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**GOVERNOR WOLF'S EMERGENCY COVID-19 DECLARATIONS:  
ILLEGAL AND UNCONSTITUTIONAL?****I. INTRODUCTION**

Responding to concerns about the spread of the COVID-19 virus, Pennsylvania's Governor, Tom Wolf, proclaimed the existence of a “disaster emergency” on March 6, 2020.<sup>1</sup> Initially limited to certain affected counties, the proclamation was eventually expanded to cover the entire state. From March 14 through May 8, 2020, as the virus continued to spread, the Governor closed schools, courts, public accommodations, and private businesses in an effort to “flatten the curve” of the disease through required “social distancing.” He also included state-mandated “stay-at-home” orders that applied throughout the Commonwealth,<sup>2</sup> and restricted public gatherings to no more than 25 people for indoor events and no more than 250 people for outdoor gatherings.<sup>3</sup> In press releases, the Governor made it clear that failure to comply with his orders would result in enforcement actions, such as citations, fines, revocation of the offender's business license, and even arrest.<sup>4</sup> During the declared emergency, \*202 the Governor acted unilaterally, with no participation by the General Assembly.

As part of his effort to curb the spread of the virus, Governor Wolf proscribed the operation of what was called “non-essential” private business, first, on March 14, 2020, in Bucks, Chester, Delaware, and Montgomery Counties. Later, by order, this restriction was expanded to all counties,<sup>5</sup> and then re-described as allowing only the operation of “life-sustaining” businesses in a detailed published list of general business categories--the content of which changed at least ten times throughout the spring and summer. Nowhere was the term “life-sustaining” ever defined.

Although the Governor created a time-limited process by which businesses could apply for a waiver of the prohibitions, this limited, exclusively on-line application process afforded no opportunity for a hearing, no ability to present witnesses, and seemed to exclude any ability to appeal an adverse decision to a reviewing court. Further, the decisions of the Department of Community and Economic Development, which was tasked with rendering the wavier decisions, never published its decisions in order to provide guidance to other affected businesses. Moreover, according to media reports, the decisions rendered by this office appeared to be inconsistent. For example, some construction projects were deemed necessary, while others were not, and some car dealerships were allowed to operate, while most were not.<sup>6</sup> In \*203 other instances, even close competitors in the same business and geographic location were treated differently. For instance, a swimming pool supply and service company was granted a waiver, while a close competitor was denied a waiver; in another instance, a home inspection company was granted a waiver, while a nearly identical company nearby was denied a similar waiver.<sup>7</sup> In total, over 31,000-34,000 wavier applications were submitted, with approximately 5,600 being granted.<sup>8</sup> On April 3, 2020, this waiver process expired with the Commonwealth refusing to accept any further applications.<sup>9</sup>

In late April, after protests by aggrieved citizens became more vocal, the Governor announced a limited easing of the restrictions which would be evaluated region-by-region. However, when the General Assembly presented bills to the Governor to ease the restriction on business operations, those bills were vetoed.<sup>10</sup> Later, when the General Assembly, by concurrent resolution, voted to terminate the emergency declaration, this too was opposed by the Governor, which prompted further litigation and a

July 14, 2020 veto.<sup>11</sup> The Governor has, in the meantime, three times **\*204** unilaterally extended the emergency declaration an additional 90 days.<sup>12</sup> By that time, the economic damage had already been done, causing 1,793,217 citizens to lose their employment<sup>13</sup> and untold numbers of businesses to fail.

Proponents, citing the spread of COVID-19 in China and Europe and the appalling fatality rate reported in New York City, argued these measures were prudent to slow the transmission of the disease and its lethality, particularly among the most vulnerable (the sick, elderly, and immune-compromised), and to ensure that hospitals were not overwhelmed with so many patients in critical care that they would be unable to provide service to all. Proponents argued that because the spread of the virus was rising exponentially, drastic measures were required to stop it. Indeed, by April 29, 2020, over 60,000 people had died from COVID-19 nationwide, greater than the death toll for the Vietnam War.<sup>14</sup> By December 5, 2020, this number had risen to 253,242.<sup>15</sup>

Critics argued that Pennsylvania's government-mandated shutdown, the restrictions against private business, and the restrictions **\*205** on travel and association were Draconian and unnecessary impositions, in view of the fact that the disease consistently displayed a maximum ten percent hospitalization rate for ages 0-64<sup>16</sup> and a likely .5% death rate overall,<sup>17</sup> comparable to other infectious diseases in the past that did not merit such drastic government action. Meanwhile, it appeared that the highest rate of fatality was largely limited to nursing home residents, the elderly, and those with health-compromised conditions.<sup>18</sup>

In March and April of 2020, several legal challenges were brought before Pennsylvania state and federal courts regarding the legality and constitutionality of the Governor's orders. The purpose of this article is not to debate the public policy merits of the orders or their effectiveness, but to focus on whether this unilateral action by the state's highest executive officer was authorized by statute and grounded in constitutional principles, and further, to examine the courts' response to the legal challenges brought before the judiciary.

On April 13, 2020, the Pennsylvania Supreme Court, in *Friends of Danny DeVito, et. al. v. Tom Wolf, et. al.*, issued a detailed decision in which it ruled 4-3 that the Governor's actions were authorized by statute and did not offend constitutional **\*206** protections.<sup>19</sup> This article argues that the court's decision was wrong on both counts. When faced with the various petitions for relief from aggrieved citizens, the judiciary failed to exercise its prerogative as a co-equal branch of government to protect both individual civil liberties and the divided structure of governance, essentially abandoning the oft-held bedrock principle that the requirements of the Constitution are not “fair-weather” friends to be abandoned in times of perceived crisis.<sup>20</sup>

## II. STATUTORY BASIS

From the day of his first proclamation, Governor Wolf referred to his authority under the Emergency Management Services Code, which grants broad powers to exercise during a “disaster.” The relevant provision states:

(a) *Responsibility to meet disasters.* - The Governor is responsible for meeting the dangers to this Commonwealth and people presented by disasters.

(b) *Executive orders, proclamations and regulations.* - Under this part, the Governor may issue, amend and rescind executive orders, proclamations and regulations which shall have the force and effect of law.

(c) *Declaration of disaster emergency.* - A disaster emergency shall be declared by executive order or proclamation of the Governor upon finding that a disaster has occurred or that the occurrence or threat of a disaster is imminent.<sup>21</sup>

**\*207** The Governor's powers are limited to a 90-day period unless renewed by the Governor, and the General Assembly may, by concurrent resolution, terminate the state of disaster emergency at any time.<sup>22</sup> The Governor may use governmental resources

to respond to the disaster by implementing local disaster plans and using any forces to distribute supplies, equipment, materials, and facilities for that purpose.<sup>23</sup> Moreover, in such a situation, the Governor has the power to act as commander-in-chief of the Pennsylvania military forces.<sup>24</sup> Further, additional powers granted to the Governor in such a situation include the following:

(f) *Additional powers.*--In addition to any other powers conferred upon the Governor by law, the Governor may:

(1) Suspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency.

(2) Utilize all available resources of the Commonwealth Government and each political subdivision of this Commonwealth as reasonably necessary to cope with the disaster emergency.

(3) Transfer the direction, personnel or functions of Commonwealth agencies or units thereof for the purpose of performing or facilitating emergency services.

**\*208** (4) Subject to any applicable requirements for compensation under section 7313(10) (relating to powers and duties), commandeer or utilize any private, public or quasi- public property if necessary to cope with the disaster emergency.

(5) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within this Commonwealth if this action is necessary for the preservation of life or other disaster mitigation, response or recovery.

(6) Prescribe routes, modes of transportation and destinations in connection with evacuation.

(7) Control ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein.

(8) Suspend or limit the sale, dispensing or transportation of alcoholic beverages, firearms, explosives and combustibles.

(9) Confer the power of arrest on the law enforcement personnel serving as part of the emergency forces of a party state during operations in this Commonwealth pursuant to a declaration of a disaster emergency under subsection (c). Law enforcement personnel shall be under the operational control of the Commissioner of Pennsylvania State Police and shall comply with the terms and conditions of the Emergency Management Assistance Compact under Chapter 76 (relating to Emergency Management Assistance Compact). Arrest powers granted under this paragraph shall expire when the declaration of a disaster emergency is terminated by executive **\*209** order, proclamation or operation of law, if the arrest powers have not previously been terminated.<sup>25</sup>

While seemingly expansive, the Governor's "disaster emergency" powers are triggered only by the existence of a "disaster emergency." This term is defined in turn as "[a] manmade disaster, natural disaster or war-caused disaster."<sup>26</sup> Each kind of disaster is further defined by statute.<sup>27</sup> Concerning the spread of an epidemic disease, the only relevant definition is that of "natural disaster," as a communicable disease does not obviously or clearly fall under the rubric of man-made or war-caused disasters.<sup>28</sup> In this regard, the statute defines a "natural disaster" as:

Any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life.<sup>29</sup>

Notably missing is any mention of communicable disease. For his statutory authority, the Governor therefore relied on the "catch-all" portion of the definition: "or other catastrophe which results in substantial ... hardship, suffering or possible loss of life." The scope of this provision became the focus of challenges to the Governor's statutory authority and the Supreme Court's \*210 eventual upholding of that authority. Moreover, the implementation of this statute became the focus of challenges to the constitutionality of the Governor's actions.

### III. LEGAL CHALLENGES

Shortly after its issuance, the Governor's proclamations came under legal attack from a number of petitioners, many of whom directly invoked the King's Bench jurisdiction of the Pennsylvania Supreme Court for redress.<sup>30</sup> Petitioners challenged the proclamations on both statutory and constitutional grounds.

#### *A. The Civil Rights Firm Challenge*

The first challenge was raised in a King's Bench petition, captioned *Civil Rights Defense Firm, P.C., et. al. v. Wolf*, 63 MM 2020 (Pa. 2020) (filed March 20, 2020), which was filed on behalf of the Civil Rights Defense Firm, P.C., the Firearms Policy Coalition, Inc., the Prince Law Offices, P.C., Trop Gun Shop, Ltd., and Roger Mullins. The parties complained that the petitioning law firms were forbidden to conduct necessary in-person operations, that these activities were an unavoidable necessity in conducting the business of a law firm, and that they feared being prosecuted for violating the Governor's order.<sup>31</sup> The gun shop petitioner and the firearms coalition complained that their operations were unable to determine whether they were "life-sustaining" businesses and that they also faced the possibility of \*211 prosecution for in-person sale of firearms.<sup>32</sup> Mullins described himself as a member of the firearms coalition and was, as a result of the Governor's order, unable to purchase firearms to which he would otherwise be legally entitled.<sup>33</sup> The firearms coalition petitioner described itself as a non-profit advocacy group dedicated to the protection of the right to bear arms.<sup>34</sup>

Petitioners argued that the Governor's action had no statutory basis, insofar as the definition of a "natural disaster," which allegedly triggered the Governor's emergency powers, was entirely too vague.<sup>35</sup> Petitioners also argued that even if a statutory basis existed, the Governor's powers would be limited to regulating the sale, dispensing, and transportation of alcohol, firearms, and explosives in commerce.<sup>36</sup> Moreover, Petitioners argued that the Governor's action was a violation of the due process property protections of the Fifth and Fourteenth Amendment to the Federal Constitution, that it indirectly violated state and federal constitutional rights to bear arms, and that it unconstitutionally intruded upon the Pennsylvania Supreme Court's exclusive right to regulate the legal profession.

Concerning the due process violation, the Petitioners argued that the right to conduct a business is a fundamental property right, which was unduly restricted, because the prohibition against conducting any business that was not "life-sustaining" was excessively vague in view of the fact that the operative phrase was never defined and its application arbitrary and capricious.<sup>37</sup> In this regard, the Petitioners highlighted anomalies with the list of prohibited activities, such as forcing the closure of "specialty

food stores” while allowing “grocery stores” to remain open, or mandating the closure of “sporting goods stores” while allowing “general merchandise stores” to remain open.<sup>38</sup> The arbitrary and inconsistent nature of the prohibited activities underlined the \*212 Petitioners' contention that the means were not narrowly tailored to the goals.<sup>39</sup> While perhaps not the most doctrinally sophisticated argument, the Petitioners presented the fundamental point that the Governor's order violated principles of due process because it was both excessively vague and inconsistent, thereby making it difficult for citizens to predict the application of the law and avoid prosecution.

Secondarily, the Petitioners argued that the Governor's order constituted an indirect but, nevertheless, unconstitutional restriction on the right to bear arms. While the Governor's order did not specifically forbid the selling of firearms, existing state law did require that the consummation of any firearms sale must be in person and “only upon the place of business” of a one licensed to sell firearms.<sup>40</sup> The net effect of the interaction between this existing law requiring in-person sales of firearms and the Governor's order generally prohibiting in-person transactions where such transactions were not “life-sustaining” was to effectively prohibit the sale of firearms.<sup>41</sup> After the Petition had been filed, and perhaps in response to lobbying by gun-rights groups, the Governor's office modified its prohibition on firearms transactions to state:

Except that firearms dealers may operate physical businesses on a limited basis to complete only the portions of a sale/transfer that must be conducted in-person under the law, subject to the following restrictions: 1) all such sale/transfers will be conducted by individual appointment during limited hours only so as to minimize social interactions and congregating of persons; 2) the dealer will comply with social distancing, sanitization of applicable area between appointments, and other \*213 mitigation measures to protect its employees and the public.<sup>42</sup>

Lastly, the Petitioners argued that the Governor's order unconstitutionally intruded upon the Pennsylvania Supreme Court's exclusive power to govern the practice of law.<sup>43</sup> In this regard [article V, section 10\(c\) of the Pennsylvania Constitution](#) states in relevant part:


(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch ....<sup>44</sup>

The Pennsylvania Supreme Court has frequently and consistently interpreted this to mean it has *exclusive* jurisdiction over the practice of law.<sup>45</sup> At the time the Petition was filed, the prohibited list of activities included “legal services,” and indeed intruded upon the Pennsylvania Supreme Court's exclusive jurisdiction. However, after the Governor had issued his own initial directives, the Pennsylvania Supreme Court, on March 18, \*214 2020 *sua sponte*, issued its own *per curiam* set of directives.<sup>46</sup> This declared a “judicial emergency,” closed the courts except in limited exigent circumstances, and delegated each president judge in each judicial district to issue further clarifying orders.<sup>47</sup> This order said nothing about the practice of law. Subsequently, on April 1st, 2020, the Pennsylvania Supreme Court issued a further order concerning the practice of law, stating, *inter alia*:

Guidance has been provided by the executive branch explaining that members of the legal profession “may continue physical operations ... as required to allow attorneys to participate in court functions deemed essential by a president judge per the Pennsylvania Supreme Court's order of March 18, 2020, or similar federal court directive, and lawyers may access their offices to effectuate such functions and directives.” Paragraph 13 of the Governor's Frequently Asked Questions additionally advises that businesses that are otherwise required to suspend in-person operations may “retain essential personnel to process payroll and insurance claims, maintain security, and engage in similar limited measures on an occasional basis,” subject to the caveat that “telework (i.e. working from home) should be employed wherever possible, and social distancing must be observed.”<sup>48</sup>

As implied above, the Pennsylvania Supreme Court, at the time, seemed to ratify the Governor's relaxation of restrictions on the practice of law into its own order, much of this happening well after the Petition was filed. Reflecting this apparent change in policy, the Governor relaxed his own published proscription against providing legal services in its list of prohibited commerce as follows:

**\*215** Except as required to allow attorneys to participate in court functions deemed essential by a president judge per the Pennsylvania Supreme Court's order of March 18, 2020, or similar federal court directive, and lawyers may access their offices to effectuate such functions and directives.<sup>49</sup>

The Civil Rights Defense Firm's Petition was swiftly opposed by both the Governor's office and the City of Philadelphia. The Governor's Office argued that the public was facing a medical emergency requiring swift and comprehensive action, which was authorized by the Emergency Management Services Code, 25 Pa. C.S. §7101 *et. seq.*<sup>50</sup> It highlighted the catch-all language in the definition of “natural disaster,” and it argued, further, that the COVID-19 epidemic could also be construed as a “man-made disaster” because it was “driven by person-to-person contact.”<sup>51</sup> It took issue with the use of statutory canons requiring general language to be limited by specific language and argued that “extreme deference” should be given to the Governor when interpreting statutes under his execution in times of crisis.<sup>52</sup> The Governor further argued that this was a nonjusticiable “political question” requiring deference to the Executive.<sup>53</sup> Concerning the constitutional challenges, the Governor argued that the order and its subsequent list of prohibited and allowed activities were not vague because they referenced U.S. Bureau of Labor Statistics commercial categories, and because the public could seek clarification through the Department of Community and Economic Development.<sup>54</sup> Concerning the right to bear arms, the Governor argued that this was a temporary time, place, and manner **\*216** restriction consistent with the rights of states to create gun-control regulations under  *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).<sup>55</sup> Lastly, the Governor argued that it was not regulating the practice of law because modern law practices could continue without in-person contact.<sup>56</sup>

Within days of the filings having been submitted, the Pennsylvania Supreme Court issued a per curiam opinion on March 22, 2020, without detailed legal analysis, denying the petition as largely moot. This was likely because any imposition on the practice of law had been mitigated in light of the court's own order declaring a judicial emergency and the Governor's subsequent relaxation of his prohibition to allow lawyers to access their offices to effectuate those functions specifically allowed by the Pennsylvania Supreme Court and its subsidiary courts.<sup>57</sup> The Pennsylvania Supreme Court did not address the Petitioners' remaining argument concerning the right to bear arms, although presumably that issue was rendered moot as well in light of the Governor having subsequently allowed in-person purchases of firearms with “social distancing.” Nor did the court address the Petitioner's arguments concerning due process or the lack of statutory basis for the Governor's orders.

**\*217** Justice Wecht issued a concurring and dissenting opinion in which Justices Donohue and Dougherty joined.<sup>58</sup> He first expressed his concern regarding the uncertainty of the Governor's order as applied to attorneys “whose legal expertise is necessary for the citizenry to obtain redress of harms,” and whose practice is exclusively regulated by the Supreme Court.<sup>59</sup> He agreed, however, that the issue was rendered moot by the Governor's subsequent clarification.<sup>60</sup> He dissented with regard to the restriction on the fundamental constitutional right to bear arms, arguing that the order prohibiting in-person transactions conflicted with the requirement that firearms purchases be consummated in an in-person transaction, effectively creating an “absolute and indefinite prohibition upon the acquisition of firearms by the citizens of this Commonwealth.”<sup>61</sup> He suggested that it would be “incumbent upon the Governor to make some manner of allowance for our citizens to continue this constitutional right” and suggested further that “the Governor may limit the patronage of firearm retailers to the completion of the portions of the transfer that must be conducted in-person,” consistent with “sensible restrictions designed to slow the spread of COVID-19.”<sup>62</sup> In fact, as described above, this is exactly what occurred--the Governor having modified his restrictions to allow the final transaction of firearms sales in-person under limited circumstances.<sup>63</sup>

### *B. Friends of Danny DeVito, et. al.*

Shortly after the Civil Rights Firm Petition was filed, a second petition was filed before the Pennsylvania Supreme Court by Marc Scaringi—an attorney, conservative radio talk-show host,<sup>64</sup> and \*218 former aide to Pennsylvania Senator Rick Santorum.<sup>65</sup> Marc Scaringi filed on behalf of a coalition of clients, which included an organization called “Friends of Danny DeVito” (a candidate committee supporting an individual, unrelated to the well-known actor, who was running for the Pennsylvania House of Representatives), a real-estate agent, a self-serve laundromat, a golf course with a restaurant, and a timber harvesting company.<sup>66</sup> The Petition challenged both the legality and the constitutionality of Governor Wolf’s orders.

Concerning the statutory challenge, the Petition argued, as above, that the plain language of the Emergency Management Services Code only granted power to the Governor to declare a disaster for man-made, war-caused, or natural disasters, and that the spread of COVID-19 did not qualify under any of these categories.<sup>67</sup> The petition argued further that neither 71 P.S. §532(a) nor 71 P.S. §1403(a) of the Health Code granted the power to the Secretary of Health to conduct wide-spread quarantines and the suppression of broad categories of business.<sup>68</sup> Instead, it authorized action only where it is determined that a “nuisance” or “disease” detrimental to the public health existed—a determination that was never made on an individualized basis.<sup>69</sup> In this regard, the petitioners stated that “neither the Governor nor the Secretary have presented any evidence that there has been a report of a disease at Petitioners’ physical operation”<sup>70</sup> or that “Petitioners have been exposed to a communicable disease.”<sup>71</sup>

The Petition argued further that its coalition members were directly harmed by the Governor’s prohibitions. Danny DeVito’s \*219 campaign alleged it could not meet with volunteers, conduct campaign activities, or access his office equipment and supplies, while his incumbent opponent was not similarly disfavored.<sup>72</sup> The real estate agent alleged she could not physically show homes.<sup>73</sup> The self-serve laundromat alleged it was initially unable to conduct business at all, and that although the Governor had later moved laundromats to the list of permitted activities, there was no guarantee that the Governor would not change his mind.<sup>74</sup> The golf course and restaurant complained that its operation was proscribed, and it questioned how, since take-out was permitted only from its restaurant, it could have access to its customers over a closed facility.<sup>75</sup> Lastly, and similarly, the timber-harvesting company also complained about being initially placed on the proscribed activities list, only to have that determination reversed without guarantee that this status could not be changed again.<sup>76</sup>

Citing to *Markham v. Wolf*, the Petitioners argued that the Governor’s order violated the constitutional separation of powers, insofar as the Governor was exercising legislative powers without statutory warrant.<sup>77</sup> Further, the Petitioners argued that the Governor’s action was so arbitrary, capricious, and impermissibly vague as to violate the constitutional protections of due process.<sup>78</sup> In this regard, they argued that the use of the term “life-sustaining” had no basis in any law, simply being constructed out of whole cloth from the imagination of the Governor.<sup>79</sup> They argued further that application of the concept was inconsistent and irrational, questioning, for example, why “beer, wine and liquor stores” were determined to be non-life-sustaining, while beer distributors were permitted to continue operation, and questioning why the operation \*220 of department stores was prohibited, while the operation of general merchandise stores was allowed.<sup>80</sup> Marked for particular scorn was the fact that the Governor’s list seemed to have been amended from day to day, sometimes even more than once during a single day.<sup>81</sup> Lastly, the Petitioners argued that the Governor’s order was vague in its application to particular businesses, where combined prohibited and allowed activities might occur.<sup>82</sup>

The court granted a briefing schedule, and briefs were submitted, with the Governor’s Office opposing the petition largely on the basis of arguments it raised previously in response to the Civil Rights Petition. A number of other parties submitted amici briefs as well, including the Pennsylvania Association of Realtors and various home builder associations in favor of Petitioners, with the cities of Philadelphia and Pittsburgh writing in opposition.

On April 13, 2020, a divided Pennsylvania Supreme Court issued its decision, 4-3, denying relief.<sup>83</sup> The *DeVito* Petitioners thereafter filed a petition for writ of certiorari with the United States Supreme Court on April 27, 2020.<sup>84</sup> The *DeVito* decision, which will be described in more detail herein, no doubt influenced the later denial of a related application for relief under the King’s Bench jurisdiction by Earl Markey, which raised slightly different arguments.

### C. Markey Petition

On April 7, 2020, Earl Markey, a pro se litigant, filed his own Emergency Ex Parte Application for Extraordinary Relief under the Pennsylvania Supreme Court's Kings Bench jurisdiction.<sup>85</sup> Unlike the other petitions, which focused on the Governor's edicts concerning commerce, Mr. Markey raised specific and directed \*221 arguments that the Governor's actions impacted his constitutional right of freedom of association and travel. Markey, who stated he had no COVID-19 symptoms, alleged that he would like to leave his home by motor vehicle to take a scenic drive with his family, and he further alleged that he would also like to engage in protests concerning the Governor's action in public outdoor spaces.<sup>86</sup> In this regard, the petition was a direct attack on the “stay-at-home” orders, which prohibited gatherings outside the home except in limited circumstances.

Mr. Markey first took issue with the purported statutory basis of the Governor's authority, repeating arguments already made by others that the COVID-19 pandemic did not fit within the definition of a “natural disaster,” sufficient to trigger the Governor's emergency powers.<sup>87</sup> Moreover, he argued that the restrictions on travel and association violated [article I, section 1 of the Pennsylvania Constitution](#), which describes the fundamental rights of the Commonwealth's citizens; article 1, section 20, which describes the right to assembly (together with the federal guarantees of the First Amendment); and the right to travel articulated in judicial precedent.<sup>88</sup>

On April 20, 2020, the court denied the petition for extraordinary relief in a per curiam opinion without explanation, but was no doubt influenced by its more detailed analysis in the *DeVito* case, discussed *infra*.<sup>89</sup>

### D. Schulmerich Bells, LLC, et. al.

While the various King's Bench petitions were pending before the Pennsylvania Supreme Court, a company named Schulmerich Bells, LLC (Schulmerich), brought a civil rights action in the United States District Court for the Eastern District of Pennsylvania under [42 U.S.C. 1983](#) against Governor Wolf for violation of the Fifth and Fourteenth Amendment protections of due process. It purported to file on its own behalf, on behalf of all \*222 other businesses similarly situated, and on behalf of its employees.<sup>90</sup> Schulmerich, which manufactures orchestral quality musical handbells and handchimes, challenged Governor Wolf's commerce prohibitions. It alleged that the business was not categorized as either “essential” or “life-sustaining,” and thus, was forced to cease operations at the busiest time of year.<sup>91</sup>

Uniquely, rather than a direct constitutional challenge, Schulmerich alleged that the state's action amounted to a seizure of property without compensation.<sup>92</sup> On this basis, it sought a monetary award from the Commonwealth, rather than just a simple declaration of invalidity.<sup>93</sup> It also sought a declaration of constitutional invalidity, but based on substantive due process, as distinguished from procedural due process—an argument not raised by the other petitioners.<sup>94</sup> On August 31, 2020, however, the Schulmerich plaintiffs voluntarily dismissed their own complaint, not coincidentally, the very same day that a different judge of the U.S. District Court for the Eastern District of Pennsylvania dismissed a substantive due process challenge to the Governor's emergency declarations in *Paradise Concepts Inc. v. Wolfe*.<sup>95</sup>

### E. Paradise Concepts, Inc. v. Wolf

That parallel case was brought by three local businesses—two of whom had unsuccessfully applied for waivers while close, local competitors of theirs had been granted permission to operate.<sup>96</sup> Plaintiff Kenwood Pools operated a retail swimming pool supply and service company and failed to obtain a waiver as “life-sustaining,” while two of its local competitors providing identical products and services were granted waivers.<sup>97</sup> Similarly, plaintiff \*223 WIN Home Inspection also unsuccessfully applied for a waiver, while a local competitor was successful in securing one.<sup>98</sup> Plaintiffs complained that the government's action violated their substantive due process and equal protection rights.

Reviewing a motion to dismiss, Judge R. Barclay Surrick held that the Governor's prohibitions did not violate standards of substantive due process, which would otherwise apply to “protect[] individual liberty against certain government actions



regardless of the fairness of the procedures used to implement them.”<sup>99</sup> Judge Surrick reasoned that the business closure orders imposed only temporary restraints on business and did not permanently deprive any individuals of the right to pursue a particular line of work.<sup>100</sup> Reviewing precedent concerning substantive due process, Judge Surrick concluded that “the case law strongly suggests that Substantive Due Process only extends to situations in which there is some degree of permanence to the loss of liberty or property.”<sup>101</sup> Therefore, no substantive due process rights were violated. Concerning equal protection, Judge Surrick concluded that the plaintiffs had presented a prima facie case for a violation, subject to adequate proof at a later stage of the proceedings. The reason was that “[r]elying strictly on the pleadings, we cannot ascertain any reason why Plaintiffs were treated differently from their nearby competitors.”<sup>102</sup> Thus, while the substantive due process claim was dismissed, the equal protection claim was deemed plausible.

### F. *County of Butler v. Wolf*

The most recent case to be decided after the *DeVito* decision was brought by a coalition of Pennsylvania counties, four members of the U.S. House of Representatives and Pennsylvania House of Representatives, and seven businesses in the U.S. District Court for \*224 the Western District of Pennsylvania.<sup>103</sup> In contrast to the *DeVito* and *Paradise Concepts* decisions, after expedited discovery and a two-day evidentiary hearing with 18 witnesses,<sup>104</sup> Judge Stickman held that Governor Wolf's congregate gathering limits, “stay-at-home” orders, and business closures violated the U.S. Constitution's First Amendment, substantive due process protections, and the Equal Protection Clause.<sup>105</sup>

As an initial matter, Judge Stickman refused to accept the Commonwealth's invitation to depart from traditional constitutional levels of strict, intermediate, and rational basis scrutiny, and instead apply an even more deferential degree of review given the nature of the public health emergency.<sup>106</sup> Judge Stickman reasoned that the three-tiered basis for review had become entrenched in constitutional jurisprudence, and that a public health emergency did not absolve the courts from their responsibility to review governmental actions.<sup>107</sup> Further, two factors supported applying the traditional three-tiered analysis rather than a more deferential one. First, Judge Stickman observed, based on the record developed, that the current restrictions, while billed as temporary, really were open-ended and indefinite in duration. He highlighted that the Governor could renew his state of emergency (and in fact did so), and that Commonwealth witnesses had admitted that greater strictures could be imposed at any time if necessary.<sup>108</sup> Second, he observed that “ordinary constitutional scrutiny is necessary to maintain the independent judiciary's role as a guarantor of constitutional liberty—even in an emergency.”<sup>109</sup> In this regard, the court stated:

\*225 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 undermine our system of constitutional liberties or the system of checks and balances protecting those liberties.<sup>110</sup>

The court then turned its attention to the general congregate gathering restrictions of no more than 25 for indoor activities and 250 for outdoor gatherings, and compared this to the business rules that restricted use in terms of occupancy limits of the business's buildings, depending on the nature of the business (bars and restaurants being limited to 25 percent of permitted occupancy and all others between 50-75 percent).<sup>111</sup> Applying intermediate scrutiny, because the decrees were content-neutral,<sup>112</sup> the court declared this restriction an invalid imposition on First Amendment rights. The court reasoned that the means used to serve the goal of managing the COVID-19 pandemic were not narrowly tailored for that purpose, mainly because while hundreds of people were allowed to congregate in large commercial spaces with high permitted occupancy limits, fewer people were allowed to congregate in non-commercial venues more traditionally associated with freedom of expression.<sup>113</sup> In this regard, the court highlighted with special emphasis that the Commonwealth had permitted the attendance of up to 20,000 people at a commercial car show in Carlisle (due to its large occupancy permit), well above the outdoor gathering limit.<sup>114</sup> And the court further observed, “Indeed hundreds of people may congregate in stores, large restaurants and other businesses based only on the occupancy \*226 limit of the building.”<sup>115</sup> Yet, those venues more traditionally associated with free expression--“political,

social, cultural, educational and other expressive gatherings”--were subject to more restrictive occupancy requirements.<sup>116</sup> Therefore, the court concluded:

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.<sup>117</sup>

In sum, the rules did not serve the purpose of limiting the spread of COVID-19 through excessively large gatherings of people, and, in fact, differentially impacted more protected expressive conduct as compared to commercial conduct.

The court also held that the stay-at-home orders and the business closure rules violated the plaintiffs' substantive due process rights. Regarding the stay-at-home orders, the court first observed that the matter was reviewable and not moot, precisely because the lock-down of the population could be renewed at any time,<sup>118</sup> and because such an action was entirely unprecedented at the state or national level.<sup>119</sup> Further, the orders implicated the right to intrastate travel, which is a “right to move freely about one's neighborhood or town” and is “‘implicit in the concept of ordered liberty’ and ‘deeply rooted in the Nation's history.’”<sup>120</sup> Moreover, the court observed, those restrictions are not isolated, but had a ripple effect on additional rights of association and privacy as well.<sup>121</sup> Applying intermediate scrutiny, the court \*227 reasoned that a broad lock-down of the population, wherein the default was confinement to one's home, was “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 governmental end.”<sup>122</sup> Yet here, the court reasoned, even in the very worst prior epidemics, the government had never employed such a drastic policy, preferring to employ other disease mitigation tools instead.<sup>123</sup>

Regarding the business cessation rules, wherein the Governor permitted only those business to operate that fell in the category of providing “live-sustaining” services or products, the court held these also violated constitutional principles of substantive due process.<sup>124</sup> As an initial matter, the court held that “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” due process protections.<sup>125</sup> Further, in the modern post-Lochner era, substantive due process claims concerning economic legislation are, the court observed, subject to a rational basis test.<sup>126</sup> Yet, even applying this most forgiving standard, the court found that the rules failed constitutional scrutiny.

First, the record demonstrated that the Governor's office had never defined what constituted “life-sustaining” or conversely “non-life-sustaining” businesses,<sup>127</sup> and indeed the list of permitted business categories changed ten times between March 19, 2020 and May 28, 2020.<sup>128</sup> Additionally, the Governor's office eliminated any ability of a business to obtain a waiver as of April 3, 2020.<sup>129</sup> Further, the process of placing certain businesses \*228 within one category rather than another were “shockingly arbitrary,” with no theoretical grounding or policy basis being articulated by the policy-makers.<sup>130</sup> Further, to underscore the arbitrary nature of the decision-making, the court observed 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,’”<sup>131</sup> undermining any claim for consistency. For example, a small appliance and furniture store was required to be closed while its larger big-box cousins, such as Lowes, Home Depot, and others, remained open; similarly, a hair salon was required to be closed and could not sell hair products, while larger drug stores were allowed to remain open to sell similar products.<sup>132</sup> In this regard, the court stated, “It is paradoxical that in effort to keep people apart, Defendants' business closure orders permitted to remain in business the largest retailers with the highest occupancy limits.”<sup>133</sup> Therefore, the rules violated substantive due process because they were arbitrary and undefined in application, contradictory in impact, and not rationally tailored to serve the goal of limiting exposure to the virus through public interaction.

Lastly, for similar reasons, the court held that the business closure rules also violated the Equal Protection Clause of the Fourteenth Amendment.<sup>134</sup> Once again pointing to the differential treatment of smaller businesses that sold the same or similar products and services as their larger counterparts, the court held that the rules failed to pass even rational basis scrutiny, primarily

because of the “arbitrary and *ad hoc*” process by which they were created and then applied, as described above.<sup>135</sup> It stated that the rules did not rationally relate to the state purpose of limiting the interaction of large groups of people to curtail the virus because its net effect was to encourage people to patronize the largest retailers, who remained open.<sup>136</sup>

\*229 In rendering its decision, the court barely acknowledged the *DeVito* decision, previously rendered by the Commonwealth's highest court, relegating discussion to a footnote on the basis that the *DeVito* decision lacked a fully developed evidentiary record and that state court decisions have no binding effect on federal questions.<sup>137</sup>

#### IV. FRIENDS OF DANNY DEVITO V. WOLF: THE GOVERNOR'S STATUTORY AUTHORITY

At the center of this ongoing controversy is the Pennsylvania Supreme Court's own ruling, which preceded the decisions of the two U.S. federal district courts. In a 4-3 decision, with Justice Donohue writing the opinion of the court, the Pennsylvania Supreme Court in *Friends of Danny DeVito v. Wolf*, ruled that the Governor's emergency COVID-19 edicts were both legal and constitutional.<sup>138</sup> Politically, Justices Baer, Todd, Donohue and Wecht (all Democrats) were in the majority. Chief Justice Saylor (a Republican) issued a concurring and dissenting opinion in which Justices Mundy (Republican) and Dougherty (Democrat) joined.<sup>139</sup>

In rendering its decision, the court addressed the statutory challenges to the Governor's authority to act at all. It first observed that the broad powers granted to the Governor in the Emergency Code remain “firmly grounded in the Commonwealth's police power ... to promote the public health, morals or safety and the general well-being of the community.”<sup>140</sup> These powers, it reasoned, are the “most essential” and “least limitable” because they maintain vitality and order in society.<sup>141</sup> The court then agreed with Petitioners that the Governor's emergency powers were triggered in this instance by a “natural disaster” as defined by statute, and more specifically, by the catchall language of “other catastrophe which results in substantial \*230 damage to property, hardship, suffering or possible loss of life.”<sup>142</sup> Although the Petitioners had argued that the canon of statutory interpretation, “*ejusdem generis*,” required that this concluding open-ended phrase be limited by the more specific words that preceded it,<sup>143</sup> the court rejected this in two respects.

First, the court reasoned that the specific preceding list of disasters in the definition of “natural disaster” lacked any commonality, because some disasters are weather-related (e.g. hurricanes, tornados and storms), while others are not (tidal waves, earthquakes, fire, explosions).<sup>144</sup> But it then observed, “To the contrary, the only commonality among the disparate types of specific disasters referenced is that they all involve ‘substantial damage to property, hardship, suffering or possible loss of life.’”<sup>145</sup> This meant that the preceding list was not specific enough in its import to trigger use of the statutory canon of *ejusdem generis* to influence interpretation of the concluding, more general phrase in the statute. In this respect, the court concluded that “the COVID-19 pandemic is of the ‘same general nature or class as those specifically enumerated,’ and thus is included, rather than excluded, as a type of ‘natural disaster.’”<sup>146</sup>

The court reasoned, further, and secondarily, that canons of statutory interpretation are to be used solely for determining the \*231 purpose of the General Assembly and are not to be used where that intention can be determined by the words actually used.<sup>147</sup> The court noted:

By setting forth a general list of catastrophes and then including the language ‘other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life,’ it is clear that the General Assembly intended to *expand* the list of disaster circumstances that would provide Respondents with the necessary powers to respond to exigencies involving vulnerability and loss of life.<sup>148</sup>

As further evidence of the General Assembly's intent, the court pointed to the stated goals of the Emergency Code, which were to “[r]educe vulnerability of people and communities in this Commonwealth to damage, injury and loss of life and property resulting from disasters,” and to “strengthen” the Governor's role ‘in prevention of, preparation for, response to and recovery from disasters.’”<sup>149</sup>

The Pennsylvania Supreme Court then examined Petitioners' alternative argument that even if the Governor's actions were grounded in statute, they did not appropriately reach the Petitioners' specific businesses. Petitioners argued, first, that the Governor's powers only extended to a "disaster area," but none of Petitioners' businesses were in fact located in any region where COVID-19 cases had been reported (Allegheny, Northampton and Warren Counties).<sup>150</sup> The court dispensed of this argument by observing that by the time the decision was rendered, the virus had in fact been reported in these locations.<sup>151</sup> More fundamentally, however, the court also observed that because of the manner in which the virus is communicated from person to person, "any location (including Petitioners' businesses) where two or more \*232 people can congregate is within the disaster area."<sup>152</sup> The court also noted that the Governor's statutory power to compel evacuation of all or part of a population from any area in instances of emergency disproves any challenge to the less drastic measure of prohibiting commerce.<sup>153</sup>

The court next turned to the allegation that the Governor's actions exceeded the permissible scope of his police powers. In this regard, Petitioners had argued that the public's interests were not served by the mass closure of businesses, that the closure of businesses was not necessary to prevent the spread of COVID-19, and that the closure of businesses was unduly burdensome.<sup>154</sup> In response, the court first reasoned that the public interests were indeed served by the Governor's actions because the disease spreads "exponentially," citing to public sources reporting on the increasing death toll.<sup>155</sup> The court ultimately concluded that the policy choice concerning how to mitigate the spread of the disease was ultimately up to the Governor and his Secretary of Health to make, as long as it was tailored to the nature of the emergency, which the court concluded it was.<sup>156</sup> Although not explicitly stated, it appears the court relied on a principle of deference to the coextensive branches of government concerning "political questions" that courts are typically wary of questioning.<sup>157</sup> In response to Petitioners' contention that the state-wide closure of certain businesses was unnecessary to prevent the spread of COVID-19 because the disease was not located everywhere equally, the court observed again that the virus does not spread because it is located in any one particular location; instead, it spreads through person-to-person contact with an incubation period that allows transmission without knowledge.<sup>158</sup> Finally, responding to Petitioners' argument that the remedy was excessively burdensome, the court reasoned that the burden must \*233 be "unduly oppressive" to be the subject of challenge, and that "faced with protecting the health and lives of 12.8 million Pennsylvania citizens," the Governor's choice of remedies did not create any undue oppression.<sup>159</sup>

However, in surveying and dispensing with the Petitioners' statutory arguments, the court did not exhaust the universe of potential, reasonable challenges to the Governor's statutory authority. In this regard, it appears uncontroversial that the Governor's "disaster emergency" powers are triggered only by the existence of a "disaster emergency." As set forth above, the term "disaster" is defined as "[a] man-made disaster, natural disaster or war-caused disaster."<sup>160</sup> Each kind of disaster is further defined by statute.<sup>161</sup> Concerning the spread of an epidemic disease, the only relevant definition is that of "natural disaster," as a communicable disease does not obviously fall under the rubric of man-made or war-caused disasters.<sup>162</sup> Accordingly, as the court rightly observed, the statute defines a "natural disaster" as:

Any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life.<sup>163</sup>

Notably missing is any mention of communicable disease. It appears uncontroversial that for his statutory authority, the \*234 Governor must therefore rely on the "catch-all" portion of the definition: "or other catastrophe which results in substantial ... hardship, suffering or possible loss of life."

However, as a matter of statutory interpretation, did the General Assembly intend for this broad final phrase to include epidemics or pandemics? To determine the import of a statute, the first step is to examine the plain meaning of the words used in the statute itself. In this regard, the General Assembly has directed in the Statutory Construction Act, 1 PA. CONS. STAT. § 1501 *et seq.*, that the object of interpretation and construction of all statutes is to ascertain and effectuate the intention of the General Assembly.<sup>164</sup> "Generally speaking, the best indication of legislative intent is the plain language of a statute."<sup>165</sup> Furthermore, in construing statutory language, "words and phrases shall be construed according to rules of grammar and according to their common and approved usage ...."<sup>166</sup>

Applying these principles, there is no specific language in the statute that grants the Governor emergency powers in times of an epidemic or pandemic. As the various Petitioners had argued, if the legislature had intended to include disease on the list, it was more than competent to do so. In fact, it did so in a different context, the Disease Prevention and Control Law of 1955 (DPCL), codified at 35 PA. CONS. STAT. § 521.1. While the DPCL grants the Secretary of Health the power to employ the most efficient and practical means for the prevention and suppression of disease,<sup>167</sup> nowhere does the DPCL grant the Governor sweeping powers to enact a state of emergency, close private businesses, make \*235 arbitrary distinctions about what is essential or not, or deem who is and is not privileged to conduct “life-sustaining” activities.

Nor do these provisions specifically authorize mandatory quarantine of *all* individuals in their homes without regard to a *specific, individualized* determination of their infected status. While the Governor specifically cited 35 P.S. § 521.5 for his authority in this regard, a close examination belies the support sought. It states in relevant part:

Upon the receipt by a local board or department of health or by the department, as the case may be, of a report of a disease which is subject to isolation, quarantine, or any other control measure, the local board or department of health or the department shall carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation.<sup>168</sup>

Regulations that implement this provision make it clear that while the Department of Health may issue isolation or quarantine orders of sick individuals, this does not apply to *all* individuals regardless of their infected status:

(a) The Department or local health authority shall direct isolation of a person or an animal with a communicable disease or infection; surveillance, segregation, quarantine or modified quarantine of contacts of a person or an animal with a communicable disease or infection; and any other disease control measure the Department or the local health authority considers to be appropriate for the surveillance of disease, when the disease control measure is necessary to protect the public from the spread of infectious agents.

(b) The Department and local health authority will determine the appropriate disease control measure based upon the disease or infection, **the patient's circumstances**, the type of facility available and **any \*236 other available information relating to the patient** and the disease or infection.

(c) If a local health authority is not [a Local Morbidity Reporting Office (LMRO)], it shall consult with and receive approval from the Department prior to taking any disease control measure.<sup>169</sup>

Thus, by stating that the appropriate disease control measure should be based on the patient's *circumstances* and other *localized* information, the plain language of the above regulations requires an *individualized* analysis concerning whether the affected individual possesses an infectious disease. Similarly, related regulations merely reinforce this interpretation by referring to the need to identify and isolate *specific* persons known or suspected to be harboring an infectious agent, limited to locations where the infection has occurred.<sup>170</sup>

A reviewing court could therefore reasonably infer that the omission of this language in the Emergency Management Services Code but its inclusion in the Disease Prevention and Control Law was intentional and should be construed consistently with one another.<sup>171</sup>

It is precisely this emphasis in the statute and implementation of regulations upon an *individualized* analysis, based on *localized* circumstances, that the Pennsylvania Supreme Court overlooked in its own statutory analysis. If this is the right interpretation of the statute and its implementing regulations, the Governor surely lacked the statutory authority to impose generalized, across-

the-board prohibitions of certain kinds of commerce, or for that matter, \*237 generalized stay-at-home orders, without regard to the specific, individualized and localized circumstances of the affected parties.

Instead, the court, mostly in response to the arguments Petitioners chose to emphasize, based its statutory reading mostly on an extremely strained use of the canon of interpretation “*ejusdem generis*.” This canon basically says that if a statute has a series of specific words followed by a general phrase, the general phrase is not to be construed to expand the scope of the preceding phrase.<sup>172</sup> The idea is grounded in the cautionary notion that courts should not unnecessarily expand the scope of statutes beyond what is specifically stated, for otherwise, courts would run the risk of engaging in legislation through interpretation, which would ultimately fall afoul of the separation of powers. However, in *Friends of Danny DeVito*, the court, as discussed above, was led by this emphasis into an apparent logical contradiction. It initially reasoned that the final concluding language of the definition of “natural disaster” (“other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life”), could reasonably be interpreted to include a pandemic, because it was of the same generalized category as those disasters previously enumerated in the definition, i.e. naturally-occurring causes of “vulnerability and loss of life.”<sup>173</sup> Yet by the same token, it also reasoned that the final concluding language in fact is an *additional* term that *expands* the prior list of specific disasters,<sup>174</sup> which did not include a virus-caused pandemic. This is a seeming contradiction that cannot be reconciled, except to say, perhaps, that the court was searching within such murky waters for a means to support results-oriented jurisprudence in the face of a public health emergency.

\*238 Moreover, if one examines the list of natural disasters set forth in the statute, which precede the catch-all category, it is clear that the things described all cause *property damage*, which is specifically mentioned in the concluding catch-all phrase. Thus, a hurricane, tornado, storm, flood, high-water, wind-driven water, tidal wave, earthquake, landslide mudslide, snowstorm, drought, fire, explosion--each of these have the potential to cause substantial *property damage*. A virus-caused pathogen does not. Not only did the court neglect to observe that pathogens do not cause the specific kind of physical devastation shared among the list of catastrophes fully set forth in the statute, it also failed to note that the concluding catch-all specifically referenced damage to property. This would seem to limit the catch-all to causes of property damage, not pathogens. Although it is true that the concluding phrase also includes “hardship, suffering, or possible loss of life” in the disjunctive, construing the two parts of the statute together would seem to imply that the concluding catch-all should relate only to hardship, suffering, or possible loss of life caused by widespread property damage. Rather than expanding the category of things covered by the term “natural disaster,” a reasonable and careful interpretation of this provision would limit the category only to natural causes that cause property damage.

Perhaps the statute's legislative history could be of help in discerning the intention of the legislature? The use of legislative history in Pennsylvania is an entirely appropriate means of discerning legislative intent, provided it is consistent with the plain language of the statute itself.<sup>175</sup> Here, however, a review of the legislative history provides no clarity concerning this ambiguity, because it is indeed bereft of any reference to diseases as a form of natural disaster.<sup>176</sup> Not surprisingly, the court's only reference to \*239 the legislative history is located in a footnote in which it observes that the Governor's power was extended from a proposed 30 days to 90 days.<sup>177</sup> Legislative history played a limited role in the court's interpretation because of its paucity, but it is precisely the absence of any specifics about epidemics or other diseases that should have given the court pause.

In sum, the court misconstrued the plain language of the statute and implemented regulations upon which Governor Wolf purported to obtain his authority, because the language requires a greater emphasis as to an *individualized* context than the court acknowledged. Additionally, a careful examination of the statutory language would seem to limit the category of “natural disasters” to natural causes of *property damage*, and would therefore exclude non-physical causes like disease. Instead, the court appealed to a strained use of one particular canon of legislative interpretation, leading to an apparent contradiction that the term “natural disaster” was both of a piece of and distinct from prior listed causes in the statute. Further, it ignored the telling silence in the legislative history of the statute.

No doubt, in its careful and detailed opinion, the court displayed a sensitivity to the impact that the COVID-19 pandemic was having on the lives and fortunes of Pennsylvania citizens, and no doubt, it did not want to assert itself as an institution unnecessarily in times of crisis. However, it is precisely in times of crisis that a reviewing court must be at its most vigilant if we are to remain a free society of laws. This reminder becomes ever more important when constitutional liberties are at stake, as will be examined herein.

**\*240 V. FRIENDS OF DANNY DEVITO V. WOLF: CONSTITUTIONAL CHALLENGES**

After concluding that the Governor's actions were within his statutory authority, the Pennsylvania Supreme Court considered various constitutional challenges. It characterized the Petitioners' challenges as five-fold:

Petitioners contend that the Executive Order violates the separation of powers doctrine; that the Executive Order constitutes a taking requiring just compensation; that Petitioners were not accorded procedural due process in the compilation of the list of life-sustaining and non-life-sustaining businesses or in the waiver process and that both are arbitrary, capricious and vague; that it violates equal protection principles; and that the Executive Order interferes with DeVito Committees right of free speech and assembly.<sup>178</sup>

**Separation of Powers.** Citing *Markham v. Wolf*,<sup>179</sup> Petitioners argued that Governor Wolf's proclamations violated the constitutional separation of powers by enacting rules and regulations that served to legislate, rather than execute, legislation duly enacted by the General Assembly.<sup>180</sup> The Petitioners had argued that the Governor could issue proclamations for ceremonial purposes, direct subordinate officials with regard to execution of laws, or interpret statutory or other law for purposes of execution, but that "any executive order that, in essence, creates law, is unconstitutional."<sup>181</sup> Dismissing this argument in a single paragraph, the Pennsylvania Supreme Court reasoned that the Emergency Code specifically recognized that the Governor had the power to issue executive orders and proclamations with the force of law in times of emergency, concerning movements of people \*241 and engaging in commerce.<sup>182</sup> Concerning the movement of people, it reasoned, the Emergency Code specifically gave the power to the Governor to control "ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein."<sup>183</sup> Concerning the regulation of commerce, it reasoned, but without citation, that this action was also "inherent in the broad powers authorized by the General Assembly."<sup>184</sup>

However, assuming the court was correct that Governor Wolf was appropriately delegated broad powers to manage commerce and the movement of the state's citizens within the state-wide disaster area, what was neither briefed nor discussed was the constitutionality of this *delegation* of legislative power. The nondelegation doctrine has a long and storied history--a detailed description of which is beyond the scope of this article. However, in general, as a constitutional matter implied by the divided structure of power, the legislative arm of government may not delegate its law-making function to another branch of government unless it provides an "intelligible principle" to which the delegated branch of government is authorized to confirm its action.<sup>185</sup> Nothing in the Emergency Code instructs the Governor how to manage the movement of people or the undertaking of commerce in times of emergency. Indeed, this is amply demonstrated by the constantly changing and contradictory nature of the Governor's many proclamations, which seemed to be unmoored from any principled guidance. To the extent that there is a wholesale delegation of authority without any specific statutory "intelligible principle" guiding the Governor's emergency powers, the actions of the Governor, authorized though they might be, could potentially fall afoul of the nondelegation doctrine as it is presently considered in modern jurisprudence.

**Takings Without Compensation.** The *DeVito* and *Schulmerich* petitioners also raised the argument that the \*242 commerce prohibitions acted to take private property for public use without just compensation in violation of the Fifth Amendment to the U.S. Constitution and [article 1, section 10 of the Pennsylvania Constitution](#). However, citing to *Appeal of White*<sup>186</sup> and *Balent v. City of Wilkes-Barre*,<sup>187</sup> the court initially noted that where the government exercises its police powers, payment of just compensation is not required.<sup>188</sup> Nevertheless, the court also acknowledged a contrary principle that where government action deprives an owner of all economically beneficial uses of its property, the action does require just compensation.<sup>189</sup> Navigating the space between the two principles, the court relied upon the decisions in *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*<sup>190</sup> and *Nat'l Amusements Inc. v. Borough of Palmyra*<sup>191</sup> for the proposition that where regulations at issue in the case are "merely temporary measures, ... no categorical taking has occurred."<sup>192</sup> The court reasoned that the Governor's orders were the kind of temporary action that were not susceptible to a takings claim because the Emergency Code limits the Governor's powers to 90 days, unless renewed by the Governor, and provides that the General Assembly may terminate the Governor's declaration of emergency at any time.<sup>193</sup>

Chief Justice Saylor was particularly--and rightly--troubled by this conclusion. In his concurring and dissenting opinion, he observed:

While the majority repeatedly stresses that such closure [of businesses] is temporary, ... this may in fact not be so for businesses that are unable to endure the associated \*243 revenue losses. Additionally, the damage to surviving businesses may be vast. Significantly moreover, the Supreme Court of the United States has admonished that the impermanent nature of a restriction 'should not be given exclusive significance one way or the other' in determining whether it is a proper exercise of police power.<sup>194</sup>

Indeed, not only did certain businesses fail permanently as a result of the temporary restrictions, but the consequences of the failure extend to more permanent effects: loss of jobs for employees, loss of employer-sponsored health insurance, inability to pay one's mortgage or other debts, inability to feed one's family, poverty, sickness and so on. Moreover, as a result of the prohibition against all but essential medical services, elective surgeries plummeted and resulted in striking loss of revenue for many hospitals in the Commonwealth, upon which they rely to exist, the very institutions that the emergency powers of the Governor were invoked in order to preserve.<sup>195</sup> Lastly, the toll on the health of the general economy from numerous business failures, the severe decrease in revenue flowing into the state treasury from lost taxes, and the massive expenditure from the treasury due to the remedial programs like unemployment compensation insurance claims, all are likely to be severe and long-lasting.

It should also be observed that Americans have an unfortunate history of panic and overreaction in response to perceived emergencies, albeit temporary in nature, but no less an imposition upon basic personal freedoms. One only needs to reflect upon the widespread fear of anarchists with the rise of labor activism, the reprisals against Germans during the First World War, the public support for Japanese internment camps during the Second World War, the widespread fear engendered by the Red Scare during the \*244 1950s, and many other examples, to understand that all too frequently a temporary panic occludes reason and results in long-term and severe deprivation of rights to life, liberty, and property. During each of these events, the majority imposed restrictions on oppressed minorities that could be characterized as "merely temporary," but which were no less unfortunate in their consequences, both in terms of constitutional violation and the toll on peoples' lives. In each of these instances, the judiciary mostly refused to intervene, and in some circumstances, actually blessed the governmental actions, actions which were to be viewed in retrospect with appropriate dismay after the crisis had passed. And in each of these examples, the toll on human liberty was marked and long-term.

Clearly, as argued above, while the allegedly temporary nature of the Governor's actions may impose both long-lasting economic effects and short-term but substantial erosions of civil liberties, it should finally be noted that the short-term duration of the actions has been over-emphasized, especially in light of the Governor's multiple extensions of his own authority. Indeed, if the General Assembly continues to lack a veto-proof majority to enact a concurrent resolution to end the emergency declaration, there is no guarantee that the Governor would not yet again extend the emergency for an additional amount of time. Therefore, to the extent that the Governor has the political power to extend the emergency and has in fact done so, arguments that constitutional infirmities are merely temporary would be gainsaid by the Governor's continuing extensions of his own authority.

**Due Process.** The federal and state Constitutions protect citizens from deprivations of liberty and property without due process of law, both in a procedural and a substantive sense. While reviewing courts have frequently held that the procedural safeguards of due process are flexible and to be tailored to the circumstances, procedural due process requires any deprivation of liberty or property interests to be accompanied by an opportunity to be heard before a neutral decision-maker, the ability to present evidence in support of the defense and cross-examine witnesses in opposition, neutral standards for rendering a decision, and the \*245 ability to appeal from an adverse result.<sup>196</sup> By way of contrast, substantive due process protects a citizen's fundamental rights or interests from deprivation or interference in certain extreme circumstances, where even the protections of procedural due process would be inadequate.<sup>197</sup> The *DeVito* court construed the Petition as raising only procedural due process claims and, therefore, did not rule on any claim as to violations of substantive due process.<sup>198</sup>

In its *DeVito* decision, the Pennsylvania Supreme Court characterized the procedural due process issues raised as requesting a ruling on: (a) whether pre-deprivation notice and opportunity to be heard was required; (b) if not, whether petitioners



were entitled to post-deprivation protections; and (c) whether the Governor's waiver process provided sufficient due process protections under the circumstances.<sup>199</sup>

Regarding pre-deprivation safeguards, the court held that the constitution did not mandate relief. It first referenced the uncontroversial proposition, oft cited by courts, that due process is a flexible concept and applied the three-part balancing test announced in *Mathews v Eldridge*, which considers the following factors:<sup>200</sup>

- (1) the private interest affected by the governmental action;
- (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and
- (3) the state interest involved, including the administrative \*246 burden the additional or substitute procedural requirements would impose on the state.<sup>201</sup>

In light of the above, the court concluded that, given the exigent circumstances surrounding the need to act quickly in response to the escalating number of COVID-19 cases, it was not possible for the Governor to create pre-deprivation procedures.<sup>202</sup> If the Governor had spent time to create and manage a pre-deprivation hearing process, it would have taken “weeks, months, or even years” which could not lightly be expended, given the nature of the emergency.<sup>203</sup> However, by the same token, the court emphasized that this did not mean no due process was required, because even in the most extreme times of crisis, such as war, “essential liberties remain in effect.”<sup>204</sup>

The court then turned to the post-deprivation due process in place through the “waiver” procedure. Interestingly, both the Petitioners and the court found that certain features of the “waiver” process were indeed troubling.<sup>205</sup> This included a time-limited, exclusively online application, which afforded no opportunity for a hearing, provided for no ability to present witnesses, articulated no clear standards, and seemed to exclude any ability to appeal an adverse decision to a reviewing court. Moreover, according to media reports, the waiver decisions appeared to be inconsistent, allowing some, but not all construction projects and car dealerships to operate.<sup>206</sup> Concerns were also raised about potential political favoritism in the awarding of waivers, with Governor Wolf's family cabinetry business and the Senate's President Pro \*247 Tempore's chocolate business successfully gaining waivers, while other similar businesses were not.<sup>207</sup> The *Civil Rights* petitioners also highlighted anomalies with the general list of prohibited activities outside the scope of the waiver process, such as forcing the closure of “specialty food stores,” while allowing “grocery stores” to remain open, or mandating the closure of “sporting goods stores” while allowing “general merchandise stores” to remain open.<sup>208</sup> Similarly, the *DeVito* petitioners rightly protested that the application of the concept of “life-sustaining” was inconsistent and irrational. They questioned, for example, why “beer, wine and liquor stores” were determined to be non-life-sustaining while beer distributors were permitted to continue operation, and why the operation of department stores were prohibited while the operation of general merchandise stores were allowed.<sup>209</sup> Marked for particular scorn was the fact that the Governor's list seemed to have been amended from day to day, sometimes even more than once during a single day.<sup>210</sup>

The court, however, concluded that “while procedural due process is required even in times of emergency,” here, the special circumstances dictated that the post-deprivation waiver process provided sufficient due process.<sup>211</sup> In support, the court reasoned that the waiver process provided a means for affected businesses to challenge their placement on the list of non-life-sustaining activities, essentially an opportunity to correct a *miscategorization* of the affected business.<sup>212</sup> It noted, without citation, certain procedures to establish the criteria for rendering a waiver decision, but reasoned that the only legitimate purpose was “protecting individuals from the *mistaken* deprivation of life, liberty or property.”<sup>213</sup> It reasoned further that no formal hearing was required, even in post-deprivation due process, because the \*248 exigencies of the timing of the crisis did not afford sufficient time for formal hearings, and because it would impose “massive administrative burden” that would “overwhelm an entire department of government otherwise involved with disaster mitigation.”<sup>214</sup> It noted in this regard that more than 34,000 waiver applications had been filed,<sup>215</sup> and it speculated that “massive numbers of staff” and “troves of telecommunications devices” would be necessary to manage such a process. In doing so, the court engaged in a balancing test, weighing the administrative burden against the rights of the aggrieved and found the latter wanting.

Lastly, the court addressed whether the lack of any mechanism for appealing an adverse decision impacted the petitioners' due process rights and held it did not. The court reasoned that as a constitutional matter, the right to appeal flows from decisions of a court of record or administrative agencies.<sup>216</sup> However, the court observed, the letters in the record granting or denying waivers were issued by the Governor and the Secretary of Health, not the Department of Community and Economic Development, and so were not actually administrative adjudications of that Department.<sup>217</sup> It concluded that “[b]ecause article V, section 9 does not confer a right of appeal from an executive decision of the Governor or the Secretary, no right of appeal lies in this instance.”<sup>218</sup>

The court's treatment of this crucial aspect of due process would surely disappoint civil rights advocates. First, the post-deprivation “waiver” process expired on April 3, 2020, with the Commonwealth refusing to accept any further applications after that date.<sup>219</sup> To the extent that the court felt due process rights had \*249 been adequately protected through this process, it neglected to grapple with the fact that this very protection disappeared as of April 3, 2020 after an excessively short window for applications had closed.

Second, the court's characterization of the waiver process as merely a means to ensure that certain businesses were properly categorized within the applicable industry code, rather than being a more substantive review process, failed to recognize the allegations in the record that the waiver process resulted in contradictory and seemingly arbitrary results, with identical type businesses being treated differently for reasons that were hard to explain. If the procedure had been in place merely to ensure proper and accurate categorization, there would have been more consistent results. In view of the several contradictory results, however, one would suspect a more substantive-- and secretive--process was at work.

Third, while the court seemed to believe that the waiver process followed certain procedures to establish whether businesses fell within one or another criterion, concerning their “life-sustaining” properties, in fact there were no clear and publicly announced standards that any advocate could clearly consult in anticipation of making their case. In the absence of clear, publicly available standards, how could an advocate ever give advice to his or her client or adequately represent the client before the deciding tribunal? It would seem uncontroversial that clearly announced rules of law are a prerequisite for the maintenance of due process, with their absence raising the specter of arbitrary governance reminiscent of the evils of the English Star Chamber, against which hundreds of years of common law and constitutional principles have protected us.

Fourth, while the court did highlight the potential for massive disruption of state operations if the waiver process were to afford individualized attention to each application, it is certainly no valid constitutional principle that states that fundamental rights should give way to mere administrative convenience. If the state were to enact a procedure for adequately addressing grievances, it is incumbent upon the state to grant a procedure that would secure that right rather than thwart it, for otherwise it would instantly make a mockery of its intent.

\*250 Additionally, and perhaps most disturbingly, the court's refusal to allow for an appeal from waiver decisions, simply on the basis that they were issued by the Governor's office rather than a separate administrative agency, smacks of bald sophistry with dangerous consequences. Less scrupulous governors of any future party affiliation could easily take this principle as a cue to inoculate any governmental decision from appeal by having such decisions diverted through and issued by the Governor's office, thus clearly undermining the letter and spirit of due process. In this respect, allowing such decisions to be insulated from appeal has the potential for the most dangerous consequences to our structure of government and civil liberties.

Lastly, the *DeVito* court failed to consider principles of substantive due process, which protects fundamental liberties implicit in the concept of ordered liberty that are recognized in our country's history and tradition from being violated, even if an opportunity to be heard is afforded by the government. At the very least, one could observe that at present, there is a reasonable disagreement between the U.S. District Courts for the Eastern and Western Districts of Pennsylvania in this regard, with Judge Surrick holding that no substantive due process rights have been violated while Judge Stickman held the opposite. While Judge Surrick observed that substantive due process violations are more commonly associated with more permanent deprivations of rights, Judge Stickman properly concluded that no matter how seemingly temporary the Governor's edicts may be, there is nothing to stop the Governor from continuing or reinstating the offending restrictions.<sup>220</sup> Moreover, while the edicts themselves may be temporary in nature, one must not forget that their impact--in terms of loss of business, livelihood and opportunities for travel and association--may in fact be permanent.

A reasonable case can therefore be made that the Governor's edicts have violated both procedural and substantive principles of due process.

**\*251 Equal Protection.** It is a fundamental principle of American jurisprudence that courts only decide the cases before them. No less the case here, the court only considered those equal protection matters raised by the Petitioners. This related only to the alleged unequal treatment of the *DeVito* election committee's operations, which could not operate face-to-face campaign activity, as compared to the operations of the incumbent, which were allowed to engage in such activities. The court was largely correct in dismissing this argument.

However, a better equal protection argument could have been raised that the categorization of activities as “life-sustaining” or not, and the associated waiver process, resulted in unequal treatment due to the vagueness of the term “life-sustaining,” and due to the opaque, arbitrary, and unannounced standards applied in implementing this regulatory scheme. In this regard, the court would have had an opportunity to review the fundamental rights and liberties at stake, namely the right to operate a business and support one's livelihood, and it could have had an opportunity to evaluate whether the entire scheme of categorizing certain operations as “life-sustaining” or not is narrowly tailored to accomplish the stated goals of the Governor's orders, just as Judge Stickman did in *Butler v. Wolf*. Moreover, the court could have had the opportunity to evaluate whether the list of prohibited and permitted activities resulted in “underinclusive” and “overinclusive” categorizations, such that it would pass or fail the test of narrow tailoring with a disparate impact among citizens.<sup>221</sup> This is the standard analysis of equal protection jurisprudence, but a missed opportunity in this case.

Instead, in denying the equal protection challenge, the court focused on the campaign matter at hand. It reasoned that the *DeVito* campaign offices and the incumbent's legislative offices were not similarly situated for equal protection purposes because their operations are significantly different: one engages in political campaigning while the other engages in governance.<sup>222</sup> It noted **\*252** further that the incumbent was in fact legally prohibited from using government offices for campaign purposes, so the alleged competitive unfairness did not exist.<sup>223</sup>

Yet, had the court been faced with a more expansive equal protection challenge, it might have observed that the list of permitted life-sustaining activities was fatally both underinclusive and overinclusive, failing the test of narrow tailoring. As an initial matter, it should be observed that the stated goal of the Governor's list of prohibited and permitted activities, as described above, was to slow the spread of the COVID-19 virus so that health care facilities would not be overwhelmed, as occurred elsewhere. The presumption would be that prohibited activities would be more likely to spread the virus, while permitted activities would be less likely to spread the virus. It is this causal connection which is important to the constitutional analysis.

The Governor's list,<sup>224</sup> for example, allows various forms of crop production, animal husbandry, forestry and logging, fishing, hunting, trapping, agricultural support, and certain kinds of mining and gas extraction. But by the same token, the Governor prohibits building construction, heavy and civil engineering construction, and specialty trade contractors, such as electricians and plumbers, from working, except with newly enacted allowances for emergency work or where social distancing is adhered to. Is there any evidence that the COVID-19 virus is less likely to spread in circumstances where people are engaging in agriculture as compared to residential renovation or heavy industry? Surely not. Both activities presumably require teams of individuals and limited interaction with the public.

Other examples abound. For instance, the Governor forbids fabricated metal product manufacturing, such as forging and stamping of metal products, the creation of cutlery and hand tools, and the manufacturing of spring and wire products. But he allows plastics and rubber manufacturing. Both are forms of manufacturing for component parts and thus have similar means of operation in the broadest sense. But is there any evidence to suppose that one category encourages the spread of the COVID-19 **\*253** virus more than another? One scratches one's head in wonderment when attempting to find an intelligible principle to distinguish the two kinds of manufacturing in view of the Governor's stated goals. The same can be asked why semiconductor manufacturing is allowed while manufacturing of magnetic optical media is not. Or why you may sell building materials and supplies but not lawn and garden equipment. Or what the difference is between general merchandise stores (allowed) and department stores (forbidden) or interurban and rural bus transportation (allowed) and charter busses (forbidden).

Perhaps the criteria used, and the causal connection identified, is the likelihood of interaction with the public? But then why are grocery stores, specialty foods stores and beer, wine and liquor stores allowed to be open, while home furnishing stores, automobile dealers and lawn and clothing stores are not? Or why are hotel operations permitted while bars are not? Surely all of these are instances where large numbers of people visit a central location and have the potential for interacting with one another, yet some are forbidden and other allowed.

Indeed, the U.S. Supreme Court most recently has squarely considered this very issue in *Roman Catholic Diocese of Brooklyn v. Cuomo*.<sup>225</sup> Reviewing an equal protection challenge brought by religious institutions adversely affected by New York's prohibition of religious gatherings of 10 or more people in “red” zones and 25 or more people in “orange” zones, the Court enjoined enforcement on the grounds that secular gatherings were not subject to equivalent restrictions.<sup>226</sup> Applying strict scrutiny, the Court held that less restrictive means were possible, especially as there was no evidence that the affected churches had contributed to the spread of COVID-19.<sup>227</sup> Justice Gorsuch was especially critical of the arbitrary nature of the restrictions:

People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in \*254 hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able and willing to follow all the safety precautions required of “essential” businesses and perhaps more besides.<sup>228</sup>

The Court has laid down a clear principle within the context of equal protection jurisprudence that arbitrary and unequal restrictions of fundamental liberties is not to be tolerated, even during a public health crisis. Indeed, as Justice Gorsuch said, “Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical.”<sup>229</sup> Although the Supreme Court here reviewed unequal and arbitrary treatment that affected the fundamental right to religious liberty, the right to earn a living implicated by Governor Wolf's actions seems no less fundamental than the right to worship one's God.

Viewing the Governor's list as a whole, one pattern does emerge: it is one person's view of what is necessary to feed and maintain the populace, hence the use of the term “life-sustaining.” But the problem is that this concept has nothing to do with the articulated goals of reducing the spread of COVID-19 through the prohibition of large group interactions. Therefore, in addition to being arbitrary in application, it is surely not narrowly tailored to serve the very goals articulated by the Governor. By way of contrast, given that we have learned the vast majority of COVID-19 cases and deaths occur in confined institutions like nursing homes, prisons and hospitals, surely a narrowly tailored approach would have been to restrict activities in, and address appropriate resources towards, those institutions alone.

Because there is no actual causal nexus between the stated goals of the Governor's orders and the categories used, and because a careful analysis of the categories used demonstrates that they are both underinclusive and overinclusive in serving the stated goal, resulting in widely disparate treatment, a case can be made \*255 that the Governor's orders are not narrowly tailored restrictions and should be rejected as a constitutional matter of equal protection.

***The Right to Free Speech and Assembly.*** The *DeVito* court's discussion of the impact of the Governor's prohibitions on free speech and assembly is similarly constrained by the arguments presented by the Petitioners and does not address the broader issues. Responding to the complaint by the *DeVito* campaign committee that it was foreclosed from using its physical campaign office, the court rightly concluded that this physical restriction had no impact on the ability to speak, because other non-physical means were available and because the restriction was not aimed at favoring one viewpoint over another.<sup>230</sup>

Yet this does not exhaust the universe of possible infringements of First Amendment rights, particularly the right to assemble, which is directly infringed by the Governor's orders to stay at home and his prohibitions against “gatherings” of several people, as Judge Stickman in *Butler v. Wolf* has extensively described.<sup>231</sup> Indeed, Mr. Markey's petition had directly raised the right to assemble and protest the Governor's action under the U.S. and Pennsylvania Constitutions, but the court simply denied his petition without comment.<sup>232</sup>

It is uncontroversial that time, place, and manner restrictions on the right to assemble, such as requirements to obtain parade permits or restrictions on where political demonstrations may occur, are, and have been, viewed as consistent with the constitutional protections of the right to assemble. Yet, Governor Wolf's restrictions are not of this kind. His edicts have forbidden any public gatherings of a certain size. In doing so, it clearly overregulates the right to assemble in a way that is not narrowly tailored to accomplish the goal of the regulation, which is to prevent the spread of COVID-19. Instead, he could have implemented requirements that for any public gathering, facemasks \*256 must be worn, or that they be conducted outside

with appropriate social distancing in designated areas. Regulations of this kind would easily be considered constitutional, as consistent with the sort of time, place, and manner restrictions regularly approved by the courts. But forbidding all public gatherings is surely both novel and unnecessary to accomplish the goals sought.

No doubt if some future enforcement of the Governor's edicts were to infringe on this fundamental constitutional right, perhaps the court would revisit this issue in context because of its overbreadth. To date, this author is unaware of any such enforcement. Even though large protests occurred at the state capitol, no enforcement action took place. Nevertheless, it is certainly theoretically possible, as Judge Stickman has argued, that the Governor's unprecedented stay-at-home order--which reverses the presumption of freedom inherent in our history and tradition--would conflict with citizens' rights to peaceably assemble for political redress, and the possibility of arrest or fines for violation could surely create a chilling effect upon anyone contemplating such action.

**The Right to Travel.** Another issue raised by the Markey petition, and discussed in *Butler v Wolf*, but not decided by the Pennsylvania Supreme Court, concerns the constitutional right to travel.<sup>233</sup> The right to travel across state lines and within states is a fundamental right, implied in the federal and state constitutions.<sup>234</sup> The right is clearly established:

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492 (1849):

\*257 For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.<sup>235</sup>

To the extent that the Governor's stay-at-home orders infringe this right directly, a court could find it in conflict with constitutional protections, as did Judge Stickman in *Butler v Wolf*. For instance, one York County woman was fined \$200 simply for going for a drive despite the Governor's orders to stay at home.<sup>236</sup> Yet like all constitutional rights, this one is not absolute. In view of emergency or exigent circumstances, the right to travel may perhaps be limited, but it may take another petition and specific circumstances to determine the allowable scope of such limitations. As with other restrictions on fundamental rights, however, any such challenge must show that the governmental action is not narrowly tailored to accomplish the goals sought. So, the success of any such challenge would surely depend on the nature of the restriction, and the geographic location where it is applied, particularly as it relates to the distribution and spread of COVID-19 at that time. In this regard, it is certainly arguable that a travel restriction that is limited to the locations where the disease is most widespread (e.g. major metropolitan areas), or limited to the movement of people from institutions (such as nursing homes) where the disease is especially prevalent, would survive constitutional scrutiny. Conversely, an unnecessarily broad and overinclusive travel restriction that restricts the movement of people regardless of its impact on the spread of the disease should be viewed as not narrowly tailored to accomplish the stated goals of regulation. Insofar as Governor Wolf's travel restrictions were \*258 excessively broad, and not directed to travel to or from institutions or locations where the disease is prevalent, they should be viewed with great scrutiny.

## VI. CONCLUDING THOUGHTS

This article has argued that Governor Wolf's proclamations and edicts during the COVID-19 crisis, though well-meant, were illegal and inappropriately infringed on fundamental constitutional liberties. However, upon review of petitions by aggrieved citizens, the Pennsylvania Supreme Court wrongly held otherwise. This decision is limited by the circumstances wherein those rights were asserted and the arguments raised by the parties. It will be for another day to consider, perhaps, other matters not resolved, such as the imposition on the right to assemble and the right to travel.

Perhaps, however, this article has favored the theoretical over the practical. After all, as has oft been said, in combatting COVID-19, we are fighting a "war" against an "invisible enemy." Perhaps second-guessing the Executive's decisions in a time of crisis is the worst of Monday-morning quarterbacking. In other words, perhaps the courts should defer to the political decisions

of our representatives in times of crisis and stay out of the role of making--or second-guessing--policy. No doubt, our nation's courts have been traditionally cautious in intruding upon the purview of the legislature in order to avoid passing on matters of solely political import.<sup>237</sup> This is all the more so, not only to respect the separation of the judicial from the legislative function, but also, it has been observed, because the courts are not the best venue for the extensive fact-finding required of political decisions. Moreover, even if the courts were to intervene, would not a more fully developed factual record be a better basis for making decisions, rather than disputed presentations of fact through petitions, untested by the crucible of trial? Indeed, this need for better fact-finding is precisely what Chief Justice Saylor raised in \*259 his concurring and dissenting opinion and would have perhaps better served the purpose of constitutional review.<sup>238</sup>

Yet, by the same token, when faced with a direct emergency appeal for judicial review of potential overreach by a coordinate branch of government, the courts must act swiftly to preserve their own role in the system of divided government, to ensure perpetuation of judicial integrity in a nation ruled by law, and to secure those rights laid out in the founding documents. As Justice Gorsuch has recently concluded, the “judicial impulse to stay out of the way in times of crisis” does not mean that the judiciary should “shelter in place when the Constitution is under attack.”<sup>239</sup> Here, however, the Pennsylvania Supreme Court employed strained statutory readings and unconvincing constitutional arguments, perhaps in a misguided effort to stay out of the way in a time of crisis, where many presume our leaders are acting in our best interests. In this regard, it should be remembered what Justice Brandeis observed many years ago:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.<sup>240</sup>

By the time this article has been published, both the current crisis and Governor's Wolf's emergency powers remain intact, just as Chief Justice Saylor feared. Indeed, the damage done to the economy, to household livelihoods, to the integrity of the judicial system, and to constitutionally guaranteed freedoms may be long-lasting and difficult to repair.

### Footnotes

- <sup>a1</sup> J.D. Dickinson School of Law, M.A. University of Wisconsin-Madison, B.A. Vassar College. Andrew Cotlar is a partner with the Law Office of Cotlar & Cotlar in Doylestown, Pennsylvania.
- <sup>1</sup> Proclamation of Disaster Emergency, Commonwealth of Pennsylvania Office of the Governor (Mar. 6, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf>.
- <sup>2</sup> Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home (Mar. 23, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/03.23.20-TWW-COVID-19-Stay-at-Home-Order.pdf>.
- <sup>3</sup> *Targeted Mitigation Order - Frequently Asked Questions*, PENNSYLVANIA DEPARTMENT OF HEALTH, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Guidance/Targeted-Mitigation-FAQ.aspx> (last updated Sept. 9, 2020).
- <sup>4</sup> “Failure to comply with these requirements will result in enforcement action that could include citations, fines, or license suspensions.” *All Non-Life-Sustaining Businesses in Pennsylvania to Close Physical Locations as of 8 PM Today to Slow Spread of COVID-19*, PENNSYLVANIA DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT (Mar. 19, 2020), <https://dced.pa.gov/newsroom/all-non-life-sustaining-businesses-in-pennsylvania-to-close-physical-locations-as-of-8-pm-today-to-slow-spread-of-covid-19/>; For instance, one York County woman was fined \$200 for going for a drive despite the Governor's orders to stay at home. Kara Seymour, *Pa Woman Gets \$200 Ticket For Driving During Stay-At-Home Order*, PATCH (Apr. 6, 2020, 2:42 PM), <https://patch.com/pennsylvania/across-pa/pa-woman-gets-200-ticket-driving-during-stay-home-order>.



- 5 Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses That Are Not Life Sustaining (Mar. 19, 2020), <https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order>.
- 6 Laura Benshoff & Ryan Briggs, *Just Insanity: Closed Pa. Businesses Cry Foul as Competitors Snag Waivers to Open*, WHYY (Apr. 2, 2020), <https://whyy.org/articles/just-insanity-closed-pa-businesses-cry-foul-as-competitors-snap-waivers-to-reopen/>; Concerns were also raised about potential political favoritism in the awarding of waivers, with Governor Wolf's family cabinetry business and the Senate's President Pro Tempore's chocolate business successfully gaining waivers. *Id.*
- 7 Paradise Concepts, Inc. v. Wolf, 2020 U.S. Dist. LEXIS 157250, at \*3-5 (E.D. Pa. 2020).
- 8 *Id.*; see also Brad Bumsted & Angela Coulombis, *Pa to Close Waiver Process for Businesses Affected by Coronavirus Shutdown as Calls for Transparency Mount*, THE PHILADELPHIA INQUIRER (Apr. 26, 2020), <https://www.inquirer.com/news/pennsylvania/spl/pennsylvania-coronavirus-business-waivers-life-sustaining-gop-response-20200403.html>.
- 9 *Life Sustaining Business Frequently Asked Questions*, SCRIBD, <://www.scribd.com/document/452553495/UPDATED-5-15-PM-April-10-2020-Life-Sustaining-Business-FAQs> (last updated May 28, 2020).
- 10 See Veto Message of Governor Wolf Concerning SB 613 (Apr. 20, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200420-SB613-Veto-Memo.pdf>; see also Veto Message of Governor Wolf Concerning SB 327, HB 2388, and HB 2412 (May 19, 2020), <https://www.governor.pa.gov/newsroom/gov-wolf-vetoes-sb-327-hb-2388-and-hb-2412/>.
- 11 See Wolf v. Scarnati, 33 A.3d 679, 685-86 (Pa. 2020) (recounting history of Governor's renewal and attempts to rescind emergency declaration); see also Veto Message of Governor Wolf Concerning HR 836 (July 14, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/07/20200714-Veto-Message-HR-836.pdf>.
- 12 Amendment to Proclamation of Disaster Emergency (June 3, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/06/20200603-TWW-amendment-to-COVID-disaster-emergency-proclamation.pdf>; see also Amendment to Proclamation of Disaster Emergency (Aug. 31, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/09/20200831-TWW-amendment-to-COVID-disaster-emergency-proclamation.pdf>; see also Amendment to Proclamation of Disaster Emergency (Nov. 24, 2020), <https://www.pema.pa.gov/Governor-Proclamations/Documents/11.24.2020%20TWW%C203rd%C20Amendment%20COVID-19%20Proclamation.pdf>
- 13 *Unemployment Compensation Claim Statistics & COVID-19*, BUREAU OF UNEMPLOYMENT COMPENSATION, <https://www.uc.pa.gov/COVID-19/Pages/UC-Claim-Statistics.aspx> (last updated Oct. 10, 2020).
- 14 See Ciara Linnane, *Coronavirus Update: U.S. Deaths to COVID-19 Exceed Vietnam War Toll, and Pence Slammed for Not Wearing Face Mask*, MARKETWATCH.COM (Apr. 29, 2020, 2:36 PM), <https://www.marketwatch.com/story/coronavirus-update-us-deaths-to-covid-19-exceed-vietnam-war-toll-and-pence-slammed-for-not-wearing-face-mask-2020-04-29>.
- 15 *Daily Updates of Totals by Week and State: Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> (last visited Dec. 5, 2020).
- 16 *COVID-19 Data for Pennsylvania: Hospitalization Rates by Age Range to Date*, PENNSYLVANIA DEPARTMENT OF HEALTH, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last updated Oct. 20, 2020).
- 17 See Joel Achenbach, *Antibody Tests Support What's Been Obvious: Covid-19 Is Much More Lethal than the Flu*, WASHINGTON POST (Apr. 28, 2020, 3:06 PM) (stating that recent serological data shows infections greatly outnumber the confirmed number of COVID-19 cases, that “higher infection rates mean lower lethality risk on average,” and that actual death rates are .5%).
- 18 “In a CBS3 review of nursing home case numbers--compared against overall county COVID-19 mortality rates--these facilities account for, in most counties, the majority of COVID-19 deaths. In Montgomery County, of 184 deaths

countywide, 138 are in nursing homes. That's 75% of the mortality rate. In Delaware County, 69% or 68 of 99 deaths are in those care facilities. In Chester County, it's 68%, Bucks County with 58%, and in Philadelphia, the figure is 54%." Joe Holden, *Coronavirus Pennsylvania: COVID-19 Continues To Have Devastating Impact At Nursing Homes Across Region*, 3CBSPHILLY (Apr. 20, 2020, 4:53 PM), <https://philadelphia.cbslocal.com/2020/04/20/coronavirus-pennsylvania-covid-19-continues-to-have-devastating-impact-at-nursing-homes-across-region/>.

19

 [Friends of Danny DeVito v. Wolf](#), 227 A.3d 872 (Pa. 2020).

20

 [Joint Anti-Fascist Refugee Comm. v. McGrath](#), 341 U.S. 123, 162 (1951) (“The requirement of ‘due process’ is not a fair-weather or timid assurance.”);  [Skinner v. Ry. Labor Executives' Ass'n](#), 489 U.S. 602, 637 (1989) (Marshall, J., dissenting) (“Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when ‘special needs’ make them seem not.”).

21

 35 PA. CONS. STAT. § 7301(a)-(c) (2020).

22

*Id.* However, the General Assembly's power to terminate any disaster declaration is subject to the Governor's veto power under the Presentment Clause of the state constitution. See [Wolf v. Scarnati](#), 233 A.3d 679 (Pa. 2020).

23

 *Id.* § 7301(d).

24

 *Id.* § 7301(e).

25

 *Id.* § 7301(f).

26

*Id.* § 7102.

27

§ 7102.


28

“‘*Man-made disaster*.’ Any industrial, nuclear or transportation accident, explosion, conflagration, power failure, natural resource shortage or other condition, except enemy action, resulting from man-made causes, such as oil spills and other injurious environmental contamination, which threatens or causes substantial damage to property, human suffering, hardship or loss of life.” *Id.* “‘*War-caused disaster*.’ Any condition following an attack upon the United States resulting in substantial damage to property or injury to persons in the United States caused by use of bombs, missiles, shellfire, nuclear, radiological, chemical or biological means, or other weapons or overt paramilitary actions, or other conditions such as sabotage.” *Id.*

29

*Id.*

30

The Pennsylvania Supreme Court retains original jurisdiction to hear cases and administer powers “as fully and amply ... as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.” 42 PA. CONS. STAT. § 502 (1978). The court may assume King's Bench jurisdiction over a matter even where no action is pending before a lower court and when “an issue of public importance ... requires timely intervention ... to avoid the deleterious effects arising from delays incident to the ordinary process of law.” *Commonwealth v. Williams*, 129 A.3d 1139, 1206 (citing  [In re Bruno](#), 101 A.3d 635, 670 (Pa. 2014)).

31

Petitioners' Emergency, *Ex Parte* Application for Extraordinary Relief Pursuant to the Court's King's Bench Jurisdiction at 7-9, [Civil Rights Defense Firm, P.C. v. Wolf](#), 226 A.3d 569 (Pa. 2020) (No. 63 MM 2020) (“Civil Rights Petition”).

32

*Id.* at 10.

33

*Id.*

34

*Id.* at 11.

35

*Id.* at 12-15.



- 36 *Id.* at 16.
- 37 Civil Rights Petition at 17-20, *Civil Rights Defense Firm*, 226 A.3d 569 (No. 63 MM 2020).
- 38 *Id.* at 19.
- 39 *Id.*
- 40  18 PA. CONS. STAT. § 6111(c) (2019).
- 41 Civil Rights Petition at 22-24, *Civil Rights Defense Firm*, 226 A.3d 569 (No. 63 MM 2020).
- 42 The change was not publicly announced but was quietly inserted into the comments section of the list of prohibited and permitted activities. *See* List of Permitted Business Activities (Apr. 28, 2020) (on file with author).
- 43 Civil Rights Petition at 24, *Civil Rights Defense Firm*, 226 A.3d 569 (No. 63 MM 2020).
- 44 PA. CONST. art. V, § 10(c).
- 45 *See*  *Lloyd v. Fishinger*, 605 A.2d 1193, 1195 (Pa. 1992);  *Commonwealth v. Stern*, 701 A.2d 568, 572 (Pa. 1997);  *Shaulis v. Pennsylvania State Ethics Comm'n*, 833 A.2d 123, 124 (Pa. 2003); *Yocum v. Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 233 (Pa. 2017);  *Wajert v. State Ethics Comm'n*, 420 A.2d 439, 442 (Pa. 1980).
- 46 Order, In re: General Statewide Judicial Emergency, Nos. 531 and 532 Judicial Administration Docket (Pa. Mar. 18, 2020).
- 47 *Id.* at 1-2.
- 48 Second Supplemental Order, In re: General Statewide Judicial Emergency, Nos. 531 and 532 Judicial Administration Docket (Pa. Apr. 1, 2020) (citations omitted).
- 49 List of Permitted Activities, *supra* note 42.
- 50 Governor Wolf's Answer to the Applications for Extraordinary Relief at 5, *Civil Rights Defense Firm, P.C. v. Wolf*, 226 A.3d 569 (Pa. 2020) (Nos. 63 MM 2020 and 64 MM 2020).
- 51 *Id.* at 5-6.
- 52 Governor Wolf's Answer to the Applications for Extraordinary Relief at 7, *Civil Rights Defense Firm*, 226 A.3d 569 (Nos. 63 MM 2020 and 64 MM 2020).
- 53 *Id.* at 9 (citing  *Baker v. Carr*, 369 U.S. 186, 210 (1962)).
- 54 *Id.* at 9-10.
- 55 *Id.* at 10.
- 56 *Id.* at 10-13.  
“Long gone are [sic] the need for attorneys to maintain large physical law libraries, conduct in-person meetings, or file physical documents with the Prothonotary. Electronic filing through PACFile is at least a decade old and client meetings and court hearings can, and are, being performed via video conference or telephone.” *Id.* at 12. One might legitimately ask, however, how one could accomplish the execution of a will using such remote technology when the formalities of such a document require in-place witnesses and notarization of the act.
- 57 An additional King's Bench Petition for Extraordinary Relief was filed with the supreme court by the law firm of Costopoulos, Foster, & Fields on March 20, 2020, in which it similarly alleged that the Governor's order had engaged in the unconstitutional regulation of legal services. *See* Pet. For Extraordinary Relief, Costopoulos, Foster, and Fields

v. Wolf, 2:20-cv-677, 2020 U.S. Dist. LEXIS 167544 (W.D. Pa. 2020) (No. 64 MM 2020) (Petition was withdrawn pursuant to an agreement with the Office of the Attorney General, likely for similar reasons.).

58 [Civil Rights Defense Firm, P.C. v. Wolf](#), 226 A.3d 569, 570 (Pa. 2020) (Wecht, J., concurring and dissenting).

59 *Id.* at 570.

60 *Id.*


61 *Id.* at 571.

62 *Id.* at 571.

63 *Id.*

64 THE MARC SCARINGI SHOW, <https://www.themarcsparingishow.com/> (last visited Oct. 19, 2020).

65 Laura Bonawits, *What's Marc Scaringi Up To*, POLITICS PA (Mar. 22, 2011), <https://www.politicspa.com/whats-marc-scaringi-up-to/22680/>.

66 Emergency Application for Extraordinary Relief at 2,  [Friends of Danny DeVito v. Wolf](#), 227 A.3d 872 (Pa. 2020) (No. 68 MM 2020).


67 *Id.* at 9-10.

68 *Id.* at 11.

69 *Id.* at p. 12-15. This may be another instance of my argument above that the statute requires an individualized finding that a person is infected, and does not apply to broad groups of people who may be presumptively considered infected.

70 *Id.* at 15.

71 *Id.* at 16.

72 Emergency Application for Extraordinary Relief at 17-18,  [Friends of Danny DeVito](#), 227 A.3d 872 (No. 68 MM 2020).

73 *Id.* at 18-20.

74 *Id.* at 20-21.

75 *Id.* at 21-24.

76 *Id.* at 24-27.

77 *Id.* at 27 (citing [Markham v. Wolf](#), 190 A.3d 1175, 1183 (Pa. 2018) (“[A]ny executive order that, in essence, creates law, is unconstitutional.”)).



78 Emergency Application for Extraordinary Relief at 29,  [Friends of Danny DeVito](#), 227 A.3d 872 (No. 68 MM 2020).





79 *Id.* at 28.

80 *Id.* at 29.

81 *Id.* at 30.

82 *Id.*

- 83 See  [Friends of Danny DeVito](#), 227 A.3d 872.
- 84 Petition for Writ of Certiorari, [Friends of Danny DeVito](#), 227 A.3d 872 (No. 19-1265).
- 85 See Petitioner's Emergency *Ex Parte* Application for Extraordinary Relief Pursuant to the Court's King's Bench Jurisdiction, [Markey v. Wolf](#), 227 A.3d 1276 (Pa. 2020) (No. 75 MM 2020).
- 86 *Id.* at 5.
- 87 *Id.* at 7.
- 88 *Id.* at 10-11.
- 89 Order Denying Application for Extraordinary Relief Pursuant to the Court's King Bench Jurisdiction, [Markey](#), 227 A.3d 1276 (No. 75 MM 2020).
- 90 Complaint, Schulmerich Bells, LLC, et. al v. Wolf, 2:20-cv-01637 (E.D. Pa. Mar. 26, 2020).
- 91 *Id.* at 9.
- 92 *Id.* at 5.
- 93 *Id.* at 2 (Count I).
- 94 *Id.*
- 95 [Paradise Concepts, Inc. v. Wolf](#), No. 20-2161, 2020 U.S. Dist. LEXIS 157250 (E.D. Pa. Aug. 31, 2020).
- 96 *Id.* at \*3-4.
- 97 *Id.* at \*4.
- 98 *Id.*
- 99 *Id.* at \*7.
- 100 *Id.* at \*9.
- 101 [Paradise Concepts, Inc.](#), No. 20-2161, 2020 U.S. Dist. LEXIS 157250, at \*9.
- 102 *Id.* at \*11.
- 103 [Cty. of Butler v. Wolf](#), No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 176307, at \*2-5 (W.D. Pa. Sept. 14, 2020).
- 104 *Id.* at \*13. The County Plaintiffs were subsequently dismissed for lack of standing. *Id.* at \*15.
- 105 *Id.* at \*15.
- 106 *Id.* at \*16, \*24-25 (citing  [Jacobson v Massachusetts](#), 197 U.S. 11, 31 (1905)).
- 107 *Id.* at \*16-21.
- 108 *Id.* at \*26.
- 109 [Cty. of Butler](#), No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 176307, at \*30.
- 110 *Id.* at \*30-31.
- 111 *Id.* at \*32-33.

- 112 *Id.* at \*42-44.
- 113 *Id.* at \*44-46.
- 114 *Id.* at \*45-46.
- 115 *City of Butler*, No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 176307, at \*45.
- 116 *Id.* at \*46.
- 117 *Id.* at \*47-48.
- 118 *Id.* at \*47-49.
- 119 *Id.* at \*60-66.
- 120 *Id.* at \*67 (quoting  [Lutz v. City of York](#), 899 F.2d 255, 268 (3d Cir. 1990)).
- 121 *City of Butler*, No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 176307, at \*68-69.
- 122 *Id.* at \*72-73.
- 123 *Id.* at \*71-72.
- 124 *Id.* at \*73-75.
- 125 *Id.* at \*77.
- 126 *Id.* at \*80.
- 127 *City of Butler*, No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 176307, at \*83-84.
- 128 *Id.* at \*87.
- 129 *Id.* at \*88.
- 130 *Id.* at \*89.
- 131 *Id.* at \*90 (emphasis added).
- 132 *Id.* at \*90-91.
- 133 *City of Butler*, No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 176307, at \*91.
- 134 *Id.* at \*99.
- 135 *Id.* at \*93, \*97.
- 136 *Id.* at \*98-99.
- 137 *Id.* at \*32 n.13.
- 138  [Friends of Danny DeVito v. Wolf](#), 227 A.3d 872 (Pa. 2020).
- 139  *Id.* at 903-05 (Saylor, C.J., concurring and dissenting).
- 140  *Id.* at 886 (majority opinion) (quoting [Pa. Rest. & Lodging Ass'n v. City of Pittsburgh](#), 211 A.3d 810, 817 (Pa. 2019)).

- 141 *Id.* at 886-87 (quoting [Nat'l Wood Preservers, Inc. v. Dep't of Env'tl Resources](#), 414 A.2d 37, 42-43 (Pa. 1980)).
- 142 *Id.* at 887 (quoting [35 PA. CONS. STAT. § 7102](#) (2020)).
- 143 *Id.* at 888; see [Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals](#), 814 A.2d 180, 184 (Pa. 2002), where the court noted:  
General words shall be construed to take their meanings and be restricted by preceding particular words. [1 Pa.C.S. § 1903\(b\)](#). This concept is known as the statutory construction doctrine of ejusdem generis. As we further discussed in [McClellan v. Health Maintenance Organization of Pennsylvania](#), 546 Pa. 463, 686 A.2d 801, 806 (Pa. 1996): Under our statutory construction doctrine ejusdem generis (“of the same kind or class”), where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. [Steele v. Statesman Insurance Co.](#), 530 Pa. 190, 607 A.2d 742 (1992); [Summit House Condominium v. Commonwealth](#), 514 Pa. 221, 523 A.2d 333 (1987).
- 144 [Friends of Danny DeVito](#), 227 A.3d at 888.
- 145 *Id.* at 888-89.
- 146 *Id.* at 889.
- 147 *Id.*
- 148 *Id.*
- 149 *Id.* at 885 (quoting [35 PA. CONS. STAT. § 7103\(1\), \(4\)](#)).
- 150 [Friends of Danny DeVito](#), 227 A.3d at 889.
- 151 *Id.*
- 152 *Id.* at 890.
- 153 *Id.* (quoting [§ 7301\(f\)\(5\)](#)).
- 154 *Id.*
- 155 *Id.*
- 156 [Friends of Danny DeVito](#), 227 A.3d at 891.
- 157 See e.g., [Baker v. Carr](#), 369 U.S. 186, 210 (1962) (political question doctrine).
- 158 [Friends of Danny DeVito](#), 227 A.3d at 891.
- 159 *Id.* at 892.
- 160 [35 PA. CONS. STAT. § 7102](#) (2020).
- 161 *Id.*
- 162 “‘*Man-made disaster*.’--Any industrial, nuclear or transportation accident, explosion, conflagration, power failure, natural resource shortage or other condition, except enemy action, resulting from man-made causes, such as oil spills and other injurious environmental contamination, which threatens or causes substantial damage to property, human

suffering, hardship or loss of life.” *Id.* “‘War-caused disaster.’--Any condition following an attack upon the United States resulting in substantial damage to property or injury to persons in the United States caused by use of bombs, missiles, shellfire, nuclear, radiological, chemical or biological means, or other weapons or overt paramilitary actions, or other conditions such as sabotage.” *Id.*

163 *Id.*

164 *See* 1 PA. CONS. STAT. §§ 1903(a), 1921(b) (2020).

165 *Commonwealth v. Gilmour Mfg. Co.*, 822 A.2d 676, 679 (Pa. 2003) (citing *Bowser v. Blom*, 807 A.2d 830, 835 (Pa. 2002) (citations omitted).

166 § 1903.

167 “The Department of Health shall have the power, and its duty shall be:  
(a) To protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease ....” 71 PA. CONS. STAT. § 532 (2020); “(a) It shall be the duty of the Department of Health to protect the health of the people of the State, and to determine and employ the most efficient and practical means for the prevention and suppression of disease.” § 1403.


168 35 PA. CONS. STAT. § 521.5 (2020).

169 28 PA. CODE § 27.60 (emphasis added).

170 *See id.* § 27.61 (authorizing the isolation “of a person or animal that is suspected of harboring an infectious agent”); *see also* § 27.65 (“If the disease is one which the Department, or a local health authority which is also an LMRO, determines to require the quarantine of contacts in addition to isolation of the case, the Department or local health officer of the LMRO shall determine which contacts shall be quarantined, specify the place to which they shall be quarantined, and issue appropriate instructions.”).

171 “(b) Statutes in pari materia shall be construed together, if possible, as one statute.” 1 PA. CONS. STAT. § 1932(b) (2020).

172 “Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.” *Id.* § 1933.

173  *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 889 (Pa. 2020).













174 *Id.*

175 “The comments or report of the commission, committee, association or other entity which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly, but the text of the statute shall control in the event of conflict between its text and such comments or report.” § 1939 (2020).

176 *See* 35 PA. CONS. STAT. § 7102 (originally enacted as Act 1978-323 (S.B. 1104), P.L. 1332, § 1, approved Nov. 26, 1978, eff. immediately; Act 1996 Special Session-2 (H.B. 4), P.L. 1762, § 1, approved May 31, 1996, eff. immediately; Act 2004-73 (S.B. 922), P.L. 689, § 1, approved July 13, 2004, eff. in 60 days; Act 2014-203 (H.B. 2377), § 1, approved Oct. 31, 2014, eff. in 60 days.) A review of the Senate Journal for comments cross-referenced with the above did not reveal any further guidance. *See* H. 161-82, Reg. Sess., at 853 (Pa. September 26, 1977); H. 161-69, Reg. Sess., at 894 (Pa. Oct 4, 1977); H. 162-12, Reg. Sess., at 182 (Pa. Mar. 6, 1978). Subsequent amendments did not relate to the present section.

177  *Friends of Danny DeVito*, 227 A.3d at 885 n. 9.

- 178  *Id.* at 892.
- 179 [Markham v. Wolf](#), 190 A.3d 1175 (Pa. 2018).
- 180 Brief for Petitioner at 37,  [Friends of Danny DeVito](#), 227 A.3d 872 (No. 68 MM 2020).
- 181 [Markham](#), 190 A.3d at 1183.
- 182  [Friends of Danny DeVito](#), 227 A.3d at 892-93.
- 183  *Id.* at 892 (citing  35 PA. CONS. STAT. § 7301(a), (f)(7))
- 184  *Id.* at 893.
- 185 *See, e.g.*,  [Gundy v. United States](#), 139 S.Ct. 2116, 2119 (2019);  [J.W. Hampton, Jr. & Co. v. United States](#), 276 U.S. 394, 409 (1929).
- 186  [Appeal of White](#), 134 A. 409 (Pa. 1926).
- 187  [Balent v. City of Wilkes-Barre](#), 669 A.2d 309 (Pa. 1995).
- 188  [DeVito](#), 227 A.3d at 894.
- 189  *Id.* at 895-96 (citing to  [Lucas v. S.C. Coastal Council](#), 505 U.S. 1003, 1016 (1992)).
- 190  [Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency](#), 535 U.S. 302 (2002).
- 191 [Nat'l Amusements Inc. v. Borough of Palmyra](#), 716 F.3d 57 (3d Cir. 2013).
- 192  [DeVito](#), 227 A.3d at 895 (citations omitted).
- 193  *Id.* at 895-96.
- 194  *Id.* at 904 (Saylor, C.J., concurring and dissenting).
- 195 Todd C. Frankel and Tony Romm, *Historical Financial Decline Hits Doctors, Dentists and Hospitals-Despite Covid-19--Threatening Overall Economy*, WASHINGTON POST (May 4, 2020), <https://www.washingtonpost.com/business/2020/05/04/financial-distress-among-doctors-hospitals-despite-covid-19-weighs-heavily-economy>.
- 196 *See, e.g.*,  [Mathews v. Eldridge](#), 424 U.S. 319, 332-35 (1976).
- 197 *See, e.g.*,  [County of Sacramento v. Lewis](#), 523 US. 833, 846-47 (1998) (holding that state conduct that shocks the conscience and violates decencies of civilized conduct violates substantive due process);  [Deshaney v. Winnebago Cty. Dep't of Soc. Servs.](#), 489 U.S. 189, 200 (1989) (holding that substantive due process triggered by state action, not private action, when subject is deprived of liberty and relies upon state for basic human needs);  [Youngberg v. Romeo](#), 457 U.S. 307, 316 (1982) (holding that profoundly mentally challenged individual in involuntary state custody possesses substantive due process right to “safety, freedom of movement and training ... to ensure safety and freedom from undue restraint”).
- 198  [Friends of Danny DeVito](#), 227 A.3d at 896 n. 16.

- 199  *Id.* at 896-97.
- 200  *Mathews*, 424 U.S. at 335.
- 201  *DeVito*, 227 A.3d at 897.
- 202  *Id.* at 897.
- 203 *Id.*
- 204 *Id.* at 898.
- 205 *Id.* at 900 n. 18 (noting the “lack of transparency” with the waiver process); *id.* at 904 (Saylor, C.J. concurring and dissenting) (“[G]reater account must be given to the specific nature of the exercise, and that arbitrariness cannot be tolerated, particularly when the livelihoods of citizens are being impaired to the degree presently asserted.”).
- 206 Laura Benshoff and Ryan Briggs, *Just Insanity: Closed Pa. Businesses Cry Foul as Competitors Snag Waivers to Open*, WHY Y (Apr. 2, 2020), <https://why.org/articles/just-insanity-closed-pa-businesses-cry-foul-as-competitors-snap-waivers-to-reopen/>.
- 207 *Id.*
- 208 Civil Rights Petition at 19, [Civil Rights Defense Firm, P.C. v. Wolf](#), 226 A.3d 569 (Pa. 2020) (No. 63 MM 2020).
- 209 Petition for Writ of Certiorari at 26,  *Friends of Danny DeVito*, 227 A.3d 872 (No. 68 MM 2020).
- 210 *Id.* at 22.
- 211  *Friends of Danny DeVito*, 227 A.3d at 898.
- 212  *Id.* at 899 (emphasis added).
- 213 *Id.*
- 214 *Id.* at 900.
- 215 *Id.* at 899.
- 216 *Id.* at 900 (citing PA. CONST. art. V, § 9).
- 217  *Friends of Danny DeVito*, 227 A.3d at 901.
- 218 *Id.*
- 219 Governor Tom Wolf, *Life Sustaining Businesses Frequently Asked Questions*, OFFICE OF GOVERNOR TOM WOLF, <https://www.scribd.com/document/452553495/UPDATED-5-15-PM-April-10-2020-Life-Sustaining-Business-FAQs> (last updated May 28, 2020).
- 220 See  *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam) (noting the possibility of reinstating COVID-related restrictions that had been relaxed supports injunctive relief regardless of technical mootness).
- 221 See, e.g.,  *Brown v. Entm't Mechs. Ass'n*, 564 U.S. 786, 805 (2011);  *Nordlinger v. Hahn*, 505 U.S. 1, 35 (1992) (Stevens, J., dissenting);  *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974).



- 222  [Friends of Danny DeVito](#), 227 A.3d at 901.
- 223 *Id.*
- 224 See List of Permitted Activities, *supra* note 42.
- 225  [Roman Catholic Diocese of Brooklyn v. Cuomo](#), 141 S. Ct. 63 (2020) (per curiam).
- 226  *Id.* at 66.
- 227  *Id.* at 67.
- 228 *Id.* at 69 (Gorsuch, J. concurring).
- 229 *Id.* at 70. (Gorsuch, J. concurring).
- 230  [Friends of Danny DeVito v. Wolf](#), 227 A.3d 872, 903 (Pa. 2020).
- 231 [Cty. of Butler v. Wolf](#), No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 167544, at \*32-48 (W.D. Pa. Sept. 14, 2020).
- 232 Order at 1, [Markey v. Wolf](#), 227 A.3d 1276 (Pa. 2020) (No. 75 MM 2020).
- 233 [Cty of Butler](#), 2020 U.S. Dist. LEXIS, at \*67-69.
- 234 “The word ‘travel’ is not found in the text of the Constitution. Yet the ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.”  [Saenz v. Roe](#), 526 U.S. 489, 498 (1999).
- 235  [Shapiro v. Thompson](#), 394 U.S. 618, 629-30 (1969) (citing [The Passenger Cases](#), 48 U.S. 283, 492 (1849)).
- 236 Kara Seymour, [Pa Woman Gets \\$200 Ticket for Driving During Stay-at-Home Order](#), PATCH (Apr. 6, 2020, 2:42 PM), <https://patch.com/pennsylvania/across-pa/pa-woman-gets-200-ticket-driving-during-stay-home-order>.
- 237 See, e.g.,  [Baker v. Carr](#), 369 US 186, 210 (1962) (political question doctrine).
- 238  [Friends of Danny DeVito v. Wolf](#), 227 A.3d 872, 901 (Pa. 2020) (Saylor, C.J., concurring and dissenting).
- 239  [Roman Catholic Diocese of Brooklyn v. Cuomo](#), 141 S. Ct. 63, 71 (2020) (Gorsuch, J. concurring) (per curiam).
- 240  [Olmstead v. United States](#), 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

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