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

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

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

partnership with Carnegie Mellon University and using the Federal government's Opening Up America Guidelines, is data-driven and reliant upon quantifiable criteria for a targeted, evidence-based, regional approach.[6] However, while the actions of the Governor and the Secretary have ameliorated the exponential rise of COVID-19 cases in Pennsylvania, the pandemic continues to infect hundreds of Pennsylvanians every day.[7] Indeed, case counts are increasing in several counties, including Butler and Washington. Because the COVID-19 disaster has not yet ended, on June 3, 2020, the Governor renewed the Proclamation of Disaster Emergency.[8]

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

STATEMENT OF FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

QUESTIONS PRESENTED

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

Suggested Answer: Yes

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

Suggested Answer: Yes

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

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

Suggested Answer: Yes

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

Suggested Answer: Yes

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

Suggested Answer: Yes

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

Suggested Answer: Yes

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The authority of the states when exercising their police powers is broad and, indeed, "one of the least limitable of the powers of government." *District of*

Columbia v. Brooke, 214 U.S. 138, 149 (1909). The protection of the public health, safety, and welfare falls within the traditional scope of a State's police powers. *Hillsborough Cty. v. Automated Med. Laboratories, Inc.*, 471 U.S 707, 719 (1985).

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

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

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

outbreak. *Jacobson*, 197 U.S. at 12. Much like Plaintiffs in the present case, the defendant in *Jacobson* argued that "his liberty [was] invaded" by the mandatory vaccination law, which he believed was "unreasonable, arbitrary, and oppressive." *Id.* at 26.

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

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

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

In striking the proper balance, police powers can be used whenever reasonably required for the safety of the public under the circumstances. *Jacobson*, 197 U.S. at 28; *see also Lawton v. Steele*, 152 U.S. 133, 137 (1894) (a state may exercise its police power when (1) the interests of the public require government interference, and (2) the means used are reasonably necessary to accomplish that purpose).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

While the First Amendment generally prohibits states from "abridging the freedom of speech, or of the press[,]" U.S. Const. amend. I, States may place "content-neutral" time, place, and manner regulations on speech "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though

it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill v. Colorado*, 530 U.S. 703, 726 (2000).

The *Benner* Court analyzed a similar First Amendment claim and rejected it. That Court stated "[p]rotecting lives is among the most substantial of government interests, and we see no indication whatsoever that the Orders are content-based. They apply equally to all citizens of Pennsylvania and to a great number of non-life sustaining businesses, regardless of message." *Benner,* Doc. 15 at 19. The Court went on to determine that alternative avenues are available to Plaintiffs noting,

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

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

CONCLUSION

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

Respectfully submitted,

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