

No. 19A1032

IN THE SUPREME COURT OF THE UNITED STATES

FRIENDS OF DANNY DEVITO, KATHY GREGORY, B&J
LAUNDRY, LLC, BLUEBERRY HILL PUBLIC GOLF
COURSE & LOUNGE, and CALEDONIA LAND COMPANY,
Petitioners

v.

TOM WOLF, GOVERNOR AND RACHEL LEVINE,
SECRETARY OF PA. DEPARTMENT OF HEALTH,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

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

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1. Introduction & Procedural History in this Court

Petitioners hereby seek a stay and/or injunction of the Executive Order dated March 19, 2020 issued by The Honorable Thomas Wolf, Governor of the Commonwealth of Pennsylvania (hereinafter the “Governor”).

On April 27, 2020, Petitioners submitted to this Court a PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT.

On April 27, 2020, Petitioners submitted to this Court an APPLICATION TO STAY THE ENFORCEMENT OF GOVERNOR WOLF’S EXECUTIVE ORDER DATED MARCH 19, 2020 PENDING THE FILING AND DISPOSITION BY THE UNITED STATES SUPREME COURT OF PETITIONERS’ PETITION FOR WRIT OF CERTIORARI.

On May 4, 2020, Respondents submitted to this Court a RESPONSE IN OPPOSITION TO APPLICATION TO STAY THE ENFORCEMENT OF GOVERNOR WOLF’S EXECUTIVE ORDER DATED MARCH 19, 2020

On May 4, 2020, Petitioners submitted to this Court a SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION TO STAY THE ENFORCEMENT OF GOVERNOR WOLF’S EXECUTIVE ORDER DATED MARCH 19, 2020 PENDING THE FILING AND DISPOSITION BY THE UNITED STATES SUPREME COURT OF PETITIONERS’ PETITION FOR WRIT OF CERTIORARI.

On May 6, 2020, Petitioners hereby submit to this Court, pursuant to Rule 15 (6) of the United States Supreme Court, the herein REPLY BRIEF TO RESPONSE

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

2. Statement of the Case

On March 6 2020, the Governor issued a proclamation declaring a disaster emergency throughout the Commonwealth of Pennsylvania.¹ On March 19, 2020, the Governor issued an Executive Order barring any person or entity from operating a place of business in Pennsylvania that is not “life-sustaining,” ordering that life sustaining businesses may remain open, but must follow, at a minimum, the social distancing practices and other mitigation measures defined by the Centers for Disease Control (CDC) (the “Executive Order”). The Executive Order contained a list classifying all industries as either life-sustaining or non-life-sustaining (the “List”). The Executive Order explained that its violation could result in citations, fines, or license suspensions, forfeiture of the ability to receive any application disaster relief; prosecutions by the Department of Health, including quarantine, isolation, or other disease control measure with violators subject to fines or imprisonment and any other criminal charges that might be applicable. Petitioners are businesses or entities included on the List as non-life-sustaining and were compelled to close the physical operations of their businesses or entities.

After issuing the Executive Order, the Governor added a “waiver” process thru which businesses and entities could submit an application to the Pennsylvania

¹ <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf>

Department of Community and Economic Development (DCED) and request that they be permitted to operate. DCED received 42,380 waiver requests. So far, DCED approved 7,837 requests for a waiver, rejected 18,746, found 14,471 did not require one for the activity they wanted to perform. The remainder are still being processed.² On Wednesday, April 1, 2020, DCED announced that it was ending the waiver process for new request on April 3, 2020 at 5:00PM.³

DCED employees review the waiver applications and grant or deny them. The Governor provided no further administrative review and denies there is any judicial review for denials. The lower court held that the Governor, and not DCED, is reviewing and deciding the waivers and that the Governor's actions are not subject to the right of judicial review guaranteed by the Pennsylvania Constitution because the Governor is not an administrative agency. This opinion results in the denial of judicial review to at least 18,746, businesses whose waivers were denied.

Petitioners filed an Emergency Application in the Pennsylvania Supreme Court asking that court to strike down the Order as beyond the Governor's statutory authority and violative of the Petitioners' Pennsylvania and U.S. Constitutional rights by *inter alia* depriving them of the use and control of their businesses without due process of law and/or just compensation, subjecting them to a List and waiver process that was arbitrary and capricious and allowed for no

² <https://www.pennlive.com/news/2020/04/gov-tom-wolf-vetoes-bill-that-could-allow-more-pa-businesses-to-reopen.html>

³ <https://www.pennlive.com/coronavirus/2020/04/pa-businesses-seeking-waiver-to-stay-open-through-coronavirus-closures-have-until-friday-to-apply.html>

judicial review and for violating their equal protection and free speech and assembly rights. The Governor countered that he has the authority under the Pennsylvania Constitution and statutes and that Petitioners' rights under the Pennsylvania and U.S. Constitution were not violated.

3. State of Questions Presented

I. Whether Applicants Did Not Attempt to Establish the Demanding Standard Necessary for this Court to Upend the Status Quo?

Respondents argue that the Application to Stay should be considered a request for injunctive relief and cite *McCarthy v. Briscoe*, 429 U.S. 1317 (1976) in support of their claim. Petitioners agree that the Application requests that this Court enjoin the enforcement of the Governor's Executive Order and that the Application should be considered a request for injunctive relief. Pursuant to *McCarthy v. Briscoe*, Justice Alito may consider this Application a request for injunctive relief, and may preside over and decide this Application:

An individual Justice of the United States Supreme Court, as Circuit Justice, will treat an application styled "Application for a partial stay of an order and judgment [of a Federal Court of Appeals]" as an application for an injunction pursuant to 28 USCS 1651 and Rules 50 and 51 of the United States Supreme Court Rules, where the applicants actually seek affirmative relief. [Per Powell, J., as Circuit Justice.]

McCarthy v. Briscoe, 429 U.S. 1317, 1317 (1976)

Pursuant to 28 USC 1651, "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and **agreeable to the usages and principles of law.**" (emphasis added). A usage and principle of law is "equitable relief." Stays and injunctions are

forms of equitable relief. In their Application, Petitioners request that this Court issue an order staying the enforcement of the Executive Order. This request can and should be interpreted as a request for an injunction.

Justice Powell, in *McCarthy v. Briscoe*, took a pleading titled, “Application for a partial stay of an order and judgment,” and considered it as an application for an injunction, agreed with the lower courts that the state law in question violated the U. S. Constitution, but unlike the lower courts, he granted the applicant’s request for relief and ordered the Governor of Texas to do what the applicant requested. Justice Powell stated, “I am authorized to say that a majority of the Court would grant the application.” *Id.* 1324. Petitioners are making the same request in their Application. Further, in *McCarthy v. Briscoe*, this Court reviewed the state law and determined it violated U.S. Const. amend. XIV. It held that the statute in question:

demonstrates an intransigent and discriminatory position and an incomprehensible policy, violative of the constitutional rights of independent presidential candidates and state voters;

Id. 1317

Likewise, in the case at bar, the Executive Order, the List and the Waiver all demonstrate an intransigent and discriminatory position and an incomprehensible policy and thus violate the constitutional rights of Petitioners. In *McCarthy*, the lower courts refused to grant the injunctive relief because they were concerned about disrupting the court’s electoral scheme and the upcoming election. Justice Powell, however, determined that the constitutional violation should not go unremedied; he reviewed and analyzed the state’s legitimate interests and in doing so

reasoned that, “a court may properly look to available evidence or to matters subject to judicial notice...” to assist in its determination. *Id.* at 1323. He then determined the remedy requested was within the public interest and ordered the relief. He did not apply any test other than considering the legitimate interest of the state and determined that the relief he was granting achieved those interests, even though the state and its governor disagreed. Petitioners here request that this Court do the same. As the Petitioner have argued in all legal papers filed with this Court, The Executive Order is not in the public interest, and in fact is causing substantial harm to the public interest, and should be enjoined and then struck down.

Respondents argue this Application should be decided according to this Court’s holding in *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401 (2012), in which this Court stated:

Accordingly, a Circuit Justice of the Supreme Court may issue an injunction only when it is necessary or appropriate in aid of the Supreme Court's jurisdiction and the legal rights at issue are indisputably clear.

Id. 1401

Even if this Court utilizes the test in *Hobby Lobby*, Petitioners satisfy the test.

First, the injunction is necessary or appropriate in aid of this Court's jurisdiction, which Petitioners have requested via the appropriate statute 28 U.S.C.S. § 1257(a), via the Petition for Writ of Certiorari. In *Hobby Lobby*, Justice Sotomayor held the applicants, although they “alleged 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.

Id. 1404.

Petitioners in the case at bar have alleged “irreparable harm,” and have presented facts in support thereof, in their Application to Stay, Supplemental Brief in Support of their Application to Stay and in their Petition for Writ of Certiorari. Petitioners’ claim for irreparable harm is of considerable merit and was even acknowledged by the three Justices in the Concurring and Dissenting Opinion in the lower court.

Unlike the application in *Hobby Lobby*, in which applicants there were requesting that a certain component of a health care regulation not apply to it under the First Amendment, Petitioners, Declarants and tens of thousands of similarly situated businesses and entities are currently suffering severe financial harm and a complete deprivation of their right to their property, which is the very property they use to generate revenues needed to provide for themselves, their families and their workers. Petitioners could very well suffer complete financial ruin and the closure of their businesses and the permanent loss of their property interests if the Executive Order is not stayed/enjoined right now. Thus, the injunction is necessary to aid this Court in its jurisdiction and its determination of the underlying constitutional claims because Petitioners may go out of business and never able to recover in the time it takes this Court to conduct a full and comprehensive review of the Petition for Writ of Certiorari.

Further, unlike the applicants in *Hobby Lobby* who had the right to continue their challenge to the regulations in the lower courts, and had not obtained a final

judgment or even filed a petition for writ of certiorari in this Court, Petitioners have exhausted their challenge to the Executive Order in the lower court, have obtained a final judgment in the lower court, requested and were denied an application to stay/enjoin the Executive Order in the lower court and have filed their Petition for Writ of Certiorari with this Court.

More particularly, Petitioners in the case at bar are precluded from continuing their challenge of the Executive Order in the lower courts. The Pennsylvania Supreme Court, which is the highest court in Pennsylvania, has denied all of Petitioners' claims in its Order dated April 13, 2020. Respondents refer to a previous Petition for Review that some, but not all, of the instant Petitioners filed in the Commonwealth Court of Pennsylvania raising the same claims and argue the instant Petitioners can go back to the Commonwealth Court and assert those claims there, and as such Justice Alito need not grant the within request because it is not necessary or appropriate in aid of this Court's review of the pending Petition for Writ of Certiorari. However, the claims Petitioners raised in the case before the Commonwealth Court, which is an inferior court to the Pennsylvania Supreme Court, are the same claims the Pennsylvania Supreme Court denied in the case at bar. Thus, Petitioners, as a matter of law, are precluded from asserting these claims in the Commonwealth Court, which is contrary to Respondents' claim.

Second, Petitioners satisfy the second prong of the test in *Hobby Lobby*, as well. The legal rights in the case at bar are, "indisputably clear." Unlike in *Hobby*

Lobby, Justice Alito is not reviewing an extremely complex, regulation implementing an equally complex and extremely lengthy and novel regulation. The Circuit Justice is reviewing a two-page Executive Order that in just a few sentences orders the shut-down of tens of thousands of Pennsylvania businesses and entities. This Executive Order is the broadest and most sweeping in the history of the Pennsylvania, if not the United States of America, and its overbreadth and unconstitutionality is obvious. Furthermore, the Executive Order is still just a state exercise of police power. And, this Court has for hundreds of years reviewed similar claims brought by persons harmed by state police power actions that deprived them of their constitutional rights and has struck them down. For more analysis see Section II A-E below.

Further, Respondents argue Petitioners failed to establish the standard for the authority of this Court to enter an injunction and states the Petitioners' Application to Stay should be denied per *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Com.*, 479 U.S. 1312 (1986). In *Ohio Citizens*, applicants requested that the Circuit Justice issue a stay of an interlocutory order of a lower court, which was by definition not a final order. Justice Scalia declined to do so because the order was non-final, stating, "it is only the execution or enforcement of final orders that is stayable under §2101(f). See *Twentieth Century Airlines, Inc. v. Ryan*, 74 S. Ct. 8, 10, 98 L. Ed. 1143, 1145 (1953) (Reed, J., in chambers)." *Id.* at 1312-13. Unlike the applicants in *Ohio Citizens*, Petitioners are requesting a stay/injunction of the enforcement of a gubernatorial Executive Order that they

litigated against to finality in the lower court, which is the highest court in Pennsylvania, not a non-final, interlocutory judicial order by a federal appellate court. Thus, *Ohio Citizens* is entirely inapt to the case at bar.

Furthermore, Justice Scalia cites the law on Circuit Justice's injunctive power:

The Circuit Justice's injunctive power is to be used “sparingly and only in the most critical and exigent circumstances,” *Fishman v. Schaffer*, 429 U.S. 1325, 1326 (1976) (MARSHALL, J., in chambers)(quoting *Williams v. Rhodes*, 89 S. Ct. 1, 2, 21 L. Ed. 2d 69, 70 (1968) (Stewart, J., in chambers)), and only where the legal rights at issue are “indisputably clear,” *Communist Party of Indiana v. Whitcomb*, 409 U.S. 1235 (1972) (REHNQUIST, J., in chambers). Moreover, the applicant must demonstrate that the injunctive relief is “necessary or appropriate in aid of [the Court's] [jurisdiction].” 28 U. S. C. § 1651(a). I will not consider counsel to have asked for such extraordinary relief where, as here, he has neither specifically requested it nor addressed the peculiar requirements for its issuance.

Id. 1313-14

Petitioners have asked for such extraordinary relief. They requested in their Application to Stay that the Governor be stayed (i.e. stopped or enjoined) from enforcing his Executive Order and claimed, provided evidence of and argued they would be “irreparably harmed,” which is a long-standing core factor in equitable and injunctive relief, if the Governor was not so stayed or enjoined.⁴ Further,

⁴ Whether this Court is considering a stay of a judicial order or proceeding, or an injunction of the enforcement of a statute, regulation or executive order, this Court is sitting in equity and applies equitable principles in deciding these cases. And the equities require the enjoining of the Executive Order pending review of the Petition for Writ of Certiorari. Circuit Justices have reviewed requests to stay judicial orders and have applied equitable principles many times. See *Rostker v. Goldberg*, 448 U.S. 1306 (1980). *Rostker* is distinguished in *Ohio Citizens*, but cited with approval in six Supreme Court opinions, including *O'Brien v. O'Laughlin*, 557 U.S. 1301 (2009); *Conkright v. Frommert*, 556 U.S. 1401 (2009); *Bellotti v. Latino Political Action Comm.*, 463 U.S. 1319 (1983); *Corsetti v. Massachusetts*, 458 U.S. 1306 (1982); *Karcher v. Daggett*, 455 U.S. 1303 (1982); *In re Roche*, 448 U.S. 1312 (1980).

Petitioners filed a Supplemental Brief in support of their Application to Stay in which they cited leading and current United States Supreme Court cases deciding injunctive relief cases and in which Petitioners presented additional evidence in the form of five statements of financial harm by the Declarants and analyzed and argued the factors involving injunctive relief and in which they requested a stay/injunction according to those injunctive relief cases, and pursuant to the All Writs Act, 28 U. S. C. § 1651(a). Herein, Petitioners present the law on Circuit Justice's injunctive power, address the requirements for its issue and argue the factors in support of this Justice granting the relief Petitioners have requested.

Lastly, the Circuit Justice can apply the law Petitioners cited and argued in their Supplemental Brief or the law Petitioners cite and argue pursuant to *Hobby Lobby* herein and the Circuit Justice should reach the same conclusion and grant the relief requested in the Application to Stay.

II. Whether Applicants Have Failed to Establish That Their Rights are Indisputably Clear or That There is Any Merit to Their Claims?

A. Whether the Executive Order is A Lawful Exercise of the Commonwealth's police power?

The Executive Order indisputably violates Petitioners' rights against unconstitutional police power actions. See Petitioners' detailed analysis of how the Executive Order fails the test in *Lawton v. Steele*, 152 U.S. 133, which is the test this Court uses to determine the constitutionality of a state police power actions, in their Petition for Writ of Certiorari pages 6-13. Also see Petitioners' Supplemental

Brief in Support of the Application to Stay in which Petitioners explain how the Governor's Plan to Reopen Pennsylvania undermines Respondents' claim that the Executive Order was reasonable, measured and necessary.

B. Whether There Has Been A Violation of the Applicants' First Amendment Rights?

The Executive Order indisputably violates Petitioners' rights to free speech and assembly guaranteed by U.S. Const. amend. I. See Petitioners' detailed analysis of how the Executive Order violates these rights in their Petition for Writ of Certiorari pages 34-37. Furthermore, in Respondents' Reply in Opposition, Respondents misrepresent the effect of the Executive Order when considered in tandem with the Stay-At-Home:

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.

Respondents' Reply in Opposition, Page 18.

Respondents do not cite any section of the Executive Order or Stay-At-Home Order that supports Respondents' incorrect interpretation of their own orders. In short, the Executive Order prohibits Petitioners, Declarants, et al from operating their businesses or entities at their physical locations. And, the Stay-At-Home Order

compels Pennsylvanians to stay at home except to participate in “lifesustaining services.”⁵ The Stay-At-Home Order states:

Individuals are permitted to engage in outdoor activities; however, gatherings of individuals outside of the home are generally prohibited except as may be required to access, support, or provide life-sustaining services as outlined above.

Id. FN 5

Further neither order declares speech or assembly to be a “life-sustaining service.” Thus, the Executive Order, in tandem with the Stay-At-Home Order, prohibits all Pennsylvania businesses and entities on the non-life-sustaining list and all Pennsylvanians from exercising their right to speech and assembly in streets and parks and in fact anywhere in Pennsylvania.

The Stay-At-Home Order states, “Enforcement of this Order will commence immediately for all counties covered under my prior Order directing ‘Individuals to Stay at Home’ first issued March 23, 2020, as amended. Enforcement of this Order will commence at 8:00 PM Wednesday, April 1, 2020, for all other counties.” *Id.* FN 5. Respondents point out that the undersigned counsel and Petitioner Danny DeVito (Friends of Danny DeVito) spoke at outdoor rallies on April 20, 2020. And, Respondents state neither person was arrested or cited for doing so. *Respondents’ Reply in Opposition*, Pages 18-19. However, just because the undersigned counsel and Petitioner Danny DeVito were not arrested or cited for attending rallies does

⁵ <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf>

not negate the meaning and effect of the orders. Pennsylvanians have been cited for violating the orders.⁶ Also, as explained in Petitioners' Supplemental Brief, the Governor's Plan to Reopen Pennsylvania will move twenty-four counties on May 8, 2020 from the red to the yellow zone.⁷ In the red zone, which will pertain to forty-three counties, all assemblies are prohibited. In the yellow zone, assemblies will be limited to no more than twenty-five persons. Thus, the rights to speech and assembly will continue to be either completely prohibited or severely restricted in certain physical locations, which include massive swaths of the geography of Pennsylvania and as such violates the U.S. Const. amend. I pursuant to *Citizens United v. FEC*, 558 U.S. 310 and *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

C. Whether There Has Been A Violation of the Equal Protection Clause?

The Executive Order indisputably violates Petitioners' rights to equal protection of the law guaranteed by the U.S. Const. amend. XIV. See Petitioners' detailed analysis of how the Executive Order violates these rights in their Petition for Writ of Certiorari pages 30-34. In Respondents' Reply in Opposition they claim:

⁶ <https://triblive.com/news/pennsylvania/state-police-have-cited-2-warned-8-for-violating-stay-at-home-order/>

<https://www.wgal.com/article/police-in-columbia-arrest-two-people-for-violating-gov-tom-wolfs-statewide-stay-at-home-order/32045856#>

<https://www.wtae.com/article/westmoreland-couple-cited-violating-pennsylvania-stay-at-home-order/32224905>

⁷ <https://www.governor.pa.gov/process-to-reopen-pennsylvania/>

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.*

Respondents’ Reply in Opposition, Page 20.

The lower court concluded that Social Advocacy Groups are dissimilar from Friends of Danny DeVito, “because Social advocacy groups advocate for vulnerable individuals during this time of disaster.” *Majority Opinion*, Page 47. So, according to the Respondents and the lower court, the advocacy of those groups is life-sustaining. However, Friends of Danny DeVito has been advocating for the vulnerable business owners and workers “during this time of disaster,” whose businesses and jobs have been destroyed by the Order. However, according to the Respondents and the lower court, Friends of Danny DeVito’s advocacy is not life-sustaining. The two groups are similar. It is glaringly apparent that the lower court and the Respondents prefer the advocacy of the Social Advocacy Groups and disfavor the advocacy of Friends of Danny DeVito, which is an impermissible reason to subject the two groups to dissimilar treatment.

Further, the Respondents did not even attempt to explain its unequal treatment of real estate agents, whom they deem to be non-life-sustaining, and accountants whom they deem to be life-sustaining.

D. Whether There Has Been A Taking of the Applicants’ Properties Under the Fifth and Fourteenth Amendments?

The Executive Order indisputably violates Petitioners’ rights not to have their property taken without just compensation as guaranteed by the U.S. Const.

amends. V, XIV. See Petitioners' detailed analysis of how the Executive Order violates these rights in their Petition for Writ of Certiorari Pages 13-17.

E. Whether the Executive Order Comports with Due Process?

The Executive Order violates Petitioners' right to due process is indisputable. Regarding Petitioners' claim that they were denied judicial review, this Court has held repeatedly that persons subject to state police power actions have the right of judicial review. See *Lawton* at 142. However, in this case the lower court held there is no right to judicial review of the Executive Order and of the denial of the waivers. Neither the lower court nor the Respondents have identified one case on point from any court, let alone this Court, that supports their claim. This Court can easily declare that the Executive Order is stricken because it denied Petitioners and all those similarly situated the right to judicial review before and/or after they were deprived of their property and those Petitioners, Declarants, et al who were denied judicial review of their waiver denials.

More particularly, regarding the right to pre-deprivation due process, this Court has repeatedly held that persons have the right to some form of pre-deprivation due process. See *Fuentes v. Shevin*, 407 U.S. 67, 69 (1972). See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), which illustrates that federal law establishes minimum due process procedural requirements below which states cannot go. Petitioners got none in this case.

More particularly, regarding the right to post-deprivation due process, this Court has repeatedly held that property owners have that right. See *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). *Hodel* is most instructive. In *Hodel*, the mine operator received much more due process than Petitioners than Petitioners did in the case at bar, including the right to notice and an abatement period if the state inspector found that its activity, “creates an immediate danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.” *Id.* 298. The owners also received the right to request temporary relief from enforcement, to which the state was required to respond within five days, and the right to judicial review of the state’s denial of temporary relief. Concerning immediate cessation orders, the owners received, “a prompt and adequate post-deprivation administrative hearing and an opportunity for judicial review.” *Id.* 268. Petitioners in the case at bar received none of these protections. During wartime, this Court upheld a federal statute imposing rent control because it provided administrative and judicial review, even emergency judicial review, for the property owners objecting to the government’s rent control determinations. *Bowles v. Willingham*, 321 U.S. 503, 516 (1944). None of the due process rights afforded the owners of the property interests in *Hodel* and *Bowles* were afforded to the Petitioners in the case at bar.

Respondents cited two cases to explain that due process is not fixed and is flexible considering the situation at hand. In support of this position, Respondents

cite this Courts decisions in *Gilbert v. Homar*, 520 U.S. 924 (1997) and *Morrissey v. Brewer*, 408 U.S. 471 (1972). However in these cases, this Court determined a state worker could be suspended without pay upon being charged with a crime, but because the worker:

could receive a **prompt post-suspension hearing**, the state had a significant interest in immediately suspending employees in high profile positions when felony charges were filed against them, **and the risk of erroneous deprivation was low where an independent third party had determined that there was probable cause to believe that the employee committed a serious crime.**

Id. *Gilbert* 926 (emphasis added).

In the case at bar, the Respondents and the lower court have denied Petitioners, Declarants, et al any post-deprivation hearing. Further, in the case at bar, the risk of erroneous deprivation is not low because the Governor has admitted to making thousands of mistake in moving over a dozen entire industries from the non-life-sustaining List to the life-sustaining List and in granting thousands of waivers which the lower court has determined to be mistakes. Also, in the case at bar, there is no independent third party that had made any determinations about the Petitioners, Declarants, et al. It is the Governor's agency, DCED, that made all decisions concerning who is on the non-life-sustaining List and who would be granted a waiver, and in deciding there would be no administrative review of the denial and no judicial review.

Respondents also cited *Morrissey v. Brewer*, 408 U.S. 471 (1972). However in this case this Court granted the relief requested by the petitioners who were paroles and held there were entitled to a pre-deprivation hearing:

Petitioners were granted relief on appeal, and the court ***held that petitioners were entitled to a hearing prior to parole revocation.*** The court reversed the decision of the lower court denying the necessity for such a hearing and remanded both cases for further adjudication.

Id. 472 (emphasis added).

Petitioners in the case at bar, were denied a pre-deprivation hearing as well.

Further, Respondents state lower court’s reasoning for denying Petitioners with pre-deprivation due process:

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.*

Respondents’ Reply in Opposition, Page 27.

The lower court cited no legal authority for the above conclusion. It simply made an observation based upon staggeringly inaccurate projections about COVID-19 and hysterical reports in the media about how COVID-19 would cause mass death. In fact, COVID-19 is a mild flu to the overwhelming majority of people who contract it; it is so mild great numbers of people do not even know they have contracted it; and it only presents risk of death to an infinitesimal number of people. Policy decisions based upon staggeringly inaccurate projections and hysteria are not rationale.

Respondents dismiss Petitioners’ claims about the arbitrariness and capriciousness of the waiver process despite overwhelming criticism of it in the media, the General Assembly, which is now subpoenaing DCED waiver records because of these claims, and even the Justices who signed the Concurring and

Dissenting Opinion in the lower court. The waiver process has even resulted in the Pennsylvania Auditor General announcing he is auditing it because of these criticisms. Respondents' response to this mass criticism:

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.

Respondents' Reply in Opposition, Page 28.

First, the Respondents have failed to prove their Executive Order saved even one life; that statement is simply an assumption made upon staggeringly inaccurate projections and reveals a gross misunderstanding about the danger of COVID-19; again, it is only potentially deadly to an infinitesimally small percentage of people. Second, Respondents purport that Petitioners' challenge to the waiver process is based upon a claim that they are confused as to which of the two classes – life-sustaining and non-life-sustaining—they are placed in. However, Petitioners claim the Governor's determination as to which industries would be placed in which of is classes, and subsequently to which businesses he would grant or deny waivers, is arbitrary and capricious. It is true that the Governor used the NAICS coding system to identify industries and thus the businesses within those industries. But it is false to state or infer that the NAICS coding system has anything to do which businesses and entities are life-sustaining and which are non-life-sustaining – two terms which do not exist in the NAICS and which the Governor made up. The NAICS

classification simply assigns code numbers to industries so that businesses know what industry they are classified in for whatever reason they may need to know.⁸

Respondents argue, “Finally, the absence of further appeal from a waiver denial does not render the waiver process constitutionally deficient.” *Respondents Response Reply in Opposition*, Page 30. In support of that legal conclusion, Respondents cite a case about at-will employment and security clearances. In *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886 (1961), this Court held that, “Due process did not require that civilian petitioner be advised of the specific grounds for her exclusion and be accorded a hearing, because government employment, in the absence of legislation, could be summarily denied.” *Id.* 887. This case involved a civilian worker who wanted the U.S. Navy to return her badge, after having it revoked because she failed a security investigation, so that she could re-enter a naval base. Petitioners are not civilian workers trying to enter government property despite having their security clearance revoked; they simply seek the legal right to re-enter and operate their private property from which they were evicted by Executive Order.

III. Whether Applicants Failed to Establish That an Injunction is Necessary to Aid This Court in the Exercise of its Jurisdiction?

In support of this conclusion, Respondents claim that Petitioners failed to show, “that continued implementation of the Governor’s Order would prevent this Court’s exercise of its appellate jurisdiction to decide the merits of Applicants’

⁸ <https://www.naics.com/what-is-a-naics-code-why-do-i-need-one/>

appeal. *Turner Broadcasting*, 507 U.S. at 1302.” *Respondents’ Reply in Opposition*, Page 32. However, the first ground the Circuit Justice listed for why he denied the injunction is because it involved an Act of Congress and an Act of Congress, “is presumptively constitutional and thus should remain in effect pending a final decision on the merits by the Supreme Court,” *Turner Broad. Sys. v. FCC*, 507 U.S. 1301, 1301 (1993). However, Respondents have not claimed that gubernatorial executive orders are presumptively constitutional; and, this Court has struck them down before even one issued as part of gubernatorial declaration of martial law. See *Sterling*. Second, Justice Rehnquist noted that in the lower court even, “the dissenting judge rejected the argument now urged by applicants.” *Id. Turner Broad. Sys.* 1302. In the case at bar the three Concurring and Dissenting Justices acknowledged the serious and significant harm caused by the Executive Order, “We recognize the serious and significant economic impact of the closure of Petitioners’ businesses.” *Majority Opinion*, Page 30. And, these justices expressed their concern about the arbitrariness of the waiver process and, of critical importance, their concern that the Majority Opinion declared there is no judicial review for a business that suffered a waiver denial. The Pennsylvania Chief Justice wrote:

I am less confident, however, in the majority’s conclusion that “summary administrative action” by the executive branch to close many businesses throughout the Commonwealth must ***evade judicial review*** as a check against arbitrariness. Majority Opinion, slip op. at 42. ***While the majority repeatedly stresses that such closure is temporary, see id., this may in fact not be so for businesses that are unable to endure the associated revenue losses. Additionally, the damage to surviving businesses may be vast.*** Significantly, moreover, the Supreme Court of the United States has admonished that the impermanent nature of a restriction “should not be given exclusive significance one way or the other” in determining whether it

is a proper exercise of police power. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 337, 122 S. Ct. 1465, 1486 (2002).

Concurring and Dissenting Opinion, Page 3. (emphasis added).

Also, petitioners in *Turner* did not plead irreparable harm like the Petitioners in the case at bar have.

IV. Whether Applicants' Petition for Writ of Cert Presents an Exceedingly Flawed Vehicle for This Court's Review?

Respondents claim that Petitioners' Petition for Writ of Certiorari presents and exceedingly flawed vehicle for this Court's review. In support of Respondents' claim, it explains how the lower court decided this case based upon an interpretation of the Pennsylvania Emergency Management Services Code and other state statutes the lower court determined where unnecessary to its disposition. And argued that:

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 adequate and independent state law grounds, *see Walker v. Martin*, 562 U.S. 307, 315 (2011).

Respondents' Reply in Opposition, Page 34

However, neither *Washington State Department of Licensing*, to which Justice Alito dissented, nor *Johnson v. United States*, 559 U.S. 133 (2010), nor *Walker v. Martin*, 562 U.S. 307 (2011) involved a claim that a state action violates the U.S. Constitution.

Respondents also state claim the lower court made findings of fact and that this Court should not correct them:

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).

Respondents' Reply in Opposition, Page 34.

First, it is not clear that the lower made any findings of fact. Second, Respondents do not say what findings of fact the lower court made. Third, the lower court stated it was not a trier of fact. Fourth, Petitioners attached several verified statements to their pleadings in the lower court and before this Court; Respondents made no attempt to deny or refute any of them. Fifth, this Court may analyze the facts in order to render its decision:

...in order to pass upon the federal question, the court may, and should, analyze the facts. Even when the case comes to the Supreme Court from a state court this duty must be performed as a necessary incident to a decision upon the **claim of denial of federal right**.

Sterling v. Constantin, 287 U.S. 378, 386 (1932).

This Court is free to analyze all of the facts. Again, Petitioners are claiming a denial of several federal Constitutional rights.

4. Conclusion

Respondents make a series of incorrect claims in their Conclusion:

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.

Respondents' Reply in Opposition, Page 34.

First, Petitioners do not merely offer a disagreement with Respondents over public policy. Petitioners argue the Executive Order is a police power action that is clearly violative of several of their federal Constitutional rights. Petitioners apply this Court's long-established test to determine whether state actions violate the U.S. Constitution; and the Executive Order clearly does. And, this Court has reviewed many state police power cases to determine whether such actions have violated the federal Constitutional rights of those subject to them. This Court has struck down state police power actions for violating those rights including gubernatorial executive orders. See *Sterling*. Second, Respondents claim that the lower court "applied well-established principles," but does not name them or explain what the lower court did with them. The lower court did characterize the Executive Order as a "long-established tool," which is surprising because an Executive Order like this has never been issued before in the history of Pennsylvania or the United States of America. Lastly, Respondents' claim that the Petitioners "misunderstand the nature of the Executive Order," is inexplicable considering the Petitioners have explained the Executive Order in detail and how it has clearly violated their Constitutional rights

Respondents also claim:

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.

Respondents' Reply in Opposition, Page 34.

This statement is equally inexplicable considering Petitioners have not claimed that the Federal Government has police power, the Federal Government's police power was never raised and is not an issue in this case. And, Respondents have not provided evidence of how the Executive Order has saved one life; whereas the Petitioners have presented proof by world-renowned scientists how the Executive Order and the Stay-At-Home Order are actually putting healthy Pennsylvanians at greater risk by weakening their immune systems, and how the serious health risk posed by COVID-19 is limited to a narrow demographical group of the infirm, elderly and those with co-morbidities.

Further, this Court clearly has the authority to provide relief from a gubernatorial Executive Order:

where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief. [citations omitted]. The Governor of the State, in this respect, is in no different position from that of other state officials. [citations omitted] Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has **exceeded** the authority conferred by the State, deprive the court of jurisdiction. [citations omitted]

Id. Sterling 393

Furthermore, this Court can review every question including state law questions raised in the court below:

The jurisdiction...of the Supreme Court upon appeal, ***extends to every question involved, whether of state or federal law***, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case.

Id. 386

No matter which test this Circuit Justice employs, the traditional test for preliminary injunctions set forth in Petitioners' Supplemental Brief or the *Hobby Lobby* test set forth herein, the conclusion is the same – this Circuit Justice should enjoin the enforcement of the Executive Order pending review and disposition of the within Petition for Writ of Certiorari lest the businesses and entities included in the Executive Order's non-life-sustaining List cease to exist due to the obvious and extremely well-documented economic devastation and continued complete deprivation of constitutional rights this Executive Order has wrought. Lastly, the Circuit Justice can reach that conclusion by finding that the Executive Order violates just one of Petitioners' rights protected by the U.S. Constitution.

Respectfully submitted,

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Date: May 6, 2020

IN THE SUPREME COURT OF THE UNITED STATES

FRIENDS OF DANNY DEVITO,	:
KATHY GREGORY,	:
B&J LAUNDRY, LLC	: No. 19A1032
BLUEBERRY HILL PUBLIC GOLF	:
COURSE & LOUNGE, and	:
CALEDONIA LAND COMPANY,	: REPLY BRIEF TO
Petitioners	: RESPONSE IN OPPOSITON
	: TO APPLICATION TO STAY
	:
v.	:
	:
TOM WOLF, GOVERNOR	:
AND RACHEL LEVINE,	:
SECRETARY OF PA.	:
DEPARTMENT OF	:
HEALTH,	:
Respondents	:

CERTIFICATE OF SERVICE

I, Deborah A. Black, Paralegal for Scaringi Law, do hereby certify that I served a true and correct copy of *Petitioners' Reply Brief to Response in Opposition to Application to Stay* in the above-captioned action, upon the following via electronic mail to:

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