defendants . . . designed, implemented, and administered the business closures is shockingly arbitrary."
- "The Court recognizes that Defendants were acting in haste to address a public health situation. But to the extent that Defendants were exercising raw governmental 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 certainty how the critical classifications were to be made, and a mechanism to challenge an alleged misclassification."

Closure of "non-life-sustaining businesses – 14th Amendment Equal Protection

"[W]hile attempting to limit [personal] interactions, the arbitrary method of distinction used by Defendants almost universally favored businesses which offered more, rather than fewer products. As such, the largest retailers remained open to attract large crowds, while smaller specialty retailers—like some of the Business Plaintiffs here—were required to close. The distinctions were arbitrary in origin and application. They do not rationally relate to Defendants' own stated goal."

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COUNTY OF BUTLER, et al.,	:	NO. 2:20-cv-677-WSS
Plaintiffs,	:	
vs.	:	
THOMAS W. WOLF, et al.,	:	
Defendants.	:	

BRIEF IN SUPPORT OF COMPLAINT FOR DECLARATORY JUDGMENT

AND NOW, come Plaintiffs, County of Butler, et al., by and through their attorneys Dillon McCandless King Coulter & Graham, LLP, per Thomas W. King, III, Esquire; Ronald T. Elliott, Esquire; Thomas E. Breth, Esquire; and Jordan P. Shuber, Esquire, to file the within Brief in Support of Complaint for Declaratory Judgment.

I. STATEMENT OF FACTS

On March 6, 2020, Governor Wolf proclaimed the existence of a disaster emergency throughout the Commonwealth of Pennsylvania pursuant to the authority granted to the Governor under the Emergency Management Services Act. 3*5 Pa. C.S. §7301, et seq., Joint Stipulation No. 1*. Governor Wolf's Proclamation of Disaster Emergency was issued pursuant to Paragraph (c) of Section 7301 - General Powers of Governor which reads in relevant part as follows:

> "A disaster emergency shall be declared by executive order or proclamation of the Governor upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent. The state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of disaster

> emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency. All executive orders or proclamations issued under this subsection shall indicate the nature of the disaster, the area or areas threatened and the conditions which have brought the disaster about or which make possible termination of the state of disaster emergency…"

35 Pa. C.S. §7301(c)

On or about March 13, 2020, Governor Wolf announced the temporary closure of all K-12 schools within the Commonwealth of Pennsylvania, including all non-public schools. *Joint Stipulation No. 2.* In subsequent announcements, Governor Wolf extended the closure, and on March 30, 2020, he announced the indefinite closure of all public and non-public K-12 schools within the Commonwealth of Pennsylvania. *Joint Stipulation No. 25.*

On March 19, 2020, Governor Wolf issued an Order in which he prohibited the operation of non-Life Sustaining Businesses within the Commonwealth of Pennsylvania. *Joint Stipulation No. 4.* Section 1 - Prohibition of Operation of Businesses that are not Life Sustaining of the Order reads in relevant part as follows:

> "All prior orders and guidance regarding business closures are hereby superseded.
>
> No person or entity shall operate a place of business in the Commonwealth that is not a life sustaining business regardless of whether the business is open to members of the public. This prohibition does not apply to virtual or telework operations (e.g. work from home), so long as social distancing and other mitigation measures are followed in such operations.
>
> Life sustaining businesses may remain open, but they must follow, at a minimum, the social distancing practices and other mitigation measures defined by the Centers for Disease Control to protect workers and patrons. A list of life sustaining businesses that may remain open is attached to and incorporated into this Order.
>
> Enforcement actions will be taken against non-life sustaining businesses that are out of compliance effective March 21, 2020, at 12:01 a.m."

Included within Governor Wolf's Order was a list of businesses classified by Industry; Sector; Subsector; and, Industry Group, with a corresponding designation of whether the business

may or may not continue physical operations. As proclaimed by Governor Wolf, only businesses designated as "Life Sustaining" were permitted to continue physical business operations. *Joint Stipulation No. 4.*

As legal authority for his Order, Governor Wolf cited Section 7301(c) of the Emergency Management Services Act, 3*5 Pa. C.S. §7301,* as previously referenced above; along with the Secretary of Health's purported authority under Paragraph (a) of Section 532 - General Health Administration of the Administrative Code, as amended, *71 P.S. 532(a)*; Paragraph (a) of Section 1403 - Duty to Protect Health of the People of the Administrative Code, as amended, *71 P.S. 1403(a)*; and, Section 521.5 - Control Measures of the Disease Prevention and Control Law of 1955, as amended, *35 P.S. §521.5.*

Section 521.5 - Control Measures reads in relevant part as follows:

> "Upon the receipt by a local board or department of health or by the department, as the case may be, of a report of a disease which is subject to isolation, quarantine, or any other control measure, the local board or department of health or the department shall carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation."

35 P.S. §521.5.

Paragraph (a) of Section 532 - General Health Administration of the Administrative Code reads in relevant part as follows:

> "The Department of Health shall have the power, and its duty shall be:
>
> (a) To protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease; …"

71 P.S. 532(a)

Paragraph (a) of Section 1403 - Duty to Protect Health of the People of the Administrative Code reads in relevant part as follows:

> "(a) It shall be the duty of the Department of Health to protect the health of the people of the State, and to determine and employ the most efficient and practical means for the prevention and suppression of disease."

71 P.S. 1403(a)

Governor Wolf's March 19, 2020, Order further prohibited the operation of Dine-In Facilities, including Bars and Restaurants. *Joint Stipulation No. 3.* Section 2 - Prohibition on Dine-in Facilities including Restaurants and Bars of the Order reads in relevant part as follows:

> "All restaurants and bars previously have been ordered to close their dine-in facilities to help stop the spread of COVID-19.
>
> Businesses that offer carry-out, delivery and drive-through food and beverage service may continue, so long as social distancing and other mitigation measures are employed to protect workers and patrons. Enforcement actions will be taken against businesses that are out of compliance effective March 19, 2020, at 8 p.m."

On March 23, 2020, Governor Wolf issued an Order requiring individuals residing within Allegheny, Bucks, Chester, Delaware, Monroe, Montgomery, and Philadelphia Counties to stay at home, except as needed to access, support and provide life sustaining businesses, emergency, or government services (hereinafter referred to as "Stay-at-Home" orders). *Joint Stipulation No. 6.* Governor Wolf's Order reads in relevant part as follows:

> "All individuals residing in Allegheny County, Bucks County, Chester County, Delaware County, Monroe County, Montgomery County and Philadelphia Count are ordered to stay at home except as needed to access, support, or provide life sustaining business, emergency, or government services. For employees of life sustaining businesses that remain open, the following child care services may remain open: group and family child care providers in a residence; child care facilities operating under a waiver granted by the Department of Human Services Office of Child Development and Early Learning; and, part-day school age programs operating under an exemption from the March 19, 2020, business closure Orders.
>
> 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.

> Individuals leaving their home or place of residence to access, support, or provide life sustaining services for themselves, another person, or a pet must employ social distancing practices as defined by the Centers for Disease Control and Prevention. Individuals are permitted to engage in outdoor activities; however, gatherings of individuals outside of the home are generally prohibited except as may be required to access, support or provide life sustaining services as outlined above.
>
> Enforcement of this Order will commence at 8:00 p.m. on March 23, 2020."

On April 1, 2020, Governor Wolf issued an additional "Stay-at-Home" Order in which he ordered all individuals residing within the Commonwealth of Pennsylvania to stay at home, except as needed to access, support and provide life sustaining businesses, emergency, or government services. *Joint Stipulation No. 21*. Governor Wolf's Order reads in relevant part as follows:

> "All individuals residing in the Commonwealth are ordered to stay at home except as needed to access, support, or provide support, or provide life-sustaining business, emergency, or government services. For employees of life-sustaining businesses that remain open, the following child care services may remain open: group and family child care providers in a residence; child care facilities operating under a waiver granted by the Department of Human Services Office of Child Development and Early Learning; and, part-day school age programs operating under an exemption from the March 19, 2020, business closure Orders.
>
> 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.
>
> Individuals leaving their home or place of residence to access, support, or provide life sustaining services for themselves, another person, or a pet must employ social distancing practices as defined by the Centers for Disease Control and Prevention. Individuals are permitted to engage in outdoor activities; however, gatherings of individuals outside of the home are generally prohibited except as may be required to access, support or provide life sustaining services as outlined above.
>
> Enforcement of this Order will commence immediately for all counties covered under my prior Order directing "Individuals to Stay at Home" first issued March 23, 2020, as amended. Enforcement of this Order will commence at 8:00 p.m. Wednesday, April 1, 2020, for all counties."

On or about April 17, 2020, Governor Wolf announced his intent to implement a Phased Reopening Plan (hereinafter referred to as "Plan") for the Commonwealth of Pennsylvania. *Joint*

Stipulation No. 28. Under Governor Wolf's Plan, as implemented, the entire Commonwealth was initially placed in the "Red" Phase with designated "Work and Congregate Setting Restrictions" and, "Social Restrictions" as established and imposed by the Governor. In addition to the "Red" Phase, Governor Wolf's Plan included "Yellow" and "Green" Phases with corresponding designated "Work and Congregate Setting Restrictions" and "Social Restrictions," all of which were established and imposed by the Governor.

In addition to the Red, Yellow or Green Phase designations, Governor Wolf's Plan stated in relevant part as follows:

> "There is no single tool or model that can determine easing of restrictions or reopening, but the Commonwealth, through partnerships with Carnegie Mellon University and other institutions of higher education, and the criteria set by the Department of Health, will make informed decisions based on data and science.
>
> To determine when a region is ready to reopen and return to work, the state will evaluate the incident rate of COVID-19 cases per capita, relying upon existing regional health districts used by the Pennsylvania Department of Health. A regional assessment will measure the COVID-19 cases to determine if the target goals of an average of less than 50 cases per 100,000 individuals over the course of 14 days is met. The administration will work closely with county and local governments to enable the communities to reopen and transition back to work.
>
> Throughout this process, the administration will have a guidance in place to support best public health practices to avoid these negative impacts. This guidance will reinforce and build on exiting business and building safety orders and will adapt to the changing nature of the pandemic, even as we learn from the first communities to reopen."

On May 7, 2020, Governor Wolf issued an Amendment to his April 1, 2020, "Stay-at-Home" Order in which he extended the effective date of the Order through June 4, 2020. *Joint Stipulation No. 34.* Also, on May 7, 2020, Governor Wolf issued a separate Order permitting the limited reopening of businesses and the lifting of the "Stay at Home" Order requirements in designated Counties within the Commonwealth. *Joint Stipulation No. 36.* Governor Wolf's Order reads in relevant part as follows:

"A. My Order directing the "Closure of All Businesses That Are Not Life Sustaining" issued March 19, 2020, as subsequently amended, is suspended for the following counties:

Bradford, Cameron, Centre, Clarion, Clearfield, Clinton, Crawford, Elk, Erie, Forest, Jefferson, Lawrence, Lycoming, McKean, Mercer, Montour, Northumberland, Potter, Snyder, Sullivan, Tioga, Union, Venango, and Warren.

B. The prohibition on dine-in facilities throughout the Commonwealth including restaurants and bars that previously had been ordered to help stop the spread of COVID-19 remains in effect. Businesses that offer carry-out, delivery, and drive-through food and beverage service may continue, so long as social distancing and other mitigation measures are employed to protect workers and patrons.

C. All businesses operating in the counties listed in Section 1(A) above for which my Order for the "Closure of All Businesses That Are Not Life Sustaining" issued March 19, 2020, as subsequently amended, is suspended, and which had been conducting their operations in whole or in part remotely through individual teleworking of their employees under that Order, may continue to conduct such operations remotely through individual teleworking of employees and may not commence in person business operations for those employees or business functions.

D. The following categories of businesses operating in the counties listed in Section 1(A) above for which my Order for the "Closure of All Businesses That Are Not Life Sustaining" issued March 19, 2020, as subsequently amended, is suspended, are authorized to commence in-person operations as outlined below, provided that the businesses fully comply with all substantive aspects of: the Order of the Secretary of Health providing for building safety measures, issued April 5, 2020; the Order of the Secretary of Health providing for business safety measures (to keep employees and customers safe), issued April 15, 2020; and any other future applicable Department of Health (DOH) and Centers for Disease Control and Prevention (CDC) guidance, and subject to the conditions outlined below:

i. Businesses that have not been able to conduct in-person operations in whole or in part under my Order directing the "Closure of All Businesses That Are Not Life Sustaining" issued March 19, 2020, as subsequently amended, because the functions of such businesses are not conducive to working remotely are authorized to commence such in person operations (except for businesses described in section E below);

ii. Businesses that were permitted to conduct in-person operations under my Order directing the "Closure of All Businesses That Are Not Life Sustaining" issued March 19, 2020, as subsequently amended, including:

a. those listed as life sustaining according to the Governor's and Secretary's Non-Life Sustaining Business Closure Orders (as amended);

b. those that received an exemption from those Orders from the Department of Community and Economic Development; or

c. those permitted to conduct in-person operations pursuant to a subsequent applicable Order or amendment to those Orders from the Governor and Secretary including, the construction industry (subject to the Guidance issued by the Department of Health to the Construction Industry, issued April 19, 2020); vehicle dealerships (subject to the Guidance issued by the Governor regarding Vehicle Transactions, issued April 20, 2020); and real estate industry (subject to the Guidance issued by the Department of State to the Real Estate Industry, reissued April 28, 2020).

E. Notwithstanding the foregoing, the suspension of my Order directing the "Closure of All Businesses That Are Not Life Sustaining" issued March 19, 2020, as subsequently amended, as set forth in Section 1(A), does not apply to the following types of businesses: indoor recreation, health and wellness facilities and personal care services (such as gyms, spas, hair salons, nail salons, massage therapy providers), and all entertainment (such as casinos, theaters), and such businesses remain closed.

Section 2: Limited Lifting of Stay at Home Orders

A. My Order directing "Individuals to Stay at Home" issued April 1, 2020, as subsequently amended, is suspended for the following counties:

Bradford, Cameron,Centre, Clarion, Clearfield, Clinton, Crawford, Elk, Erie, Forest, Jefferson, Lawrence, Lycoming, McKean, Mercer, Montour, Northumberland, Potter, Snyder, Sullivan, Tioga, Union, Venango, and Warren.

B. Large gatherings of more than twenty-five (25) people are prohibited in the counties listed in Section 2(A) above for which my Order for directing individuals to "Stay at Home" issued April 1, 2020, as subsequently amended, is suspended.

Section 3: Enforcement

Enforcement of this Order will commence on its effective date."

Since his May 7, 2020, Order, Governor Wolf has issued additional Orders to further implementing his Plan, including Orders that have impacted Plaintiffs. In addition to Governor Wolf's above-referenced Orders and Plan, as amended, Defendant, Secretary of Health Levine, has issued numerous concurrent Orders pursuant to his purported authority under Pennsylvania's Disease Control and Prevention Law of 1955, as amended. *35 P.S. §521.1, et seq., Joint*

Stipulations No. 5, 7, 9, 11, 13, 15, 17, 19, 21, 24, 27, 30, 33, 35, 37, 39, 41, 43, 45, 48, 50, 53, 55, 57, and, 59.

II. ISSUES BEFORE THE COURT

1. Whether Defendants' actions, individually or jointly, violated Plaintiffs' Substantive Due Process rights under the Fourteenth Amendment to the Constitution of the United States of America.

2. Whether Defendants' actions, individually or jointly, violated Plaintiffs' Equal Protection rights under the Fourteenth Amendment to the Constitution of the United States of America.

3. Whether Defendants' actions, individually or jointly, violated Plaintiffs' rights under the First Amendment to the Constitution of the United States of America.

III. LEGAL AUTHORITY IN SUPPORT OF ARGUMENT

A. Violation of Plaintiffs' Substantive Due Process Rights

The Fourteenth Amendment to the Constitution forbids a state from depriving anyone of life, liberty, or property without due process of law. Without a deprivation of life, liberty or property, there can be no due process claim. *See Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); *Finley v. Giacobbe*, 79 F.3d 1285, 1296 (2d Cir.1996); *Federico v. Board of Educ.*, 955 F.Supp. 194, 198-99 (S.D.N.Y.1997).

The substantive component of the Due Process Clause guarantees that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) (*quoting Whitney v. California*, 274 U.S. 357, 373 (1927)). The Supreme Court has stated,

> Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For

> the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning. While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, *e. g.*, *Bolling* v. *Sharpe*, 347 U.S. 497, 499-500; *Stanley* v. *Illinois*, 405 U.S. 645.

Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

In determining whether a plaintiff has a viable substantive due process claim, courts must be mindful of the Supreme Court's commands in addressing the interplay of constitutional and state tort law. *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 400 (3d Cir. 2000).

First, the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Second, it must be remembered that "[a]s a general matter, the [Supreme] Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.

When examining the conduct of governmental entities and officials, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense . . ..'" *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1992). The Supreme Court has "for half a century now . . . spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Id.* Determining whether the challenged action rises to this level has been described as a "threshold" question in a challenge to governmental action. *Id.* at 847 n.8. The Third Circuit held that the "shocks the conscience" standard applies to substantive due process claims. *United*

Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392 (3d Cir. 2003). "Since *Lewis* our cases have repeatedly acknowledged that executive action violates substantive due process only when it shocks the conscience…" *Id.* at 399, 400.

As articulated by the *Lewis* Court:

> Most recently, in *Collins v. Harker Heights*, [503 U.S. 115, 128, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)], we said again that the substantive component of the Due Process Clause is violated by executive action *only when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.*" *Lewis*, 523 U.S. at 847, 118 S.Ct. 1708 (emphasis added). *See also Fagan v. City of Vineland*, 22 F.3d 1296, 1303 (3d Cir.1994) (en banc) ("[T]he substantive component of the Due Process Clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience.' "). *United Artists Theatre Circuit, Inc. v. Township of Warrington, PA, et al.*, 316 F.3d 392, 399 (3d Cir.2003) citing, *Lewis* at 845-846, which cited *Collins* at 128.

In *United Artists*, the Court recognized that "the measure of what is conscience-shocking is no calibrated yard stick," *United Artist* at 399, citing, *Lewis* at 847, and that, "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another." *United Artists* at 399, citing *Lewis* at 850. The Third Circuit Court has consistently acknowledged that executive actions violate substantive due process only when such actions shock the conscience; however, the meaning and application of this standard varies depending upon the factual context of the actions. *United Artist* at 400, referencing, *Leamer v. Fauver*, 288 F.3d 532, 546 (3d Cir.2002); *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 400 (3d Cir.2000); *Nicini v. Morra*, 212 F.3d 798, 809 (3d Cir.2000) (en banc); *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3d Cir.1999).

As articulated in *Alexander*, "although the 'outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects' have not been defined, *Planned Parenthood, supra* at

848, 112 S.Ct. at 2805, certain protected liberties fall within the ambit of protection. Thus, those to whom the Amendment applies have a right to be free:

> 'from bodily restraint but also the right ... to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [their] own conscience[s], and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.'"

Alexander v. Whitman, 114 F.3d 1392, 1403, (3d Cir.1997), citing, *Board of Regents v. Roth*, 408 U.S. 564, 572, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626–27, 67 L.Ed. 1042 (1923)).

"Where fundamental rights or interests are involved, a state regulation limiting these fundamental rights can be justified only by a compelling state interest and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Id., citing, *Roe v Wade*, 410 U.S. 113, 154, 93 S.Ct. 705, 727, (1973).

"Whether the property right asserted is entitled to substantive due process protection depends on whether it is considered fundamental. Fundamental rights are rights that are 'deeply rooted in the Nation's history and traditions .... [and] interests implicit in the concept of ordered liberty like personal choice in matters of marriage and family.' " Wrench Transportation Systems, Inc. v. Bradley, 340 Fed.Appx. 812, 815 (2009), citing, Nicholas v Pa. State University, 227 F.3d 133, 143 (3d Cir.2000).

"A few very old cases contain dicta suggesting that the right to localized intrastate travel is substantively protected by the Fourteenth Amendment Due Process Clause. The clearest of these is *Williams v. Fears*, 179 U.S. 270, 21 S.Ct. 128, 45 L.Ed. 186 (1900), in which the Court commented that 'the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of liberty ... secured by the 14th amendment.' " *Lutz v City of York*, 899 F.2d 255, 266, (3d Cir.1989) quoting, *Fears*, supra at 274. "The narrowest conception of

substantive due process articulated in recent years was advanced by Justice Scalia in *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). Justice Scalia expressly endorsed the well-settled proposition that the Due Process Clause substantively protects unenumerated rights 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Id.*, 109 S.Ct. at 2341. (plurality opinion)" *Lutz v City of York*, 899 F.2d 255, 267-68 (3d Cir.1989).

"Solely for purposes of this appeal, we adopt Justice Scalia's view, not because it represents the views of the Court, but because if a fundamental right of intrastate travel can be recognized under a view of substantive due process … The right or tradition we consider may be described as the right to travel locally through public spaces and roadways. … We conclude that the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'" *Lutz v City of York*, 899 F.2d 255, 268 (3d Cir.1989). The Court of Appeals for the Third Circuit has recognized that the substantive component of the Due Process Clause encompasses a right to intrastate travel. *McCool v. City of Philadelphia*, 494 F.Supp.2d 307, 312 (2007), citing, *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir.1990).

"In addition to its solid historical foundation, the tremendous practical significance of a right to localized travel also strongly suggests that such a right is secured by substantive due process. The right to travel locally through public spaces and roadways, perhaps more than any other right secured by substantive due process, is an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function. In the words of Justice Douglas:

> 'Freedom of movement, at home and abroad, is important for job and business opportunities—for cultural, political, and social activities—for all the

> commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.'"

Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir.2002), quoting, *Aptheker v. Secretary of State*, 378 U.S. 500, 519–20, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964) (Douglas, J., concurring).

As will be more fully detailed in Plaintiffs' post-hearing brief and submissions, Defendants' actions have clearly violated Plaintiffs' Substantive Due Process rights under the Fourteenth Amendment of the United States Constitution.

B. Violation of Plaintiffs' Equal Protection Rights

Under the Equal Protection clause, Section I of the Fourteenth Amendment, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Const. Amend. XIV, § I; *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). The purpose of the Equal Protection Clause of the Fourteenth Amendment is to secure every person within a state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073 (2000).

"The Equal Protection Clause 'announces a fundamental principle: the State must govern impartially,' and 'directs that all persons similarly circumstanced shall be treated alike.' Therefore, '[g]eneral rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply' with the Equal Protection Clause. Only when a state 'adopts a rule that has a special impact on less than all persons subject to its jurisdiction' does a question arise as to whether the equal protection clause is violated." *Alexander v. Whitman*, 114 F.3d 1392, 1403, (3d Cir.1997), quoting, *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587, 99 S.Ct. 1355, 1367, 59 L.Ed.2d 587 (1979); quoting, *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d

786 (1982), quoting, *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561–62, 64 L.Ed. 989 (1920).

The first issue in the Equal Protection analysis is the determination of which standard of review applies to Plaintiffs' claims. "It is generally accepted by both the courts and commentators that in cases involving equal protection challenges that Supreme Court applies three levels of review in ruling on the validity of the challenged statute. The three tiers of review are the rational basis test, intermediate or 'middle-tier' scrutiny and strict scrutiny." *Brown v. Heckler*, 589 F.Supp. 985, 989 (E.D. Pa. 1984) (citations omitted). In general, the term "heightened scrutiny" refers to either level of review above rational basis. *Brown, at* 989.

The Court uses a strict scrutiny standard if a classification impermissibly interferes with the exercise of a fundamental right. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Under strict scrutiny, the government has the burden of proving that the suspect classifications "are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). If the plaintiff is not a member of a suspect class and there is not claimed interference with a fundamental right, the Court should analyze the claim under a rational basis standard. *Sellers v. School Board of Manassas Virginia*, 141 F.3d 524 (4th Cir. 1988). This test provides a presumption of constitutionality and only requires that the law or action have a legitimate purpose and a rational relationship to the fulfillment of that purpose. *Brown, supra.* Intermediate, or middle-tier scrutiny, falls somewhere between rational basis and strict scrutiny.

The Supreme Court articulated the standard by stating that the challenged law must be "substantially related" to "important governmental objectives." *Craig v. Boren*, 429 U.S. 451 (1976). Previous Supreme Court cases have established that classifications that distinguish

between males and females are subject to this middle-tier scrutiny under the Equal Protection clause. *Craig*, 429 U.S. at 457; *Reed v. Reed*, 404 U.S. 71, 75 (1971). Gender classifications must serve important governmental objections and must be substantially related to those objectives in order to withstand constitutional challenge. *Craig*, at 457.

These different standards of equal protection review set different bars for the magnitude of the governmental interest that justifies the statutory classification. Heightened scrutiny demands that the governmental interest served by the classification be "important," see, *e.g., Virginia, supra*, at 533, 116 S.Ct. 2264, whereas rational basis scrutiny requires only that the end be "legitimate," see, *e.g., Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992). Strict scrutiny requires that the government interest be "compelling." *Adarand, supra*, at 227.

"The most important difference between heightened scrutiny and rational basis review, of course, is the required fit between the means employed and the ends served. Under heightened scrutiny, the discriminatory means must be "substantially related" to an actual and important governmental interest. Under rational basis scrutiny, the means need only be "rationally related" to a conceivable and legitimate state end." *Tuan Anh Nguyen v. I.N.S.*, 533 US 53, 77 (2001) (citations omitted). Strict scrutiny requires that the means be "narrowly tailored" to further a compelling governmental interest. *Adarand, supra*, at 227.

Further, the Fourteenth Amendment's guarantee of equal protection must "coexist with the practical necessity that most legislation creates classifications for one purpose or another, and that these classifications may disadvantage various groups or persons." *McCool v. City of Philadelphia*, 494 F.Supp.2d 307, 317 (2007), citing, *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) ("not all classifications are per se unconstitutional or automatically subject to heightened scrutiny").

"[A]s the Court of Appeals for the Third Circuit observed, *Shapiro* and its progeny are Equal Protection cases in the sense that they involved classifications that were suspect because they penalized a group of people on the basis of their having exercised a constitutionally protected right to travel. *Lutz,* 899 F.2d at 265; *see also Maricopa County,* 415 U.S. at 261, 94 S.Ct. 1076. But the penalty must be sufficiently significant, or affect a sufficiently significant right, to, in fact, constitute a bona fide penalty with the potential of deterring travel. *See Soto–Lopez,* 476 U.S. at 903, 106 S.Ct. 2317 (in deciding whether a durational residency requirement sufficiently impinges upon the right to travel or migrate to trigger strict scrutiny, the Court looks to see whether the challenged law's "primary objective" is to impede interstate travel; whether it "penalize[s] the exercise of that right;" or whether it "actually deters such travel"). *McCool v. City of Philadelphia*, 494 F.Supp.2d 307, 319 (2007).

Further, the Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment provides that "Congress shall make no law respecting an establishment of religion or *prohibiting the free exercise thereof....*" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), citing, *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi, supra* at 532, citing, *Braunfeld v. Brown,* 366 U.S. 599, 607, 81 S.Ct. 1144, 1148, 6 L.Ed.2d 563 (1961); and, *Fowler v. Rhode Island,* 345 U.S. 67, 69–70, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953).

"Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects

against governmental hostility, which is masked, as well as overt. 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'" *Lukumi, supra* at 534, quoting, *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696, 90 S.Ct. 1409, 1425, 25 L.Ed.2d 697 (1970).

"Nor does it make a difference that faith-based bigotry did not motivate the orders. The constitutional benchmark is 'government *neutrality*,' not 'governmental avoidance of bigotry.'" *Roberts v. Neace*, 958 F.3d 409, 415 (2020), citing, *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008). "A law is not neutral and generally applicable unless there is 'neutrality between religion and non-religion.'" *Roberts v. Neace*, 958 F.3d 409, 415 (2020), citing, *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir, 1995). "And a law can reveal a lack of neutrality by protecting secular activities more than comparable religious ones. *Roberts v. Neace*, 958 F.3d 409, 415 (2020), citing, *Hartmann* at 979; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1233–35, 1234 n.16 (11th Cir. 2004); *see also Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) ("[T]he Free Exercise Clause is not confined to actions based on animus.").

Defendants' actions, by and through their various Orders, violate Plaintiffs' Equal Protection rights under the Fourteenth Amendment regardless of the level of scrutiny utilized by the Court.

C. **Violation of Plaintiffs' First Amendment Rights**

The Supreme Court has identified three categories of government property affecting when and how public speech may be regulated: (1) traditional public fora ('streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public

questions'); (2) designated public fora ('public property which the State has opened for use by the public as a place for expressive activity'); and, (3) nonpublic fora ('[p]ublic property which is not by tradition or designation a forum for public communication'). *Doe v. City of Albuquerque*, 667 F.3d 1111, 1128 (10th Cir. 2012) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

"In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed." *Startzell v. City of Philadelphia*, 533 F.3d 183 (3d Cir.2008); citing, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); and, *Frisby*, 487 U.S. at 480, 108 S.Ct. 2495 (noting that "public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum")." *Startzell, supra* at 194, citing, *Perry*, 460 U.S. at 45, 103 S.Ct. 948. "In such traditional public fora the state may not prohibit all communicative activity." *Id*. at 194. "Indeed, "[s]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Startzell, supra* at 194, citing, *Carey v. Brown*, 447 U.S. 455, 460, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).

"In a traditional public forum or designated public forum, the government may only restrict speech after satisfying the requirements of either strict or intermediate scrutiny to show that the restriction is narrowly crafted to achieve a government interest." *Martin v. City of Albuquerque*, 369 F.Supp.3d 1008, (2019), citing, *Perry supra*, 460 U.S. at 45–46, 103 S.Ct. 948.

The Supreme Court has held that there are two kinds of freedom of association that are constitutionally protected: intimate association and expressive association. *Roberts v. United*

States Jaycees, 468 U.S. 609 (1984). In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to association for the purpose of engaging in those activities protected by the First Amendment - speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties. *Roberts* at 468 U.S. at 617-618.

Further, as set forth earlier, the Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment provides that "Congress shall make no law respecting an establishment of religion or *prohibiting the free exercise thereof*...." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), citing, *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, *supra* at 532, citing, *Braunfeld v. Brown*, 366 U.S. 599, 607, 81 S.Ct. 1144, 1148, 6 L.Ed.2d 563 (1961); and, *Fowler v. Rhode Island*, 345 U.S. 67, 69–70, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953).

"Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility, which is masked, as well as overt. 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious

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"Nor does it make a difference that faith-based bigotry did not motivate the orders. The constitutional benchmark is 'government *neutrality*,' not 'governmental avoidance of bigotry.'" *Roberts v. Neace*, 958 F.3d 409, 415 (2020), citing, *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008). "A law is not neutral and generally applicable unless there is 'neutrality between religion and non-religion.'" *Roberts v. Neace*, 958 F.3d 409, 415 (2020), citing, *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir, 1995). "And a law can reveal a lack of neutrality by protecting secular activities more than comparable religious ones. *Roberts v. Neace*, 958 F.3d 409, 415 (2020), citing, *Hartmann* at 979; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1233–35, 1234 n.16 (11th Cir. 2004); *see also Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) ("[T]he Free Exercise Clause is not confined to actions based on animus.").

Defendants' actions, by and through their various Orders, violate Plaintiffs' Equal Protection rights under the Fourteenth Amendment regardless of the level of scrutiny utilized by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas E. Breth, Attorney for Plaintiff, do hereby certify that I have this day served the foregoing ***Brief in Support of Complaint for Declaratory Judgment*** via email on the following:

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DATE: July 9, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COUNTY OF BUTLER, *et al.*, **Plaintiffs** **v.** **THOMAS W. WOLF, in his official capacity as Governor of the Commonwealth of Pennsylvania, and RACHEL LEVINE, MD, in her official capacity as Secretary of the Pennsylvania Department of Health,** **Defendants**	**No. 2:20-CV-677-WSS** ***Complaint Filed 5/7/20***

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' COMPLAINT FOR DECLARATORY JUDGMENT

Respectfully submitted,

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INTRODUCTION

In bringing this suit to enjoin the actions of the Governor and Secretary, Plaintiffs have not presented any novel legal issues for the Court's consideration. What's more, they seek a declaratory judgment where there is no live case or controversy between the parties. All of Plaintiffs' claims have been mooted as a result of the Commonwealth's reopening, requiring dismissal of all claims.

What began as two presumptive positive cases of COVID-19 in Pennsylvania on March 6, 2020, has grown to 92,148 cases and 6812 deaths in just under four months.[1] Throughout the United States, there are nearly three million confirmed cases of COVID-19, and more than 131,000 people have died from this pandemic so far.[2]

On March 6, 2020, Governor Wolf signed a Proclamation of Disaster Emergency pursuant to the Emergency Management Services Code (Emergency Code), 35 Pa.C.S. § 7101 *et seq*.[3] This emergency proclamation allowed the

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[1] "COVID-19 Data for Pennsylvania," Pa. Dept. of Health, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last visited 7/8/20).

[2] "Cases in the U.S.," Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?fbclid=IwAR2YGdSiJ1zk6mktakCLsCqjU-tEq9XsvLMK2fGG0vmHPIsAdMgl8C13cOU (last visited 7/9/20)

[3] Website of the Governor of Pennsylvania, https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf

Governor to issue executive orders "to protect the citizens of the Commonwealth from sickness and death[.]" On March 19, 2020, the Governor entered an Executive Order directing all non-life-sustaining businesses in Pennsylvania to temporarily close their physical locations so that those businesses would not serve as centers for contagion. *Doc. 1-1.* The Secretary of Health issued a similar order.[4] (Collectively "Business Closure Orders").

The Supreme Court of Pennsylvania unanimously agreed that the Governor, under Pennsylvania law, had the authority to enter the Executive Order, that the Order was a lawful exercise of Pennsylvania's police powers, and that the Order does not violate state or federal constitutional rights. *Friends of Danny DeVito v. Wolf*, 227 A.3d. 872 (Pa. April 13, 2020). The Commonwealth's response slowed the spread of the virus and reduced the death toll in Pennsylvania.

The Commonwealth is in the process of a phased reopening with all 67 counties now in the "green" phase.[5] This carefully structured reopening, crafted in

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[4] Order of the Secretary of the Pennsylvania Department of Health Regarding the Closure of All Businesses that are Not Life Sustaining, Website of the Department of Health, https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-Order-of-Secetary-of-PA-DOH-Closure-of-All-Businesses-That-Are-Not-Life-Sustaining.pdf

[5] "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).

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.[6] However, while the actions of the Governor and the Secretary have ameliorated the exponential rise of COVID-19 cases in Pennsylvania, the pandemic continues to infect hundreds of Pennsylvanians every day.[7] Indeed, case counts are increasing in several counties, including Butler and Washington. Because the COVID-19 disaster has not yet ended, on June 3, 2020, the Governor renewed the Proclamation of Disaster Emergency.[8]

Despite this, Plaintiffs ask this Court to declare that the Business Closure Orders are unconstitutional and enjoin their enforcement. This invitation to endanger the lives of Pennsylvanians should be declined.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 11, 2020, Plaintiffs commenced this action alleging that the March 19, 2020, Business Closure Orders issued by Governor Wolf and Secretary Levine,

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

[7] "COVID-19 Data for Pennsylvania," Pa. Dept. of Health, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Coronavirus.aspx (last visited 7/120).

[8] Website of the Governor of Pennsylvania, https://www.governor.pa.gov/wp-content/uploads/2020/06/20200603-TWW-amendment-to-COVID-disaster-emergency-proclamation.pdf (last visited 6/14/20).

which directed all non-life-sustaining businesses in Pennsylvania to temporarily close their physical locations, were not a proper exercise of the Commonwealth's police powers and that the orders violate various rights granted to Plaintiffs under the United States Constitution. Plaintiffs further allege that the Commonwealth's reopening plan violates their rights. *Doc. 1.* Plaintiffs filed a Motion for Speedy Hearing, which was granted with respect to Counts II (Substantive Due Process), IV (Equal Protection) and V (First Amendment) of the Complaint.[9] *Doc. 15.* Defendants submit this pre-hearing brief in accordance with this Court's June 2, 2020 Case Management Order. *Doc. 18*.

QUESTIONS PRESENTED

I. MUST PLAINTIFFS' REQUEST FOR A DECLARATORY JUDGMENT BE DENIED WHERE THERE IS NO ACTUAL CONTROVERSY BETWEEN THE PARTIES BECAUSE THE HARM SET FORTH IN THE PLEADINGS HAS BEEN REMEDIED BY THE TRANSITION TO THE GREEN PHASE?

Suggested Answer: Yes

II. MUST THE COUNTY PLAINTIFFS' CLAIMS BE DISMISSED FOR LACK STANDING BECAUSE POLITICAL SUBDIVISIONS ARE NOT ENTITLED TO RELIEF UNDER SECTION 1983?

Suggested Answer: Yes

[9] Because the speedy hearing is limited to Counts II, IV, and V of the Complaint, Defendants will not address Count I (Takings Clause) or Count III (Procedural Due Process) in this brief. Defendants reserve the right to address these claims at a later point in the litigation.

III. WERE THE GOVERNOR'S ORDERS A PROPER EXERCISE OF THE COMMONWEALTH'S POLICE POWER?

Suggested Answer: Yes

IV. MUST PLAINTIFFS' SUBSTANTIVE DUE PROCESS CLAIM BE DISMISSED WHERE PLAINTIFFS HAVE INVOKED CLAIMS UNDER SPECIFIC CONSTITUTIONAL AMENDMENTS AND THE GOVERNOR'S ORDERS DO NOT SHOCK THE CONSCIENCE?

Suggested Answer: Yes

V. MUST PLAINTIFFS' EQUAL PROTECTION CLAIM BE DISMISSED WHERE THEY ARE NOT SIMILIARLY SITUATED TO ANY OWNERS OF LIFE-SUSTAINING BUSINESSES?

Suggested Answer: Yes

VI. MUST PLAINTIFFS' FIRST AMENDMENT CLAIM BE DISMISSED WHERE THE GOVERNOR'S ORDERS ARE CONTENT-NEUTRAL AND ISSUED IN FURTHERANCE OF A SUBSTANTIAL GOVERNMENTAL INTEREST?

Suggested Answer: Yes

ARGUMENT

The Declaratory Judgment Act ("DJA") requires that a "case of actual controversy" exist between the parties before a federal court may exercise jurisdiction. 28 U.S.C. § 2201(a); *see also Korvettes, Inc. v. Brous*, 617 F.2d 1021, 1023–24 (3d Cir. 1980). In determining whether there is subject matter jurisdiction over declaratory judgment claims, a court should ask "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between

parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007); *see also Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1335–36 (Fed. Cir. 2008). A case or controversy must be "based on a real and immediate injury or threat of future injury that is caused by the defendants—an objective standard that cannot be met by a purely subjective or speculative fear of future harm." *Prasco,* 537 F.3d at 1339.

"Declaratory judgment is inappropriate solely to adjudicate past conduct." *Corliss v. O'Brien*, 200 F. App'x 80, 84–85 (3d Cir. 2006). "Nor is declaratory judgment meant simply to proclaim that one party is liable to another." *Id.* Likewise, it is not a vehicle to obtain "an opinion advising what the law would be upon a hypothetical state of facts." *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 649 (3d Cir. 1990). As such, litigants will not satisfy the "actual controversy" requirement when their dispute becomes moot prior to judicial resolution. *Korvettes*, 617 F.2d at 1023–24. Indeed, "[o]ne of the primary purposes behind the [DJA] was to enable plaintiffs to preserve the status quo before irreparable damage was done . . . [t]he idea behind the Act was to clarify legal relationships so that plaintiffs (and possibly defendants) could make responsible decisions about the future." *Step-Saver Data Sys.,* 912 F.2d at 649. Such is not the case here.

I. Plaintiffs Cannot Prove That There Is an "Actual Controversy" Warranting a Declaratory Judgment Because the Harm Set Forth in Their Pleadings Has Been Remedied by the Transition to the "Green" Phase

The "speedy trial" in this matter is proceeding on three discrete claims: substantive due process (Count II); equal protection (Count IV); and First Amendment (Count V). The facts underlying these claims no longer present an actual controversy.

With respect to Counts II and IV, Plaintiffs take issue with the waiver process[10], which they allege disparately classified businesses as life-sustaining or non-life-sustaining, *see Doc. 1*, ¶¶ 78-80, 104, and the county-based phased reopening "beginning May 8, 2020," which purportedly treated counties dissimilarly, *see Doc. 1,* ¶¶ 81-82, 85 ("The Defendants' classification of what counties may reopen on May 8, 2020, is arbitrary and capricious."). These facts are no longer live, however. Currently, all counties are in the "green" phase and all businesses are permitted to open. Moreover, it is unknown whether the facts as pled will exist again, considering the unprecedented nature of the pandemic, and the Defendants' response. Thus, a declaratory judgment on this record amounts to

[10] The waiver process was set up to allow businesses to challenge their classification as non-life-sustaining. Richard E. Coe, "Pennsylvania Grants Waivers Allowing Non-'Life-Sustaining' Businesses to Resume Operations," (Apr. 1, 2020), https://www.natlawreview.com/article/pennsylvania-grants-waivers-allowing-non-life-sustaining-businesses-to-resume.

nothing more than either an adjudication of past conduct or an advisory opinion on hypothetical future facts.

The same is true for Count V. Plaintiffs complain that their First Amendment rights have been violated because "[t]he restrictions contained in the Business Closure Orders limit public gatherings to ten (10) people, and in the next 'phase', twenty-five (25) people." *Doc. 1*, ¶ 113. These limitations are no longer in place. All counties are in the "green" phase and although events and mass gatherings remain restricted, they are not restricted to small groups, nor are they restricted based upon the region in which they occur. Plaintiffs have pled no facts indicating that their rights are being violated under the current scheme, which allows for larger gatherings. Therefore, a declaration on Count V is inappropriate, and, again, would constitute an opinion on either stale or hypothetical facts.

Accordingly, because a declaratory judgment must be "based on a real and immediate injury," and because the harms alleged by Plaintiffs have been rendered moot by the transition to the "green" phase, Plaintiffs' request for a declaratory judgment should be denied.

II. The County Plaintiffs Lack Standing Because Political Subdivisions Lack Rights Under Section 1983

Pennsylvania Rule of Civil Procedure 76 defines a Political Subdivision as "[a]ny county, city, borough, incorporated town, township, school district, vocational school district, county institution district or municipal of other local

authority." Pa. R.Civ.P. 76. By their own admission, the County Plaintiffs are "Count[ies] of the Commonwealth." *Doc. 1,* ¶¶6-9. It is well settled that a political subdivision is not entitled to relief under Section 1983.

Over eighty years ago the United State Supreme Court stated: "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." *Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 40 (1933). More recently, after finding no Third Circuit cases addressing this subject, the Middle District of Pennsylvania analyzed cases from other circuits to likewise find a political subdivision does not have standing to bring a Section 1983 claim. *Jackson v. Pocono Mountain School Dist.*, No. 3:10-cv-1171, 2010 WL 4867615 (M.D. Pa., Nov. 23, 2010), *rev'd on other grounds*, 442 F. App'x 681 (3d Cir. Aug 25, 2011). The District Court noted "the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh [Circuits], have all held that a political subdivision may not bring a federal suit against its parent state or its subdivisions on rights secured through the Fourteenth Amendment or other constitutional provisions." *Id.* at *3. *See also South Macomb Disposal Auth. v. Twp. of Washington,* 790 F.2d 500 (6th Cir. 1986) (finding that a municipal corporation could not sue another township); *City of Moore, Okl. v. Atchison, Topeka, & Santa Fe Ry. Co.,* 699 F.2d 507, 512 (10th Cir. 1983) (finding city lacked standing to

challenge zoning statute as a violation of equal protection clause); *Tahoe v. Cal. Tahoe Reg'l Planning Agency,* 625 F.2d 231, 233 (9th Cir. 1980) (ruling that political subdivision could not challenge land use regulations on constitutional grounds when defendant was political subdivision of the state); *City of New York v. Richardson,* 473 F.2d 923, 929 (2d Cir. 1973) (ruling that city could not challenge state law on constitutional grounds).

"[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *McCauley v. Univ. of the Virgin Islands,* 618 F.3d 232, 241 (3d Cir. 2010). Accordingly, as the County Plaintiffs are political subdivisions of the Commonwealth, they may not bring Section 1983 claims against the Commonwealth or its officials in their official capacity, and their claims fail as a matter of law.

III. The Governor's Orders Were a Proper Exercise of the Commonwealth's Police Power

As a threshold matter, the Court must determine whether the Business Closure Orders were a proper exercise of the Commonwealth's police power. The Pennsylvania Supreme Court determined it was, and this Court is bound by that holding.

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). The protection of the public health, safety, and welfare falls within the traditional scope of a State's police powers. *Hillsborough Cty. v. Automated Med. Laboratories, Inc.*, 471 U.S 707, 719 (1985).

The Pennsylvania Supreme Court determined that state law grants the Governor "broad emergency management powers" when responding to a "disaster," including the power to temporarily close certain businesses. *Friends of Danny DeVito*, 227 A.3d. at 885. Plaintiffs' request that this Court overrule Pennsylvania's highest court's interpretation of the state's own laws is wholly improper. As the Pennsylvania Supreme Court addressed and resolved those issues on the basis of state law, this Court is bound by that resolution. *See Washington State Department of Licensing v. Cougar Den, Inc.*, 139 S.Ct. 1000, 1010 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 138 (2010)).

Regarding the Commonwealth's inherent police power under the Tenth Amendment,[11] the United States Supreme Court enunciated the framework by which individual constitutional rights are balanced with a state's need to prevent the spread of disease more than a century ago in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). At issue in *Jacobson* was the constitutionality of a Massachusetts law requiring all citizens to be vaccinated for smallpox, which was enacted after an

[11] 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.

outbreak. *Jacobson*, 197 U.S. at 12. Much like Plaintiffs 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.

In response, the High 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 free 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 the 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).

In striking the proper balance, 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) (a state may exercise its police power when (1) the interests of the public require government interference, and (2) the means used are reasonably necessary to accomplish that purpose).

Plaintiffs propose that their physical locations should have remained open while employing unspecified COVID-19 precautions. *Doc. 1* at ¶55. But even assuming Plaintiffs' proposals could be discerned and were reasonable, so was the Governor's response. And it has often been said that "debatable questions as to reasonableness are not for the court." *See, e.g., Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 594-95 (1962).

As the Pennsylvania Supreme Court found, the Defendants "utilized a recognized tool, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19." *Friends of Danny DeVito*, 227 A.3d at 891. The Middle District of Pennsylvania recently reached the same conclusion in the matter of *Benner v. Wolf,* No. 1:20-cv-775. Chief Judge Jones stated, "government interference was required to stem the tide of the COVID-19 public health crisis," and there was no support for the *Benner* Plaintiffs' argument "that the Orders were not necessary to slow the spread of COVID-19, nor that they were an unreasonable reaction to the global pandemic." *Benner,* Doc. 15 at 16-17. Indeed,

nearly every state responded in the same way, ordering all or certain non-essential businesses to close physical locations in order to enforce social distancing.[12] *See Jacobson,* 197 U.S. at 31 (looking to other states and countries in determining that vaccination law was a reasonably necessary means of protecting public health and safety). So have the courts, and for the same reason.

Plaintiffs cannot show that the Business Closure Orders were an unreasonable exercise of the Commonwealth's police powers, much less that their rights have been violated. Accordingly, their claims should be dismissed.

IV. Plaintiffs' Substantive Due Process Claim Fails as a Matter of Law Because Plaintiffs Have Invoked Claims under Various Constitutional Amendments, and the Business Closure Orders Do Not Shock the Conscience

Count II of Plaintiffs' complaint purports to raise a substantive due process claim. Plaintiffs' argument, however, evidences no understanding of the elements of such a claim. Indeed, "[a]s a general matter, the [Supreme] Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). *Accord Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

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[12] "State Data and Policy Actions to Address Coronavirus," Kaiser Family Foundation, https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/ (last visited 5/1/20).

Plaintiffs' Complaint is replete with references to a host of claimed affronts to their "rights" but, as discussed herein, the Business Closure Orders are consistent with those rights. Moreover, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 374-75 (3d Cir. 2016) (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994)). Put simply, Plaintiffs' invocation of multiple particular constitutional amendments are antithetical to their stand-alone substantive due process claim.

At bottom, the actual basis for this action is clear: Plaintiffs challenge the Business Closure Orders because their right to operate their businesses as usual was curtailed. As they see it, they have an absolute right to engage in economic activity as they see fit. That is not the law. Nor does such a claim provide viable support for a violation of substantive due process.

"Substantive due process refers to and protects *federal* rights." *Ransom v. Marazzo*, 848 F.2d 398, 411 (3d Cir. 1988) (emphasis added). That being so, the analysis of any substantive due process claim "must begin with a careful description of the asserted right[.]" *Reno v. Flores*, 507 U.S. 292, 302 (1993). To be protected, the "asserted right" must be "fundamental"—arising from the Constitution itself, and not from state law. *Id. See also Desi's Pizza, Inc. v. City of Wilkes-Barre,* 321 F.3d

411, 427 (3d Cir. 2003); *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 140-42 (3d Cir. 2000).

What Plaintiffs are complaining about appears to concern the impairment of their *property* interests. *See* U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of . . . property, without due process of law"). But "[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). By today's constitutional standards, then, the alleged impairment of individuals' state-law property interests, by state actors, cannot serve as the basis for a substantive due process claim.[13] Accordingly, Count II of the Complaint must be dismissed.

V. Plaintiffs Cannot Establish an Equal Protection Violation Because They Are Not Similarly Situated to Any Owners of Life-Sustaining Businesses

Plaintiffs allege that "Defendants' classification of Pennsylvania businesses and entities into life-sustaining and non-life-sustaining is arbitrary and irrational . . . [violating] the equal protection clause." *Doc. 1,* ¶¶104-105. Further, Plaintiffs

[13] It might have been different a hundred years ago, or so, when the Due Process Clause was invoked to strike down "unreasonable" economic legislation as "unwise," but that line of authority has long since been repudiated. *See Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963) (summarizing change in legal doctrine).

allege that the Governor's reopening plan, which eased restrictions on a county by county basis, is irrational and arbitrary. *Doc. 1,* ¶107. The United States Constitution does not require state officials to treat all entities "alike where differentiation is necessary to avoid an imminent threat" to health and safety. *Jones v. N. Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies.")

Here, Plaintiffs make no attempt to allege their businesses are life-sustaining or that they are similarly situated to life-sustaining businesses. *See Doc. 1,* generally. Instead, they allege they are similarly situated to either businesses in other counties who entered the "yellow" or "green" phases first or businesses in other states. *Doc. 1,* ¶¶107-109. This argument ignores the fact that Plaintiffs' businesses were located in counties that did not meet the reopening criteria, thus, differentiating them from businesses located in counties that had met the criteria.

Plaintiffs' argument is nothing more than a public policy disagreement with the Defendants' determination as to which physical business locations would remain open and which would be temporarily closed and how the Commonwealth should reopen. Plaintiffs essentially argue that if they had been empowered by law to make these life and death decisions, they would have responded to this global crisis differently. This policy matter is not for Plaintiffs to decide.

Likewise, the Court need not trouble itself with evaluating the wisdom of executive policy decisions. The Pennsylvania Supreme Court correctly recognized, "[i]t is not for this Court, but rather for the Governor pursuant to the powers conferred upon him by the Emergency Code, to make determinations as to what businesses, or types of businesses, are properly placed in either category." *Friends of Danny DeVito,* 227 A.3d at 903. "[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy. . . . [I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 27 (1989) (internal quotation marks and citations omitted). *See also Whitmore v. Arkansas*, 495 U.S. 149, 161 (1990) ("It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case"); *Williamson, 348 U.S. at 488*) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought).

Here, during an unprecedented and rapidly evolving global health disaster, deference to the public policy decisions of Commonwealth officials is most appropriate. The Business Closure Orders balance the economic interests of the

Commonwealth against the health and lives of 12.8 million Pennsylvanians. Temporarily closing certain physical locations in order to protect lives is certainly not invidious or wholly arbitrary. The health and survival of those residents is the most compelling of state interests. And the classifications and distinctions made to protect our citizenry are absolutely essential—not just reasonably related—to achieving that most compelling of state interests. Because the Governor's Order does not violate the Equal Protection Clause, Count IV of Plaintiffs' complaint must be dismissed.

VI. The Business Closure Orders Do Not Infringe on Plaintiffs' First Amendment Rights because the Orders are Content-Neutral and Issued in Furtherance of a Substantial Governmental Interest

While the First Amendment generally prohibits states from "abridging the freedom of speech, or of the press[,]" U.S. Const. amend. I, States may place "content-neutral" time, place, and manner regulations on speech "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 *Benner* Court analyzed a similar First Amendment claim and rejected it. That Court stated "[p]rotecting lives is among the most substantial of government interests, and we see no indication whatsoever that the Orders are content-based. They apply equally to all citizens of Pennsylvania and to a great number of non-life sustaining businesses, regardless of message." *Benner,* Doc. 15 at 19. The Court went on to determine that alternative avenues are available to Plaintiffs noting,

> the Governor's Orders do not limit political candidates and their supporters from speaking on television and radio; the Orders do not prevent any campaign from sending out direct mailings; the Orders do prohibit putting up yard signs; and, the Orders do not stop anyone from speaking to the press. Indeed, protesting is also not curtailed, even when social distancing protocols are not adhered to.

Id. at 20 (internal citations and quotation marks omitted). The same holds true for the candidate and County Plaintiffs here. Thus, Plaintiffs' First Amendment claim fails, and Count V of the Complaint must be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs claims for violations of substantive due process, equal protection, and the First Amendment all fail as a matter of law; therefore, Plaintiffs are not entitled to declaratory relief and Counts II, IV, and V of the Complaint must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen M. Romano, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing Pre-Hearing Brief, via ECF, on the following:

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DATE: July 9, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COUNTY OF BUTLER, et al.,	:	NO. 2:20-cv-677-WSS
	:	
Plaintiffs,	:	The Hon. William S. Stickman IV
	:	
vs.	:	District Judge, U.S. District Court for the Western District of Pennsylvania
	:	
THOMAS W. WOLF, et al.,	:	
	:	
Defendants.	:	

Plaintiffs' Post Hearing Brief in Support of Civil Action Seeking Declaratory Judgment

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TABLE OF AUTHORITIES

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STATUTES

FEDERAL RULES OF CIVIL PROCEDURE

UNITED STATES CONSTITUTION

PENNSYLVANIA CONSTITITION

LIST OF ORDERS

1. March 6, 2020, Governor Wolf issued a Disaster Declaration for the Commonwealth of Pennsylvania. *ECF Doc 42-1*

2. March 13, 2020, Governor Wolf ordered the closure of all K-12 schools in the Commonwealth of Pennsylvania for a period of two weeks. *ECF Doc 42-2*

3. March 19, 2020, Governor Wolf orders the closure of all non-life sustaining businesses in the Commonwealth of Pennsylvania. *ECF Doc 42-3*

4. March 23, 2020, Governor Wolf issued a Stay-at-Home Order for the counties of Allegheny, Bucks, Chester, Delaware, Monroe, Montgomery, and Philadelphia. *ECF Doc 42-15*

5. March 24, 2020, Governor Wolf issued an Amended Stay-at-Home Order to include Erie County. *ECF Doc 42-17*

6. March 25, 2020, Governor Wolf issued an Amended Stay-at-Home Order to include the counties of Lehigh and Northampton. *ECF Doc 42-19*

7. March 27, 2020, Governor Wolf issued an Amended Stay-at-Home Order to include the counties of Berks, Butler, Lackawanna, Lancaster, Luzerne, Pike, Wayne, Westmoreland and York. *ECF Doc 42-21*

8. March 28, 2020, Governor Wolf issued an Amended Stay-at-Home Order to include the counties of Beaver, Centre and Washington. *ECF Doc 42-23*

9. March 30, 2020, Governor Wolf ordered the closure of all K-12 schools in the Commonwealth of Pennsylvania indefinitely. *ECF Doc 42-25*

10. March 30, 2020, Governor Wolf issued an Amended Stay-at-Home Order to include the counties of Carbon, Cumberland, Dauphin and Schuylkill. *ECF Doc 42-26*

11. March 31, 2020, Governor Wolf issued an Amended Stay-at-Home Order to include the counties of Cameron, Crawford, Forest, Franklin, Lawrence, Lebanon and Somerset. *ECF Doc 28*

12. April 1, 2020, Governor Wolf issued the Statewide Stay-at-Home Order. *ECF Doc 42-30*

13. April 9, 2020, Governor Wolf ordered the closure of all schools in the Commonwealth of Pennsylvania for the remainder of the school year. *ECF Doc 47-5*

14. April 17, 2020, Governor Wolf released his initial plan for Pennsylvania's COVID-19 Recovery. *ECF Doc 47-7*

15. April 20, 2020, Governor Wolf issued an Amended Order for the closure of all non-life sustaining businesses. *EFC Doc 47-8*

16. April 20, 2020, Governor Wolf issued an Amended Stay-at-Home Order extending his previous Order through May 8, 2020. *ECF Doc 42-48*

17. May 7, 2020, Governor Wolf issued an Amended Stay-at-Home Order extending his order through June 4, 2020. *ECF 42-50*

18. May 7, 2020, Governor Wolf issued the guidance of the Yellow Phase and placed the counties of Bradford, Cameron, Centre, Clarion, Clearfield, Clinton, Crawford, Elk, Erie, Forest, Jefferson, Lawrence, Lycoming, McKean, Mercer, Montour, Northumberland, Potter, Snyder, Sullivan, Tioga, Union, Venango and Warren into the Yellow Phase effective May 8, 2020. *ECF Doc 42-52*

19. May 14, 2020, Governor Wolf issued an Amended Order placing the counties of Allegheny, Armstrong, Bedford, Blair, Butler, Cambria, Fayette, Fulton, Greene, Indiana, Somerset, Washington and Westmoreland into the Yellow Phase effective May 15, 2020. *ECF Doc 42-55*

20. May 21, 2020, Governor Wolf issued an amended Order placing the counties of Adams, Beaver, Carbon, Columbia, Cumberland, Juniata, Mifflin, Perry, Susquehanna, Wyoming, Wayne and York into the Yellow Phase effective May 22, 2020. *ECF Doc 42-56*

21. May 27, 2020, Governor Wolf issued an Amended Order providing guidance on the Green Phase and placing the counties of Bradford, Cameron, Centre, Clarion, Clearfield, Crawford, Elk, Forest, Jefferson, Lawrence, McKean, Montour, Potter, Snyder, Sullivan, Tioga, Venango and Warren in the Green Phase effective May 29, 2020. *ECF Doc 42-58*

22. May 28, 2020, Governor Wolf issued an Amended Order placing the counties of Dauphin, Franklin, Huntingdon, Lebanon, Luzerne, Monroe, Pike and Schuylkill in the Yellow Phase effective May 29, 2020. *ECF Doc 42-61*

23. June 3, 2020, Governor Wolf issued an Amendment to the Disaster Declaration renewing the Declaration for another 90 days. *ECF Doc 42-62*

24. June 4, 2020, Governor Wolf issued an Amended Order placing the counties of Berks, Bucks, Chester, Delaware, Lackawanna, Lancaster, Lehigh, Montgomery, Northampton and Philadelphia into the Yellow Phase effective June 5, 2020. *ECF Doc 42-64*

25. June 4, 2020, Governor Wolf issued an Amended Order placing the counties of Allegheny, Armstrong, Bedford, Blair, Butler, Cambria, Clinton, Fayette, Fulton, Greene, Indiana, Lycoming, Mercer, Somerset, Washington and Westmoreland into the Green Phase effective June 5, 2020. *ECF Doc 42-65*

26. June 11, 2020, Governor Wolf issued an Amended Order placing the counties of Adams, Beaver, Carbon, Columbia, Cumberland, Juniata, Mifflin, Northumberland, Union, Wayne, Wyoming and York effective June 12, 2020. *ECF Doc 42-68*

27. June 18, 2020, Governor Wolf issued an Amended Order placing the counties of Dauphin, Franklin, Huntingdon, Luzerne, Monroe, Perry, Pike and Schuylkill into the Green Phase effective June 19, 2020. *ECF Doc 42-70*

28. June 25, 2020, Governor Wolf issued an Amended Order placing the counties of Berks, Bucks, Chester, Delaware, Erie, Lackawanna, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia and Susquehanna into the Green Phase effective June 26, 2020. *ECF Doc 42-72*

29. July 2, 2020, Governor Wolf issued an Amended Order placing the final county, Lebanon, into the Green Phase effective July 3, 2020. *ECF Doc 42-74*

30. July 15, 2020, Governor Wolf issued an Order for targeted mitigation statewide effecting bars, night clubs, and other social gatherings. *ECF Doc 48-5*

EVIDENTIARY OBJECTIONS

Rule 701 - Opinion Testimony by Lay Witnesses of the Federal Rules of Evidence states as follows:

> "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determine a fact in issue; and
> (c) *not based on scientific, technical, or other specialized knowledge within the scope of Rule 702*." *FED. RULE EVID. 701 (Emphasis added.)*

Plaintiffs placed several evidentiary objections on the record, to wit:

> "Your Honor, based upon the declarations proffered by the Commonwealth … we would like to note an objection.[1] … All of these are examples, Your Honor, of opinions that are being expressed by a lay witness, and we would assert that the reason why Paragraph C of Rule 701 is in play is to prevent this type of expert testimony, testimony that is based upon scientific, technical or other specialized knowledge, from coming in through a lay witness. That type of testimony requires expert testimony and a factual basis within the record to support that expert testimony, [n]one of which exits today. We would ask and we would pace on the record a general objection indicating that any opinions expressed by the witnesses proffered by the Commonwealth be excluded from the record as being in violation of Rule 701.[2] … And we have other objections, Your Honor. It assumes facts not in the record, there are hearsay objections. We don't have documentation to support any of this[ese] alleged expert opinions with respect to the conduct of the health secretary and the governor of Pennsylvania."[3]

The Court noted that "It's a standing objection on the record, which I note."[4]

It's important to note that both Defendants, Governor Thomas Wolf, and Secretary of Health, Dr. Rachael Levine, chose not to testify in these proceedings but instead, chose to have surrogates testify on their behalf. Defendants did not call a single expert witness to testify in support of their Orders but chose to have lay witnesses testify on their behalf. Although Defendants' witnesses broadly referred to "experts" throughout their testimony, Defendants have declined to identify even one person by name, title, experience and qualifications that could arguably have been recognized as an "expert" in these proceedings.

ISSUES BEFORE THE COURT

COUNT II - SUBSTANTIVE DUE PROCESS
Plaintiffs, Gifford, Prima Capelli, Schoeffel, Crawford, Hoskins, R.W. McDonald & Sons, Inc., Starlight Drive-In, Inc., and Skyview Drive-In, LLC.

1. Whether Defendants' Business Closure Orders which ordered the closure of "non-life sustaining" businesses were arbitrary, capricious and interfered with the concept of "ordered liberty".

2. Whether such Orders interfered with Plaintiffs right to pursue lawful employment free of governmental interference.

3. Whether the "waiver" program as created by Defendants without statutory authority, without a statutory or indeed even a certain definition of the terms as applied (i.e. "life sustaining" and "non-life sustaining") to Plaintiffs violated Plaintiffs' constitutional rights.

COUNT IV - VIOLATION OF EQUAL PROTECTION
Butler County, et al.

1. Whether Defendants' Business Closure Orders which ordered the closure of "non-life sustaining" businesses while permitting "life sustaining" businesses to continue to operate violate the Equal Protection Clause of the Fourteenth Amendment.

2. Whether Defendants' Business Closure Orders and Stay-at-Home Orders treated similarly situated counties within the Commonwealth of Pennsylvania in a disparate manner in violation of the Equal Protection Clause of the Fourteenth Amendment.

3. Whether Defendants' Business Closure Orders and Stay-at-Home Orders treated similarly situated businesses within the Commonwealth of Pennsylvania in a disparate manner in violation of the Equal Protection Clause of the Fourteenth Amendment.

COUNT V - VIOLATION OF FIRST AMENDMENT
Butler County, et al.

1. Whether Defendants' Orders violated Plaintiff's First Amendment rights including, but not limited to Plaintiffs' rights of assembly, association, religion and intrastate travel.

I. INTRODUCTION

Perhaps the warning and advice from Thomas Jefferson as repeated by the Wisconsin Supreme Court in *Wisconsin Legislature vs. Palm, 391 Wis.2d 497, 555, 492 N.W.2d 900, 2020 WI 42*, best describes the purpose of this Declaratory Judgment Action brought by four Pennsylvania Counties, several businesses and four individuals seeking re-election to public office:

> "…Thomas Jefferson advised against being 'deluded by the integrity of' government actors' 'purposes' and cautioned against 'conclud[ing] that these unlimited powers will never be abused' merely because the current office holders 'are not disposed to abuse them.' Jefferson forewarned that 'the time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold than to trust to drawing his teeth and talons after he shall have entered.' …".[5]

This Honorable Court has permitted an expedited hearing on Counts II, IV and V of Plaintiffs' Complaint each of which assert not only existing violations, but also continued and foreseeable future violations of Plaintiffs' rights under the United States Constitution.

This Court has further clearly differentiated the basis for Declaratory Relief versus a Preliminary Injunction stating that "… Plaintiffs need not establish immediate and irreparable injury to justify expedited review under Rule 57."[6]

Count II - Substantive Due Process of the Complaint is asserted on behalf of the "business" Plaintiffs, Gifford, Prima Capelli, Schoeffel, Crawford, Hoskins, R.W. McDonald & Sons, Inc., Starlight Drive-In, Inc., and Skyview Drive-In, LLC. This Count raises essentially three issues: whether Defendants' decisions to order the closure of "non-life sustaining" businesses were arbitrary, capricious and interfered with the concept of "ordered liberty"; whether such Orders interfered with Plaintiffs' right to pursue lawful employment free of governmental interference; and, whether the "waiver" program as invented and applied by Defendants, without statutory

authority, without a statutory or indeed even a uniform or written definition (or perhaps any definition) of the terms applied (i.e. "life sustaining" and "non-life sustaining") violated Plaintiffs' constitutional rights.

Count IV - Violation of Equal Protection of the Complaint was brought by all the Plaintiffs asserting violations of equal protection as guaranteed by the Fourteenth Amendment to the U.S. Constitution. This Count asserts that classifying some businesses as "life sustaining" and others as "non-life sustaining" is, in-and-of-itself unconstitutional in origin and application. This Count further asserts that similarly situated counties, acting on behalf of themselves and their residents, were arbitrarily treated disparately to their great harm.

Count V - Violation of First Amendment of the Complaint was brought by all the Plaintiffs asserting First Amendment Rights violations which include the Plaintiffs' rights of assembly, association, and religion. Included in these rights are likewise the right to intrastate travel.

This Complaint asserts that the Governor's and Secretary of Health's "stay at home" orders and "business closure" orders violate the most fundamental of Pennsylvanian's rights under the United States Constitution. Indeed, as the evidence in this case clearly shows, Pennsylvanians were "locked down" in their homes, their businesses were ordered closed and shuttered and they were threatened with arrest by a variety of law enforcement officials, including the Pennsylvania State Police. As the Brief will address, these issues are ongoing and pose a continued and very real possibility, if not a likelihood of being reinstated at any time in the future. Indeed, the business closure order was partially reinstated during the pendency of this case.

The "Red-Yellow-Green" system of closure or re-openings remains in effect albeit in part "suspended", but not eliminated. And, as the Court well knows, during the pendency of this

Action, the Governor shuttered businesses in the entertainment industry with his Order of July 15, 2020, as well as imposing severe additional restrictions on bars and restaurants.

The proffered excuse for these egregious constitutional violations is that they will possibly slow the spread of the SARS virus and COVID-19.

However, as Justice Alito has said:

> "We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility." and, "But a public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persist. As more medical and scientific evidence becomes available, and *as states have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights*."[7] (Emphasis added)

The Record in this case further reveals that the Governor exercised his own First Amendment Right to march in a protest in Harrisburg that clearly violated his own Orders in regard to the congregate rules in then "yellow" Dauphin County as well as ignoring "social distancing" requirements. The Governor exercised his Constitutional rights while trampling those of his fellow citizens.

Again, Justice Alito, addressing similar conduct by the Governor of Nevada in the *Calvary Chapel* case wrote:

> "Public protests are themselves protected by the First Amendment and any efforts to restrict them would be subject to judicial review. But respecting some First Amendment rights is not a shield for violating others. The State defends the Governor on the ground that the protests expressed a viewpoint on important issues, and that is undoubtedly true, but favoring one viewpoint over others is anathema to the First Amendment."[8]

As the *Calvary Chapel* case involved alleged disparate treatment of casinos versus churches, Justice Gorsuch wrote:

> "The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel."[9]

Likewise, there is "no world" in which the Constitution permits 13 million healthy Pennsylvanians to be locked down in their homes, threatened with arrest, their businesses shuttered by a "Policy Group" deciding who is "life sustaining" or not, and their counties arbitrarily and disparately treated by the Governor and the Secretary of Health.

Justice Douglas wrote in *Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed. 2d 992 (1964)*, that:

> "Freedom of movement, at home and abroad, is important for job and business opportunities - for cultural, political and social activities – for all the comingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberties so as to give rise to punishable conduct is part of the price we pay for this free society."[10]

No Governor, no Secretary of Health, indeed no government, has the power to incarcerate its citizens under such circumstances. Likewise, none have the right nor the power to shutter and close, and even to economically destroy, businesses and commerce under such circumstances.

As Justice Bradley of the Wisconsin Supreme Court wrote in her concurring opinion:

> "In Wisconsin, as in the rest of America, the Constitution is our King – not the governor, not the legislature, not the judiciary, and not a cabinet secretary. We can never "allow fundamental freedoms to be sacrificed in the name of real or perceived exigency" nor risk subjecting the right of people to "the mercy of wicked rulers or the clamor of an excited people." Fear never overrides the Constitution. Not even in times of public emergencies, not even in a pandemic."[11]

Pennsylvania's "Stay-at-Home" Orders and "Business Closure" Order, and their multiple and constantly changing continuing sub-parts loom as the vulture over the wounded Constitutional prey in Pennsylvania.

As in Wisconsin, Pennsylvanians' Constitutional Rights as set forth in this case, and as evidenced by the testimony of all the witnesses, should not be subjected to fear, excitement or excuses of exigency.

Only this Honorable Court stands between the oppressors and the oppressed.

II. ARGUMENT

COUNT II - SUBSTANTIVE DUE PROCESS
Plaintiffs, Gifford, Prima Capelli, Schoeffel, Crawford, Hoskins, R.W. McDonald & Sons, Inc., Starlight Drive-In, Inc., and Skyview Drive-In, LLC.

The Fourteenth Amendment to the Constitution forbids a state from depriving anyone of life, liberty, or property without due process of law. Without a deprivation of life, liberty or property, there can be no due process claim.[12]

The substantive component of the Due Process Clause guarantees that "all fundamental rights comprised within the term "liberty" are protected by the Federal Constitution from invasion by the States."[13] The Supreme Court has stated,

> For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning. While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, *e. g., Bolling* v. *Sharpe*, 347 U.S. 497, 499-500; *Stanley* v. *Illinois*, 405 U.S. 645.[14]

Plaintiff assert that Defendants' Business Closure Orders which ordered the closure of "non-life sustaining" businesses were arbitrary, capricious and interfered with the concept of

"ordered liberty" as protected by the Fourteenth Amendment. As justification for Defendants' Orders, Defendants, via the testimony of Sam Robinson, Executive Deputy of Staff to the Governor, testified that "… they needed to take steps to curtail economic activity and movement" and that there was no "playbook" for doing that, so Defendants devised a process "for curtailing economic activity and movement". [15]

Defendants formed a policy team of five or six political appointees, none of whom were experts in infection control[16], and authorized them to categorize businesses into two classifications: "Life Sustaining" businesses and "non-Life Sustaining" businesses.[17] The policy team was comprised of Margaret Snead, Secretary of Policy and Planning; Andrew Barnes, Executive Deputy Secretary of Policy and Planning; and, Tara Piechowicz, Allison Jones and Erin Watcher from the Policy and Planning Office.[18] None of the policy team members possessed any medical background, medical training, expertise in public health issues or expertise in infection control.[19]

Despite their complete and utter lack of expertise in the control of infectious diseases, the policy team members unilaterally determined which businesses were or were not "life sustaining" based upon:

> "whether they considered, you know, an energy production location or utility or supermarket to be life-sustaining as distinguished from others that they did not believe. We didn't, I believe, write down a definition specifically but just translated the sort of common understanding of life-sustaining or not into that business list."[20]

These determinations were made without the assistance or formality of written definitions, criteria, guidelines, rules, or any other commonly utilized practice to safeguard consistency and fairness in a decision making process (even assuming such process itself is constitutional). To the contrary, the policy team did not "spend a lot of time around the formality of kind of enshrining a definition of life sustaining business."[21] The entire process was based solely upon the subjective

life experiences and prejudices of the five or six individuals appointed to the policy team. Despite the critical nature and devastating impact of this classification system, Defendants, via any of their designated witnesses, were unable to produce any written record or document memorializing the decision making process. No meeting minutes, agenda, reports, records of attendees, or any other form of record keeping commonly applicable to public bodies. Through the testimony of Defendants' witnesses, they consistently used terms like "life-sustaining businesses," "non-life sustaining businesses," "primary business operations," "critical work," and "essential work".[22] All of these terms, based upon the significance placed on them by Defendants' witnesses, were fundamental to the actions of Defendant. None of Defendants' witnesses were able to articulate a cogent explanation of the definition for any of these terms.

In their defense, Defendants assert that the policy team utilized the classifications contained within the North American Industry Classification System ("NAICS") to determine whether a business was or was not a life sustaining business.[23] The NAICS is a production-oriented or supply-based statistical tool used by Mexico, Canada and the United States to compare groups of industries which utilize similar processes to produce goods and services.[24] The "NAICS United States is designed for statistical purposes" to assist in the evaluation of industry "inputs and outputs, industrial performance, productivity, unit labor costs, …" and, "other statistics and structural changes occurring" within the United States.[25] Nowhere in NAICS's 961 pages does the definition of "life sustaining" or "non-life sustaining" businesses appear.

There is no dispute that the Fourteenth Amendment protects the right "to engage in any of the common occupations of life."[26] An individual's right to engage in the pursuit of his or her "chosen profession free from unreasonable governmental interference" is a fundamental "liberty" protected by the Fourteenth Amendments."[27] Courts have found that this fundamental liberty is

unreasonably burdened if government officials show preferential treatment to favored businesses while making competition impossible for disfavored businesses; or, if government officials arbitrarily remove businesses from approved lists of government businesses.[28] "[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."[29]

The Supreme Court has "for half a century now . . . spoken of the cognizable level of executive abuse of power as that which shocks the conscience."[30] The determination of whether government action shocks the conscience has been described as a "threshold" question in any challenge to governmental action.[31] In *United Artists*, the Court recognized that "the measure of what is conscience-shocking is no calibrated yard stick,"[32] and that, "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another."[33] The Third Circuit Court of Appeals has consistently acknowledged that executive actions violate substantive due process only when such actions shock the conscience; however, the meaning and application of this standard varies depending upon the factual context of the actions.[34] "Where fundamental rights or interests are involved, a state regulation limiting these fundamental rights can be justified only by a compelling state interest and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[35]

Defendants assert, via the testimony of Sarah Boateng, Executive Deputy Secretary of Health, that Defendants had a compelling state interest in the reduction of interaction between individuals as a means of slowing the spread of COVID-19.[36] Defendants further assert, via the testimony of Sam Robinson, Executive Deputy of Staff to the Governor, that in the furtherance of this compelling state interest, Defendants' Orders were intended to "curtail economic activities" and reduce the interaction between individuals[37] regardless of whether those businesses and/or

individuals were healthy or sick, infected or not, or were in any way responsible for the spread of COVID-19.[38] Defendants' Orders were not "quarantine" or "isolation" orders which relate to individuals who have contracted the disease or individuals who may have been exposed to the disease, but have not yet been diagnosed with the disease.[39] Defendants' Orders, by design and application, were intended to limit and restrict the rights of individuals whether or not those individuals had contracted COVID-19, recovered from COVID-19 or had even been exposed to COVID-19.

There is no factual dispute that Plaintiffs Gifford, Prima Capelli, Schoeffel, Crawford, Hoskins, R.W. McDonald & Sons, Inc., Starlight Drive-In, Inc., and Skyview Drive-In, LLC. (hereinafter "Business Plaintiffs"), had their physical business operations shutdown pursuant to Defendants' Order and that restrictions on Business Plaintiffs remain in place today. In addition, there is no factual dispute that certain aspects of Defendants' Business Closure and Stay-at-Home Orders have been suspended; that, as of July 15, 2020, Defendants Ordered additional restrictions applicable to Business Plaintiffs; that Defendants have threaten to re-impose previously suspended restrictions; and, that Defendants' Red/Yellow/Green classification system is still in place.[40] Further, there is no factual dispute that businesses arbitrarily designated as life sustaining were permitted to continue their business operations uninterrupted and without restrictions.[41]

Plaintiff Cathy Hoskins, owner of Classy Cuts which is located Greene County testified in part as follows:

> "None of our owners, employees or regular customers have ever tested positive for the coronavirus at any time mentioned herein. My customers, my employees, and I were all subjected to "stay-at-home" orders and were threatened by the Governor with arrest or loss of licensure for violations. … We were forced to close operations on March 19, 2020 and had to remain closed until June 5, 2020. … Despite being located in a County with zero deaths and a very low confirmed case count, Greene County businesses, such as ours, were forced to remain closed and had been grouped together with urban Counties with very high case counts. Overall, this

> caused our business to remain closed far longer than necessary, causing the business to suffer significant financial losses. Even after Greene County was allowed to enter the Green designation in Governor Wolf's phased reopening plan, our business is still severely restricted in how we conduct business."[42]

Plaintiffs Chris and Jody Young, co-owners of Prima Capelli Salon, which is located Butler County, testified in part as follows:

> "Our typical business operations include cutting and styling hair, including washing hair and the sale of hair care products such as gels, sprays, creams, shampoos and conditioners. … Our clients travel from surrounding Counties to seek services at our salon, including customers from Clarion, Mercer, Armstrong, Lawrence, and Beaver Counties. … Governor Wolf's shutdown orders mandating that non-essential businesses immediately cease operations and forcing healthy individuals to stay in their homes. None of our owners, employees or regular customers have tested positive for the coronavirus at any time mentioned herein. Further, no single case of COVID-19 has ever been traced to any activity at our business. This phased reopening plan unfairly impacted Butler County by mandating it remain in the Red designation, despite Butler County having comparable cases to Counties such as Clarion, who were allowed to move into the Yellow and Green designations sooner. This caused many of our out-of-county residents to seek our services elsewhere in their home counties. Given the uncertain nature of the virus, we may be subjected to these same restrictions or prohibitions in the future."[43]

Plaintiffs Charles and Elizabeth Walker, owners of Skyview Drive-in located Greene County, testified in part as follows:

> "In March of 2020, Governor Wolf entered orders mandating that all non-essential businesses cease operation and close physical locations as well as mandating that individuals to stay at home. Due to these orders affecting Greene County, the theater was not able to open at our usual time of early-April. … Our drive-in theater features a full restaurant that serves full meals. … Governor Wolf's orders coupled with our denial of a waiver caused almost all of these perishable items to be lost. At the same time, a local Dairy Queen franchise and Fox's Pizza were allowed to remain open for carry-out meals while we were forced to close, even though our business offers the same products and meals. … While we were permitted to reopen on May 15, 2020, we are still in the Green designation which still carries many restrictions and seemingly never ends. … Our right to operate our business as well as to travel to and from our business were and continue to be violated. Our neighbors in the ice cream and pizza businesses were wrongfully treated differently than us."[44]

Plaintiff Lee McDonald, owner of R.W. McDonald & Sons, which is located in Butler County testified in part as follows:

> "Yet despite our sale and provision of essential goods and services we were denied a waiver and mandated to close. After discovering that businesses like Lowes and Home Depot were permitted to remain open despite selling identical products to our own, we applied again for a waiver. We never received any official response from this waiver request. Following this, complying with the Orders, we ceased all sales operations on March 19, 2020. We were forced to lay off 3 of our 13 employees and had to operate our business with 6-8 employees as the remainder decided to collect unemployment benefits, Ultimately the shutdown orders have caused us to lose approximately 60% of our staff. … After reopening when Butler County was designated Yellow, R.W. McDonald & Sons faced significant difficulty in returning to normal operations. We were still heavily restricted in our store capacity and many of our customers had already began seeking goods similar to ours at larger businesses who were permitted to remain open during the pandemic. It is estimated that we have lost approximately $300,000 in revenue from being unfairly mandated to remain closed despite meeting the criteria for an essential business. … We have also lost a significant amount of our customer base to Counties that were allowed to open under fewer restrictions than Butler County as well as identical stores that were permitted to remain open under a business waiver. As stated above, Lowes, Home Depot, Walmart, J.M. Beatty Furniture, and A.K. Nahas were allowed to remain open and continue sales as "essential" businesses. This caused many of our customers to begin going to those stores to meet their appliance needs during the pandemic. Many of these customers have not returned to our location, causing us to continually lose out on their business. The color-coded designation that Governor Wolf has used to reopen Counties has also had a similar effect on our business. Many of our customers began traveling to other counties that were in a less restricted designation than Butler County and began seeking goods and services in those counties. Previously we had a large customer base from all over Western Pennsylvania, all of whom would travel to our location to buy appliances."[45]

Plaintiffs Nancy and Michael Gifford, owners of Double Image Styling Salon, which is located in Butler County, testified in part as follows:

> "The salon employs 23 individuals in various capacities related to hair styling. The salon has been very successful, earning $1.2 million in gross revenue for 2019. … However, operations were changed significantly when the Governor entered orders declaring an emergency, shutting down non-essential businesses, and mandating that healthy individuals stay at home to supposedly slow the transmission of COVID-19. … We were forced to close operations on March 19, 2020 and had to remain closed until June 5, 2019. … We and our customers were prohibited as a result of the "Stay-at-Home" Orders from even traveling to our place of business.

> … On April 17, 2020, the Governor issued a plan to reopen Pennsylvania in phases by County. … After April 28, 2020, it was our understanding that our salon would be able to reopen when Butler County was designated yellow in the phased reopening plan. Butler moved into the yellow phase on May 15, 2020, a week later than other Counties with similar numbers of confirmed COVID-19 cases, yet we were still unable to open despite the fact that we were trained by the state in sanitization and inspected by the state inspectors as part of our licensure with the Commonwealth. We were forced to remain closed until Butler County was designated Green on June 5, 2020, yet Counties geographically close to Butler County with similar numbers of confirmed cases could reopen a week earlier on May 29, 2020. Some of our clients were able to travel to those Counties to obtain services which we could not provide. … Even after being placed in the green designation, our salon is still subject to regulations on social distancing, disinfecting, capacity limits, and the wearing of personal protective equipment."[46]

In addition to an individual's right to engage in the pursuit of his or her "chosen profession free from unreasonable governmental interference,"[47] citizens have a fundamental right to intrastate travel. As articulated in *Williams v. Fears,*[48] "the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of liberty ... secured by the 14th amendment."[49] In *Michael H.,*[50] Justice Scalia expressly endorsed the well-settled proposition that the Due Process Clause substantively protects unenumerated rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.*, 109 S.Ct. at 2341. (plurality opinion), Also, see, *Lutz v City of York,* 899 F.2d 255, 267-68 (3d Cir.1989).

In *Lutz v. City of York*, the Third Circuit Court recognized that "a fundamental right of intrastate travel can be recognized under a view of substantive due process … The right or tradition we consider may be described as the right to travel locally through public spaces and roadways. … We conclude that the right to move freely about one's neighborhood or town, even by automobile, is indeed implicit in the concept of ordered liberty and deeply rooted in the Nation's history." [51] Referring to *Lutz*, the Court in *McCool v. City of Philadelphia* recognized that the substantive component of the Due Process Clause encompasses a right to intrastate travel.[52]

"In addition to its solid historical foundation, the tremendous practical significance of a right to localized travel also strongly suggests that such a right is secured by substantive due process. The right to travel locally through public spaces and roadways, perhaps more than any other right secured by substantive due process, is an everyday right, a right we depend on to carry out our daily life activities."[53]

In the words of Justice Douglas:

> "Freedom of movement, at home and abroad, is important for job and business opportunities—for cultural, political, and social activities—for all the commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society."[54]

Defendants acknowledged, via the testimony of Sarah Boateng, Executive Deputy Secretary of Health, that Defendants' Stay-at-Home Orders required the citizens of the Commonwealth to remain at home except for specific limited exceptions established by Defendants;[55] that Defendants' Orders were official action on behalf of the Commonwealth;[56] and, that Defendants' Orders contained specific enforcement provisions.[57] As indicated above, Defendants' Orders, as acknowledged by Sarah Boateng's testimony, were not intended to "quarantine" or "isolate" individuals who had contracted COVID-19 or, other individuals who were suspected of possible COVID-19 infection.[58] Defendants' Orders, by design and application, were intended to limit and restrict the rights of citizens to travel freely within the Commonwealth of Pennsylvania without regard for whether or not those citizens had contracted COVID-19, recovered from COVID-19 or had even been exposed to COVID-19. Healthy, law abiding citizens had their constitutionally protected rights taken by the threat of government force.

The exercise of a state's police power to confine individuals is strictly limited."[59] "The Supreme Court, in the civil commitment cases, has set constitutional standards that must be met before an individual can be detained. The central requirements set out by the Court are the right to a particularized assessment of an individual's danger to self or others and the right to less restrictive alternatives."[60]

A particularized assessment requires evidence that the individual has exhibited behavior dangerous to himself or others. "Assuming that [mental illness] can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."[61] In addition, a particularized assessment must take into consideration the willingness and ability of the individual to comply with recommended medical treatment in order to satisfy substantive due process requirements associated with involuntary civil commitment. Finally, a compelling state interest is not enough to satisfy substantive due process, unless the state utilizes the least restrictive means available to advance its interest. Compelling state interests cannot be pursued "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[62] This civil commitment doctrine has been applied by courts to evaluate the constitution appropriateness of mentally ill individuals for decades.[63]

Surely, Business Plaintiffs, along with their employees, who have been subjected to civil commitment within their homes, under the threat of criminal prosecution and confinement, should be entitled to the same substantive due process rights afford society's mentally ill citizens.

There is no question that Defendants' Orders violated the Fourteenth Amendment's Substantive Due Process rights. For these reasons, this Court should enter an Order and declare

that Defendants' Orders are unconstitutional as violative of the Fourteenth Amendment to the United States Constitution.

COUNT IV - VIOLATION OF EQUAL PROTECTION
Butler County, et al.

With regard to Plaintiffs' claims under the Fourteenth Amendment to the United States Constitution, Plaintiffs incorporate by reference their Brief in Support of Complaint in Declaratory Judgment filed on July 9, 2020, at ECF No. 36.

The Defendants' Stay at Home Orders and Business Closure Orders violate the Fourteenth Amendment to the United States Constitution in several different ways. If this Court determines that the rational basis scrutiny applies here, the subject Orders cannot withstand scrutiny. Under the rational basis standard, the Government's action must be "substantially related" to an actual and important governmental interest. Here, the Defendants' actions do not satisfy this standard. Further, because the Stay at Home Orders significantly impair the right to travel, and that because criminal sanctions were threatened and imposed, the strict scrutiny standard is applicable in analyzing the Stay at Home Orders. Under that standard, the subject Orders pass constitutional muster only if they "are narrowly tailored measures that further compelling governmental interests."[64]

A. The Defendants' Reopening Plan

The Defendants' reopening plan is not a rational use of Governmental Authority. In general, the plan was devised to, by definition, treat the Counties, and the residents of the Counties, differently. Indeed, the entire plan was such that different levels of restrictions were imposed based upon geographical locale. However, as was demonstrated at the hearing, the difference in treatment based upon a county line has no rational relation to the actual virus. Indeed, the

Defendants introduced no evidence to justify keeping hair salons closed in northern Butler County in the red and yellow phases while hair salons in adjoining counties were permitted to open under the green designation.

Here, the Defendant Secretary of Health (as well as the Governor) chose not to testify, even by affidavit or declaration. Hence the Defendants produced no medical witness or expert, despite claiming to have a stable of epidemiologists and physicians on staff.[65] Thus, all medical opinion testimony from any of the three witnesses of Defendants should be excluded. Therefore, Defendants have proffered no medical evidence whatsoever in order to justify either the Business Closure Orders or the Stay at Home Orders. This arbitrary designation by the Defendants is not narrowly tailored to meet any goals of the Defendants, whether stated or not. Indeed, these Orders are not rational. For these reasons, the Defendants' Stay at Home and Business Closure Orders are in violation of the Fourteenth Amendment to the United States Constitution.

The Chairperson of the Butler County Board of Commissioners, Leslie Osche, testified in part as follows:

> "On April 27, 2020 during a virtual meeting with the SWPA Commission, Mr. Fitzgerald asked the Commission to collect the data on each County in the region based on the measure the state announced, which was 50 new cases per 100,000 population over a rolling 14-day period. SPC staff did that for all the 9 counties in the region and Butler County more than met the measurement to move from the red to the yellow zone. … On the afternoon of May 1, 2020, the Governor held a press conference in which we learned our County would NOT move to the yellow phase on May 8, but other counties surrounding Butler County including Clarion, Venango, Mercer and Lawrence Counties would move to yellow. … At the height of the pandemic, Butler County only had 257 purported cases of COVID-19, of which only 230 were confirmed, representing only 0.14% of Butler County's overall population (in excess of 180,000 people). Clarion, Venango, Mercer, Lawrence, and Armstrong Counties are similarly situated to Butler County in terms of population, medical infrastructure, confirmed COVID-19 cases, and COV1D-19 Deaths. Yet, these counties were allowed to enter the Yellow designation while Butler County stayed shut down (Red). Clarion County, a neighboring County to Butler, had 0.08% of their overall population infected with COVID-19. Despite a difference of only 0.06%, Clarion County was permitted to enter the "Green"

> designation while Butler was not. Mercer and Lawrence Counties only had 0.10% of their population infected with COVID-19, yet both counties were permitted to enter the "Green" designation while Butler was not. Armstrong County, a neighboring County to Butler, had 0.11% of their overall population infected with COVID-19. None of these differences are material or significant. Despite a difference of only 0.03%, Armstrong County was permitted to enter the "Green" designation while Butler was not [moved to green]. … On the morning of Saturday May 2, 2020, I discovered an email with a "Risk Assessment Tool" dated May 1, 2020 that outlined the index factors used to determine how counties move from one phase to another. We received this information after they already had determined we would remain Red. It was the understanding of the Counties in the Southwestern region that the color designations were to be measured only by 50 new cases per 100,000 people in a 14- day period. However, this tool added four more factors and indicated that we would need to have proper "contact tracing" in place to move to Green."[66]

The Chairperson of the Greene County Board of Commissioners, Mike Belding, testified in part as follows:

> "We were given no explanation as to why Greene County has consistently been grouped with counties with significantly higher case numbers in the phased reopening plan. Greene County had only 30 confirmed cases of COVID-19 yet was not allowed to enter the yellow phase until May 15, 2020, In comparison, Clarion and Clearfield Counties were allowed to reopen with caution under the yellow designation a full week before Greene County despite Clarion and Clearfield Counties having more confirmed cases. This trend of disparate treatment of Greene County continued when being moved from the yellow designation to green. Greene County was not moved into the green designation until June 5, 2020 despite Counties with higher case counts being allowed to enter the green designation on May 29, 2020. … This unfair treatment of Greene County has severely impacted the well-being of residents and business owners within the County, Greene County's proximity to the West Virginia border caused many residents to travel outside of the County to obtain crucial services and goods as most businesses in Greene County were mandated to cease operation. … The County Government itself has been severely impacted by the shutdown orders, as well, Pursuant to Governor Wolf's orders, Greene County had to cease all operations at the County office building and transition our entire work force to telecommuting. … It is currently estimated that only approximately 50%-60% of the residents in the County have access to the reliable internet. … After the shutdown orders, Greene County was forced to start holding Commissioner meetings virtually by allowing individuals to call in over a conference line and. by streaming the meetings to a Facebook page. Many County residents were unable to access or participate in these meetings. … All of the above is a result of the shutdown orders issued by Governor Wolf' and the Commonwealth of Pennsylvania, which have unfairly targeted Greene County as a County of concern despite being one of the Counties with the

> lowest overall case count in the Commonwealth, Greene County has to this day only confirmed 42 cases of COVID-19, a case count significantly lower than all of the Counties that were moved to yellow and green in conjunction with Greene County and even lower than some Counties who were moved to yellow and green weeks before Greene County."[67]

The Chairperson of the Washington County Board of Commissioners, Diana Irey Vaughn, testified in part as follows:

> "The Shutdown Orders have also severely impacted our ability as County Commissioners to hold our bi-monthly meetings with effective participation from Washington County residents. The Shutdown Orders forced our public meetings to be held via conference call due to the travel ban and the congregate restrictions and required residents to partake via Facebook live streaming as per Senate Bill 841. Many of our residents do not have access to a reliable internet connection, making the use of virtual platforms ineffective. We have had as many as 100 residents and citizens attend the Older American's proclamation month prior to the Shutdown Orders. … The Governor's Shutdown Orders also had a significant financial impact on residents and businesses of Washington County. … Our proximity to West Virginia, which has much lighter restrictions on businesses for the COVID-19 pandemic, caused many of the individuals who sought goods or services in Washington County businesses to travel across state lines to West Virginia where they were able to move and shop freely. This caused many Washington County businesses to lose a significant portion of their customer base that may not ever fully return. Outdoor capacity restrictions to Washington Wild Things, minor league baseball team, are not comparable to larger indoor department stores. … I believe that Washington County's reported COVED-19 cases and deaths when compared to other Pennsylvania Counties should have resulted in different treatment than that which the Governor and Secretary of Health imposed upon us. This disparate treatment resulted in significant deprivation of the constitutional rights of our citizens including the ban on their (our) travel, assembly, worship, and free speech. The Commonwealth's forced closures of small businesses provided little or no opportunity for an appeal process to reopen in order to compete with large box stores, the lack of transparency is unjustified."[68]

The Chairperson of the Fayette County Board of Commissioners, David Lohr, testified in part as follows:

> "On March 19, 2020, Governor Wolf issued shutdown orders closing all non-essential businesses and requiring even healthy individuals to stay at home. … The Governor's Orders generally affected the reputation and well-being of our County, especially in light of disparate treatment of businesses and citizens in neighboring West Virginia. … The operations of the County were also severely impacted by the Governor's shutdown orders. The orders mandated that all County buildings close

> their doors to the public barring a few very limited exceptions. Other than being able to apply for a concealed carry permit in the lobby of the building, residents and citizens of Fayette County were completely denied access to our public County building. … Fayette County has experienced disparate treatment in regard to Governor Wolf's phased reopening plan. The plan, which places counties into a color-coded designation, arbitrarily placed Fayette County with other counties who had much higher case counts, such as Allegheny County. Fayette County saw a maximum number of confirmed cases at 110 and 4 deaths as of July 1, 2020 yet were consistently placed in the same color-coded designation as Allegheny County which had 2,760 confirmed cases of COVID-19 with 190 deaths. Additionally, surrounding Counties and States in proximity to Fayette County were allowed to reopen much sooner than Fayette County even though their confirmed cases were similar to or higher than Fayette's confirmed cases. For example, West Virginia allowed businesses to begin reopening on May 3, 2020. This was a full week before any Counties in Pennsylvania were even allowed to enter the Yellow designation. … I have firsthand knowledge of is that a number of residents of Fayette County interested in purchasing automobiles traveled to West Virginia where car dealerships were allowed to remain open. This has affected our County by encouraging residents to travel outside of the County and Commonwealth to conduct business, greatly affecting Fayette County businesses and citizens. The same is true of other commercial sales and services such as haircuts and dining at restaurants or bars. … In sum, Fayette County has experienced a deprivation of participation in government by our citizens and a loss of access to vital governmental services and offices by the Shutdown Orders. Our citizens have been quarantined, healthy or ill. Fayette County residents have been threatened with arrest for violations of the travel bans initiated by the Governor and Secretary of Health. And our businesses have been severely impacted by disparate treatment of our County compared to neighboring West Virginia. Fayette County should never have been put in the Red designation to begin with. Any decision to do so was arbitrary and capricious and served to violate the constitutional rights of our citizens."[69]

B. The Defendants' Business Closure Order Violates the Fourteenth Amendment to the United States Constitution.

The Defendants' Business Closure Order was not the product of legislative action. On the contrary, the Order resulted solely from Executive Action. The categories issued by the Executive were not based on an objective criterion. Rather, the Executive Orders merely assigned the label of "Life-Sustaining" or "Non Life-Sustaining" ("LS" or "NLS") to businesses. The businesses that received the NLS characterization were required to close, thus leading to unequal treatment.

The Executive branch did not develop definitions of these terms and provided no additional guidance.

The categorizations were not narrowly tailored to the Defendants' ostensible goal of controlling the spread of the virus. Rather, the categories let to the absurd result that people/entities that were involved in the same business activity were treated differently. For example, as was testified to in this case, one major appliance retailer, R.W. McDonald, was forced to close while other major appliance dealers such as Lowes, and Home Depot, were permitted to remain open.[70] This discrepancy is clearly not narrowly tailored to further the Defendants' stated interest. Indeed, it is not even rational. It is, therefore, unconstitutional.

In addition to the above, the Defendants' "Waiver" system that allowed affected businesses to file an "appeal," does not impact this issue. The waiver system was not even a waiver system. Rather, it was a system to request a reclassification from non-life sustaining to life sustaining, or an exemption from the non-life sustaining classification.[71]

In addition to the Business Closure Orders requiring certain businesses to close based upon an arbitrary classification of a business in a certain way, the system treated businesses differently in the waiver/exemption process by imposing an artificial appeal deadline period. Then, because there were too many appeals, the entire system was discontinued.[72] Moreover, some of the amendments to the Business Closure List were made after the Executive branch closed down the entire waiver process.[73] Thus, the entire business classification system led to the anomalous result that individuals in the same line of work were treated differently in that some were required to close while others were permitted to remain open. Moreover, individuals that that filed appeals were treated differently, such that some individuals that filed appeals were permitted to pursue those appeals while others were not when the entire appeals process was discontinued. Moreover,

some of the business classifications were changed *after* the appeal deadline passed and after the entire appeal system was discontinued.[74]

Accordingly, it is clear that citizens of this Commonwealth were treated differently based upon where they lived, or what occupation they were engaged in, under the Executive's Business Closure Orders and Waiver process. Business owners in the same line of business, i.e. major appliance sales, or restaurants in drive-in theatres were treated differently. What is more, people were treated differently based upon when an appeal was filed, especially if the business owner wanted to file an appeal after the entire system was closed down, and/or after some of the business classifications were changed.[75]

In addition to the properties held by Plaintiffs Butler, Green, Fayette and Washington Counties in their governmental capacity, each of the Plaintiff Counties also owes and holds private or proprietary properties.[76] All of the properties held by Plaintiffs Butler, Green, Fayette and Washington Counties for their private purposes were and continue to be adversely affected by Defendants' Orders.[77]

There is no question that Defendants' Orders violated the Fourteenth Amendment's Equal Protection clause. For these reasons, this Court should enter an Order and declare that Defendants' Orders are unconstitutional as violative of the Fourteenth Amendment to the United States Constitution.

COUNT V - VIOLATION OF FIRST AMENDMENT
Butler County, et al.

The Supreme Court has identified three categories of government property affecting when and how public speech may be regulated: (1) traditional public fora ('streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public

questions'); (2) designated public fora ('public property which the State has opened for use by the public as a place for expressive activity'); and, (3) nonpublic fora ('[p]ublic property which is not by tradition or designation a forum for public communication').[78]

"In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed."[79] "In such traditional public fora the state may not prohibit all communicative activity."[80] "Indeed, "[s]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."[81]

"In a traditional public forum or designated public forum, the government may only restrict speech after satisfying the requirements of either strict or intermediate scrutiny to show that the restriction is narrowly crafted to achieve a government interest."[82]

The Supreme Court has held that there are two kinds of freedom of association that are constitutionally protected: intimate association and expressive association.[83] In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to association for the purpose of engaging in those activities protected by the First Amendment - speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.[84]

Further, as set forth earlier, the Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment provides that "Congress shall make no law respecting an establishment of religion or *prohibiting the free exercise thereof*...."[85] "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[86] "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility, which is masked, as well as overt. 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'"[87]

"Nor does it make a difference that faith-based bigotry did not motivate the orders. The constitutional benchmark is 'government *neutrality*,' not 'governmental avoidance of bigotry.'"[88] "A law is not neutral and generally applicable unless there is 'neutrality between religion and non-religion.'"[89] "And a law can reveal a lack of neutrality by protecting secular activities more than comparable religious ones."[90]

Plaintiff Timothy R. Bonner, who is a resident of Mercer County, a member of the Pennsylvania House of Representative for District 8 and a candidate, for election, testified in part as follows:

> "These shutdown orders severely impacted my ability to effectively campaign and thus to exercise our rights of assembly, association and freedom of speech related to the campaign. … It is critical for political candidates to be able to personally interact with their voter base. It allows for a more effective communication of political ideals and allows voters to voice their policy concerns to the candidates before the election. Yet this necessary interaction was prohibited by the shutdown orders set forth by Governor Wolf. … All of our door to door operations had to be stopped as we were prevented from both soliciting volunteers and campaigning door to door. We were also prevented from holding fundraisers and attending dinners. … The campaign has also been unfairly impacted by the shutdown orders

> as my District is comprised of two (2) adjacent counties that were placed under different designations during the phased reopening plan. … I also believe that Butler and Mercer Counties were treated disparately and without regard to the physical proximity of population centers within these counties. I believe that the Orders of the Governor and Secretary of Health in these regards violated my constitutional rights and those same rights of my constituents."[91]

Plaintiff Marci Mustello, who is a resident of Butler County, a member of the Pennsylvania House of Representative for District 11 and a candidate for re-election, testified in part as follows:

> "Typical campaign activities include fundraisers, dinners, meet and greets, attending public events, and distributing political flyers and pamphlets door-to-door. In these shutdown orders severely impacted my ability to effectively reach voters. Their orders violated my right to travel, as well as my rights of free speech and association. … I was prevented from being able to travel inside my own jurisdiction to meet with the public, leaving little to no face-to-face interaction with the voters. This restriction significantly diminished my campaign efforts as many volunteers were unable to legally leave their homes. In the past, my successful campaigns had a large emphasis on traveling door-to-door to meet with constituents. I firmly believe that it is critical for political candidates to be able to personally interact with their voter base. It allows for a more effective communication of political ideals and allows individuals to voice their policy concerns to the candidates before the election. … Many of the residents of this district live in rural areas without broadband service which makes online communication difficult. My district includes areas such as Karns City, Petrolia, and Fairview, all of which have inadequate internet infrastructure."[92]

In addition to her Affidavit, Plaintiff Mustello testified that the congregate restrictions of Defendants' Orders continue to impact her fundraising ability. A few days after her testimony, Plaintiff Mustello had scheduled a fundraiser that was adversely impacted by Defendants' July 15, 2020, Orders.[93]

Plaintiff Daryl Metcalfe, who is a resident of Butler County, a member of the Pennsylvania House of Representative for District 12th and a candidate for re-election, testified in part as follows:

> "Campaign activities normally include meeting with campaign volunteers and voters at various locations throughout my district, including their homes. Campaign plans may also include fundraiser events, breakfast meetings, coffee meetings, going door to door to speak with voters and disseminating campaign literature. …

> The most significant and egregious impacts on political campaigns from these shutdown and stay-at-home orders are the restrictions placed on in person interactions with campaign volunteers and voters. Throughout my more than 22 years of campaigning, grassroots activity has been the foundation of my successful campaigns. I believe that grassroots, door to door and one on one in person meetings are necessary for voters to be able to have access to the candidates who are attempting to serve in our constitutional republican form of government. Not only was the candidates' opportunity to campaign in person obstructed by these orders, but the right of voters to have an opportunity to speak with, be heard from and discuss issues with the candidates was stopped. My grassroots campaign activity of meeting in person, one on one with volunteers and voters was obstructed by Governor Wolf's and Secretary Levine's orders to stay at home. These orders were directed at citizens who were perfectly healthy and who had no exposure to COVID-19. These orders and regulatory schemes were not the result of any law passed by the legislature and were not vetted through the regulatory processes which would have exposed them as unconstitutional and a violation of the people's rights. … My rights as an American citizen running for political office have been violated. I have never in my life felt so much empathy for fellow citizens who have suffered due to the orders of Wolf and Levine that prohibited them from leaving home to earn a daily wage so that they could exchange it in the marketplace for food to feed themselves and their families. Our basic rights as Americans, God given rights affirmed in our Constitution, have been violated by Governor Wolf and Secretary Levine. I appeal to the court to correct this grave injustice."[94]

Plaintiff Mike Kelly, who is a resident of Butler County, a member of the United States House of Representative 16th District and a candidate for re-election, testified in part as follows:

> "The most egregious impact that these Shutdown Orders had on my campaign stemmed from the prohibition of intra-state travel throughout the Commonwealth of Pennsylvania. I was prevented from being able to travel inside my own district to meet my constituents (and they were likewise so prohibited), leaving little to no face to face interaction with the voting public. This restriction significantly diminished my campaign staff as many volunteers were unable to legally travel to or significantly diminished my campaign staff as many volunteers were unable to legally travel to or from our campaign offices or to meet with voters. In the past, my successful campaigns had a large emphasis on traveling door to door to meet with constituents. It is my belief that it is critical for political candidates to be able to personally interact with their voter base. This allows for more effective communication of political positions and allows voters to voice their policy concerns to the candidates before the election. Yet this necessary interaction was eliminated by the Shutdown Orders set forth by Governor Wolf and Secretary Levine. … The 16th Congressional District of Pennsylvania is geographically located across multiple Counties in western Pennsylvania, these counties include Butler, Lawrence, Mercer, Crawford, and Erie Counties. Governor Wolf's phased reopening plan significantly impacted my campaign efforts as the reopening plan

> allowed counties to be reopened at different times based on a color coded designation based on confirmed cases within the County. The arbitrary designations had caused Butler and Erie County to reopen at later times than Lawrence, Mercer, and Crawford Counties within my District. This had the effect of allowing travel in certain portions of my district and forbidding travel in others. … All of our door-to-door operations had to be stopped as we were prevented from both using volunteers to go door-to-door and from actually traveling door-to-door."[95]

Plaintiff Kelly went on the further testify as follows:

> "We were also forced to cancel multiple fundraisers and dinners. In the past, these fundraisers have financed a significant portion of my campaigns, yet for this election we had to entirely forego holding them. My campaign was also forced to cancel a political rally for me to speak to constituents due to both travel prohibitions and congregate rules. Likewise, businesses where we have traditionally held such events were closed as well. … Specifically, Governor Wolf s shutdown orders required us to cancel our annual St. Patrick's Day event due to travel bans and congregate restrictions. At the same time political protests, including those attended by the Governor have far exceeded the number of constituents we have experienced at our campaign rallies and political events. The Governor's and Health Secretary's Orders were ignored by both Governor (see Exhibit " " attached) and the participants with no threats of enforcement, while we and other citizens were threatened with arrests and fines for violations thereof. Previously this event was an invaluable opportunity to meet and talk with my constituents and provided the public much needed access to political candidates."[96]

The Record in this case further reveals that the Governor exercised his own First Amendment Right to march in a protest in Harrisburg that clearly violated his own Orders in regard to the congregate rules in then "yellow" Dauphin County as well as ignoring "social distancing" requirements. The Governor exercised his Constitutional rights while trampling those of his fellow citizens.

As acknowledged by Defendant Wolf at a June 24, 2020 Press Conference, when asked the question:

> "What attitudes should people have in regard to COVID-19? I went to Saturday Nights in the City in Harrisburg, and I saw crowds of people gathering together, some people had on masks, some people didn't, and it seemed like in March, there was a heightened sense of the contagiousness of this disease, and people had on masks, they were going into Walmart wiping down carts, had hand sanitizer, and

> it seems like that has fallen off with the reopening of the Commonwealth. What attitudes should people have right now in relation to coronavirus?"

Defendant Wolf responded as follows:

> "Well, it's the same thing, Dr. Levine and I were just saying, it's not a political thing, and in March, the coronavirus was an infectious disease that was very contagious, we're now in June. it's still a very contagious, infectious disease. And so I think you're right that some people—the weather's nicer, you can be outside more, that's one of the things social distancing does mitigate, the likelihood of the disease, but this is one thing that I don't think I want to play roulette with. I'd just as soon say let me do what I need to do to stay safe. ***If I'm going to take a risk—I mean I went out and took part in a protest demonstration in Harrisburg. I took a risk! But I knew I was taking a risk, it wasn't like I'm ignoring the fact that I'm taking that risk. I'm increasing the possibility that I'm going to get this disease. I knew that. I took that risk. You're going to do that in life. You're going to go through an intersection for some reason or another, and likely you'll make it through, but you might not. And why would you take that added risk for no reason at all, just because you don't believe it?*** I think we need to redouble our efforts if we're going to succeed, to continue to succeed as Pennsylvanians, it's not going to be because Dr. Levine and I have great policy, it's going to be because every one of the 13 million Pennsylvanians—Republicans, Democrats, men, woman, everybody—sits down and decides in their lives that they're going to do what they need to do to reduce the risk of getting this disease. So I think you're right, there seems to be a little bit of a relaxation here, I think we've somehow nationally made this a political issue and I'm not sure why that is. The reality is that virus is still out to get us, that has not changed, and we need to do everything we can to reduce the risk that that virus is in fact going to get us." (Emphasis added.)[97]

There is no question that Defendants' Orders violated Plaintiffs' First Amendment rights. For these reasons, this Court should enter an Order and declare that Defendants' Orders are unconstitutional as violative of the First Amendment to the United States Constitution.

III. ACTUAL CONTROVERSY

In its May 28, 2020 Memorandum Opinion and Order[98] (ECF Doc 15), this Court held that merely moving from one phase in the Governor's reopening plan will not automatically render moot the Plaintiffs' claims relating to business shutdown or reopening requirements, nor will it moot their First Amendment claims. The Court properly took into account that the Defendants had

conceded in oral argument that restrictions will remain even after the Plaintiff Counties move into the "green" phase of the Governor's classifications. Moreover, the Plaintiff Counties submit that it is entirely possible that the Defendants will return to more restrictive phases even for the counties that have reached the least restrictive "green" phase.

To satisfy the "actual controversy" requirement in a declaratory judgment action, the dispute must be definite and concrete and touching the legal relations of parties having adverse legal interests. The dispute must be real and substantial and admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.[99]

As recently stated by the Third Circuit, when a plaintiff seeks declaratory relief, a defendant arguing mootness must show, as the Defendants here cannot, that there is no reasonable likelihood that a declaratory judgment would affect the parties' future conduct. Voluntary cessation will moot a case only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.[100] A case becomes "moot" only when it is impossible for a court to grant any effectual relief whatsoever to the prevailing party.[101]

In an action alleging that the Pennsylvania Governor's emergency orders to mitigate the COVID-19 pandemic impeded the plaintiff's ability to presently acquire the 1,000 signatures due by August 3, 2020, the court concluded the action had not been rendered moot:

> The "live" dispute alleged in Mr. Acosta's case is not moot under the test's first prong. Under the first prong, a case is moot when "the alleged violation has ceased, and there is no reasonable expectation that it will recur."[102]

The "alleged violation" alleged today is the Governor's enforcement of the Commonwealth's signature requirement in light of the executive emergency orders to mitigate the COVID-19 pandemic. But even though the executive emergency orders were scheduled to end on

Saturday, June 5, they were in fact extended and there is still a "reasonable expectation" the Governor will further extend the executive emergency orders or issue similar restrictive measures. For example, the Governor may further extend the executive emergency orders because infection rates may increase with now-relaxed social distancing guidelines despite there being no vaccine to COVID-19. If the Governor were to exercise such executive authority to address the COVID-19 pandemic again, Mr. Acosta would be subjected to its requirements once more. The "alleged violation" would recur.

The "live" dispute alleged in Mr. Acosta's case is not moot because it fails the test's second prong as well. A case is moot when "interim relief or events have completely and irrevocably eradicated the effects" of the actual controversy of the alleged violation."[103] From the time Mr. Acosta filed his amended complaint, there has been no interim event to "completely and irrevocably" eliminate the effects of the "alleged violation." We are not aware of a vaccine to contain COVID-19. In the interim, no state law modifies the timeline or the ballot access framework of the upcoming November 2020 election. The Governor and Secretary continue to enforce the state's signature requirement candidates must satisfy to secure a place on the ballot. The "live" dispute alleged in Mr. Acosta's case is not moot. By failing both prongs of the test articulated by our Court of Appeals, Mr. Acosta alleges a "live" dispute, so his case is not moot.[104]

In a § 1983 action by churches challenging the Governor of Illinois' executive order limiting the size of public assemblies, including religious services, issuance of a second executive order that permitted the resumption of all religious services did not render the action moot because, as could well occur here, the governor could elect to restore the restrictions should conditions caused by the COVID-19 pandemic deteriorate.[105]

Likewise, the Governor of Maryland's amendment to an executive order, which order made in response to the COVID-19 pandemic prohibited all religious services involving gatherings of more than 10 people, to allow in-person indoor religious services at half-capacity did not moot the claims by individuals, businesses, and religious leaders that the executive order violated their right to free exercise of religion under the First Amendment. The amendment was due to the downward trend in COVID-19 hospitalizations, and the governor could amend the executive order to again include religious gatherings in the ban on gatherings of 10 or more people.[106] As Mr. Robinson testified "anything is possible" and "it is possible that some of these pieces could be reinstated."[107]

IV. PLAINTIFF COUNTIES' STANDING

Count IV (equal protection) and Count V (First Amendment) of the Complaint (Doc. 1) have been brought by all of the Plaintiffs, including the four Plaintiff Counties.

In paragraphs 63 and 64 of the Complaint, it is alleged that the four Counties have standing because they have actual and ongoing injuries and losses caused by the Governor's Orders, including interference with the holding of public meetings that can be attended by all residents of the Counties, negative impacts on tax revenue, negative impacts on reputation, negative impacts on the citizens of the respective Counties, and loss of access to lawyers and law offices in those Counties.

The equal protection claim in Count IV is based on the arbitrary and irrational classification of businesses as "life-sustaining" or "non-life-sustaining," the easing of restrictions in some counties but not in others, and the decision not to ease stay-at-home restrictions on all counties. (Compl. ¶¶ 102-111.)

The First Amendment claim in Count V is based on the impact of the Defendants' Business Shutdown Order limiting public gatherings to 10 people, and in the next phase 25 people and, as it concerns the Plaintiff Counties in particular, the impact of this order on their ability to hold public meetings that can be attended by members of the public. (Compl. ¶¶ 112-121.)

There is persuasive case law from Pennsylvania and the Third Circuit that supports the Plaintiff Counties' standing in their own right to litigate the constitutionality of actions taken by state officials. In an action by a city against the federal Bureau of the Census for declaratory and injunctive relief, for the purpose of standing, the city's loss of revenue-sharing aid was sufficient to establish standing.[108] The court stated:

> "The Court does hold, however, that the City's allegation of a loss of revenue-sharing aid is sufficient to support the holding that the City has standing to challenge both the failure of the Bureau to properly implement the Local Review Program and the Bureau's failure to include an adjustment factor."[109]

Similarly, in *City of Philadelphia v. SEC*, the city and its director of finance, alleging that a "preliminary" investigation by the federal SEC into the offer, sale, and resale of the city's securities was undermining investor confidence and causing an increase in interest rates that the city was obliged to pay, had standing to maintain their action for declaratory and injunctive relief challenging the constitutionality of the investigation.[110]

In another analogous case, four counties had a direct and substantial interest in the determination of district attorneys' salaries such that they could bring action under the Declaratory Judgments Act to determine the proper formula for such salaries. The district attorneys were slated for pay raises, their salaries were calculated based on the compensation of common pleas judges, the Commonwealth was required to fund a portion of the district attorneys' salaries, the attorney general was unsure as to how much funding to request for reimbursement, and the amount of the reimbursement ultimately affected each county's budget.[111]

A public school district, suing Pennsylvania's Secretary of Education and other defendants, successfully argued that a classification scheme in an amendment to the Education Empowerment Act, which allowed the mayor of a coterminous city rather than the Secretary of Education to appoint a board of control to oversee a school district due to "extraordinarily low" student test scores, violated the Equal Protection Clause. The classification scheme demonstrated no rational basis as to why a second-class school district of a coterminous third-class city with a population of more than 45,000 and a mayor/council form of government should be treated differently than any other district with "extraordinarily low" student test scores.[112]

The standing of local governments that sued state officials in *Robinson Township v. Commonwealth*,[113] challenging the constitutionality of a legislative act that set out a statutory framework for regulation of oil and gas fracking operations, was not challenged by the defendants, but the case provides a recent example of a local government's standing to challenge actions of the state on constitutional grounds. As long as the requirement of Article III injury-in-fact is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, also may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.[114]

Despite the ability of the Plaintiff Counties to assert their claims under Article III, Defendants make much of the separate headings used by Plaintiff in each count of their complaint referencing Section 1983. Those headings, in-and-of themselves, are not dispositive of the relief Plaintiffs are seeking. To the contrary, Fed. R. Civ. P. 8, "imposes minimal burdens on the plaintiff at the pleading stage."[115] "[A] complaint need only contain 'a short and plain statement of each claim showing that the pleader is entitled to relief.'" *Id.* "Fundamentally, Rule 8 requires that a

complaint provide fair notice of 'what the…claim is and the ground upon which it rests.'" *Id.* Further under Section (e) of Rule 8, "[p]leadings must be construed to do justice." *Id.*

Here, the Plaintiff Counties are not asserting their claims specifically under Section 1983, nor would they need to. Indeed, it is well-settled that, "Section 1983 does not, by its own terms, create substantive rights; it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws."[116] Rather, it is clear under the pleading standards found in Rule 8 that the substance of the Plaintiff Counties' requested relief is also in the form of a Declaratory Judgment. *See* ECF Doc. No. 1. p. 1 (where the Complaint clearly references that plaintiffs' are seeking declaratory judgment).

More importantly, other federal district courts have clearly recognized that county plaintiffs have standing under Article III. For example, the U.S. District Court in the Western District of Texas recently dealt with a situation that is analogous to the instant case. In *El Paso County v. Trump*, 408 F. Supp. 3d 840, 848 (W.D. Tex. 2019) the district court held that El Paso County had Article III standing to sue President Trump related to the President's Proclamation aimed at building a border wall along the southern border between El Paso County and Mexico. The district court opined that, "because El Paso County is the object of the Proclamation, it has [Article III] standing to bring this challenge." *Id.* This is directly on point to the issues before this Court.

Here, the Plaintiff Counties are clearly the objects of Governor Wolf's proclamations and orders related to the pandemic. The Plaintiff Counties have also suffered harm to their reputations (*See e.g.* Testimony of D. Lohr p. 89 lines 14-20). The Plaintiff Counties have also suffered economic harm (*See e.g.* Testimony of D. Lohr p. 100 lines 20-24). Based upon the testimony in this matter, the Plaintiff Counties have all clearly demonstrated the necessary causation and

redressability necessary to assert standing under Article III. Accordingly, for the same reasons as stated in *El Paso County v. Trump*, the Plaintiff Counties in this case have Article III standing to bring their declaratory claims against these Defendants regardless of whether Section 1983 headings were used because the overall Rule 8 pleading requirements have been satisfied. *See also Amato v. Wilentz*, 952 F.2d 742, 747 (3d Cir. 1991) (where the Third Circuit held that Essex County had Article III standing to bring its claims because the County alleged "actual and threatened injury (loss of revenue) that is fairly traceable to the defendant's action and that could be redressed by a favorable decision on the merits.").

Generally, constitutional rights are personal and may not be asserted vicariously, but First Amendment rights may be asserted by litigants who are not claiming that their own rights of free expression are violated.[117] Here, the Plaintiff Counties have standing both in their own right and in that of the resident citizens within their boundaries to challenge the actions of the Defendants on both First Amendment and equal protection grounds. By analogy, the reasoning of the court in *American Colleges of Obstetricians & Gynecologists v. U.S. Food & Drug Administration*,[118] decided very recently, is instructive. Plaintiffs have asserted a separate claim in which they contend that the disparity in the treatment of mifepristone, as compared to other drugs for which in-person requirements have been waived for the duration of the pandemic, violates the equal protection rights of the physicians and patients who prescribe and take mifepristone. The Court's third-party standing analysis as to the due process claim is equally applicable here.

Plaintiffs also argue that their physician members have direct standing because their own constitutional rights are at stake. This theory of standing does not depend on the third-party standing doctrine because the physicians assert that as prescribing physicians they are subjected to differential treatment as compared to other physicians who prescribe other drugs subject to more

favorable rules during the COVID-19 pandemic.[119] Because physicians prescribing mifepristone have an equal protection right to be free from unequal treatment as compared to other doctors, the imminent injury to physicians such as Dr. Paladine is sufficient alone to establish standing to assert this claim. *Id.* In turn, Plaintiffs such as NYSAFP, of which Dr. Paladine is a member, have associational standing to assert this claim on behalf of their physician members.[120]

In addition, Plaintiffs Butler County, Fayette County and Greene County and Washington County assert that under Pennsylvania's Constitution, they have standing to challenge the Governor and Secretary of Health based upon numerous Pennsylvania decisions addressing standing of Commonwealth subdivisions and as well under Article I, Section 25 and 26 of the Pennsylvania Constitution which provide as follows:

> "§ 25. Reservation of power in people.
>
> To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate."
>
> "§ 26. No discrimination by Commonwealth and its political subdivisions.
>
> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

Pennsylvania's Constitution clearly vests responsibility as well as duties in Municipal Subdivisions ("Counties" in this Complaint) to protect and insure "Civil Rights" such as those which are the subject of this action.

Commissioners Osche, Irey Vaughan, Belding and Lohr all testified with respect to the Constitutional violations affecting their counties as well as the citizens of their counties.[121] The Commissioners also testified that each County owned specific properties such as parks, pools and fairgrounds, that were adversely affected by the shutdown and closure Orders.[122]

CONCLUSION

For all of the reasons set forth herein, the Plaintiffs respectfully request this Honorable Court to declare that the aforesaid Orders violated the constitutional rights asserted in the Complaint and in this Brief.

Perhaps, the following quote reflects the need for judicial intervention (keeping in mind that the term "quarantine" was gravely misapplied in the Commonwealth of Pennsylvania as applied to this case):

> "In this historical moment, the need for the refinement of the constitutional law of quarantine could not be greater. Not only do we face significant and perhaps growing threats from emerging infectious diseases, we are also living in an era marked by high levels of political polarization, deep distrust of government and even science, and intensifying racial and ethnic scapegoating. In this epidemiological and political environment, the risks of misusing quarantine--particularly by targeting minorities--seem especially high. So too is the danger that if and when quarantine is needed to fight an outbreak for which it is well-suited, many members of the public will disbelieve government officials and fail to comply. Under such circumstances, clarity as to what the Constitution demands, and the knowledge that the courts will assure fealty to those demands, may offer the best or only hope we have that quarantine is neither misused nor rendered ineffective." *Quarantining the Law of Quarantine: Why Quarantine Law does not reflect Contemporary Law*, by the Wake Forest Journal of Law & Policy: Wendy E. Parment Copyright © 2018.

Respectfully submitted,

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[1] *Breth at 7/22/2020 TR, p. 4*

[2] *Breth at 7/22/2020 TR, pp. 7-8*

[3] *Breth at 7/22/2020 TR, pp. 4-9*

[4] *Judge Stickman at July 22, 2020 TR, p. 11.*

[5] *Wisconsin Legislature vs. Palm, 391 Wis.2d 497, 555, 492 N.W.2d 900, 2020 WI 42, quoting, Thomas Jefferson, Notes on the State of Virginia by William Peden, University of North Carolina Press for the Institute of Early American History and Culture (1954).*

[6] *Memorandum Opinion and Order of Court, May 28, 2020. ECF No. 15.*

[7] *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada, al., 591 U.S. __ (2020)*

[8] *Id.*

[9] *Id.*

[10] *Aptheker v. Secretary of State, 378 U.S. 500, 519-20, 84 S.Ct. 1659, 12 L.Ed. 2d 992 (1964)*

[11] *Wisconsin Legislature at 22.*

[12] *Board of Regents v. Roth, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); Finley v. Giacobbe, 79 F.3d 1285, 1296 (2d Cir.1996); Federico v. Board of Educ., 955 F.Supp. 194, 198-99 (S.D.N.Y.1997).*

[13] *Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 847 (1992); quoting, Whitney v. California, 274 U.S. 357, 373 (1927).*

[14] *Board of Regents v. Roth, 408 U.S. 564, 572 (1972).*

[15] *Robinson at 7/22/2020 TR, p. 19*

[16] *Robinson at 7/22/2020 TR, p. 25*

[17] *Robinson at 7/22/2020 TR, p. 84*

[18] *Robinson at 7/22/2020 TR, pp. 23-24*

[19] *Robinson at 7/22/2020 TR, pp. 24-25*

[20] *Robinson at 7/22/2020 TR, pp. 95-99*

[21] *Robinson at 7/22/2020 TR, pp. 98-99*

[22] *Robinson at 7/22/2020 TR, supra; and, Weaver at 7/22/20 TR, pp. 216-217, 235-236*

[23] *Robinson at 7/22/2020 TR, pp. 101*

[24] *NAICS, 2007, p. 15, ECF No. 48-1*

[25] *NAICS, 2007, pp. 14-15, ECF No. 48-1*

[26] *McCool v. City of Philadelphia, 497 F.Supp.2d 307, 328 (E.D.Pa. 2007); citing, Meyer v. Nebraska, 262 U.S. 390 (1923); and, Board of Regents of State College v. Roth, 408 U.S. 564, 572 (1972).*

[27] *McCool at 326; citing, Piecknick v. Commonwealth, 36 F.3d 1250, 1259 (3d Cir.1994).*

[28] *McCool at 326; citing, Cowan v. Corley, 814 F.2d 223, 225 (5th Cir.1987); Nall v. Pitre, No. 88–965 (M.D. La. June 9, 1989).*

[29] *McCool at 328; citing, Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915).*

[30] *Id.*

[31] *Id. at 847 n.8.*

[32] *United Artist at 399, citing, Lewis at 847.*

[33] *United Artists at 399, citing Lewis at 850.*

[34] *United Artist at 400, referencing, Leamer v. Fauver, 288 F.3d 532, 546 (3d Cir.2002); Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 400 (3d Cir.2000); Nicini v. Morra, 212 F.3d 798, 809 (3d Cir.2000) (en banc); Miller v. City of Philadelphia, 174 F.3d 368, 375 (3d Cir.1999).*

[35] *Alexander v. Whitman, 114 F.3d 1392, 1403, (3d Cir.1997), citing, Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972), quoting, Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626–27, 67 L.Ed. 1042 (1923); and, citing, Roe v Wade, 410 U.S. 113, 154, 93 S.Ct. 705, 727, (1973).*

[36] *Boateng, 7/22/20 TR, pp. 208-210*

[37] *Robinson at 7/22/2020 TR, p. 19*

[38] *Robinson at 7/22/2020 TR, p. 122*

[39] *Boateng, 7/22/20 TR, pp. 208-210*

[40] *Robinson at 7/22/2020 TR, pp. 70-76*

[41] *Robinson at 7/22/2020 TR, pp. 80*

[42] *Plaintiff Cathy Hoskins Affidavit. ECF No. 33.*

[43] *Plaintiffs Chris and Jody Young Affidavit. ECF No. 32.*

[44] *Plaintiffs Charles and Elizabeth Walker Affidavit. ECF No. 28.*

[45] *Plaintiff Lee McDonald Affidavit. ECF No. 30.*

[46] *Plaintiffs Nancy and Michael Gifford Affidavit. ECF No. 31.*

[47] *McCool at 326; citing, Piecknick v. Commonwealth, 36 F.3d 1250, 1259 (3d Cir.1994)*

[48] *Williams v. Fears, 179 U.S. 270, 21 S.Ct. 128, 45 L.Ed. 186 (1900)*

[49] *Lutz v City of York, 899 F.2d 255, 266, (3d Cir.1989) quoting, Williams v. Fears, 179 U.S. 270, 21 S.Ct. 128, 45 L.Ed. 186 (1900) at 274.*

[50] *Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989)*

[51] *Lutz v City of York, 899 F.2d 255, 268 (3d Cir.1989).*

[52] *McCool v. City of Philadelphia, 497 F.Supp.2d 307, 328 (E.D.Pa. 2007)*

[53] *Id.*

[54] *Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir.2002), quoting, Aptheker v. Secretary of State, 378 U.S. 500, 519–20, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964) (Douglas, J., concurring).*

[55] *Boateng, 7/22/20 TR, pp. 172-173*

[56] *Boateng, 7/22/20 TR, p. 174*

[57] *Boateng, 7/22/20 TR, pp. 177-178*

[58] *Boateng, 7/22/20 TR, pp. 208-210*

[59] *O'Connor v. Donaldson,422 U.S. 563, 582–83 (1975) (Burger, C.J., concurring); see also Minnesota ex rel. Pearson v. Probate Court of Rumsey County, 309 U.S. 270, 273–74 (1940); Jacobson v. Massachusetts, 197 U.S. 11, 25–29 (1905); Compagnie Francaise de Navigation a Vapeur v. State Board of Health, Louisiana, 186 U.S. 380, 391–92 (1902).*

[60] *Best v. St. Vincent's Hospital, 2003 WL 21518829 (S.D.NY 2003)*

[61] *O'Connor, 422 U.S. at 575 (citations omitted); see also Humphrey v. Cady, 405 U.S. 504, 509 (1972) (holding that an individual can be detained for mental illness only when his "potential for doing harm, to himself or others, is great enough to justify such a massive curtailment of liberty.").*

[62] *Shelton v. Tucker, 364 U.S. 479, 488 (1960).*

[63] *See Project Release v. Prevost, 551 F.Supp. 1298, 1305 (E.D.N.Y.1982); Lessard v. Schmidt, 349 F.Supp. 1078, 1096 (E.D.Wis.1972), vacated on other grounds, 414 U.S. 473 (1973).*

[64] *Adarand v. Pena, 515 U.S. 200, 227 (1995).*

[65] *Boateng, 7/22/20. TR 163, 200-202.*

[66] *Plaintiff Butler County Affidavit.*

[67] *Plaintiff Green County Affidavit.*

[68] *Plaintiff Washington County Affidavit.*

[69] *Plaintiff Fayette County Affidavit.*

[70] *Plaintiff McDonald Affidavit and 7/17/20, TR p, 144.*

[71] *Boateng, 7/22/20. TR 106.*

[72] *Weaver 7/22/20 TR 226-229.*

[73] *Id.*

[74] *Weaver 7/22/20 TR 226-229.*

[75] *Weaver Id.*

[76] *Plaintiffs Butler, Green, Fayette and Washington Counties' Supplemental Affidavits.*

[77] *Plaintiffs Butler, Green, Fayette and Washington Counties' Supplemental Affidavits.*

[78] *Doe v. City of Albuquerque, 667 F.3d 1111, 1128 (10th Cir. 2012) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).*

[79]*Startzell v. City of Philadelphia, 533 F.3d 183 (3d Cir.2008); citing, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); and, Frisby, 487 U.S. at 480, 108 S.Ct. 2495 (noting that "public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum")." Startzell, supra at 194, citing, Perry, 460 U.S. at 45, 103 S.Ct. 948.*

[80] *Id. at 194.*

[81] *Startzell, supra at 194, citing, Carey v. Brown, 447 U.S. 455, 460, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).*

[82] *Martin v. City of Albuquerque, 369 F.Supp.3d 1008, (2019), citing, Perry supra, 460 U.S. at 45–46, 103 S.Ct. 948.*

[83] *Roberts v. United States Jaycees, 468 U.S. 609 (1984).*

[84] *Roberts at 468 U.S. at 617-618.*

[85] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), citing, Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940).*

[86] *Lukumi, supra at 532, citing, Braunfeld v. Brown, 366 U.S. 599, 607, 81 S.Ct. 1144, 1148, 6 L.Ed.2d 563 (1961); and, Fowler v. Rhode Island, 345 U.S. 67, 69–70, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953).*

[87] *Lukumi, supra at 534, quoting, Walz v. Tax Comm'n of New York City, 397 U.S. 664, 696, 90 S.Ct. 1409, 1425, 25 L.Ed.2d 697 (1970).*

[88]*Roberts v. Neace, 958 F.3d 409, 415 (2020), citing, Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1260 (10th Cir. 2008).*

[89] *Roberts at 415, citing, Hartmann v. Stone, 68 F.3d 973, 978 (6th Cir, 1995).*

[90] *Roberts at 415, citing, Hartmann at 979; Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1233–35, 1234 n.16 (11th Cir. 2004); see also Shrum v. City of Coweta, 449 F.3d 1132, 1145 (10th Cir. 2006) ("[T]he Free Exercise Clause is not confined to actions based on animus.").*

[91] *Plaintiff Timothy R. Bonner Affidavit.*

[92] *Plaintiff Marci Mustello Affidavit.*

[93] *Plaintiff Mustello, 7/17/20, TR p, 166-167.*

[94] *Plaintiff Daryl Metcalf Affidavit*

[95] *Plaintiff Mike Kelly Affidavit*

[96] *Plaintiff Mike Kelly Affidavit*

[97] *Gov. Wolf, Supplemental Answer to Interrogatories, ECF No. 55.*

[98] *Memorandum Opinion and Order, ECF No. 5.*

[99] *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007).*

[100]*Hartnett v. Pa. State Educ. Ass'n, 963 F.3d 301 (3d Cir. 2020).*

[101] *Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597 (2013).*

[102] *New Jersey Turnpike Authority v. Jersey Central Power and Light, 772 F.2d 25, 30-31 (3d Cir. 1985).*

[103] *New Jersey Turnpike Authority at 30-31.*

[104] *Acosta v. Wolf, No. CV 20-2528, 2020 WL 3542329, at *2 n.7 (E.D. Pa. June 30, 2020).*

[105] *Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341 (7th Cir. 2020).*

[106] *Antietam Battlefield KOA v. Hogan, No. CV CCB-20-1130, 2020 WL 2556496 (D. Md. May 20, 2020); see also First Baptist Church v. Kelly, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020) (action brought by churches and pastors alleging that governor's executive order prohibiting mass gatherings in light of COVID-19 pandemic violated their First Amendment free exercise rights was not rendered moot by governor's issuance of new executive order superseding challenged order, where new order imposed identical restrictions on religious activities).*

[107] *Robinson, 7/22/20, TR pp. 37-38*

[108] *City of Philadelphia v. Klutznick, 503 F. Supp. 663 (E.D. Pa. 1980).*

[109] *Id. at 671.*

[110] *City of Philadelphia v. SEC, 434 F. Supp. 281 (E.D. Pa. 1977).*

[111] *County Comm'rs Ass'n of Pa. v. Dinges, 935 A.2d 926 (Pa. Commw. Ct. 2007).*

[112]*Harrisburg Sch. Dist. v. Hickok, 781 A.2d 221 (Pa. Commw. Ct. 2001).*

[113] *Robinson Township v. Commonwealth, 637 Pa. 239, 147 A.3d 536 (2016).*

[114] *Wartluft v. Milton Hershey Sch., 400 F. Supp. 3d 91 (M.D. Pa. 2019) (citing Warth v. Seldin, 422 U.S. 490 (1975)); see also Susquehanna County ex rel. Susquehanna County Bd. of Comm'rs v. Commonwealth, 500 Pa. 512, 458 A.2d 929 (1983) (county had standing to appeal actions of Department of Environmental Resources in issuing order addressed to corporation engaged in sanitary landfill operation).*

[115] *Garrett v. Wexford Health, 938 F.3d 69, 92 (3d Cir. 2019), cert. denied, 140 S. Ct. 1611 (2020).*

[116] *Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996) (citations omitted).*

[117] *Pringle v. Ct. of Common Pleas, 604 F. Supp. 623 (M.D. Pa.), rev'd on other grounds, 778 F.2d 998 (3d Cir. 1985).*

[118] *American Colleges of Obstetricians & Gynecologists v. U.S. Food & Drug Administration, No. CV TDC-20-1320, 2020 WL 3960625 (D. Md. July 13, 2020),*

[119]*See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (stating that in an equal protection case, "the denial of equal treatment resulting from the imposition of [a] barrier" is sufficient injury to satisfy the "injury in fact" requirement).*

[120]*Id. at 14*

[121] *Plaintiffs Butler, Green, Fayette and Washington Counties' Affidavits and Supplemental Affidavits.*

[122] *Plaintiffs Butler, Green, Fayette and Washington Counties' Affidavits and Supplemental Affidavits.*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COUNTY OF BUTLER, *et al.*, **Plaintiffs** **v.** **THOMAS W. WOLF, in his official capacity as Governor of the Commonwealth of Pennsylvania, and RACHEL LEVINE, M.D., in her official capacity as Secretary of the Pennsylvania Department of Health,** **Defendants**	**No. 2:20-CV-677-WSS** ***Complaint Filed 5/7/20***

DEFENDANTS' POST HEARING BRIEF IN OPPOSITION TO PLAINTIFFS' COMPLAINT FOR DECLARATORY JUDGMENT

INTRODUCTION

In the winter of 2020, a global pandemic known as COVID-19 reached the Commonwealth, threatening the health and lives of its residents. In response, Governor Wolf and Secretary Levine acted swiftly to limit the damage and spread of the disease, issuing stay-at-home orders and shuttering the physical locations of businesses that are not life-sustaining. It worked; as winter became spring and spring became summer, Pennsylvania saw the numbers of COVID-19 cases and deaths fall.

But powering down the economic engine of the state with the sixth largest economy in the country was not simple, because many businesses played a critical function in sustaining the health, safety, and welfare of the Commonwealth. Closing ***all*** businesses in the name of health would have been counterproductive. Consequently, when they issued their orders closing certain businesses (the "Business Closure Orders"), Governor Wolf and Secretary Levine did not apply the Orders to these "life-sustaining" businesses. The Administration systematically identified

specific industries that naturally perform life-sustaining functions for exemption from the closure orders, and, through the Department of Community and Economic Development ("DCED"), allowed other individual businesses in the Commonwealth that were not in these industries to petition for an individual exemption from the Business Closure Orders by showing that they were, in fact, life-sustaining or supporting the work of a life-sustaining business (the "Waiver Program").[1]

And now, as we head toward fall, the Commonwealth has reopened. As of July 3, all counties are in the "green" phase of the Commonwealth's reopening plan and the stay-at-home and Business Closure Orders have been suspended "to allow the economy to strategically reopen while continuing to prioritize public health."[2] Despite this substantial progress, Plaintiffs present this Court with tales of what once was and what may never be, all the while claiming their Constitutional rights are being trampled. But their focus is misdirected. Whether Plaintiffs' rights were violated in the past, which Defendants deny, or whether they could ever conceivably be violated in the future, are not issues to be decided in this declaratory judgment action. The straight-forward issue this Court must decide is whether there is a current or ongoing violation of Plaintiffs' Constitutional rights. There is not. In the absence of such a violation, Plaintiffs have failed to meet their burden and their substantive due process, equal protection, and first amendment claims must be dismissed and their request for a declaratory judgment denied.

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[1] Many have mischaracterized the Waiver Program as a policy allowing non-life-sustaining businesses to open, rather than as a procedure for a business to show that it was actually life-sustaining even if it did not fall within an exempted industry. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 899 (2020)

[2] "What Phase Is My County In?", Website of the Office of the Governor, https://www.pa.gov/guides/responding-to-covid-19/#WhatPhaseIsMyCountyin (last visited 8/12/20).

QUESTIONS PRESENTED

I. MUST PLAINTIFFS' REQUEST FOR A DECLARATORY JUDGMENT BE DENIED BECAUSE THERE IS NO ACTUAL CONTROVERSY BETWEEN THE PARTIES BECAUSE ANY ALLEGED HARM CEASED WITH THE END OF THE WAIVER PROGRAM AND THE BEGINNING OF THE COMMONWEALTH'S REOPENING?

Suggested Answer: Yes

II. MUST THE COUNTY PLAINTIFFS' REQUEST FOR A DECLARATORY JUDGMENT BE DENIED FOR LACK OF STANDING BECAUSE POLITICAL SUBDIVISIONS ARE NOT ENTITLED TO RELIEF UNDER SECTION 1983?

Suggested Answer: Yes

III. MUST PLAINTIFFS' SUBSTANTIVE DUE PROCESS CLAIM BE DENIED BECAUSE PLAINTIFFS HAVE NOT ESTABLISHED A VIOLATION OF A FUNDAMENTAL LIBERTY INTEREST AND THE BUSINESS CLOSURE ORDERS AND STAY-AT-HOME ORDERS DO NOT SHOCK THE CONSCIENCE?

Suggested Answer: Yes

IV. MUST PLAINTIFFS' EQUAL PROTECTION CLAIM BE DISMISSED BECAUSE THE BUSINESS CLOSURE ORDERS AND REOPENING PLAN ARE RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST AND PLAINTIFFS HAVE NOT BEEN TREATED DIFFERENTLY THAN ANY SIMILARLY SITUATED INDIVIDUAL, BUSINESS OR COUNTY?

Suggested Answer: Yes

V. MUST PLAINTIFFS' FIRST AMENDMENT CLAIM BE DISMISSED WHERE THE DEFENDANTS' ORDERS ARE CONTENT-NEUTRAL AND ISSUED IN FURTHERANCE OF A SUBSTANTIAL GOVERNMENTAL INTEREST?

Suggested Answer: Yes

ARGUMENT[3]

At the outset of the hearing in this matter, the Court noted "[u]nder Rule 57, only present and immediately definable and ascertainable future deprivation of rights is at issue, not past deprivation of rights." *7-17 Tr.*[4] at 7:9-11. It is within this framework that the issues must be addressed. Currently at issue are the Business Plaintiffs'[5] claim that the Defendants' actions violate their substantive due process rights and all Plaintiffs' claims that the Defendants' actions violate their equal protection and first amendment rights. Not only have Plaintiffs not proven a present or ongoing constitutional violation, but they also have not demonstrated that the County Plaintiffs[6] have standing or that an actual controversy exists between the parties. Accordingly, their request for a declaratory judgment must be denied.

I. Plaintiffs have not proven that there is an "actual controversy" warranting a declaratory judgment because any alleged harm ceased with the end of the Waiver Program and the beginning of the Commonwealth's reopening

The Court need look no further than the Introduction of Plaintiffs' Post Hearing Brief, *Doc. 56,* to see that no live controversy exists. Plaintiffs state:

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3 The issues in this case were framed in Defendants' pre-hearing brief in opposition to Plaintiffs' Complaint. *Doc. 40.* In the interest of judicial economy, Defendants will not reassert those arguments in this brief. Rather, this brief will focus on applying the legal standards set forth in Defendants' pre-hearing brief to the evidence presented during the hearing held on July 17 and July 22, 2020, as well as responding to Plaintiffs' Post Hearing Brief. *Doc. 56.*

4 "*7-17 Tr*." refers to the written transcript of proceedings conducted on July 17, 2020 in this matter.

5 The term "Business Plaintiffs" refers to Nancy Gifford and Mike Gifford d/b/a Double Image Styling Salon, Prima Capelli, Inc., Steven Schoeffel, Paul Crawford t/d/b/a Marigold Farm, Cathy Hoskins t/d/b/a Classy Cuts Hair Salon, R.W. McDonald & Sons, Inc., Starlight Drive-In Inc., and Skyview Drive-In LLC. Plaintiff Crawford did not present any evidence in this matter.

6 The term "County Plaintiffs" refers to the County of Butler, County of Fayette, County of Greene, and County of Washington.

- "Count II Substantive Due Process … raises essentially three issues: whether Defendants' decisions to order the closure of 'non-life sustaining' business ***were*** arbitrary, capricious and ***interfered*** with the concept of 'ordered liberty'; whether such Orders ***interfered*** with Plaintiffs' right to pursue lawful employment free of governmental interference; and, whether the 'waiver' program ***as invented and applied*** by Defendants … ***violated*** Plaintiffs' constitutional rights."

- "Count IV – Violation of Equal Protection … asserts that classifying some businesses as 'life sustaining' and others as 'non-life sustaining' is, in-and-of itself unconstitutional ***in origin and application*** [and that] similarly situated counties … ***were arbitrarily treated disparately***…"

- "Count V – Violation of First Amendment … Pennsylvanians ***were 'locked down'*** in their homes, their businesses ***were ordered*** closed and shuttered and ***they were threatened*** with arrest…"

Doc. 56 at 13-14. All of Plaintiffs arguments are based upon circumstances that no longer exist. There is no dispute that all counties have now entered the "green" phase and Plaintiffs' businesses have reopened.[7] *7-17 Tr. at* 33:18-20, 34:3-13, 41:6-8, 44:4-6, 45:15-46:5, 46:20-23, 53:24-25, 62:12-63:4, 97:11-98:13, 142:16-17, 163:20-21, 171:12-13, 178:12-13, 193:14-17, 208:18-19, 209:15-16, 216:11-12, 222:19-20. *See also, 7-22 Tr.*[8] at 42:3-4. There is likewise no dispute that the Waiver Program has closed or that the designations of life-sustaining and non-life-sustaining were only used in the "red" phase. *Doc. 38,* ¶13; *Doc. 39,* ¶16. *See also 7-22 Tr.* at 226:24-227:1, 232:12. Finally, there is no dispute that the stay-at-home orders were suspended as counties entered the "yellow" phase of the Commonwealth's reopening plan. *See Doc.* 42-52 through 42-61; 42-63 through 42-66; and 42-68 through 42-75.

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[7] Plaintiffs cite to the Governor's July 15, 2020, Order closing nightclubs to support their argument of an ongoing violation. *Doc. 56,* at 3. But no Plaintiffs operate nightclubs and none of Plaintiffs' businesses were impacted by the July 15 Order. Accordingly, the July 15 Order does not support a claim for a current or ongoing violation of the Plaintiffs' constitutional rights.

[8] "*7-22 Tr*." refers to the written transcript of proceedings conducted on July 22, 2020 in this matter.

Plaintiffs argue that a live controversy remains because "it is entirely possible that the Defendants will return to more restrictive phases." *Doc. 56*, at 40. But there is no support for this argument. Indeed, a review of the actions taken by the Defendants since moving counties into the "yellow" phase makes it clear that the Administration is determined to move forward rather than back. "The Governor … doesn't want to impose one additional restriction more or one day of restriction more than is necessary and dictated by the virus." *7-22 Tr.* at 71:19-22. To that end, the Governor announced a plan for the reopening of Pennsylvania on April 22, 2020.[9] Beginning May 8, restrictions were lifted as counties that met the reopening criteria advanced from the "red" phase to the "yellow" phase and eventually to the "green" phase. *See Doc. 42-52* through *42-61*, *42-63* through *42-66*, and *42-68* through *42-75*. Even when case counts began to rise again, the Defendants took targeted mitigation efforts to avoid returning counties to the "yellow" or "red" phases. *7-22 Tr.* at 76:7-8 ("we're putting in place targeted mitigation steps that respond to that increase in viral spread"). Sam Robinson, Deputy Chief of Staff for Governor Wolf testified, "[the Administration has] at all times tried to tailor the steps that [it is] taking as much as possible to do only what [is] absolutely necessary in order to prevent spread and to remove restrictions when they no longer bec[o]me necessary." *7-22 Tr.* at 137: 1-4. He added, "the whole point [is] to prevent the spread of the disease by getting out in front of the spread of the disease." *7-22 Tr.* at 122:12-14. All official comments on the subject

[9] "Gov. Wolf: Reopening Targeted for May 8 in North-Central, Northwest," Website of the Office of the Governor, https://www.governor.pa.gov/newsroom/gov-wolf-reopening-targeted-for-may-8-in-north-central-northwest/ (last visited 8/17/20).

reinforce the Administration's strategy to take targeted mitigation efforts rather than imposing broad restrictions.[10]

Curiously, Plaintiffs rely on a footnote from a case that was summarily dismissed to support their argument that their claims are not moot. *Doc. 56* at 40 (citing *Acosta v. Wolf*, No. CV-20-2528, 2020 WL 3542329 (E.D. Pa. June 30, 2020)). Due to the COVID-19 pandemic, Mr. Acosta wanted the Court to place him on the ballot for the November 2020 general election without his obtaining the signatures required by Pennsylvania law. *Id.* The Court addressed Mr. Acosta's complaint pursuant to its screening requirements for Plaintiffs proceeding *in forma pauperis*. *Id.* at *1. In a footnote, the Court noted that the action was not moot because it is possible that the Governor could reinstate the executive orders that had expired less than four weeks prior. *Id.* at *2 n.7.

The timing was similar in the other cases cited by Plaintiffs. *See Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (holding claim not moot where executive order—issued a matter of weeks after reopening plan was announced—provided relief sought). *See also Antietam Battlefield KOA v. Hogan*, CV CCB-20-1130, 2020 WL 2556496 (D. Md. May 20, 2020) (amended executive order issued only days after reopening plan did not moot

[10] *See* Rumors about Pa. counties returning to red phase are untrue, state officials say: report, https://www.pennlive.com/coronavirus/2020/07/rumors-about-pa-counties-returning-to-red-phase-are-untrue-state-officials-say-report.html ("If we have to use more restricting mitigation efforts than what are already in place they will be surgical and targeted to reduce the spread"). *See also* Pa Health Department: No plans yet to impose new statewide restrictions despite coronavirus case increases, https://www.pennlive.com/coronavirus/2020/07/pa-health-department-no-plans-yet-to-impose-new-statewide-restrictions-despite-coronavirus-case-increases.html ("We do not plan at this time to use those dramatic statewide types of measures the, [like] the red, yellow and green schema…"); "Officials won't return counties to yellow or red, mitigation efforts remain the focus," https://www.northcentralpa.com/covid-19/officials-wont-return-counties-to-yellow-or-red-mitigation-efforts-remain-the-focus/article_1fc5e890-c53b-11ea-aca4-3f989794dff9.html

claim for relief); *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 28, 2020) (amended executive order did not render claim moot when it contained identical restrictions as the challenged order). These cases are not binding on this court. They are also distinguishable. Unlike those cases, here, the parties are not just a matter of weeks removed from the expiration of the Business Closure Orders and stay-at-home orders, but months removed. Butler, Fayette, Greene, and Washington counties all entered the "yellow" phase on May 15, 2020. *Doc.* 42-54. Not only have no new restrictions been placed on the Plaintiffs or their resident counties since that time, but the restrictions in place were relaxed even more on June 5, 2020, when Butler, Fayette, Greene, and Washington counties entered the "green" phase. *Doc. 42-65*.

At bottom, there is no evidence that Butler, Fayette, Green, or Washington counties will be moved back to the "yellow" or "red" phase, that stay-at-home orders will be put reinstituted, that Plaintiffs' physical business locations will again be closed based upon the life-sustaining and non-life-sustaining designations, or that the Waiver Program will ever be reinstated. Indeed, Mr. Robinson testified "we do not have specific plans to reinstate those phases of the reopening at this time and it's not been discussed." *7-22 Tr.* at 38:2-4, 40:14-17. A declaratory judgment on this record amounts to nothing more than either an adjudication of past conduct or an advisory opinion on hypothetical future facts. Neither is proper. *See Corliss v. Obrien,* 200 F.App'x 80, 84-85 (3d Cir. 2006) ("Declaratory judgment is inappropriate solely to adjudicate past conduct"). *See also, Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 649 (3d Cir. 1990) (declaratory judgment is not a vehicle to obtain "an opinion advising what the law would be upon a hypothetical state of facts"). In evaluating Plaintiffs' claims, "the focus must be on current and … immediately appreciable harm as opposed to a mere possibility." *7-17 Tr.*, at 42:23-25.

Plaintiffs have not presented any evidence of "immediately appreciable harm" and instead only offered evidence as to "a mere possibility" of future harm; therefore, there is no live controversy between the parties and Plaintiffs' request for a declaratory judgment must be denied.

II. The County Plaintiffs lack standing because political subdivisions lack rights under Section 1983.

Defendants have argued that, as political subdivisions, the County Plaintiffs lack standing. To be clear, Defendants are not arguing that the County Plaintiffs could never have standing to file a lawsuit. Rather, Defendants are arguing that the County Plaintiffs, as political subdivisions, do not have standing to bring a Section 1983 claim alleging violations of their federal constitutional rights against the Commonwealth. And a suit against Commonwealth officials, in their official capacities, is the same as bringing a case against the Commonwealth itself. *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 241 (3d Cir. 2010). Such is the case here, requiring dismissal.

After admitting that a county cannot be a Section 1983 plaintiff at the hearing, Plaintiffs in their brief attempt to downplay their use of the term "Section 1983" in their Complaint, stating "the Plaintiff Counties are not asserting their claims specifically under Section 1983 ..." *7-17 Tr.* at 6:22-7:1, *Doc. 56* at 45. Plaintiffs miss the point. Section 1983 does not, by its own terms, create substantive rights; rather, it is the vehicle through which an individual may bring a private cause of action to redress the deprivation of rights established by other provisions of law. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). *See also Gomez v. Toledo*, 446 U.S. 635, 638 (1980) (Section 1983 "provides a cause of action for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws by any person acting under color of any statute, ordinance, regulation, custom, or usage, or of any State or

Territory"). In enacting section 1983, Congress provided a statutory remedy to address constitutional violations, and there is no place for an implied right to a direct constitutional claim as well. *See Rogin v. Bensalem Township*, 616 F.3d 680, 686-87 (3d Cir. 1980) ("[I]t would be a redundant and wasteful use of judicial resources to permit the adjudication of both direct constitutional and § 1983 claims where the latter wholly subsume the former."). *See also*, *Moses v. City of Evanston*, 97 F.3d 1454 (Table), 1996 WL 543378, at * *2 (7th Cir. 1996) ("[T]here is no cause of action directly under the Fourteenth Amendment when § 1983 is available."). The fact that Plaintiffs are seeking a declaratory judgment is of no consequence. Without Section 1983, Plaintiffs have no path to that relief. *Id.*

Plaintiffs commit a lot of real estate trying to convince the Court that the County Plaintiffs have standing. But the cases cited by Plaintiffs do not support their argument and are not binding on this Court. Further, not a single case cited presents a situation where a political subdivision was determined to have standing in an action against its creator for a deprivation of rights. Defendants will discuss these cases *seriatim.*

The County Plaintiffs first cite to cases brought by the City of Philadelphia against federal agencies, which are inapplicable to this case. *See City of Philadelphia v. Klutznick*, 503 F.Supp. 603 (E.D. Pa. 1980) (city may maintain action against Federal Bureau of the Census). *See also City of Philadelphia v. SEC*, 434 F.Supp. 281 (E.D. Pa. 1977) (city may bring suit against Securities Exchange Commission). Next, they cite a case where standing is not even discussed. *County Comm'rs Ass'n of Pa. v. Dinges*, 935 A.2d 926 (Pa. Cmwlth. 2001). The County Plaintiffs then move on and discuss a facial challenge to the constitutionality of amendments to the Education Empowerment Act. *Harrisburg Sch. Dist. V. Hickok*, 781 A.2d 221 (Pa. Cmwlth. 2001). But this was a facial challenge to the statute and legislative process

itself, not an as applied constitutional challenge as is presented here. *Doc. 56* at 42-43 ("[t]he equal protection claim is based on … the easing of restrictions in some counties but not others. … The First Amendment claim is based on the impact … as it concerns the Plaintiff Counties in particular...").

Perhaps recognizing that they fare no better in discussing *Robinson Township v. Commonwealth,* 637 A.3d 536 (2016), and *Wartluft v. Milton Hershey School.,* 400 F.Supp.3d 91 (M.D. Pa. 2019), Plaintiffs omit key information from their discussion of the cases. Plaintiffs argue that *Robinson Township* establishes the standing of local governments to sue state officials. *Doc. 56* at 44. What Plaintiffs fail to mention is that the claims presented in *Robinson Township* were brought under the Pennsylvania Constitution. Plaintiffs here do not present any claims under the Pennsylvania Constitution; rather, they only allege deprivations of their federal constitutional rights.[11] It is this attempt to assert challenges to purported federal constitutional rights that deprives them of standing. *Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 40 (1933) ("[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator"). Similarly, when discussing *Wartluft*, Plaintiffs posit that "[a]s long as the requirement of Article III injury-in-fact is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, also may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim." *Doc. 56* at 44. Plaintiffs present this holding out of context. Plaintiffs fail to mention that the *Wartluft* Court was addressing a

[11] Plaintiffs also argue that they have standing under the Pennsylvania Constitution to challenge Defendants' Orders. *Doc. 56* at 47. But such a claim has not been pled and is not properly before this Court for determination. *See Doc. 1.*

party's standing to bring a claim under the Fair Housing Act and not for a deprivation of federal constitutional rights. In full, the Court stated:

> [t]he sole requirement for standing to sue **under the Fair Housing Act** is the [Article] III minima of injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered 'a distinct and palpable injury.' So long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.

Watrluft, 400 F.Supp.3d at 100 (internal quotations and citations omitted) (emphasis added).

In the end, Plaintiffs do not cite to a single case that supports their standing claim. This is because as political subdivisions of the Commonwealth, the County Plaintiffs may not bring Section 1983 claims for a deprivation of purported federal constitutional rights against the Commonwealth or its officials in their official capacity. As a result, their claims fail as a matter of law and their request for a declaratory judgment must be denied.

III. The Business Plaintiffs' substantive due process claim fails because they have not established a violation of a fundamental liberty interest and the Business Closure Orders and stay-at-home orders do not shock the conscience.

The Business Plaintiffs posit that the Business Closure Orders "interfered with the concept of 'ordered liberty' as protected by the Fourteenth Amendment." *Doc. 56* at 1, 17-18. A substantive due process claim requires a plaintiff to establish not just ***any*** interest protected by the Fourteenth Amendment but rather a "particular interest" that would give rise to protection by substantive due process. *Chainey v. Street*, 523 F.3d 200, 219 (3d Cir. 2008). Plaintiffs cannot and have not done so. Their interest in operating a business during a disaster emergency is not protected by substantive due process and they cannot demonstrate that Defendants' actions shock the conscience.

A. Plaintiffs' interest in operating a business is not protected by substantive due process.

"'[T]wo very different threads' make up 'the fabric of substantive due process': substantive due process relating to legislative action and substantive due process relating to non-legislative action." *Newark Cab Ass'n v. City of Newark*, 901 F.3d 146, 155 (3d Cir. 2018) (quoting *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000)). For a non-legislative claim—*e.g.*, a challenge to an executive action—to establish the "threshold matter" of a protected interest, a plaintiff must show a "particular quality" of interest and not simply any interest protected by due process. *Nicholas*, 227 F.3d at 139-40. "[T]his particular quality 'depends on whether that interest is fundamental under the United States Constitution.'" *Newark Cab Ass'n*, 901 F.3d at 155 (quoting *Nicholas*, 227 F.3d at 140). Substantive due process "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). In analyzing substantive due process claims, the Supreme Court requires courts to provide "a careful description of the asserted fundamental liberty interest." *Id.* (internal quotation marks and citations omitted). "Courts have been generally reluctant to expand the scope of substantive due process protection." *Newark Cab Ass'n*, 901 F.3d at 155.

The Supreme Court has summarized fundamental liberty interests as including "the rights to marry, have children, direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Glucksberg*, 521 U.S. at 720 (internal citations omitted). The Supreme Court has since clarified (but not necessarily expanded) that these fundamental liberties also include the right to engage in private sexual activity, *Lawrence*

v. Texas, 539 U.S. 558, 567 (2003); the "right of parents to make decisions concerning the care, custody, and control of their children," *Troxel v. Granville*, 530 U.S. 57, 66 (2000); and marriage equality, *Obergefell v. Hodges*, 135 S.Ct. 2584, 2604-05 (2015).

Property interests are generally not protected by substantive due process because "[p]rotected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975). Because the courts have narrowly limited the scope of liberties protected by substantive due process, "the only protected property interests" held to invoke substantive due process "involved ownership of real property." *Newark Cab Ass'n*, 901 F.3d at 155.

Plaintiffs contend that they have "the right 'to engage in any of the common occupations of life.'" *Doc. 56* at 19. Plaintiffs' position is based upon a broad statement by the Supreme Court in *Meyer v. Nebraska*, 262 U.S. 390 (1923), as quoted by the Eastern District in *McCool v. City of Philadelphia*, 494 F.Supp.2d 307 (E.D. Pa. 2007). This argument stretches the limits of Plaintiffs' substantive due process rights. As noted by the Third Circuit, "[t]he Supreme Court has already held that *Meyer* may not be read to constitutionalize all executive actions that affect the pursuit of a profession in any way." *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 404 (3d Cir. 2000) (citing *Conn v. Gabbert*, 526 U.S. 286 (1999)). In analyzing this limitation, the Court explained:

> *Meyer* involved a prosecution of a teacher who violated a statutory bar on the teaching of a foreign language. In reversing the conviction on due process grounds, the Supreme Court uttered the broad and celebrated language about the right to engage in any of the common occupations of life. ... The case turned, however, on a direct bar to the teacher's teaching, as well as the concurrent interference in parental rights over children.

Id. The Business Closure Orders did not bar Plaintiffs from engaging in their chosen professions. Rather, the Orders simply closed the physical locations of Plaintiffs' businesses for a temporary period to halt the spread of disease. Accordingly, *Meyer* is "too slender a reed on which to rest [their] substantive due process claim[s]." *Boyanowski*, 215 F.3d at 404.

Moreover, a Third Circuit panel in an unpublished opinion explicitly rejected the argument that there is any fundamental right to earn a living. *See Wrench Transp. Sys., Inc. v. Bradley*, 340 F. App'x. 812, 815 (3d Cir. 2009) ("[T]he right to 'engage in business'" is "more similar to the type of intangible employment rights that this Court has rejected as not protected by substantive due process than the real property interests which can be protected by substantive due process"). *See also Saucon Valley Manor, Inc. v. Miller*, 392 F.Supp.3d 554, 570-71 (E.D. Pa. 2019) (holding that a plaintiff had no fundamental interest in personal care home license); *Liberty Bell Temple III v. Trenton City Police Dep't*, No. 16-cv-1339, 2019 WL 4750836, at *13 (D.N.J. Sept. 30, 2019) (finding no substantive due process right to "conduct a legitimate business"); *Flanders v. Dzugan*, 156 F.Supp.3d 648, 665 n.10 (W.D. Pa. 2016) (plaintiff had no "constitutionally protected property interest in his business"); *Chester Cty. Aviation Holdings, Inc. v. Chester Cty. Aviation Auth.*, 967 F.Supp.2d 1098, 1110 (E.D. Pa. 2013) (holding that ability to operate a business at an airport was not protected by substantive due process). And beyond this, Plaintiffs' novel contention that there is a substantive due process right in operating a private business would be at odds with clear Third Circuit authority, which provides that there is no equivalent substantive due process right even for an individual ***directly employed*** by the state. *See Nicholas*, 227 F.3d at 142. As Plaintiffs have not demonstrated any substantive due process violation due to the temporary closure of their physical business locations, this claim must be denied.

B. Plaintiffs have failed to establish a conscience-shocking deprivation of their constitutional rights.

Even if Plaintiffs had a substantive due process right at stake, Defendants' actions were consistent with their due process obligations. The Supreme Court has "emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 846. In other words, "the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Id.* at 848. With this backdrop, the Supreme Court held that state action violates due process only when it "shocks the conscience." *Id.* at 846.

Both the Supreme Court and the Third Circuit have made it clear that the "shocks the conscience" standard depends to some extent on the facts of a particular case, but it has certain guideposts. "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Lewis*, 523 U.S. at 849. Conduct with less than a specific intent to injure may rise to the conscious-shocking level, but only when the state official has time and means for "deliberation about the proper course of conduct." *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 64 (3d Cir. 2002) (citing *Lewis*). In a "hyperpressurized environment," an intent to cause harm is usually required. On the other hand, in cases where deliberation is possible and officials have the time to make "unhurried judgments," a plaintiff need only show deliberate indifference. *Sanford v. Stiles*, 456 F.3d 298, 309 (3d Cir. 2006). To show deliberate indifference sufficient to shock the conscience, a complaint must contain sufficient facts to show that the defendant "acted with willful disregard for or deliberate indifference to plaintiff's safety." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d

902, 910 (3d Cir. 1997). "In other words, the state's actions must evince a willingness to ignore a foreseeable danger or risk." *Id.* Unconstitutional conduct must be the result of a state official's "***deliberate, callous decisions***." *Id.* at 911 (emphasis added).

This is not a situation that fits within the framework for conscience-shocking, arbitrary government action. In fact, it is quite the opposite. The Administration was "very quickly reacting to a public health emergency, a pandemic, the likes of which had [ ] never been seen in the Commonwealth or nationally, internationally, in 100 years." *7-22 Tr.* at 19-22. As Mr. Robinson noted, "[t]here had never been a circumstance in anyone's lifetime where this type of action was taken or was needed to be taken." *7-22 Tr.* at 81:14-15. The Administration was "doing [its] best to create a response to it that was understandable by the public … given the criticality of preventing people from moving around and spreading the disease in the early days of the virus." *7-22 Tr.* at 81:15-20. While the Business Closure Orders certainly had a detrimental effect on Pennsylvania's economy, it was the product of a necessary, calculated decision given the grave danger that the state faced from COVID-19. And the Administration's decision to apply the Business Closure Orders only to certain businesses was equally calculated. The Defendants examined business categories established by The North American Industry Classification System (NAICS), a "standardized system" maintained by the United States Census Bureau, that "distinguishes between different types of businesses." Based upon these categories, a team of economic development professionals determined which of the industry groups were necessary to sustain life. *7-22 Tr.* at 86:5-88:5, 88:22-89:1.

In reality, Plaintiffs raise nothing more than a public policy disagreement with the Defendants' determination as to which physical business locations would remain open and which would be temporarily closed and how the Commonwealth should reopen. Plaintiffs readily

admit this disagreement and generally opine they could do better despite lacking any of the expertise that guided the Administration. *7-17 Tr.* at 19:19-22, 20:2-13, 43:17-44:33, 56:12-18, 83:21-23, 88:25-89:10, 113:18-114:4, 120:3-16, 121:23-122:7, 142:22-143:5, 151:7-11, 171:19-21, 223:5-21. The Pennsylvania Supreme Court correctly recognized, "[i]t is not for this Court, but rather for the Governor pursuant to the powers conferred upon him by the Emergency Code, to make determinations as to what businesses, or types of businesses, are properly placed in either category." *DeVito*, 227 A.3d at 903. "[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.... [I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 27 (1989) (internal quotation marks and citations omitted). *See also Whitmore v. Arkansas*, 495 U.S. 149, 161 (1990) ("It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case"); *Williamson, 348 U.S. at 488*) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought").

Plaintiffs have not demonstrated a current or ongoing violation of their substantive due process rights; therefore, their claim for declaratory judgment must be denied.

IV. Plaintiffs cannot establish an equal protection violation because the Business Closure Orders and reopening plan are rationally related to a legitimate governmental interest and Plaintiffs have not been treated differently than any similarly situated individual, business, or county.

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." U.S. CONST.

amend. XIV § 1. The Commonwealth's creation of a classification is not "per se unconstitutional or automatically subject to heightened judicial scrutiny." *Maldonado v. Houstoun*, 157 F.3d 179, 184 (3d Cir.1998). If a "classification 'neither burdens a fundamental right nor targets a suspect class, [it will be upheld] so long as it bears a rational relation to some legitimate end.'" *Id.* (quoting *Vacco v. Quill*, 521 U.S. 793, 799 (1997)) (alteration omitted). And only "a classification that trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage ... must meet the strict scrutiny standard, under which a law must be narrowly tailored to further a compelling government interest." *Schumacher v. Nix*, 965 F.2d 1262 at 1266 (3d Cir. 1992) (citation, alteration, and internal quotation marks omitted). Here, the Business Closure Orders and reopening plan did not differentiate based upon any suspect class; therefore, rational basis review applies.

"Rational basis is a very deferential standard." *Newark Cab Ass'n v. City of Newark*, 901 F.3d 146 at 156 (3d Cir. 2018). It is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Government action survives rational basis review under the equal protection clause "if there is any reasonably conceivable state of facts that could provide a rational basis" for treating the plaintiff differently. *United States v. Walker*, 473 F.3d 71, 77 (3d Cir. 2007) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). "[T]he principles of equal protection are satisfied 'so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.'" *Id.* (quoting *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 107 (2003)). Further, the Constitution does not require state

officials to treat all entities "alike where differentiation is necessary to avoid an imminent threat" to health and safety. *Jones v. N. Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977). *See also Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies"). Plaintiffs allege that the Commonwealth's Business Closure Orders and reopening plan violate their equal protection rights. Both arguments fail.

A. The Defendants' Reopening Plan

Plaintiffs take issue with Defendants' decision to reopen the Commonwealth on a county by county basis.[12] Whether the Defendants' plan was wise, or the best course of action, is not for Plaintiffs to decide. It is not for the Court to decide either. While "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement," that decision constitutionally belongs to state officials. *South Bay United Pentecostal Church v Newsom*, 140 S.Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring in the denial of the application for injunctive relief) (internal citations, quotation marks, and alterations omitted). "When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad," which means that generally "they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *Id.*

[12] Plaintiffs argue that making decisions based upon county lines is arbitrary. *Doc. 56* at 28. But many statutes and regulations distinguish based upon county lines or regional borders (e.g. representation for public office, taxes, education, post offices and environmental protection). Reopening on a county by county basis allowed for decisions to be made based upon well-established dividing lines understood by Pennsylvania residents.

As with the Business Closure Orders and stay-at-home orders, decisions about reopening were made with an eye toward "protect[ing] the public from the novel and completely unprecedented pandemic that was striking Pennsylvania, to protect public health." *7-22 Tr.* at 136:20-23. Plaintiffs ask this Court to act as a Monday morning quarterback and second-guess these decisions. The Court should decline the invitation. Plaintiffs contend the reopening plan was "devised to, by definition, treat the Counties, and the residents of the Counties, differently." *Doc. 56* at 15. This is untrue. In reality, the Plan was devised to promote "relief, reopening, and recovery." *Doc. 47-7.* To "keep Pennsylvanians alive and repair the damage [COVID-19] has caused across Pennsylvania." *Id.* Based upon the advice and recommendation of numerous medical and economic development experts, Defendants adopted a plan that allowed counties to reopen as it was safe to do so. *Doc. 37*, ¶¶ 16-21. *See also 7-22 Tr.* at 198:2-12, 200:9-203:3. The same criteria was used in making reopening decisions for each county, and the same restrictions apply to all non-life-sustaining businesses and public gatherings as their resident counties move through the phases of the reopening plan.[13] *Doc. 37*, ¶¶ 16-19, 21, 25. There is simply no evidence that any Plaintiff was treated differently than a similarly situated individual, business, or county with respect to reopening. As such, their equal protection claim fails and their request for a declaratory judgment must be denied.

B. The Business Closure Orders

The Business Plaintiffs make no attempt to allege their businesses are life-sustaining or that they are similarly situated to life-sustaining businesses. *See Doc. 1,* generally. Instead, they complain that their non-life-sustaining businesses were treated differently than life-sustaining

[13] Defendants acknowledge that on July 15 additional targeted mitigation efforts were announced with respect to bars, restaurants, and nightclubs. *Doc. 48-5.* None of the Plaintiffs in this matter fall within the impacted industries; therefore, this Order is not relevant.

businesses. *Doc. 56* at 31. Plaintiffs are comparing apples to oranges. For example, Lee McDonald argues he was treated differently than Lowe's Companies, Inc. ("Lowe's") and The Home Depot, Inc. ("Home Depot"). *Doc. 30.* Yet, he admits that while he sells appliances just like Lowe's and Home Depot, he does not sell life-sustaining products such as cleaning supplies, roofing supplies, electrical supplies, batteries or propane. *7-17 Tr.* at 134:9-135:3, 146:25-147:9. It is these differences that resulted in Lowe's and Home Depot being categorized as life-sustaining and R.W. McDonald & Sons, Inc. ("R.W. McDonald") being categorized as non-life-sustaining. It is also these differences that demonstrate R.W. McDonald is not similarly situated to his proffered comparators; therefore, he cannot establish an equal protection violation.

The same is true with respect to the drive-in Plaintiffs who complain that their concession stands could not remain open while local pizza and ice cream shops could. But Plaintiffs acknowledge their primary business purpose is to show movies and their concession stands are only open while movies are being shown or other private events are being held. *7-17 Tr.* at 176:20-177:9, 201:11-202:4, 203:18-21. This differentiates them from the local restaurants whose primary purpose is to sell food and, thus, negates their equal protection argument. *7-17 Tr.* at 184:10-15. To establish an equal protection violation Plaintiffs must establish they are being treated differently than individuals, businesses or counties who are "similarly-situated in all other material respects." *Evancho v. Pine-Richland School Dist.*, 237 F.Supp.3d 267, 285 (W.D. Pa. 2017). They have not done so. Moreover, their entire argument is based upon past events that cannot support a claim for declaratory relief. *See Doc. 56.*

The Business Closure Orders were issued "to limit the scale and scope of personal interactions as much as possible in order to reduce the number of new infections." *Doc. 37*, ¶6. *See also 7-22 Tr.* at 209:19-20. The most effective way to do this would have been to close all

businesses and schools. *Id.* at ¶7. But this was not feasible because people needed access to certain products and services to survive. *Id.* at ¶8. In order to strike the correct balance between limiting personal interactions and maintaining access to life-sustaining products and services, the Commonwealth allowed businesses who provide life-sustaining products and services to remain open while closing the physical locations of all others.[14] *Id.* at ¶9. None of Plaintiffs' businesses falls into the life-sustaining category and all were treated the same as other non-life-sustaining businesses. Currently, all of Plaintiffs' businesses are open. *7-17 Tr.* at 34:3-13, 41:6-8, 44:4-6, 45:15-46:5, 62:14-63:4, 97:12-98:13, 142:16-17, 171:12-13, 178:12-13, 193:14-17, 208:18-19, 216:11-12, 222:19-20. And Plaintiffs acknowledge they are subject to the identical restrictions as other non-life-sustaining businesses throughout the Commonwealth that are similarly situated. *7-17 Tr.* at 52:10-13, 53:4-6, , 76:24-25, 106:17-22, 171:14-16, 178:14-16, 193:18-21, 208:20-22, 214:17-19, 216:20-217:2, 222:24-223:4. Indeed, just as the Carlisle Car Show is permitted to operate as a flea market at 50% occupancy,[15] so too is Starlight Drive-In.[16] *Doc. 64-1, 7-17 Tr.*

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[14] Contrary to Plaintiffs' assertions, these types of containment measures are neither new nor unprecedented. Sarah Boateng, Executive Deputy Secretary for the Department of Health, testified that these are "typical public health measures" that have been used to combat other viruses. Specifically, the Commonwealth used "many of the same mitigation steps" to fight the 1918 pandemic, including "the closing of bars, saloons, cancellation of vaudeville shows, as they called them, and cabarets, the prohibition of large events." Additionally, with diseases like polio "there had been the closure of schools and public swimming pools." Finally, Ms. Boateng noted that "even in the more recent times … with small measle outbreaks and the like, [the Department has] isolated and quarantined individuals." *7-22 Tr.* at 203:22-204:13.

[15] This is the same limit applicable to the drive-in theaters for its normal operations. The congregate limit only applies indoors or when individuals are outside their vehicles. Targeted Mitigation Order – Frequently Asked Questions, Department of Health website, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Guidance/Targeted-Mitigation-FAQ.aspx ("Drive-in movies or drive-in entertainment events may occur still under the Order. The drive-in complex or special event organizers must post and enforce rules regarding social distancing, mask wearing when outside of the car, and generally encourage people to stay in their cars and have strict procedures for reducing the number of people at points of

at 193:16-17 (confirming drive-in has been hosting Sunday flea markets since June). *See also, Doc. 48-5* (congregate limit applicable to "events and gatherings"), *7-22 Tr.* at 207:15-18 (congregate limits do not apply to regular business operations). Likewise, the Candidate Plaintiffs[17] admit they have at all times been—and continue to be—subject to the same restrictions as their similarly situated opponents. *7-17 Tr.* at 74:2-5, 108:12-109:6, 148:24-149:5, 159:21-160:1, 164:2-5. Because of this, Plaintiffs have not proven an equal protection violation and their claim must be denied.[18]

V. The Business Closure Orders do not infringe on Plaintiffs' First Amendment rights because the orders are content-neutral and issued in furtherance of a substantial governmental interest

"The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction." "Even in a traditional public forum, the government may impose content-neutral time, place, or manner restrictions provided that the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Startzell v. City of Philadelphia,* 533 F.3d 183, 197 (3d

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congregation (like shared restrooms or concession stands); that is, individuals may not congregate indoors in groups of greater than 25, nor outdoors (outside of their cars) in groups of 250 or more").

[16] No other Plaintiff operates a flea market; therefore, they are not similarly-situated to the Carlisle Car Show.

[17] The term "Candidate Plaintiffs" refers to Mike Kelly, Marci Mustello, Daryl Metcalfe, and Tim Bonner.

[18] Plaintiffs' Brief discusses the waiver process as part of its equal protection argument. *Doc. 56* at 32. Because this Court has already ruled that the waiver process is not currently at issue in this matter, there is no need to address this argument. *Doc. 15* at 8.

Cir. 2008) *quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791. The restrictions imposed by the Business Closure Orders satisfy this test.

The Pennsylvania Supreme Court has opined, "[t]here is no question that the containment and suppression of COVID-19 and the sickness and death it causes is a substantial governmental interest." *DeVito*, 227 A.3d at 902-03. Plaintiffs conveniently ignore this holding. They likewise ignore the fact that the Middle District recently analyzed the same issue with respect to candidate Plaintiffs and determined no First Amendment violation existed. *Benner v. Wolf*, No. 20-cv-775, 2020 WL 2564920, *7-8 (M.D. Pa., May 21, 2020). The *Benner* Court held that "[p]rotecting lives is among the most substantial of government interests, and we see no indication whatsoever that the Orders are content-based. They apply equally to all citizens of Pennsylvania and to a great number of non-life sustaining businesses, regardless of message." *Id.* at *8. The Court went on to determine that alternative avenues are available to candidate plaintiffs noting:

> the Governor's Orders do not limit political candidates and their supporters from speaking on television and radio; the Orders do not prevent any campaign from sending out direct mailings; the Orders do prohibit putting up yard signs; and, the Orders do not stop anyone from speaking to the press. Indeed, protesting is also not curtailed, even when social distancing protocols are not adhered to.

Id. (internal citations and quotation marks omitted). While not binding on this Court, both holdings are certainly persuasive. Plaintiffs have chosen to ignore the developing body of case law related to the very Orders at issue. This Court should not do the same.

The bottom line is the Candidate Plaintiffs want to be able to campaign however they choose. But this is not the law. The evidence demonstrates that while the candidates may not

have been able to campaign door-to-door as they claim they would like,[19] there have always been reasonable alternatives available to get their message out. *7-17 Tr.* at 74:12-17, 74:25-76:7, 109:7-110:5, 110:17-111:21, 149:6-150:9, 152:5-13, 160:2-162:16, 163:11-19 Plaintiffs admit they utilize web pages and social media to communicate with voters which, as the Pennsylvania Supreme Court noted, "has become the lifeblood for the exercise of First Amendment rights." *DeVito,* 227 A.3d. at 903. Likewise, the Business and County Plaintiffs acknowledged they could communicate via alternative means. *7-17 Tr.* at 22:23-25, 30:22-31:11, 44:7-13, 45:11-14, 62:10-11, 63:5-8, 141:10-13, 143:6-22, 173:15-17, 178:17-179:4, 193:22-194:3, 217:3-8. Just because Plaintiffs do not believe these are the most effective methods of campaigning or communicating does not mean these avenues do not exist.

Perhaps most important to this Court's analysis is the fact that Plaintiffs have not alleged any current or ongoing First Amendment violation. Plaintiffs' brief avers that "[a] few days after her testimony, Plaintiff Mustello had scheduled a fundraiser that was adversely impacted by Defendants' July 15, 2020, Orders." *Doc. 56* at 36. But this assertion belies the actual testimony. Plaintiff Mustello testified that her event was scheduled to be held outdoors and the number of anticipated attendees did not exceed the applicable congregate limits. *7-17-20 Tr.*, 166:20-167:6. No other Plaintiff offered testimony regarding an alleged current or ongoing violation.

Similarly, Plaintiffs' argument that Governor Wolf marched in a protest in violation of his own orders is inapposite. In the midst of a global pandemic, there was social unrest

[19] Even without stay-at-home orders in effect, door-to-door campaigning may not have been productive in light of the virus. As noted by Representative Bonner, "the voters don't even want to open their door at this point in time." Even with telephone campaigning he found that voters "did not want to talk politics or the election … [t]hey viewed it as an intrusion." *7-17 Tr.* at 152:3-4, 154:8-10.

following the death of George Floyd in Minnesota on May 25, 2020. People across the country took to the streets to make their voices heard, including in Pennsylvania. While it is true that Governor Wolf decided to participate in one such rally, it is also true that Defendants did not take any enforcement action against those who attended similar rallies or protests based upon a violation of the stay-at-home orders. *Doc. 37,* ¶3. *See also 7-22 Tr.* at 176:2-10. Indeed, several Plaintiffs testified that either there were rallies in their county or they personally attended a rally and were not aware of any enforcement action. *7-17 Tr.* at 26:17-27:18, 77:2-78:16, 115:15-116:1, 117:2-118:6, 162:19-25, 163:3-10. This is because the Administration recognized the importance of allowing Pennsylvania residents to exercise their First Amendment rights (Defendants made "limited exceptions for those Constitutionally protected speech, such as protests, and the individuals had the right to protest and demonstrate"). . *7-22 Tr.* at 176:2-10. *See also, Benner,* 2020 WL 2564920, *8 ("Indeed, protesting is also not curtailed, even when social distancing protocols are not adhered to").

In introducing their First Amendment claim, Plaintiffs argue that they, and all other Pennsylvanians, were "locked down" and "threatened with arrest" violating their "right to intrastate travel." *Doc. 56* at 14.[20] But the evidence does not support this contention. While the stay-at-home orders instructed Pennsylvanians to stay home whenever possible, there was no restriction on travel and the guidance issued made clear that people were permitted to leave their homes. *Doc. 37,* ¶¶10-12. The Administration never intended an aggressive enforcement approach; rather, they sought to educate. *7-22 Tr.* at 61:1-3, 62:13-4. Mr. Robinson explained "there was no intent that people would be stopped on the roads for a violation of the stay-at-

[20] While Plaintiff presents this claim as part of their First Amendment argument, it is more properly a substantive due process claim. Regardless of under which theory this claim is analyzed, it fails as a matter of law.

home order. That was not the intent. And so to the extent that that happened early on, that was not what was contemplated under the order, and we worked to change that." *7-22 Tr.* at 68:9-13. Moreover, there is no evidence that any Plaintiff, or resident of a County Plaintiff, was ever questioned by law enforcement, let alone actually threatened with arrest. *7-22 Tr.* at 27:19-28:19, 32:5-12, 45:8-10, 60:22-24, 80:10-16, 96:12-18, 98:14-18, 119:2-120:2, 152:19-25, 217:14-16. The Third Circuit has held, "just as the right to speak cannot conceivably imply the right to speak whenever, wherever and however one pleases—even in public fora specifically used for public speech—so too the right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases—even on roads specifically designed for public travel." *Lutz v. City of York, Pa.*, 899 F.2d 255, 269 (3d Cir. 1990). The Court added, "[u]nlimited access to public fora or roadways would result not in maximizing individuals' opportunity to engage in protected activity, but chaos." *Id.* Particularly relevant here is the fact that the stay-at-home orders are no longer in effect and there is no current or ongoing restriction on any Plaintiffs' ability to travel. Put simply, Plaintiffs have not demonstrated that any current restrictions impact their First Amendment rights; therefore, their First Amendment claim must be denied.

Plaintiffs argue the Defendants' Orders resulted in "egregious constitutional violations." *Doc. 56* at 15. But they offered no support for this argument and, perhaps most relevant at this juncture, they offered no evidence of any current or ongoing violation of any constitutional right. To support their argument, Plaintiffs rely upon language from a recent United States Supreme Court case but fail to acknowledge that all of the quoted language comes from dissenting opinions and has no precedential value. *See Calvary Chapel Dayton Valley v. Sisolack*, ___ U.S. ____, 2020 WL 4251360 (July 24, 2020). Plaintiffs further ignore the fact that the courts that

have analyzed the specific orders at issue in this case have determined they were a proper exercise of the Commonwealth's police powers and were necessary to protect the lives of Pennsylvanians. *See DeVito,* 227 A.3d at 891 (Defendants "utilized a recognized tool, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19"); *Benner at *6-7* ("government interference was required to stem the tide of the COVID-19 public health crisis," and there was no support for Plaintiffs' argument "that the Orders were not necessary to slow the spread of COVID-19, nor that they were an unreasonable reaction to the global pandemic"). This Court should do the same.

CONCLUSION

What once was and what may never be does not define the present. Plaintiffs have presented nothing more than public policy arguments and have failed to demonstrate any current or ongoing deprivation of their substantive due process, equal protection or First Amendment rights. Accordingly, their request for a declaratory judgment must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen M. Romano, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing **Defendants' Post Hearing Brief in Opposition to Plaintiffs' Complaint for a Declaratory Judgment**, via ECF, on the following:

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DATE: August 19, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COUNTY OF BUTLER, et al.,	:	NO. 2:20-cv-677-WSS
Plaintiffs,	:	
vs.	:	
THOMAS W. WOLF, et al.,	:	
Defendants.	:	

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF COMPLAINT FOR DECLARATORY JUDGMENT

AND NOW, come Plaintiffs, County of Butler, et al., by and through their attorneys Dillon McCandless King Coulter & Graham, LLP, per Thomas W. King, III, Esquire; Ronald T. Elliott, Esquire; Thomas E. Breth, Esquire; and Jordan P. Shuber, Esquire, to file the within Reply Brief in Support of Complaint for Declaratory Judgment.

I. ARGUMENT.

Defendants assert that the Plaintiffs have failed to prove that there is an actual controversy because "any alleged harm ceased with the end of the Waiver Program and the beginning of the Commonwealth's reopening." Nothing could be further from the truth. Although the Defendants cite to testimony from Sam Robinson, Deputy Chief of Staff to the Governor, who testified that he was authorized to speak on behalf of the Governor, they failed to recite important testimony that Mr. Robinson gave.

Specifically, Mr. Robinson testified "It is the case that – it is the case that the governor continues to have a disaster declaration in place; and based on the course and development of the virus, that certain restrictions could be put back in place. But anything beyond that would be speculative, and I think that I would say that ultimately obviously the governor retains those

authorities under state law, has been upheld by numerous courts at this time, but that we do not have specific plans to reinstate those phases of the reopening at this time, and it's not been discussed."[1] Further, when asked about Defendants' July 15, 2020, Orders, Mr. Robinson answered "So when you talk about possibilities, in the broad sense that anything is possible and the governor retains authorities, that is – you know, it is possible that some of these pieces could be reinstated."[2]

Defendants' Brief likewise ignores Mr. Robinson's testimony on behalf of the Governor about the on-going application of the Red-Yellow-Green phases (with no end in sight after Green), which all of Pennsylvania is currently under. When asked about the Green Phase and Defendants' most recent Orders, Mr. Robinson confirmed that "It imposes different restrictions on people in the green phase, yes. … they are different than what were imposed under the original green phase order, yes. … they are more restrictive, I suppose, in the sense that in some instances the occupancy requirements are lower. If that means more restrictive, then yes."[3]

Defendants' Brief also ignores the plain language of this Court's Memorandum Opinion and Order of Court. This Court from the beginning heard from the Defendants that the entire Commonwealth, although in the Green Phase, was still subject to restrictions on businesses, and with "substantial" limitations on occupancy. Those restrictions and limitations exist today and have likewise been enhanced by more restrictions imposed July 15, 2020, by the Governor on bars and restaurants and with the closure of all "nightclubs." The restaurants of the drive-in-theater Plaintiffs are most certainly subject to those restrictions as applicable. And the congregate rules continue to this date as applicable to all the "business Plaintiffs" and as applicable to the "political"

[1] *Robinson TR, pp. 37-38.*
[2] Id.
[3] *Robinson TR, p. 42.*

Plaintiffs. They likewise affect the private property interests of the Counties as applied to owned County fairgrounds, swimming pools, and County parks. Congregate rules also have caused substantial revenue losses to the Counties as a result of the inability of their hotels to hold events indoors in excess of 25 persons or outdoors in excess of 250 persons (and the loss of "bed" tax revenue).

The County hotels generate "bed tax" revenue that funds County tourism agencies in Pennsylvania, including the tourism agencies of the County Plaintiffs.[4] As was testified to by Commissioners Lohr, the revenue losses from the closure of the Casinos (on-going restricted in attendance) and hotels such as Nemacolin (professional golf eliminated and indoor/outdoor events severely restricted by the congregate rules), are substantial.[5]

Further, the candidate Plaintiffs are certainly subject to not only the modified Green congregate rules as they pertain to political gatherings, but the Governor has made it clear that he intends to continue to enforce his rules by use of the police on an on-going basis.[6] In fact, the Governor warned the President of the United States not to exceed 250 people attending his acceptance speech at the sacred Gettysburg Battleground National Park. In addition, the on-going congregate limits on the business Plaintiffs as well as the County operated fairs continue to cause the loss of revenue and operations at such locations. The candidate Plaintiffs continue to be affected by all the congregate rules and the disparate treatment of commercial speech (Carlisle Car Show) and political speech.

As early as 1923, the United States Supreme Court in *Commonwealth of Pennsylvania vs. West Virginia*[7] found that the prospective enforcement of competing state laws was enough to

[4] *16 P.S. § 1770.10.*
[5] *Lohr, TR p. 100.*
[6] *ECF 57-2 Local Police Enforcement Rules – Second Motion for Judicial Notice.*
[7] *Commonwealth of Pennsylvania vs. West Virginia, 262 U.S. 553, 43 S. Ct. 658, 67 L.Ed. 117 (1923)*

justify the requirement that a "justiciable controversy" existed to comply with Article III of the United States Constitution. Mr. Justice Van Devanter opined "What is sought is not an abstract ruling on that question, but an injunction against a withdrawal presently threatened and likely to be productive of great injury. … But (o)ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough."[8] In the present case, the injury is certainly on-going and in the absence of a vaccine or cure, certainly "impending."

A federal declaratory judgment action decided by the U.S. Supreme Court in *Steffel v. Thompson*[9] is highly relevant. The Supreme Court, in this Vietnam-era case, held that an "actual controversy" existed even when prosecution has merely been "threatened." Mr. Justice Brennan opined " ... petitioner has alleged threats of prosecution that cannot be characterized as 'imaginary or speculative.'"[10] The Court further found that the arrest of petitioner's companion (note the arrest and threatened arrests of Pennsylvanians for violations of Defendants' Orders in this case) "is ample demonstration that petitioner's concern with arrest has not been chimerical."[11] As Mr. Justice Brennan announced "The federal courts have the solemn responsibility to guard, enforce, and protect every right granted or secured by the Constitution of the United States."[12]

In *State of Washington v. Donald J. Trump, al.,*[13] a United States District Judge, Barbara Jacobs Rothstein, found that the "expected" loss of state and local tax revenue was enough to confer Article III standing on the State of Washington. And in *El Paso County vs. Trump, al.,*[14] a

[8] *Id.*
[9] *Steffel v. Thompson , 415 U.S. 452 (1974).*
[10] *Steffel at 457-458*
[11] *Steffel at 457-458*
[12] *Steffel at 457-458*
[13] *State of Washington v. Donald J. Trump, al., 441 F. Supp. 3d 1101 (2020)*
[14] *El Paso County vs. Trump, al., 408 F. Supp. 3d 840 (2019)*

Texas County could pursue injunctive relief because it was likely to incur harm in the absence of relief and that it established an injury in fact, that a.) is concrete and particularized; b.) is fairly traceable to the challenged action of Defendant; and, c.) is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[15]

In the case at bar, these Plaintiffs have pled and the record in this case establishes a "case and controversy" legally enough to invoke judicial relief under Article III of the United States Constitution. The challenges evidence concrete and particularized injury, that is traced to the unconstitutional actions of the Defendants and which injuries can be redressed by a favorable decision. As to Defendants' argument that the case is "moot," the U.S. Supreme Court has held that a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."[16] And the Ninth Circuit has reiterated that "the party alleging mootness bears a heavy burden in seeking dismissal." Defendants have not met their burden. This case is not "moot" as set forth herein.

Lastly, Footnote 10 is improper and outside of the record of this case. And Defendants' attempt to attack Plaintiffs' statement of the issues by boldening and italicizing past tense verbs, seems to show a lack of awareness (at best) that Plaintiffs merely recited the statement of issues set forth by this Court in its Memorandum Opinion and Order in this case.[17] The Governor's Enforcement Guidance of August 6[18] clearly establishes the on-going intent to enforce his Orders.

In their Brief, Defendants assert that there is no "fundamental liberty interest" at issue; and, that Defendants' Orders do not shock the conscience.[19] The caselaw relied upon by Defendants in

[15] *El Paso County vs. Trump, al., 408 F. Supp. 3d 840 (2019)*
[16] *Chafin v. Chafin, 113 S.Ct. 1017, 185 L.Ed.2d 1 (2013).*
[17] *Memorandum Opinion and Order, pp. 2-3.*
[18] *ECF Doc. 57-1 and 57-2*
[19] *Defendants' Brief, p 12.*

support of their assertion of no fundamental liberty interest relate to "state-created" property or contract rights. In the present case, Business Plaintiffs' are not asserting rights related to "state-created" property or contract rights. Business Plaintiffs are asserting that their right "to engage in any of the common occupations of life, … and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[20], are being violated in an arbitrary and capacious manner.

Defendants completely ignore that arbitrary nature of the life sustaining, non-life sustaining classifications; the complete lack of any statutory authority for Defendants Order as currently applied to Business Plaintiffs and other businesses in the Commonwealth of Pennsylvania; the arbitrary nature of the congregate rules as currently applied to Business Plaintiffs and other businesses in the Commonwealth of Pennsylvania; and, Defendants' conscience shocking disregard of their own Orders.

As detailed in Plaintiffs' Post Hearing Brief, Defendants formed a policy team of five or six political appointees, none of whom were experts in infection control, and authorized them to categorize businesses into two classifications life sustaining and non-life sustaining businesses. None of the policy team members possessed any medical background, medical training, expertise in public health issues or expertise in infection control. Despite their complete and utter lack of expertise in the control of infectious diseases, the policy team members unilaterally classified businesses. These determinations were made without the assistance or formality of written definitions, criteria, guidelines, rules, or any other commonly utilized practice to safeguard consistency and fairness in a decision making process (even assuming such process itself is constitutional). "… a classification that is drawn on suspect lines or burdens a fundamental right

[20] *Meyer v. Nebraska, 262 U.S. 390, 399.*

will be subject to strict scrutiny, passing constitutional muster only if it is narrowly tailored to serve a compelling state interest.[21]

In his most recent Order, July 15, 2020, Defendant Wolf asserts that "in addition to my general powers, during a disaster emergency I am authorized specifically to" and Defendant Wolf lists eight (8) expressed powers as contained in the Emergency Management Services Code.[22] None of the eight (8) expressed powers, as cited by Defendant Wolf, provide him with the authority to restrict Business Plaintiffs' constitutional right to operate their businesses. There is no statutory authority for Defendants' Business Closure Orders as they related to Business Plaintiffs and their ability to operate their business free from arbitrary government restrictions.

Much like the classification of businesses, Defendants congregate orders continue to be applied in an arbitrary manner. In *Weiman v. Updegraff*,[23] the Court held that the "indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." There is no evidence that Business Plaintiffs, their business operations and/or their employees are more likely to spread COVID-19 than "life sustaining" businesses and other businesses that Defendants have permitted to operate without restriction.

As detailed in Plaintiffs' Post Hearing Brief, the Supreme Court has for half a century now . . . spoken of the cognizable level of executive abuse of power as that which shocks the conscience. The Third Circuit Court of Appeals has consistently acknowledged that executive actions violate substantive due process only when such actions shock the conscience; however, the meaning and application of this standard varies depending upon the factual context of the actions. The record in this case contains at least two conscience shocking examples of Defendants' willful violations

[21] *Dunn Blumstein, 405 U.S. 330, 335, Clark v. Jeter, 486 U.S. 456, 461(1988).*
[22] *35 Pa.C.S.§7301(f).*
[23] *Weiman v. Updegraff , 344 U.S. 183 (1952)*

of their own Orders. While publicly threatening criminal prosecution and encouraging citizens to report violations of his Orders, Defendant Wolf's participating in a public march with hundreds of protesters, none of which, were prosecuted. Once again, while publicly threatening criminal prosecution and encouraging citizens to report violations of Defendants' Orders, Defendant Levine entered into a Confidential Agreement permitting the Carlisle Car Show and other future events at the facilities to proceed in direct violation of Defendants Orders. For months, Defendants attempted to keep the terms of the Agreement from the public.

There is no evidence in the record to substantiate Defendants' claim that Defendants' Orders are rationally related to the legitimate governmental interest of slowing the infection rate of the COVID-19 virus. As detailed in Plaintiff's Post Hearing Brief, the Defendant Secretary of Health (as well as the Governor) chose not to testify in this case. Defendants' chose to have 3 lay witnesses testify and pursuant to Rule 701 of the Federal Rules of Evidence, these witnesses are precluded from offering opinions that require scientific, technical or other specialized knowledge with the scope of Rule 702. Hence Defendants produced no medical witness or expert, despite claiming to have a stable of epidemiologists and physicians on staff. Thus, all medical opinion testimony from any of Defendants' witnesses cannot be relied upon as evidence that Defendants' Orders are rationally related or narrowly tailored to a legitimate governmental interest. Further, there is no evidence that non-life sustaining business are more likely to transmit or spread COVID-19 than life sustaining businesses.

Further, Defendants assertion that Plaintiffs have not been treated differently than any "similarly situated" individual, business or county is not a denial of discrimination, but an acknowledgement of it. The arbitrary classification of Plaintiffs into "similarly situated" individuals, businesses or county is per se discrimination without justification. Defendants' have

failed to produce any evidence that the business activities of "life sustaining" businesses are less likely to transmit COVID-19 than Plaintiffs' business activities. Defendants' assertion of equal treatment is, in actuality, equal discrimination because the basis of the unequal treatment has nothing to do with the alleged governmental interest. Defendants Orders are not based upon which businesses are more likely to transmit the COVID-19. The Orders are based upon the alleged importance or necessity of the business as arbitrarily determined by Defendants. All of Defendants' determinations lack any medical foundation or justification within the record before this Court.

As indicated earlier, the candidate Plaintiffs are certainly subject to not only the modified Green congregate rules as they pertain to political gatherings, but the Governor has made it clear that he intends to continue to enforce his rules by use of the police on an on-going basis.[24] In fact, the Governor warned the President of the United States not to exceed 250 people attending his acceptance speech at the sacred Gettysburg Battleground National Park.

Unlike the treatment of the Carlisle Car Show facility, the on-going congregate limits on Business Plaintiffs, as well as the County owned and operated fairs, farmer show grounds, pools and other areas, continue to cause the loss of revenue and operations at such locations and facilities. The candidate Plaintiffs continue to be affected by the congregate rules and the disparate treatment of commercial speech (Carlisle Car Show) and political speech.

The One-Plaintiff Rule enables the Plaintiff Counties' claims to proceed to an adjudication on the merits, which Defendants have conflated with standing. The One-Plaintiff Rule "has been invoked in [many]…Supreme Court cases and…has figured in several of the highest-profile cases of the last several years." Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 Duke

[24] *Local Police Enforcement Rules – Second Motion for Judicial Notice.*

L.J. 481, 484 (2017).[25] This rule holds that "a court entertaining a multiple-plaintiff case may dispense with inquiring into the standing of each plaintiff as long as the court finds that one plaintiff has standing to pursue the claims before the court." *Id.* at 481. The One-Plaintiff Rule "has played a role in many of the highest-profile controversies of recent years, including litigation over the Affordable Care Act, immigration policy, and climate change." *Id.*

Here, the instant case is no different and concerns the deprivation of Plaintiffs' constitutional rights by Defendants on an unprecedented level. Since at least one plaintiff has standing in this action, this Court can, and should, decide not only the Business Plaintiffs' claims, but also the County Plaintiffs' claims because it is critical to the preservation of Plaintiffs' rights, not only now, but in the future. *See e.g. Texas v. U.S.,*[26] ; *King v. Burwell.*[27]

Defendants' admonishment of the Plaintiff Counties is irrelevant here. Defendants' arguments related to: the section headings of Plaintiffs' Complaint, Plaintiffs' citations, and Plaintiffs' counsel's statement at July 17th hearing are red herrings. These arguments ignore the County Plaintiffs' overarching argument that they cannot be required by Defendants to restrict the constitutional rights of their citizens. Political subdivisions may sue their creating state under a limited set of circumstances, and "the Supreme Court and courts of appeals *have shied away from erecting an absolute bar*."[28] Furthermore,

> "[w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power

[25] This law review article provides a comprehensive academic critique for the Court to consider.
[26] *Texas v. U.S., 945 F.3d 355, 377–78 (5th Cir. 2019); King v. Burwell, 576 U.S. 473 (2015).*
[27] *King v. Burwell, 576 U.S. 473 (2015).*
[28] *Kerr v. Polis, 930 F.3d 1190, 1195 (10th Cir. 2019).*

> acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.'"[29]

Defendants criticize County Plaintiffs for "commit[ing] a lot of real estate trying to convince the Court that the County Plaintiffs have standing."[30] However, Defendants' argument is contradictory and ignores the record testimony that the County Plaintiffs have Article III standing based upon their reputational and economic harm as well as their individual property interest harm.[31] Alternatively, County Plaintiffs have standing under the "One-Plaintiff Rule," which stands for the proposition that if at least one Plaintiff has standing, it is not necessary to address all the Plaintiffs' standing. *See e.g. Town of Chester, N.Y. v. Laroe Estates, Inc.*,[32] (where the Supreme Court stated, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint."). There is no dispute that the Business and Political Plaintiffs have standing, thus, the One-Plaintiff Rule applies here. Each issue will be addressed in turn.

Defendants' argument is that the County Plaintiffs have no claim on the merits because they have no constitutional rights that may be enforced against the state or state officials. This argument conflates an argument regarding standing with an argument on the merits. The Supreme Court of the United States has consistently held that these arguments are not the same. *See e.g. Assn. of Data Processing Serv. Organizations, Inc. v. Camp,*[33] (where the Supreme Court held that, "[t]he 'legal interest' test goes to the merits…[t]he question of standing is different.").

Here, Defendants have limited their argument regarding the County Plaintiffs strictly to standing. However, in doing so, Defendants fail to provide any reason to doubt that the County

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[29] *Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).*
[30] *Defendants' Brief in Opposition p. 10.*
[31] Defendants correctly state on Page 9 of the Opposition, "[t]o be clear, Defendants are not arguing that the County Plaintiffs could never have standing to file a lawsuit." Then, they contradictorily state on Page 10 of the Opposition that, "[w]ithout Section 1983, [the County] Plaintiffs have no path to…relief."
[32] *Town of Chester, N.Y. v. Laroe Estates, Inc.,137 S. Ct. 1645, 1651 (2017)*
[33] *Assn. of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970)*

Plaintiffs have met the requirements necessary to satisfy the elements of Article III standing: 1) injury in fact, 2) causation, and 3) redressability. *See e.g. Susan B. Anthony List v. Driehaus,*[34] (where the Supreme Court held that plaintiffs established Article III standing based on the treat of future enforcement), citing *Lujan v. Defenders of Wildlife, Inc.*,[35]; *El Paso County v. Trump,*[36] (where the court stated that, "unlike the plaintiffs in *Lujan*, who only had intentions of visiting a targeted area without any concrete plans, [the] County is the 'object' or target of the government action."[37]

Plaintiff Counties have standing under Article III based upon the record testimony. Defendants ignore the record and Article III standing because it is fatal to their argument. *See e.g. Amato v. Wilentz,*[38] (where the defendant did "not argue that the County lacks Article III standing to bring the claims, *nor could he,* for the County certainly alleges actual and threatened injury (loss of revenue) that is fairly traceable to the defendant's action and that could be redressed by a favorable decision on the merits.") (emphasis added) (citation and footnote omitted). Instead, Defendants conflate Section 1983 with Article III. This is a fatal flaw in Defendants' argument.

County Plaintiffs have all suffered reputational harm. During the July 17, 2020 hearing, Commissioner Lohr testified:

> "Well, our county has had issues in the past as far as just the reputation of the county, and we have worked hard in the previous term of commissioners to really make that change. And when our county itself, the businesses and the personnel that are there, get hit with something like this and the businesses are closed and have to struggle to stay alive, it just hurts all the way around as far as the reputation and also the mentality of the county."[39]

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[34] *Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 (2014)*
[35] *Lujan v. Defenders of Wildlife, Inc., 504 U.S. 555 (1992)*
[36] *El Paso County v. Trump, 408 F. Supp. 3d 840, 848 (W.D. Tex. 2019)*
[37] *Comm. on Jud., U.S. H.R. v. McGahn, 415 F. Supp. 3d 148, 192 (D.D.C. 2019).*
[38] Amato v. Wilentz, 952 F.2d 742, 747 (3d Cir. 1991)
[39] *Lohr, 7/17/20 TR, p. 89.*

The Affidavits of all four County Plaintiffs also addressed the harm suffered to their reputations because their citizens had to flee their borders to enjoy their basic fundamental rights:

> "The Governor's Orders generally affected the reputation and well-being of our County, especially in light of disparate treatment of businesses and citizens in neighboring West Virginia."[40]

> "[O]n May 1, 2020, we were flooded with calls, emails and protests from small business owners who were about to lose their lifelong investments and livelihoods…As a result of this arbitrary procedure, many Butler County citizens traveled to surrounding counties in…Ohio and West Virginia…In Butler County our residents have been threatened with arrest…They have also been refused the right to worship…Our only records is to seek protection from the Federal Courts on behalf of our County and our citizens…"[41]

> "Following the shutdown order on March 19, hundreds of constituents called, emailed, or Facebook messaged…to levy complaints…Our proximity to West Virginia, which has much lighter restrictions on businesses…caused many of the individuals to…to travel across state lines…This caused many Washington County businesses to lose a significant portion of their customer base…"[42]

> "Never did we feel adequately informed, have the ability to discuss our future options or present[] any evidence that our voice was being heard…Greene County's proximity to the West Virginia border caused many residents to travel outside of the County."[43]

Additionally, the record supports the County Plaintiffs suffered irreparable and ongoing economic harm:

> "The closure of our offices also required many employees to telecommute. The cost of arranging such a telecommuting program for our employees was in excess of $100,000."[44]

> "Washington County had to secure additional laptops, upgrade existing laptops, secure polycom hardware, and upgrade the network infrastructure for the County…This has caused the County to expend significant funds of approximately $119,226.45…In addition to this the hotel industry in Washington County was decimated by being forced to close down, causing the County and its designee to

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[40] *ECF Doc. No. 23 p. 2, Affidavit of Commissioner Lohr, Fayette County.*
[41] *ECF Doc. No 20 pp. 5-9, Affidavit of Commissioner Osche, Butler County.*
[42] *ECF Doc. No. 21 p. 3, Affidavit of Commissioner Irey-Vaughan, Washington County.*
[43] *ECF Doc. No. 22, Affidavit of Commissioner Belding, Greene County.*
[44] *ECF Doc. No 20 p. 2, Affidavit of Commissioner Osche, Butler County.*

> lose significant hotel tax revenue, estimated projected losses are approximately $1.4 to $1.6 million.[45]
>
> "These accommodations required upgrades to our technological infrastructure, the purchase of new equipment, and long hours from our Technology Information staff…We currently estimate the cost to implement telecommuting to be $255,000…Total unbudgeted expenses for our poor county are estimated at more than $951,000…"[46]
>
> "Fayette County had to expend significant funds to update our technological infrastructure, refurbish laptops, buy new laptops, and to pay our technology information department to execute and carry out these upgrades."[47]

These economic harms are obvious, and the damage is irreparable and ongoing. Further, all four County Plaintiffs maintain private property that has been either restricted or permanently shut down, resulting in lost revenue that can never be recovered.[48]

II. CONCLUSION.

For all the reasons set forth herein, the Plaintiffs respectfully request this Honorable Court to declare that the aforesaid Orders violated the constitutional rights asserted in the Complaint and Plaintiffs' Briefs.

Respectfully submitted,

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By:/s/Thomas W. King, III, Esquire
Attorney for Plaintiffs

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[45] *ECF Doc. No. 21, pp. 2, 3, Affidavit of Commissioner Irey-Vaughan, Washington County. Washington County also lost revenue from large events, including the "Adios" and casino. 7/17/20 TR, p. 48.*

[46] *ECF Doc. No. 22, pp. 3, 4, Affidavit of Commissioner Belding, Greene County. Greene County also lost revenue from the cancellation of their fair. 7/17/20 TR, pp. 66, 67.*

[47] *ECF Doc. No. 23, p. 2. Fayette County also lost revenue from Nemacolin as well as hotel and casino taxes. 7/17/20 TR, p. 100.*

[48] *See ECF Doc. No. 46 Ex. 1-4, Plaintiff Counties Supplemental Affidavits.*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COUNTY OF BUTLER, *et al*, *Plaintiffs*, v. THOMAS W. WOLF, *et al*, *Defendants*.	Civil Action No. 2:20-cv-677 Hon. William S. Stickman IV

OPINION

WILLIAM S. STICKMAN IV, United States District Judge

I. INTRODUCTION

The COVID-19 pandemic has impacted every aspect of American life. Since the novel coronavirus emerged in late 2019, governments throughout the world have grappled with how they can intervene in a manner that is effective to protect their citizens from getting sick and, specifically, how they can protect their healthcare systems from being overwhelmed by an onslaught of cases, hindering their ability to treat patients suffering from COVID-19 or any other emergency condition. In this Country, founded on a tradition of liberty enshrined in our Constitution, governments, governors, and courts have grappled with how to balance the legitimate authority of public officials in a health emergency with the Constitutional rights of citizens. In this case, the Court is required to examine some of the measures taken by Defendants—Pennsylvania Governor Thomas W. Wolf and Pennsylvania Secretary of Health Rachel Levine—to combat the spread of the novel coronavirus. The measures at issue are: (1)

the restrictions on gatherings[1]; and, (2) the orders closing "non-life-sustaining" businesses and directing Pennsylvanians to stay-at-home.

After reviewing the record in this case, including numerous exhibits and witness testimony, the Court believes that Defendants undertook their actions in a well-intentioned effort to protect Pennsylvanians from the virus. However, good intentions toward a laudable end are not alone enough to uphold governmental action against a constitutional challenge. Indeed, the greatest threats to our system of constitutional liberties may arise when the ends *are* laudable, and the intent *is* good—especially in a time of emergency. In an emergency, even a vigilant public may let down its guard over its constitutional liberties only to find that liberties, once relinquished, are hard to recoup and that restrictions—while expedient in the face of an emergency situation—may persist long after immediate danger has passed. Thus, in reviewing emergency measures, the job of courts is made more difficult by the delicate balancing that they must undertake. The Court is guided in this balancing by principles of established constitutional jurisprudence.

This action seeks a declaration that Defendants' actions violated and continue to violate the First Amendment, as well as both the Due Process and Equal Protection clauses of the Fourteenth Amendment. Specifically, Plaintiffs argue that numeric limitations on the size of gatherings violates the First Amendment. They argue that the components of Defendants' orders closing "non-life-sustaining" businesses and requiring Pennsylvanians to stay-at-home violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

[1] Pursuant to the July 15, 2020 Orders of Defendants, indoor events and gatherings of more than 25 people are prohibited, and outdoor events and gatherings of more than 250 people are prohibited. (ECF Nos. 48-5, 48-6).

To examine the issues presented by Plaintiffs, the Court first had to determine what type of scrutiny should be applied to the constitutional claims. As explained at length below, the Court believes that ordinary canons of scrutiny are appropriate, rather than a lesser emergency regimen. The Court next had to determine whether the question of the business closure and related stay-at-home provisions of Defendants' orders remain before it. The record shows that they do. The language of the orders themselves, as well as testimony adduced at trial, show that these provisions are merely suspended, not rescinded, and can be re-imposed at Defendants' will. This, in addition to the voluntary cessation doctrine, compelled the Court to examine issues relating to these components of Defendants' orders.

Having addressed the necessary threshold questions, the Court proceeded to the merits of Plaintiffs' claims and, after carefully considering the trial record and the parties extensive pre and post-trial briefing holds and declares: (1) that the congregate gathering limits imposed by Defendants' mitigation orders violate the right of assembly enshrined in the First Amendment; (2) that the stay-at-home and business closure[2] components of Defendants' orders violate the Due Process Clause of the Fourteenth Amendment; and (3) that the business closure components of Defendants' orders violate the Equal Protection Clause of the Fourteenth Amendment.

II. BACKGROUND

Pennsylvania saw its first presumptive positive cases of COVID-19 in the early days of March 2020. (ECF No. 40, p. 1; ECF No. 37, ¶ 6). On March 6, 2020, Governor Wolf signed a Proclamation of Disaster Emergency noting that "the possible increased threat from COVID-19

[2] Plaintiffs challenge only the business closure provisions which had designated every business in the Commonwealth as "life-sustaining" or "non-life-sustaining" and closed the later. They do not challenge components of those orders which permit the businesses to open subject to certain restrictions, such as percentage occupancy limits. As such, the Court's opinion does not impact those components of Defendants' orders.

constitutes a threat of imminent disaster to the health of the citizens of the Commonwealth" such that it was necessary "to implement measures to mitigate the spread of COVID-19." (ECF No. 42-1).

The Governor's proclamation of a disaster emergency vested him with extraordinary authority to take expansive action by executive order. Within the Governor's office, a "group" "was formed to work on issues related to the pandemic" both on the "economic development side and pertaining to the business closures" and "on the health side, teams were formed to work to understand the progress of the pandemic." (ECF No. 75, p. 17).[3] It was an "interdisciplinary team" with "individuals from the [G]overnor's office and agencies being pulled together for specific tasks," including Secretary Levine. (ECF No. 75, pp. 17-18). The "group" never reduced its purpose to writing, although "its stated purpose was to develop mechanisms to respond to that emerging threat [i.e. a pandemic] in a very quick period of time." (ECF No. 75, p. 26). The names of its members remain unknown.

Part of the "group" consisted of a "reopening team" and a "policy team." (ECF No. 75, pp. 17-21). None of their "hundreds, if not thousands" of meetings were open to the public, no meeting minutes were kept, and "formality was not the first thing on [their] minds." (ECF No. 75, pp. 21, 26, 28, 30-31, 89-90, 134). The "reopening team" was "working to develop the various guidance that was necessary to respond to the pandemic," and it "published that on the Commonwealth's website and put out press releases." (ECF No. 75, pp. 27-28, 32). It also formulated the stay-at-home order. (ECF No. 75, pp. 33-34). The "policy team" was tasked with creating the distinctions between "life-sustaining" and "non-life-sustaining" businesses as well as preparing responses for the public on frequently asked questions. (ECF No. 75, pp. 21,

[3] Throughout this Opinion, page citations are to pages of the applicable trial transcripts and pleadings, and not the ECF document page number.

35). Its members consisted solely of employees from the Governor's policy and planning office, none of whom possess a medical background or are experts in infection control. (ECF No. 75, pp. 22-25, 100-01).

The Governor never attended meetings of the various teams, but he "participated in regular calls and updates with members of his administration" and he "was briefed and consulted on key matters." (ECF No. 75, p. 29). Ultimately, without ever conducting a formal vote, the teams, by consensus when "there [was] a favorite approach everyone agree[d] on," put together the scope of an order and submitted it to the Governor through his Chief of Staff for approval.[4] (ECF No. 75, pp. 45-47, 96-97). All of the orders, according to the Governor, were geared "to protect the public from the novel and completely unprecedented pandemic" and "prevent the spread of the disease." (ECF No. 75, pp. 136-37). According to the Executive Deputy Secretary for the Pennsylvania Department of Health, from a public health perspective, the intent of the orders "was to reduce the amount of interaction between individuals." (ECF No. 75, p. 209; ECF No. 37, ¶ 7).

The various orders issued by Defendants will be discussed with specificity in the analysis that follows as they relate to the particular legal issues in this case. That said, by way of background, the Court would note the following relevant events.

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[4] For example, in regard to the July 15, 2020 Order that contained a limit of twenty-five percent of the stated fire code maximum occupancy for indoor dining, policy team members reviewed models from other states - Florida, Colorado, Texas, and California - "and then made a decision based on collective input of the policy folks, the legal folks, the Department of Health and health professionals as to what would be the best approach to move forward." (ECF No. 74, pp. 49-51). As to the provision in the Order that alcohol could only be served in the same transaction as a meal, "it was one of the features of the California order that we [i.e. the policy team] did look at and thought it made sense." (ECF No. 74, p. 59). At the end of this process, the proposal for the Order was submitted to the Governor for approval. (ECF No. 74, p. 51).

On March 13, 2020, the Governor announced a temporary closure of all K-12 Pennsylvania schools. (ECF No. 42-2). On March 19, 2020, the Governor issued an Order regarding the closure of all Pennsylvania businesses that were "non-life-sustaining."[5] (ECF No. 42-2). Enforcement of the Order was to begin on March 21, 2020 at 12:01 a.m. (ECF No. 42-2). Secretary Levine issued a similar order on March 19, 2020. (ECF No. 42-14). Defendants then issued stay-at-home orders for Allegheny County, Bucks County, Chester County, Delaware County, Monroe County, Montgomery County, and Philadelphia County. (ECF Nos. 42-15 and 42-16). Enforcement of the Governor's Order was slated to commence on March 23, 2020 at 8:00 PM. (ECF No. 42-15). Amended stay-at-home orders were issued by Defendants from March 23, 2020 through March 31, 2020 to include other counties. (ECF Nos. 42-17 through 42-29). On April 1, 2020, Defendants ordered all citizens of Pennsylvania to stay-at-home effective immediately "except as needed to access, support, or provide life-sustaining businesses, emergency or government services." (ECF Nos. 42-30, 42-31, 47-2). Then, on April 9, 2020, the Governor extended the school closures for the remainder of the 2019-2020 academic year. (ECF No. 47-5).

The Governor issued a "Plan for Pennsylvania" on or about April 17, 2020, that included a three phased reopening plan – moving from the "red phase" to the "yellow phase" to the "green

[5] A waiver process, whereby businesses could challenge their designation as "non-life-sustaining," existed from March 19, 2020 until April 3, 2020. (ECF No. 75, p. 226). A team of economic development professionals within the Pennsylvania Department of Community and Economic Development was assembled to review the waiver requests. (ECF No. 75, p. 214). Originally, there were twelve team members and by the end of two weeks there were forty team members plus fifty members answering the telephones. (ECF No. 75, p. 214). By the time the waiver period closed, 42,380 waiver requests were received. 6,124 were granted, 12,812 were denied, and 11,636 were determined not to need a waiver. (ECF No. 38, ¶ 14).

phase" - with corresponding "work & congregate setting restrictions" and "social restrictions."[6] (ECF Nos. 47- and 42-81). The stay-at-home provisions of Defendants' orders were extended through June 4, 2020.[7] (ECF Nos. 42-48, 42-49, 42-50, and 42-51). On May 7, 2020, Defendants issued an order for limited opening of businesses, lifting the stay-at-home requirements in certain counties and moving them into the "yellow phase," but imposing gathering limits. (ECF Nos. 42-52 and ECF Nos. 42-53). Throughout May and June, various counties were moved by Defendants from the "yellow phase" to the "green phase." (ECF Nos. 42-54 through 42-61, and 42-63 through 42-75). The final county, Lebanon, was moved into the "green phase" effective July 3, 2020. (ECF No. 42-74). The "green phase" eased most restrictions with the continued suspension of the stay-at-home and business closure orders. (ECF No. 75, pp. 36-37, 144-45).

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[6] The phases were developed by members of senior staff in the Governor's Office who thought it would be "understandable" to the citizens of Pennsylvania. (ECF No. 75, p. 75). The Commonwealth partnered with Carnegie Mellon University to review demographic and health data for each county. When considering the movement of counties from the "yellow phase" to the "green phase," the Department of Health relied on four metrics:

> (1) whether the county had stable, decreasing, or low confirmed case counts for the immediately proceeding 14-day period compared to the previous 14-day period; (2) whether the contacts of cases within the county were being monitored; (3) whether the Polymerase Chain Reaction (PCR) testing positivity rate, meaning the number of positive cases per 100,000 population, had been less than 10% for the past 14 days; and (4) whether hospital bed use was 90% per district population in the county.

(ECF No. 37, ¶ 25). 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." (ECF No. 39, ¶ 17).

[7] While the Governor's representative testified that "our approach throughout the pandemic has not been to take an aggressive enforcement approach," the fact remains that Pennsylvanians were cited for violating the stay-at-home and business closure orders. (ECF No. 74, pp. 61-69; ECF Nos. 42-102, 48-7, 54-3).

On June 3, 2020, the Governor renewed his proclamation of disaster emergency for ninety days. (ECF No. 42-62). On July 15, 2020, Defendants issued "targeted mitigation" orders imposing limitations on businesses in the food services industry, closing nightclubs, prohibiting indoor events and gatherings of more than 25 persons, and prohibiting outdoor gatherings of more than 250 persons. (ECF Nos. 48-5, 48-6, 54-1). Most recently, on August 31, 2020, Governor Wolf renewed his proclamation of disaster emergency for ninety days stating "the COVID-19 pandemic continues to be of such magnitude and severity that emergency action is necessary to protect the health, safety, and welfare of affected citizens of Pennsylvania." (ECF Nos. 73, 73-1). This disaster declaration allows "based on the course and development of the virus, that certain restrictions could be put back in place." (ECF No. 75, p. 37).

Plaintiffs filed their Complaint on May 7, 2020, seeking a declaratory judgment that Defendants violated certain constitutional rights through the issuance of orders designed to combat the COVID-19 pandemic. Plaintiffs are comprised of three groups. The "County Plaintiffs" consist of the Counties of Butler, Fayette, Greene, and Washington, Pennsylvania. The "Political Plaintiffs" consist of the following individuals: Mike Kelly, an individual residing in the County of Butler and a member of the United States House of Representatives; Daryl Metcalfe, an individual residing in the County of Butler and a member of the Commonwealth of Pennsylvania House of Representatives; Marci Mustello, an individual residing in the County of Butler and a member of the Commonwealth of Pennsylvania House of Representatives; and Tim Bonner, an individual doing business in the County of Butler and a member of the Commonwealth of Pennsylvania House of Representatives. The "Business Plaintiffs" consist of the following: Nancy Gifford and Mike Gifford, d/b/a Double Image; Prima Capelli, Inc.; Steven Schoeffel; Paul F. Crawford, t/d/b/a Marigold Farm; Cathy Hoskins, t/d/b/a Classy Cuts Hair

Salon; R.W. McDonald & Sons, Inc.; Starlight Drive-In, Inc.; and, Skyview Drive-In, LLC. The Complaint asserted five counts under 42 U.S.C. § 1983: Count I - Violation of The Takings Clause; Count II – Substantive Due Process; Count III – Procedural Due Process; Count IV – Violation of Equal Protection; and, Count V – Violation of the First Amendment. (ECF No. 1).

On May 20, 2020, Plaintiffs filed a Motion for Speedy Hearing of Declaratory Judgment Action Pursuant to Rule 57 and a supporting brief. (ECF Nos. 9 and 10). Defendants filed their Response on May 26, 2020. (ECF Nos. 12 and 13). Telephonic oral argument occurred on May 27, 2020. By May 28, 2020 Memorandum Opinion and Order, the Court held that expedited proceedings were warranted to examine the claims in the Complaint at Count II by the Business Plaintiffs, at Count IV by all Plaintiffs, and at Count V by all Plaintiffs. The Court denied the motion as to Counts I and III. (ECF No. 15).

A Case Management Order was issued on June 2, 2020. (ECF No. 18). Expedited discovery commenced on June 12, 2020. (ECF No. 18). The parties agreed that all direct testimony for the Declaratory Judgment Hearing would be given via written Declarations and/or Affidavits and the parties filed those documents along with a Joint Stipulation of Facts and Joint Exhibits. (ECF Nos. 16, 19-34, 37-40, 42, 47, 48). Pre-hearing briefs were also submitted. (ECF Nos. 36, 40). The declaratory judgment hearing occurred over two days, July 17, 2020 and July 22, 2020, with eighteen witnesses testifying. (ECF Nos. 74 and 75). Afterward, the parties submitted comprehensive post-hearing briefs and additional adjudicative facts. (ECF Nos. 56, 59, 61, 64, 66, 67, 68, 71, 73).

III. ANALYSIS

A. THE COUNTY PLAINTIFFS CANNOT ASSERT CLAIMS UNDER SECTION 1983

Defendants argue that the County Plaintiffs—Butler, Fayette, Greene, and Washington Counties—are not proper plaintiffs. They contend that the County Plaintiffs lack standing to bring an action under 42 U.S.C. § 1983. The County Plaintiffs argue that they have standing on both an individual basis and as representatives of their citizens. The Court holds that County Plaintiffs are not proper parties.

The County Plaintiffs focus their argument on general concepts of Article III standing, pointing to areas where the Counties may be able to illustrate specific harm to them, as counties, resulting from Defendants' actions. The alleged harm includes "interference with the holding of public meetings that can be attended by all residents of the Counties, negative impacts on tax revenue, negative impacts on reputation, negative impacts on the citizens of the respective Counties, and loss of access to lawyers and law offices in those Counties." (ECF No. 56, p. 30). But even if these allegations of harm could establish general Article III standing, they are not enough to confer standing under Section 1983.

Section 1983 does not confer any substantive rights, but rather, merely provides a cause of action for the deprivation of constitutional rights under the color of state law. Counties are creatures of the state. They do not possess rights under the Constitution. They cannot assert a claim against the state—of which they are a creation—for violating rights that they do not possess. *See Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."); *see also Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf*, 324 F.

Supp. 3d 519, 530 (M.D. Pa. 2018) ("Counties, municipalities, and other subdivisions owing their existence to the state generally cannot assert constitutional claims against their creator."); *Williams v. Corbett,* 916 F. Supp. 2d 593, 598 (M.D. Pa. 2012) (same); *Jackson v. Pocono Mountain School District*, 2010 WL 4867615, at *3 (M.D. Pa. Nov. 23, 2010) ("[A] number of Circuits, including the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh, have all held that a political subdivision may not bring a federal suit against its parent state or its subdivisions on rights . . . .").

The County Plaintiffs have attempted to assert claims in their own right and as the representatives of their residents. While counties may undoubtedly litigate in many circumstances, as Defendants aptly note, well established law prohibits the County Plaintiffs from bringing claims of constitutional violations under Section 1983. As such, the County Plaintiffs are not proper parties and cannot obtain relief in this case. They are hereby dismissed as parties.

B. Constitutional Challenges to Defendants' Orders

1) "Ordinary" canons of constitutional review should be applied to Defendants' orders.

Before moving into the substance of Plaintiffs' constitutional claims, the Court will examine what "lens" it should use to review those claims. In other words, what is the appropriate standard, or regimen of standards, that the Court must use to weigh the constitutionality of the claims? Plaintiffs base their constitutional arguments on ordinary constitutional scrutiny, whereas Defendants argue that their actions should be afforded a more deferential standard as emergency measures relating to public health.

Over the last century, federal courts have developed a regimen of tiered scrutiny for examining most constitutional issues—rational basis scrutiny, intermediate scrutiny and strict

scrutiny. The appropriate standard depends on the nature of the claim and, specifically, the nature of the right allegedly infringed. In this case, Defendants point to the emergency nature of the challenged measures and correctly argue that they have broad authority under state police powers in reacting to emergency situations relating to public health and safety. They contend that the traditional standards of constitutional scrutiny should not apply, but rather, that a more deferential standard as articulated in *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905), should be used. Defendants contend that *Jacobson* sets forth a standard that grants almost extraordinary deference to their actions in responding to a health crisis and that, based on that deference, Plaintiffs' claims are doomed to fail. In other words, Defendants argue that no matter which traditional level of scrutiny that the underlying constitutional violation would normally require, a more deferential standard is appropriate.

In *Jacobson*, the Supreme Court upheld a Massachusetts statute empowering municipal boards of health to require that all residents be vaccinated for smallpox.[8] Jacobson was prosecuted for refusing to comply with the City of Cambridge's vaccination mandate. *Id.* at 13. He argued that the mandatory vaccine regimen "was in derogation of the rights secured to [him] by the preamble to the Constitution of the United States, and tended to subvert and defeat the purposes of the Constitution as declared in its preamble." *Id.* at 13-14. Jacobson also contended that the measure violated the Fourteenth Amendment and the "spirit of the Constitution." *Id.* at 14.

The Supreme Court rejected out-of-hand the arguments that the measure violated the Constitution's preamble or "spirit," explaining that only the specific, substantive provisions of the Constitution can give rise to an actionable claim of rights. The Supreme Court, likewise,

[8] The statute provided an exception for children who had a certificate signed by a physician representing that they were "unfit subjects for vaccination." *Id.* at 12-13.

rejected Jacobson's challenge under the Fourteenth Amendment. It explained that the States possess broad police powers which encompass public health measures:

> [a]lthough this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states.

Id. at 25. The Supreme Court explained that "the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactments as will protect the public health and the public safety." *Id.*

Although the *Jacobson* Court unquestionably afforded a substantial level of deference to the discretion of state and local officials in matters of public health, it did not hold that deference is limitless. Rather—it closed its opinion with a *caveat* to the contrary:

> Before closing this opinion we deem it appropriate, in order to prevent misapprehension [of] our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.

Id. at 38. There is no question, therefore, that even under the plain language of *Jacobson*, a public health measure may violate the Constitution.

Jacobson was decided over a century ago. Since that time, there has been substantial development of federal constitutional law in the area of civil liberties. As a general matter, this development has seen a jurisprudential shift whereby federal courts have given greater deference to considerations of individual liberties, as weighed against the exercise of state police powers. That century of development has seen the creation of tiered levels of scrutiny for constitutional claims. They did not exist when *Jacobson* was decided. While *Jacobson* has been cited by some modern courts as ongoing support for a broad, hands-off deference to state authorities in matters

of health and safety, other courts and commentators have questioned whether it remains instructive in light of the intervening jurisprudential developments.

In *Bayley's Campground, Inc. v. Mills*, __ F. Supp. 3d __, 2020 WL 2791797 (D. Me. May 29, 2020), a district court examined whether the governor of Maine's emergency order requiring, *inter alia*, visitors from out of state to self-quarantine, was constitutional. As here, before proceeding to its analysis of the substantive legal issues, the court examined how it should weigh the issues—according to a very deferential analysis purportedly consistent with *Jacobson*, as advocated by the governor, or under "regular" levels of scrutiny advocated by the plaintiffs. The district court examined *Jacobson* and, specifically, whether it warranted the application of a looser, more deferential, standard than the "regular" tiered scrutiny used on constitutional challenges. It observed: "[i]n the eleven decades since *Jacobson*, the Supreme Court refined its approach for the review of state action that burdens constitutional rights." *Id.* at *8 (citing *Planned Parenthood v. Casey,* 505 U.S. 833, 857 (1992)). *See also Planned Parenthood*, 505 U.S. at 857 (citing *Jacobson*, 197 U.S. 24-30) (affirming that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims."). The district court declined to apply a standard below those of the established tiered levels of scrutiny. It stated:

> [T]he permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review. This may help explain why the Supreme Court established the traditional tiers of scrutiny in the course of the 100 years since *Jacobson* was decided.

Bayley's Campground, at *8.

Justice Alito's dissent (joined by Justices Thomas and Kavanaugh) to the Court's denial of emergency injunctive relief in *Calvary Chapel Dayton Valley v. Sisolak*, __ U.S. ___, 2020

WL 4251360 (Jul. 24, 2020) (Alito, J., dissenting), also casts doubt on whether *Jacobson* can, consistent with modern jurisprudence, be applied to establish a diminished, overly deferential, level of constitutional review of emergency health measures.[9] In arguing that the Supreme Court should have granted the requested injunction, Justice Alito stated: "[w]e have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility." *Id.* at *1. Justice Alito pointed out:

> For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic.
>
> But a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.

Id. at *2. Justice Alito found unreasonable the argument that *Jacobson* could be used to create a deferential standard whereby public health measures will pass scrutiny unless they are "beyond all question a plain, palpable invasion of rights secured by the fundamental law." *Id.* at *5. Rather, he reasoned, "it is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic . . . . It is a considerable stretch to read the [*Jacobson*] decision as establishing the test to be applied when

[9] The Court is aware that neither the Supreme Court's denial of review, nor Justice Alito's dissent are precedential, however, in light of the facts and circumstances in this case, the Court finds Justice Alito's dissent instructive and persuasive regarding the issues presented.

statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case." *Id.* at *5.

The district court in *Bayley's Campground* cited to a recent scholarly article examining the type of constitutional scrutiny that should be applied to challenges to COVID-19 mitigation strategies—Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: the Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179 (2020).[10] The Court has reviewed the professors' paper and finds it both instructive and persuasive. There, the learned professors argue that *Jacobson* should not be interpreted as permitting the "suspension" of traditional levels of constitutional scrutiny in reviewing challenges to COVID-19 mitigation measures. *Id.* at 182 ("In this Essay, we argue that the suspension approach to judicial review is wrong—not just as applied to governmental actions taken in response to novel coronavirus, but in general."). The professors highlight three objections to an overly deferential "suspension" model standard of review:

> First, the suspension principle is inextricably linked with the idea that a crisis is of finite—and brief—duration. To that end, the principle is ill-suited for long-term and open-ended emergencies like the one in which we currently find ourselves.
>
> Second, and relatedly, the suspension model is based upon the oft-unsubstantiated assertion that "ordinary" judicial review will be too harsh on government actions in a crisis—and could therefore undermine the efficacy of the government's response. In contrast, as some of the coronavirus cases have already demonstrated, most of these measures would have met with the same fate under "ordinary" scrutiny, too. The principles of proportionality and balancing driving most modern constitutional standards permit greater incursions into civil liberties in times of greater communal need. That is the essence of the "liberty regulated by law" described by the Court in *Jacobson*.
>
> Finally, the most critical failure of the suspension model is that it does not account for the importance of an independent judiciary in a crisis—"as perhaps

[10] Lindsay F. Wiley is Professor of Law and Director, Health Law and Policy Program, American University Washington School of Law. Stephen I. Vladeck is the A. Dalton Cross Professor of Law, University of Texas School of Law. *Id.* at 179.

> the only institution that is in any structural position to push back against potential overreaching by the local, state, or federal political branches . . . . Otherwise, we risk ending up with decisions like *Korematsu v. United States*—in which courts sustain gross violations of civil rights because they are either unwilling or unable to meaningfully look behind the government's purported claims of exigency.

Id. at 182-83 (internal footnotes and citations omitted). These objections, especially the problem of ongoing and indefinite emergency measures, largely mirror the concern expressed by Justice Alito in *Calvary Chapel*.

The Court shares the concerns expressed by Justice Alito, as well as Professors Wiley and Vladeck, and believes that an extraordinarily deferential standard based on *Jacobson* is not appropriate. The Court will apply "regular" constitutional scrutiny to the issues in this case. Two considerations inform this decision—the ongoing and open-ended nature of the restrictions and the need for an independent judiciary to serve as a check on the exercise of emergency government power.

First, the ongoing and indefinite nature of Defendants' actions weigh strongly against application of a more deferential level of review. The extraordinary emergency measures taken by Defendants in this case were promulgated beginning in March—six months ago. What were initially billed as temporary measures necessary to "flatten the curve" and protect hospital capacity have become open-ended and ongoing restrictions aimed at a very different end—stopping the spread of an infectious disease and preventing new cases from arising—which requires ongoing and open-ended efforts. Further, while the harshest measures have been "suspended," Defendants admit that they remain in-place and can be reinstated *sua sponte* as and when Defendants see fit. In other words, while not currently being enforced, Pennsylvania citizens remain subject to the re-imposition of the most severe provisions at any time. Further, testimony and evidence presented by Defendants does not establish any specified exit gate or end

date to the emergency interventions. Rather, the record shows that Defendants view the presence of disease mitigation restrictions upon the citizens of Pennsylvania as a "new normal" and they have no actual plan to return to a state where all restrictions are lifted. It bears repeating; after six months, there is no plan to return to a situation where there are no restrictions imposed upon the people of the Commonwealth. Sam Robinson, a Deputy Chief of Staff to the Governor, testified as much when asked if there was a phase of reopening beyond the "green phase" where there would be no restrictions:

> Q. You can't move from green to no restrictions whatsoever? There's no way to do that under this system, right?
>
> A. So there are a number of options for, you know, what post green potentially could look like, and that could just be entirely removal of all restrictions or replacement with other restrictions, maybe not a color-coordinated system. There are certainly other options on the July 15th order that we've referenced from last week, certainly an approach that was a change that was not strictly speaking within the red/yellow/green framework as originally contemplated.
>
> And we are doing our best to respond to the pandemic nimbly and not being locked into a specific approach but to target areas where we see spread and things that we can do to balance the need to reopen the economy and continue moving Pennsylvania back towards the new normal that the governors and others have talked about while at the same time taking targeted mitigation steps to prevent the spread of the virus, which is what's embodied in that July 15th order.
>
> Q. What is the new normal? What does the governor mean by the new normal? What's that mean?
>
> A. Well, we're still evolving into it, but obviously it's more consciousness about steps to prevent the spread of COVID and ways that Pennsylvanians are having to be more conscious of those mitigation efforts and take steps to be responsible individually to protect fellow Pennsylvanians.

(ECF No. 75, pp. 70-71). Even when the existing restrictions are replaced, it appears to be the intent of Defendants to impose and/or keep in place some ongoing restrictions. Mr. Robinson testified that "early on it was sort of just assumed that beyond green was no restrictions, and that

may be ultimately where we get." (ECF No. 75, p. 75). However, the position is now less clear in that Mr. Robinson hedged on whether any future period of no restrictions can be foreseen. (ECF No. 75, p. 76) ("at the point that we are ready to remove all of the restrictions, we will have a discussion about how specifically to do that. ***It may be that the whole—you know, that whole system is replaced with just very limited restrictions***.") (emphasis added).

Courts are generally willing to give temporary deference to temporary measures aimed at remedying a fleeting crisis. Wiley & Vladeck, *supra* p. 16, at 183. Examples include natural disasters, civil unrest, or other man-made emergencies.[11] There is no question, as Justice Alito reasoned in *Calvary Chapel*, that courts may provide state and local officials greater deference when making time-sensitive decisions in the maelstrom of an emergency. But that deference cannot go on forever. It is no longer March. It is now September and the record makes clear that Defendants have no anticipated end-date to their emergency interventions. Courts surely may be willing to give in a fleeting crisis. But here, the duration of the crisis—in which days have turned into weeks and weeks into months—already exceeds natural disasters or other episodic emergencies and its length remains uncertain. Wiley & Vladeck, *supra* page 16, at 184. Faced with ongoing interventions of indeterminate length,[12] "suspension" of normal constitutional levels of scrutiny may ultimately lead to the suspension of constitutional liberties themselves.

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[11] *See generally Moorhead v. Farrelly*, 727 F. Supp. 193 (D. V.I. 1989) (discussing the destruction resulting from Hurricane Hugo); *United States v. Chalk*, 441 F.2d 1277 (4th Cir. 1971) (discussing widespread civil unrest resulting from racial incident); *In re Juan C.*, 28 Cal.App.4th 1093 (Ca. 1994) (discussing measures implemented to combat widespread looting and violence resulting from Los Angeles rioting).

[12] It is true that under 35 Pa.C.S.A § 7301(c), the Governor's declaration of emergency, and related measures, will expire after ninety days. However, the Governor is able to *sua sponte* issue a continued emergency declaration. In *Wolf v. Scarnati*, __A.3d__, 2020 WL 3567269 (Pa. Jul. 1, 2020), the Pennsylvania Supreme Court held that a vote of the legislature was powerless to vitiate the declaration, unless the governor signed off (as in normal legislation). *See id.* at *11

Second, ordinary constitutional scrutiny is necessary to maintain the independent judiciary's role as a guarantor of constitutional liberties—even in an emergency. While principles of balancing may require courts to give lesser weight to certain liberties for a time, the judiciary cannot abrogate its own critical constitutional role by applying an overly deferential standard.

While respecting the immediate role of the political branches to address emergent situations, the judiciary cannot be overly deferential to their decisions. To do so risks subordinating the guarantees of the Constitution, guarantees which are the patrimony of every citizen, to the immediate need for an expedient solution. This is especially the case where, as here, measures directly impacting citizens are taken outside the normal legislative or administrative process by Defendants alone. There is no question that our founders abhorred the concept of one-person rule. They decried government by fiat. Absent a robust system of checks and balances, the guarantees of liberty set forth in the Constitution are just ink on parchment. There is no question that a global pandemic poses serious challenges for governments and for all Americans. But the response to a pandemic (or any emergency) cannot be permitted to

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("because H.R. 836 was not presented to the Governor, and, in fact, affirmatively denied the Governor the opportunity to approve or veto that resolution, H.R. 836 did not conform with the General Assembly's statutory mandate in section 7301(c) or with the Pennsylvania Constitution."). Thus, in practical effect, absent a veto-override, the Governor's orders can be reissued without limit. Professors Wiley & Vladeck recognized that this situation could lead to the situation of the permanent emergency: "[a]t least under federal law, emergencies, once declared, tend not to end; the President can unilaterally extend national emergency declarations on an annual basis in perpetuity, and can be stopped only by veto-proof supermajorities of both houses of Congress. And unless courts are going to rigorously review whether the factual justification for the emergency measure is still present[,] . . . the government can adopt measures that wouldn't be possible during "normal" times long after the true exigency passed." Wiley & Vladeck, *supra* page 16, at 187. On August 31, 2020, the Governor renewed the emergency declaration, extending his extraordinary authority for an additional ninety days. (ECF No. 73-1). Again, absent an extraordinary veto-proof vote of the General Assembly, there is no limit on the number of times the Governor may renew the declaration and vest himself with extraordinary unilateral powers.

undermine our system of constitutional liberties or the system of checks and balances protecting those liberties. Here, Defendants are statutorily permitted to act with little, if any, meaningful input from the legislature. For the judiciary to apply an overly deferential standard would remove the only meaningful check on the exercise of power.

Using the normal levels of constitutional scrutiny in emergency circumstances does not prevent governments from taking extraordinary actions to face extraordinary situations. Indeed, an element of each level of scrutiny is assessing and weighing the purpose and circumstances of the government's act. The application of normal scrutiny will only require the government to respect the fact that the Constitution applies even in times of emergency. As the Supreme Court has observed: "[t]he Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency." *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 425 (1934).[13] Ordinary constitutional scrutiny will be applied.

2) The gathering limits imposed by Defendants' orders violate the First Amendment.

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[13] In a recent case brought in the Middle District of Pennsylvania, plaintiffs brought suit against Governor Wolf and others, contending that their constitutional rights were violated as a result of the Governor's Orders, and to that extent, requested the district court to temporarily restrain the enforcement of the Orders. *Benner v. Wolf*, __F. Supp. 3d _____, 2020 WL 2564920, at *1-3 (M.D. Pa. May 21, 2020). The district court addressed, *inter alia*, whether the Governor's Orders exceeded the permissible scope of his police powers, and in doing so, applied the deferential *Jacobson* standard of review. *Id.* at *6. The district court held that the plaintiffs had failed to establish that the Orders were not "reasonably necessary" or "unduly burdensome" because they could not provide evidentiary support to contradict the defendant's broad policy decisions. *Id.* The immediate case, however, is readily distinguishable because the Court now has the benefit of a developed evidentiary record, which includes specific reasoning and testimony from the parties. The Court also recognizes that the Pennsylvania Supreme Court's decision in *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020), addresses some of the federal constitutional issues presented in this case and the court reviewed those issues through a more deferential standard. While the Pennsylvania Supreme Court is final on questions of Pennsylvania law, it does not bind the Court on federal questions.

Defendants' July 15, 2020 Order imposes limitations on "events and gatherings" of 25 persons for indoor gatherings and 250 persons for outdoor gatherings. The Order defines "events and gatherings" as:

> ***A temporary grouping of individuals for defined purposes, that takes place over a limited timeframe, such as hours or days***. For example, events and gatherings include fairs, festivals, concerts, or shows and groupings that occur within larger, more permanent businesses, such as shows or performances within amusement parks, individual showings of movies on a single screen/auditorium within a multiplex, business meetings or conferences, or each party or reception within a multi-room venue.
>
> The term does not include a discrete event or gathering in a business in the retail food services industry addressed by Section 1 [of the July 15, 2020, Order].
>
> The maximum occupancy limit includes staff.

(ECF No. 48-5, Section 2) (emphasis added). The Order has no end-date or other mechanism for expiration, but rather, purports to remain in effect "until further notice." (ECF No. 48-5, Section 8). By its own language, the congregate gathering limitation imposed is broad—applying to any gathering of individuals on public or private property for any purpose—including social gatherings.[14] The July 15, 2020 Order is an amendment to the May 27, 2020 Order setting forth the parameters of the "green phase" of Defendants' reopening plan. The difference between the two orders is that the May 29, 2020 Order did not include the 25 person indoor limit, but rather provided: "[a]ny gathering for a planned or spontaneous event of greater than 250 individuals is prohibited." (ECF No. 42-58).

The gathering limits specifically exempt religious gatherings and certain commercial operations set forth in the Order and previous orders. Section 1 of the July 15, 2020 Order

[14] For example, the Governor's "Process to Reopen Pennsylvania" classifies the congregate limits in the category of "social restrictions." (ECF 42-81, p. 4). Mr. Robinson confirmed that they apply to purely personal or social gatherings, like weddings. (ECF No. 75, p. 54).

imposes an occupancy limit of twenty-five percent (25%) of "stated fire code maximum occupancy" for bars and, apparently, restaurants. (ECF No. 48-5, Section 1). The May 27, 2020 Order permits businesses (other than businesses in the retail food industry, personal services, such as barbers and salons, and gyms—all of which are given other guidance) to operate at either fifty percent (50%) or seventy-five percent (75%) of their building occupancy limits. (ECF No. 42-58, Section 1). Mr. Robinson confirmed that the gathering limits do not apply to normal business operations:

> [T]he 25-person restriction that we were discussing previously does not apply in the course of general business operations. So you could have more than 25 people in that store. There's no restriction of that sort that would be applicable, and I think we've tried to clarify that in many different forms, the sort of applicability of the occupancy restrictions—sorry. The discrete event limits.
>
> But to the extent—and this is just to provide an overly full answer. To the extent that a store had a special sales event or something of that sort, a product demonstration, they would be limited to 25 people in that specific instance. But in any other instance there would be no applicable limit within the store for their general business beyond the kind of occupancy limits that would be in place.

(ECF No. 75, pp. 139-40).

The record is unclear as to whether the orders limiting the size of gatherings apply to protests. The plain language of the orders makes no exception for protests, which seemingly run directly contrary to the plain language of the May 27, 2020 Order that states, "[a]ny gathering for a planned or spontaneous event of greater than 250 individuals." (ECF No. 42-58). However, the record unequivocally shows that Defendants have permitted protests, and that the Governor participated in a protest which exceeded the limitation set forth in his order and did not comply with other restrictions mandating social distancing and mask wearing. (ECF No. 42-101).

Finally, Plaintiffs make much of the fact that Defendants have provided an exception to the congregate gathering limit as applied to a major event in central Pennsylvania referred to as

"Spring Carlisle," which is an auto show and flea market. (ECF 64). After being sued in the Pennsylvania Commonwealth Court because of the impact of the congregate limits on the event, Secretary Levine settled the action by giving a substantial exception for the event. Specifically, indoor occupancy was permitted up to an occupancy of 250 individuals or 50% of the maximum building occupancy. (ECF 64-1, p. 1). Outdoor occupancy was permitted up to 20,000 individuals, which is 50% of the normal capacity. (ECF No. 64-1, p. 2).

Plaintiffs argue that the limits on gatherings imposed by Defendants violate their right of assembly and their related right of free speech. Specifically, the Political Plaintiffs (Metcalfe, Mustello, Bonner and Kelly) contend that the gathering limits unconstitutionally violate their right to hold campaign gatherings, fundraisers, and other events. Each argued that the congregate gathering limitations hindered their ability to campaign and limited their ability to meet and connect with voters. By way of example, Congressman Kelly stated:

> We were also forced to cancel multiple fundraisers and dinners. In the past, these fundraisers have financed a significant portion of my campaigns, yet for this election I had to entirely forgo holding them. My campaign was also forced to cancel a political rally for me to speak to constituents due to both travel prohibitions and congregate rules.

(ECF No. 27, p. 2). On a similar note, Representative Mustello testified that a planned fundraiser had to be scrapped after the July 15, 2020 Order decreased indoor capacity to twenty-five (25) people. (ECF No. 74, pp. 166-67). She testified that she intended to host it outside, but she was concerned about the weather. (ECF No. 74, p. 167). Political Plaintiffs contend that the gathering limits unfairly target some gatherings, while permitting others—such as commercial gatherings or protests.

Defendants contend that the gathering limits pass constitutional muster because they are legitimate exercises of Defendants' police power in an emergency situation and are content-

neutral. (ECF No. 66, p. 24). They contend that "[e]ven in a traditional public forum, the government may impose content-neutral time, place and manner restrictions provided that the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alterative channels for communication of the information." (ECF No. 66, pp. 24-25) (citing *Startzell v. City of Philadelphia*, 533 F.3d 183, 197 (3d Cir. 2008)). Defendants argue that the restrictions leave open many different avenues of campaigning and communication, such as internet, mailings, yard signs, speaking to the press, television and radio. (ECF No. 66, p. 25). Finally, Defendants reject the contention that the stated (although not in the orders themselves) permission to attend protests constituted impermissible content-based distinctions on the applicability of the limits. They point to the fact that some of the Plaintiffs attended rallies and protests against Defendants' measures and that neither they nor other protesters were subject to enforcement action, "even when social distancing protocols are not adhered to." (ECF No. 66, p. 27) (citing *Benner v. Wolf*, __ F. Supp. 3d __, 2020 WL 2564920, at *8 (M.D. Pa. May 21, 2020)).

a) The Court will apply intermediate scrutiny to Plaintiffs' challenges.

The Court must first determine what standard of constitutional scrutiny to apply to the congregate limits set forth in Defendants' orders. The right of assembly is a fundamental right enshrined in the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. CONST. AMEND. 1, *in relevant part*. The right of assembly has long been incorporated to the States. *See DeJonge v. Oregon*, 299 U.S. 353, 259-260 (1937). Although the right to peaceably assemble is not coterminous with the freedom of

speech, they have been afforded nearly identical analysis by courts for nearly a century. *See generally* Nicholas S. Brod, *Rethinking a Reinvigorated Right to Assemble*, 63 DUKE L.J. 155 (2013). *See also DeJonge*, 299 U.S. at 364 ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (applying speech analysis to a gathering on the National Mall); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152-53 (1969) (While not "speech" in the purest sense of the word, gathering, picketing, and parading constitute methods of expression, entitled to First Amendment protection.).

In this case, some of the Plaintiffs seek to assemble relative to their campaigns for public office. This type of gathering is unquestionably expressive in nature and, therefore, neatly fits into the practice of looking at right of assembly challenges through the lens for free speech jurisprudence. This is the approach taken by the Eastern District of Kentucky in a recent case challenging COVID-19 congregate limits. *Ramsek v. Beshear*, ___F. Supp. 3d __, 2020 WL 3446249 (E.D. Ky. Jun. 24, 2020).[15]

Ramsek, like this case, was a challenge to the congregate limits imposed by the governor of Kentucky as applied to protests. Specifically, the plaintiffs argued that the limits violated their right to gather to protest elements of the governor's COVID-19 mitigation strategy. The *Ramsek* court explained that content-based time, place and manner restrictions on speech and gatherings are subject to strict scrutiny. *Id* at *7. "A content-based restriction on speech is one that singles out a specific subject matter for differential treatment." *Id.* (citing *Reed v. Town of*

[15] The congregate limits in question applied to "any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities." *Ramsek*, at *8. The Order was subsequently amended to permit faith-based gatherings. *Id.* at *8 n.8.

Gilbert, Ariz., 576 U.S. 155, 157 (2015)). Content-neutral time, place and manner restrictions, on the other hand, are afforded intermediate scrutiny. *Id.* (citing *Perry v. Educ. Ass'n v. Perry Local Educator's Ass'n.*, 460 U.S. 37, 46 (1983)) (content-neutral time, place and manner restrictions on speech are permissible to the extent that they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."). The *Ramsek* court ultimately decided to apply intermediate scrutiny—holding that the congregate restrictions were content-neutral because they applied to all gatherings for the purpose of speech, protest, and other expressive gathering. *Id.* at 9. In doing so, the *Ramsek* court rejected the argument that the restrictions were not content-neutral because people are permitted to gather in, for example, retail establishments, airports, and bus stations. It held that those activities were not apt comparisons because they do not constitute expressive conduct. *Id.* (citing *Dallas v. Stanglin*, 490 U.S. 19 (1989)).

The Court questions whether the *Ramsek* court, perhaps, conflated viewpoint neutrality and content neutrality or over-weighed the need for expression for assembly to fall under the First Amendment. Moreover, the instant Defendants' restrictions are more stringent than traditional time, place and manner restrictions in that they apply to all fora, not just public. Further, the Court wonders whether—in their breadth, the orders in question implicate the right of association—as a subbranch of First Amendment assembly jurisprudence. However, because it is an established trend, if not the rule, to apply speech jurisprudence in assembly cases, the Court will apply the same approach here.

The question before the Court is whether strict scrutiny or intermediate scrutiny should apply to Plaintiffs' challenge to the congregate gathering limits. Following free speech jurisprudence, Plaintiffs' challenge what are akin to time, place and manner restrictions. The

Court must determine whether the restrictions are content-based or content-neutral. To do so, the Court must first determine whether the limits ban certain types of expressive gathering (political and community meetings, gatherings, etc.), while permitting others (protests). To make that determination the Court must disentangle the language of Defendants' orders from their testimony. Sarah Boateng, the Executive Deputy Secretary of the Pennsylvania Department of Health, testified that protests are permitted under Defendants' orders: "the governor and the secretary did make some public comments about protests and religious services, you know, saying ***that they have made those limited exceptions for those constitutionally protected speech, such as protests, and the individuals had the right to protest and demonstrate***." (ECF No. 75, p. 176) (emphasis added). She was unable to specifically identify any specific statement or instrument amending the actual language of the orders. Having reviewed the record, the Court does not believe that the orders do, in fact, make allowance for protests. Their plain language makes no mention of protests and makes no distinction between expressive and other gatherings. The Court does not doubt Ms. Boateng's position, that the Governor and Secretary have made comments seemingly permitting protests or justifying the Governor's personal participation in them, but even under their broad emergency powers, Defendants cannot govern by comment. Rather, they are bound by the language of their orders. Those orders make no allowance for protests. As such, the orders apply to all expressive gatherings, across the board. To that end, they are content-neutral.

As in *Ramsek*, Plaintiffs make much of the fact that certain gatherings are limited by a specific quota, while people are free to congregate in stores and similar businesses based on a percentage of the occupancy limit. Does permitting people to gather for retail, dining, or other purposes based only upon a percentage of facility occupancy, while setting hard-and-fast caps on

other gatherings, constitute content-based restrictions? The Supreme Court has explained that "the principle inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, 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). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Based on that definition, Defendants' orders are content-neutral. Limiting people by number for the gatherings specified in the orders, while permitting commercial gatherings based only on occupancy percentage, is not content-based in that it has nothing to do with the "message" of any expressive behavior. *See Ramsek* at *9 (citing *Dallas,* 490 U.S. at 25) ("Unlike an individual protesting on the Capitol lawn, one who is grocery shopping or traveling is not, by that action, engaging in protected speech."). Because the restrictions are content-neutral, Defendants' orders will be reviewed with intermediate scrutiny.

b) The congregate gathering restrictions fail intermediate scrutiny.

Under First Amendment jurisprudence, a non-content-based restriction is not subjected to strict scrutiny, but still must be "narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45. Here, the Court credits the fact that Defendants' actions were undertaken in support of a significant government interest—managing the effects of the COVID-19 pandemic in the Commonwealth. The congregate limitations fail scrutiny, however, because they are not narrowly tailored.

The Supreme Court explained that "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799 (quoting *United States v.*

Albertini, 472 U.S. 675, 689 (1985)) (citing *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 297 (1984)). Further, "this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* Additionally, "a statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Defendants' congregate limits are not narrowly tailored. Rather, they place substantially more burdens on gatherings than needed to achieve their own stated purpose. This is not a mere supposition of the Court, but rather, is highlighted by Defendants' own actions. While permitting commercial gatherings at a percentage of occupancy may not render the restrictions on other gatherings content-based, they do highlight the lack of narrow tailoring. *See Ramsek*, at *10 ("retail stores, airports, churches and the like serve as an inconvenient example of how the Mass Gatherings Order fails at narrow tailoring."). Indeed, hundreds of people may congregate in stores, malls, large restaurants and other businesses based only on the occupancy limit of the building. Up to 20,000 people may attend the gathering in Carlisle (almost 100 times the approved outdoor limit!)—with Defendants' blessing. Ostensibly, the occupancy restriction limits in Defendants' orders for those commercial purposes operate to the same end as the congregate gathering limits—to combat the spread of COVID-19. However, they do so in a manner that is far less restrictive of the First Amendment right of assembly than the orders permit for activities that are more traditionally covered within the ambit of the Amendment—political, social, cultural, educational and other expressive gatherings.

Moreover, the record in this case failed to establish any evidence that the specific numeric congregate limits were necessary to achieve Defendants' ends, much less that "[they] target and eliminate no more than the exact source of the 'evil' [they] seek to remedy." *Frisby* 487 U.S.at 485. Mr. Robinson testified that the congregate limits were designed to prevent "mega-spreading events." (ECF No. 75, p. 56). However, when asked whether, for example, the large protests—often featuring numbers far in excess of the outdoor limit and without social distancing or masks—led to any known mega-spreading event, he was unable to point to a single mega-spreading instance. (ECF No. 75, p. 155) ("I am not aware specifically. I have not seen any sort of press coverage or, you know, CDC information about that. I have not seen information linking a spread to protests.").

Further, the limitations are not narrowly tailored in that they do not address the specific experience of the virus across the Commonwealth. Because all of Pennsylvania's counties are currently in the "green phase," the same restrictions apply to all. Pennsylvania has nearly fourteen million residents across sixty-seven counties. Pennsylvania has dense urban areas, commuter communities servicing the New York metropolitan area, small towns and vast expanses of rural communities. The virus's prevalence varies greatly over the vast diversity of the Commonwealth—as do the resources of the various regions to combat a population proportionate outbreak. Despite this diversity, Defendants' orders take a one-size fits all approach. The same limits apply in counties with a history of hundreds or thousands of cases as those with only a handful. The statewide approach is broadly, rather than narrowly, tailored.

The imposition of a cap on the *number* of people that may gather for political, social, cultural, educational and other expressive gatherings, while permitting a larger number for commercial gatherings limited only by a percentage of the occupancy capacity of the facility is

not narrowly tailored and does not pass constitutional muster. Moreover, it creates a topsy-turvy world where Plaintiffs are more restricted in areas traditionally protected by the First Amendment than in areas which usually receive far less, if any, protection. This inconsistency has been aptly noted in other COVID-19 cases. As recognized by the court in *Ramsek*, "it is the right to protest—through the freedom of speech and freedom of assembly clauses—that is constitutionally protected, not the right to dine out, work in an office setting, or attend an auction." *Id.* at *10. In an analogous situation examining restrictions on religious practice, while permitting retail operations, a court aptly observed that "[i]f social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection." *Tabernacle Baptist Church, Inc. v. Beshear*, __F. Supp. 3d__, 2020 WL 2305307, at *5 (E.D. Ky. May 8, 2020). The same applies here. The congregate limits in Defendants' orders are unconstitutional.

3) Defendants' orders violated Plaintiffs' rights to substantive due process under the Fourteenth Amendment.

Plaintiffs assert that the components of Defendants' orders closing "non-life-sustaining" businesses and imposing a lockdown violated their liberties guaranteed by the Due Process Clause of the Fourteenth Amendment. Substantive due process is not an independent right, but rather, a recognition that the government may not infringe upon certain freedoms enjoyed by the people as a component of a system of ordered liberty. Here, Plaintiffs assert two grounds whereby Defendants' orders violated substantive due process—in the imposition of a lockdown and in their closure of all businesses that they deemed to be "non-life-sustaining." While both issues fall under the general ambit of substantive due process, they implicate different underlying rights. As such, the Court will address Plaintiffs' substantive due process claims in two stages, first examining whether the component of Defendants' orders imposing a lockdown passes

constitutional muster and, then, proceeding to an examination of the business shutdown component.

a) The stay-at-home provisions.

Governor Wolf issued the first stay-at-home Order on March 23, 2020, mandating in relevant part:

> 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. For employees of life sustaining businesses that remain open, the following child care services may remain open: group and family child care providers in a residence; child care facilities operating under a waiver granted by the Department of Human Services Office of Child Development and Early Learning; and part-day school age programs operating under an exemption from the March 19, 2020, business closure Orders.
>
> 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.
>
> Individuals leaving their home or place of residence to access, support, or provide life sustaining services for themselves, another person, or a pet must employ social distancing practices as defined by the Centers for Disease Control and Prevention. Individuals are permitted to engage in outdoor activities; however, gatherings of individuals outside of the home are generally prohibited except as may be required to access, support or provide life sustaining services as outlined above.

(ECF No. 42-15). On April 1, 2020, the Order was later extended to all counties in the Commonwealth. (ECF 42-30). Although the initial stay-at-home Order had an expiration date of two weeks, it was amended by subsequent orders to extend to later dates. (ECF Nos. 42-48, 42-50). Ultimately, upon the moving of specified counties, and later all counties, into the "green phase," the stay-at-home requirements were "suspended." The suspension is not a rescission, in that Defendants may reinstate the stay-at-home requirements, *sua sponte*, at any time. Finally, the currently applicable orders, which maintain the stay-at-home provisions, albeit in suspension

of operation, have no end date, applying "until further notice." (ECF Nos. 42-58, 42-59, 42-65 through 42-75, 48-5).

Plaintiffs argue that the lockdowns effectuated by the stay-at-home orders violate their substantive due process rights secured by the Fourteenth Amendment. They contend that the orders do not impose traditional disease control measures, such as quarantine or isolation, but rather involuntarily, and without due process, confine the entire population of the Commonwealth to their homes absent a specifically approved purpose. Plaintiffs contend that the lockdown violated their fundamental right to intrastate travel and their freedom of movement. Plaintiffs further argue that, while the power to involuntarily confine individuals is generally strictly limited by law, Defendants' lockdown was overbroad and far exceeded legitimate government need and authority. They conclude that even compelling state interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (ECF No. 56, p. 14) (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

Defendants first argue that the suspension of the stay-at-home orders render their consideration in this case moot. Moreover, Defendants argue that the stay-at-home orders were not actually orders at all, but merely recommendations.[16] On a substantive basis, they argue that the stay-at-home orders survive constitutional scrutiny because they do not shock the conscience. (ECF No. 66, p. 12 *et seq.* ("The Business Plaintiffs . . . have not established a violation of a fundamental liberty interest and the Business Closure Orders and stay-at-home orders do not shock the conscience.")). They contend that "the touchstone of due process is protection of the

[16] The Court rejects out-of-hand any suggestion that the stay-at-home provisions of Defendants' orders were merely recommendations. The plain language of the orders shows that these provisions were mandates. Further, the record contains evidence of citations issued to Pennsylvania residents for violating the orders.

individual against arbitrary action of government" and that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." (ECF No. 66, p. 16) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1988)). Essentially, Defendants argue that both the stay-at-home orders and the business closure orders were a legitimate exercise of their emergency authority in "very quickly responding to a public health emergency, a pandemic, the likes of which had . . . never been seen in the Commonwealth or nationally, internationally, in 100 years . . . ." (ECF No. 66, p. 17) (quoting ECF No. 75, p. 26)).

In examining this issue, the Court was faced with three major questions—1) whether it can, and/or should, consider the constitutionality of the suspended stay-at-home provisions; if so; 2) what a lockdown is, from a legal and constitutional perspective and what type of constitutional analysis should be applied; and finally 3) whether a lockdown is constitutional.

i. The Court may, and should, consider Plaintiffs' arguments about the stay-at-home provisions.

Defendants argue that the question of whether the stay-at-home provisions of orders are unconstitutional is moot.[17] According to Defendants, stay-at-home orders have been suspended in operation. As such, the citizens of the Commonwealth are free to leave their homes for any purpose. Likewise, Defendants contend that their reopening plan has permitted nearly all businesses to reopen, has eliminated the distinction between "life-sustaining" and "non-life-sustaining" businesses, and have only imposed certain operational restrictions on ongoing operations. Plaintiffs counter that the issues remain ripe for review because, according to language of the orders, the earlier, more restrictive, provisions are merely suspended, rather than

[17] There is no question that the ongoing restrictions on gatherings are ripe for review. The mootness question is directed at issues surrounding the suspended "stay-at-home' orders and the substantially amended business closure orders.

rescinded and Defendants retain the authority to reimpose any and all restrictions *sua sponte* and at any time.

The doctrine of mootness is rooted in Article III of the Constitution, which gives federal courts jurisdiction over "cases" and "controversies." Federal courts can only entertain actions if they present live disputes. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-94 (2009). The plaintiff in a federal action has the initial burden of showing a ripe dispute, but the burden will shift if a defendant asserts that some development has mooted elements of the plaintiff's claim. *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 305 (3d. Cir. 2020). "If the defendant . . . claims that some development has mooted the case, it bears the heavy burden of persuading the court that there is no longer a live controversy." *Id.* at 305-06 (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 189 (2000)). Although a change in circumstance *may* render a case moot, it will not *always* do so. "So, sometimes a suit filed on Monday will be able to proceed even if, because of a development on Tuesday, the suit would have been dismissed for lack of standing if it had been filed on Wednesday. The Tuesday development does not necessarily moot the suit." *Hartnett*, 963 F.3d at 306.

The "voluntary cessation" doctrine may serve as an exception to mootness. *Friends of the Earth*, 528 U.S. at 189 ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.") (citation omitted). As the Third Circuit explained,

> [o]ne scenario in which we are reluctant to declare a case moot is when the defendant argues mootness because of some action it took unilaterally after the litigation began. This situation is often called "voluntary cessation," and it "will moot a case only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"

Hartnett, 963 F.3d at 306 (citations omitted). Thus, "[w]hen a plaintiff seeks declaratory relief, a defendant arguing mootness must show that there is ***no reasonable likelihood*** that a declaratory judgment would affect the parties' future conduct." *Id.* (emphasis added).

Federal courts have applied the voluntary cessation doctrine in COVID-19 litigation to examine issues in governors' mitigation orders that were, seemingly, rendered moot by subsequent amendments to the orders. In *Elim Romanian Pentecostal Church et al. v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), the plaintiffs challenged an order of the governor of Illinois restricting in-person religious services. After the case was filed, the governor replaced the original order with one lifting the restrictions (at least as to religious organizations). The Seventh Circuit Court of Appeals rejected the argument that the superseding order rendered moot the question of whether the revoked order violated the First Amendment. It observed that the governor could move back to the more restrictive measures at will and that the new order specifically reserved the right to do so. As such, the voluntary cessation doctrine precluded finding that the constitutional issues posed by the initial order were moot. *Elim Romanian*, 962 F.3d at 344-45.

In *Acosta v. Wolf*, 2020 WL 3542329 (E.D. Pa. June 30, 2020), the plaintiff challenged elements of Governor Wolf's emergency orders arguing, *inter alia*, that they hindered his ability to obtain the requisite number of signatures needed to appear on the ballot for United States Congress and seek an order placing him on the ballot. The district court rejected the argument that the promulgation of other, less restrictive orders rendered moot the claims. It stated:

> The "alleged violation" alleged today is the Governor's enforcement of the Commonwealth's signature requirement in light of the executive emergency orders to mitigate the COVID-19 pandemic. But even though the executive emergency orders cease on Saturday, June 5, there is still a "reasonable expectation" the Governor could reinstate the executive emergency orders or issue similar restrictive measures before the November 2020 election.

Acosta, at *2 n.7. The district court, therefore, proceeded to examine the plaintiff's complaint, but ultimately found that it failed to state claim upon which relief could be granted and was frivolous.

Here, the application of the voluntary cessation doctrine precludes a determination that the loosening of restrictions in subsequent orders renders moot Plaintiffs' constitutional challenges to elements of Defendants' March 19, 2020 Business Closure Orders and the March 23, 2020 Stay-at-Home Orders. The language of all subsequent orders merely amends the operation of those orders. It does not completely abrogate them. They remain in place, incorporated into the existing orders and are only "suspended."[18] Mr. Robinson specifically testified:

> Q. As we sit here today, is there a stay-at-home order in place?
>
> A. There is—there is a stay-at-home order in place, but it has been modified by the subsequent orders that have been put out.

(ECF No. 75, p. 144). He testified, regarding both the stay-at-home and the business closure provisions of Defendants' orders that "it is possible that some of these [provisions] could be reinstated." (ECF No. 75, p. 38). The language of the orders and the explanation offered by Defendants' witnesses makes clear that the people of the Commonwealth remain subject to a stay-at-home order. Although that order is suspended in operation, it remains incorporated into the most recent mitigation orders issued by Defendants and can, at their will, be reinstated to full

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[18] Q. So in the green phase, which all of Pennsylvania is in today—in the green phase here is not an elimination of the stay-at-home order but, rather, a suspension of the stay-at-home order; is that correct?

A. That is correct.

(ECF No. 75, pp. 36-37).

effect. There is no question that under the voluntary cessation doctrine the Court can examine the issue, which remains fully ripe for review.

The Court is cognizant that the voluntary cessation doctrine may create some tension with a principle of judicial restraint—that courts should generally, when possible, avoid constitutional issues. However, courts have a duty to fully examine and address issues legitimately brought to them by the parties and failure to do so in the name of restraint may very well constitute a dereliction of duty. *See Citizens United v. FEC*, 558 U.S. 310, 329 (2010) ("It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling.").

Here, the Court cannot, consistent with its most fundamental duties, avoid addressing the issues raised by Plaintiffs relating to the stay-at-home orders. The record is unequivocal that those orders, albeit suspended, remain in place. In other words, all of Plaintiffs and, indeed, all of the citizens of the Commonwealth continue to be subject to stay-at-home orders that can be reinstated at the will of Defendants. Moreover, the specter of future, reinstated lockdowns remains a concern for Plaintiffs and continues to hang over the public consciousness. The Court is compelled, therefore, to address whether such lockdowns comply with the United States Constitution.

ii. Broad population lockdowns are unprecedented in American law.

To determine whether Defendants' stay-at-home orders are constitutional the Court must, as in all cases, determine which level of scrutiny should apply. To do so, the Court has to determine what a population lockdown, the effect of the stay-at-home orders, is from a legal perspective. This is not necessarily an easy task. Although this nation has faced many epidemics and pandemics and state and local governments have employed a variety of interventions in response, there have never previously been lockdowns of entire populations—much less for lengthy and indefinite periods of time.

One term that has frequently been employed to describe the lockdowns is "quarantine." Quarantines have been used throughout history to slow the spread of infectious diseases by isolating the infected and others exposed to the disease. Statutes enabling quarantine in times of disease date to colonial times. *See* Laura K. Donohue, *Biodefense and Constitutional Constraints*, 4 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 82, 94 (2013-2014). Pennsylvania employed quarantine provisions from the time of William Penn—mainly directed at passengers and cargo from incoming ships. *Id.* at 104-106.[19] Following independence, the states, including Pennsylvania, continued to maintain and, when necessary, employ quarantine powers. Those powers are currently set forth in the Pennsylvania Disease Prevention and Control Law of 1955. The statute empowers the state board of health to issue rules and regulations regarding quarantine and for the state, as well as local boards or departments of

[19] Interestingly, William Penn ensured that Pennsylvania's use of quarantine was less severe than he had witnessed in London where, he observed, the effects of quarantine were disproportionately harmful to the poor. *Id.* at 104-06, (quoting CATHERINE UWENS PEARE, WILLIAM PENN: A BIOGRAPHY, 48-51 (1957)) ("[In London] Families with plague cases were boarded up into their houses for forty days without sufficient resources. Door upon door bore the great placard with its red cross and the plea, 'Lord have mercy upon us!'").

health, to impose a quarantine, when necessary. 35 P.S. 521.3, 521.5, 521.16. The statute defines "quarantine" as:

> **Quarantine.** The limitation of freedom of movement of persons or animals who have been exposed to a communicable disease for a period of time equal to the longest usual incubation period of the disease in such manner as to prevent effective contact with those not so exposed. Quarantine may be complete, or, as defined below, it may be modified, or it may consist merely of surveillance or segregation.
>
> (1) Modified quarantine is a selected, partial limitation of freedom of movement, determined on the basis of differences in susceptibility or danger of disease transmission, which is designed to meet particular situations. Modified quarantine includes, but is not limited to, the exclusion of children from school and the prohibition or the restriction of those exposed to a communicable disease from engaging in particular occupations.
>
> (2) Surveillance is the close supervision of persons and animals exposed to a communicable disease without restricting their movement.
>
> (3) Segregation is the separation for special control or observation of one or more persons or animals from other persons or animals to facilitate the control of a communicable disease.

35 P.S. 521.2.

The plain language of the statute makes clear that the lockdown effectuated by the stay-at-home orders is not a quarantine. A quarantine requires, as a threshold matter, that the person subject to the "limitation of freedom of movement" be "exposed to a communicable disease." *Id.* Moreover, critically, the duration of a quarantine is statutorily limited to "a period of time equal to the longest usual incubation period of the disease." The lockdown plainly exceeded that period. Indeed, Defendants' witnesses, particularly Ms. Boateng, conceded upon examination that the lockdown cannot be considered a quarantine. (ECF No. 75, p. 209) (Q: "And you agree with me that the governor's order and the secretary's stay-at-home orders are not isolation orders

and are not quarantine orders?" A: "I would agree with that."). Rather, Defendants simply classify the order as "public health mitigation." (ECF No. 75, p. 209).[20]

Defendants attempt to justify their extraordinary "mitigation" efforts by pointing to actions taken to combat the Spanish Flu pandemic a century ago. Ms. Boateng testified that, in response to the Spanish Flu, "much of the same mitigation steps were taken then, the closing of bars, saloons, cancellation of vaudeville shows, as they called them, and cabarets, the prohibition of large events. So some of these same actions that we're taking now had been taken in the past." (ECF No. 75, pp. 203-04). But an examination of the history of mitigation efforts in response to the Spanish Flu—by far the deadliest pandemic in American history—reveals that nothing remotely approximating lockdowns were imposed.

Records show that on October 4, 1918, Pennsylvania Health Commissioner B. Franklin Royer 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

[20] 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. State quarantine power, "although broad, is subject to significant constitutional restraints." Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST J.L. & POL'Y 1, 4 (2018). The power to subject a citizen to quarantine is subject to both procedural and substantive due process restraints. "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 4 (internal citations omitted). Defendants' stay-at-home orders imposed a statewide lockdown on every resident of the Commonwealth that included none of these basic constitutional safeguards.

description until further notice."[21] The order left to local officials the decision on whether to cancel school and/or religious services. The restrictions were lifted on November 9, 1918.[22] A comparative study of nonpharmaceutical interventions used in various U.S. cities in 1918-19 shows that state and local mitigation measures were of similarly short durations across the nation.[23] While, unquestionably, states and local governments restricted certain activities for a limited period of time to mitigate the Spanish Flu, there is no record of any imposition of a population lockdown in response to that disease or any other in our history.[24]

Not only are lockdowns like the one imposed by Defendants' stay-at-home orders unknown in response to any previous pandemic or epidemic, they are not as much as mentioned in recent guidance offered by the Centers for Disease Control and Prevention ("CDC"). For example, the *Community Mitigation Guidelines to Prevent Pandemic Influenza—United States, 2017* offers guidelines "to help state, tribal, local, and territorial health departments with pre-

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[21] *Sweeping Order Issued by State Health Director*, PITTSBURGH POST, Oct. 4, 1918, at 1, https://newscomwc.newspapers.com/image/87692411; https://newscomwc.newspapers.com/image/14397438.

[22] *See* Edwin Kiester Jr., *Drowning in their Own Blood*, PITTMED, Jan. 2003, at 23, https://www.pittmed.health.pitt.edu/Jan_2003/PITTMED_Jan03.pdf.

[23] Howard Markel et al., *Nonpharmaceutical Interventions Implemented by US Cities During the 1918-1919 Influenza Pandemic*, 298 JAMA 644, 647 (2007). The total duration of nonpharmaceutical interventions imposed by state and local mandate for Philadelphia and Pittsburgh were 51 and 53 days, respectively. *Id.* at 647, Table 1. This length was, generally, representative of the duration of interventions in most cities. *Id.* Seattle had the longest period of restrictions, nationwide, at 168 days from start to finish.

[24] *See also* Greg Ip, *New Thinking on Covid Lockdowns: They're Overly Blunt and Costly*, WALL ST. J., Aug. 24, 2020 ("Prior to Covid-19, lockdowns weren't part of the standard epidemic tool kit, which was primarily designed with flu in mind. 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 nonessential businesses. No such measures were imposed during the 1957 flu pandemic, the next-deadliest one; even schools stayed open.").

pandemic planning and decision-making by providing updated recommendations on the use of NPIs [non-pharmaceutical interventions]."[25] It recommends an array of personal protective measures (i.e. staying home when sick, hand hygiene and routine cleaning) and community level NPI measures that may be taken by state and local authorities. *Id.* at 2. The community level interventions include "temporary school closures and dismissals, social distancing in workplaces and the community, and cancellation of mass gatherings." *Id.* There are no recommendations in the document that even approximate the imposition of statewide (or even community wide) stay-at-home orders or the closure of all "non-life-sustaining" businesses. Indeed, even for a "Very High Severity" pandemic (defined as one comparable to the Spanish Flu), the guidelines provide only that "CDC recommends *voluntary* home isolation of ill persons," and "CDC might recommend *voluntary* home quarantine of exposed household members in areas where novel influenza circulates." *Id.* at 32, Table 10 (emphasis added). This is a far, far cry from a statewide lockdown such as the one imposed by Defendants' stay-at-home orders.

The fact is that the lockdowns imposed across the United States in early 2020 in response to the COVID-19 pandemic are unprecedented in the history of our Commonwealth and our Country. They have never been used in response to any other disease in our history. They were not recommendations made by the CDC. They were unheard of by the people this nation until just this year. It appears as though the imposition of lockdowns in Wuhan and other areas of China—a nation unconstrained by concern for civil liberties and constitutional norms—started a domino effect where one country, and state, after another imposed draconian and hitherto untried measures on their citizens. The lockdowns are, therefore, truly unprecedented from a legal perspective. But just because something is novel does not mean that it is unconstitutional. The

[25] Noreen Qualls et al., *Community Mitigation Guidelines to Prevent Pandemic Influenza—United States, 2017* 2 (Sonja A. Rasmussen et al. eds., 2017).

Court will next attempt to apply established constitutional principles to examine this unfamiliar situation.

iii. The stay-at-home provisions of Defendants' orders are unconstitutional.

Plaintiffs argue that the lockdown implemented by the stay-at-home provisions of Defendants' orders violated the substantive due process guarantees of the Fourteenth Amendment. Specifically, they contend that it infringes upon the right to intrastate travel that has been suggested by precedent of the Supreme Court[26] and specifically adopted by the Third Circuit in *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990). In *Lutz*, the Third Circuit examined a municipal ordinance regulating car cruising and unequivocally held that "the right to move freely about one's neighborhood or town, even by automobile, is indeed, 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'" *Id.* at 268.

The Third Circuit considered what level of scrutiny should be applied to the right to intrastate travel and rejected the argument that strict, rather than intermediate scrutiny should apply:

> Not every governmental burden on fundamental rights must survive strict scrutiny, however. We believe that reviewing all infringements on the right to travel under strict scrutiny is just as inappropriate as applying no heightened scrutiny to any infringement on the right to travel not implicating the structural or federalism-based concerns of the more well-established precedents.

Id. at 269. By applying intermediate scrutiny, it allowed for the right to travel, like speech, to be subject to reasonable time, place and manner restrictions. *Id.*

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[26] *Williams v. Fears*, 179 U.S. 270, 274 (1900) ("Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution.").

The Court wonders whether the lockdown effectuated by the stay-at-home provisions of Defendants' orders are of such a different character than the municipal car cruising ordinance as would warrant the imposition of strict scrutiny. There is no question that requiring all citizens of the Commonwealth to stay-at-home unless they have a reason to go out approved by Defendants' orders is a far greater burden on personal autonomy than the situation in *Lutz*. In that case, the drivers were not precluded from leaving home and driving around town, but they were merely restricted from certain practices at certain times, not unlike many other traffic control policies. Herein, the stay-at-home orders strictly limited the right of movement, confining citizens to their homes unless they had a specific permissible reason to leave enumerated in Defendants' orders. Thus, the stay-at-home orders impacted liberties not merely limited to the act of traveling, but the very liberty interests arising from the fruits of travel, such as the right of association and even the right to privacy—i.e., the right simply to be left alone while otherwise acting in a lawful manner. Our Courts have long recognized that beyond the right of travel, there is a fundamental right to simply be out and about in public. *City of Chicago v. Morale*, 527 U.S. 41, 53-54 (1999) (striking down an antiloitering ordinance aimed at combatting street gangs and observing that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."). *See also Papachristou v. Jacksonville*, 405 U.S. 156, 164-65 (1972) (citing a Walt Whitman poem in extolling the fundamental right to loiter, wander, walk or saunter about the community); *Bykofsly v. Borough of Middletown*, 429 U.S. 964 (1976) (Marshall, J., dissenting) ("The freedom to leave one's house and move about at will is of the very essence of a scheme of ordered liberty, . . . and hence is protected against state intrusions by the Due Process Clause of the Fourteenth Amendment.") (internal citation and quotation marks omitted)); *Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989) (referencing *Papachristou*

and stating "[t]he right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all—and to do so whenever one pleases—is an integral component of life in a free and ordered society.").

While the Third Circuit applied intermediate level scrutiny to the limited time, place and manner restrictions on the right to intrastate travel imposed by the ordinance at issue, there are substantial grounds to hold that strict scrutiny should apply to the stay-at-home provisions of Defendants' orders. The intrusions into the fundamental liberties of the people of this Commonwealth effectuated by these orders are of an order of magnitude greater than any of the ordinances examined in right to travel cases, loitering and vagrancy cases or even curfew cases. Defendants' stay-at-home and business closure orders subjected every Pennsylvanian to a lockdown where he or she was involuntarily committed to stay-at-home unless he or she was going about an activity approved as an exception by the orders. This is, quite simply, unprecedented in the American constitutional experience.

The orders are such an inversion of the usual American experience that the Court believes that no less than the highest scrutiny should be used. However, the Court holds that the stay-at-home orders would even fail scrutiny under the lesser intermediate scrutiny used by the Third Circuit in *Lutz*. A critical element of intermediate scrutiny is that the challenged law be narrowly tailored so that it does "not burden more conduct than is reasonably necessary." *Assoc. of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey*, 910 F.3d 106, 119 (3d. Cir. 2018). The stay-at-home orders far exceeded any reasonable claim to be narrowly tailored. Defendants' orders subjected every Pennsylvanian to a lockdown where he or she was involuntarily committed to stay-at-home unless he or she was going about an activity approved as an exception by the orders. Even in the most recent, and currently applicable, iteration of

Defendants' orders, while the operation of the stay-at-home provisions is "suspended," it is not rescinded and may be re-imposed at any time at the sole discretion of Defendants. Thus, Defendants' orders have created a situation where the *default* position is lockdown unless suspended at their will. When in place, the stay-at-home order requires a *default* of confinement at home, unless the citizen is out for a purpose approved by Defendants' orders. Moreover, this situation applied for an indefinite period of time. This broad restructuring of the default concept of liberty of movement in a free society eschews any claim to narrow tailoring.

In addition, the lack of narrow tailoring is highlighted by the fact that broad, open-ended population lockdowns have *never* been used to combat any other disease. In other words, in response to *every* prior epidemic and pandemic (even more serious pandemics, such as the Spanish Flu) states and local governments have been able to employ other tools that did not involve locking down their citizens. Although it is the role of the political branches to determine which tools are suitable to address COVID-19, the 2017 CDC guidance highlights the fact that governments have access to a full menu of individual and community interventions that are not as intrusive and burdensome as a lockdown of a state's population. Finally, the Court observes that the suspension of the operation of the stay-at-home order highlights that it "burdens more conduct than is reasonably necessary." In other words, Defendants are currently using means that are less burdensome to the rights of a free people.

The Court declares, therefore, that the stay-at-home components of Defendants' orders were and are unconstitutional. Broad population-wide lockdowns are such a dramatic inversion of the concept of liberty in a free society as to be nearly presumptively unconstitutional unless the government can truly demonstrate that they burden no more liberty than is reasonably

necessary to achieve an important government end. The draconian nature of a lockdown may render this a high bar, indeed.

b) The business shutdown components of Defendants' orders violate the Due Process clause of the Fourteenth Amendment.

The Business Plaintiffs further argue that the business closure orders violated the Due Process Clause. The Order states, in relevant part: "[n]o person or entity shall operate a place of business in the Commonwealth that is not a life-sustaining business regardless of whether the business is open to members of the public." (ECF No. 42-3, Section 1). The Order attached a list of "life-sustaining" businesses that were permitted to stay open. Defendants also set up a waiver system, whereby a business deemed to be "non-life-sustaining" could request permission to continue operations. (ECF No. 38, p. 2). Defendants decided to close the waiver process on April 3, 2020, largely because of an overwhelming number of requests. (ECF No. 38, p. 4; ECF No. 75, pp. 227-31). The record shows that 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. (ECF No. 75, pp. 97-98). Finally, the record shows that the definition of "life-sustaining" continued to change, even after the waiver process closed. The Business Plaintiffs argue that all of these facts highlight the constitutional infirmity of the business shutdown.

As with the lockdown, Defendants' shutdown of all "non-life-sustaining" businesses is unprecedented in the history of the Commonwealth and, indeed, the nation. While historical records show that certain economic activities were curtailed in response to the Spanish Flu pandemic, there has never been an instance where a government or agent thereof has *sua sponte* divided every business in the Commonwealth into two camps—"life-sustaining" and "non-life-sustaining"—and closed all of the businesses deemed "non-life-sustaining" (unless that business

obtained a discretionary waiver). The unprecedented nature of the business closure—even in light of historic emergency situations—makes its examination difficult from a constitutional perspective. It simply does not neatly fit with any precedent ever addressed by our courts. Never before has the government exercised such vast and immediate power over every business, business owner, and employee in the Commonwealth. Never before has the government taken a direct action which shuttered so many businesses and sidelined so many employees and rendered their ability to operate, and to work, solely dependent on government discretion. As with the analysis of lockdowns, the unprecedented nature of the business shutdowns poses a challenge to its review. Nevertheless, having reviewed this novel issue in light of established Due Process principles, the Court holds that the business closure orders violated the Fourteenth Amendment.

i. The challenges to the business closures remain ripe for review.

As with the stay-at-home component of Defendants' orders, the business closure provisions remain reviewable under the voluntary cessation doctrine. The business closure orders were never rescinded. Rather, they are merely suspended. Specifically, the May 7, 2020 Order outlining the movement of certain counties from the "red phase" to the "yellow phase" provides: "[m]y order directing the 'Closure of All Businesses That are not Life Sustaining' issued March 19, 2020, as subsequently amended, is ***suspended*** for the following counties . . . ." (ECF No. 42-52, Section 1:A) (emphasis added). The language of the Order makes clear that it provides no guarantee of permanence in that it states: "[w]hereas, it is necessary to relax some of the requirements of the aforementioned orders ***for a period of time*** as part of a gradual and strategic return to work." (ECF No. 42-52) (emphasis added). Following orders moving counties into the "green phase," likewise, state that the orders closing "non-life-sustaining" businesses are "suspended." (*See* e.g. ECF No. 42-58, Section 1:A). Mr. Robinson confirmed

that the orders remain suspended and "it is possible that some of these provisions could be reinstated." (ECF No. 75, p. 38). Thus, Defendants' orders closing all "non-life-sustaining" businesses, imposed by them *sua sponte*, suspended by them *sua sponte*, and susceptible to *sua sponte* re-imposition at any time are appropriately before the Court.

ii. The Fourteenth Amendment guarantees a citizen's right to support himself by pursuing a chosen occupation.

The Business Plaintiffs argue that the business shutdown orders violated their right to substantive due process under the Fourteenth Amendment. Specifically, they contend that the designation of some businesses—including all of their businesses—as "non-life-sustaining" and closing them violated their right to "engage in the common occupations of life" and to engage in the pursuit of his or her "chosen profession free from unreasonable governmental interference." (ECF No. 56, p. 7 *et seq.*) (citing *McCool v. City of Philadelphia*, 497 F. Supp. 2d 307, 328 (E.D. Pa. 2007)). Defendants counter that the Fourteenth Amendment does not guarantee "any fundamental right to earn a living." (ECF No. 66, p. 15). They argue that Plaintiffs read too much into precedent that generally references the right of citizens to pursue their chosen occupations, that mere economic regulation is given little scrutiny and, that Plaintiffs were not deprived of any protected liberty interest, but rather, just temporarily prevented from operating their businesses. (ECF No. 66, pp. 14-16). Thus, Defendants argue that Plaintiffs' substantive due process claims should be rejected.

The Due Process Clause of the Fourteenth Amendment includes a substantive component that bars arbitrary, wrongful, government action "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Contrary to Defendants' argument, the right of citizens to support themselves by engaging in a chosen occupation is deeply rooted in our nation's legal and cultural history and has long been

recognized as a component of the liberties protected by the Fourteenth Amendment. Over a century ago, the Supreme Court recognized that "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915) (holding that a state anti-alien labor statute violated both equal protection and due process). Later, in striking down a law banning the teaching of foreign languages in school, the Supreme Court observed that the Fourteenth Amendment guaranteed the right, *inter alia*, "to engage in any of the common occupations of life . . . ." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The emphasis given to economic substantive due process reached its apex in the *Lochner* era, *Lochner v. New York*, 198 U.S. 45 (1905), and was considerably recalibrated and de-emphasized by the New Deal Supreme Court and later jurisprudence. Nevertheless, our Supreme Court has never repudiated the recognition that a citizen has the right to work for a living and pursue his or her chosen occupation.

The Third Circuit has recognized "[t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the 'liberty' and the 'property' concepts of the Fifth and Fourteenth Amendments." *Piecknick v. Comm. of Pa.*, 36 F.3d 1250, 1259 (3d. Cir. 1994) (citing *Green v. McElroy*, 360 U.S. 474, 492 (1959); *Truax*, 239 U.S. at 41). However,

> [t]he Constitution only protects this liberty from state actions that threaten to deprive persons of the right to pursue their chosen occupation. State actions that exclude a person from one particular job are not actionable in suits . . . brought directly under the due process clause. It is the liberty to pursue a calling or occupation, and not the right to a specific job, that is secured by the Fourteenth Amendment.

Id. (internal citations and quotation marks omitted). There is no question, then, that the Fourteenth Amendment recognizes a liberty interest in citizens—the Business Plaintiffs here—to

pursue their chosen occupation. The dispositive question is not whether such a right exists, but rather, the level of infringement upon the right that may be tolerated.

Although federal courts have recognized the existence of a substantive due process right of a citizen to pursue a chosen occupation for over a century, there is little specific analysis on how that right should be weighed and what sort of test should be applied to allegedly infringing conduct. As a matter of general consensus, courts generally treat government action purportedly violating the right to pursue an occupation in the same light as economic legislation and use the general standard of review applied to substantive due process claims. In reviewing a substantive due process claim, the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a government officer that is at issue." *Cty. of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998). "Specific acts" are also known as "executive acts" in substantive due process jurisprudence. The Third Circuit has explained that "executive acts, such as employment decisions, typically apply to one person or to a limited number of persons, while legislative acts, generally laws and broad executive regulations, apply to large segments of society." *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 n.1 (3d. Cir. 2000). Substantive due process challenges to a legislative act are reviewed under the rational basis test. *Am. Exp. Travel Related Serv's., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d. Cir. 2012).[27]

[27] In recent years, a growing chorus of cases and commentators have questioned whether the general deference afforded to economic regulations of the right to pursue one's occupation should be reexamined, and that governmental action be subjected to greater scrutiny. *See generally*, Rebecca Haw Allensworth, *The (Limited) Constitutional Right to Compete in an Occupation*, 60 WM. & MARY L. REV. 1111 (2019); *see also* Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 208 (2003). The latest focus on governmental action impacting the right to earn a living centers upon occupational licensing schemes. Professor Allensworth observed, "[w]ithin the movement [to reinvigorate protections on the right to pursue an occupation] there is disagreement about what doctrinal changes are needed to resurrect this once-vibrant right. Some call for a revision of the rational basis test that would place a heavier burden on the government to justify economic regulation as 'rational.' Others see the rational

Before proceeding to applicable constitutional scrutiny, the Court will address the fact that, as Defendants point out, the closures of "non-life-sustaining" businesses was only temporary. Defendants hold that this precludes a claim that the closures violated the Fourteenth Amendment. Although the closures were ultimately "suspended" after a period of approximately two months (for businesses in some counties and longer for businesses in other counties), the March 19, 2020 Order has no end date. Rather, it is open-ended, remaining "in effect until further notice." (ECF No. 42-3). Moreover, even the subsequent orders suspending (not rescinding) the shutdown of "non-life-sustaining" businesses recognize only that "it is necessary to relax some of the requirements of the aforementioned orders ***for a period of time*** as part of a gradual and strategic return to work." (ECF No. 42-52). A total shutdown of a business with no end-date and with the specter of additional, future shutdowns can cause critical damage to a business's ability to survive, to an employee's ability to support him/herself, and adds a government-induced cloud of uncertainty to the usual unpredictability of nature and life.

Evidence of record shows that the impact of the shutdown, even though temporary, was immediate and severe on the Business Plaintiffs. For example, R.W. McDonald & Sons, a small business, estimates that it "lost approximately $300,000 in revenue[,]" and that its business has been "financially devastated." (ECF No. 30, p. 2). R.W. McDonald expressed ongoing concern that the restrictions may be re-imposed, which could be fatal. Plaintiffs Chris and Jody

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basis test as beyond salvation and call for a different tier of review, such as intermediate scrutiny, for economic rights such as the right to be free from unreasonable licensing laws." Allensworth, *supra,* at 1128. *See also* Alexandra L. Klein, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 WASH. & LEE L. REV. 411 (2016). There is no question that occupational licensing requirements and other, similar, restrictions on the right to pursue one's occupation are considerably different than a state-wide shutdown of all businesses deemed to be "non-life-sustaining." This is, perhaps, a case where the level of interference with the citizens' right to earn a living was so immediate and severe as to warrant a heightened level of scrutiny.

Bertoncello-Young explained that the losses to their small salon exceeded $150,000 and that they depleted their entire emergency fund to pay expenses that came due when their business was required to remain closed. (ECF No. 32, p. 3). The Bertoncello-Youngs also expressed concern about re-imposition of the restrictions. (ECF No. 30, p. 4). It matters little to a business owner or employee that Defendants intended for the restrictions to be temporary. They were, and remain, open-ended and subject to imposition at the sole discretion of Defendants. The fact that Plaintiffs' businesses were only temporarily shutdown does not preclude a finding that the shutdown violated their liberty interests. The nature of a state-wide shut down of "non-life-sustaining" business is such an immediate and unprecedented disruption to businesses and their employees as to warrant constitutional review.

The Supreme Court has recognized that the "core of the concept" of substantive due process is the protection against arbitrary government action. *Lewis*, 523 U.S. at 845 (citing *Hurtado v. California*, 110 U.S. 516, 527 (1884)).[28] Indeed, "the touchstone of due process is protection of the individual against arbitrary actions of government . . . ." *Id.* Rational basis review is a forgiving standard for government acts, but it "is not a toothless one . . . ." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). As a general matter, the rational basis test requires only that the governmental action "bear[] a rational relationship to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Conversely, actions which are irrational, arbitrary or capricious do not bear a rational relationship to any end. *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d. Cir. 2006) (quoting *Pace Resources, Inc., v. Shrewsbury Twp.*, 808 F.2d 1023,

[28] "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of powers of government, unrestrained by the established principles of private right and distributive justice." *Lewis*, 523 U.S. at 845.

1035 (3d Cir. 1987)) ("Thus, for appellants' facial substantive due process challenge to the Ordinance to be successful, they must 'allege facts that would support a finding of arbitrary or irrational legislative action by the Township.'"). Even with this forgiving standard as its guide, the Court nevertheless holds that the March 19, 2020 Order closing all "non-life-sustaining" businesses was so arbitrary in its creation, scope and administration as to fail constitutional scrutiny.

The record shows that the Governor's advisory team, which designated the Business Plaintiffs and countless other businesses throughout the Commonwealth as "non-life-sustaining" and, thereby, closing them, did so with no set policy as to the designation and, indeed, without ever formulating a set definition for "life-sustaining" and, conversely "non-life-sustaining." The terms "life-sustaining" and "non-life-sustaining" relative to businesses are not defined in any Pennsylvania statute or regulation. Mr. Robinson explained that Defendants' policy team used the North American Industry Classification System (NAICS) as a component of their determination of how to classify businesses. (ECF. No. 39, p. 2). The NAICS is a manual used by federal statistical agencies in classifying businesses for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. economy. (ECF. No. 39, p. 2). The NAICS does not classify businesses into "life-sustaining" and "non-life-sustaining" categories. It does not even use the terms. Rather, it merely divides the economy into "20 broad sectors and 316 industry groups." (ECF No. 39, p. 2). It was the policy team that made the decision as to which businesses would be deemed "life-sustaining," and which would be closed. (ECF No. 75, p. 96).

The record demonstrates that the policy team's unilateral determination as to which classes of businesses would be classified as "life-sustaining" was never formalized and the team never settled on a specific definition of "life-sustaining":

> Q. Well, I'd ask you if you'd do me a favor. Would you please tell me where I could find the definition of "life-sustaining?" Because I couldn't find it—I looked—Judge, I looked in 956 pages of the NAICS document, I couldn't find it there. So where would I find it, Mr. Robinson?
>
> A. I believe that it's driven by the categorization and the determination—***I'm not sure that we wrote down anywhere what "life-sustaining" meant***. It was policy decisions that were made by our team as to whether they considered, you know, an energy production location or utility or supermarket to be life-sustaining as distinguished from others that they did not believe. ***We didn't I believe, write down a definition specifically but just translated the sort of common understanding of life sustaining or not into that business list***.

(ECF No. 75, pp. 95-96). Mr. Robinson further testified about the lack of any set, formalized, definition for "life-sustaining":

> Q. So there's nowhere—you can't point me to anywhere where I could read the definition of life-sustaining?
>
> A. I do not believe that we ever wrote down what the definition of life-sustaining was. It was, again, just developed through the list. So the meaning is in some sense determined by what was on the list.

(ECF No. 75, p. 97). When further pressed, about a definition, Mr. Robinson testified:

> A. We—the policy team that developed the list spent time discussing for each category whether they believed that it was essential for life; and in cases where they made that determination, it was, yes, allowed to remain open. In categories where they particularly did not believe that the classification of the business type was that level of criticality, it was no, and those businesses were required to close.
>
> ***I don't believe that we spent a lot of time around the formality of kind of enshrining a definition somewhere***. We were working quickly to provide clarity to the public as to how to prevent the spread of the disease and protect public health.

(ECF No. 75, p. 98) (emphasis added).

The explanation for how Defendants' policy team chose which businesses were "life-sustaining" and which were "non-life-sustaining" is circuitous, at best. Mr. Robinson said that they used the NAICS system to determine which businesses were "life-sustaining," although the

NAICS does not actually use that categorization. He acknowledged that the team simply applied their common-sense judgment as to what was, or was not, "life-sustaining." In doing so, they did not confine themselves to "the formality of kind of enshrining a definition somewhere." So, without a definition, how can one determine which businesses can stay open and which must close? Mr. Robinson said that one should look to the policy team's list (of "life-sustaining" businesses). Essentially, a class of business is "life-sustaining" if it is on the list and it is on the list because it is "life-sustaining."

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:

> Q. Mr. Weaver, the chart that we've referred to you've indicated is the definition of life-sustaining and non-life-sustaining. That chart has changed ten times; is that correct?
>
> A. It has, yes.

(ECF No. 75, p 226).[29] Even though, however, the classification of "life-sustaining" was never formally reduced to an objective definition in writing and Defendants' list of business types that they considered to be "life-sustaining" remained in flux, changing ten times, Defendants eliminated the ability of a business to obtain a waiver as of April 3, 2020. (ECF. No. 38, p. 4). The waiver process allowed a business that believed it had been mistakenly classified as "non-life-sustaining" to submit information to show that it should have been classified as "life-sustaining" and, thus, permitted to operate. Once the waiver process closed, a business that had

[29] The initial list was published on March 19, 2020. Amendments to the list were published on March 21, March 24, April 1, April 20, April 27, April 28, May 8, May 11 and May 28. (ECF No. 75, p. 226).

been wrongly categorized had no recourse—even though the list of "life-sustaining" business continued to fluctuate:

> Q. So if I have a business and I've changed my business operations and I was previously categorized as non-life-sustaining but I've changed my business model, I've changed my way of doing business, I've got the best plan that the CDC has ever seen, I can't get my name changed—or I can't get reclassified as non-life-sustaining (sic) despite the fact that you've changed the definition of life-sustaining post closing down the waiver process; is that correct?
>
> A. Could you repeat that?
>
> Q. Sure. You've acknowledged that the definition of life-sustaining changed after the waiver process was closed?
>
> A. Correct.
>
> Q. Based upon those changes, if I looked at all those charts and I said, "wow, I'm now life-sustaining" or "I think I can meet the definition of life-sustaining." I don't have a vehicle for you to approve my waiver?
>
> A. Correct.

(ECF No. 75, pp. 230-31). To add to the arbitrary nature of the entire situation surrounding the business closures, Defendants closed the waiver process because the backlog of requests slowed the process down. (ECF No. 75, pp. 227-31). Defendants decided to go "from a slowed process to no process." (ECF No. 75, p. 230).

The manner in which Defendants, through their policy team, designed, implemented, and administered the business closures is shockingly arbitrary. The policy team was not tasked with formulating a theoretical policy paper or standard to categorize abstract classes of business or NAICS codes. Rather, it had the authority to craft a policy, adopted wholesale by Defendants, that had an immediate impact on the Business Plaintiffs and countless other businesses, employers, and employees across the Commonwealth. Despite the fact that their decisions had the potential (and in many cases the actual effect) of destroying businesses and putting

employees out of work, Defendants and their advisors never formulated a set, objective definition in writing of what constitutes "life-sustaining." The Court recognizes that Defendants were acting in haste to address a public health situation. But to the extent that Defendants were exercising raw governmental 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 certainty 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.

Another layer of arbitrariness inherent in the business shutdown components of Defendants' orders are that many "non-life-sustaining" businesses sell the *same products* or perform the *same services* that were available in stores that were deemed "life-sustaining." For example, Plaintiff R.W. McDonald & Sons is a small appliance and furniture store that was deemed a "non-life-sustaining" business and required to close. (ECF No. 30, p. 1). But larger retailers selling the same products, such as Lowes, The Home Depot, Walmart and others remained opened. Mr. McDonald stated that his business "lost approximately $300,000 in revenue" and that his business has been "financially devastated." (ECF No. 30, p. 2). He also averred that he lost business to the big-box retailers that were permitted to remain in operation.[30] Plaintiffs Mike and Nancy Gifford and Chris and Jody Bertoncello-Young, each in the salon business, attempted to remain open to sell hair and other styling products, but were advised that as "non-life-sustaining" businesses they had to close. (ECF Nos. 31 and 32). But those products could be purchased at "life-sustaining" big box retailers and drug stores. It is paradoxical that in

[30] R.W. McDonald & Sons applied for a waiver twice. The first request was denied. There was no follow up communication relating to the second. (ECF No. 30; ECF No. 74, pp. 138-39).

an effort to keep people apart, Defendants' business closure orders permitted to remain in business the largest retailers with the highest occupancy limits.

The Court recognizes that Defendants were facing a pressing situation to formulate a plan to address the nascent COVID-19 pandemic when they took the unprecedented step of *sua sponte* determining which businesses were "life-sustaining" and which were "non-life-sustaining." But in making that choice, they were not merely coming up with a draft of some theoretical white paper, but rather, determining who could work and who could not, who would earn a paycheck and who would be unemployed—and for some—which businesses would live, and which would die. This was truly unprecedented.

An economy is not a machine that can be shut down and restarted at will by government. It is an organic system made up of free people each pursuing their dreams. The ability to support oneself is essential to free people in a free economy. The late Justice William O. Douglas observed:

> The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on Politics, 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

Barsky v. Board of Regents of University of State of New York, 347 U.S. 442, 472 (1954) (Douglas, J, dissenting). In a free state, the ability to earn a living by pursing one's calling and to support oneself and one's family is not an economic good, it is a human good. Although jurisprudence may not afford the right to pursue one's occupation the same weight as others in our hierarchy of liberties, it cannot be given such short shrift as to allow it to be completely

subordinated to an *ad hoc* and arbitrary regimen that cannot even be reduced to an objective, written definition—even where that regimen is based on good intent. Here, Defendants took the unprecedented step of closing *all* businesses that they self-deemed to be "non-life-sustaining." The record shows that in doing so and in their manner of doing so, Defendants' actions were so arbitrary as to violate the Business Plaintiffs' substantive due process rights guaranteed by the Fourteenth Amendment.

4. The business closure provisions of Defendants' orders violated the Equal Protection Clause of the Fourteenth Amendment.

Finally, the Court examines whether the business closure provisions of Defendants' orders violated the Equal Protection Clause of the Fourteenth Amendment. The Business Plaintiffs contend that Defendants' orders violated equal protection in two ways. They contend that the division of the Commonwealth into regions (on the county level) wrongly treated them dissimilarly from businesses in other similarly situated counties. They also argue that the distinction between them and other businesses that were permitted to operate was arbitrary and fails equal protection scrutiny. Defendants counter the first point by arguing that distinctions are commonly made based on county boundaries. They further argue that their decision to distinguish between "life-sustaining" and "non-life-sustaining" businesses (closing the latter) was rationally related to a legitimate government end, and, thus survives constitutional scrutiny.

The Equal Protection Clause of the Fourteenth Amendment forbids the states to "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. 14th Amend. Where a plaintiff in an equal protection claim does not allege that distinctions were made on the basis of a suspect classification such as race, nationality, gender or religion, the claim arises under the "class of one" theory. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). To prevail on 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). As explained above, the rational basis test is forgiving, but not without limits in its deference. Distinctions cannot be arbitrary or irrational and pass scrutiny. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985)

The Business Plaintiffs have demonstrated they were treated differently than other businesses that are similarly situated. For example, R.W. McDonald & Sons is a retailer that sells furniture and appliances—so is Walmart, Lowes and The Home Depot. The only difference is the extent of their offerings—Walmart, Lowes and The Home Depot are larger and offer more products. However, in essence, they are the same—retailers selling consumer goods. Likewise, the Salon Plaintiffs (in their role as retailers of health and beauty products, rather than performing personal services) are similarly situated to the big box retailers and drug stores in that they sell the same health and beauty products. Again, the only distinction is size. Nevertheless, Defendants' orders treated these retailers differently than their larger competitors, which were permitted to remain open and continue offering the same products that Plaintiffs were forbidden from selling. The record unequivocally establishes that the distinction was made intentionally. Thus, the final question is whether there was a rational basis for the difference in treatment.

Defendants are correct that the provisions of their reopening plan, which made distinctions between different regions of the Commonwealth, passes constitutional scrutiny. It is well established that states and local governments may impose requirements or restrictions that apply in one region and not in others. *See Cty. Bd. Of Arlington Cty., Va. v. Richards*, 434 U.S.

5, 6-8 (1977). The Court holds that Defendants had a rational basis for rolling out their reopening plan on a regional basis based on counties. Doing so recognized and respected the differences in population density, infrastructure and other factors relevant to the effort to address the virus. The Business Plaintiffs point to similarity between their area and neighboring counties permitted to open earlier, but rational basis does not require the granularity of a neighborhood by neighborhood plan. Distinctions between counties are a historically accepted manner of statewide administration and pass scrutiny here.

However, the manner in which Defendants' orders divided businesses into "life-sustaining" and "non-life-sustaining" classifications, permitting the former to remain open and requiring the latter to close, fails rational basis scrutiny. 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 measurable definition. As stated above in reference to the Business Plaintiffs' due process challenge, to the extent that Defendants were going to exercise an unprecedented degree of immediate power over businesses and livelihoods; to the extent that they were going to singlehandedly pick which businesses could stay open and which must close; and to the extent that they were picking winners and losers, they had an obligation to do so based on objective definitions and measurable criteria. 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." (ECF No. 75 p. 95).

Finally, the record shows that Defendants' shutdown of "non-life-sustaining" businesses did not rationally relate to Defendants' stated purpose. The purpose of closing the "non-life-

sustaining" businesses was to limit personal interactions. Ms. Boateng averred: "[i]n an effort to minimize the spread of COVID-19 throughout Pennsylvania, the Department [of Health] sought to limit the scale and scope of personal interaction as much as possible in order to reduce the number of new infections." (ECF No. 37, p. 2). "Accordingly, it was determined that the most effective way to limit personal interactions was to allow only businesses that provide life-sustaining services or products to remain open and to issue stay-at-home orders directing that people leave their homes only when necessary." (ECF No. 37, p. 3). But Defendants' actions did not rationally relate to this end. Closing R.W. McDonald & Sons did not keep at home a consumer looking to buy a new chair or lamp, it just sent him to Walmart. Refusing to allow the Salon Plaintiffs to sell shampoo or hairbrushes did not eliminate the demand for those products, it just sent the consumer to Walgreens or Target. In fact, while attempting to limit interactions, the arbitrary method of distinction used by Defendants almost universally favored businesses which offered more, rather than fewer products. As such, the largest retailers remained open to attract large crowds, while smaller specialty retailers—like some of the Business Plaintiffs here—were required to close. The distinctions were arbitrary in origin and application. They do not rationally relate to Defendants' own stated goal. They violate the Equal Protection Clause of the Fourteenth Amendment.

IV. CONCLUSION

The Court closes this Opinion as it began, by recognizing that Defendants' actions at issue here were undertaken with the good intention of addressing a public health emergency. But even in an emergency, the authority of government is not unfettered. The liberties protected by the Constitution are not fair-weather freedoms—in place when times are good but able to be cast aside in times of trouble. There is no question that this Country has faced, and will face,

emergencies of every sort. But the solution to a national crisis can never be permitted to supersede the commitment to individual liberty that stands as the foundation of the American experiment. The Constitution cannot accept the concept of a "new normal" where the basic liberties of the people can be subordinated to open-ended emergency mitigation measures. Rather, the Constitution sets certain lines that may not be crossed, even in an emergency. Actions taken by Defendants crossed those lines. It is the duty of the Court to declare those actions unconstitutional. Thus, consistent with the reasons set forth above, the Court will enter judgment in favor of Plaintiffs.

BY THE COURT:

WILLIAM S. STICKMAN IV
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

IN RE: AMENDED FIFTH JUDICIAL DISTRICT EMERGENCY OPERATIONS PLAN	)	No. 23 WM 2020

ORDER OF COURT

AND NOW, this 31st day of August 2020, having previously declared a judicial emergency in the Fifth Judicial District of Pennsylvania, this Court amends its previous Emergency Operations Orders and now orders that the actions set forth below be taken pursuant to Pa.R.J.A. No. 1952(B)(2). All provisions of this Order apply through December 31, 2020.

I. Public Access to Court Facilities

- A Court Facility includes, but is not limited to:
    - The Civil Division located on the 7th and 8th floors of the City-County Building and the Housing Court Help Desk, located on the first floor of the City-County Building, 414 Grant Street, Pittsburgh, PA 15219;
    - The Criminal Division located on the 3rd and 5th floor of the Courthouse, 436 Grant Street, Pittsburgh, PA 15219;
    - The Family Law Center located at 440 Ross Street and 559 Fifth Avenue, Pittsburgh, PA 15219;
    - The Orphans' Court Division, located on the 17th floor of the Frick Building, 437 Grant Street, Pittsburgh, PA 15219;

- Pittsburgh Municipal Court, 660 First Avenue, Pittsburgh, PA 15219;
- All Magisterial District Courts located in Allegheny County;
- All Adult Probation Offices, located in Allegheny County;
- All Juvenile Probation Offices including the six Community Intensive Supervision Program sites located in Allegheny county;
- The Juvenile Dependency Hearing Officer Courtrooms located at:
    1. (East Region) 10 Duff Road—Suite 208, 10 Corporate Center, Penn Hills, PA 15235;
    2. (Mon Valley Region) 355 Lincoln Highway, North Versailles, PA 15137;
    3. (North Region) 421 East Ohio Street, Pittsburgh, PA 15212;
- Any Administrative Offices of the Fifth Judicial District; and
- Any other facility, building, or room designated by the President Judge to hear and dispose of matters pending before the Court of Common Pleas or Magisterial District Courts in the Fifth Judicial District.

- All court facilities, including the courtrooms in all Divisions of the Court of Common Pleas, the Magisterial District Courts and Pittsburgh Municipal Court, will be open to the public for matters as specified below in this Order.

- Persons must wear masks or face coverings to enter and remain in any court facility. Persons who are not compliant with this order, will be required to leave the court facility.

- Persons who enter any court facility shall comply with CDC and Health Department recommendations for social distancing as well as any signage posted in or on court facilities or instructions from a judge,

judicial officer, Sheriff's deputy, police officer, constable, building security, or court employee.

- News media shall be permitted into court facilities but only in a manner that is consistent with public safety. Cameras will not be allowed in any court facility, unless specifically authorized by the President Judge, Administrative Judge of a Division, or the District Court Administrator.

- Sheriff's deputies, police, constables, and building security assigned to any court facility are authorized to deny admission or remove a person who is visibly ill or who is exhibiting symptoms of COVID-19. Any person excluded or removed for health concerns shall be provided with information (telephone number or email address) to enable them to initiate, participate in, or complete necessary essential court business/functions during the judicial emergency.

- Only persons with essential court business are guaranteed admission into any court facility, subject to restrictions above. Friends and family members may be required to wait outside the facility.

- Sheriff's deputies, police, constables, and building security shall have the authority to enforce all of the conditions in this section. Persons who are not compliant with this order, will be required to leave the court facility.

II. Methods for Conducting Proceedings

- Whenever appropriate and feasible, and as directed by the President Judge, the Administrative Judges of the Divisions, and the District Court Administrator, court proceedings shall be conducted by Advanced Communication Technology (ACT), primarily through Microsoft Teams, pursuant to the protocol for teleconference hearings issued by the Court. Other audio or teleconference methods may be employed, pursuant to the protocol for teleconference hearings issued by the Court, with the approval of the Administrative Judges. *See* Protocol for Teleconference Hearings found on the Fifth Judicial District website.

- Remote matters, conducted through Advanced Communication on Technology shall be conducted with the same decorum as in-person matters.

- When it is determined that conducting court proceedings through ACT is not appropriate or feasible, court hearings and proceedings shall be conducted utilizing protocols and policies relating to the use of masks or other personal protective equipment, social distancing, and other guidance specified in Section II of this Order.

- Any administrative order, policy, or protocol issued by an Administrative Judge requiring certain proceedings to be conducted through ACT shall be followed. Any exceptions to such an administrative order, policy, or protocol must be approved by the Administrative Judge of the Division.

- In order to prevent overcrowding, court appearances and hearing times shall be staggered, and the Administrative Judges may require that scheduling of cases be centralized in each division.

- Attorneys are strongly encouraged to bring only essential witnesses and persons to in-person court proceedings. Attorneys should encourage their clients to refrain from having non-participants accompany them to court proceedings.

- When a court reporter or other approved form of recording court proceedings is unavailable, alternative forms of recording shall be permitted.

- All persons participating in a court proceeding, including but not limited to, judges and judicial officers, attorneys, court employees, court reporters, witnesses, and spectators, are required to wear a mask or face covering for the entire proceeding. The judge or judicial officer may permit a person to temporarily remove the mask to take testimony or where the presence of a mask would affect the ability to judge credibility, provided that the requirements for social distancing, and in the case of matter in the Criminal Division, the attached Criminal Division Procedures (as may be subsequently amended and posted on

the website of the Fifth Judicial District) are followed. In such cases, the person will be required to wear a face shield. The Court shall make every effort to minimize the number of people present for in-person court proceedings, including allowing particular attorneys or witnesses to appear remotely.

- Orders prohibiting and limiting the use of cellular phones in courtrooms and court facilities remain in effect. However, due to the requirements for social distancing, an attorney may use a cellular telephone to communicate with a client or a witness while outside of the courtroom. An attorney may use a cellular telephone to summon witnesses waiting in another location, to the courtroom; or for such other purpose deemed appropriate by the judge or judicial officer presiding over the court proceeding.

- The taking of photographs or the recording of any proceeding is strictly prohibited. Anyone violating this provision shall forfeit their cellular phone or device and shall be subject to contempt proceedings or other sanctions.

- Taking the testimony of witnesses through ACT is strongly encouraged. However, when a witness must testify in person in a courtroom, the witness may be required to wait in another location until such time as the court is prepared to take the testimony of the witness. Upon conclusion of the testimony, the witness shall be excused from the courtroom and shall leave the court facility unless the judge or judicial officer determines that there is a reason that the witness must remain in the court facility.

- News media may be permitted into a courtroom, if social distancing can be maintained. The court may designate certain seats for the news media, however, seats for attorneys, parties to the proceedings and essential court staff take priority over seats for the news media.

- Sidebar conferences are prohibited until further order of court.

III. Time Calculations and Deadlines

- Except as otherwise set forth in this Order, the suspension of time calculations due to the judicial emergency that began on March 16, 2020 ended at the end of the day on June 1, 2020.

- Time calculations and deadlines were suspended during the judicial emergency so that they did not continue to run during that time. The suspension began on March 16, 2020 and continued through June 1, 2020–or for 78 days. New deadlines shall be calculated by adding the time period of the suspension (days during which time calculations were suspended due to the judicial emergency as applied to the particular time calculation) to the original deadline. The period of suspension caused by the judicial emergency added on to the deadline shall only include that period of the suspension during which the particular time calculation would have otherwise been running.

- For example, if an original 30-day deadline fell on March 19, 2020, and the period of suspension under the judicial emergency was 78 days (March 16th through June 1st), the new deadline would be June 5, 2020 (78 days after March 19th). In this example, the particular time calculation stopped running during the entire 78-day suspension when it would have otherwise been running. If, however, a deadline expired before the judicial emergency began, then that deadline would not be extended by the judicial emergency.

- The period of suspension caused by the judicial emergency added on to the deadline shall only include that period of the suspension during which the particular time calculation would have otherwise been running. For example, if a 20-day time period begins running on May 27, 2020, when a complaint is served, then the original 20-day deadline would be June 16, 2020. The period during which this particular time calculation would be suspended by the judicial emergency would be 6 days (from May 27th through June 1st) and the new deadline would be June 22, 2020 (6 days after June 16, 2020). Stated differently, if a 20-day time period begins running on May 27, 2020, when a complaint is served upon the defendant, the parties start counting the 20-day time

period from June 2, 2020, (i.e. June 3rd is day one), and the new deadline is again June 22, 2020.

- If, however, the particular time calculation did not start to run until after June 1, 2020, then the deadline would not be extended as it would be unaffected by the suspension. For example, if a 20-day time period begins running on June 3, 2020 when a complaint is served then the original 20-day deadline of June 23, 2020 would not be extended.

- Postponements or continuances resulting from the judicial emergency shall be considered court postponements and shall constitute excludable time, subject to constitutional limitations for purposes of the application of Rule 600. *See* C*ommonwealth v. Bradford*, 46 A.3d 693 (Pa. 2012) and *Commonwealth v. Mills*, 162 A. 3d 323 (Pa. 2017).

- The suspension of Rule 600, subject to constitutional limitations, as indicated in this Court's previous Emergency Operations Orders, began on March 16, 2020 and will continue through December 31, 2020, subject to further order of court.

- Jury trials in both the Civil and Criminal Divisions remain suspended until further Order of Court.

- Attorneys and litigants shall not use the judicial emergency to secure strategic advantage in litigation, including by dilatory conduct. Individual judges may determine, on a case-by-case basis, whether a failure to meet a deadline was not directly the result of or affected by the judicial emergency, (such as in routine discovery matters) and whether the deadline should have been met during the judicial emergency. The judge may then take any action deemed appropriate to address the situation.

IV. Transportation, Signatures, Fingerprinting, and Publication

- There will be no identification process at time of arrest, unless processed through the Allegheny County Jail. Defendants will be assigned a fingerprint appointment for a later date.

- Until further Order of Court:

    - No inmates will be transported from the Allegheny County Jail or a state correctional facility for preliminary hearings.
    - Juveniles will not be transported from Shuman Detention Center or Hartman Shelter for court hearings, unless the judge orders the juvenile to appear in court.
    - Where the participation of the inmate or juvenile is required at a court hearing, Advanced Communication Technology shall be considered before issuing the order to transport.
    - All juveniles or inmates who are being transported shall wear a mask.
    - The Sheriff's deputies may refuse to transport an inmate or juvenile who is visibly ill, who is exhibiting symptoms of COVID-19, or who refuses to wear a mask, and shall immediately notify the assigned judge.

- Alternative methods of signing, delivery, and service of court documents and orders shall be permitted. This includes, but is not limited to, facsimile signatures, electronic signatures, proxy signatures, and designated court employees authorized to sign on behalf of a judge after the judge has reviewed and approved the document for signature. *Pro se* litigants completing forms at Pittsburgh Municipal Court may authorize court employees to sign documents, when necessary, for the safety of the litigants and court employees. Under such circumstances, the court employee will sign his/her name to the document indicating that the litigant has reviewed the document and that all of the information contained therein was provided by the litigant. If an employee must sign for a pro se litigant, he/she will do so in a manner allowing the litigant to see the employee sign the document.

- In the interest of public health, the *Pittsburgh Legal Journal* shall be published as an electronic PDF through the duration of the judicial emergency in the Fifth Judicial District. During the judicial emergency, proofs of publication produced by the *Pittsburgh Legal Journal* can be properly verified and signed by a notary public only, instead of a notary public and an affiant as is typically required. Proofs of publication may

be mailed or emailed to relevant parties. Records of all electronic proofs of publication and email correspondence shall be preserved.

V. Civil Division

- Where appropriate and feasible, Civil Division proceedings shall be conducted by Advanced Communication Technology, primarily through Microsoft Teams, pursuant to the protocol for teleconference hearings issued by the Court. Other audio or teleconference methods may be employed, pursuant to the protocol for teleconference hearings issued by the Court, with the approval of the Administrative Judges. *See* Protocol for Teleconference Hearings posted on the Fifth Judicial District website.

- All published trial lists are temporarily suspended pending further Order of Court.

- Non-jury trials commenced in June 2020. Non-jury trials shall continue to be conducted pursuant to the protocols outlined in this Order. Such non-jury trials shall be identified by the Court and specially listed for non-jury trial by separate Order(s) of Court. Where appropriate and possible, such non-jury trials shall be conducted using Advanced Communication Technology (ACT). When it is not appropriate and possible to use ACT for non-jury trials, all parties, lawyers, witnesses, and persons participating in the trial must follow the Fifth Judicial District's protocols and policies relating to the use of masks or other personal protective equipment, social distancing, and other guidance specified in Section II of this Order.

- Jury trials shall commence on a limited basis and only where the Court enters an Order specifically scheduling a jury trial. Parties with cases on previously published trial lists may jointly, with written consent by all parties involved in the litigation, submit consented-to motions to the Calendar Control Judge requesting that their case be scheduled to be tried before a jury.

- Consistent with this Order, the following matters shall be conducted remotely through the use of Advanced Communication Technology:

    1. Calendar Control Motions,
    2. Housing Court Motions,
    3. Discovery Motions,
    4. General Motions (contested and uncontested),
    5. Oral arguments on Preliminary Objections,
    6. Oral arguments on Motions for Summary Judgment, or Judgment on the Pleadings,
    7. Conciliations relating to cases on the May 2020 Trial List, and
    8. All other matters scheduled by any individual judge relating to a case specifically assigned to that judge, unless litigants lack the ability to participate using Advanced Communication Technology and under such circumstances, the individual Judge will utilize appropriate methods to adjudicate and/or conduct arguments/hearings utilizing protocols and policies relating to the use of masks or other personal protective equipment, social distancing, and other guidance specified in Section II of this Order.

- *See* the Fifth Judicial District website, www.alleghenycourts.us, for procedures and instructions relating to the following matters, including Operating Procedures for all judges and remote submissions of the following:

    1. Calendar Control Motions;
    2. Discovery Motions;
    3. General Motions;
    4. Housing Court Motions;
    5. Preliminary Objections; and
    6. Motions for Summary Judgment/Judgment on the Pleadings.

- Notwithstanding the suspension of time calculations and deadlines set forth in Section I above, individual judges are hereby invested with substantial discretion with the enforcement of time deadlines which he/she has established in a particular case when handling one of the matters outlined above in items (1) through (8) of the Civil Division section of this Order.

- The Governor's Orders of May 7 and May 22, 2020 prohibiting commencement of actions filed under the Landlord Tenant Act of 1951 for failure to pay rent, or due to an expired lease are scheduled to expire on August 31, 2020. Landlord tenant actions in the Civil Division of the Allegheny County Court of Common Pleas shall proceed pursuant to applicable rules and laws. Residential landlord tenant actions filed at the Magisterial District Courts shall proceed pursuant to the attached Order, filed this same date, entitled Fifth Judicial District Temporary Procedures Regarding Certain Residential Landlord Tenant Actions.

- Arbitration hearings resumed in June of 2020 utilizing the protocols and policies relating to the use of masks or other personal protective equipment, social distancing, and other guidance specified in Section II of this Order. However, where all parties agree to using Advanced Communication Technology (ACT), or by Order of Court upon cause shown by one or more parties, arbitration hearings may be conducted remotely through use of ACT.

- Conciliations and hearings before the Board of Viewers shall be conducted remotely where appropriate and possible using ACT. Where the litigants are unable to participate remotely utilizing ACT, the Board of Viewers may proceed with in-person hearings, as necessary, utilizing protocols and policies relating to the use of masks or other personal protective equipment, social distancing, and other guidance specified in Section II of this Order.

- In any case specially assigned to a judge, the judge assigned shall attempt to use Advanced Communication Technology for all hearings, conferences, and/or oral arguments on such matters so assigned. Where one or more parties is unable to participate using Advanced Communication Technology, then under such circumstances, the assigned judge may conduct in-person hearings, conferences, and/or oral arguments utilizing protocols and policies relating to the use of masks or other personal protective equipment, social distancing, and other guidance specified in Section II of this Order.

- The Commerce and Complex Litigation Center will hear all petitions, motions, conciliations, and hearings remotely using Advanced Communications Technology; see the standardized operating procedures for Administrative Judge Christine A. Ward, and Judge Philip Ignelzi, available on the Fifth Judicial District website, www.alleghenycourts.us for information concerning matters assigned to the Commerce and Complex Litigation Center.

VI. Criminal Division

A. Remote Proceedings

- During the judicial emergency, the following matters in the Allegheny County Court of Common Pleas, Criminal Division, shall presumptively be conducted remotely through Advanced Communication Technology:

  1. Bail Hearings and Motions Court;
  2. Motions for Continuance and other motions which do not require testimony;
  3. Guilty Pleas;
  4. Sentencing Hearings;
  5. ARD Hearings;
  6. Phoenix Docket and EDP Hearings;
  7. Review Hearings for SOC, Domestic Violence Court, Drug Court, DUI Court, Mental Health Court, PRIDE Court, and Veteran's Court;
  8. Probation Violation Hearings;
  9. SOC Formal Arraignments.

- If a judge in a particular case determines that extenuating circumstances exist that justify an in-person proceeding, then one of the types of matters listed in the paragraph above may be heard in-person, in whole or in part, in the courtroom. Extenuating circumstances may exist, for example, when an interpreter is required or where there is a likelihood that a sentence of imprisonment will be imposed after a guilty plea. The Court shall make efforts to minimize the number of people present for these in-person matters including allowing particular attorneys or witnesses to appear remotely.

- Recognizing the difficulty that defendants representing themselves may have using Advanced Communication Technology, such defendants may appear in person for any matter at the discretion of the judge. Defendants representing themselves may also appear in person at Formal Arraignment or Pretrial Conferences.

- Defense Counsel is encouraged to conduct Formal Arraignments without appearing at the Formal Arraignment Office pursuant to the attached procedure.

- Absent extenuating circumstances, Pretrial Conferences for represented defendants should be conducted by email, telephone, or videoconferencing.

B. In-Person Matters

- Matters not listed in the first paragraph of section VI(A) of this Order, which would otherwise be conducted in person, may also be conducted using Advanced Communication Technology after consultation with the parties and if the defendant consents and waives his or her confrontation clause rights and his or her right to be physically present. This may include matters such as non-jury trials or pretrial suppression motions in which witnesses will be called.

- The Court shall continue to evaluate the circumstances regarding the pandemic in Allegheny County to determine an appropriate time to resume jury trials. A separate order will set forth additional requirements relating to resumption of jury trials.

C. Conduct of Court Business

- Attorneys are to participate in Case Status Conferences as set forth in the attached Case Status Conference Procedures. Judges or their staff may also conduct status conferences via telephone or videoconferencing. Attorneys are required to participate in any such status conferences.

- Absent extenuating circumstances unique to a particular case, inmates will not be transported to the courthouse for proceedings except for trials, hearings on matters which require witnesses, and cases where an interpreter is necessary for an incarcerated defendant.

- Attorneys are strongly encouraged to file motions (including motions to reduce bail), pleadings, and other documents through PACFile. Attorneys and self-represented parties shall add their email address on the cover page of all filings with the Court as part of their contact information. The Bail Review Request Form may continue to be utilized and emailed to Pretrial Services via the Court's website at https://www.alleghenycourts.us/criminal/pretrial_services/bail_services/brr.aspx.

- All bail and miscellaneous motions for cases at the Court of Common Pleas level that are assigned a CR number, should be filed through PACFile. Miscellaneous motions, however, may also be filed in person and brought to the motions counter in room 534 of the courthouse. All bail motions for cases at the Magisterial District Court level shall be filed by emailing the motion (with the OTN number of the case on the coversheet) to DCRCriminal@AlleghenyCounty.us. A copy of any bail motion, at either level, and/or a Bail Review Request form, which can be found on the Criminal Division page of Fifth Judicial District website, shall be submitted to PTS_Bail_Questions_Bin@alleghenycourts.us.

- All motions to lift detainers should be filed through PACFile and emailed to the assigned judge and his/her staff but may be filed in person at the Department of Court Records and brought to the appropriate courtroom. Email addresses for Criminal Division Judges and staff are located on the Fifth Judicial District website.

- Requests or Motions for Continuance should be liberally granted.

- Alternative methods of signing, delivery and service of court documents and orders shall be permitted. Such methods may include, but are not limited to:
    1. The signature of defense counsel on a defendant's behalf;
    2. The signature of court personnel while in the presence of the defendant or while on the record, with the defendant's verbal permission;
    3. The faxed, scanned or electronic signature of a defendant; and
    4. Other methods determined to be reliable by a judge.

- Defendants who wish to address warrants for failure to appear may do so by phoning (412) 350-1229, Monday through Friday between 9:00 A.M. and 3:00 P.M.

- Electronic monitoring supervision by the Adult Probation Department continues to be available at the discretion of the Criminal Division judges.

- The August 21, 2020 Order entitled Amended Fifth Judicial District Emergency Operations Plan Criminal Division is consistent with this Order and remains in effect.

D. Safety Provisions Enforcement

- In addition to social distancing, masking, and other safety requirements set forth in the Emergency Operations Plan Order dated May 28, 2020, and this Order, the attached Criminal Division Procedures (as may be subsequently amended and posted on the website of the Fifth Judicial District) shall be followed in the Criminal Division of the Allegheny County Court of Common Pleas.

VII. Family Division

Child Support, Divorce, Alimony, and Equitable Distribution of Property

- For information or questions about child/spousal support, custody, divorce or presentation of a pro se motion contact (412) 350-5600 or 1stFOP@pacses.com. The regional offices in the Penn Hills and Castle Shannon shall remain closed to the public.

- Consent Agreements and Orders may be sent to the following email address for review and processing: pacsessupportconsentagreement@pacses.com

- Until further Order of Court, child support payments will not be accepted in person. Child supports payments may be made by credit card, check, and/or money order. Payment coupons and instructions are available on the Fifth Judicial District website: www.alleghenycourts.us

- All scheduled conferences and/or hearings shall be conducted telephonically. Litigants will receive telephonic conference/hearing instructions via US Postal Mail and, when possible, by text message.

- All evidence being submitted for support proceedings may be submitted by text message, email, or fax prior to or during the course of the proceeding.

- Exceptions to Hearing Officer Support Recommendations shall be filed electronically at alleghenysupportexceptions@pacses.com. The complete "Exceptions Procedure" shall be maintained on the Fifth Judicial District website and is incorporated herein, by reference.

- Masters' Rules and Procedures are posted to the Fifth Judicial District website and are made applicable by this Order.

- The Court shall continue to review and grant divorces, administratively, when all required documents are filed with the Department of Court Records.

- Any matter may be presented to the Court by motion, without a hearing, pursuant to the judges' procedures on the website, for entry of an Order.

Custody

- Custody motions will be addressed on a case by case basis. Any matter may be presented to the Court by Motion, without a hearing, for entry of an Order, pursuant to the assigned judge's procedures posted on the Fifth Judicial District website.

- For new custody cases originating by motion without a judicial assignment, please contact the Court by email at emergencycustody@alleghenycourts.us with the following information: parents' names and dates of birth and the child(ren)'s names and dates of birth. The Court will respond to the inquiry with the appropriate judicial designation.

- *Pro se* emergency custody motions will be addressed by completing the Court's online submission platform for the same on the Fifth Judicial District website.

- Questions concerning custody matters may be submitted by email to custodydepartment@alleghenycourts.us or by leaving a message at 412-350-4311. Emails and calls will be returned during regular business hours. For questions concerning an emergency custody matter, please call 412-350-1500, Monday through Friday, between 9:00 AM and 3:00 PM.

- Until further Order of Court, the Generations education seminar requirement shall be completed by reading and reviewing the Generations booklet, which is posted on the Fifth Judicial District website. The password to access the booklet is contained in the scheduling order. For litigants who do not have access to the internet, please call 412-350-4311 to receive the materials by regular mail.

- Until further order of Court, the Generations mediation session, DRO custody conciliation, interim relief hearing, and partial custody hearing

before the hearing officer, shall be conducted remotely, either by teleconference or videoconference, at the Court's direction. Five (5) days in advance of the scheduled court event, litigants shall send contact information (telephone number and email address) where they may be reached by the Court on the date and time of the scheduled court event to custodydepartment@alleghenycourts.us or by phone at 412-350-4311. Failure to timely provide this information to the Court may result in the proceeding not being held and/or a delay in scheduling/rescheduling the custody case.

- All other custody proceedings, including those scheduled to be heard before the assigned Judge, shall be heard remotely by teleconference or videoconference at the Court's direction, until further Order of Court and unless the judge requires an in-person proceeding. Litigants should carefully review the scheduling order issued for each matter for information on the remote requirements, witness testimony, and submission of evidence and exhibits.

- Exceptions to Hearing Officer Custody Recommendations shall be filed at the Allegheny County Department of Court Records, with a copy sent to the Court via email at custodydepartment@alleghenycourts.us.

Protection from Abuse

- All Temporary Protection From Abuse matters will be addressed at the Family Law Center, 440 Ross Street, Room 3030, Pittsburgh, PA 15219. Temporary Protection from Abuse Hearings shall be conducted generally through videoconference. If a hearing cannot be conducted through videoconference, the hearing shall be held by audio or teleconference.

- Temporary Protection From Abuse Petitions will be prepared and processed between the hours of 8:00 A.M. and 11:00 A.M., and videoconference hearings will be conducted until 2:00 P.M, Monday through Friday. This timeframe may be modified upon further order.

- Emergency Protection From Abuse Petitions will be addressed from 11:00 A.M.. until 8:00 A.M., Monday through Friday, and 24 hours

Saturday and Sunday and on court holidays at the Pittsburgh Municipal Court Building, 660 First Avenue, Pittsburgh, PA 15219.

- Emergency Protection From Abuse Petitions may also be addressed from 11:00 A.M. until 3:30 P.M. at the Magisterial District Courts.

- Final Protection From Abuse Hearings shall be heard through Advanced Communication Technology (ACT), until further Order of Court.

- Temporary Protection From Abuse Orders that were entered during the judicial emergency or that were extended due to the judicial emergency shall expire on June 16, 2020, unless an order entered after May 28, 2020 sets a different expiration date.

- Defendants (or their attorneys) intending to contest a Protection From Abuse action and participate in a hearing must submit an "Intent to Defend" form prior to the scheduled hearing. If the Defendant appears at the hearing without having completed and submitted the Intent to Defend form prior to the scheduled hearing, the hearing may be postponed and the Temporary PFA Order may be extended until the rescheduled hearing date.

- Until further Order of Court, Indirect Criminal Contempt (ICC) Complaints will not be accepted by private petition.

- ICC Police Complaints will be accepted, and bail hearings will be held before a Magisterial District Judge using Advanced Communication Technology. If a defendant is detained, a bail hearing shall be held before the judge assigned to hear the Temporary PFA Petitions.

- For questions concerning Protection from Abuse, please call (412) 350-4441, Monday through Friday between 9:00 A.M. and 3:00 P.M.

Juvenile Matters

- Juvenile proceedings shall be conducted by Advanced Communication Technology, primarily through Microsoft Teams, pursuant to the protocol

for teleconference hearings issued by the Court. Other audio or teleconference methods may be employed, pursuant to the protocol for teleconference hearings issued by the Court, with the approval of the Administrative Judge. *See* Protocol for Teleconference Hearings posted on the Fifth Judicial District website.

- Delinquency adjudicatory hearings, where the juvenile requests a hearing or a trial may be conducted as an in-person hearing. Requirements for social distancing and masks and face coverings as set forth in this order, shall be strictly followed. With the consent of the juvenile, a delinquency adjudicatory hearing may be heard, in whole or in part, through Advance Communication Technology, provided that after conducting a colloquy on the record, the Court determines that:

    1. The juvenile understands the Constitutional right to confront witnesses;
    2. The juvenile understands the right to be present; and
    3. The right and knowingly and voluntarily waives these rights.

- All Juvenile Court matters will be heard by the assigned judges according to the scheduling protocol in effect prior to the judicial emergency. Matters may continue to be heard through Advanced Communication Technology, as the interest of public safety dictates.

- The Court shall continue to issue Orders for protective custody, pursuant to Pa. R.J.C.P. Rule 1210.

- Detention hearings will be heard by a hearing officer on Mondays, Wednesdays, and Fridays. Hearing officer recommendations will be sent to the daily assigned judge for approval and entry of an order.

- Shelter Care Hearings will be heard by a hearing officer three days a week. Walk-in Shelter Care Hearings will not be permitted. Hearing officer recommendations will be sent to the assigned judge for approval and entry of an order.

- Emergency motions will be heard in accordance with the weekly motions judge schedule. All Motions shall be filed through PACFile with a copy e-mailed to juvenilemotions@alleghenycourts.us, the probation officer, and the caseworker.

- For emergency matters involving delinquency, please contact the Juvenile Probation Department at (412) 350-1501.

- In cases where the juvenile is detained prior to the adjudicatory hearing, the Court may schedule the adjudicatory hearing more than 10 days after the filing of the petition or the pre-hearing conference, as deemed appropriate by the hearing officer or the judge, but the Court must review the detention status by memo every 10 days until the adjudicatory hearing is held. The attorney for the juvenile and the attorney for the Commonwealth shall be provided the opportunity to provide input in writing and/or through Advanced Communication Technology. In all cases, the Court shall determine whether the continued detainment is necessary to ensure the safety of the public and is constitutionally permissible.

- Termination of Parental Rights Hearings shall be scheduled and heard by the assigned judge.

- Adoption Hearings shall be scheduled and heard as determined by the assigned judge.

- Post-dispositional hearings, where the recommendation is to close supervision, may be presented by memo for the entry of an Order to terminate supervision.

- Initial pre-hearing conferences shall be conducted through Microsoft Teams. With the consent of the parties, all other matters may be presented to the Court by memo, without a hearing, for entry of an Order.

- The Court shall continue to be available to issue orders for Authorization for Medical Treatment of a Minor, pursuant to 18 Pa. C.P.S. 3201.

- Private Dependency Petitions and Petitions to Modify/Enforce Permanent Legal Custodianship Orders shall be processed electronically or by US Postal Mail. Complete instructions are available on the Fifth Judicial District website.

- Questions concerning dependency matters, termination of parental rights, adoptions and juvenile scheduling matters may be submitted by email to childrenscourt@alleghenycourts.us or by calling 412-350-0377, Monday through Friday, between 9:00 AM and 3:00 PM. Emails and calls will be returned during regular business hours.

VIII. Orphans' Court Division

- Whenever appropriate and feasible, Orphans' Court Proceedings should be conducted by Advanced Communication Technology (ACT), primarily through Microsoft Teams, pursuant to the protocol for teleconference hearings issued by the Court. Other audio or teleconference methods may be employed, pursuant to the protocol for teleconference hearings issued by the Court, with the approval of the Administrative Judges. *See* Protocol for Teleconference Hearings found on the Fifth Judicial District website. Proceedings in Orphans' Court cases that are specially assigned to a judge may, at the discretion and direction of the judge, be conducted in-person in open court.

- The following types of Petitions/Motions may be filed at the Department of Court Records Wills/Orphans' Court Division for transmittal to the Orphans' Court Division for assignment to the trial judge or motions judge:

    1. Settlement Petitions involving minors, incapacitated persons, or Decedent's Estates;
    2. Petitions requesting the issuance of a Citation or Rule to Show Cause;
    3. Petitions requesting the scheduling of a hearing, including but not limited to, termination of parental rights, adoptions, guardianships of incapacitated persons and minors, and review of involuntary civil commitment;
    4. Petitions to Settle a Small Estate;

5. Petitions for Allowance involving minors or incapacitated persons; and
6. Petitions or motions that are consented to in writing by all counsel of record and/or by all unrepresented parties in interest.

- Petitions or motions that are contested must comply with the requirements of Rule 3.1 of the Allegheny County Orphans' Court Division Rules and shall be presented in-person in open court to the motions judge at 9:30 a.m. or at such time and manner, including via Advanced Communications Technology, as directed by the motions judge.

- In-person in court proceedings must follow the protocols and policies relating to the use of masks or other personal protective equipment, social distancing and other guidance specified in Section II of this Order.

- Involuntary Civil Commitment hearings will continue as scheduled and will be conducted by audio or teleconference.

IX. Magisterial District Courts

- All Magisterial District Courts and Pittsburgh Municipal Court are open for designated court proceedings as set forth in this order.

- Police agencies are to follow the Revised Magisterial District Courts COVID-19 Plan and the Pittsburgh Municipal Court, City of Pittsburgh COVID-19 Plan for the filing of criminal complaints, ICC complaints, arrest warrants, and search warrants. *See* attached Revised MDC COVID-19 plans.

- Magisterial District Judges will remotely handle criminal case initiation and processing. The remote operations include:

    - Criminal Complaint filing, arrest warrant requests, and cases initiated by on-view arrests only,
    - Search Warrant issuance,
    - Bail Hearings and Bail Hearings on ICC Complaints filed by police.

- Preliminary Arraignments conducted through Pittsburgh Municipal Court shall be handled remotely.

- Preliminary Arraignments conducted at the Magisterial District Courts shall presumptively be handled remotely but may at the discretion of the Magisterial District Judge be handled in person.

- Preliminary hearings with incarcerated defendants will be conducted using Advanced Communication Technology. Other parties may participate through Advanced Communication Technology.

- Preliminary hearings for non-incarcerated defendants may be conducted using Advanced Communication Technology. Other parties may participate through Advanced Communication Technology. There will be no identification process at time of arrest, unless processed through the Allegheny County Jail. Defendants will be assigned a fingerprint appointment for a later date.

- Constables that serve arrest warrants for misdemeanor/felony cases are to instruct defendants to turn themselves in or contact the police agency that requested the warrant.

- Defendants shall pay their court-ordered financial obligations—costs, fines, and fees—electronically, through Court Payment Services at alleghenytix.com and through the Pennsylvania ePay system at ujsportal.pacourts.us. Cash payments at the Magisterial District Courts may be accepted at the discretion of the Magisterial District Judge. Cash payments will be accepted at Pittsburgh Municipal Court.

- Magisterial District Judges may *sua sponte* revise individual payment plans to reduce the minimum payment requirement.

- Facsimile signatures are to be used for documents generated in the Magisterial District Judge Computer System.

- Police complaints, affidavits, and search warrant requests filed with an electronic signature shall be accepted by the Court.

- After review and with their approval, a Magisterial District Judge may permit staff to sign a criminal complaint on his/her behalf. The Magisterial District Judge shall utilize the procedures set forth below.

    - The Magisterial District Judge shall review the criminal complaint and electronically notify the staff of their approval.
    - A record of this permission shall be attached to the criminal complaint.
    - The form of signature shall be Magisterial District Judge Name/Staff initials.

- Emergency Protection From Abuse Petitions will be addressed from 11:00 A.M. until 8:00 A.M., Monday through Friday, and 24 hours Saturday and Sunday and court holidays at the Pittsburgh Municipal Court Building, 660 First Avenue, Pittsburgh, PA 15219. Emergency Protection from Abuse Petitions may be addressed at the Magisterial District Courts from 11:00 A.M. until 3:30 P.M. Petitioners should call the Magisterial District Court in advance of arrival. Phone numbers may be found on the Fifth Judicial District Website: https://www.alleghenycourts.us/district_judges/offices.aspx

- Until further Order of Court, Indirect Criminal Contempt (ICC) Complaints will not be accepted by private petition.

- ICC Police Complaints will be accepted, and bail hearings will be held before a Magisterial District Judge using Advanced Communication Technology. If a defendant is detained, a bail hearing shall be held before the judge assigned to hear the Temporary Protection from Abuse Petitions.

- All other proceedings, including summary proceedings, civil actions, and landlord/tenant actions may be conducted using Advanced Communication Technology, which includes audio or videoconference at the discretion of the Magisterial District Judge.

- Private complaint interviews will not take place at the Magisterial District Courts. Please refer to the Allegheny County District Attorney's website for directions for filing a private complaint at http://alleghenycountyda.us/.

- Residential landlord tenant actions shall proceed pursuant to the attached Order, filed this same date, entitled Fifth Judicial District Temporary Procedures Regarding Certain Residential Landlord Tenant Actions.

BY THE COURT:

_____ P. J.
Kim Berkeley Clark
President Judge

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: FIFTH JUDICIAL DISTRICT	:	
TEMPORARY PROCEDURES	:	No. 23 WM 2020
REGARDING CERTAIN RESIDENTIAL	:	
LANDLORD TENANT ACTIONS	:	

ORDER OF COURT

AND NOW, this 31st day of August 2020, pursuant to Pa.R.J.A. No. 1952(B)(2), this Court having declared a judicial emergency in the Fifth Judicial District of Pennsylvania through December 31, 2020, and recognizing that rent assistance through the CARES Rent Relief Program and other programs is available for landlords and tenants in Allegheny County and that landlords and tenants may require time to apply for such assistance and additional time for their applications to be processed, the following is hereby **ORDERED, ADJUDGED and DECREED**.

1. Effective September 1, 2020, all residential landlord tenant actions will be accepted for filing within the Fifth Judicial District pursuant to the applicable statutes and rules governing those actions.

2. Initial hearing dates for residential landlord tenant actions filed at the Magisterial District Courts where the action is based solely on non-payment of rent shall be scheduled at the latest available landlord tenant court date consistent with Pa.R.C.P.M.D.J. 504 and may be scheduled up to seven (7) days beyond the time limit set forth in Rule 504, if the Magisterial District Judge finds it necessary due to the volume of cases already scheduled.

3. On such cases, if on or before the initial hearing date, the tenant provides an affidavit or testifies under oath affirming that the tenant has submitted or will submit an application for rental assistance under the CARES Rent Relief Program or any of the other available rental assistance programs, the initial hearing date shall be used to conduct a status conference rather than a hearing. During this status conference, the CARES Rent Relief Program or other program shall be considered by the parties who shall determine if they will move forward with an application.

4. If both parties agree to move forward with an application through the CARES Rent Relief Program or other available rental assistance program, the hearing shall be continued to allow for sufficient time for the application to be processed as agreed to by the parties and the Magisterial District Judge. Multiple continuances may be granted so there is sufficient time for the application to be processed and the relief to be provided. A hearing shall not occur until the application has either been granted, denied or withdrawn.

5. If, during the status conference, the parties do not both agree to move forward with an application, the case may be postponed to a new date for a hearing on the matter or the Magisterial District Judge may, in his or her discretion, continue the hearing to allow for an application to be made and processed.

6. The procedures in paragraphs 2 through 5 above apply only to residential landlord tenant actions at the Magisterial District Courts where the action is based solely on non-payment of rent.

7. Application for COVID-19 related rent assistance through the CARES Rent Relief Program can be made online at https://covidrentrelief.alleghenycounty.us.

8. Additional information about other rental assistance programs may be found at the following links:
   - https://www.ura.org/pages/covid-19-resources-for-residents
   - https://www.alleghenycounty.us/human-services/index.aspx
   - https://renthelppgh.org/

The Fifth Judicial District Judicial Temporary Prohibition on Commencement of Certain Residential Landlord Tenant Actions expires on August 31, 2020. This Order shall become effective on September 1, 2020 and shall remain in effect until further Order of Court.

BY THE COURT:

_____,P. J.
Kim Berkeley Clark
President Judge

CRIMINAL DIVISION PROCEDURES

Additional Courtroom Procedures

Participants Who Cannot Be Heard Clearly While Wearing Masks

- Paper masks will be provided in each courtroom where the judge determines that a witness, defendant or other participant cannot be heard or understood while wearing a cloth or other mask.

- The judge may permit a witness to temporarily remove a mask to take testimony where the presence of a mask would adversely affect the ability to evaluate credibility. In such cases, the witness will be required to wear a face shield but will put their mask back on whenever approached by an attorney.

- A participant shall not be asked to lower or remove their mask at any time while they are within 15 feet of another person unless protected by a plexiglass partition.

Private Attorney/Client Communication in Courtroom

- During any hearing requiring a witness, the defendant, defense counsel, prosecutor, and affiant will each be provided with paper and a pen (if consistent with safety concerns of the Court, Deputy Sheriff, and attorneys) and will be permitted to write confidential notes to each other. The court may permit other means of confidential communication including providing for brief recesses or allowing the defendant and attorney to briefly exit the courtroom to confer consistent with safety concerns.

Early arrival for court proceedings

- Attorneys and witnesses arriving more than 30 minutes prior to a scheduled court event may be asked by the Court to leave and return later in order to maintain social distancing and reduce the amount of people in the courtroom at any given time.

Signing of Subpoenas

- Alternative methods of signing should be used to avoid contact between court staff and defendants.

CRIMINAL DIVISION PROCEDURES

Document Transfer

- All efforts shall be made to transfer as many documents as possible to court staff electronically. When a physical document must be provided to court staff in a courtroom, it shall be done, whenever possible, by placing the document on a table provided for the exchange rather than by a direct hand- to-hand exchange.

CRIMINAL DIVISION PROCEDURES

Formal Arraignment Waiver

The following steps must be taken by defense counsel to waive appearance at Formal Arraignment during the judicial emergency:

- Defense counsel must enter their Appearance on behalf of the Defendant.

- After the Praecipe for Appearance has been filed with the Department of Court Records, defense counsel may download and complete Waiver of Appearance at Formal Arraignment form. This document can be found on the Fifth Judicial District Website, https://www.alleghenycourts.us/Criminal/Default.aspx

- Once completed, the Waiver of Appearance at Formal Arraignment form must be forwarded to ccformalarraignment@alleghenycourts.us.

- The email must include defense counsel and the defendant's phone number, email address, and mailing address.

- The Formal Arraignment Office will review the waiver request and determine if the Criminal Information has been filed by the District Attorney's Office.

- If the Criminal Information has been filed, the Formal Arraignment Office will email the attorney of record the information and all paperwork along with the judge assignment and a subpoena for the Defendant to appear on the scheduled Pretrial Conference date or Phoenix Court date. When required, a Court Reporting Network (CRN) appointment will be included in the paperwork; the defendant shall attend the scheduled CRN appointment and complete the full drug/alcohol assessment, if required, prior to the scheduled court date.

- If the case is eligible for ARD, information will be provided to defense counsel to contact the District Attorney's ARD unit and complete the ARD interview. Upon receipt of the ARD paperwork from defense counsel showing that the defendant has been accepted into the ARD program, the Formal Arraignment Office will provide an ARD date and subpoena to defense counsel via email.

CRIMINAL DIVISION PROCEDURES

- If the Criminal Information has not been filed, the Formal Arraignment Office will reschedule the Formal Arraignment date and notify defense counsel of the new date.

- Defense Counsel will sign the subpoena on the defendant's behalf with the defendant's permission or will make arrangements for the defendant to sign the subpoena and return it to the Formal Arraignment Office by email.

- Pretrial Conferences for defendants should be conducted by email, telephone, or videoconferencing, but may be conducted in person.

- Defense counsel may accept a subpoena on a defendant's behalf by completing a Waiver of Appearance at Pretrial Conference. This document can be found on the Fifth Judicial District Website, https://www.alleghenycourts.us/Criminal/Default.aspx.

- Defendants without an attorney must appear in person to schedule their cases, unless other arrangements have been made by court staff, in which case the Pretrial Conferences may be conducted by telephone or videoconferencing

CRIMINAL DIVISION PROCEDURES

In-Person Proceedings

Attorneys shall confer with their witnesses and clients prior to the hearing date to ensure that they are not exhibiting symptoms of COVID-19 and are not awaiting the results of a COVID-19 test. Those exhibiting COVID-19 symptoms or awaiting a test result are not permitted in any court facility. Information on appropriate actions to take when experiencing COVID-19 symptoms can be found on the CDC website at https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/index.html.

Attorneys shall notify the Court of any witness or client exhibiting symptoms or awaiting the results of a COVID-19 test. Arrangements shall be made for the person to participate remotely or the matter shall be postponed.

Taking the testimony of witnesses through Microsoft Teams is strongly encouraged. However, when a witness must testify in person in a courtroom, attorneys will be responsible for management of their witnesses.

Witnesses may be required to wait in designated areas of the Courthouse, outside the Courthouse or elsewhere so that social distancing may be maintained and to reduce the amount of people in the courtroom at any time.

Witnesses who wait in the hallways may not congregate and must socially distance.

Attorneys shall inform the Court of the status and location of their witnesses prior to the start of a proceeding so that the attorneys may be given adequate time to notify and call each witness to testify. Upon conclusion of the testimony, the witness shall be excused from the courtroom and shall leave the court facility unless the judge or judicial officer determines that there is a reason that the witness must remain in the court facility.

The taking of photographs or the recording of any proceeding is strictly prohibited. Anyone violating this provision shall forfeit their cellular phone or device and shall be subject to contempt proceedings or other sanctions. Notwithstanding, with the permission of the presiding judge, an attorney may use a cellular telephone to summon a witness waiting in another location or for such other purpose authorized by the judge. When a judge is on the bench, the attorney shall first request permission from the judge.

CRIMINAL DIVISION PROCEDURES

ARD Procedures

After the defendant completes the ARD interview and accepts the ARD offer, the defendant will receive a subpoena from the Court Arraignment Office with the hearing date and time noted.

ARD Court staff will email defense counsel (or the defendant, if not represented) the ARD Packet with instructions to complete it and return it at least 7 days prior to the ARD hearing date.

ARD Court staff will email an invitation for the Microsoft Teams ARD Hearing to both the Defendant and Defense Counsel the week of the ARD hearing.

The ARD Hearing and Admission into the ARD program will take place as scheduled through Microsoft Teams.

Upon the conclusion of the ARD Hearing on Microsoft Teams, the ARD Officer and defendants will remain on the Teams call so that the ARD Officer may review the ARD rules with the defendants.

ARD Probation either will complete the intake interview at the conclusion of the ARD TEAMS hearing or will contact the defendant approximately one week after the hearing. If a defendant has not had an intake interview within 14 days of the ARD hearing, please contact the ARD office at 412-350-4632.

CRIMINAL DIVISION PROCEDURES

Phoenix Court Procedures

On all Phoenix cases a full discovery packet, sentencing guidelines and offer are presented to the Defendant at the time of Formal Arraignment.

The Phoenix Hearing will be conducted remotely through Advanced Communication Technology primarily through Microsoft Teams unless extenuating circumstances exist that justify an in-person proceeding.

The Remote Plea Packet should be completed and sent to the assigned courtroom staff two (2) business days before the assigned court date. The protocol during the Plea Hearing via remote access will also be followed.

If the Phoenix Offer is rejected, a Rejection of Phoenix Offer and Election to Proceed to Trial form must be completed and filed with the Court.

A trial date will then be set by the Court and the Case Status Conference protocol must be then followed.

CRIMINAL DIVISION PROCEDURES

Case Status Conferences (CSC)

All attorneys will be required to engage in an audio and/or video case status conference with opposing counsel in every case at least one week prior to the next scheduled court date during which the following matters must be addressed:

- Whether any plea offers have been made; all plea negotiations must occur before the CSC deadline;

- If a plea offer has been made and the defendant intends to reject the plea offer and proceed to trial, the rejection of the offer shall be placed on the record. The court, in its discretion, may notify the defendant that, once the plea is rejected and the case is scheduled for trial, the Court will no longer accept a negotiated plea;

- If a plea offer will not be made, a determination will be made as to whether the case is ready to proceed to jury or nonjury trial. If the parties are not prepared to proceed, a postponement request must be submitted electronically via https://www.alleghenycourts.us/criminal/MotionForContinuance.aspx at least four (4) business days before the next court date. Postponement requests submitted in this fashion will be granted or denied by the end of the next business day after submission.

After the CSC is complete, but in no event later than 4 business days before the next court listing, the Prosecutor shall submit an email to the minute clerk and the designated court staff for each courtroom, with a copy to defense counsel, which shall include the following:

- Defendant's name,
- Date of proceeding,
- Attorneys' names and email addresses (prosecution and defense),
- Defendant's contact information, including their email address if the proceeding is to take place remotely,
- Whether the case will resolve by plea, nonjury or jury trial or whether a postponement request will be submitted and by whom;
- Whether any motions are pending and, if so, whether any such motion requires a hearing with or without witnesses;
- Whether the defendant and witnesses and victims necessary for the scheduled proceeding have been contacted.

Counsel shall not send multiple CSC emails on the same case as such emails burden the court staff, overwhelm their email accounts and create confusion.

When a matter is scheduled as a remote plea or hearing, all paperwork shall be emailed to court staff 48 hours prior to the scheduled plea or hearing date, or, in the case of a defendant who is incarcerated, 24 hours prior to the plea or hearing date including:

- Plea Packet
- Sentencing Guidelines
- Restitution Form
- Other forms required for SORNA or Domestic Violence cases

If a case will be proceeding to trial, the parties are encouraged to stipulate to any evidence or testimony, where possible, to avoid the need for witnesses to be called to testify. If stipulations may be furthered by a party making a potential witness available via conference call with all counsel, counsel are encouraged to utilize this method or other similar opportunities to further discussions regarding possible stipulations. Where stipulations cannot be reached regarding the testimony of a witness, the parties should discuss whether any witnesses might be permitted to testify via video.

In a matter which is to proceed remotely, exhibits should be exchanged via email between the parties at least 24 hours prior to the proceeding, with a copy to court staff. If a party believes that circumstances exist that a prior exchange of a particular exhibit should not occur, the issue should be brought to the Court's attention though the Case Status Conference process.

When a defense attorney has been unable to contact the defendant, the Prosecutor shall not bring in any witnesses but shall have them available by phone in the event that a previously "unreachable" defendant appears and determines to enter a guilty plea.

If the defendant then fails to appear on their scheduled court date, a warrant shall be issued.

If the defendant does appear on their scheduled date, the courtroom staff should direct the defendant to the location previously supplied by defense counsel so that the defendant can make contact with defense counsel. The case may proceed in a manner that does not require witnesses such as a plea, or a stipulated non-jury trial, or other method agreed upon by the parties.

Otherwise, a short defense postponement may be granted with a definite date for trial.

Prosecutors shall make every effort to contact their witnesses well in advance of the scheduled court date and shall comply with the requirements of the Case Status Conferences or status conferences held by judges and their staff.

When a Prosecutor has been unable to contact a witness or victim, the prosecutor shall include on any postponement request, the efforts made to contact the witness or victim.

If a Commonwealth postponement is not granted, defense counsel shall not bring in any witnesses but shall have the defendant available by phone in the event the Commonwealth witness or victim does appear for the proceeding on the specified date.

In the event the Commonwealth witnesses do not appear on the scheduled court date, the case may be *nolle prossed*, dismissed or, at the discretion of the judge, a postponement maybe granted on that date.

If the Commonwealth witness or victim does appear on the scheduled court date, the case may proceed in a manner that does not require witnesses such as a plea, stipulated non-jury trial, or other method agreed upon by the parties. Otherwise, a short Commonwealth postponement shall be granted with a definite date for trial.

All defendants without counsel will be required to engage in a CSC with the assigned prosecutor consistent with the above procedures. Prior to the CSC, the assigned prosecutor will notify the Office of the Public Defender that the defendant is unrepresented so that the defendant can be provided counsel from the Office of the Public Defender or the Office of Conflict Counsel to explain the following:

- The right to counsel for future court proceedings;
- The right to have counsel appointed if the defendant is unable to afford an attorney; and
- If the defendant elects to proceed *pro se*, the fact that counsel will serve as a third-party witness to ensure the CSC is fairly conducted.

CRIMINAL DIVISION PROCEDURES

Designated Staff to Receive CSC Emails for Each Courtroom

JUDGE	ADDITIONAL STAFF	EMAIL	MINUTE CLERK	EMAIL
Bruce R. Beemer	Diana Colosimo	DColosimo@alleghenycourts.us	Janine McVay	McVayJ@alleghenycourts.us
Alexander P. Bicket	Carley Donnelly	CDonnelly@alleghenycourts.us	Kathy Burford	KBurford@alleghenycourts.us
Kelly E. Bigley	Teri Michaels	TMichaels@alleghenycourts.us	John D'Abruzzo	JD'Abruzzo@alleghenycourts.us
Edward J. Borkowski	Pamela Farrell	Pam.Farrell@alleghenycourts.us	John Halloran John Matter - **ARD**	John.Halloran@alleghenycourts.us JMatter@alleghenycourts.us
David R. Cashman	Wendy Hayes	Wendy.Hayes@alleghenycourts.us	Derek Smith	DJSmith@alleghenycourts.us
John J. Driscoll	Mary Angela Ogg	MOgg@alleghenycourts.us	Lindsay Williamson	LWilliamson@alleghenycourts.us
Susan F. Evashavik DiLucente	Mary Lou Conroy	mlconroy@alleghenycourts.us	Dan Cregan	DCregan@alleghenycourts.us
Thomas E. Flaherty	Sarah Deasy	SDeasy@alleghenycourts.us	Karen Cirrincione	Karen.Cirrincione@alleghenycourts.us
Beth A. Lazzara	Judy Sarna (Law Clerk)	jsarna@alleghenycourts.us	Tim Palmer	TPalmer@alleghenycourts.us
Jeffrey A. Manning	Sandy Leasure	Sandy.Leasure@alleghenycourts.us	Michele Kearney	MKearney@alleghenycourts.us
Anthony M. Mariani	Christen Hobaugh	CHobaugh@alleghenycourts.us	Christa Buchewicz	CBuchewicz@alleghenycourts.us
Lester G. Nauhaus	Lucille Trobaugh	LTrohaugh@alleghenycourts.us	Sandy Evans	Sandy.Evans@alleghenycourts.us
Jill E. Rangos	Shana Kemerer	SKemerer@alleghenycourts.us	Laura Gettings	LGettings@alleghenycourts.us
Kevin G. Sasinoski	Stephanie Ewing	SEwing@alleghenycourts.us	Candice Kelly	CKelly@alleghenycourts.us
Randall B. Todd	Gwyn Behr	GBehr@alleghenycourts.us	Elizabeth Collins	ECollins@alleghenycourts.us
Mark V. Tranquilli	Mary Angela Ogg	MOgg@alleghenycourts.us	Lindsay Williamson	LWilliamson@alleghenycourts.us
John A. Zottola	Marie Zottola	MZottola@alleghenycourts.us	Toni Snelsire	TSnelsire@alleghenycourts.us

CRIMINAL DIVISION PROCEDURES

Remote Pleas

When a matter is scheduled as a remote plea or hearing, all paperwork shall be emailed to court staff 48 hours prior to the scheduled plea or hearing date, or, in the case of a defendant who is incarcerated, 24 hours prior to the plea or hearing date.

If the case will be a plea, the following paperwork should be included:

- Request for Remote Hearing *
- Instructions for Scheduling a Remote Plea *
- Guilty Plea Colloquy *
- Waiver of Rights and Consent to Plea/Sentencing by Video Conference*
- Adult Probation Intake Form *
- General Rules and Condition of Probation Acknowledgement Form *
- Sentencing Guidelines
- Restitution Form

*Denotes items the are included in the Plea Packet.

If the case is a Domestic Violence case, include also:

- Order of Relinquishment

If the case is a SORNA case, include also:

- Specific Special Conditions of Probation
- General Rules and Condition of Probation Acknowledgement Form
- Sexual Offender Registration/Notification Act (SORNA) Colloquy

The SORNA Packet includes these 3 forms as well as all of the forms in the Plea Packet denoted by * above.

CRIMINAL DIVISION PROCEDURES

Miscellaneous Motions

Updated instructions and forms for filing Miscellaneous Motions in Motions Court can be found at:

https://www.alleghenycourts.us/criminal/MiscellaneousMotions.aspx.

CRIMINAL DIVISION PROCEDURES

Criminal Division Forms

Criminal Division forms may be found at
https://www.alleghenycourts.us/Criminal/Default.aspx

Waiver of Appearance at Formal Arraignment

Waiver of Appearance at Pretrial Conference

Plea Packet – includes:

- Request for Remote Hearing
- Instructions for Scheduling a Remote Plea
- Guilty Plea Colloquy
- Waiver of Rights and Consent to Plea/Sentencing by Video Conference
- Adult Probation Intake Form
- General Rules and Condition of Probation Acknowledgement Form

ARD Packet – includes:

- Instructions for Scheduling a Remote ARD Hearing
- Explanation of ARD Proceeding
- Waiver of Rights and Consent to Entry into ARD by Video Conference
- PAePay Instructions
- General Rules for ARD Probationers

SORNA Plea Packet – includes:

- Request for Remote Hearing
- Instructions for Scheduling a Remote Plea
- Guilty Plea Colloquy
- Waiver of Rights and Consent to Plea/Sentencing by Video Conference
- Charge Specific Special Conditions of Probation
- Adult Probation Intake Form
- General Rules and Condition of Probation Acknowledgement Form
- Sexual Offender Registration/Notification Act (SORNA) Colloquy

Order of Relinquishment (for Domestic Violence Cases)

Nolo Contendere Colloquy

Guilty Plea Colloquy

Waiver of Rights and Consent to Plea/Sentencing by Video Conference

Waiver of Rights and Consent to Non-Jury by Video Conference

COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA

Revised Magisterial District Courts COVID – 19 Plan

Due to the Covid-19 Pandemic Magisterial District Courts in the Fifth Judicial District have modified/altered their operations.

Safety Measures:

- Court users may be checked/wanded by a security guard/state constable upon entry.
- No one will be permitted into the District Court without a face mask or similar face covering.
- If a court user does not have a mask, a disposable mask will be provided.
- The number of people in the court facility shall be limited to ensure safe social distancing.
- Court Users will not be permitted to linger in court facility.
- Some District Courts will have a check in procedure wherein parties will be instructed to check in/provide phone number and wait outside (could wait in an automobile).
    - Parties will be called when it is time for their hearing.
- News media may be permitted into court facilities but only in a manner that is consistent with public safety.
- If court users are sick or have underlying medical/health issues that put them at a higher risk, please do not come to District Court. Please contact the District Court in advance of the hearing. Contact information can be found on the Fifth Judicial District Website: https://www.alleghenycourts.us/district_judges/offices.aspx

Scheduling:

- The Magisterial District Courts will stagger court times to ensure proper social distancing.
- Parties are required to be on time for their court proceeding.
- Parties are encouraged to conference with one another prior to the court proceeding.
- Parties should be prepared to proceed upon arrival.
- If a party is to complete community service check with District Court about sending completion paperwork prior to scheduled hearing review date. Some District Courts may accept without court appearance.

Hearings:

- Incarcerated individuals will not be transported to the Magisterial District Courts. These individuals will appear for the preliminary hearings via Advanced Communication Technology.
- Interpreters will work remotely by either phone or video.

- Other parties may participate via Advanced Communication Technology

Case Filings:

- Civil/LT cases will be accepted by mail.
- If a party wishes to file in person, please contact the District Court to schedule an appointment time.

Payments:

- Payments will be accepted by mail – check or money order.
- Parties are encouraged to make online payments through alleghenytix.com and ujsportal.pacourts.us.
- Lock boxes may be provided for cash payments.
- District Courts may accept cash payments if processed safely.

Criminal Case Processing:

- The Magisterial District Courts will not be conducting any criminal case initiation in person at the District Court.
- All criminal case initiation, requests for arrest warrants, on-view arrest complaints and search warrants, will be conducted remotely per the Magisterial District Court COVID-19 Criminal Processing Plan.
- All criminal arraignments will be presumptively conducted remotely per the Magisterial District Court COVID-19 Criminal Processing Plan. In person criminal arraignments may take place at the discretion of the Magisterial District Judge.

Emergency Protection from Abuse:

- Petitions will be handled at the Pittsburgh Municipal Court facility, 660 First Ave., Pittsburgh, PA 15219, Monday through Friday from 11:00 a.m. through 8:00 a.m., and 24 hours on weekends and holidays.
- Petitions will also be handled at the Magisterial District Courts from 11:00 a.m. through 3:30 p.m., please call in advance of arrival, https://www.alleghenycourts.us/district_judges/offices.aspx

COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA

COVID – 19 Pittsburgh Municipal Court Protocol

Due to the Covid-19 Pandemic Pittsburgh Municipal Court has modified/altered their operations.

Safety Measures:

- Court users will enter through the main entrance.
- Employees will enter through the employee entrance.
- Court users will exit the building in the back - new designated exit door on the first floor - towards the river.
- Security guards will be at the entrance and exit.
- Court users will go through security.
- Court users will not be readmitted at the exit (if a person goes outside for a cigarette break – they will have to enter in the front of the building).
- Face masks are required – no person will be permitted into PMC without a face mask or similar face covering.
- If a court user does not have a mask, a disposable mask will be provided.
- The number of people in the court facility shall be limited to ensure safe social distancing.
- Court Users will not be permitted to linger in court facility
- News media will be permitted into court facilities but only in a manner that is consistent with public safety.
- If court users are sick or have underlying medical/health issues that put them at a higher risk, please do not come to Pittsburgh Municipal Court. Please contact Pittsburgh Municipal Court in advance of the hearing.
- Germ guards have been installed at the bench.

Scheduling:

- Pittsburgh Municipal Court will have staggered appearance times:
    - Every 15 minutes from 8:00 a.m. – 11:00 a.m.
    - Every 15 minutes from 12:30 p.m. – 4:00 p.m.
    - The number of cases scheduled will ensure proper social distancing.
    - Parties are expected to appear at the scheduled time and be prepared to proceed.

- Criminal Cases:
    - If necessary criminal cases may be heard in 2 – 3 courtrooms, city, traffic and non-traffic courtrooms.
    - Please check hearing notice for courtroom assignment and time.
    - Parties will check in at a window designated for the courtroom assignment.

- Parties are encouraged to conference with one another prior to the court proceeding. Parties should be prepared to proceed at scheduled time.

Hearings:

- Parties are to remain at counsel tables and not approach the bench.
- Parties must speak loudly so FTR can record.
- Speaker systems have been installed.

Payments:

- Payments will be accepted by mail – check or money order.
- Parties are encouraged to make online payments through alleghenytix.com and ujsportal.pacourts.us.
- Payments may be made by cash if safety procedures are followed.
- Bail documents may be presented electronically via fax or email. Any fees will be mailed directly to the Department of Court Records if it is a Common Pleas bail.

Criminal Case Filings – Police Agencies:

- All criminal cases filed at Pittsburgh Municipal Court shall be handled remotely
- Police agencies please refer to the Pittsburgh Municipal Court Covid-19 Criminal Processing Plan.

Emergency Protection from Abuse:

- Petitions will be handled at the Pittsburgh Municipal Court facility, 660 First Ave., Pittsburgh, PA 15219, Monday through Friday from 11:00 a.m. through 8:00 a.m., and 24 hours on weekends and holidays.

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

IN RE: AMENDED FIFTH JUDICIAL DISTRICT EMERGENCY OPERATIONS PLAN	)	No. 23 WM 2020

ORDER OF COURT

AND NOW, this 15th day of September 2020, having previously declared a judicial emergency in the Fifth Judicial District of Pennsylvania, and having suspended jury trials until further Order of Court, this Court amends its previous Emergency Operations Orders and now orders that the actions set forth below be taken pursuant to Pa.R.J.A. No. 1952(B)(2). All provisions of this Order apply through December 31, 2020.

I. Resumption of Jury Trials in the Fifth Judicial District of Pennsylvania

- Jury selection for trials in both the Criminal and Civil Divisions of the Court of Common Pleas of the Fifth Judicial District shall resume on October 19, 2020.

- The Administrative Judge of each Division shall determine which cases shall proceed to trial by jury during the pendency of this Order.

- Jury selection for all matters shall take place in the David L. Lawrence Convention Center (hereinafter the Convention Center), located at 1000 Fort Duquesne Boulevard, Pittsburgh, PA 15222. All persons shall enter

the Convention Center through the West Lobby entrance of the Convention Center.

- Jury trials for Civil Division cases shall be heard in the Convention Center.

- Jury trials for Criminal Division matters shall be heard in one of three locations that are large enough to ensure sufficient social distancing. These locations are:

    - Courtroom 700 (Civil Division Assignment Room) located on the 7th floor of the City-County Building, 414 Grant Street, Pittsburgh, PA 15219;
    - The Gold Room located on the 4th floor of the Courthouse, 436 Grant Street, Pittsburgh, PA 15219; and
    - Courtoom 313 located on the 3rd floor of the Courthouse, 436 Grant Street, Pittsburgh, PA 15219.

- With prior approval of the Sheriff of Allegheny County and the Adminstrative Judge, some criminal jury trials may take place in the Convention Center, provided that the defendant is not incarcerated and the case does not involve a crime of violence, the use or possession of a firearm or other deadly weapon, or the delivery of a controlled substance.

II. Other matters to be heard at the Convention Center

- Other minor matters, such as traffic matters, as designated by the President Judge, the with approval of the Sheriff of Allegheny County, may be heard in the Convention Center.

III. Safety and Health Measures

- For purposes of this Order and to hear and dispose of matters set forth in this Order, the David L. Lawrence Convention Center and the Gold

Room located on the 4th floor of the Courthouse are deemed court facilities. All provisions regarding court facilities contained in the Emergency Operations Plan Order entered on August 31, 2020 and its attachments shall apply to the Convention Center and the Gold Room.

- The Allegheny County Sheriff shall provide security for all court activities in the Convention Center and for jury trials in the Courthouse and the City-County Building. Sheriff's deputies shall have full authority to enforce the provisions of the August 31, 2020 Order in the Convention Center.

- The health and safety of all persons, including but not limited to, jurors, witnesses and victims, defendants, attorneys, employees, judges and judicial staff is a priority of the Court. Accordingly, health and safety measures are in place and include:

    - All persons shall be required to undergo security screening (magnetometer and x-ray) upon entry to the Convention Center, the City-County Building, and the Courthouse.
    - Temperature checks will be administered upon entry to the Convention Center, the Gold Room, the Civil Division Assignment Room, and Courtroom 313.
    - COVID-19 screening questions will be administered.
    - Social distancing is ordered and will be practiced in all courtrooms and jury assembly rooms.
    - Face masks or coverings must be worn by all persons entering or remaining in court facilities. Masks will be available for those who do not have one.
    - Hand sanitizer stations will be placed at key areas throughout court facilities.
    - The public, including the news media, will observe jury trials in separate courtrooms or rooms designated for this purpose.
    - All provisions regarding court facilities contained in the Emergency Operations Plan Order entered on August 31, 2020 and its attachments shall apply to the Convention Center and the Gold Room.

- Sheriff's deputies, police, constables, and building security shall have the authority to enforce all of the conditions in this Order and the August 31, 2020 Emergency Operations Plan Order. Persons who are not compliant with these orders will be required to leave the Convention Center or other court facility.

By the Court:

.P.J.

Kim Berkeley Clark
President Judge

Allegheny County prepares convention center for jury selection amid pandemic

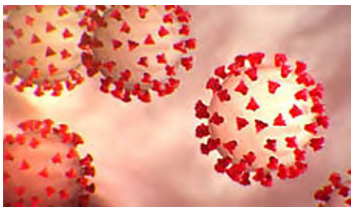
MICK STINELLI
Pittsburgh Post-Gazette

OCT 20, 2020 | 5:30 AM

Allegheny County has picked an unusual spot to start the process of resuming jury trials: the David L. Lawrence Convention Center.

Jury selection will begin Wednesday in two large convention center halls, each housing a maximum of 80 potential jurors. Chairs will be spread out several feet apart so people can distance themselves from one another. Traffic court already is using the building, and other areas will be used for civil cases.

Jury trials were put on hold in March, when the Pennsylvania Supreme Court ordered all state courts to close during the earliest



“The right to a trial by jury is one of the fundamental rights of U.S. citizenship, but due to the pandemic, there has not been a jury trial held in Allegheny County for the last six months,” Allegheny County Common Pleas President Judge Kim Berkeley Clark wrote in a recent statement.

“During this time, defendants who are being held in jail, as well as victims and their families, have been waiting for a just resolution of their cases. We must begin to bring resolution and closure to these cases in the safest manner possible.”

The decision to move forward with trials is a difficult balancing act of protecting civil rights and adhering to the advice of public health experts, defense attorney Dave Shrager said, adding, “We can’t suspend people’s constitutional rights, and we can’t put people in harm’s way.”

Mr. Shrager said he believes the county is doing its best to make the process as safe as possible.

It has instituted measures that include spreading jurors out instead of having them sit shoulder to shoulder in the jury box; erecting Plexiglas barriers to protect the judge, witnesses and other court employees; and requiring everyone to wear face coverings inside the convention center. The same rules apply for other proceedings continuing at the Allegheny County Courthouse on Grant Street.

Defense attorney Phil DiLucente said some of his colleagues have expressed concern about returning to the courthouse.

Russ Broman, a longtime assistant district attorney, died in August after contracting COVID-19. His colleague, Ted Dutkowski, also contracted the virus and was hospitalized as infections spread across the court system in June and July.

But Mr. DiLucente said he had confidence that the court will do what it can to prevent an outbreak.

“The general consensus is that they’re going to follow the [Centers for Disease Control and Prevention] guidelines and avoid spread,” he said.

Measures such as temperature checks at entrances, requiring the public to view proceedings over video feed in a separate room,

"While no one can guarantee, in any setting, that someone will not get COVID, we have taken precautions to minimize the risk of transmitting the virus during both jury selection and the trial," Mr. Connors wrote in an email.

If someone has a temperature of 100.4 degrees or higher, that person will be asked to leave the convention center via a back exit, a measure to protect others in line at the entrance. Jurors can also opt out of duty if they have a health concern.

Mike Feeney, a civil litigator, was one of six members of the Allegheny County Bar Association who gave input to the county on restarting civil trials, which will be held on the third floor of the convention center. Those trials can't proceed unless all parties agree to move forward, and most people are willing to wait at least a little while longer, Mr. Feeney said.

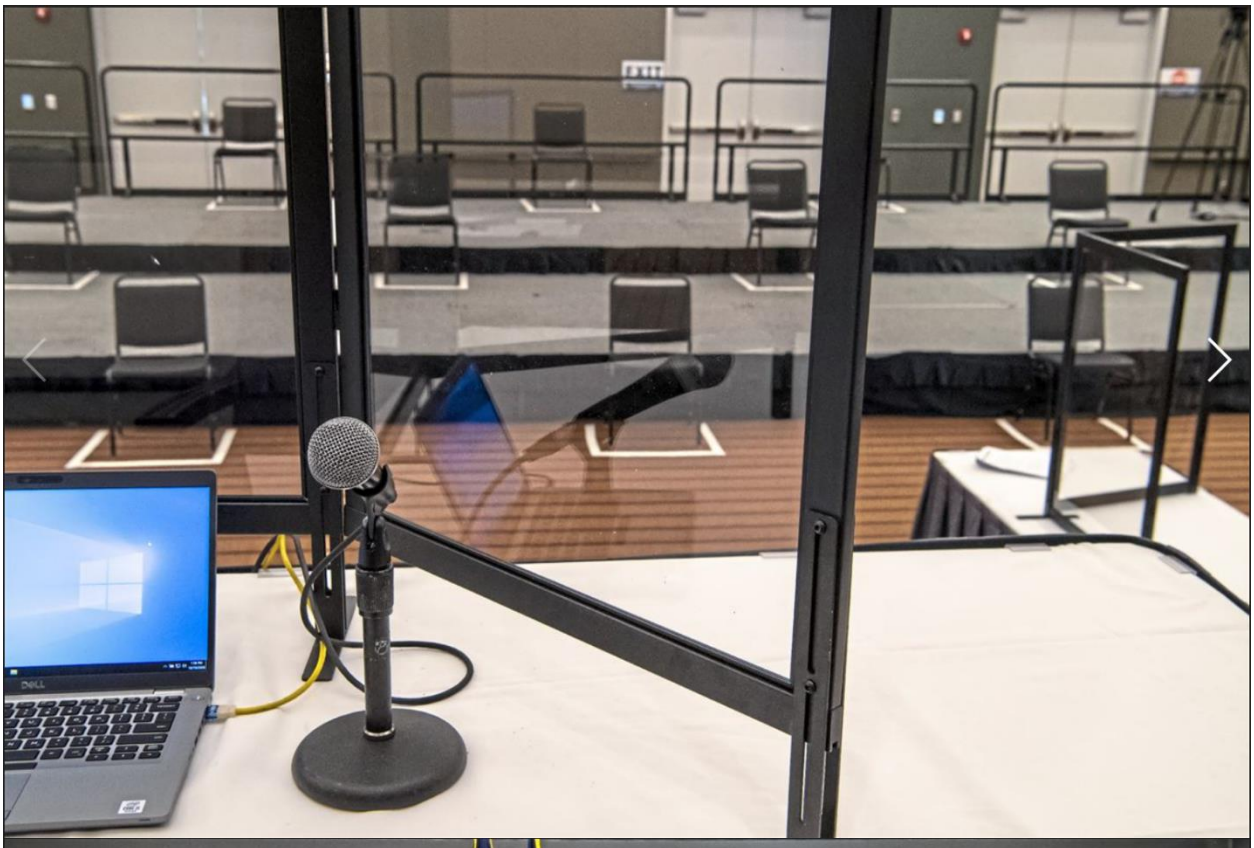
"The majority view is, there's no harm in waiting," Mr. Feeney said of the his colleagues. "Why risk lives to try a case we could try six months from now?"

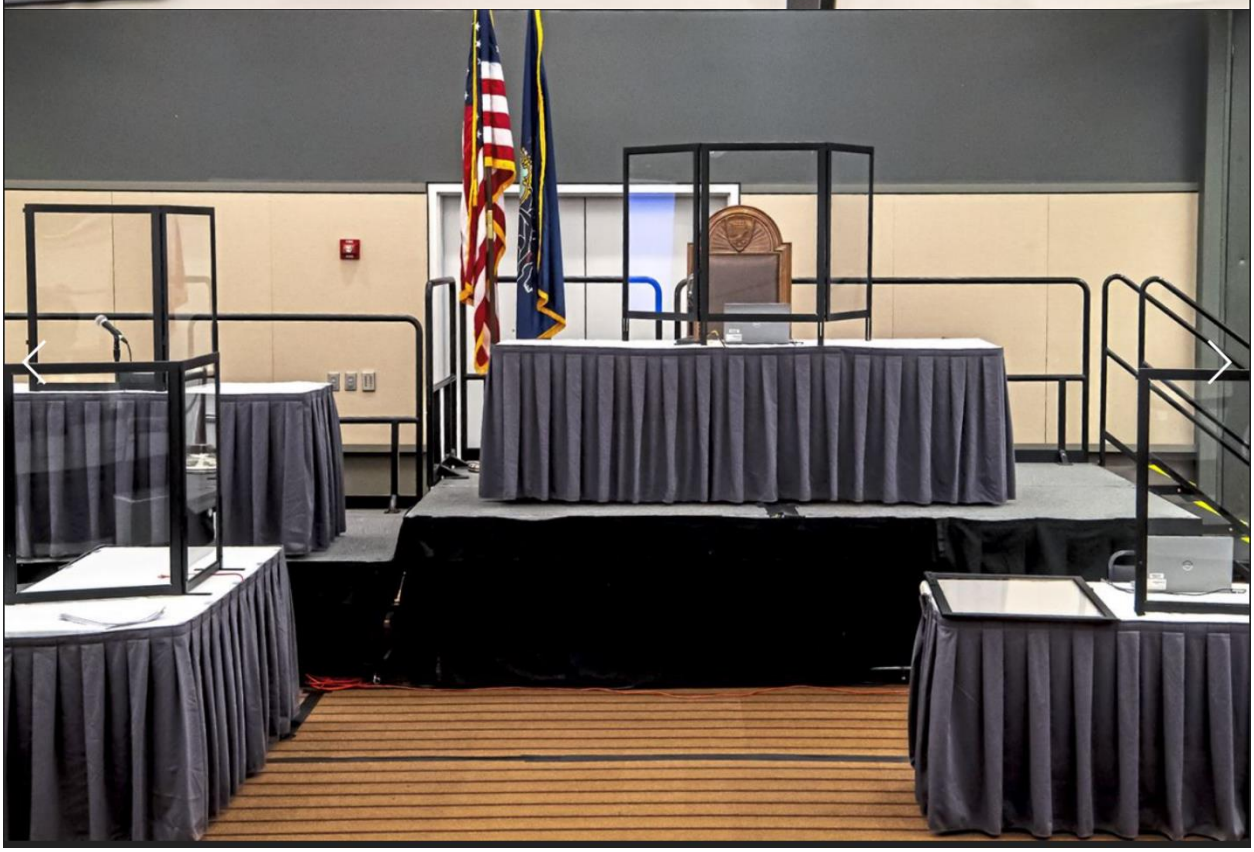
He sees the current arrangement as a "great compromise" by the court: No one is forced into an unsafe position, but trials are able to move forward if everyone involved agrees to proceed.

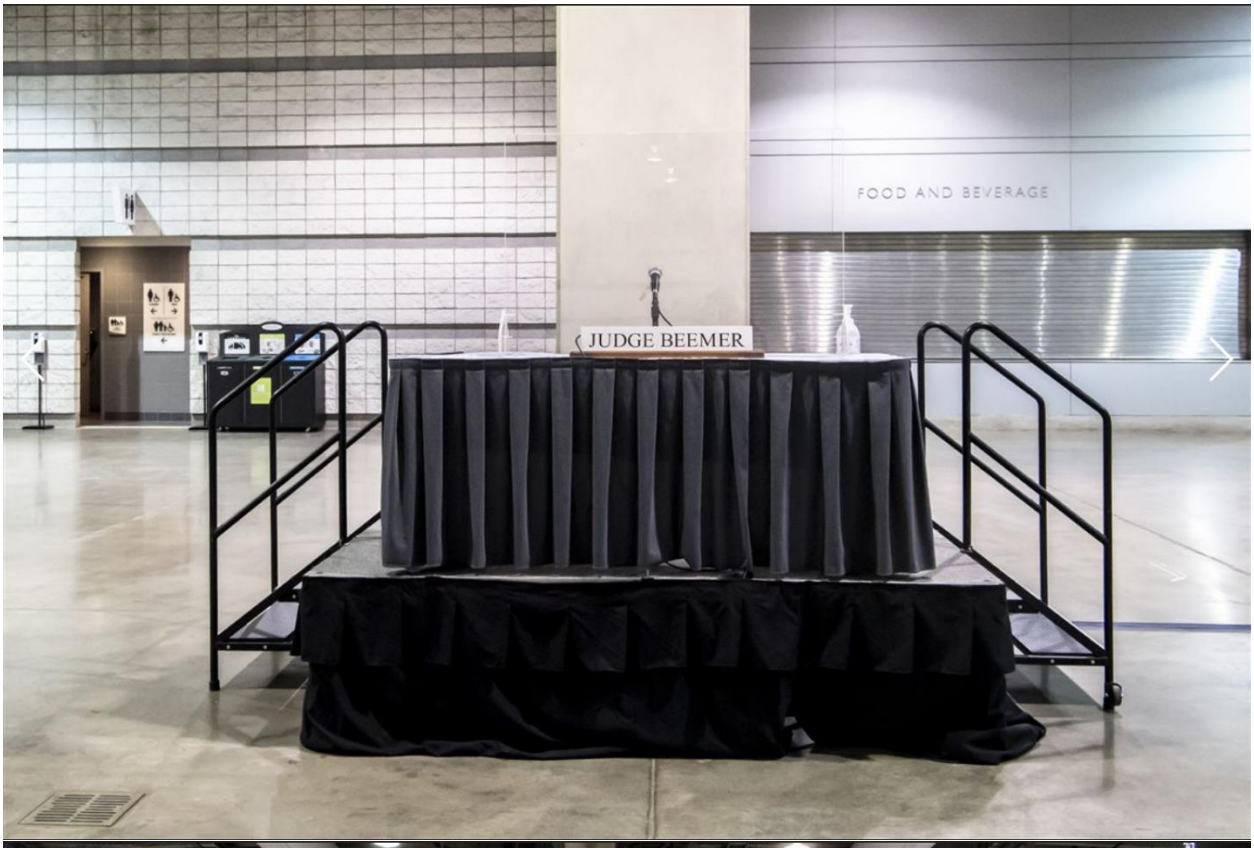
The financial effects of the pandemic have some people eager to move forward in civil cases and get a settlement, said Lori Azzara, a construction litigator at the Downtown law firm Cohen Seglias.

"Even more so now, I think it's important to be sensitive to how long they've been without money," Ms. Azzara said. She pointed to the ongoing uncertainty of whether courts will stay open if there is a resurgence of infections in the colder months.

Especially in criminal cases, where people may be jailed for months as they await trials, people are anxious to get cases in motion, Mr. DiLucente said. "[Clients are] like, 'Phil, when's this






FOOD AND BEVERAGE
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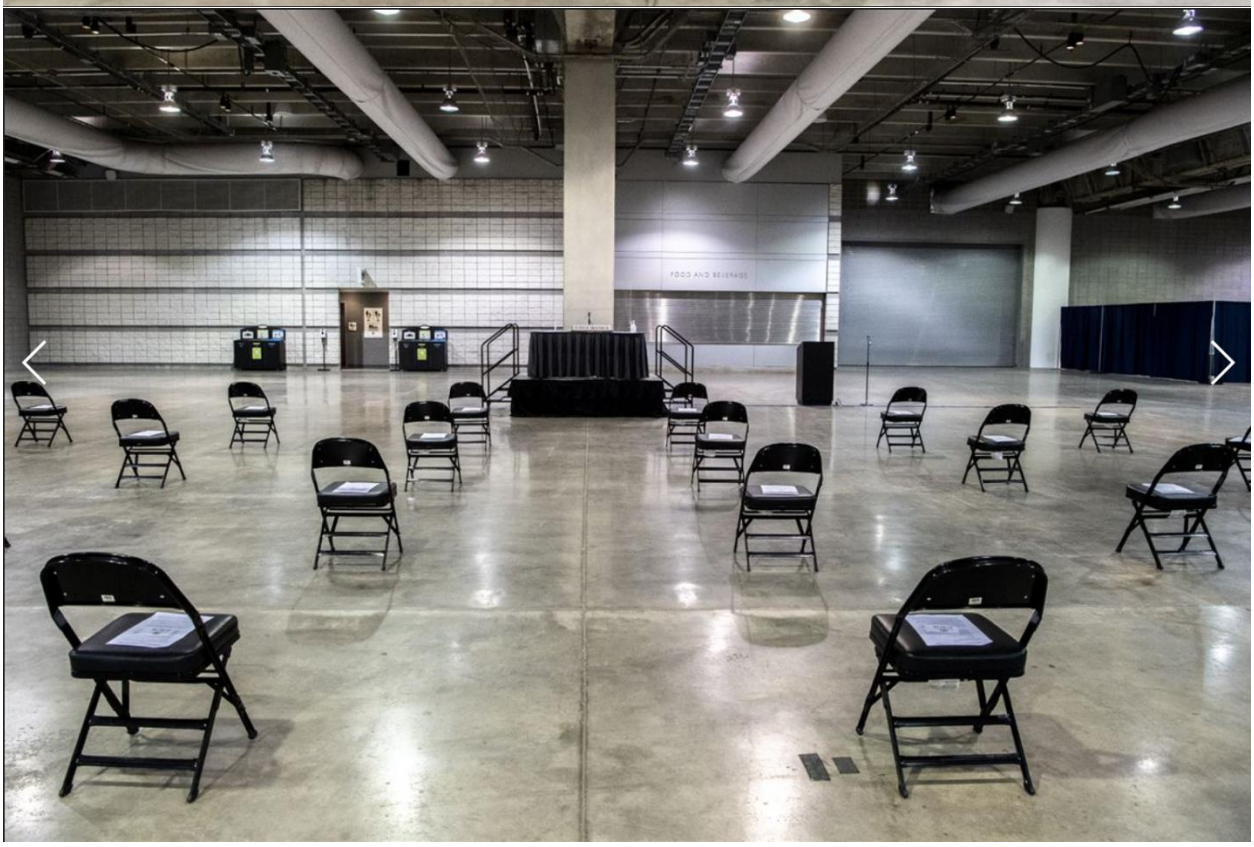

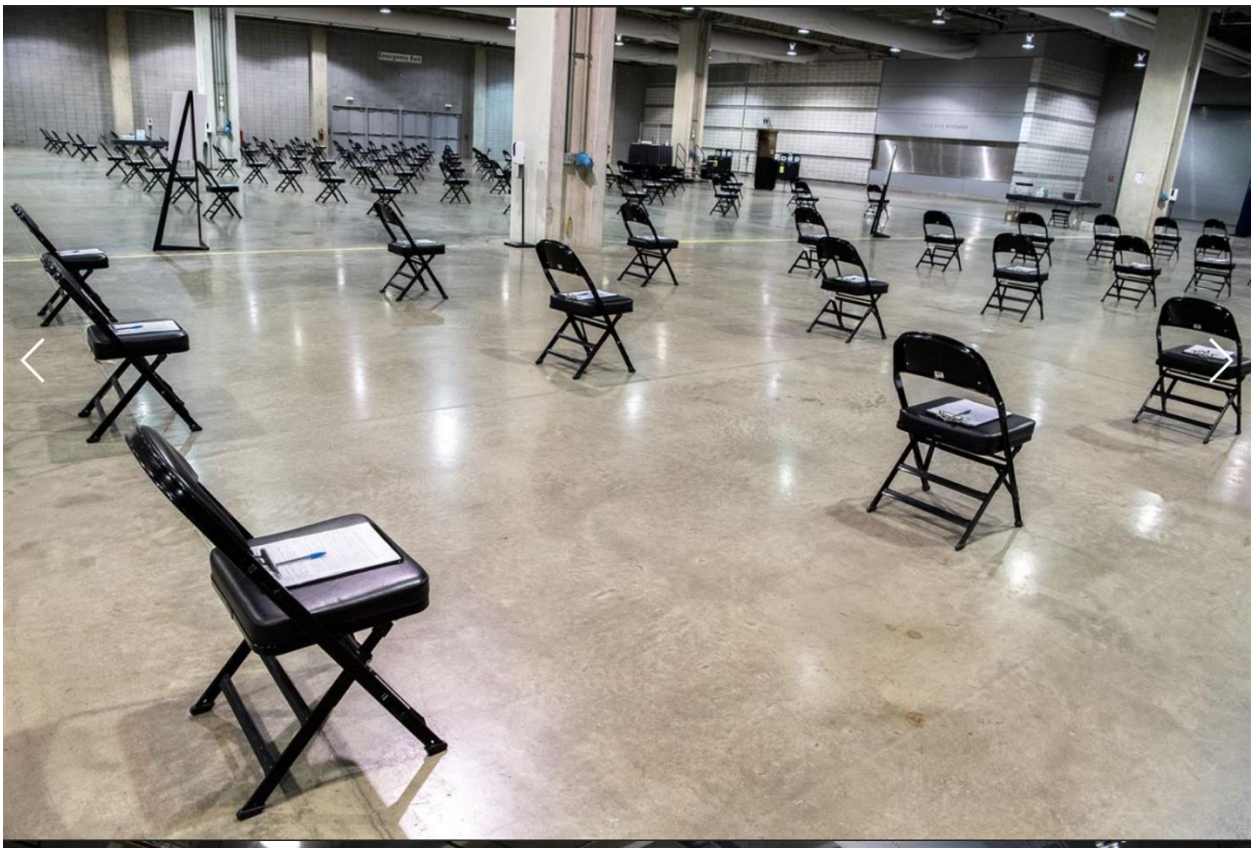

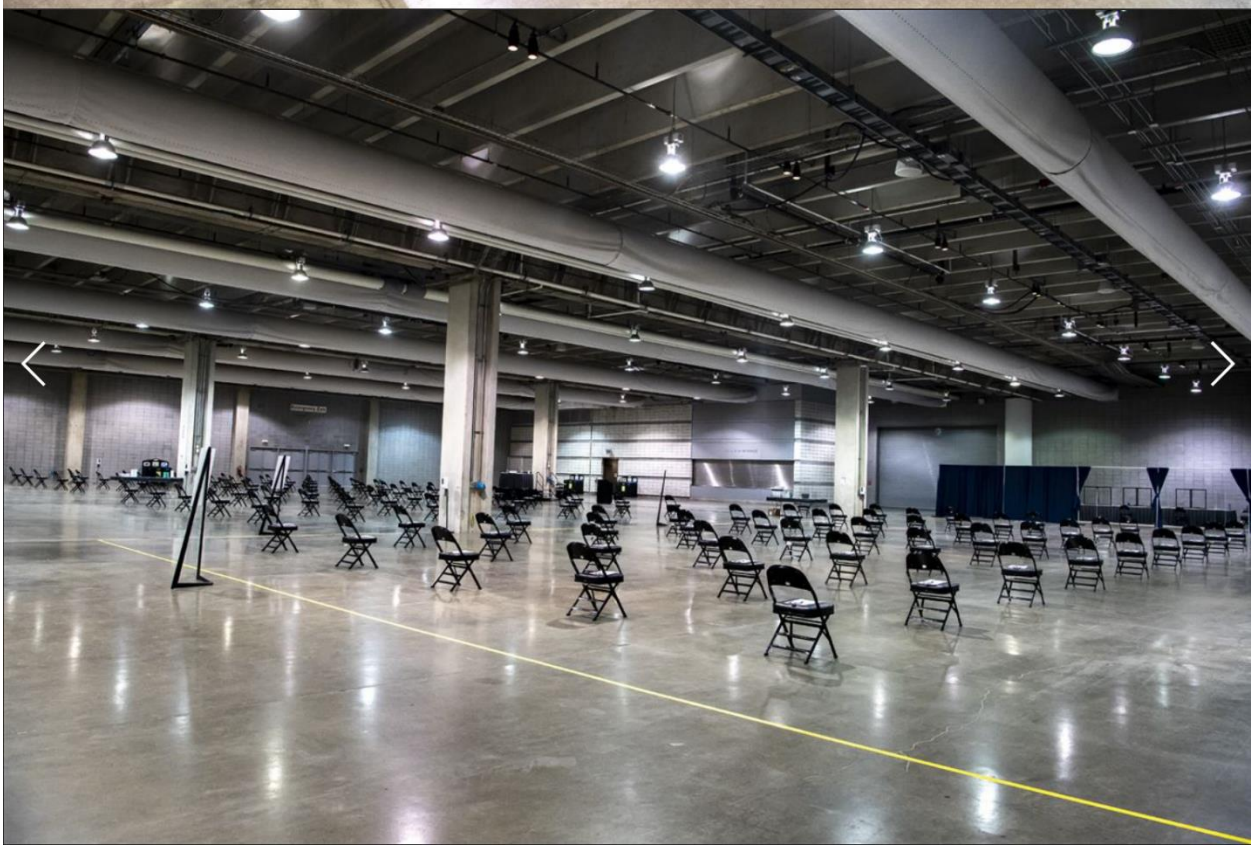


NOTICE
Everyone entering must wear a Mask/Facial Covering
4
3
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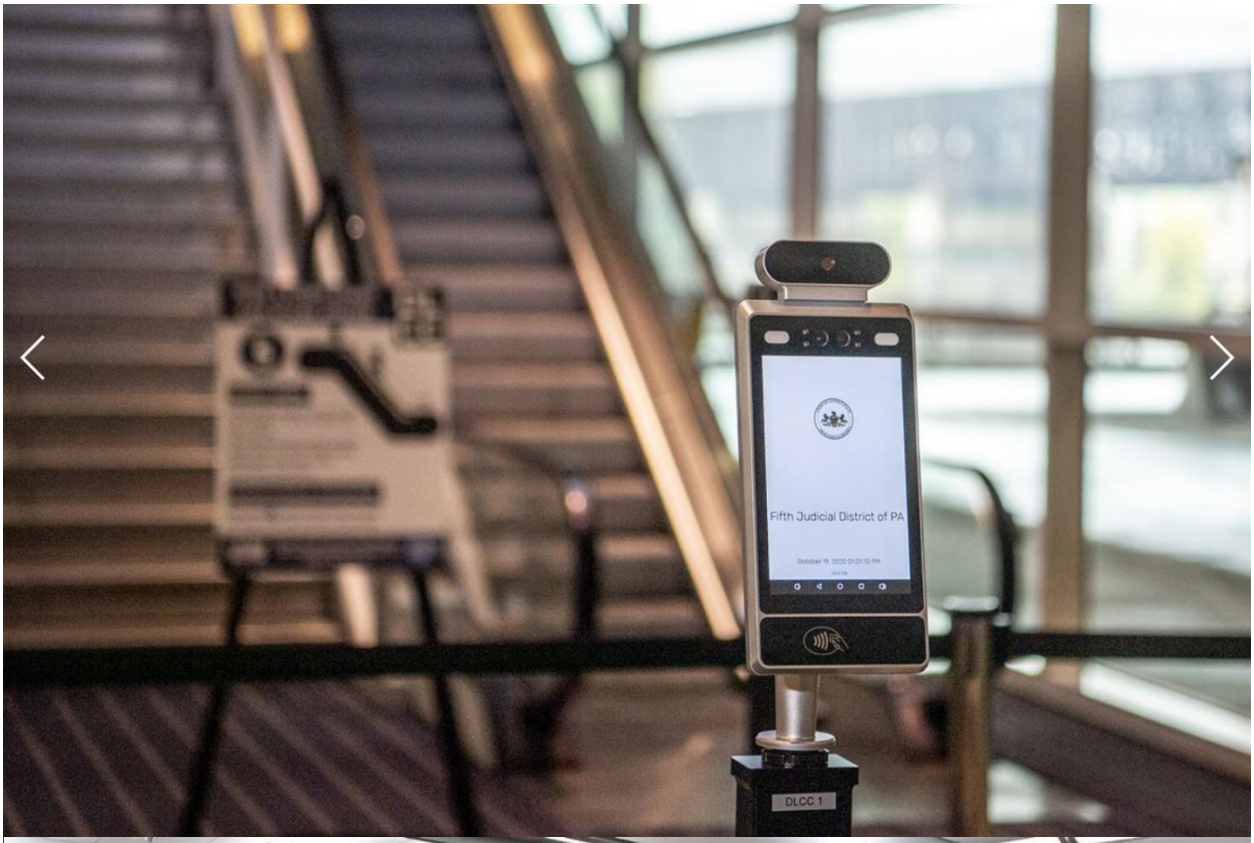
1


SECURITY NOTICE
GARRETT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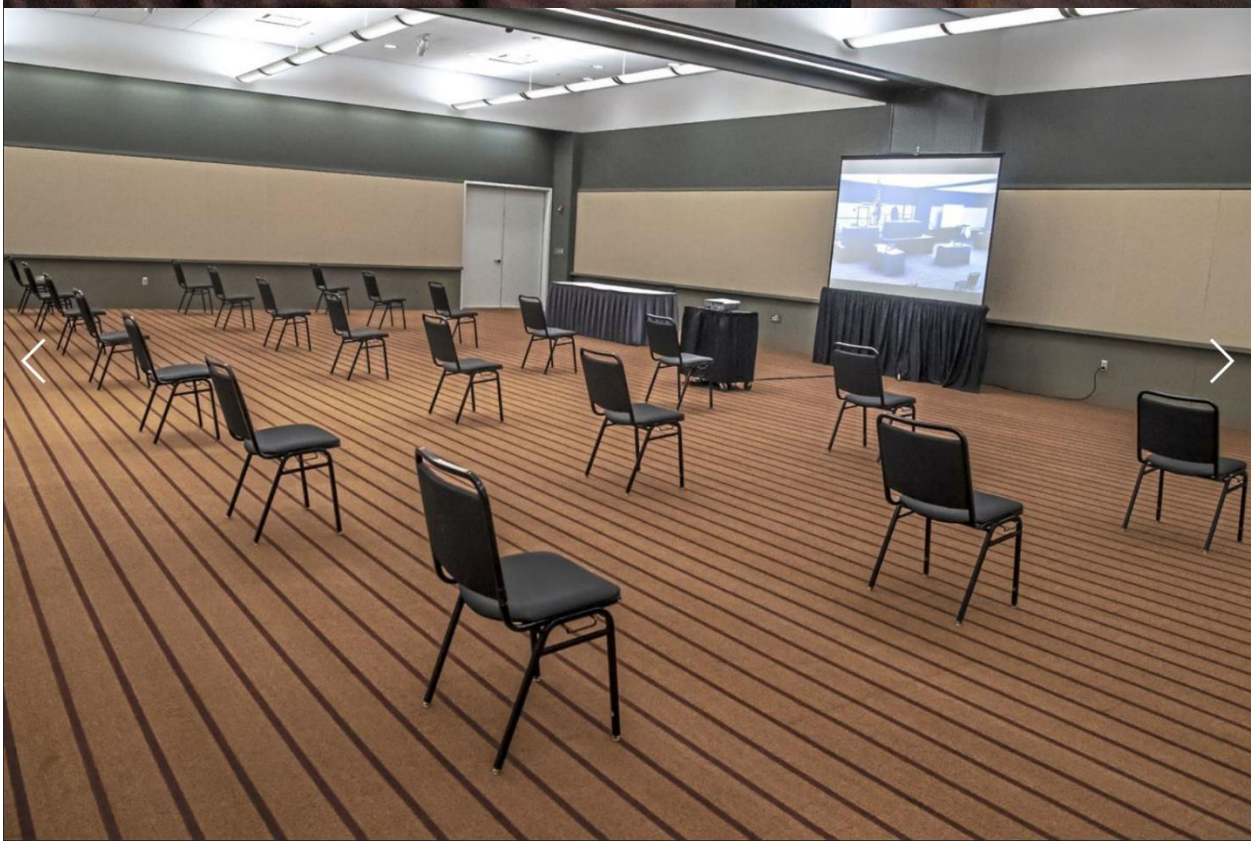

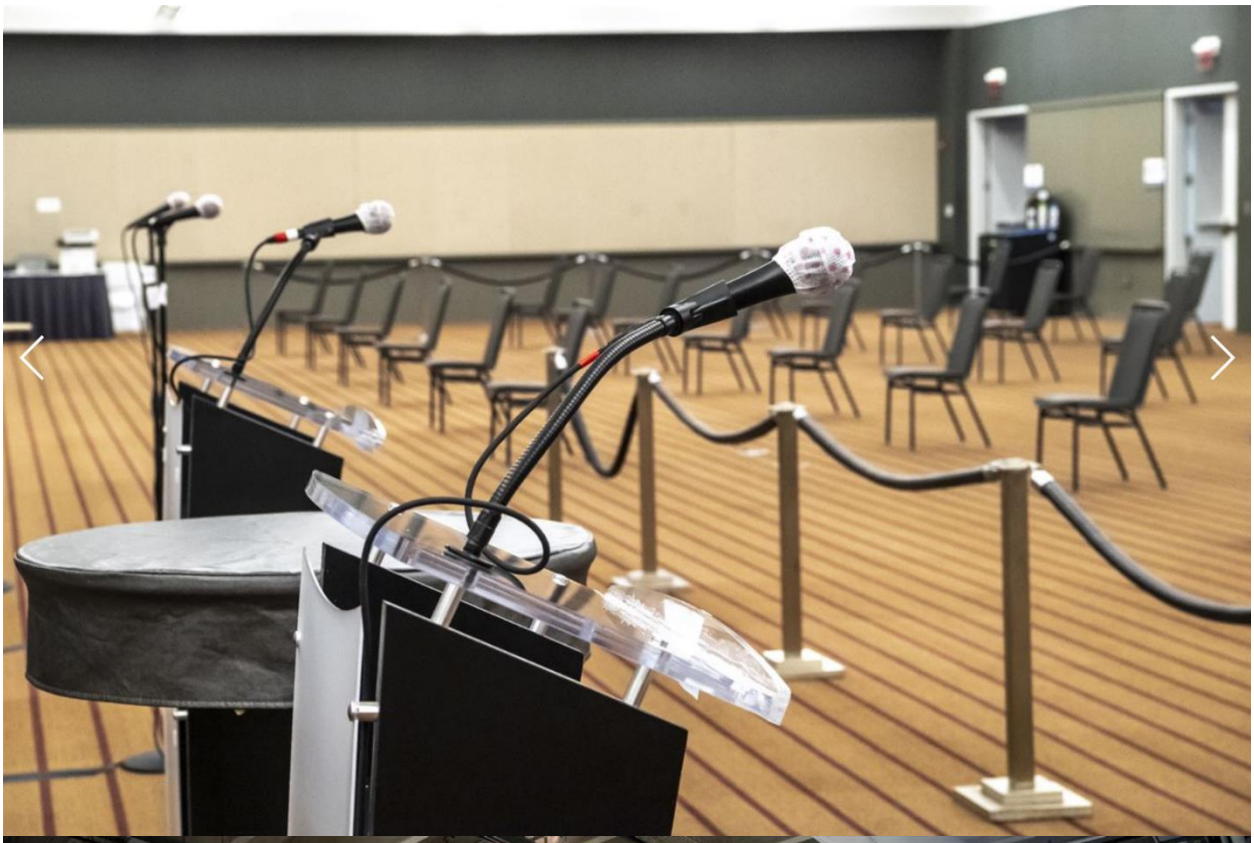

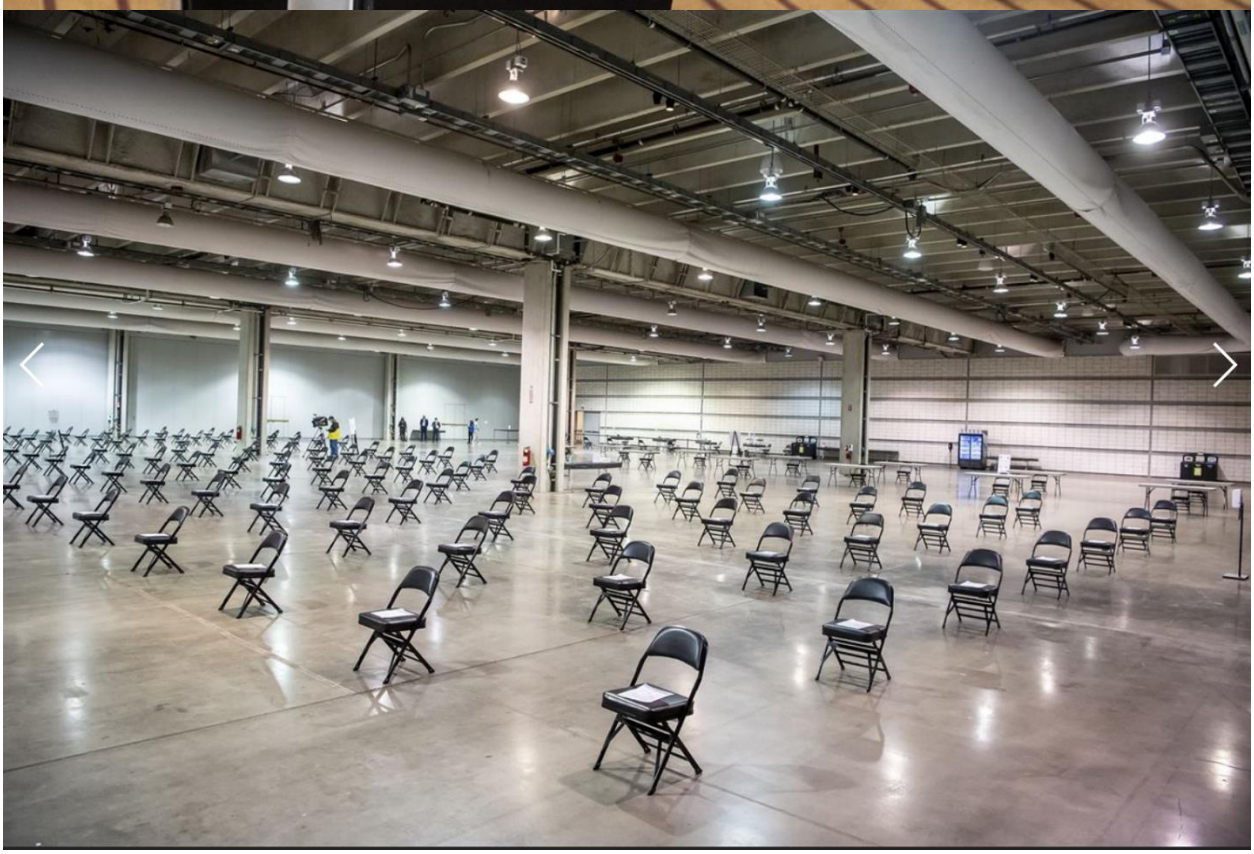

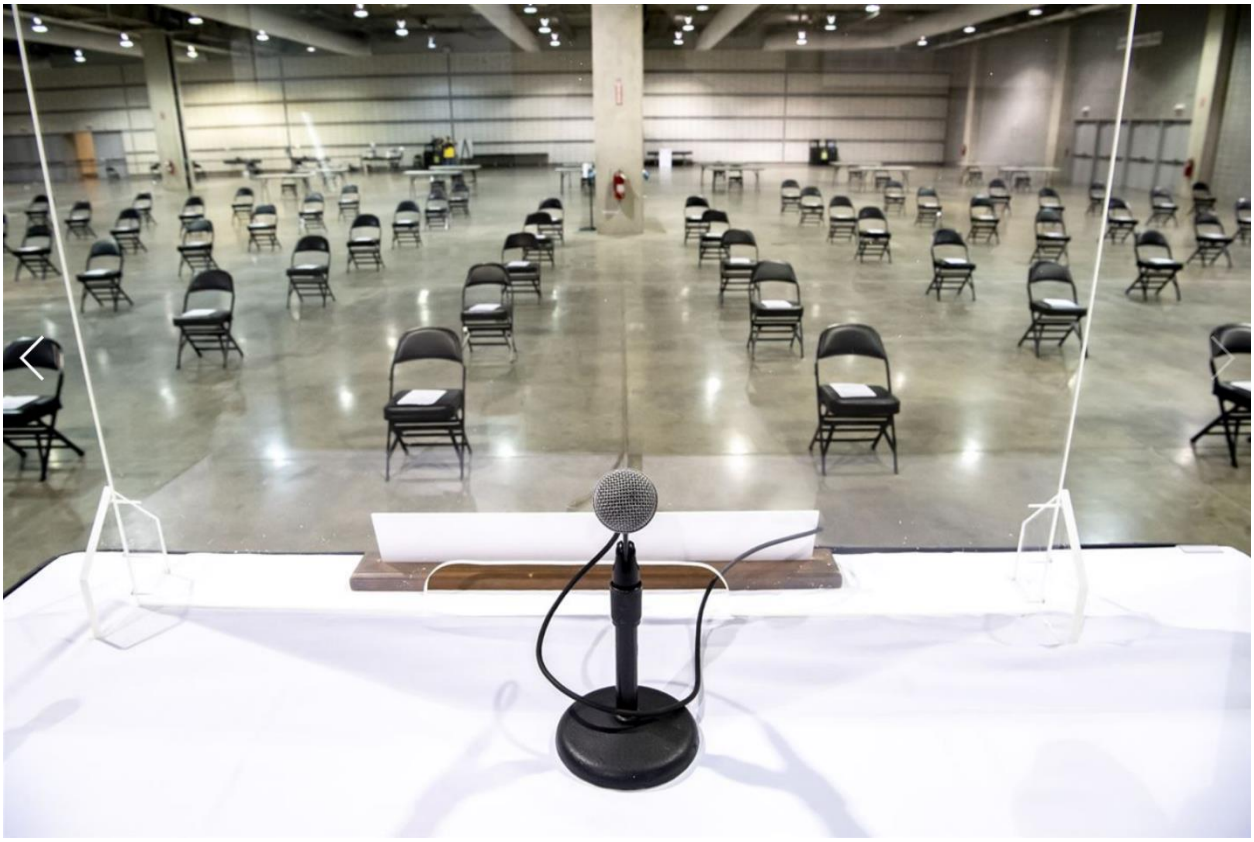

The Legal Intelligencer

Lawyers Press Pa. Supreme Court to Set in Motion COVID-Delayed Med Mal Case

Lawyers representing a young woman injured during surgery due to alleged malpractice have asked the Pennsylvania Supreme Court to exercise extraordinary jurisdiction to get the case moving again after it was delayed by the COVID-19 pandemic.

By P.J. D'Annunzio | November 11, 2020

Photo: Shutterstock

Lawyers representing a young woman injured during surgery due to alleged malpractice have asked the Pennsylvania Supreme Court to exercise extraordinary jurisdiction to get the case moving again after it was delayed by the COVID-19 pandemic.

The application for extraordinary relief (//images.law.com/contrib/content/uploads/documents/402/72419/Application-for-Extraordinary-Relief.pdf-Accepted.pdf) was filed on behalf of the parents of Brooke Bayles, whose case was postponed indefinitely March 16 due to the court's declaration of a statewide judicial emergency.

According to court papers, Bayles has Klippel-Feil syndrome, a bone disorder characterized by the abnormal joining of vertebrae at the base of the skull. In 2014, at age 13, Bayles underwent spinal surgery at the University of Pittsburgh Medical Center.

During the operation, a surgical assistant moved a fluoroscopy imaging unit, however the C-arm was not locked in place and rocked on its axis. Court papers said that arm struck a Penfield dissector, a surgical tool, driving the sharp instrument into Bayles' spine.

As a result, Bayles suffered injuries including neurological issues, more pronounced on the right side of her body, according to court papers. A lawsuit was filed in September 2016 and and was listed for trial in May 2020. The court's declaration of a judicial emergency came in March 2020.

On Aug. 31, the trial judge held that to move forward, consent was required by all parties in the lawsuit. Bayles' lawyers claimed that violated her right to a trial without undue delay under the Pennsylvania Constitution.

"The Aug. 31 order did not merely delay jury trial by requiring a statutory arbitration procedure first. It gave the defendants an absolute veto power over whether the jury trial happens at all," court papers said. "Article I, Section 6 provides that the right to a trial by jury 'shall remain inviolate' and requires a jury trial in a civil case where a plaintiff demands it."

"This constitutional guarantee did not grant defendants a right to decide whether a jury trial will occur," court papers said. "It does not authorize courts to give defendants veto power over whether a jury trial will occur. It did not require cases to be indefinitely postponed and unresolved because the defendant prefers not to submit the plaintiffs' case to the citizenry."

The plaintiffs are represented by Shanin Specter of Kline & Specter in Philadelphia.

"We feel strongly that neither side to a lawsuit should be able to veto the right to a trial. We hope the Allegheny County procedure is amended to reflect that fundamental concept," Specter said.

John Conti of Dickie, McCamey & Chilcote represents UPMC.

"Delay serves no one's interest, including defendants. But the prospect of trying a complex, three-week malpractice case with perhaps a dozen out-of-town experts, under unprecedented and untested COVID protocols is a practical impossibility," Conti said. "We see how COVID disrupts lives daily and without forewarning, making the likelihood of avoiding a mistrial in such a case vanishingly small. The broader public interest has to take precedence."

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COVID-19

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99 WM 2020

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. ___ WM 2020

JASON BAYLES and LESLEY BAYLES, as Parents and Natural Guardians of BROOK LACEY BAYLES,

Plaintiffs-Petitioners,

v.

ELIZABETH TYLER-KABARA, M.D., PhD., c/o Children's Hospital of Pittsburgh; UNIVERSITY OF PITTSBURGH PHYSICIANS; CHILDREN'S HOSPITAL OF PITTSBURGH; CHILDREN'S HOSPITAL OF PITTSBURGH UPMC, and UPMC HEALTH SYSTEM.

Defendants-Respondents.

APPLICATION FOR EXTRAORDINARY RELIEF UNDER 42 Pa.C.S. § 726 OF JASON AND LESLEY BAYLES

On petition from a matter pending in the Allegheny County Court of Common Pleas docketed as G.D. No. 16-005501

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Attorneys for Petitioners Jason Bayles and Lesley Bayles

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TO MR. CHIEF JUSTICE SAYLOR AND THE HONORABLE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

Petitioners Jason and Lesley Bates respectfully ask this Court to exercise its extraordinary jurisdiction to consider the issues raised herein and afford Petitioners relief as requested below.

I. Concise statement of the case

A. Brook Bayles sustained serious injuries during spine surgery.

Brook Bayles is currently a 20-year old young woman. As an infant, she was diagnosed with Klippel-Feil syndrome. Klippel-Feil syndrome is a bone disorder characterized by the abnormal joining of vertebrae at the base of the skull. As a result of this disorder, Ms. Bayles's skull is abnormally small and her cerebellum is displaced downward into the spinal canal. During her childhood, Ms. Bayles underwent medical treatment and several surgeries related to her condition, but otherwise lived an active, independent life.

On April 1, 2014, then-13-year old Ms. Bayles underwent a spinal surgery performed by Dr. Elizabeth Tyler-Kabara at Children's Hospital of Pittsburgh-University of Pittsburgh Medical Center. Dr. Tyler-Kabara and her surgical team used a fluoroscopy unit to obtain continuous imaging of Ms. Bayle's spine during surgery. One member of the team was Agnieszka Czechowski, a second-year student at Westmoreland Community College. During the procedure, Ms. Czechowski was directed to move the fluoroscopy imaging unit in order to clear the surgical field.

Unfortunately, the C-arm of the imaging unit was not properly locked. As Ms. Czechowski was moving the unit, the C-arm rocked on its axis and struck a Penfield dissector that the surgical team had placed as a marker in Ms. Bayles' back. The C-arm drove the dissector into Ms. Bayles' spinal canal. Dr. Tyler-Kabara assessed that the dissector caused a 4-cm tear in the tissue covering Ms. Bayles' spinal cord and that the dissector had been driven between the nerve roots. Dr. Tyler-Kabara noted release of blood and spinal fluid. She noted that instruments monitoring electrical impulses through the spinal cord indicated damage on the right side of her body. *See* Complaint (Exhibit "A").

Ms. Bayles suffered permanent injuries from this incident. She has permanent and significant neurologic deficits that affect mobility in all four limbs. Those deficits are especially pronounced on the right side of her body. She also suffers cognitive impairments, swallowing difficulties requiring a gastronomy tube, loss of bladder and bowel control, chronic muscle spasms, severe scoliosis, and pain in her abdomen and back. She has required multiple additional surgeries to address these conditions. Because of these conditions, she also suffers from anxiety and depression. *Id.*

In September 2016, Plaintiffs filed suit against Dr. Tyler-Kabara; University of Pittsburgh Physicians; Children's Hospital of Pittsburgh; Children's Hospital of Pittsburgh UPMC, and UPMC Health System (together "UPMC"), alleging that UPMC was negligent for the acts of its employees and ostensible agents. She demanded a civil

jury trial. *Id.* After discovery and pre-trial proceedings, the trial court entered an order listing the case on the May 2020 trial list with a trial date certain and jury selection to commence on May 18, 2020. *See* Order, dated July 15, 2019 (Exhibit "B").

B. Trial of Ms. Bayles case has been indefinitely postponed because of an order enabling defendants to veto trial from being scheduled.

On March 16, 2020, because of the Covid-19 pandemic, this Court declared a state-wide judicial emergency and authorized president judges of individual judicial districts to declare judicial emergencies within their districts and take emergency action authorized by Pa.R.J.A. 1952. *See* Order, dated March 16, 2020 (Exhibit "C"). This Court maintained the state-wide judicial emergency in subsequent orders dated March 18, March 24, April 1, and April 28, 2020. The state-wide judicial emergency ceased on June 1, 2020.

Pursuant to the authority afforded by these orders, the Honorable Kim Berkeley Clark, President Judge of the Fifth Judicial District, issued an order declaring a judicial emergency within the District on March 16, 2020. She entered additional orders on April 2, May 6, May 28, and August 31, 2020 that maintained and extended the District's judicial emergency until December 31, 2020. *See* Collected Judicial Emergency Orders (Exhibit "D").

On March 18, 2020, Judge Clark entered an order concerning emergency operations of the Fifth Judicial District under Pa.R.J.A. 1952(B)(2)(i). The order suspended all civil jury trials until further order of court (including the trial of this case).

President Judge Clark entered further orders concerning emergency operations on March 23, March 26, and May 6, each restating that civil jury trials were suspended until further order of court. *See* Collected Emergency Operation Orders (Exhibit "E").

On August 31, 2020, contemporaneous with her order extending the judicial emergency to December 31, 2020, President Judge Clark entered a further emergency operations order providing for the resumption of civil jury trials in the Fifth Judicial District. The order stated that civil jury trials would recommence on a "limited basis" where the trial court enters an order specifically scheduling such a jury trial. *See* Order, dated Aug. 31, 2020, at 7 (Exhibit "F"). Parties with cases included on an earlier trial list could file a joint motion that the case be specifically scheduled for trial. *Id.* at 9. Below is the key language:

> Jury trials shall commence on a limited basis and only where the Court enters an Order specifically scheduling a jury trial. Parties with cases on previously published trial lists may jointly, with written consent by all parties involved in the litigation, submit consented-to motions to the Calendar Control Judge requesting that their case be scheduled to be tried before a jury.

Id. Thus, any request for jury trial would require the consent of all parties. No trial can occur if a defendant does not agree. *Id.*

In the face of ongoing challenges presented by Covid-19, the Fifth Judicial District generated a solution for resuming jury trials in Allegheny County. It leased a large space—the David L. Lawrence Convention Center, located at 1000 Fort Duquesne Boulevard in Pittsburgh—for purposes of selecting juries in all cases and

conducting civil jury trials in courtrooms constructed in the Convention Center space. Criminal jury trials would take place in courtrooms located in the City-County Building and the Allegheny County Courthouse. As reported by the Pittsburgh Post-Gazette, jury selection involving no more than 100 potential jurors at a time would take place in a convention-center room with a maximum capacity of 6,000. Civil jury trials would be held in convention-center rooms large enough to hold a maximum of 170 people. *See* "Allegheny County to use convention center when jury trials resume in October," *Pittsburgh Gazette*, September 15, 2020 (Exhibit "G").[1]

Judge Clark set forth this plan in an emergency operations order dated September 15, 2020. This order stated that the Convention Center would be deemed a court facility—no different from the City-County Building of the Allegheny County Courthouse. It provided that jury selection for trials would resume on October 19, 2020. *See* Order, dated Sept. 15, 2020 (Exhibit "H"). It provided that the Sheriff would provide security for all court activities within the Convention Center. It also established Covid-related protocols for the protection of court staff and the public. These included temperature checks, screening questions, social distancing in courtrooms and jury assembly rooms, face mask requirements, the availability of hand sanitizer, and provisions for the public and news media to observe jury trials in separate spaces. *Id.*

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[1] *See* https://www.post-gazette.com/news/crime-courts/2020/09/15/Fifth-Judicial-District-Pittsburgh-trials-criminal-civil-resume-October-convention-center/stories/202009150142 (last viewed Oct. 3, 2020).

After Judge Clark entered the September 15 Order, the following language appeared on the "Civil" page of the Fifth Judicial Website, confirming that no civil trial could be scheduled absent the consent of all parties:

> PRESIDENT JUDGE CLARK'S SEPTEMBER 15, 2020 ORDER REGARDING JURY TRIALS IN THE CONVENTION CENTER, AND HER AUGUST 31, 2020 ORDER MUST BE READ TOGETHER. PURSUANT TO THE AUGUST 31, 2020 ORDER, THE 2020 PUBLISHED TRIAL LISTS ARE SUSPENDED. FURTHER, PURSUANT TO THE AUGUST 31, 2020 ORDER, IF YOUR CASE IS ON A PUBLISHED TRIAL LIST, AND ALL PARTIES CONSENT TO MOVING FORWARD WITH A JURY TRIAL, THEY MAY PRESENT A CONSENTED-TO MOTION TO THE CALENDAR CONTROL JUDGE, AND IF THE CONSENTED-TO MOTION IS GRANTED, A JURY TRIAL WILL BE SCHEDULED TO BE HELD IN THE CONVENTION CENTER.

See Civil Division website page (Exhibit "I").[2]

As noted above, the trial scheduled to begin in this case on May 18, 2020 had been suspended because of the Fifth Judicial District's emergency operation orders suspending civil jury trials generally. However, the August 31 and September 15 Orders provided the case with a pathway forward. Thereafter, the case was assigned on September 24, 2020 to Judge Philip A. Ignelzi for disposition. *See* Order, dated Sept. 24, 2020 (Exhibit "J").

On September 29, 2020, following the lead of the August 31 order, Ms. Bayles sought consent from defendant UPMC to file a joint motion for scheduling a jury trial in the convention center. *See* Correspondence, dated Sept. 29, 2020 (Exhibit "K"). UPMC declined consent, stating that it regarded trial "as a practical impossibility" under the "unprecedented and untested protocols offered by the court. Not to mention the

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[2] *See* https://www.alleghenycourts.us/Civil/Default.aspx (last viewed Oct. 5, 2020).

appellate issues that will doubtlessly arise." *See* Reply Correspondence, dated Sept. 29, 2020 (Exhibit "L"). Given the August 31 Order's requirement that all parties consent for a civil jury trial to be scheduled, UPMC's lack of consent means that a jury trial will not be conducted in this case for the indefinite future.

II. Questions presented for review

1. Should this Court review this matter under its extraordinary jurisdiction?

2. Does the trial court's order requiring written consent by all parties for a jury trial to occur violate Ms. Bayles's right to a jury trial under Article I, Section 6 of the Pennsylvania Constitution

3. Does the trial court's order requiring written consent by all parties for a jury trial to occur violate Ms. Bayles's right to a remedy without undue delay under Article I, Section 11 of the Pennsylvania Constitution?

Suggested answers to all three questions: Yes.

III. The Court should exercise extraordinary jurisdiction.

Upon petition of any party, this Court may assume plenary jurisdiction of any matter of immediate public importance that is pending before the court of common pleas, and may enter a final order or otherwise cause right and justice to be done. 42 Pa.C.S. § 726; *Board of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010) ("*BRT*"); *In re Bruno*, 101 A.3d 635, 659 (Pa. 2014). Extraordinary jurisdiction serves the Court's power of general superintendency over the judicial branch. It is similar to the Court's King's Bench jurisdiction. *Id.*

In exercising discretion regarding whether to assume plenary jurisdiction, this Court considers the immediacy and public importance of the issues raised. *See BRT*, 4 A.3d at 620. In *BRT*, the Court assumed plenary jurisdiction over a legal dispute implicating a Philadelphia ordinance that reorganized the local agency performing property assessments. The Court noted the challenge to the validity of the ordinance was of interest to members of the public and the Judiciary, who would benefit from a prompt and final determination of the statutory issue presented. *Id.* at 620-21. "A clear final ruling," the Court explained, would avoid piece-meal litigation and discourage collateral attacks on the ordinance in the context of individual cases. *Id.* The Court also noted an interest in maintaining continuity and a working public system of local taxation and revenue collection. *Id.* The Court added that "[s]wift resolution of this matter will also promote confidence in the authority and integrity of our state and local institutions." *Id.*; *Ieropoli v. AC & S Corp.*, 842 A.2d 919 (Pa. 2004) (plenary jurisdiction over constitutional challenge to statute extinguishing causes of action that had accrued before statute was enacted); *Silver v. Downs*, 425 A.2d 359 (Pa. 1981) (plenary jurisdiction over interlocutory appeal from order disqualifying township solicitor from representing township officers).

Here, Ms. Bayles challenges the constitutionality of the trial court's order concerning emergency operations dated August 31, 2020, with a focus on her rights under the Pennsylvania Constitution to a jury trial and to a remedy without undue delay.

This challenge affects not only Ms. Bayles, but numerous members of the public whose cases are pending in the Fifth Judicial District and whose cases therefore cannot be considered for trial under the August 31 order unless the defendant consents. Prompt resolution of whether the Pennsylvania Constitution is violated by giving veto power to the defendant concerning the scheduling of civil jury trial would benefit litigants, counsel, and the bench. It would confirm whether a judicial district capable of scheduling jury trials in a safe and appropriate manner may require defendant's consent before scheduling occurs. It likewise would "promote confidence in the authority and integrity of our state and local institutions." *See BRT*, 4 A.3d at 620-21. For all these reasons, Petitioners urge the Court to grant this petition and cause right and justice to be done. *See* 42 Pa.C.S. § 726.

IV. The Court should grant relief in Plaintiffs' favor.

The August 31 Order provides for the scheduling of a civil jury trial only upon "written consent by all parties involved in the litigation"—i.e., when the defendant agrees that trial may proceed. *See* Order, dated Aug. 31, 2020, at 9 (Exhibit F). Ms. Bayles challenges the Order under two provisions of the Pennsylvania Constitution: Article I, Section 6 (right to jury) and Article I, Section 11 (right to remedy without undue delay). Each provision provides an independent basis for granting relief in Plaintiffs' favor.

A. The order violates Article I, Section 6 of the Pennsylvania constitution.

Article I, Section 6 states that the right of trial by jury shall "remain inviolate." PA. CONST. art. I, § 6. This right belongs to the party seeking to have a jury trial, not to the party seeking to avoid a jury trial. *See Commonwealth v. Tharp*, 754 A.2d 1251, 1253 (Pa. 2000).

Article I, Section 6 was helpfully explicated in *Parker v. Children's Hosp. of Pa.*, 394 A.2d 932 (Pa. 1978), and *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980). In *Parker*, the plaintiffs argued, *inter alia*, that a statutory requirement that medical malpractice matters first be submitted to an arbitration procedure denied the right to a trial by jury or, alternatively, was an onerous restriction that postponed access to a trial by jury. The Court reasoned that this approach did not facially offend Article I, Section 6 because a *de novo* trial by jury was available prior to the final determination of the parties' respective rights. However, the Court stated that a plaintiff's constitutional right to jury trial "must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable." Therefore, the Court withheld judgment on whether the arbitration procedure was onerous so as to give the General Assembly time to test the effectiveness of the legislation establishing this approach. *See Parker*, 394 A.2d at 938-40.

In *Mattos*, the Court considered a renewed challenge to the statute requiring compulsory arbitration in medical malpractice matters. This time, the Court declared

the statute unconstitutional. The Court reasoned that the lengthy delay occasioned by the arbitration system burdened the right to a jury trial with "onerous conditions, restrictions or regulations which . . . ma[de] the right practically unavailable." *See Mattos*, 421 A.2d at 195-96.

Here, the deprivation of the right to jury trial is even more profound than was presented in *Parker* and *Mattos*. The August 31 order did not merely delay jury trial by requiring a statutory arbitration procedure first. It gave the defendants an absolute veto power over whether the jury trial happens at all. Article I, Section 6 provides that the right to a trial by jury "shall remain inviolate" and requires a jury trial in a civil case where a plaintiff demands it. *See* PA. CONST. art. I, § 6; *Tharp*, 754 A.2d at 1253. This constitutional guarantee did not grant defendants a right to decide whether a jury trial will occur. It does not authorize courts to give defendants veto power over whether a jury trial will occur. It did not require cases to be indefinitely postponed and unresolved because the defendant prefers not to submit the plaintiffs' case to the citizenry. *See Tharp*, 754 A.2d at 1253.

In *Parker*, the Court explained that a litigant's ability to present her claim to a jury "must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable." *See Parker*, 394 A.2d at 938-40. In *Mattos*, the Court recognized that even a lengthy delay in trying a case to the jury burdens the right to a civil jury trial. *See Mattos*, 421 A.2d at 195-96. The

requirement in the August 31 order that all litigants consent to a jury trial before a civil jury may be empaneled is an onerous condition that has made the right to a trial by jury unavailable to Ms. Bayles. The order causes this onerous result by permitting every defendant the opportunity to veto a jury trial from happening.

The delays occasioned by the Covid-19 pandemic and the state-wide emergency may be long-lasting. Currently the judicial emergency within the Fifth Judicial District extends to the end of the year. Given the defense-consent requirement in the August 31 Order, delay in empaneling a jury to decide Ms. Bayles' claims currently is indefinite. The order operates to make Ms. Bayles' right to a jury trial "practically unavailable." *See Parker*, 394 A.2d at 939. That outcome is unacceptable and unconstitutional, especially in a jurisdiction that has established a plan for conducting civil jury trials despite the unavailability of its usual courtrooms. For all of these reasons, the August 31 Order violates Ms. Bayles' right to a trial by jury pursuant to Article I, Section 6 of the Pennsylvania Constitution.

B. The order violates Article I, Section 11 of the Pennsylvania Constitution.

Article I, Section 11 of the Pennsylvania Constitution provides that "[a]ll courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay." PA. CONST. art. I, § 11.

The Court has elaborated on the meaning of this passage, explaining that "[i]t is the constitutional right of every person who finds it necessary or desirable to repair to the courts for the protection of legally recognized interests to have justice administered without sale, denial or delay." *Masloff v. Port Auth. of Allegheny Cty.*, 613 A.2d 1186, 1190 (Pa. 1992). The Court has added that "the right to 'due course of law' provides an independent guarantee of legal remedies for private wrongs by one person against another, through the state's judicial system." *Konidaris v. Portnoff Law Associates, Ltd.*, 953 A.2d 1231, 1240 (Pa. 2008). This language expresses the notion that a plaintiff's pursuit of a cause of action may not be so impaired as to have been rendered illusory. It must be adjudicated by courts in the due course of law. *Id.*

Section 11 calls for remedy and justice administered without "denial" or "delay." PA. CONST. art. I, § 11. This Court has recognized that constitutional language as guaranteeing an "efficient flow of justice" to facilitate "substantive justice" for litigants and to vindicate Section 11 rights. *See Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346, 1350-51 (Pa. 1991).

The Covid-19 pandemic has been devastating and disruptive on all aspects of life. The impact of the pandemic on the Pennsylvania judiciary need not be described to this Court. In the Fifth Judicial District, President Judge Clark understandably declared a judicial emergency and suspended civil jury trials generally for a period of time. However, the August 31 Order authorized civil jury trials to commence within

the Fifth Judicial District. The September 15 Order made clear that civil jury trials would take place in the Convention Center and that jury selection would begin on October 19, 2020. As the Fifth Judicial District has resumed jury trials, the issue presented is confined to whether that court, having the means and wherewithal to conduct jury trials, may effectively close the courthouse door to plaintiffs by allowing defendants to decide whether the trial will occur as a threshold matter. Stated plainly, may a trial court give defendants the keys to the courthouse? Surely the answer is no. Otherwise the defendant is permitted to indefinitely stall the constitutionally-guaranteed vehicle by which Ms. Bayles has sought redress for claims. *See Ieropoli*, 842 A.2d at 930-31; *Masloff*, 613 A.2d at 1190.

Ms. Bayles was injured six and a half years ago. Her case has been pending in the Allegheny County Court of Common Pleas for more than four years. She had a trial date of May 18, 2020, when the Covid-19 pandemic started and trials were suspended generally for public health reasons. The case remains trial ready and needs only a courtroom. The Fifth Judicial District now has courtrooms (in the Convention Center), but has wrongly empowered UPMC in this case to indefinitely stop the trial from taking place through its refusal to consent. Of course, it is no surprise that UPMC has refused consent. Even where liability may be clear, defendants are advantaged by delay. Memories may fade. Medical and litigation costs may increase. The plaintiff is rendered unable to take advantage of funds rightfully due her, increasing pressure to

resolve the case for a suboptimal amount. Undue delay has an especially grave impact on persons who are catastrophically injured like Ms. Bayles and who may need case resolution sooner rather than later. The ability to impose indefinite delay places a defendant in strong position relative to the plaintiff. *See Laudenberger v. Port Auth. of Allegheny Cty.*, 436 A.2d 147, 151 (Pa. 1981). But the violation of Article I, Section 11 is not occasioned here simply by the equities. The Constitution guarantees those who initiate lawsuits that the courts "shall be open" and that plaintiffs shall have a remedy "by due course of law" and without "sale, denial or delay." PA. CONST. art. I, § 11. Here, the August 31 Order allows a plaintiff to reach the courtroom only if the defendant consents to that outcome. That outcome is more than unfair. It violates the promise of Article I, Section 11.

Pa.R.J.A. 1952(B)(2) is not to the contrary. This rule may permit President Judge Clark to cancel or suspend trials during the state-wide judicial emergency. But where the Fifth Judicial District has provided for civil jury trials to commence, the rule does not allow a plaintiff's constitutional right to jury trial to be conditioned on the defendant's consent. *See* Pa.R.J.A. 1952(B)(2)(a)-(s). The August 31 violates Article I, Section 11 for this reason as well.

As a final matter, the August 31 Order's consent provision cannot be justified simply because civil trials must occur in a location other than where they normally occur. Buildings may come and go. Infrastructure plans may change. But the

guarantees of jury trial and open courts have been part of the Pennsylvania Constitution since 1776 and do not depend on access to the usual courtrooms. The analysis ought not change because it was Covid-19 (rather than a fire or flood) that caused courtrooms to shift to the Convention Center. Everyone would prefer to have trials unimpacted by Covid-19. But trials are now proceeding in Allegheny County and throughout the Commonwealth in the Covid-19 environment. Courts are solving the challenges presented by the pandemic, as the Fifth Judicial District has done by leasing and building courtrooms within the Convention Center facility. Constitutional rights should not be compromised in this circumstance.

V. Relief sought and conclusion

The Court should declare the trial court's August 31, 2020 order unconstitutional as relates to language conditioning civil jury trial on the written consent of all parties.

Respectfully submitted,

By: /s/ Charles L. Becker

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Dated: November 6, 2020 *Attorneys for Petitioner Brook Bayles*

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Charles L. Becker

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Dated: November 6, 2020 *Attorneys for Petitioner Brook Bayles*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, two true and correct copies of the foregoing were served upon the following as indicated below:

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Dated: November 6, 2020 *Attorneys for Petitioner Brook Bayles*

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

IN RE: AMENDED FIFTH JUDICIAL DISTRICT EMERGENCY OPERATIONS PLAN	)	No. 23 WM 2020

ORDER OF COURT

AND NOW this 13th day of November 2020, it is hereby **ORDERED, ADJUDGED AND DECREED** that the Amended Emergency Operations Plan Orders entered on August 31, 2002 and September 15, 2020 are amended as follows with respect to jury trials in the Civil Division.

- Parties with cases on previously published trial lists may jointly, with written consent by all parties involved in the litigation, submit consented-to-motions to the Calendar Control Judge requesting that their case be scheduled to be tried before a jury.

- If a party wishes to proceed with a jury trial and the other party does not consent, the party wishing to proceed to a jury trial may present a contested motion to the Calendar Control Judge requesting that the case be scheduled for a trial by jury. The Calendar Control Judge shall promptly rule upon the motion.

- If the Calendar Control Judge grants the motion, the case shall proceed to a jury trial as specified in the Amended Emergency Operations Plan Order entered on September 15, 2020.

BY THE COURT:

_____, P.J.
Kim Berkeley Clark
President Judge

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99 WM 2020

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 99 WM 2020

JASON BAYLES and LESLEY BAYLES, as Parents and Natural Guardians of BROOK LACEY BAYLES,

Plaintiffs-Petitioners,

v.

ELIZABETH TYLER-KABARA, M.D., PhD., c/o Children's Hospital of Pittsburgh; UNIVERSITY OF PITTSBURGH PHYSICIANS; CHILDREN'S HOSPITAL OF PITTSBURGH; CHILDREN'S HOSPITAL OF PITTSBURGH UPMC, and UPMC HEALTH SYSTEM.

Defendants-Respondents.

PRAECIPE FOR DISCONTINAUNCE OF APPLICATION FOR EXTRAORDINARY RELIEF

On petition from a matter pending in the Allegheny County Court of Common Pleas docketed as G.D. No. 16-005501

Shanin Specter
Charles L. Becker
Kila B. Baldwin
Ruxandra M. Laidacker
Kline & Specter, P.C.
1525 Locust Street, 19th Floor
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(215) 772-1000

Attorneys for Petitioners Jason Bayles and Lesley Bayles

TO THE PROTHONOTARY:

Subsequent to the filing of this petition, the Court of Common Pleas of Allegheny County entered an order providing that if a party wishes to proceed with a civil jury trial, and another party does not consent, the party wishing to proceed may present a contested motion to the Calendar Control Judge, who shall promptly rule on the motion. *See* Order of November 13, 2020 (attached as Exhibit "A"). In light of this order, we respectfully withdraw our petition.

Respectfully submitted,

By: /s/ Charles L. Becker

Shanin Specter
Charles L. Becker
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Attorneys for Petitioner Jason and Lesley Bayles

Dated: November 16, 2020

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, a true and correct copy of the foregoing was served upon the following as indicated below:

John C. Conti, Esquire (email and first class mail)
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The Honorable Kim Berkeley Clark (first class mail)
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By: /s/ Charles L. Becker
Charles L. Becker
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Dated: November 16, 2020

EXHIBIT “A”

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

IN RE: AMENDED FIFTH JUDICIAL DISTRICT EMERGENCY OPERATIONS PLAN	)	No. 23 WM 2020

ORDER OF COURT

AND NOW this 13th day of November 2020, it is hereby **ORDERED, ADJUDGED AND DECREED** that the Amended Emergency Operations Plan Orders entered on August 31, 2002 and September 15, 2020 are amended as follows with respect to jury trials in the Civil Division.

- Parties with cases on previously published trial lists may jointly, with written consent by all parties involved in the litigation, submit consented-to-motions to the Calendar Control Judge requesting that their case be scheduled to be tried before a jury.

- If a party wishes to proceed with a jury trial and the other party does not consent, the party wishing to proceed to a jury trial may present a contested motion to the Calendar Control Judge requesting that the case be scheduled for a trial by jury. The Calendar Control Judge shall promptly rule upon the motion.

- If the Calendar Control Judge grants the motion, the case shall proceed to a jury trial as specified in the Amended Emergency Operations Plan Order entered on September 15, 2020.

BY THE COURT:

_____, P.J.
Kim Berkeley Clark
President Judge