IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2936

COUNTY OF BUTLER, *et al*.,

Appellees

v.

GOVERNOR OF PENNSYLVANIA, *et al*.,

Appellants

BRIEF OF APPELLANTS GOVERNOR TOM WOLF AND SECRETARY RACHEL LEVINE

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
ENTERED SEPTEMBER 14, 2020

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STATEMENT OF JURISDICTION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983, over which the District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On September 14, 2020, the District Court entered an order invalidating certain measures implemented by the Commonwealth of Pennsylvania in an effort to control the spread of COVID-19. A.67. On September 22, the District Court made its September 14th order final with respect to Counts II, IV, and V pursuant to Fed.R.Civ.P. 54(b), expressly concluding that there was no just reason for delay of an appeal. A.69. That day, Appellants filed a notice of appeal. A.92.

This Court has jurisdiction by virtue of 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

After several politicians and businesses challenged the constitutionality of certain measures adopted by the Commonwealth to contain the COVID-19 pandemic, the District Court entered a declaratory judgment in the challengers' favor. The four questions presented are:

I. Did the District Court err in concluding that the Supreme Court's seminal decision in *Jacobson v. Massachusetts*—issued in 1905, consistently followed, and never overruled—is no longer good law and thus did not support the Commonwealth's efforts to control the spread of COVID-19?

II. Did the District Court err in not recognizing that the "economic liberty" approach to substantive due process (exemplified by *Lochner v. New York* and similar cases) has long been repudiated, and in so doing, fail to recognize that that the actions challenged here did not impinge upon "fundamental" rights and, in any event, were neither irrational nor conscience-shocking?

III. In deciding which businesses could and could not continue to operate at the outset of the pandemic, did the District Court err in determining that it was irrational to differentiate between "life-sustaining" and "non-life-sustaining" businesses?

IV. Because congregational limits on gatherings of large numbers of people are laws of general applicability that only regulate non-expressive conduct, did

the District Court err in concluding that those occupancy limits violate the First Amendment?

STATEMENT OF RELATED CASES

This case has not previously been before the Court. It is related to *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020), *injunction denied*, 19A1032 (U.S. May 6, 2020), *cert. denied*, 19-1265, 2020 WL 5882242 (U.S. Oct. 5, 2020), and *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020).

STATEMENT OF THE CASE

This is an appeal from a declaratory judgment against two Pennsylvania officials: the Governor, Tom Wolf; and the Secretary of Health, Rachel Levine. The District Court invalidated certain measures the Governor and Secretary implemented in an effort to control the spread of COVID-19 in Pennsylvania. That decision was erroneous and cannot stand.

A. Relevant Facts.

As this brief is being drafted, the Commonwealth, the nation, and indeed the world continue to battle the COVID-19 pandemic. On March 6, 2020, when COVID-19 first appeared in Pennsylvania, Governor Wolf signed a Proclamation of Disaster Emergency under the Emergency Management Services Code, 35 Pa.C.S. §§ 7101 *et seq.* Pursuant to the Emergency Management Services Code, the emergency declaration authorized the Governor to issue executive orders "to protect the citizens of the Commonwealth from sickness and death," and he did so.[1] *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 897 (Pa. 2020).

Because COVID-19 spreads primarily from person to person, medical experts, scientists, and public health officials agree that, in the absence of a widely

[1] Because the Governor's executive orders have the "full force of law," *Friends of Danny DeVito*, 227 A.3d at 892, they are "given the effect of a legislative statute for the purposes of constitutional review." *Nat'l Ass'n of Theatre Owners v. Murphy,* 320-CV-8298, 2020 WL 5627145, at *7 (D.N.J. Aug. 18, 2020) (citing *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 7 (3d Cir. 1964)).

available vaccine, there is only one proven method of preventing further spread of the virus: limiting person-to-person interactions through social distancing.[2] Knowing this, staff within the Governor's office and several Commonwealth agencies, including the Department of Health, mobilized to address the overall situation. They worked in several "teams," each with a particular focus.[3] Collectively, the teams considered both health-related details regarding COVID-19 (such as the medical consequences of the virus for individuals) and potential economic ramifications traceable to COVID-19 (of particular concern to businesses).[4] A.2962-2963 (7/22/2020 transcript).

On March 19, 2020, the Governor issued an Executive Order directing all non-life-sustaining businesses in Pennsylvania to temporarily close their physical

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[2] Florence A. Kanu, *et al.*, "Declines in SARS-CoV-2 Transmission, Hospitalizations, and Mortality After Implementation of Mitigation Measures— Delaware, March–June 2020," CDC, https://www.cdc.gov/mmwr/volumes/69/wr/mm6945e1.htm?s_cid=mm6945e1_w (Nov. 13, 2020); M. Shayne Gallaway, PhD, *et al.*, "Trends in COVID-19 Incidence After Implementation of Mitigation Measures — Arizona, January 22–August 7, 2020" CDC, https://www.cdc.gov/mmwr/volumes/69/wr/mm6940e3.htm?s_cid=mm6940e3_w (Oct. 9, 2020).

[3] The District Court incorrectly suggested the teams did not include individuals with medical backgrounds or expertise in infectious disease. A.5 (opinion). In fact, the teams relied upon and were informed by the Department of Health's medical professionals. A.2928, 2933, 3021, 3024, 3083 (7/22/2020 transcript). Moreover, these officials utilized guidance from the medical professionals at the Centers for Disease Control and Prevention (CDC). A.2937-2940, 3090-3091 (*id.*).

[4] The District Court incorrectly suggested that the Governor never met with the teams. A.5 (opinion). The Governor met regularly with members of the reopening team. A.2915 (7/22/2020 transcript).

locations so those businesses would not serve as centers for contagion. The Secretary of Health issued a similar order. Together, these are termed the "Business Closure Orders."[5]

In the Business Closure Orders, the distinction between life-sustaining and non-life-sustaining businesses was based upon the North American Industry Classification Systems (NAICS). Whether a business was deemed to be life-sustaining or non-life-sustaining was determined by the classification given to the businesses' NAICS code. Following these classifications, the Cybersecurity and Infrastructure Security Agency (CISA) released guidance on critical infrastructure workers during the pandemic. The policy team revised its list of life-sustaining businesses to more closely align with the categories determined to be critical infrastructure. A.335-336 (Robinson Decl.); A.2968, 3034-45 (7/22/2020 transcript).

The NAICS divides businesses into 20 broad sectors and 316 industry groups. The policy team decided which of those would be deemed life-sustaining and which would not, based on which industries do (or do not) perform life-sustaining functions. In addition, between March 19 and April 3, 2020, the De-

[5] "Enforcement" of the Business Closure Orders was scheduled to begin on March 21, 2020. Citizens and businesses were expected to comply voluntarily and largely did so; though there was some confusion at the outset, the policy with respect to the stay-at-home orders was that there were not to be any citations. With respect to the Business Closure Orders, certain enforcement actions were taken. A.2945, 3031-3033 (7/22/2020 transcript).

partment of Community and Economic Development administered what was known as the "waiver" program.[6] Utilizing that avenue, a business in the Commonwealth that was not in any of the designated industries could petition for a reclassification as life-sustaining itself or as supporting the work of a life-sustaining business. A.321-22 (Weaver Decl.).

Also, in the latter part of March, the Governor issued a series of stay-at-home orders applicable to various counties. Then, on April 1, 2020, Governor Wolf and Secretary Levine ordered all citizens of the Commonwealth to stay at home. Crucially, the April 1st Order permitted individuals to leave their homes to "access, support, or provide life-sustaining services" and to "engage in outdoor activities[.]" A.457.

As the foregoing language confirms, life-sustaining activities—such as the provision of food, medical care, mail delivery, fire protection, and law enforcement (to cite obvious examples)—continued. Moreover, thanks to computers and other telecommunications equipment, non-life-sustaining activities of many individuals and businesses continued virtually.

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[6] The Pennsylvania Supreme Court pointed out that the term "waiver process" was a misnomer, as it was not intended "to provide waivers to businesses that are not life-sustaining, but rather constitute[d] an attempt to identify businesses that may have been mis-categorized as non-life-sustaining." *Friends of Danny DeVito,* 227 A.3d at 899 (Pa. 2020).

In April 2020, the Supreme Court of Pennsylvania held that the Governor possessed statutory authority to issue these executive orders, that the orders were lawful exercises of the Commonwealth's police powers, and that the orders did not violate state or federal constitutional provisions. As to the then-pending federal constitutional claims, that court specifically held, *inter alia*, that the Governor's orders did not violate Due Process, Equal Protection, or the First Amendment. *See Friends of Danny DeVito*, 227 A.3d at 891-92, 896-903, *injunction denied*, 19A1032 (U.S. May 6, 2020), *cert. denied*, 19-1265, 2020 WL 5882242 (U.S. Oct. 5, 2020).

On April 17, 2020, Governor Wolf issued a three-phase reopening plan for the Commonwealth, whereby counties would move from the "red phase" to the "yellow phase" to the "green phase." Each phase would have corresponding "work & congregate setting restrictions" and "social restrictions." This structured, data-driven reopening plan was crafted in partnership with Carnegie Mellon University, based on demographic and health data for each county. The plan took into account four basic metrics: whether case counts were stable, decreasing, or low in a given period; whether contacts of cases in the county were being monitored; whether the "PCR" testing positivity rate had been less than 10% for the past 14 days; and whether hospital bed use in a county was no more than 90%. A.314, 317 (Boateng Decl.).

By early July 2020, all 67 counties had progressed to the "green phase." As a result, most restrictions associated with the stay-at-home orders and Business Closure Orders had been eased. But the COVID-19 disaster had not yet ended. Accordingly, on June 3, 2020, the Governor renewed the earlier Disaster Emergency proclamation for 90 more days.

On July 15, 2020, shortly before the evidentiary hearing in this matter, Governor Wolf and Secretary Levine issued new "targeted mitigation" orders, setting certain limits on events and gatherings. Indoor events were limited to no more than 25 people, while outdoor crowd levels were limited to no more than 250 people. Religious gatherings and certain commercial operations were exempt.

Governor Wolf renewed his original Disaster Emergency proclamation for a second time on August 31, 2020, for 90 additional days. The order effectuating that renewal noted that, as of August 31, "134,025 persons have tested positive or meet the requirements to be considered probable cases for COVID-19 in the Commonwealth in all 67 counties, and that 7,495 persons are reported to have died from the virus" and that "the COVID-19 pandemic continues to be of such magnitude or severity that emergency action is necessary to protect the health, safety, and welfare of affected citizens in Pennsylvania[.]"[7]

[7] Amendment to Proclamation of Disaster Emergency, https://www.governor.pa.gov/wp-content/uploads/2020/09/20200831-TWW-amendment-to-COVID-disaster-emergency-proclamation.pdf (8/31/2020).

Because of the Administration's proactive efforts in the early spring of 2020 and the subsequent implementation of its three-phase reopening plan, the number of daily COVID infections was cut in half leading into the summer months.[8] On October 6th, as circumstances changed, Governor Wolf and Secretary Levine each amended their July 15th mitigation orders, effective October 9, 2020.[9] Most notably, instead of limits based only on the number of people at an indoor or outdoor gathering, venues are now permitted to host events and gatherings based upon their "occupancy limit" as defined by the National Fire Protection Association (NFPA) Life Safety Code. The point is to regulate more effectively the number of people who can gather in various locations and facilities, of various sizes, and to regulate inherently riskier indoor events somewhat more precisely. In addition, the amended orders explicitly require venues to (a) ensure that attendees at events comply with social-distancing requirements and wear masks or face coverings and (b) implement best practices such as timed entry, multiple entry and exit points, multiple restrooms and hygiene stations.

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[8] *See* COVID-19 Data for Pennsylvania, Dept. of Health, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Nov. 18, 2020).

[9] Gov. Wolf's Amended Order, https://www.governor.pa.gov/wpcontent/uploads/2020/10/20201006-TWW-amendment-to-targeted-mitigation-order.pdf (Oct. 6, 2020); Sec. Levine's Amended Order, https://www.governor.pa.gov/wpcontent/uploads/2020/10/20201006-SOH-amendment-to-targeted-mitigation-order.pdf (Oct. 6, 2020).

Recently, the Commonwealth and the Nation have seen a dramatic rise in COVID cases. Over 11 million people in the United States have been infected thus far, with over a 151,000 new cases per day. Nearly a quarter of a million people have died from the disease with an average daily death count currently exceeding 1,700 per day—or one American every minute. Pennsylvania is also seeing its numbers increase rapidly; over 281,000 cases have occurred in the Commonwealth with nearly 6,000 new infections occurring daily.[10] Beyond the risk of death,

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[10] These numbers come from the Centers for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Nov. 18, 2020), the Pennsylvania Department of Health, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last visited Nov. 18, 2020), and Johns Hopkins University of Medicine, https://coronavirus.jhu.edu/data/cumulative-cases (Nov. 18, 2020).

Although these figures are not part of the record below, Appellate courts need not wear blinders to the outside world. Under Fed.R.Evid. 201, courts may take judicial notice of any fact "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed.R.Evid. 201(b). This includes judicial notice of "obvious facts." *Onondaga Nation v. New York*, 500 Fed.Appx. 87, 90 (2d Cir. 2012). To ignore such facts is to deny reality.

"[J]udicial notice may be taken at any stage of the proceeding." Fed.R.Evid. 201(f). And appellate courts may take notice from a variety of sources, including government reports, *see United States v. Cecil*, 836 F.2d 1431, 1452 (4th Cir. 1988); *Pueblo of Sandia v. United States*, 50 F.3d 856, 861 n.6 (10th Cir. 1995); newspaper articles, *see Acuna-Atalaya v. Newmont Mining Corp.*, 765 Fed.Appx. 811, 814 n.2 (3d Cir. 2019) (taking judicial notice of a Washington Post article); *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 598 n. 2 (3d Cir. 2000) (New York Times article); *Peters v. Delaware River Port Authority*, 16 F.3d 1346, 1356–57 (3d Cir. 1994) (multiple newspapers); and history books, *see United States v. Pozsgai*, 999 F.2d 719, 731 (3d Cir. 1993). Appellate courts "may take judicial no-

COVID-19 infection can also result in serious long term effects, such as "inflammation of the heart muscle," "lung function abnormalities,"[11] and mild brain damage.[12] As the rate of infections continues to increase, the Administration is considering whether it may be necessary for the Commonwealth to institute further mitigation efforts.

B. Procedural History.

On May 11, 2020, a number of Pennsylvania counties,[13] politicians,[14] and businesses[15] brought this civil rights action under 42 U.S.C. § 1983 against Gover-

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tice of facts that are generally known, even where the district court declined to do so." *United States v. Doe*, 962 F.3d 139, 147 (4th Cir. 2020). Taking judicial notice on appeal does not require remand. *See United States v. Remoi*, 404 F.3d 789, 793 n.1 (3d Cir. 2005) ("it would be pointless to remand the case simply to have the District Judge take notice of that which we may notice ourselves").

[11] "Long-Term Effects of COVID-19," CDC, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html (Nov. 13, 2020).

[12] Andrew Budson, M.D., "The hidden long-term cognitive effects of COVID-19, Harvard Medical School, https://www.health.harvard.edu/blog/the-hidden-long-term-cognitive-effects-of-covid-2020100821133 (Oct. 8, 2020).

[13] The county plaintiffs included Butler, Fayette, Greene, and Washington Counties. A.107 (complaint). The District Court ultimately held that they lacked standing A.10-11 (opinion), and they are not involved in this appeal.

[14] The politician plaintiffs (now Appellees) are Mike Kelley, Daryl Metcalf, Marci Mustello, and Tim Bonner. A.107-108 (complaint).

[15] The business plaintiffs (also Appellees in this Court) are 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

nor Wolf and Secretary Levine. A.105 (complaint). The plaintiffs (now Appellees) sought a declaration that the Business Closure Orders, the stay-at-home orders, and the reopening plan for the Commonwealth exceeded the Commonwealth's police powers and contravened their constitutional rights. *Ibid*. In particular, they asserted that the Governor and the Secretary denied them substantive due process rights (Count II); deprived them of equal protection of the law (Count IV); and violated their First Amendment right to freedom of expressive association (Count V). *Ibid.*

Appellees also filed a motion for a speedy hearing on their claims, which the District Court granted in part. A.131 (motion); A.172 (order). The requested hearing took place on July 17 and 22, 2020. Both sides filed pre-hearing and post-hearing submissions for the Court's consideration, after which the Court issued an opinion and accompanying order, granting declaratory relief on Counts II, IV, and V of the complaint. A.66 (opinion); A,67(order). Specifically, the Court declared that:

- the July 15, 2020, order limiting large gatherings violated the First Amendment right of assembly;
- the stay-at-home and business-closure components of the Governor's orders violated the Due Process Clause of the Fourteenth Amendment;

Cuts Hair Salon, R.W. McDonald & Sons, Inc., Starlight Drive-In Inc., and Skyview Drive-In. A.108-109 (complaint).

- the business-closure components of the Governor's orders violated the Equal Protection Clause of the Fourteenth Amendment.

On September 22, 2020, the District Court made its September 14th order final pursuant to Fed.R.Civ.P. 54(b). A.69. The Governor and Secretary filed a notice of appeal that same day. A.85.

The Governor and the Secretary filed a further motion asking the District Court to stay its order pending appeal. A.3147. That motion was denied. A.70. The Governor and the Secretary then sought a stay in this Court. By order entered October 1, 2020, this Court granted that stay.

SUMMARY OF THE ARGUMENT

The District Court's sweeping decision invalidating the Commonwealth's COVID-19 mitigation orders, which are necessary to protect Pennsylvanians from the deadliest pandemic in over a century, is remarkable.

The District Court began its analysis with an irrelevant academic debate, addressing arguments not raised by any party. This threshold error led the District Court to mistakenly cast aside the United States Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). That case established the framework for evaluating a State's actions protecting its citizens from the spread of disease. That framework has been reiterated in the decades since, and nothing supports the District Court's disregard of that binding precedent.

The District Court then validated Appellees' substantive due process claims by relying on the reasoning of *Lochner v. New York*, 198 U.S. 45 (1905), a decision that has long since been repudiated. In so doing, the District Court ignored the current standard for substantive due process claims. Because the Commonwealth's actions here did not infringe upon fundamental rights, and were neither irrational nor conscience shocking, the District Court's substantive due process determinations must be reversed.

Next, the District Court erred in concluding that the Commonwealth violated equal protection by differentiating between "life-sustaining" and "non-life sustain-

ing" businesses at the outset of the pandemic. But the Commonwealth, in making that distinction, relied upon a nationally recognized classification system, and its distinctions between businesses were rationally related to the Commonwealth's most compelling interest: protecting its citizens from a deadly virus. That is all the law requires.

The District Court also erred in holding that the Commonwealth violated the First Amendment. The Commonwealth's orders placing limits on occupancy and large gatherings did not regulate expressive conduct at all. As such, nothing about the Commonwealth's actions even implicates First Amendment principles, much less violates them. The District Court then incorrectly applied the wrong test, and conflated dissimilar actions to demonstrate a lack of narrow tailoring.

Because of these specific legal errors, the District Court's decision does substantial damage to well-established legal doctrines. In addition, with all due respect, the District Court lost sight of the nature of this novel coronavirus, the manner in which it is spread, and the dynamics of combating a deadly pandemic. Accordingly, the District Court's decision, if allowed to stand, will cost lives.

ARGUMENT

I. The Governor's COVID-19 Orders Were Lawful Exercises of the Commonwealth's Inherent Police Power.

Pursuant to longstanding principles for evaluating state public health actions, the Commonwealth's inherent police powers give it the ability to protect its citizens against a deadly virus that threatens millions. In the District Court's view, however, Appellees' desire to be unrestrained during a pandemic outweighs the public's interest in fighting its spread. That absolutist view was flatly rejected by the United States Supreme Court more than a century ago and that remains the law. The District Court's contrary holding must be reversed.

The Federal government generally lacks police power, which is reserved to the States under the Tenth Amendment to the Constitution. *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 165 (1919). In reserving police powers to the States, the Framers "ensured that the powers in which 'the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and accountable than a distant federal bureaucracy." *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519, 536 (2012) (quoting *The Federalist* No. 45, at 293 (J. Madison)). A State's authority in this regard extends to individuals and businesses alike. *See German Alliance Ins. Co. v. Hale*, 219 U.S. 307, 317 (1911).

"Once we are in this domain of the reserve power of a State we must respect the wide discretion on the part of the legislature in determining what is and what is not necessary." *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 233 (1945) (internal quotation marks omitted). While State authority is not unlimited, longstanding Supreme Court precedent establishes that a State's police power is at its zenith when utilized to quell the spread of infectious disease.

A. *Jacobson v. Massachusetts* Established the Framework for Evaluating State Public Health Actions.

More than a century ago, in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Supreme Court upheld a Massachusetts law requiring all citizens to be vaccinated for smallpox and established the framework by which individual constitutional rights are balanced with a State's need to prevent the spread of disease. Because *Jacobson*, like the present case, involved a Fourteenth Amendment challenge to a State's exercise of its police powers, it is particularly instructive.

Much like Appellees in the present case, the defendant in *Jacobson* broadly 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 Court enunciated why individual liberty cannot be absolute, but is instead subject to the common good and the liberty interests of others. Specifically, the Court emphasized that "the liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed

from restraint." *Ibid.* 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 *Jacobson'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, *et al.*, "'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, the Court held that police powers could be used whenever reasonably required for the safety of the public under the circumstances at issue. *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). Applying these principles, the Court in *Jacobson* determined that "a community has the right to protect itself against an epidemic of

disease which threatens the safety of its members" and upheld the vaccination law. *Id.* at 27-28.

The *Jacobson* framework for evaluating state public health actions has been reiterated through the decades. *See*, *e.g.*, *Zucht v. King*, 260 U.S. 174 (1922) (upholding city ordinance requiring children to be vaccinated before enrolling in public school); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding state vaccination law protecting children over religious objections of their parents because "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death"); *see also Kansas v. Hendricks*, 521 U.S. 346, 356-57 (1997) (quoting *Jacobson*); *Phillips v. City of New York*, 775 F.3d 538, 542-44 (2d Cir. 2015) (relying on *Jacobson* in rejecting substantive due process, equal protection, and First Amendment challenges); *Workman v. Mingo Cty. Bd. Of Educ.*, 419 Fed. Appx. 348, 353-56 (4th Cir. 2011) (same).

Indeed, in May of this year, in a COVID-19-related case, the High Court declined to enjoin California's numerical restrictions on public gatherings. *South Bay United Pentecostal Church v. Newsom,* 140 S.Ct. 1613 (2020). There, Chief Justice Roberts's concurring opinion revolved around *Jacobson*:

> The 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. Our Constitution principally entrusts "[t]he

> safety and the health of the people" to the politically accountable officials of the States to "guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed. 643 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

South Bay, 140 S.Ct. at 1613-14 (brackets in original).

The Commonwealth's response to the pandemic satisfies *Jacobson*. As detailed above, COVID-19 is a deadly airborne illness that spreads primarily from person-to-person. Because there are no vaccines yet widely available, or a cure, public health officials agree that there is presently only one proven method of preventing further spread of the virus: limiting person-to-person interactions through social distancing. A.312-313 (Boateng Decl. at ¶¶ 6-7).[16] In March, when the

[16] *See also* "Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others," Center for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited Nov. 18, 2020).

Commonwealth first began responding to the pandemic, CDC officials estimated that, without social distancing, 1.7 million Americans could die from COVID-19.[17]

Given this consensus, the physical locations of non-life sustaining businesses and large gatherings presented the opportunity for unnecessary personal contact and interactions that could transmit the virus, and with it, sickness and death. A.312-313 (Boateng Decl. at ¶¶ 7-9). The Commonwealth thus used long-recognized tools for fighting a pandemic: temporarily closing non-essential businesses and restricting large gatherings.

Nearly every State in the country responded the same way, ordering all or certain non-essential businesses to close physical locations in order to enforce social distancing. *See* "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 11/09/20). Many States also imposed occupancy restrictions and bans on large gatherings. *Ibid.*; *cf. 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). For the same reasons, State and Federal courts throughout the country, including

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

this one, responded by imposing restrictions on public access and holding argument via video conference.[18]

Given the stark reality that the Commonwealth faced at the outset of the pandemic—and faces yet again—temporary closure of Appellees' physical business locations and the gathering restrictions were in the public's interest and were reasonably necessary to protect that interest.

B. The District Court Waded into an Irrelevant Academic Debate and Addressed Arguments Not Raised by Any Party. That Led the District Court to Erroneously Conclude that *Jacobson* is No Longer Good Law.

The District Court began its analysis by wading into an academic debate over the so-called "suspension" approach to judicial review that some courts have employed during the pandemic. *See* A.11-21 (citing, *inter alia*, 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)). This approach posits that "constitutional constraints on government action [should] be

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[18] *See e.g.*, U.S. Court of Appeals for the Third Circuit Order detailing operations during the COVID-19 pandemic and allowing for oral argument via audio-conferencing, https://www.ca3.uscourts.gov/sites/ca3/files/NoticeofOperations_COVID19_092520.pdf; U.S. Supreme Court Order closing its building to the public, https://www.supremecourt.gov/announcements/COVID-19.aspx; U.S. Supreme Court Press Release detailing how the Court will hear May arguments telephonically, https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20; Pennsylvania Supreme Court March 18, 2020 Order closing all courts to the public, http://www.pacourts.us/assets/files/page-1305/file-8634.pdf.

suspended in times of emergency[.]" Wiley & Vladeck, 133 Harv. L. Rev. F. at 180.[19] Critically, however, Governor Wolf did not argue for the suspension approach in this case, or in any other case challenging his COVID-19 mitigation efforts. *See generally*, A.337-364, 2604-2633 (defendants' briefs). The District Court thus addressed this issue without advocacy from either side. *Ibid*; *see generally*, A.289-310, 2496-2549, 2634-2647 (plaintiffs' briefs). It is unsurprising, therefore, that the District Court began with a misstep in its analysis. This initial error permeates the District Court's opinion, and ultimately led the District Court to erroneously conclude that *Jacobson* is no longer good law.

Evidently, some State entities in *other jurisdictions* have argued that *Jacobson* gave them *carte blanche* to suspend constitutional rights for as long as the pandemic persists. *See*, *e.g.*, *Bayley's Campground, Inc. v. Mills*, 2020 WL 2791797 (D. Me. May 29, 2020); *see also Calvary Chapel Valley v. Sisolak*, 140 S.Ct. 2603, 2608 (2020). This argument is most commonly raised in the abortion context, with certain states using the pandemic as a pretext to restrict abortion access altogether. *Compare Robinson v. Alabama Attorney General*, 957 F.3d 1171 (11th Cir. 2020) *and Adams & Boyle v. Slatery*, 956 F.3d 913, 925-27 (6th Cir.

[19] As discussed further *infra*, one of the authors of that article, Professor Steven Vladeck, has criticized the District Court's decision generally, as well as specifically suggesting that its reliance on his law review article was misplaced.

2020) *with In re: Abbott*, 954 F.3d 772, 777-78 (5th Cir. 2020) *and In re: Rutledge*, 596 F.3d 1018, 1028 (8th Cir. 2020).

The District Court took this case as an opportunity to express disagreement with the suspension approach. A.14-17 (opinion). But doing so was entirely unnecessary. Again, Governor Wolf and Secretary Levine have never argued that *Jacobson* gives them unbridled authority, that "ordinary" constitutional review should not apply, or that other constitutional doctrines are displaced. What the Governor and Secretary actually argued below was that their orders constituted a proper exercise of the Commonwealth's inherent police powers, and that, pursuant to relevant legal doctrines and precedent, Appellees' substantive due process challenges failed, the congregate limits did not violate the First Amendment, and the orders comported with equal protection. *See generally* A.337 (Br. in Opp. to Compl. for Declaratory Relief).

The District Court's needless foray into an irrelevant academic debate caused it to overlook the arguments presented in *this case*. Instead, seizing upon law review articles, dissenting statements, and non-precedential district court decisions from other jurisdictions, the District Court concluded that *Jacobson* is no longer good law.

Initially, the District Court lacked any authority whatsoever to make that determination. The Supreme Court has repeatedly admonished lower courts that they

are bound by its precedents. *See e.g., Bossee v. Oklahoma*, 137 S.Ct. 1, 2 (2016) (*per curiam*) (summarily reversing where lower court disregarded binding Supreme Court precedent). And its decisions remain binding until they are clearly and squarely overturned by the High Court; indeed, even subsequent cases raising doubts about a precedent's continued vitality are insufficient. *Hohn v. United States*, 524 U.S. 236, 252-53 (1998).

The District Court justified its overreach by suggesting that the judiciary is "the only meaningful check on the exercise of [the Governor's executive] power." A.21 (opinion). The District Court was apparently referring to *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020). But in that case, the Pennsylvania Supreme Court, far from holding that the judiciary was the only check on executive power, recognized that the General Assembly had a role to play. When the General Assembly delegated power to the Governor by enacting the Emergency Management Services Code, it "made the basic policy choices about which circumstances are necessary to trigger the Governor's powers under the statute." *Id.* at 704. Concluding that recession of that authority was subject to gubernatorial presentment under the Pennsylvania Constitution, the Pennsylvania Supreme Court admonished that while "[c]urrent members of the General Assembly may regret that decision, [] they cannot use an unconstitutional means to give that regret legal effect." *Id.* at 706.

Much like its discussion of the "suspension" doctrine, it is unclear why the District Court felt it was necessary to opine on this dispute over Pennsylvania constitutional law. The District Court's failure to understand the nature of that inter-branch dispute led it astray. The Pennsylvania Supreme Court's rejection of the General Assembly's attempted unilateral action undercuts the District Court's analysis.

In addition to the District Court's lack of authority to overturn binding Supreme Court precedent, its analysis regarding why *Jacobson* should no longer be good law cannot withstand scrutiny. The District Court questioned *Jacobson's* continued vitality, in part, because there has been "substantial development of federal constitutional law in the area of civil liberties" since that decision. A.13 (opinion). As noted, however, *Jacobson* has been reiterated through the decades even as civil liberties jurisprudence evolved. *See*, *e.g.*, *Zucht*, 260 U.S. at 176-77; *Prince*, 321 U.S. at 166 n.12; *Hendricks*, 521 U.S. at 356-57. Unlike the District Court here, even those courts that have considered and rejected the suspension approach have recognized *Jacobson's* continued vitality. *See Robinson*, 957 F.3d at 1182; *Adams & Boyle*, 956 F.3d at 925-27; *see also* Wiley & Vladeck, 133 Harv. L. Rev. F. at 182 ("[T]he Supreme Court's subsequent civil liberties jurisprudence can be reconciled with *Jacobson's* broad language.").

This is for good reason; *Jacobson* is not only compatible with notions of individual liberty, *Jacobson* itself protects individual liberty. As noted, the Court's central point in *Jacobson* was that "[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.'" Mayo, *et al*.,13 J. Health & Life Sci. L. at 14 (quoting *Jacobson*, 197 U.S. at 26). Certainly, there cannot be "real liberty for all" in a society in which every individual and every business chooses for itself whether to take the precautions necessary to protect the rest of society during a deadly pandemic.

Equally problematic, the District Court, in rejecting *Jacobson*, relied heavily upon Justice Alito's dissenting statement in *Calvary Chapel Valley*, 140 S.Ct. at 2504-09, a First Amendment *free exercise* case in which Justice Alito expressed disagreement with the Supreme Court's denial of an injunction. Most obviously, Justice Alito's dissenting statement from the denial of an injunction is not binding precedent, and certainly cannot be construed as a reversal of *Jacobson*. But in any event, Justice Alito actually endorsed *Jacobson's* continued use in substantive due process challenges, such as this one. *Id.* at 2608 ("*Jacobson* must be read in context, and it is important to keep in mind that *Jacobson* primarily involved a substantive due process challenge.").

Justice Kavanaugh—in the very same case—also suggested that courts should rely upon *Jacobson* in addressing Fourteenth Amendment challenges. *Id.* at 2614 (Kavanaugh, J., dissenting) ("[C]ourts should be extremely deferential to the States when considering a substantive due process claim by a secular business that is being treated worse than another business.") (citing *Jacobson*). And, as noted, Chief Justice Roberts cited *Jacobson* in his concurring statement from the Court's denial of an injunction in *South Bay United Pentecostal Church,* 140 S.Ct. at 1613-14.

The District Court's myopic focus on Justice Alito's criticism of Illinois's over-reliance on *Jacobson* caused the District Court to overlook these very recent endorsements of *Jacobson's* continued relevance in the substantive due process context. Certainly nothing supports the District Court's outright rejection of *Jacobson*, which remains binding Supreme Court precedent.[20]

To reiterate, all parties here agree that the "suspension" approach is inappropriate. The error in the District Court's analysis was not that it rejected that approach and applied "ordinary constitutional scrutiny." A.21 (opinion). Rather, as Professor Vladeck (one of the authors of the Harvard Law Review article upon

[20] These recent statements from the Justices belie the District Court's reductive comment that "some modern courts" have cited favorably to *Jacobson*. A.13-14 (opinion). Included in these courts, specifically in the context of the COVID-19 pandemic, is the United States Supreme Court.

which the District Court relied) put it, the fundamental error in the District Court's decision is that it applied those ordinary constitutional doctrines "in a way that makes no sense," giving "remarkably short shrift" to the Commonwealth's interest in combating an ongoing public health crisis.[21]

II. The District Court had No Legal Basis for Validating Appellees' Intrinsically Flawed Substantive Due Process Claim.

From the outset of this litigation, Appellees have claimed that, among other infirmities, the challenged orders infringed upon their substantive due process rights. Specifically, in Count II of their complaint Appellees averred that the business shutdown and stay-at-home orders issued by the Governor and the Secretary constituted "arbitrary, capricious, irrational and abusive conduct that interferes with [Appellees'] liberty and property interests" A.122 (compl. at ¶ 89).

Then and since, Appellees have adopted a *laissez faire* stance, under which their own claimed autonomy to carry on as usual—especially in pursuit of commercial activities—is, and remains, paramount. From their perspective, the challenged governmental efforts to curtail the still-raging COVID-19 pandemic must therefore yield because their own rights are absolute and trump everything else. *See generally*, A.289 (br. in support of compl.); A.2496 (post-hearing br.).

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[21] *See* Stephen I. Vladeck & Robert M. Chesney, *The National Security Law Project* Episode 179, at 41:05-41:38. https://www.nationalsecuritylawpodcast.com/episode-179-this-podcast-is-considerably-recalibrated/ (last visited Nov. 18, 2020).

In granting the Appellees' request for a declaratory judgment on Count II, the District Court gave undue weight to inapplicable decisions, misunderstood currently-applicable law, and largely bypassed well-established substantive due process precedents under which Appellees had no right to relief. A.32-62 (opinion).

A. Two Crucial Supreme Court Decisions Came Down in 1905.

The Due Process Clause of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property without due process of law[.]" U.S. CONST. amend. XIV. When a violation of that provision is claimed, the reviewing court must determine whether an actionable "deprivation" has occurred and, if so, how to remedy a proven deprivation. Due process claims have been raised for decades and have taken many forms. Two crucial decisions, bearing on *this* case, were rendered back in 1905.

First, on February 20, 1905, the Supreme Court decided *Jacobson*, affirming the conviction of an individual who had violated Massachusetts' compulsory vaccination statute and, in so doing, firmly rejecting his constitutional challenge to that law. 197 U.S. at 25-33. While *Jacobson*— and the District Court's misunderstanding of it—is discussed in greater detail elsewhere in this brief, *supra* at 19, two details about the opinion merit mention here. Most basically, *Jacobson* warrants consideration as a seminal Fourteenth Amendment case. *See* 197 U.S. at 14, 23, 29. More substantively, the Court made a trenchant observation in *Jacobson*

which should guide this Court at this stage: "[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does *not* import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." 197 U.S. at 26 (emphasis added).

Less than two months after *Jacobson*, the Supreme Court decided *Lochner v. New York*, 198 U.S. 45 (1905).[22] There, the Court invalidated a New York statutory provision that regulated the number of hours bakery employees would be allowed to work, finding that "[t]he statute necessarily interfere[d] with the right of contract between the employer and employees[.]" *Id.* at 53. This followed, the majority explained, because "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution." *Ibid.*

Even as *Lochner* endorsed an "economic liberty" approach to the Fourteenth Amendment (the "right to purchase or to sell labor is part of the liberty protected by this amendment"), the majority openly acknowledged that "there are circumstances which exclude [this] right." *Id.* at 53. That is to say, States have "police powers" which "relate to the safety, health, morals and general welfare of the public." *Ibid.* Accordingly, "[b]oth property and liberty are held on such reasonable

[22] *Lochner* was decided 5-4. Justice Holmes dissented, as did Justice Harlan, the author of *Jacobson*.

conditions as may be imposed by the governing power of the state in the exercise of those [police] powers, and with such conditions the 14th Amendment was *not* designed to interfere." *Lochner*, 198 U.S. at 53 (emphasis added). Nevertheless, the particular work-hours provision at issue in *Lochner* did not fall into this category, as far as the majority was concerned. *Id.* at 57.

Notably, the *Lochner* majority made a point of discussing and distinguishing the very recent *Jacobson* ruling. As the majority pointed out, the statute under consideration in *Jacobson* was "for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease." *Lochner*, 198 U.S. at 56 (internal quotation marks omitted). And, the majority added, *Jacobson* "is also far from covering the [case] now before the court." *Ibid.*[23]

Thus, as of 1905, the Supreme Court itself recognized that *Lochner* and *Jacobson* could and would coexist. Going forward, personal economic rights would be shielded from State interference under *Lochner*. But because such rights are not

[23] Unsurprisingly, the justices who dissented in *Lochner* would have upheld the work-hours legislation at issue as a reasonable and appropriate exercise of State power, without attempting to differentiate the situation before them from the particulars of *Jacobson*. At the same time, both dissenting opinions do mention *Jacobson*. *See Lochner*, 198 U.S. at 67, 68, 69, 75. Moreover, Justice Harlan explicitly referred back to his own opinion in *Jacobson*, pointedly adding, "I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare, or to guard the public health, the public morals, or the public safety." *Lochner*, 198 U.S. at 67.

absolute, States would be entitled to enforce laws and policies meant to protect public health and safety.

B. *Lochner* Has Been Repudiated; *Jacobson* Has Not.

Without itself employing the phrase "substantive due process," *Lochner* became, for a time, the prototype for similar cases. With *Lochner* and such cases in mind, the District Court couched portions of its analysis of Appellees' substantive due process claim in terms of "economic liberty," including the right to work. *See*, *e.g.*, A.51-53, 60-61 (opinion). This was unjustified because the *Lochner* approach has not stood the test of time and because, in recent years, an entirely different analytical approach to substantive due process (explained *infra*) has supplanted it.

The District Court embraced *Lochner*'s concept of due process even though, as the court gently put it, *Lochner* "was considerably recalibrated and de-emphasized by the New Deal Supreme Court and later jurisprudence." *See* A.52. Respectfully, in post-1905 Fourteenth Amendment cases, *Lochner*'s emphasis on litigants' individual economic interests was not recalibrated, but repudiated. Conversely, *Jacobson*'s emphasis on states' powers to enact measures that protect public health and safety has retained its vitality.

Extensive judicial and scholarly commentary on this subject cannot possibly be recounted here in full, but succinct reference to well-known illustrative cases is helpful. In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the constitution-

ality of a Washington State minimum wage law was confirmed, with the Court observing that "[l]iberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Id.* at 392. In so holding, the Court explicitly overruled *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), a decision that rested on *Lochner*.

In 1963, when the Supreme Court rejected yet another Fourteenth Amendment challenge to a state regulatory statute, the Court was more explicit in repudiating *Lochner*. Specifically, *Ferguson v. Skrupa*, 372 U.S. 726 (1963), summarizes a host of prior, analogous cases and confirms that "[t]he doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *Ferguson*, 372 U.S. at 730. So, the Court added: "It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." *Id.* at 730-31 (internal quotation marks and footnote omitted).

This Court, too, has recognized that the "general spirit" of *Lochner* has been "thoroughly discredited." *Lutz v. City of York*, 899 F.2d 255, 256 (3d Cir. 1990); *see also Colorado Springs Amusements, Ltd. v. Rizzo*, 524 F.2d 571, 576 n.17 (3d Cir. 1975) (remarking on "questionable relevance" of case that "was handed down dur-

ing the era when the now long-discarded doctrine of substantive due process in the economic field was still in ascendance").

In short, if alleged deprivations of individual economic liberty, in and of themselves, once gave rise to viable substantive due process claims, that is no longer so. On the question of whether, under *current* law, Appellees were entitled to prevail on such a theory in this particular case, the answer is no.

C. A Well-Developed Legal Roadmap Applies When Scrutinizing Substantive Due Process Claims.

Since *Lochner*, the Supreme Court has refined its thinking on Fourteenth Amendment substantive due process. And this Court, too, has considered a wide range of substantive due process claims over the years. It is against these newer jurisprudential benchmarks that Appellees' present substantive due process claim must be assessed.

By its terms, the Due Process Clause "speaks to the adequacy of state procedures," but the clause "also has a substantive component." *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139 (3d Cir. 2000). "The substantive component of the Due Process Clause limits what government may do regardless of the fairness of procedures that it employs[.]" *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 399 (3d Cir. 2000) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

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, not from state law. *Ibid. See also, e.g.*, *Desi's Pizza, Inc. v. City of Wilkes-Barre,* 321 F.3d 411, 427 (3d Cir. 2003); *Nicholas*, 227 F.3d at 140-142. In the substantive due process context, protected rights and liberties are those "which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citation and quotation marks omitted).

Not every claimed right rises to this level. Indeed, 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). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272 (1994). The Supreme Court "exercise[s] the utmost care" whenever it is asked to "break new ground in this field." *Id.* (citing *Collins*, 503 U.S. at 125).

If no fundamental right is at stake in a given case, the substantive due process inquiry ends. If a fundamental right *is* implicated, further analysis is needed to determine whether the plaintiff can demonstrate an illegal *deprivation* of that right.

Substantive due process principles limit what the government can do in both its legislative and executive capacities. *Lewis*, 523 U.S. at 846. As now-Justice Alito explained in *Nicholas, supra*, "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." 227 F.3d at 139 n.1 (internal brackets and citations omitted).

When either type of action is questioned, somewhat different analytical standards apply (though both are quite deferential overall). The actions challenged in this litigation – taken by high level executive officials, pursuant to statute, but affecting many people – have both executive and legislative attributes, so both analytical approaches will be taken into account now. Whichever way the Governor's and the Secretary's actions are viewed, there is no substantive due process rationale for invalidating them.

A *legislative* enactment that impinges on "certain fundamental rights and liberty interests" will be subject to comparatively searching review. *See, e.g., Heffner v. Murphy,* 745 F.3d 56, 79 (3d Cir. 2014) (citing *Washington v. Glucksberg*, 521 U.S. at 720). But if no fundamental right or interest is involved, a legisla-

tive enactment will pass constitutional muster as long as there is a rational basis for the enactment. *See, e.g., B&G Construction Co. v. Director, Office of Workers' Comp. Programs,* 662 F.3d 233, 255 (3d Cir. 2011). Thus, "State restrictions on the right to practice a profession receive rational basis review rather than higher scrutiny." *Sammon v. New Jersey Bd. of Medical Examiners,* 66 F.3d 639, 645 (3d Cir. 1995). Similarly, general economic and social welfare legislation violates substantive due process only when it fails to meet a minimum rationality standard. *Ibid.* (citing *Stern v. Halligan*, 158 F.3d 729, 731 (3d Cir. 1998)). For a challenger, this is a very demanding test; a showing of simple "unfairness" will not suffice. *Stern*, 158 F.3d at 731.

"Under rational basis review, a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute." *Heffner*, 745 F.3d at 79 (citation and internal quotation marks omitted). Consequently, "when presenting a due process challenge to a regulation, the challenging party must show that there is no rational connection between the regulation and the interest which the regulation promotes." *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907, 912 (3d Cir. 1987). Under this forgiving standard, there need not be "mathematical precision in the fit between justification and means." *Heffner*, 745 F.3d at 80. "Policy decision[s] about

where lines should be drawn . . . [are] not legally relevant under substantive due process jurisprudence." *Id.* at 83.

To succeed on a substantive due process claim based on allegedly questionable *executive* action is even more difficult. "[E]xecutive action violates substantive due process only when it shocks the conscience[.]" *United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa.*, 316 F.3d 392, 399-400 (3d Cir. 2003). Decisions or actions do not rise to this level even if they might be deemed arbitrary and capricious. *See Hunterson v. DiSabato*, 308 F.3d 236, 248 (3d Cir. 2002) (discussing applicability of substantive due process principles in connection with *habeas* petition). Rather, "only the most egregious official conduct" meets the demanding shock-the-conscience standard. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). To shock the conscience, official action must be egregiously wrong, abusive, oppressive, "intended to injure in some way unjustifiable by *any* government interest." *Id.* at 849 (emphasis added).

D. As a Matter of Law, the District Court's Substantive Due Process Conclusions Cannot Stand.

In its opinion, the District Court sustained Appellees' substantive due process challenges to both the stay-at-home orders and the Business-Closure Orders. Both of the District Court's ultimate conclusions are contrary to the legal principles outlined above and must therefore be reversed.

1. Stay-At-Home Provisions.

Appellees questioned the stay-at-home orders—which they also derisively referred to as "lockdowns"—because they asserted that they were not traditional disease control measures. The District Court erroneously accepted this assertion. A.35-49.

After emphasizing the unprecedented nature of the "lockdowns" in Pennsylvania and throughout the United States, A.40-44, the District Court confronted the fundamental right requirement for any substantive due process claim. According to the District Court, the stay-at-home provisions infringed upon Pennsylvanians' purported fundamental right to "intrastate travel" and "freedom of movement," which was "suggested" by the Supreme Court in *Williams v. Fears,* 179 U.S. 270, 274 (1900), and purportedly adopted by this Court in *Lutz*. A.45-47. This threshold finding is wrong.

Thirty years ago, *Lutz* did recognize a right to intrastate travel, but very guardedly, beginning its discussion with the observation that "[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." *Lutz*, 899 F.2d at 266 (citing *Fears*). In the next breath, this Court went on to observe that "[i]t is unclear whether the travel aspect of cases like *Fears* can be severed from the [thoroughly discredited] general spirit of *Lochner*[,]" adding that "[i]t seems

uncertain, therefore, whether these old cases have significant continuing precedential value." *Lutz*, 899 F.2d at 266. After further discussion, this Court arrived at its fundamental-right conclusion but openly noted, "this bottom-line judgment is unquestionably ad hoc, to some extent." *Id.* at 268.[24]

For Appellees to rest their "lockdown" challenge on the denial of an asserted fundamental right to intrastate travel is puzzling, because no actual prohibition on intrastate travel was imposed in the first place. As explained in the declaration of Executive Deputy Secretary Sarah Boateng, "[t]he stay-at-home orders did not prohibit travel or movement." A.311, 313. Furthermore, there is no evidentiary basis to infer that the so-called "lockdowns" were absolute. Even the District Court acknowledged that "specific permissible reason[s] to leave [home] were enumerated" in the stay-at-home orders. A.45-47.

Even assuming, *arguendo*, the stay-at-home provisions did limit intrastate travel to some extent, that does not mean a fundamental constitutional right was impaired. The legal landscape has shifted away from *Lutz*'s tentative suggestion that a fundamental right to intrastate travel might exist. Less than three months ago, in *McCraw v. City of Oklahoma City*, 973 F.3d 1057 (10th Cir. 2020), the Tenth Circuit thoroughly surveyed existing case law, including *Lutz*, on a similar

[24] In the end, this threshold finding was not outcome-determinative, because *Lutz* ultimately held that the ordinance at issue there passed muster. 899 F.2d at 270.

point (whether there is a fundamental right to freedom of local movement). The Tenth Circuit cited, but explicitly declined to adopt, this Court's very guarded view, explaining that any fundamental right to "freedom of movement" only applies to interstate travel. *McCraw*, 973 F.3d at 1080-81. Given this evolution in judicial thinking, as well as *Lutz's* own reliance on *Lochner*, the District Court's adherence to this discredited doctrine should not be validated on appeal.

Furthermore, even if the stay-at-home orders did implicate a fundamental right, it does not follow that they resulted in any denial of substantive due process. Viewed through a rational basis lens, the stay-at-home provisions of the Governor's orders were unquestionably *rational*, non-permanent measures, imposed to help slow the spread of a serious, sometimes fatal, infectious disease among Pennsylvanians.

By the same token, the imposition of such restrictions—however inconvenient for individuals—cannot be deemed "conscience-shocking" for substantive due process purposes. Remaining at home is, at times, difficult, but experts agree that minimizing person-to-person contact is essential if COVID-19 is to be contained. To that end, for the Governor and the Secretary to act in accordance with recommendations from physicians, epidemiologists, and scientists when formulating public policy—including the stay-at-home orders—was responsible, and far from conscience-shocking.

2. Business-Closure Provisions.

Finally, Appellees' substantive due process claim encompasses an attack on the business-closure directives. As it did with respect to Appellees' assault on the stay-at-home provisions, the District Court also readily accepted their business-closure arguments, but that conclusion, too, constituted error.

At bottom, this aspect of Appellees' substantive due process claim was premised on their purportedly fundamental right to "engage in the common occupations of life" and to pursue one's "chosen profession." But their legal theory was deficient to begin with, and to make matters worse, the District Court's analysis of it was seriously flawed.

The District Court openly acknowledged that "economic substantive due process"—the legal category into which defendants' challenge to the business-closure orders would fall—"reached its apex in the *Lochner* era." A 52. By giving credence to *Lochner*, the District Court built on an analytical foundation that no longer exists. *See supra* at 35. Exacerbating this fatal flaw, the District Court relied on two other, century-old cases to justify its conclusion that the right to engage in a common occupation is "fundamental." Neither, however, carries over to the instant controversy.

The first decision cited below, *Truax v. Raich*, 239 U.S. 33 (1915), itself addressed an equal protection challenge, *see id.* at 39, 41, not a substantive due pro-

cess claim. Moreover, *Truax* was interpreted narrowly in *Conn. v. Gabbert*, 526 U.S. 286 (1999), which explained: "In a line of earlier cases, this Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation." 526 U.S. at 291-92. Thus, any possible work-related liberty interest is much more circumscribed than sweeping.

The second case cited by the District Court, *Meyer v. Nebraska*, 262 U.S. 390 (1923), concerned the prosecution of a teacher who violated a statutory bar on the teaching of a foreign language. While famous, *Meyer* does not bolster the Appellees' present substantive due process claim either. In fact, it is entitled to minimal weight, as this Court explained in *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396 (3d Cir. 2000), which concerned a transportation contractor's loss of certain contracts.

Boyanowski acknowledges that *Meyer* reversed the teacher's conviction on due process grounds and, in so doing, this Court "uttered the broad and celebrated language about the right to engage in any of the common occupations of life[.]" *Boyanowski*, 215 F.3d at 404. "The case turned, however, on a direct bar to the teacher's teaching, as well as the concurrent interference in parental rights over children," *ibid*, not on abstractions. Nothing comparable resulted from the busi-

ness-closure orders. Furthermore, *Boyanowski* goes on to explain that the Supreme Court clarified "that *Meyer* may *not* be read to constitutionalize all executive actions that affect the pursuit of a profession in any way." *Boyanowski*, 215 F.3d at 404 (citing *Conn. v. Gabbert, supra*) (emphasis added). Yet that is what Appellees have sought in this litigation.

Beyond its references to *Truax, Meyer,* and *Lochner*, the District Court zeroed in on *Piecknick v. Comm. of Pa.*, 36 F.3d 1250, 1259 (3d Cir. 1994), as unassailable authority for the existence of a protected liberty interest in pursuing a calling or occupation. *See* A.52 (opinion). But factually, *Piecknick* only concerned a specific towing contract (*i.e.,* a "specific job," not a "calling" or an "occupation"). As to that, the plaintiff there certainly did not have a protected property interest. *Id.*, 36 F.3d at 1259. Nor did he have a protected liberty interest because—again—the situation he questioned only involved a particular job; he could still pursue his chosen occupation. *Id.* at 1261-62.

But even assuming, *arguendo,* that the business-closure provisions, as issued, did touch upon some sort of recognized liberty interest (and they did not), it does not follow that the Governor's actions in this regard were legally unsustainable on substantive due process grounds. The opposite is true.

On this score, only rational basis review is mandated. *See, e.g., Heffner*, 745 F.3d at 79. The District Court agreed; it purported to apply the rational basis test to

this portion of the case, which was appropriate, and the court explicitly acknowledged that it is a "forgiving standard." A.56. Aside from those preliminary concessions, respectfully, the court went astray.

What seems to have bothered Appellees the most is the Governor's utilization of the North American Industry Classification System (NAICS) to categorize businesses as either life-sustaining or non-life-sustaining (with only the former being allowed to operate normally, while the latter were subject to physical closure).[25] Agreeing with Appellees, the District Court concluded that this approach was somehow arbitrary, but under the agreed-to rational basis test, the law dictates a different conclusion.

As presented, Appellees' attack on the business-closure provisions sounds more like an equal protection challenge than a substantive due process challenge to legislative (or, more precisely, quasi-legislative) governmental action. Regardless, the applicable rational basis test is the same either way.

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[25] For example, Appellees complained that the classification system "remained in flux, changing ten times." A.58 (opinion). What they neglect to mention, of course, is that each amendment expanded the number of businesses permitted to remain physically open. A.3122 (7/22/2020 transcript). In addition, certain individual Appellees questioned why their small businesses were deemed non-essential and forced to physically close, while "big box" businesses selling comparable products were deemed essential and allowed to remain open. A.60-61. This distinction was not based upon their size, however, but the nature of their primary business activity—a classification the small businesses made themselves. A.2975-77 (7/22/2020 transcript).

Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe*, 509 U.S. 312, 319 (1993) (quoting *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). A classification cannot run afoul of the Constitution "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 320. On rational basis review, courts are compelled "to accept a legislature's [or official's] generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Id.* at 321 (bracketed words added; internal quotation marks and citations omitted). "The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical it may be, and unscientific." *Ibid.*

That the Commonwealth's approach—unquestionably formulated in the face of a "pressing situation" brought on by COVID-19, as even the District Court acknowledged, *see* A.61—differs from what Appellees and the District Court believe would have been better policy choices does not mean that the Governor's approach lacked a rational basis. One thing that both Appellees and the District Court overlook, for instance, is that larger businesses sell all kinds of things (not just specialty items), including food and other products that must be obtainable by everyone during a pandemic. Thus, the District Court established a false equivalence be-

tween these discrete businesses and larger stores that sell food, medicine, and other essential goods that no one disputes are life-sustaining. That explains why businesses like Walmart and Home Depot remained physically open while Appellees did not. It was rational; that is all the law requires.

Nor, in closing, do Appellees' passionate criticisms of the business-closure provisions render the Commonwealth's actions "conscience-shocking" for substantive due process purposes. Recall that, to be actionable under this demanding standard, governmental (executive) action must be "intended to injure in some way unjustifiable by any governmental interest[.]" *County of Sacramento*, 523 U.S. at 849. Conduct "that shocks in one environment may not be so patently egregious in another, and [courts'] concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Hope v. Warden York Co. Prison*, 972 F.3d 310, 330 (3d Cir. 2020) (quoting *Lewis*, 523 U.S. at 850).

As specifically pointed out in *Hope*, the COVID-19 pandemic is a "highly unusual and unique circumstance," requiring this Court to "evaluate the Government's response to the virus in that context." *Id.*, at 330. That, in turn, reinforces what has already been stressed: Facing an unprecedented public health crisis affecting virtually every Pennsylvanian, directly or indirectly, the Governor and the Secretary were entitled, indeed obligated, to exercise their judgment and arrive at

workable policies for the Commonwealth. That is what they did. Issuance of the Business-Closure Orders was the antithesis of conscience-shocking behavior and, accordingly, did not deprive Appellees of substantive due process.

III. The Business Closure Orders were Consistent with Equal Protection.

To combat a pandemic that spreads through close physical proximity, the Governor temporarily closed the physical locations of all Pennsylvania non-life-sustaining businesses. Appellees brought a "class-of-one" equal protection claim, arguing that they were unconstitutionally closed while other businesses were allowed to remain open. While the District Court correctly recognized that the proper standard to review such a claim is rational basis, that court gave state officials no deference in how they addressed the ever-evolving emergency. Instead, the District Court criticized state officials for distinguishing between hair salons and stores that sold food and medicine, calling this distinction "arbitrary in origin and application." A.65 (opinion). This was in error.

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). "Evils in the same field may be of different dimensions and proportions, requiring different remedies." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955). Thus, under the rational basis standard, regulations are "presumed to

be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). This legitimate interest "may be based on rational speculation unsupported by evidence or empirical data." *F.C.C.*, 508 U.S. at 315.

Again, the District Court characterized this standard as merely "forgiving." A.63 (opinion). Such a terse description misstates the extremely deferential nature of this standard. Rather, "the threshold for upholding distinctions in a statute under rational-basis review is *extremely low*." *U.S. v. Pollard*, 326 F.3d 397, 408 (3d Cir. 2003) (emphasis added).[26]

Moreover, in applying rational basis review, "the Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Therefore, rational-basis review "confers a presumption of validity on legislation," *Real Alts., Inc. v. Sec'y of HHS*, 867 F.3d 338, 348 (3d Cir. 2017), and any challenger "must negate *every conceivable justification* for the classification in order to prove that the classification is wholly irrational." *Brian B. v. Penn. Dep't. of Educ*., 230 F.3d 582, 586 (3d Cir. 2000) (emphasis add-

[26] The Governor's executive order, which has the full force of law, is given the effect of a legislative statute for the purposes of constitutional review. *See supra* at 5, n.1.

ed). "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (citations omitted).

Instead of requiring Appellees to "negate every conceivable justification for the classification in order to prove that the classification is wholly irrational," *Pollard*, 326 F.3d at 407, the District Court criticized the classifications made by State officials as "arbitrary" and "*ad hoc*" because it found no "objective and measurable definition" for the classifications. A.64 (opinion). This analysis was incorrect for two reasons.

First, this characterization is factually incorrect. The Governor's list of life-sustaining and non-life sustaining businesses categorized industries using the North American Industry Classification System (NAICS). *See* U.S. Census Bureau, North American Industry Classification System, https://www.census.gov/eos/www/naics/ (last visited 9/23/20). These classifications of industries are well known. And by using this highly regarded and ubiquitous classification system, the Governor ensured that similarly situated entities *would* be treated the same.

Second, the District Court incorrectly inserted its own opinion as to where the line should have been drawn between life-sustaining and non-life-sustaining

businesses during a natural disaster. The Supreme Court has admonished that rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller*, 509 U.S. at 319 (citing *F.C.C.*, 508 U.S. 307, 313 (1993)). Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Rather, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights *must* be upheld against an equal protection challenge if there is *any* reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C.*, 508 U.S. at 313 (emphasis added).

"[C]lass-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006) (Sotomayor, J.). And the businesses the District Court suggested were similar, are in fact fundamentally different in the types of products they sell. For example, the District Court erred in concluding that it was "arbitrary" that a small retailer that sells furniture was considered non-life-sustaining while Walmart—which also sells furniture—was placed on the life-sustaining list. A.63. That court also highlighted a salon selling beauty prod-

ucts as supposedly being treated differently from a drug store. *Ibid.* The District Court concluded that these distinctions amounted to discrimination based on the size of the businesses, shutting small businesses while allowing larger ones to remain open. A.65. Respectfully, this is simply wrong.

Walmart was classified as a life-sustaining business because it sold *food and medicine*. A person can survive a pandemic without a new chair; they cannot without food. To shut down a major source of groceries because those stores also sold non-life-sustaining products would have deprived Pennsylvanians of access to life-sustaining food and medicine during a global health crisis. A seller of both life-sustaining and non-life sustaining products, and one that only sells the latter, are fundamentally different.

Similarly, drug stores were permitted to remain open, not because they sold beauty products, but because they sold *medicine*. Home Depot and Lowes—among others—were permitted to remain open because they sold life-sustaining products such as roofing supplies, electrical supplies, batteries, and propane. Appellee R.W. McDonald & Sons did not. *See e.g.*, A.2785-86, 2797-98 (7/17/2020 transcript). It was not the size, but rather the life-sustaining items sold within that permitted some business to remain physically open while others were temporarily closed. The District Court ignored this obvious distinction in favor of its own invented distinction based on size. Additionally, the District Court overlooked neighborhood

convenience stores, which, regardless of size, remained physically open to provide essential goods.

"The 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."). "These restraints on judicial review have added force 'where the legislature must necessarily engage in a process of line-drawing.'" *F.C.C.*, 508 U.S. at 315 (quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). And any line drawing "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Id*. at 315-316 (internal quotation marks and citation omitted).

The Commonwealth's decision on which businesses had to remain open to sustain life were made during a rapidly evolving global health disaster. A.2953,

3018-20 (7/22/2020 transcript). The Commonwealth "must be allowed leeway to approach a perceived problem incrementally." *Id.* at 316 (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955)). The Governor's Order balanced the economic interests of the Commonwealth against the health and lives of millions of Pennsylvanians. Temporarily closing certain physical locations in order to protect lives is certainly not invidious or wholly arbitrary. The health and survival of our residents is the most compelling of State interests. And the classifications and distinctions made to protect all Pennsylvanians are absolutely essential to achieving that most compelling of interests. The Governor's Order did not violate the Equal Protection Clause.

IV. The Governor and Secretary's Orders are Laws of General Applicability Regulating Non-Expressive Conduct; As Such, They Do Not Implicate the First Amendment.

Appellees brought a First Amendment claim against the Governor's earlier limitation of crowd sizes, A.127 (complaint), which the District Court converted into a challenge of the Governor's July 15th Order. A.25-26 (opinion). That second order placed occupancy limits on the number of people who may congregate for "events and gatherings:"[27] 25 persons indoors and 250 persons outdoors. A.22.

[27] That order gives examples of what is meant by gatherings: "fairs, festivals, concerts, or shows . . . movies on a single screen/auditorium . . . , business meetings or conferences, or each party or reception within a multi-room venue." A.22 (opinion quoting July 15, 2020 Order).

Laws of general applicability, like this order or a fire code, do not implicate First Amendment protections. *See e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-07 (1986); *Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Castille*, 799 F.3d 216, 220–21 (3d Cir. 2015) (refusing to apply either heightened or intermediate scrutiny to First Amendment challenge to content-neutral licensing requirement for the practice of law because the requirement did not prohibit or otherwise restrict professional speech); *Wright v. City of St. Petersburg, Florida*, 833 F.3d 1291, 1296-97 (11th Cir. 2016) ("Simply because the trespass warning incidentally burdened Wright's First Amendment activities does not mean that Ordinance § 20–30 is subject to First Amendment scrutiny[.]").

In *Arcara v. Cloud Books, Inc.*, the Supreme Court rejected the notion that courts must apply First Amendment scrutiny to every regulation or ordinance that "will have some effect" on First Amendment activities. 478 U.S. at 705. Rather, First Amendment scrutiny applies "only where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . or where [an ordinance] based on a nonexpressive activity has the inevitable effect of *singling out* those engaged in expressive activity." *Id.* at 706–07 (emphasis added). When "enforcement of a public health regulation" does neither, "the First Amendment is not implicated[.]" *Id.* at 707.

The occupancy limits were not directed at expressive activity and did not single out those engaged in such activity; they merely placed occupancy limits on the number of people who may congregate for events and gatherings. These public health orders regulated the size of crowds; they did not regulate what people may say or do, or with whom they may associate, when in these crowds. They also did not single out those that engaged in expressive activities. These orders applied to concerts, movies, baseball games, and picnics alike. The District Court should never have applied First Amendment scrutiny to these public health laws of general applicability.

In addition to this basic misstep, the District Court began its First Amendment analysis of the occupancy limits with a claim never asserted, then applied the wrong standard to that claim, conflated unlike situations to demonstrate lack of narrow tailoring, and ended with a conclusion that ignores the basic science of how this pandemic spreads. Respectfully, this cascading series of compounding errors arose from the District Court's efforts to wedge a square public health regulation into the round hole of free speech jurisprudence. This was all in error.

The District Court began its analysis by misstating Appellees' First Amendment claim as alleging a violation of their *right of assembly*. A.25-26. That is not what Appellees asserted in their complaint; in Count V, Appellees clearly asserted a

right to expressive association.[28] A.127 (complaint at ¶ 114). Specifically, Appellees complain about the "limit[] on the numbers of individuals at public gatherings", which they assert "violates the freedom of association clause inasmuch as expressive advocacy cannot take place because of the Business Shutdown Order[.]" A.127-28 (complaint).

The claim that Appellees actually asserted clearly fails. While the First Amendment protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000), the occupancy limits here did not prevent Appellees from associating with whomever they choose—so long as they did not create large crowds. These orders were conceptually the same as the occupancy limit in a fire code.[29] Fire codes and zoning laws routinely limit the number of people permitted to occupy a structure or venue at the same time, in order to protect the safety and health of those involved. While the occupancy limits challenged

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[28] Appellees' choice not to raise an assembly claim is likely no accident: "The Supreme Court has all but forgotten the right to assemble in the modern era." *Legacy Church, Inc. v. Kunkel*, CV 20-0327, 2020 WL 3963764, at *69 (D.N.M. July 13, 2020) (noting that the Supreme Court has not heard a right-to-assemble claim in over thirty years).

[29] This fire code analogy is even more explicit with the October 6th occupancy orders, which establish COVID-19 occupancy limits based upon fire occupancy limits.

in this case restrict the size of crowds, they do not regulate or restrict the makeup of those assembled.

Such health-and-safety occupancy limits do not violate one's freedom of association. In *Doe v. City of Butler, Pa*., 892 F.2d 315 (3d Cir. 1989), this Court examined whether a six-resident limitation for transitional dwellings in the City of Butler's zoning ordinance violated freedom-of-association rights. In holding no, the Court noted that a zoning occupancy ordinance "does nothing to prevent plaintiffs from associating with each other, and with others similarly situated. It merely provides that for zoning purposes, a reasonable occupancy limit must be observed." *Id*. at 322-23. *See also, Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628, 639 (7th Cir. 2014) ("the First Amendment does not require the state to maintain policies that allow certain associations to thrive"). Although much larger in scale, the occupancy orders were conceptionally no different—they limited the size of mass gatherings to prevent super-spreader events from occurring.

Having mischaracterized Appellees' associational claim, the District Court then conducted a standard freedom of speech analysis. As explained above, First Amendment scrutiny "has no relevance to [a public health regulation] directed at imposing sanctions on nonexpressive activity." *Arcara*, 478 U.S. at 707. The occupancy orders did not prevent people from congregating in any area to protest or speak their minds. They did not remotely touch upon *who* may congregate, *where*,

or for *what* purpose. They simply limited the size of crowds to limit the spread of COVID-19.

But even if it were appropriate to apply First Amendment scrutiny to this public health law of general applicability, the District Court erred in the application. Initially, the District Court's use of the "time, place, or manner" test was incorrect. That test applies to regulations directed specifically at expression—such as billboards or demonstrations—and such regulations are upheld so long as the governmental purpose is unrelated to disagreement with the message and there are adequate alternative channels of communication. *See e.g. Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293, 297 (1984) (where the Supreme Court assumed *arguendo* that the actions at issue were expressive). But as explained above, the occupancy orders were not directed at expressive conduct. Appellees were free to express whatever message they wished.

Accordingly, even if a First Amendment test were applicable—and it was not—the District Court should have applied the *O'Brien* test, named for *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Under that standard, a general law that impacts conduct with both expressive and non-expressive elements, but does not target or single out expressive conduct, need only be "within the constitutional power of the government" and in furtherance of "an important or substantial governmental interest [that] is unrelated to the suppression of free expression."

O'Brien, 391 U.S. at 376–377; *see Barnes v. Glen Theatre, Inc*., 501 U.S. 560, 572 (1991) (plurality). Subsequently, the Supreme Court explained that "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved *less effectively absent the regulation*." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 67 (2006) (emphasis added). This is a highly deferential standard: the High Court "ha[s] never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest." *Barnes*, 501 U.S. at 577 (1991) (Scalia, J. concurring).

The Commonwealth clearly possesses the constitutional power to limit crowd sizes for the health and safety of individuals. *See supra* at 18. Likewise, even the District Court acknowledged that the Governor's order was "undertaken in support of a significant governmental interest—managing the effects of the COVID-19 pandemic in the Commonwealth[,]" which was wholly unrelated to expressive conduct. A.29 (opinion). And the Commonwealth's interest in inhibiting the spread of this contagious disease would certainly be "achieved less effectively" if it could not limit the sizes of crowds or prevent mega-spreader events.

Deputy Chief of Staff Sam Robinson testified that the 25/250 occupancy limits were taken from CDC guidelines and after collecting "significant amounts of information and review[ing] significant amounts of information about the way that the virus spreads through groups[.]" A.2937-2939 (7/22/2020 Transcript). That information revealed that the virus spreads quickly throughout a community when "people [are] densely packed and congregating in, particularly, indoor settings . . . ." *Ibid.* "[T]here's significant evidence that that type of gathering is responsible for spread, which is why the CDC and many other states and entities have taken steps to prevent large congregate gathering[s]." A.2939. Preventing large gatherings of people was equivalent to removing fuel from a fire.

The District Court did not credit the reality of how the pandemic spreads and applied an incorrect standard to the Commonwealth's approach. The District Court's reliance on *Frisby v. Schultz*, 487 U.S. 474 (1988), demonstrates its misunderstanding of which standard to apply. *Frisby* examined a law that targeted speech by prohibiting picketing in front of residential homes. Despite this direct and intended restriction on speech, the Supreme Court held that the ordinance's complete ban on targeted residential picketing was narrowly tailored. *Id.* at 487. The order here did not target speech or expressive conduct at all, and yet the District Court demanded a surgical level of tailoring beyond that used in *Frisby*. As the Supreme Court explained in *Clark*, "[i]t would be odd" to scrutinize laws of general ap-

plicability that have "only an incidental impact on speech" under a standard higher than laws which "directly limit[] oral or written expression." *Clark*, 468 U.S. at 299 n.8. This is precisely what the District Court did here.

Acting under the wrong standard, the District Court invalidated the occupancy limits as not narrowly tailored because it found "the record in this case failed to establish any evidence that the specific numeric congregate limits were necessary to achieve [the Commonwealth's] ends . . . ." A.31 (opinion). But even using the "time, place, or manner" test, this was again error.

This Court recently reiterated that such exacting proof is not required to survive intermediate scrutiny: "The Supreme Court has not demanded that the enacting authority achieve legislative certainty or produce empirical proof that the adopted legislation would achieve the stated interest [in the First Amendment context] even when applying strict scrutiny." *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 122 (3d Cir. 2020). After all, jurists are not epidemiologists. The Commonwealth may, therefore, justify a content neutral restriction on large assemblies by "reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (internal citations omitted); *see also Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 608 (9th Cir. 2010) (illus-

trating the Supreme Court's flexible approach to First Amendment restrictions under intermediate scrutiny).

To satisfy the narrow tailoring requirement, "a regulation need not be the least restrictive or least intrusive means." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). It need only further "a substantial government interest that would be achieved less effectively absent the regulation." *Id*. at 799.

In downplaying the effect of mass gatherings on the spread of this disease, the District Court ignored the overwhelming scientific consensus that "[t]he COVID-19 spread illustrates the role of [mass gatherings] in exacerbation of the scope of pandemics[,]" and "[c]ancellation or suspension of [mass gatherings] would be critical to pandemic mitigation." Shahul Ebrahim, *et al*., "COVID-19 – the role of mass gatherings," National Library of Medicine, https://pubmed.ncbi.nlm.nih.gov/32165283/ (Mar.-Apr. 2020).[30] As the CDC has repeatedly stressed, "[v]arious gatherings of persons from different locations, followed by return to their home communities, played a notable role in the early U.S. spread of COVID-19." "Public Health Response to the Initiation and Spread of

[30] *See e.g*., Nor Fazila Che Mat, *et al*., "A single mass gathering resulted in massive transmission of COVID-19 infections in Malaysia with further international spread," National Library of Medicine, https://pubmed.ncbi.nlm.nih.gov/32307549/ (May 18, 2020); Hiroshi Nishiura, *et al*. "Closed environments facilitate secondary transmission of coronavirus disease 2019 (COVID-19)," medRXiv.org, https://www.medrxiv.org/content/10.1101/2020.02.28.20029272v2 (April 16, 2020).

Pandemic COVID-19 in the United States, February 24–April 21, 2020," CDC, https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e2.htm (May 8, 2020).[31]

This is not just a matter of judicial notice. It is common knowledge that a virus spreads farther through person-to-person contact in large groups. Ignoring that COVID-19 spreads through large gatherings amounts to ignoring basic science and the reality of the public health crisis surrounding us.

Further, in concluding that the order treated businesses better than social or political gatherings, the District Court overlooked the plain language of the order itself. The Governor's Order defines gatherings to include, in part, "a temporary grouping of individuals for defined purposes, that takes place *over a limited timeframe, such as hours or days*" including "groupings that occur within larger, more permanent businesses . . . ." A.22 (quoting the order) (emphasis added). Customers in a store do not typically sit or stand right next to each other for hours, unlike the audience at a concert or movie. Additionally, store patrons do not typically share food, as guests at a wedding would. The chance of spread in a store is much

[31] CDC articles are replete with examples of large gatherings leading to a surge in this virus. *See e.g.* Christine M. Szablewski, DVM, *et al.*, "SARS-CoV-2 Transmission and Infection Among Attendees of an Overnight Camp—Georgia, June 2020," CDC, https://www.cdc.gov/mmwr/volumes/69/wr/mm6931e1.htm (Aug. 7, 2020); Megan Lewis, *et al.*, " COVID-19 Outbreak Among College Students After a Spring Break Trip to Mexico—Austin, Texas, March 26–April 5, 2020," CDC, https://www.cdc.gov/mmwr/volumes/69/wr/mm6926e1.htm (July 3, 2020).

smaller, therefore, than in a concert. To treat these disparate scenarios as if they were the same, as the District Court demands, would be illogical and the precise opposite of narrow tailoring.

The Governor's Order was also narrowly tailored because it permits alternative forms of communication and assembly. For example, the Governor's Order did not prohibit politicians from meeting with campaign volunteers or supporters in small groups, or through non-physical means, such as by telephone, video-conferencing, or web-streaming through YouTube and Facebook. The Order did not limit campaigns from promoting their candidates on television, radio, and newspapers, or through billboards, handouts, and yard signs. Nor did it prevent campaigns from sending out direct mail from private residences, putting up yard signs or speaking to the press. The Supreme Court has recognized that, in the modern era, "cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular"—has become the quintessential forum for the exercise of First Amendment rights. *Packingham v. North Carolina*, 137 S.Ct. 1730, 1735 (2017) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997)).

Finally, the Commonwealth's allowance of political protests, rallies, and town hall meetings demonstrates that enforcement of the order was likewise narrowly tailored. As Sarah Boateng, Executive Deputy Secretary of Health, testified:

> [N]o official action was taken in regard to public entities holding board meetings, town hall meetings, public protests or public rallies that exceeded these numbers. Rather, individuals attending such events were encouraged to wear a face covering and practice social distancing.

A.313-314 (Boateng Decl. at ¶¶ 13-14). Religious gatherings were likewise exempt from the restriction.

Indisputably, COVID-19 spreads exponentially through large gatherings of people standing next to each other in close, sustained contact. A prime example of this undeniable reality is the September 26, 2020 White House Rose Garden event that infected at least 30 people. *See* Jaqueline Felscher, "Pence defends 'outdoor' Rose Garden event linked to coronavirus spread," Politico, https://www.politico.com/news/2020/10/07/pence-defends-rose-garden-event-linked-to-coronavirus-427674 (Oct. 7, 2020); Larry Buchanan, et al., "Tracking the White House Coronavirus Outbreak," The New York Times, https://www.nytimes.com/interactive/2020/10/02/us/politics/trump-contact-tracing-covid.html (Oct. 14, 2020). Likewise, early during the pandemic a conference in Boston became a notorious "mega spreading event." Both the concept of a mega-spreader event, and the example of the Boston conference, were testified to before

the District Court. A.3037-38 (7/22/2020 transcript).[32] The reality of mega-spreading events cannot be ignored.

The Commonwealth must have the ability to limit similar gatherings if we are to have any chance of halting the spread of this disease. The number of new COVID-19 cases in Pennsylvania and throughout the Nation has surged recently. The District Court's analysis did not recognize the science of how viruses spread and the repeated warnings of the CDC on the dangerousness of large gatherings. This, coupled with its multiple legal and analytical errors, renders its First Amendment determination fatally flawed. That fundamentally flawed determination should be reversed.

---

[32] One recent joint study by over 50 researchers found that a February 26, 2020 biotech conference in Boston spread COVID-19 to 20,000 people in the metropolitan area. *See* Carl Zimmer, "One Meeting in Boston Seeded Tens of Thousands of Infections, Study Finds," New York Times, https://www.nytimes.com/2020/08/26/health/covid-19-superspreaders-boston.html (Aug. 26, 2020); Jacqueline Howard, *et al*., " Covid-19 superspreading event in Boston may have led to 20,000 cases, researcher says," CNN, https://www.cnn.com/2020/08/25/health/covid-19-superspreading-boston-study/index.html (Aug. 25, 2020). Similarly, a single funeral in Albany, Georgia, sparked an outbreak that led to the surrounding rural county posting one of the nation's highest cumulative incidences of COVID-19. *See* Haisten Willis, *et al*., "A funeral is thought to have sparked a covid-19 outbreak in Albany, Ga.—and led to many more funerals," Washington Post, https://www.washingtonpost.com/politics/a-funeral-sparked-a-covid-19-outbreak--and-led-to-many-more-funerals/2020/04/03/546fa0cc-74e6-11ea-87da-77a8136c1a6d_story.html (April 4, 2020).

CONCLUSION

For these reasons, the Court should reverse the District Court's September 14, 2020 Order.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, J. Bart DeLone, Chief Deputy Attorney General, hereby certify as follows:

1. That I am a member of the bar of this Court.

2. That a virus detection program was run on the file and no virus was detected.

3. That this brief contains 15,411 words within the meaning of Fed. R. App. Proc. 27(d), 32(f). Contemporaneously filed with this motion is an unopposed motion for leave to exceed the word count. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2936

COUNTY OF BUTLER, *et al.*,

Appellees

v.

GOVERNOR OF PENNSYLVANIA, *et al.*,

Appellants

APPENDIX VOLUME I
(Pages 1-86)

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
ENTERED SEPTEMBER 14, 2020

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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.

[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]

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[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 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

DECLARATORY JUDGMENT ORDER

AND NOW, this 14 day of September 2020, IT IS HEREBY ORDERED that judgment is entered in favor of Plaintiffs Mike Kelly, Daryl Metcalfe, Marci Mustello, Tim Bonner, 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 for the reasons outlined in the Opinion filed by the Court this same day. The Court 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 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.

IT IS FURTHER ORDERED that the County Plaintiffs—Butler, Fayette, Greene, and Washington—are hereby DISMISSED from the case.

BY THE COURT:

WILLIAM S. STICKMAN IV
UNITED STATES DISTRICT JUDGE

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

FINAL DECLARATORY JUDGMENT

AND NOW, this 22nd day of September 2020, IT IS HEREBY ORDERED that there is no just reason for delay and final declaratory judgment is entered pursuant to Fed. R. Civ. P. 54(b) on Count II (Violation of Substantive Due Process), Count IV (Violation of Equal Protection), and Count V (Violation of First Amendment) in favor of Plaintiffs Mike Kelly, Daryl Metcalfe, Marci Mustello, Tim Bonner, 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 , and against Defendants for the reasons outlined in the September 14, 2020 Opinion (ECF No. 79) and Order (ECF No. 80) filed by the Court.

IT IS FURTHER ORDERED that the County Plaintiffs—Butler, Fayette, Greene, and Washington—are hereby DISMISSED from the case.

BY THE COURT:

WILLIAM S. STICKMAN IV
UNITED STATES DISTRICT JUDGE

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

MEMORANDUM ORDER

On September 14, 2020, the Court entered an Order and Opinion granting declaratory judgment in favor of some of the Plaintiffs[1] and holding that certain elements of Defendants' COVID-19 mitigation orders violated the First and Fourteenth Amendments to the United States Constitution. (ECF Nos. 79 and 80). Defendants have moved for the Court to stay its judgment pending appeal. (ECF No. 84). For the reasons set forth below, the Motion to Stay is DENIED.

I. STANDARD OF REVIEW

A district court may stay a judgment pending appeal pursuant to Federal Rule of Civil Procedure 62.[2] Granting such a stay is committed to the discretion of a district court. *Id.*; *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926) (citation omitted) ("A stay is not a matter of

[1] The Court held that County Plaintiffs lacked standing to assert constitutional claims under 42 U.S.C. § 1983.

[2] The plain language of Rule 62(c) refers to stays from the imposition of injunctions and makes no mention of declaratory judgment actions. However, courts have held that Rule 62 and the analysis used to determine whether a stay is warranted thereunder is equally applicable to declaratory relief. *See United States v. Safehouse*, ---F. Supp. 3d---, 2020 WL 3447775, at *2 (E.D. Pa. Jun. 24, 2020).

right, even if irreparable injury might otherwise result to the appellant. It is an exercise of judicial discretion."). The "'exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co.*, 272 U.S. at 672–73).

The party requesting the stay bears the burden of demonstrating that a stay is appropriate. *Id.* at 433–34. The factors for determining whether a stay is appropriate include the following:

(1) Whether the stay applicant has made a strong showing that it is likely to succeed on the merits;

(2) Whether the applicant will be irreparably injured absent a stay;

(3) Whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

(4) Where the public interest lies.

In re Revel AC, Inc., 802 F.3d 558, 568 (3d. Cir. 2015) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). District courts must "'balance them all' and 'consider the relative strengths of the four factors'" *Id.* at 568 (quoting *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011)).

The most important factors are the first two. *Id.* (citing *Nken*, 556 U.S. at 434). As to the first factor, a strong showing of the likelihood of success exists if there is "a reasonable chance, or probability, of winning." *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc). "[W]hile it is not enough that the chance of success on the merits 'be better than negligible,' . . . the likelihood of winning on appeal need not be 'more likely than not.'" *Revel*, 802 F.3d at 569 (first quoting *Nken*, 556 U.S. at 434, then quoting *Singer Mgmt. Consultants*, 650 F.3d at 229). To satisfy the second factor, the movant must demonstrate that "irreparable injury is 'likely [not merely possible] in the absence of a stay.'" *Id.* (quoting *Winter v. Natural Res. Def.*

Council, Inc., 555 U.S. 7, 22 (2008)) (alteration in original). "Likely" is understood to mean "more apt to occur than not." *Id.* (citation omitted). To establish irreparable injury, the movant "must demonstrate an injury that is neither remote nor speculative, but actual and imminent." *Id.* at 571 (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989)).

Upon satisfaction of the first two factors, courts assess the harm to the opposing parties and weigh the public interest. *Nken*, 556 U.S. at 435. In particular, district courts balance the harms by weighing the likely harm to the movant absent a stay, the second factor, against the likely harm to stay opponents if the stay is granted, the third factor. *Revel*, 802 F.3d at 569. District courts also evaluate where the public interest lies, the fourth factor, which calls for gauging "consequences beyond the immediate parties." *Id.* (quoting *Roland Mach. Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 388 (7th Cir. 1984)) (internal quotation marks omitted).

Our Third Circuit Court of Appeals has embraced a "sliding-scale" approach to determining how strong a case a movant must show. *Id.* (citations omitted). Under this sliding scale, in essence, "[t]he more likely the [movant] is to win, the less heavily need the balance of harms weigh in [its] favor; the less likely [it] is to win, the more [heavily] need [the balance of harms] weigh in [its] favor." *Id.* (quoting *Roland Mach.*, 749 F.2d at 387) (internal quotation marks omitted) (alterations in and to original). In essence, all four stay factors are interconnected, and the analysis proceeds as follows:

> Did the applicant make a sufficient showing that (a) it can win on the merits (significantly better than negligible but not greater than 50%) *and* (b) it will suffer irreparable harm absent a stay? If it has, we "balance the relative harms considering all four factors using a 'sliding[-]scale' approach. However, if the movant does not make the requisite showings on either of these [first] two factors, the[ ] inquiry into the balance of harms [and the public interest] is unnecessary, and the stay should be denied without further analysis."

Id. at 571 (quoting *Matter of Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300–01 (7th Cir. 1997)) (alterations in original).

II. ANALYSIS

A. Defendants Have Not Met the Requisite Showing of a More Than Negligible Likelihood of Success on the Merits.

To carry their burden to show that they are likely to succeed on the merits, Defendants need only demonstrate that they have "a reasonable chance, or probability, of winning." *Revel*, 802 F.3d at 571. The chance of prevailing on appeal must be "significantly better than negligible," but "need not be more likely than not." *Id.* at 569, 571. While Defendants contend that they have a strong likelihood of success on appeal for several reasons, the Court holds that the record does not support their position.

The primary focus of the request for a stay is the Court's determination that the imposition of numeric congregate gathering restrictions violated the First Amendment. It is critical to note that the Court did not hold that Defendants were powerless to enact limitations on gatherings. Rather, the Court merely held that the First Amendment will not permit a specific numeric cap on some gatherings while imposing a limitation based on general occupancy on other gatherings. The Court believes that, as to this issue, Defendants have not met their burden of establishing even the minimal showing of success on the merits required by the Third Circuit in *Revel*.

First, it is important to note that the Court's judgment did not arise out of proceedings on a temporary restraining order or even a preliminary injunction, but rather, the parties had the opportunity to develop a full evidentiary record under Rule 57. Despite this opportunity, Defendants did not proffer any specific evidence to differentiate between the danger allegedly posed by gatherings governed by specific numeric limitations and gatherings governed by occupancy limitations. The appellate court will be bound by the same record upon which the Court

premised its decision. Despite Defendants having every opportunity to make a record, there is simply no evidence that would justify, from a constitutional perspective, the disparate treatment of gatherings.[3]

The Court also notes that its decision on the First Amendment issue is not an outlier but is in concert with other federal courts that have struck down COVID-19 gathering limits that were more restrictive than the occupancy percentage limits that were placed on commercial gatherings. The Court's opinion examined the decision of the United States District Court for the Eastern District of Kentucky in *Ramsek v. Beshear*, ---F. Supp. 3d---, 2020 WL 3446249 (E.D. Ky. Jun. 24, 2020), which similarly struck down restrictions on "mass gatherings" to fifty or fewer people while permitting gatherings in some places "namely, airports, bus stations and grocery stores." *Id.* at *9. Likewise, in *Tabernacle Baptist Church, Inc. v. Beshear*, ---F. Supp. 3d---, 2020 WL 2305307 (E.D. Ky. May 8, 2020), the same judge held that numeric restrictions on religious gatherings similarly failed scrutiny and 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." *Id.* at *5. In *Marysville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020), the United States Court of Appeals for the Sixth Circuit granted an injunction pending appeal in favor of plaintiffs challenging an order limiting parking-lot religious services where there was no limit to parking in retail establishments. *Id.* at 616; *see also id.* at 614 ("The orders allow 'life sustaining' operations and don't include worship services

[3] Defendants' Brief in Support of Stay cites to several newspaper and magazine articles that purport to show the justification for limitations on gatherings. Some of these articles predate the evidentiary hearing in this case, but they were neither discussed nor used as exhibits. Defendants never moved to supplement the record to submit the articles to the Court (as Plaintiffs did on multiple occasions). These articles are not part of the record. Defendants cannot rely upon them to buttress or supplement the record that was properly before the Court and which will be before the Third Circuit on appeal.

in that definition. And many of the serial exemptions for secular activities pose comparable public health risks to worship services. For example: The exception for 'life sustaining' business allows law firms, laundromats, liquor stores, and gun shops to continue to operate so long as they follow social distancing and other health related precautions."); *Soos v. Cuomo*, ---F. Supp. 3d---, 2020 WL 3488742, at *7–14 (N.D.N.Y. Jun. 26, 2020) (rejecting on First Amendment grounds disparate treatment of religious and commercial gatherings). The Court believes that its decision is in concert with this line of cases that recognize, on one hand, the authority of public officials to limit gatherings during a public health emergency while, on the other hand, finding that strict numeric limitations on some gatherings while using a percentage of occupancy limits for others violates the First Amendment.

The lack of record support for the distinction between the numeric and percentage limitations, as well as the consensus between the Court's decision and those of other courts facing the same issue, lead the Court to hold that Defendants have failed to establish even a minimal likelihood of success on the merits on the First Amendment issue.[4]

As a final note on this factor, Defendants contend that the Court's decision created a split of authority among Pennsylvania state and federal courts that have addressed COVID-19

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[4] The Motion to Stay largely focuses on the impact of the Court's determination on congregate gathering. As to the Court's determination that the components of Defendants' orders closing "non-life-sustaining" businesses and ordering Pennsylvanians to stay-at-home were unconstitutional, the Court agrees that its decision addressed novel issues pertaining to unprecedented restrictions imposed by Defendants upon the people of the Commonwealth. Although the Court attempted to view those restrictions through the lens of existing cases, it agrees that the comparisons may not be entirely congruent. Thus, under the minimal requirement for "likelihood of success on the merits," which does not even require Defendants to show that they are "more likely than not" to prevail, the Court finds that Defendants have established the first prong for the issuance of a stay pending appeal on the Fourteenth Amendment issue alone. However, as explained below, the record does not support a showing of irreparable harm if a stay is not granted on these issues.

restrictions and that that split of authority weighs in favor of finding a likelihood of success on the merits. Defendants' position compares cases that, while facially similar, are not procedurally comparable. In *Benner v. Wolf*, ---F. Supp. 3d---, 2020 WL 2564920, (M.D. Pa. May 21, 2020), the district court addressed several of the same issues in his case. But, procedurally, the decision in *Benner* was a denial of a temporary restraining order. There, the threshold question was whether the plaintiffs had a reasonable likelihood of success on the merits. This case is a judgment on the merits after the development of a full evidentiary record. The Court was not predicting an ultimate outcome but, informed by a full record, made the ultimate determination.

In *Paradise Concepts, Inc. v. Wolf*, 2020 WL 5121345 (E.D. Pa. Aug. 31, 2020), the court had much narrower claims before it—challenging the denial of waivers under the defendants' defunct waiver program. *Id.* at *1–3. The district court granted-in-part and denied-in-part the defendants' motion to dismiss. *Id.* at *5. While, in the context of the claims and arguments made in that case, the court dismissed the plaintiffs' claim asserting substantive due process, it allowed their equal protection claim to proceed. *Id.* at *3–5. No final judgment on the merits, with a record, had been rendered in that case. *Id.*

Finally, while 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, the Court reviewed the issue under its King's Bench powers, rather than through its appellate jurisdiction. *Id.* at 876. As such, it had no evidentiary record before it when it made its decision. This was in marked contrast to the fully developed record here. In any event, while the Pennsylvania Supreme Court is final on questions of Pennsylvania law, it does not bind this Court on federal questions.

B. Defendants Will Not Be Irreparably Injured by the Denial of a Stay.

The Court is not convinced that the evidence of record supports Defendants' contention that irreparable harm will result if a stay is not imposed. To demonstrate irreparable injury, Defendants must demonstrate "'harm that cannot be prevented or fully rectified' by a successful appeal." *Revel*, 802 F.3d at 568 (quoting *Roland Mach.*, 749 F.2d at 386). Further, the possibility that "corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Id.* (quoting *Sampsom v. Murray*, 415 U.S. 61, 90 (1974)) (internal quotation marks omitted). The injury must be "neither remote nor speculative, but actual and imminent." *Id.* at 571 (quoting *Schlesinger*, 888 F.2d at 975) (internal quotation marks omitted). Defendants must demonstrate that such injury is likely, that is, "more apt to occur than not." *Id.*

The harms Defendants assert are highly speculative in light of the record—a record that they had every opportunity to develop. Defendants contend that they "are in the midst of managing and mitigating a global health crisis," and the Court's decision makes it "difficult" for them "to develop ongoing mitigation efforts" while at the same time creating "uncertainty, confusion, and danger for Pennsylvanians." (ECF No. 85, pp. 8–9). According to Defendants, the Court's decision has stripped them of their "ability to adjust to an uncertain future." (ECF No. 85, p. 9). They go so far as to posit that "eliminating the congregate limits during the pendency of the appeal will result in people's deaths." (ECF No. 85, p. 9). It is their contention that "super spreader events-events where large numbers of people gather-are driving the spread of this disease," and they point the Court to information not entered into evidence during or after the declaratory judgment proceedings. (ECF No. 85, pp. 9–11). The Court notes that the irreparable harm asserted

by Defendants is twofold, encompassing the harm to them in managing a global health crisis and the harm to the public that they assert will occur absent a stay.

First, as to the primary thrust of Defendants' request for a stay—that the determination that the specific numeric congregate gathering limits violate the First Amendment will cause irreparable harm—their position is simply not supported by the record, a record that they had every opportunity to develop. As mentioned above, it is critical to recognize that the Court's decision does not divest Defendants of any-and-all authority to impose restrictions on gatherings. Rather, the percentage restrictions imposed on certain businesses and activities remain in place (and, indeed, were not directly challenged by Plaintiffs in their submissions). Under the May 29, 2020 Order moving counties into the "green phase," occupancy restrictions on businesses were set between 50% and 75% of "the maximum capacity stated on the applicable certificate of occupancy at any given time." (ECF No. 42-58, pp. 2-3). Further, the Order provided that "[b]usinesses must still enforce social distancing requirements, which may limit occupancy below [the percentage] maximum capacity." (ECF No. 42-58, pp. 2-3). The Court takes judicial notice of the fact that effective September 21, 2020, Defendants have issued orders increasing the indoor dining occupancy limitation to 50% of the establishment's occupancy requirement. Thus, the record shows that under Defendants' own orders, and with their blessing, the people of the Commonwealth may gather in workplaces, offices, stores, restaurants and other businesses limited only to a percentage of occupancy. They do not assert, and the record does not show, that those gatherings are categorically different than others covered by a numeric limitation.

Indeed, despite having an opportunity to adduce testimony and exhibits in support of their position, Defendants did not adduce any evidence that would explain and justify treating social, cultural, political and other similar gatherings differently from the commercial gatherings covered

by a percentage of occupancy-based limitation. Mr. Robinson testified that there was concern about large gatherings, like conventions, causing "mega spreading events." (ECF No. 75, pp. 55–56). But neither Mr. Robinson nor any other witness proffered by Defendants explained the specific need to limit size of some gatherings by a numeric cap, rather than a limitation on occupancy. For example, nobody explained why hundreds may gather indoors to shop (the larger the facility, the more people permitted), dozens may dine in a restaurant (again, the larger the restaurant, the more will be permitted), but no more than twenty-five may attend an indoor lecture, a speech or a wedding.[5] Defendants failed to adduce evidence that would explain why they made distinctions between gatherings limited by number and those limited by occupancy. Their suggestion of irreparable harm because of the inability to impose set-number restrictions is not supported by the evidentiary record. They did not demonstrate why their limits on some activities by occupancy is reasonably safe but will pose irreparable and imminent danger for other activities.

From a different perspective, not only does the record not support the suggestion of immediate and irreparable harm if Defendants may not impose numeric limitations on certain gatherings, but their actions actually show the opposite—that they do not believe that gatherings exceeding their numeric caps will necessarily cause such harm. For example, to avoid litigation in the Pennsylvania Commonwealth Court, Defendants entered a Confidential Settlement Agreement permitting a large event to take place in Carlisle, Cumberland County—Spring

[5] When pressed for details, Mr. Robinson was unable to offer any actual examples of mega spreading events that occurred at any of the activities limited by numeric caps. He was asked, for example about weddings: "[d]o you know of the existence of a single wedding reception or wedding celebration, a single one in Pennsylvania, that can be identified as a source of the spread of either COVID or the virus, of the SARS virus?" (ECF No. 75, p. 55). He responded "I am not aware. But again, that would be a question that might be better answered by my colleagues in the Department of Health." (ECF No. 75, p. 55). Ms. Boateng, who testified for the Department of Health, did not offer any more details.

Carlisle, a large gathering featuring an automotive flea market and auction. (ECF No. 64-1).[6] Defendants agreed to allow the event to proceed with an indoor occupancy of "the lesser of 250 individuals or 50% of the maximum building occupancy." (ECF No. 64-1, Section 2a). This limit is ten-times higher than the 25-person cap on gatherings imposed by Defendants' July 15, 2020 Order. Defendants imposed an outdoor limitation on the event of "no more than ***20,000 individuals***, which is 50% of its capacity." (ECF No. 64-1, Section 2b) (emphasis added). This is nearly 100 times the permissible outdoor gathering limit of 250. The Confidential Agreement also required the event's sponsor to "enforce all applicable social distancing, masking, area cleaning and hygiene requirements." (ECF No. 64-1, Section 2c).

The protests that swept across the Commonwealth throughout the summer are another example of where the record dispels Defendants' suggestion of immediate and irreparable harm if they cannot impose specific numeric limitations. While the plain language of Defendants' orders makes no allowance for protests, Defendants' own actions and the statements of their witnesses show that they do not view that type of gathering as posing a risk of immediate and irreparable harm. Governor Wolf, for example, personally participated in a large protest. The photo of that protest does not indicate that social distancing requirements were honored or enforced. (ECF No. 42-100). Ms. Boateng averred that there have been gatherings that exceeded the numeric caps in Defendants' orders and that "no official action was taken in regard to public entities holding board meetings, town hall meetings, public protests or public rallies that exceeded these numbers." (ECF No. 37, ¶13). "Rather, individuals attending such events were encouraged to wear a face covering and practice social distancing." (ECF No. 37, ¶14).

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[6] The Confidential Settlement Agreement was made public through a FOIA request and was made part of the record via Plaintiffs' Second Motion Pursuant to Federal Rule of Evidence 201 "Judicial Notice of Adjudicative Facts." (ECF Nos. 60 & 61).

Defendants' treatment of Spring Carlisle and the large public protests across the Commonwealth undermine their current argument that imminent and irreparable harm will occur absent their ability to impose numeric occupancy caps. On the contrary, for the Spring Carlisle event, Defendants were content to impose the same percentage of occupancy limitation that they have imposed to business gatherings (including an allowance of up to 20,000 people to gather), along with required social distancing and masks. Likewise, Ms. Boateng acknowledged that Defendants chose not to enforce their orders vis-à-vis certain meetings and protests, only encouraging the participants to wear masks and practice social distancing. The fully developed record offers no explanation or support for Defendants' argument that people can gather in restaurants and businesses across the Commonwealth based on occupancy limitations, that Spring Carlisle can proceed based on occupancy limitations (recognizing it would draw numbers far exceeding the numeric caps) and that protests can occur with no limit (but encouraging masks and social distancing), but that the inability to cap *some* gatherings in *some* locations for *some* purposes will cause the super-spread of COVID-19 and lead to immediate and irreparable harm.

Although addressed above in relation to success on the merits, the Court will reiterate that the articles Defendants cite in support of their Motion to Stay cannot support their claim that irreparable harm will occur absent a stay. Although some of the articles predate the hearing, Defendants neither discussed them nor attempted to offer them as exhibits. Defendants never even attempted to supplement the record. Again, Defendants had an opportunity to proffer any witness that they desired and any evidence permitted by law to demonstrate why the numeric cap limitations were necessary for some, but not other gatherings. They did not do so. They cannot now rely on articles that were not part of the record to support their claim.

The focus of Defendants' argument vis-à-vis irreparable harm is upon the congregate gathering restrictions. However, to the extent that their argument can be read to claim that irreparable harm will result if a stay is not granted on the Court's determination that the business closure and stay-at-home provisions of Defendants' orders violated the Fourteenth Amendment, the Court will also reject that contention. Defendants' own Motion dispels any claim of irreparable harm absent a stay. They assert that "the Court overlooked testimony ***that the Administration does not plan to reinstate the business closure or stay at home orders***." (ECF No. 84, ¶13). The Court did not, in fact, overlook this testimony, but rather recognized that those provisions of Defendants' orders remain in place, yet suspended, and testimony confirmed that they could be reinstated at will by Defendants. But whether those components of Defendants orders remained before the Court and whether failure to stay the Court's the determination that they were unconstitutional will cause irreparable harm are two separate inquiries. Defendants cannot reasonably claim that absent a stay there will be irreparable harm when they, themselves, have suspended the operation of the stay-at-home and business closure provisions and they, themselves, state that they have no intention of reinstating them, at least at this time. As such, Defendants have not established that irreparable harm will result unless the Court stays its Order relative to the business closure and stay-at-home provisions of their orders.

C. Because Defendants Have Not Met Their Burden on the First Two Factors, It Is Unnecessary to Weigh the Third and Fourth Factors.

In *Revel*, the Third Circuit observed that "if the movant does not make the requisite showing on either of these [first] two factors, the [] inquiry into the balance of harms [and the public interest] is unnecessary, and the stay should be denied without further analysis." *Revel*, 802 F.3d at 571 (quoting *In re Forty-Eight Insulations*, 115 F.3d at 1300-01). As explained above, Defendants have not met the requisite showing as to the first two factors. There is no need,

therefore, for the Court to examine the final four factors—whether imposing a stay would harm Plaintiffs and an examination of general public interest. However, even if the Court was required to give equal consideration of those factors, it holds that they, too, would weigh against a stay.

The record demonstrates that the congregate gathering limits caused harm to the Plaintiffs who are candidates for political office, limiting their ability to fundraise and campaign. Moreover, the restrictions imposed an unconstitutional limit on the freedom of assembly of all Pennsylvanians. Imposing a stay would only perpetuate those unconstitutional limits during the pendency of the appeal. Likewise, as to the stay-at-home and business shutdown components of Defendants' orders, a stay would only continue the uncertainty that Defendants could, again, impose those novel and draconian restrictions on the people of the Commonwealth.

Finally, the public interest weighs against a stay. Defendants' brief argument as to the public interest factor largely mirrors their argument as to irreparable harm. As explained above, however, the record does not support their contention on that factor. Nor does the record support a contention that the public interest will be harmed if a stay is not imposed. Rather, the public interest will be harmed if a stay is imposed. The public has an interest in constitutional governance and, more specifically, not being subject to unconstitutional governmental action. *See Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) ("[P]ublic interest weighs strongly against a stay of the injunction. The district court issued the injunction to protect Doe's constitutional and civil rights, a purpose that is always in the public interest."); *Victory v. Berks Cty*, 2019 WL 2368579, at *7 (E.D. Pa. Jun. 3, 2019) (denying stay where district court found facts and circumstances favored petitioner's "constitutional right to be free from gender discrimination"); *Halderman v. Pennhurst State Sch. and Hospital*, 451 F. Supp. 233, 237 (E.D. Pa. 1978) ("The public interest will never benefit from a failure to provide minimally adequate

habilitation to its [intellectually disabled] citizens. This Court's Order represents nothing more than a judicial recognition that the [intellectually disabled] have constitutional and statutory rights which must not be denied."); *N.C. Democratic Party v. Berger*, 2018 WL 7982918, at *6 (M.D. N.C. Feb. 7, 2018) ("There is a weighty public interest against enforcing laws a court finds are likely to be unconstitutional, especially in the election context where voters have a strong interest in participation in elections."); *Miller v. Davis*, 2015 WL 9460311, at *2 (E.D. Ky. Sep. 23, 2015) ("If the Court granted Davis' Motion to Stay at this juncture, it would essentially allow her to reinstate her 'no marriage licenses' policy during the pendency of the appeal and likely violate the constitutional rights of eligible couples."); *Am. Civil Liberties Union Fund of Mich .v. Livingston Cty.*, 2014 WL 12662064, at *2 (E.D. Mich. May 27, 2014) ("The court is also satisfied that in balancing the potential harms that may result in denial of this motion to stay, any claim of harm by [d]efendants is made less compelling by the fact that defendants' actions likely infringe the constitutional rights of the inmates within their control."). After carefully considering the parties' arguments in light of the extensive record, the Court declared that elements of Defendants' orders violated the rights guaranteed by the First and Fourteenth Amendments. The Constitution is the law of the land and protects the rights of all citizens. The public interest would be ill served if the Court would grant a stay allowing the unconstitutional measures to remain in place.

III. CONCLUSION AND ORDER OF COURT

AND NOW, this 22nd day of September 2020, the Court hereby **DENIES** Defendants' Motion to Stay (ECF No. 84).

BY THE COURT:

WILLIAM S. STICKMAN IV
UNITED STATES DISTRICT JUDGE

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

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

NOTICE OF APPEAL

Notice is hereby given that Pennsylvania Governor Thomas W. Wolf and Pennsylvania Secretary of Health Rachel Levine, defendants in the above-named case, hereby appeal to the United States Court of Appeals from the declaratory judgment opinion and order entered against them herein on September 14, 2020, and from the Final Declaratory Judgment entered against them herein on Counts II, IV, and V pursuant to Fed.R.Civ.P. 54(b) on September 22, 2020.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

By: */s/ Karen M. Romano*

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DATE: September 22, 2020

CERTIFICATE OF SERVICE

I, Karen M. Romano, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing Notice of Appeal, via ECF, on the following:

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I, J. Bart DeLone, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing Appendix Volume, via electronic service, on the following:

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DATE: November 18, 2020