No. 19A1032

In the Supreme Court of the United States

FRIENDS OF DANNY DEVITO, ET AL.,
Applicants

v.

TOM WOLF, GOVERNOR, ET AL.,
Respondents

RESPONSE IN OPPOSITION TO APPLICATION TO STAY THE ENFORCEMENT OF GOVERNOR WOLF'S EXECUTIVE ORDER DATED MARCH 19, 2020

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Applicants are: (1) Friends of Danny DeVito, a candidate committee for Pennsylvania house of representatives; (2) Kathy Gregory, a licensed real estate agent; (3) B&J Laundry, a laundromat; (4) Blueberry Hill Public Golf Course & Lounge; and (5) Caledonia Land Company, a timber company. Respondents are Pennsylvania Governor Tom Wolf and Secretary of Health Dr. Rachel Levine. The Pennsylvania Office of Attorney General, on behalf of Respondents, respectfully files this memorandum in opposition to Applicants' application.

INTRODUCTION

This Court has recognized as fundamental, that persons and property are subject to various constraints necessary to serve the general welfare, and that a state's inherent police powers to protect that welfare are correspondingly broad. Under Pennsylvania law, the Governor is responsible for employing the most efficient and practical means for the prevention and suppression of any disease. In the context of the COVID-19 pandemic, this required delicate balancing: Close too few businesses, and COVID-19 would continue to spread uninterrupted, collapsing our health care system. Close too many businesses, and people would be unable to access life-sustaining supplies. Striking that balance is not only consistent with constitutional principles, it is necessary to their protection.

On March 19, 2020, Governor Wolf entered an Executive Order directing all non-life sustaining businesses in Pennsylvania to temporarily close their physical locations so that those locations would not serve as centers for contagion. The Supreme Court of Pennsylvania unanimously agreed that the Governor, under

Pennsylvania law, had authority to enter the Executive Order, that the Order was a lawful exercise of Pennsylvania's police power, and that the Order did not violate Applicants' constitutional rights. *Friends of Danny DeVito v. Wolf*, 68 M.M. 2020 (Pa. 2020).[1] Because of the Governor's Order enforcing social distancing, Pennsylvania slowed the spread of the virus and reduced its death toll.

Despite this, Applicants seek to upend the status quo and force Pennsylvania to prematurely reopen all business locations, regardless of public health data and contrary to the phased reopening currently underway based on that data. Such a premature precipitous action, according to experts, will cost lives.

In every conceivable respect, their application is remarkable: it is devoid of any reference to this Court's legal standards for granting relief; it is premised upon a misapprehension of this Court's criteria for granting petitions for writs of certiorari; and it reflects an indifference towards the more than 60,000 lives lost to the COVID-19 pandemic so far.

Though Applicants style their filing with this Court as an application to stay, that is not what they seek. Rather, they ask this Court to halt enforcement of

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[1] Three Justices of the Pennsylvania Supreme Court would have declined to exercise extraordinary King's Bench jurisdiction, and would have, in the alternative, allowed for the development of a factual record at the trial court level. The court, however, was unanimous in rejecting Applicants' claims on the merits. *See Concurring and Dissenting Opinion*, at 1-2 ("[S]ince the merits are now being explored, I lend my support to the majority's conclusion that the present public-health crisis may properly be regarded as a 'disaster emergency,' triggering the Governor's special powers to respond. * * * I believe judicial notice can appropriately be taken concerning the severity of the current emergency and the need for strong countermeasures").

Governor Wolf's March 19, 2020 Executive Order pending review and disposition of their petition for a writ of certiorari. Applicants thus request an injunction from this Court, a rarely granted form of relief that requires them to establish that the legal rights at issue are indisputably clear.

Applicants not only fail to satisfy this demanding standard, but they seem unaware that they bear any burden whatsoever. In their application, Applicants did not mention any decision from this Court, or any of this Court's well-established criteria for evaluating injunctions. Nor did Applicants mention the All Writs Act, 28 U.S.C. § 1651, the only source of authority for this Court to issue an injunction. These failures alone are a sufficient basis for denying the application.

Applicants' request is even more remarkable in light of their petition for a writ of certiorari. There, Applicants ask this Court to review the Pennsylvania Supreme Court's interpretation of Pennsylvania constitutional and statutory provisions, including provisions that court deemed unnecessary for its decision.

Insofar as Applicants bring claims that do arise under Federal law, though Applicants couch them as legal challenges, much of what they argue amounts to public policy disagreements as to how the Governor used his authority. The Pennsylvania Supreme Court applied well-established principles to conclude that the Governor had that authority. Applicants do not challenge the principles themselves; they merely disagree with that court's conclusions. Finally, Applicants misrepresent the nature of the Governor's Executive Order and the manner in which it has been enforced.

Applicants, none of whom are public health experts, assert that the most efficient and practical means to suppress COVID-19 is to determine which Pennsylvanians have the disease and quarantine only them; that Pennsylvania should limit the geographic scope of its shut-down to those counties in which the disease is most prevalent; and that they are beyond the reach of the pandemic because there have been no confirmed cases at their physical locations. This unscientific belief ignores that between 25% and 50% of individuals infected with the virus are asymptomatic, and that the disease has an incubation period of up to 14 days. *Majority Opinion*, at 26. As the Pennsylvania Supreme Court explained, Applicants' "argument ignores the nature of this virus and the manner in which it is transmitted. * * * [A]ny location (including [Applicants'] businesses) where two or more people can congregate is within the disaster area." *Ibid*. More fundamentally, such public policy prescriptions, as ill-founded as they are, are not legal grounds for challenging the Governor's Order. The application should be denied.

STATEMENT OF THE CASE

What began as two presumptive positive cases of COVID-19 in Pennsylvania on March 6, 2020, has grown to 49,267 cases and 2,444 deaths in Pennsylvania in less than two months.[2] Throughout the United States, there have been over one million confirmed cases of COVID-19, and 64,283 people have died from the pandemic; that's

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

more American deaths in two months than the 58,220 Americans who died over the course of two decades in the Vietnam War.[3]

Because COVID-19 spreads primarily from person-to-person, medical experts, scientists, and public health officials agree that there is only one proven method of preventing further spread of the virus: limiting person-to-person interactions through social distancing.[4] Given this consensus, the physical locations of non-life sustaining businesses present the opportunity for unnecessary gatherings, personal contact, and interactions that will transmit the virus, and with it, sickness and death. Thus, on March 19, 2020, Governor Wolf issued an Executive Order temporarily closing physical locations of non-life sustaining businesses within the Commonwealth. In addition to his inherent powers under the Pennsylvania Constitution as the Commonwealth's chief executive, the Governor's Executive Order invoked three separate state statutory grounds for his authority: the Emergency Management Services Code (Pennsylvania Emergency Code), 35 Pa.C.S. § 7101 *et seq.*; Sections 532(a) and 1404(a) of the Administrative Code, which outline the powers and

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[3] "Cases in the U.S.," Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?fbclid=IwAR2YGdSiJ1zk6mktakCLsCqjU-tEq9XsvLMK2fGG0vmHPIsAdMgl8C13cOU (last visited 5/3/20); Factsheet: America's Wars, U.S. Department of Veterans Affairs, https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf (last visited 5/2/20).

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

responsibilities of the Department of Health, 71 P.S. § 532; 71 P.S. § 1403(a); and the Disease Prevention and Control Law, 35 P.S. § 521.1 *et seq*.

Pursuant to his Executive Order, the Governor released a list identifying which businesses were considered life-sustaining and which were not. In making these classifications, the Governor relied upon: (a) the North American Industry Classification System (NAICS), which was developed by the Office of Management and Budget;[5] and (b) the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA). Further, the Governor established a waiver process whereby businesses originally categorized as non-life sustaining could be recategorized as life-sustaining.[6] Because of these efforts to enforce social distancing, Pennsylvania has slowed the spread of the virus.[7]

On March 24, 2020, Applicants filed an Emergency Application in the Pennsylvania Supreme Court pursuant to that court's King's Bench Jurisdiction, asking the Court to strike down the Executive Order in its entirety.[8] Applicants

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[5] Executive Office of the President, Office of Management and Budget's North American Industry Classification Manual, https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf (2017).

[6] As explained more fully *infra*, the Pennsylvania Supreme Court concluded that the waiver process "constitute[d] an attempt to identify businesses that may have been mis-categorized as non-life-sustaining." *Majority Opinion*, at 43.

[7] Pa Dept. of Health, COVID-19 Trajectory Animations, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Data-Animations.aspx (last visited 5/1/20).

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

argued that: (a) Governor Wolf exceeded his statutory and constitutional authority under Pennsylvania law; (b) that the Order violated the First Amendment; (c) that the Order violated the Equal Protection Clause of the Fourteenth Amendment; (d) that the Order constituted an unlawful taking; and (e) that the Order and attendant waiver process failed to comport with Due Process.

The Pennsylvania Supreme Court unanimously rejected each of Applicants' challenges. *See Majority Opinion*, at 51; *see also Concurring and Dissenting Opinion*, at 1-2 (dissenting with respect to jurisdiction, but concurring on the merits). With respect to the Governor's authority, that court held that the Emergency Code granted the Governor expansive powers to meet the needs of the Commonwealth during the COVID-19 pandemic disaster. *Majority Opinion*, at 20-24; *see also Concurring and Dissenting Opinion*, at 2.[9] Further, that court determined that the power vested in the Governor by the Pennsylvania General Assembly was "firmly grounded" in the Commonwealth's inherent police power to promote public health and safety, and that the protection of millions of Pennsylvanians from a deadly pandemic was the "sine qua non of a proper exercise of police power." *Majority Opinion*, at 20, 27-29. Regarding Applicants' remaining claims, that court held that Applicants failed to

[9] Because the court concluded that the Pennsylvania Emergency Code provided the Governor with sufficient authority for his Executive Order, that court found it unnecessary to reach the additional state statutes raised in Applicants' challenge. *See Majority Opinion*, at 20 n.10. Applicants nonetheless ask this Court to grant certiorari so that it can interpret those state-law provisions in the first instance. *See* Pet. for Writ of Cert., at 6.

"establish any basis for relief based upon their constitutional challenges." *Majority Opinion*, at 50.

The Commonwealth is in the process of a phased reopening of closed physical locations.[10] This carefully structured reopening, crafted in partnership with Carnegie Mellon University and using the Federal government's Opening Up America Guidelines, is data-driven and reliant upon quantifiable criteria for a targeted, evidence-based, regional approach.[11] Reopenings that are not structured around social distancing and public health guidance would result in a spike of cases.[12] Applicants seek to upend this carefully planned process and force the Commonwealth to prematurely hasten the reopening of all physical locations, a move that experts have declared will further hurt our state economy and cost lives.[13]

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

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

12 *Ibid*.

13 See Heidi Shierholz, "When is the right time to reopen the US economy? Our panelists' verdict," The Guardian, https://www.theguardian.com/commentisfree/2020/apr/16/when-is-the-right-time-to-reopen-the-us-economy-coronavirus-our-panelists-verdict (4/16/20); Ross Kerber, et al., "Reopening economy too early could backfire for humans and markets, investors say," Reuters, https://www.reuters.com/article/us-health-coronavirus-trump-investors-idUSKBN21B19E (3/24/20). A majority of Americans are "concerned restrictions on public activities will be lifted 'too quickly.'" Pew Research Center, https://www.people-press.org/2020/04/16/covid-19-and-the-countrys-trajectory/ (4/16/20).

ARGUMENT

I. Applicants do not attempt to establish the demanding standard necessary for this Court to upend the status quo

Applicants style their filing with this Court as an application for a stay under Supreme Court Rule 23. That filing explicitly asks this Court to halt enforcement of the Governor's March 19, 2020 Executive Order. Application, at p. 8. Applicants' labeling of their filing notwithstanding, it should be construed for what it is, a request for an injunction under Supreme Court Rule 21. *See McCarthy v. Briscoe*, 429 U.S. 1317, n.1 (1976) (Powell, J., in chambers) ("Although the application is styled 'Application for a partial stay * * *,' the applicants actually seek affirmative relief. I have therefore treated the papers as an application for an injunction pursuant to 28 U.S.C. 1651").

In *Nken v. Holder*, 556 U.S. 418, 428 (2009), this Court clarified that "[a]n injunction and a stay have typically been understood to serve different purposes." While an injunction is directed towards the conduct of a particular party and is a means by which a court prohibits some specified act, a stay, by contrast, "operates upon the judicial proceeding itself" by halting or postponing some portion of the proceeding, or by temporarily divesting a judicial order of enforceability. *Ibid.* Stated another way, a stay "simply *suspends judicial alteration* of the status quo, while injunctive relief *grants judicial intervention* that has been withheld by lower courts." *Id.* at 429 (citing *Ohio Citizens for Responsible Energy, Inc., v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia J., in chambers); *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers) ("Applicants are seeking not merely a stay of a lower

court judgment, but an injunction against the enforcement of a presumptively valid state statute."); *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers) ("By seeking an injunction, applicants request that I issue an order *altering* the legal status quo") (emphasis added, internal brackets and quotations omitted).

Here, there has been no judicial alteration of the status quo, as the Pennsylvania Supreme Court refused to countenance such an alteration. Thus, a stay is not applicable in this circumstance. It is rather Applicants who seek to alter the legal status quo through this Court's intervention, *i.e.*, an injunction.

The only source of authority for the Court to enter an injunction is the All Writs Act, 28 U.S.C. § 1651(a). *See Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2020) (Sotomayor, J., in chambers); *Turner Broadcasting System*, 507 U.S. at 1303. An injunction is appropriate only if: (1) it is "necessary or appropriate in aid of" this Court's jurisdiction; *and* (2) the legal rights at issue are "indisputably clear." *Ibid.* This Court has observed that its power to enjoin is to be used "sparingly and only in the most critical and exigent circumstances." *Ohio Citizens for Responsible Energy*, 479 U.S. at 1313; *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers); *see also* Supreme Court Rule 20.1 (issuance of an extraordinary writ under the All Writs Act "is not a matter of right, but of discretion sparingly exercised").

As noted, Applicants do not attempt to establish the above standard, as their filing does not cite the All Writs Act, the injunction standard, or any decision from

this Court. Applicants' failure in this regard is by itself a sufficient basis for denying relief. *See e.g.*, *Ohio Citizens*, 479 U.S. at 1312 ("I will not consider counsel to have asked for such extraordinary relief where, as here, he has neither specifically requested it nor addressed the particular requirements for its issuance"). Even if Applicants had referenced the correct relief, the requirements for its issuance, *and* any authority whatsoever in support of that issuance, they cannot satisfy the demanding standard for that extraordinary and rarely granted form of relief.

II. Applicants have failed to establish that their legal rights are "indisputably clear," or that there is any merit to any of their claims

As noted, to warrant an injunction from this Court after judicial intervention was withheld by the lower court, an applicant must establish that their legal rights are "indisputably clear." *Turner Broadcasting System*, 507 U.S. at 1303; *Lux*, 561 U.S. at 1307-08 (applicant could not establish that his legal rights were "indisputably clear" where courts of appeals had reached divergent results on the issue). As set forth *infra*, here the Pennsylvania Supreme Court properly rejected each aspect of Applicants' challenge to the Governor's Order based on well-established legal principles. Accordingly, there is no merit to the contentions raised in their petition for a writ of certiorari. Thus, to the extent it can be said the legal issues in this case are "indisputably clear," it is beyond peradventure that the Governor had authority under the Commonwealth's inherent police power to enter the March 19, 2020 Executive Order, and that the Order was consistent with constitutional principles.

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

It is axiomatic that the Federal government generally lacks police power, which is reserved to the states under the Tenth Amendment. *See Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 165 (1919).[14] The authority of the states when exercising their police powers is broad and, indeed, "one of the least limitable of the powers of government." *District of Columbia v. Brooke*, 214 U.S. 138, 149 (1909). The protection of the public health, safety, and welfare falls within the traditional scope of a State's police powers. *Hillsborough Cty. v. Automated Med. Laboratories, Inc.*, 471 U.S 707, 719 (1985).

The Pennsylvania Supreme Court determined that state law grants the Governor "broad emergency management powers" when responding to a "disaster," including the power to temporarily close certain businesses. *Majority Opinion*, at 17, 26. Applicants' attempt to have the Court overrule the Commonwealth's interpretation of its own laws, Pet. for Writ of Cert., at 6-8, is wholly improper. As the Pennsylvania Supreme Court addressed and resolved those issues on the basis of state law, this Court is bound by that resolution. *See Washington State Department of Licensing v. Cougar Den, Inc.*, 139 S.Ct. 1000, 1010 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 138 (2010)).

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

Regarding the Commonwealth's inherent police power under the Tenth Amendment, this Court enunciated the framework by which individual constitutional rights are balanced with a state's need to prevent the spread of disease more than a century ago in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). At issue in *Jacobson* was the constitutionality of a Massachusetts law requiring all citizens to be vaccinated for smallpox, which was enacted after an outbreak. *Jacobson*, 197 U.S. at 12. Much like Applicants in the present case, the defendant in *Jacobson* argued that "his liberty [was] invaded" by the mandatory vaccination law, which he believed was "unreasonable, arbitrary, and oppressive." *Id.* at 26.

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

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

Jacobson, 197 U.S. at 26. Legal commentators have recognized this Court's central point: "[u]nbridled individual liberty eventually clashes with the liberty interests of others, and without some legal constraints, '[r]eal liberty for all could not exist.'" Thomas Wm. Mayo, Wendi Campbell Rogaliner, and Elicia Grilley Green, "'To Shield Thee From Diseases of the World': The Past, Present, and Possible Future of

Immunization Policy," 13 J. Health & Life Sci. L. 3, 9 (Feb. 2020) (quoting *Jacobson*, 197 U.S. at 26).

In striking the proper balance, police powers can be used whenever reasonably required for the safety of the public under the circumstances. *Jacobson*, 197 U.S. at 28; *see also Lawton v. Steele*, 152 U.S. 133, 137 (1894) (a state may exercise its police power when (1) the interests of the public require government interference, and (2) the means used are reasonably necessary to accomplish that purpose). Applying these principles, *Jacobson* determined that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members" and upheld the vaccination law. *Id.* at 27.

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

Applicants maintain that the Governor has not satisfied the two-prong test established in *Lawton v. Steele*, *supra*. They are wrong. With respect to the first prong—that the interests of the public require government interference—the

Pennsylvania Supreme Court correctly determined that the health interests of the public justified the Governor's actions given the unprecedented nature of the COVID-19 pandemic. *Majority Opinion*, at 27-28. Applicants appear to acknowledge that at least some government intervention was warranted; they merely proffer a series of public policy prescriptions that differ from the actions taken by the Governor. Pet. for Writ of Cert., at 22-23, 31-33.

As to the second prong, the closure of non-essential businesses was a reasonably necessary means of protecting the public health against the spread of COVID-19. Applicants instead propose the "voluntary" practice of "social-distancing" alone, for only those demographic groups especially at risk, and in certain areas where the disease is prevalent. Pet. for Writ of Cert., at 9-11. But even assuming Applicants' proposals were reasonable, so was the Governor's response. And "[t]his Court has often said that debatable questions as to reasonableness are not for the court." *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 594-95 (1962).

As the Pennsylvania Supreme Court found, the Governor "utilized a recognized tool, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19." *Majority Opinion*, at 29. Indeed, nearly every State responded in the same way, ordering all or certain non-essential businesses to close physical locations in order to enforce social distancing.[15] *See Jacobson*, 197 U.S. at 31 (looking to other states and countries in determining that vaccination law was a

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

reasonably necessary means of protecting public health and safety). So have the courts, and for the same reason. *See e.g.*, U.S. Supreme Court closing its building to the public until further notice, https://www.supremecourt.gov/announcements/COVID-19.aspx; U.S. Supreme Court Press Release detailing how the Court will hear May arguments telephonically, https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20; Pennsylvania Supreme Court March 18, 2020 Order closing all courts to the public, http://www.pacourts.us/assets/files/page-1305/file-8634.pdf.[16]

In short, Applicants cannot show that the Governor's order was an unreasonable exercise of his police powers, much less that their construction of the law is "indisputably clear." *See Turner Broadcasting*, 507 U.S. at 1303.

B. There has been no violation of Applicants' First Amendment Rights

The Pennsylvania Supreme Court correctly concluded that "the Executive Order does not violate the First Amendment to the United States Constitution." *Majority Opinion*, at 50. While the First Amendment generally prohibits states from "abridging the freedom of speech, or of the press[,]" U.S. Const. amend. I, States may place "content neutral" time, place, and manner regulations on speech "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). "The principal inquiry in determining

[16] For a list of all emergency COVID-19 orders by the Pennsylvania Supreme Court, see http://www.pacourts.us/ujs-coronavirus-information.

content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill v. Colorado*, 530 U.S. 703, 726 (2000).

As the Pennsylvania Supreme Court correctly determined, "[t]here is no question that the containment and suppression of COVID-19 and the sickness and death it causes is a substantial governmental interest," and that the Governor's Order is content neutral because "[i]t does not regulate speech at all, let alone based on content." *Majority Opinion*, at 49-50. The Pennsylvania Supreme Court, citing to this Court, recognized that alternative avenues to communicate and assemble continue to both exist and flourish. They exist online, which in the modern age has become a quintessential forum for the exercise of First Amendment rights. *See Majority Opinion*, at 50 (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017)).[17] They also exist through means that allow for social distancing: The Governor's Order does not limit political candidates and their supporters from speaking on television and radio. Nor does it prevent any campaign from sending out direct mailings from private residences, putting up yard signs, or speaking to the press. *See e.g.*, David Murrell, "Meet Danny DeVito, the Guy Challenging Tom Wolf's

[17] Candidate Danny DeVito has a website (https://dannydevitopa.com), is active on Facebook, (https://www.facebook.com/DannyDeVitoPA) and on Twitter (@DannyDeVitoPA).

Business Shutdown Order," Philadelphia Magazine, https://www.phillymag.com/news/2020/03/26/coronavirus-business-shutdown-danny-devito/ (last visited 4/28/20).

Applicants, in their petition for writ of certiorari, misrepresent the scope of the Governor's Order and the nature of its enforcement. Specifically, Applicants assert that the Governor's Order prohibits all protests in streets and parks. And that the effect of the Governor's order is to prohibit all Pennsylvanians from exercising their right to speech and assembly anywhere in Pennsylvania. Application, at ¶ 36. The Governor's Order does no such thing. It permits protests in outdoor spaces so long as protestors maintain social distancing. And even when social distancing is not strictly adhered to, individuals are not being stopped or cited for protesting. For example, on April 20, 2020, "[l]awyer and radio host Marc Scaringi," Applicants' counsel, spoke to a rally in front of the state Capitol building protesting the Governor's Order. Steven Marroni, et al., "Protest of Gov. Wolf's coronavirus shutdown at Capitol: Recap," PennLive.com, https://www.pennlive.com/news/8d1601-protest-of-gov-wolf-s-coronavirus-shutdown-at-capitol-live-updates.html (last visited 4/28/20) (reporting on the April 20, 2020 rally). That same day, candidate Danny DeVito spoke to a similar rally in Pittsburgh. Jamie Martines, et al., "Protesters in Pittsburgh demand Gov. Wolf to reopen businesses amid coronavirus pandemic," Pittsburgh Tribune Review, https://triblive.com/local/pittsburgh-allegheny/protesters-gather-in-pittsburgh-demanding-gov-wolf-reopen-businesses-amid-coronavirus-pandemic/

(last visited 05/04/20). The protestors were not cited or stopped. Applicants' argument is belied by their counsel's own personal experience.

The Governor's Order is precisely the type of content-neutral, narrowly tailored protection of the health and safety of citizens that a State is permitted to enforce. *See Hill*, 530 U.S. at 715; *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding prohibition against sleeping in public park). Applicants' claim is without merit, and thus fails to establish entitlement to relief that is "indisputably clear."

C. There has been no violation of the Equal Protection Clause

The Pennsylvania Supreme Court correctly determined that "the Executive Order does not violate constitutional equal protection principles." *Majority Opinion*, at 48. The United States Constitution does not require state officials to treat all entities "alike where differentiation is necessary to avoid an imminent threat" to health and safety. *Jones v. N. Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies"). The Pennsylvania Supreme Court correctly concluded that Applicants were not similarly situated to the entities with which they compared themselves. For example, that court observed that "[c]ampaign offices and legislative offices are not similarly situated[,]" because when legislators use their district offices, they do so as government officials, not as candidates. In fact, it is illegal under Pennsylvania law for public officials to use their district offices for campaign

purposes. *Majority Opinion*, at 47. While some state representatives' offices remain open, albeit without visitations, this is so they can serve the public during this pandemic and vote remotely on legislation. Likewise, the "DeVito Committee is not similarly situated to social advocacy groups[,]" because, unlike the latter, the committee does not "advocate for vulnerable individuals during this time of disaster." *Ibid*.

Rather than present a meaningful challenge to the Pennsylvania Supreme Court's analysis, Applicants, in their petition for writ of certiorari, attack the life-sustaining and non-life-sustaining classification as arbitrary and incapable of being understood. It is neither. The Governor's list of life-sustaining businesses is divided among industries using the North American Industry Classification System (NAICS), which is well understood by businesses. These codes and classifications were developed under the auspices of the Office of Management and Budget and are utilized by the U.S. Census Bureau to group similarly situated organizations and entities together for classification purposes. *See* U.S. Census Bureau, North American Industry Classification System, https://www.census.gov/eos/www/naics/ (last visited 5/2/20). By using this highly regarded and ubiquitous classification system, the Governor ensured that similarly situated entities *would* be treated the same. As demonstrated by this action, Applicants certainly understand upon which side of this divide they fall.

Applicants' argument is nothing more than a public policy disagreement with the Governor's determination as to which physical locations would remain open and

which would be temporarily closed. Applicants essentially argue that if they had been empowered by law to make these life and death decisions, they would have responded to this global crisis differently. *See e.g.*, Pet. for Writ of Cert., at 31-33. Applicants made the same arguments to the Pennsylvania Supreme Court detailing in their view why golf courses should have been deemed essential. *See Majority Opinion*, at 50. But it is not their decision.

Nor is this difficult public policy determination for the courts. The Pennsylvania Supreme Court correctly recognized, "[i]t is not for this Court, but rather for the Governor pursuant to the powers conferred upon him by the Emergency Code, to make determinations as to what businesses, or types of businesses, are properly placed in either category." *Majority Opinion*, at 50. Likewise, "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy. * * * [I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 27 (1989) (internal quotation marks and citations omitted). *See also*, *Whitmore v. Arkansas*, 495 U.S. 149, 161 (1990) ("It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case").

Here, during an unprecedented and rapidly evolving global health disaster, deference to the public policy decisions of the Commonwealth is most appropriate. The Governor's Order balances the economic interests of the Commonwealth against

the health and lives of 12.8 million Pennsylvanians. Temporarily closing certain physical locations in order to protect lives is certainly not invidious or wholly arbitrary. The health and survival of those citizens is the most compelling of state interests, let alone a legitimate one. And the classifications and distinctions made to protect our citizenry are absolutely essential—let alone reasonably related—to achieving that most compelling of state interests. The Governor's Order does not violate the Equal Protection Clause and Applicants are entitled to no relief. In the context of seeking an injunction, Applicants certainly fail to establish entitlement to relief that is "indisputably clear."

D. There has been no "taking" of Applicants' properties under the Fifth and Fourteenth Amendments

Applicants further assert that the temporary restraint on non-essential businesses from operating at their physical locations is a taking arising out of eminent domain, entitling them to just compensation pursuant to the Fifth and Fourteenth Amendments. Pet. for Writ of Cert., at 14. It is not.

As explained above, the Governor's actions in regulating Applicants' physical locations have been made pursuant to the state's police powers—not through the power of eminent domain. As this Court stated in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n. 22 (1987):

> Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance. It is hard to imagine a different rule that would be consistent with the maxim "sic utere tuo ut alienum non laedas" (use your own property in such manner as not to

injure that of another).

Id. (internal citations omitted).

In *Miller v. Schoene,* 276 U.S. 272 (1928), this Court held that Virginia was not required to compensate the owners of cedar trees under the Takings Clause for the value of the trees that the state had ordered destroyed to prevent an agricultural disease from spreading to nearby apple orchards. In the present circumstance, the Governor seeks to protect Pennsylvania citizens from a disease that threatens not plant life, but human life. If the action taken to save trees in *Miller* did not require compensation, then certainly the Governor's Order to save lives cannot constitute a taking which requires compensation.

Here there is not even contemplation of property being damaged or destroyed. Rather, as the Pennsylvania Supreme Court correctly recognized, the Governor's Order "results in only a temporary loss of the use of the Applicants' businesses premises" in order to "protect the lives and health of millions of Pennsylvania citizens[.]" *Majority Opinion*, at 35-37 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S 302 (2002); *Manigault v. Springs*, 199 U.S. 473 (1905)). "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976).

Applicants cite *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), to challenge the Pennsylvania Supreme Court's conclusion that no taking had occurred

here. That case stands for the unremarkable proposition that government action rendering property *permanently* valueless constituted a taking. That is not the case here, where the restrictions are by their nature temporary. Indeed, after review and consideration of public health data, the Governor has recently announced the reopening of certain business locations for 24 counties beginning May 8, 2020.[18] Moreover, in *Lucas*, the Court found that there would be no taking if the state could show that the owner's use of the property would be prohibited by "principles of nuisance and property law." *Id*. at 1031-1032. And the Pennsylvania Supreme Court correctly determined that *Lucas* was distinguishable and that its holding had been limited by this Court's subsequent decision in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). *Majority Opinion*, at 35-37.

In *Tahoe-Sierra Pres. Council,* the regional planning authority restricted development around Lake Tahoe for a total of thirty-two months while it formulated a land-use plan for the area. This Court held that there was no taking because the controlling regulation was merely temporary. In doing so, this Court rejected "the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking." *Tahoe-Sierra Pres. Council*, 535 U.S. at 334. The Court further rejected finding a taking based merely on such things as "orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee. Such a rule would

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[18] "Gov. Wolf Announces Reopening of 24 Counties Beginning May 8," Pennsylvania Governor's website, https://www.governor.pa.gov/newsroom/gov-wolf-announces-reopening-of-24-counties-beginning-may-8/ (5/1/20).

undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power." *Id*. at 335. The present case falls squarely under the rubric established by this Court in *Tahoe-Sierra Pres. Council* for adjudicating takings claims.

Lucas simply does not stand for the proposition that all government action which temporarily restricts the use of property constitutes a taking. Further, *Lucas* does not overturn *Miller, Keystone Bituminous Coal*, or *Tahoe-Sierra Pres. Council,* which all provide that the use of the state's police powers to promote the health, safety, and general welfare does not constitute a taking.

Applicant's claim is legally untenable. It certainly fails the standard that their entitlement to relief be "indisputably clear."

E. The Governor's Order comports with Due Process

A procedural due process claim, such as Applicants', encompasses two inquiries: whether a life, liberty, or property interest entitled to due process protection is at stake and, if so, what procedures constitute "due process of law" in the situation at hand. Applicants' claimed interest in pursuing their respective business activities unimpeded is not absolute. *Cf. Jacobson*, 197 U.S. at 26 ("persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state"). On this record, the Pennsylvania Supreme Court accepted the proposition that "procedural due process is required even in times of emergency[.]" *Majority Opinion*, at 41. But that court went on to correctly conclude that Applicants received all of the process due.

Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert v. Homar,* 520 U.S. 924, 930 (1997). To the contrary, "due process is flexible and calls for such procedural protections as the particular situation demands. * * * [N]ot all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). "[W]here a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert*, 520 U.S. at 930.

As the Pennsylvania Supreme court rightly identified, *see Majority Opinion*, at 39-40, "the specific dictates of due process generally requires consideration of three distinct factors[.]" *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). They are "the private interest that will be affected by the official action; * * * the risk of an erroneous deprivation of such interest through the procedures used [including] the probable value, if any, of additional or substitute procedural safeguards; and * * * the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail." *Ibid.*

Applicants' unsupported assertion—essentially reiterated in their petition for a writ certiorari, *see* Pet. for Writ of Cert., at 18-22—"that they were entitled to the full panoply of procedural due process rights to challenge the Executive Order (containing the list placing them in the non-life-sustaining category) prior to its entry[,]" was correctly rejected by the Pennsylvania Supreme Court. *Majority*

Opinion, at 39-40. With the rapid spread of COVID-19, there was an "urgent need to act quickly to protect the citizens of the Commonwealth from sickness and death[.]" *Ibid.* Applicants—"and every other business in the state on the non-life-sustaining list"—could not possibly be afforded pre-deprivation notice and an opportunity to be heard. *Id.* at 40. That would have delayed the entry of the Governor's Order "by weeks, months, or even years, an entirely untenable result[.]" *Ibid.*

On the issue of post-deprivation process, the Pennsylvania Supreme Court, faithful to *Mathews'* balancing approach and other precedents, "conclude[d] that the waiver process provides sufficient due process under the circumstances presented here." *Majority Opinion*, at 41. This was so, according to that court, because "'[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action. Indeed, deprivation of property to protect the public health and safety is '[o]ne of the oldest examples' of permissible summary action." *Majority Opinion*, at 42 (quoting *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300-01 (1981)).

The Pennsylvania Supreme Court pointed out that the term "waiver process" is a misnomer, as it was not intended "to provide waivers to businesses that are not life-sustaining, but rather constitute[d] an attempt to identify businesses that may have been mis-categorized as non-life-sustaining." *Majority Opinion*, at 43. That court explained that this is "an entirely proper focus of procedural due process" which, after all, "is geared toward protecting individuals from the *mistaken* deprivation of

life, liberty, or property." *Ibid.* (emphasis in original) (citing *Carey v. Piphus*, 435 U.S. 247, 259-260 (1978)).

Applicants' continuing focus on the alleged unfairness and arbitrariness of the waiver process, *see* Pet. for Writ of Cert.*,* at 26-29, is both wrong and beside the point. It is wrong because, as discussed above, the Governor's determinations as to which physical locations must close in order to protect lives was based on well-established and clear NAICS classifications. *Supra,* at p. 20; *Majority Opinion*, at 7-8. It is beside the point because Applicants merely disagree as a matter of public policy with the Governor's classification of them as non-life sustaining.

As part of its *Mathews* analysis, the Pennsylvania Supreme Court also emphasized that any loss of Applicants' property rights is temporary.[19] *Majority Opinion*, at 44. Accordingly, the risk that the available waiver process may result in an erroneous deprivation cannot "outweigh the value of additional or substitute safeguards." This follows because more elaborate procedures cannot possibly be "provided within a realistic timeframe." *Ibid.* To do what Applicants claim is required "would overwhelm an entire department of government otherwise involved in disaster mitigation." *Ibid.*

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[19] Applicants seize upon Chief Justice Saylor's observation in his Concurrence and Dissent that "[w]hile the majority repeatedly stresses that such closure is temporary * * * this may in fact not be so for businesses that are unable to endure the associated revenue losses." *Concurring and Dissenting Opinion*, at 2. Applicants strip this comment from all meaningful context. The Concurrence and Dissent voiced concern about the lack of a record in this instance. *Id.* at 3-4. Nothing in the existing record establishes the specific long-term effects on any business, much less Applicants' businesses.

Applicants respond to this in two ways: first by discounting the danger that prompted the Governor's Order; and second by trying to explain away the temporal urgency that the danger created. Applicants characterize the death of more than 60,000 of their fellow citizens as "staggeringly low," Pet. for Writ of Cert., at 12, demonstrating a callous disregard for the dangers of this virus and the lives it has taken. [20] And Applicants seek to explain away the exigency this danger created, not through legal analysis, but—again—by raising policy concerns. For example, they suggest the Governor should have met with industry leaders before issuing his Executive Order and implemented that order differently. Pet. for Writ of Cert., at 22-23. This, however, is not a legal challenge, but a public policy critique that ignores the rapid, ever-evolving nature of the present crisis, which in turn necessitated a rapid, ever-evolving response. Whatever the merits of Applicants' policy critiques, they are not a subject for the courts, and are certainly not a basis for this Court's review.

Applicants next complain that those administering the waiver process, which even Applicants note has benefitted thousands of Pennsylvanians, have stopped taking new waiver applications. Application, at ¶ 5. This is misguided. By design, the waiver process will no longer be necessary as restrictions on businesses are eased and currently-closed locations are allowed to reopen. A measured reopening phase is

[20] Applicant's comparison of COVID-19 to seasonal influenza is telling. According to Applicants, over a 7-month period, between 24,000 and 60,000 Americans died from influenza in 2019-2020. In just two months, more than 60,000 Americans have died from COVID-19, with that number rising daily.

already under way as of this writing.[21] Continuing to accept waiver applications is therefore unnecessary.

Finally, the absence of further appeal from a waiver denial does not render the waiver process constitutionally deficient. Federal and state statutes contemplate judicial review of certain governmental determinations under certain circumstances. *See, e.g.,* 5 U.S.C. § 702; 2 Pa.C.S. §§ 702, 704. Conceptually, such review is an element of the "due process" available in those contexts. But Applicants' implicit assumption that *every* decision or order by a government official *must* be judicially reviewable is fanciful. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). Even criminal defendants, who are obviously entitled to due process when prosecuted, do not have an absolute right, under the Constitution, to appeal. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751 (1983).

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[21] For example, on April 27, 2020, Governor Wolf announced that some restrictions on businesses related to certain outdoor activities would be lifted as of May 1, 2020. Among them are restrictions on golf courses – including, presumably, Applicant Blueberry Hill – which are among the businesses being permitted to reopen. *See* "Governor Announces May 1 Statewide Reopening of Limited Outdoor Recreational Activities to Help Pennsylvanians Maintain Positive Physical, Mental Health," Governor of Pennsylvania's website, https://www.governor.pa.gov/?p=2846231 (4/27/20). The Governor also recently reopened certain business locations for 24 counties beginning May 8, 2020. "Gov. Wolf Announces Reopening of 24 Counties Beginning May 8," Pennsylvania Governor's website, https://www.governor.pa.gov/newsroom/gov-wolf-announces-reopening-of-24-counties-beginning-may-8/ (5/1/20).

Here, as the Pennsylvania Supreme Court explained, decisions issued by the Governor and Secretary are not administrative adjudications of a state agency that would be appealable to the courts "by law" in accordance with Pa. Const. art. V, § 9. *Majority Opinion*, at 45-46. Moreover, "the summary procedure of a review of an application for a waiver meets the exigency of this disaster—social distancing." *Majority Opinion*, at 44. What Applicants envision would require "in person testimonials, cross-examination and oral argument," which in turn would require "massive numbers of staff * * * (who would be working from home)" and "troves of telecommunication devices * * * to accomplish it." *Id.* at 44-45. "The near impossibility of such procedures contrasted with the temporary deprivation at issue here drives the conclusion that the waiver process * * * provides an adequate opportunity for [Applicants] to make their case for reclassification." *Id.* at 45.

Accordingly, "[u]nder the circumstances of an ongoing disaster emergency, a full evidentiary proceeding is not a viable post-deprivation procedural process." *Ibid.* None of the authorities Applicants rely on, *see* Pet. for Writ of Cert., at 29-30, undercut the conclusion of the Pennsylvania Supreme Court on this issue. Applicants' claim fails utterly and, thus, it cannot be said that their entitlement to relief is "indisputably clear."

III. Applicants fail to establish that an injunction is necessary in aid of this Court's jurisdiction

Applicants' claims are far from "indisputably clear." Nevertheless, even assuming that they were, Applicants would still not be entitled to an injunction from this Court. To establish entitlement to an injunction, Applicants must show that it is

necessary in aid of this Court's jurisdiction, *i.e.*, that continued implementation of the Governor's Order would prevent this Court's exercise of its appellate jurisdiction to decide the merits of Applicants' appeal. *Turner Broadcasting*, 507 U.S. at 1302. As with the requirement that claims be indisputably clear, Applicants make no attempt to meet this requirement either.

Instead, Applicants simply assert, without basis, irreparable harm. Application, at ¶ 9. [22] As this Court stated in *Hobby Lobby*:

> [W]hile the applicants allege they will face irreparable harm * * * they cannot show that an injunction is necessary or appropriate to aid our jurisdiction. Even without an injunction pending appeal, the applicants may continue their challenge to the regulations in the lower courts. Following a final judgment, they may, if necessary, file a petition for a writ of certiorari in this Court.

Hobby Lobby Stores, 568 U.S. at 1404. Here, continued enforcement of the March 19, 2020 Executive Order would not deprive this Court of jurisdiction over Applicants' petition for a writ of certiorari. Further, as in *Hobby Lobby*, Applicants may continue their challenge to the Executive Order in the lower courts. Indeed, three of the Applicants are currently litigating a parallel challenge in a Pennsylvania trial court involving a nearly verbatim complaint as the case *sub judice See Sean Logue v. Wolf*,

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[22] Even if irreparable harm were the appropriate standard in this instance, and it is not, Exhibit A to Applicants' application, which purports to describe the irreparable harm suffered by them, is not competent evidence of that harm. Applicants' self-serving "statement," was neither properly executed, dated, sworn to under penalty of perjury, nor presented to the Pennsylvania Supreme Court. *See* Application, at Exhibit A ("Statement of Petitioner"). As such, the "statement" should be disregarded.

231 M.D. 2020 (Pa. Cmwlth.). Again, on this basis alone, Applicants' application should be denied.[23]

IV. Applicants' petition for a writ of certiorari presents an exceedingly flawed vehicle for this Court's review

Applicants' failure to satisfy any aspect of this Court's injunction standard is a sufficient basis for denying their application. Because Applicants filed their petition for a writ of certiorari simultaneously with their application, it is apparent that this case would be an exceptionally poor vehicle for this Court's review.

As noted *supra*, Applicants ask this Court to review the Pennsylvania Supreme Court's interpretation of Pennsylvania's Emergency Code, as well as state statutes the court determined were unnecessary to its disposition. *See* Pet. for Writ of Cert. 6-7; *see also Majority Opinion*, at 20 n.10. It is well-established, however, that this Court is bound by a state supreme court's interpretation of state law, *see Washington State Department of Licensing*, 139 S.Ct. at 1010 (citing *Johnson*, 559 U.S. at 138), and that this Court will not review a claim rejected by a state court if it rested upon

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[23] Even if their application could reasonably be considered a stay request, and it cannot, Applicants would be unable to satisfy the "heavy burden" for issuance of a stay. *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers). When considering a stay request, a Circuit Justice considers, *inter alia*, whether there is a "a fair prospect that a majority of the Court will conclude that the decision below was erroneous," and "whether there is reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (citations and internal quotations omitted). As already explained, because the Pennsylvania Supreme Court decided Applicants' challenges based on well-established principles of law, there is not a reasonable prospect that this Court would conclude that it was erroneous. Further, as discussed *infra*, Applicants' petition for writ of certiorari presents an exceedingly poor vehicle for review by this Court, so there is not a reasonable probability that four Justices would vote to grant it.

adequate and independent state law grounds, *see Walker v. Martin*, 562 U.S. 307, 315 (2011). Further, Applicants expressly ask this Court to review the Pennsylvania Supreme Court's findings of fact. *See* Pet. for Writ of Cert., 14 n. 17. This Court, however, is not a court of error-correction. *Halbert v. Michigan*, 545 U.S. 605, 611 (2005). Even if it were, that task would be complicated by the fact that Applicants initiated an original action in the Pennsylvania Supreme Court, and thus seek review of a decision reached without a fully developed record.

When Applicants finally address issues that arise under Federal law, their arguments fall into three broad categories. The first stems from disagreements on public policy over how the Governor struck the proper balance between economic interests and saving lives. The second stems from disagreements over how the Pennsylvania Supreme Court applied well-established principles. Applicants do not challenge the principles themselves, but rather disagree with the conclusions reached in their application here. The third stems from Applicants' misrepresentations about the nature of the Governor's order and the manner in which it has been enforced. None of these types of arguments provide a basis for this Court's review.

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It is axiomatic that the Federal government generally lacks police power, which is reserved to the States. It is equally well-established that those powers are at their broadest in the States' efforts to protect the lives of their citizens. Exercising those powers is the most fundamental of public policies. The Court has been loath to enter into such matters. It should not do so here.

CONCLUSION

For these reasons, the Court should deny the application.

Respectfully submitted,

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