

No. 19-1265 _____

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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONERS'
PETITION FOR WRIT OF CERTIORARI

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AND NOW, come the Petitioners, by and through their attorney, Marc A. Scaringi, pursuant to Rule 15 (8) of the United States Supreme Court, who respectfully file this Supplemental Brief as follows:

1. Since the filing of the Petition for Writ of Certiorari there have been other intervening matters not available at the time of the Petitioners' last filing.

THE GOVERNOR NOW ADMITS HE DOES NOT
HAVE AUTHORITY FOR THE ORDER UNDER THE "CODE"

2. On May 15, 2020, the Governor stated, "...a virus is ***not like*** other disasters..."¹

3. This statement contradicts the lower court's holding that the COVID-19 "pandemic" is a disaster as defined by the Emergency Management Services Code (the "Code") and thus the Code provides the Governor with the statutory authority for his Order. *Majority Opinion*, Page 26.

4. The Code defines "disasters" and includes a list of the kind of disasters included in that definition. However, the list does ***not*** include pandemics, epidemics, viral illnesses, or communicable diseases.

5. Thus, in order to fit COVID-19 within the definition, the lower court focused on the last clause in the definition and found COVID-19 is an "other catastrophe:"

The Emergency Code defines "disaster" as "[a] man-made disaster, natural disaster or war-caused disaster." 35 Pa.C.S. § 7102. Of relevance here, "natural disaster" is defined as follows:

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

Id. (emphasis added).

Majority Opinion, Page 21-22

The lower court misapplied the statutory interpretation canon of *ejusdem generis* in order to reach this conclusion.

¹ <https://www.abc27.com/news/a-mellow-and-yellow-message-from-governor-wolf-after-a-week-of-tensions/> at 2:35

6. In their Petition for Writ of Certiorari, Petitioners argued that the Code does *not* provide the statutory basis for the Order. Petitioners explained, “Viral illnesses, pandemics, epidemics do not appear in the definition [of “natural disasters”] and are not like the things included in that definition.” *Id.* Page 7. Petitioners explained, “Under the contextual canon of *ejusdem generis* [COVID-19] cannot be included because it is not in the same kind or class as those listed.” *Id.* Page 7. Further,

Viral illness does not appear on this list and it is not like “catastrophes” on the list. A viral illness is not of the same kind or class as a hurricane, tornado or storm. In short, COVID-19 does not explode factories, burn down buildings, flood cities, make roads impassable, wash away bridges and the like. It does not cause destruction to the physical infrastructure of Pennsylvania.

Brief in Support of Application for Emergency Relief, Page 15.

7. In its application of the statutory construction canon the lower court made two contradictory findings: (1) the disasters in the Code “lack commonalty;” and (2) their only commonality is that:

they all involve substantial damage to property, hardship, suffering or possible loss of life. In this respect, the COVID-19 pandemic is of the same general nature or class as those specifically enumerated, and thus is included, rather than excluded, as a type of “natural disaster.”

Majority Opinion, Page 24.

The list of disasters cannot both lack commonality and have commonalty.

8. The lower court ignored the obvious commonalties in the list of disasters and then claimed COVID-19 fits within the last clause of the definition because it causes “hardship, suffering or possible loss of life.” However, the last

clause does not provide another type of disaster, it merely explains what natural disasters must do in order to satisfy the definition in the Code and thus empower the Governor to act. Furthermore, everything that causes those ills cannot be a disaster under the Code. Simply because someone dies or could possibly die from something does not make that thing a natural disaster under the Code; otherwise things like the flu, heart disease, driving an automobile, swimming in pool would constitute a “natural disaster” and initiate the Governor’s power. Further, just about anything can cause “hardship,” and thus, under the lower court’s interpretation, the Governor’s power under the Code would be initiated whenever he finds “hardship.”

9. Further, the lower court ignored the fact that the commonality among the disasters listed is that they are all obvious dangers caused by the traditionally and commonly understood forces of nature: earth, fire, wind and water, and that they all, as Petitioners have argued, “cause destruction to the physical infrastructure of Pennsylvania.” *Brief in Support of Application for Emergency Relief*, Page 15.

10. Under the canons of statutory construction, the “other catastrophes” must be of the same kind or class of the disasters included in the definition.

Under the statutory construction doctrine of *eiusdem generis* (“of the same kind or class”), where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

Majority Opinion, Page 23

However, a pandemic, epidemic or viral illness is clearly ***not like*** those disasters listed in the Code.

11. The Governor now agrees. On May 15, 2020, the Governor stated, "...a virus is ***not like*** other disasters where the danger is obvious. We can all see storm clouds brewing. We can see rivers swelling. We can see trees bending in the high winds. But we can't see the virus particles in someone's breath or on a doorknob or on a light switch."² (emphasis added). The Governor is pointing out the commonality of "natural disasters" included in the Code (i.e. storm clouds brewing, rivers swelling, high winds); they are all caused by the forces of nature: earth, fire, wind and water, in the Governor's example, wind and water, and are obvious to the eye and mind of a reasonable person. Now even the Governor agrees that a viral illness is not like those disasters included in the Code and, thus, the Code does not give the Governor the authority for his Order.

THIS COURT CAN DECLARE THE LOWER COURT'S INTERPRETATION OF THE CODE IS WRONG AND CAN SUBSTITUTE ITS OWN INTERPRETATION

12. This Court has the authority to review the lower court's interpretation of a state statute. The interpretation involves a federal question; it provides legal authority for the Order which violates Petitioners' rights guaranteed by the U.S. Constitution. Also, this Court may inquire whether the lower court's decision rests upon a fair or substantial basis under state law and may conclude that it does not:

Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of the Court to inquire whether the decision of the

² <https://www.abc27.com/news/a-mellow-and-yellow-message-from-governor-wolf-after-a-week-of-tensions/> at 2:35

state court rests upon a *fair or substantial basis*. If unsubstantial, constitutional obligations may not be thus evaded. But if there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support, the Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court.

Demorest v. City Bank Farmers Tr. Co., 321 U.S. 36, 37 (1944) (emphasis added).

The lower court's interpretation of the definition of disaster in the case at bar does not rest upon a fair and substantial basis. The lower court cited to no prior case law interpreting the Code or its definition of disaster. The lower court misapplied the doctrine of statutory construction in order to try to fit a communicable disease, which is governed by a different Pennsylvania statute, the Disease Prevention and Control Law of 1955 (the "Disease Act"), into the Code.³

13. The lower court's interpretation of the Code is not supported by any case law on emergencies and diseases and actually contradicts the Disease Act; the Disease Act does not apply to businesses or those individuals not infected with a communicable disease or not likely to have been exposed to one; the Order does.

14. In *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), this Court reversed the decision of the South Carolina Supreme Court, which had held that the state regulation was a proper police power. This Court disagreed with that court's interpretation of the regulation and found there was no support for it in South Carolina law on property and nuisance:

Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that

³ 35 P.S. § 521.1

background principles of the State's law of property and nuisance already place upon land ownership.

Id. at 1029 (emphasis added).

The Governor has identified no background principles of Pennsylvania law on property and nuisance that support the Order. Petitioners explained to the lower court that Pennsylvania public health nuisance law empowers local governments to bring about the abatement of a public health nuisance found on real property when they have identified a public health nuisance on the property, and the owners refuse to abate the nuisance. However, the owners receive full due process protections prior to the government action; and those laws do not empower the Governor to bar owners from their own premises. See *Nat'l Wood Preservers v. Commonwealth Dep't of Env'tl. Res.*, 489 Pa. 221 (1980) and Petitioners' Brief in Support of Application for Emergency Relief to the Pennsylvania Supreme Court Pages 22-23 and 29-31.

Petitioners explained to the lower court:

71 Pa. Stat. Ann. § 532 (a) sets forth a broad and general power, but does not specifically empower the Secretary to close the physical operations of businesses or prohibit private property owners from accessing their physical premises. The more particular and relevant power is set forth in 71 Pa. Stat. Ann. § 532 (d):

If the owner or occupant of any premises, ***whereon any nuisance detrimental to the public health exists, fails to comply with any order of the department for the abatement or removal thereof***, to enter upon the premises, to which such order relates, and abate or remove such nuisance, as may now or hereafter be provided by law.

Brief in Support of Application for Emergency Relief to the Pennsylvania Supreme Court Page 29. (emphasis added)

The lower court simply ignored longstanding Pennsylvania case law and statutory law on public health nuisance in order to reach its conclusion.

15. Furthermore, this Court stated in a footnote in *Lucas*:

We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an ***objectively reasonable application of relevant precedents*** would exclude those beneficial uses in the circumstances in which the land is presently found.

Id. at 1032 n.18 (emphasis added).

16. In the case at bar, the lower court did not cite to any objectively reasonable application of relevant precedents; there are no precedents in support of its interpretation of the Code. Thus, this Court can reverse the lower court as to its interpretation of the Code under state law because it does not rest upon a fair and substantial basis and/or is not an objectively reasonable application of relevant precedents. Under *Demorest v. City Bank Farmers Tr. Co.*, this Court can declare the lower court's interpretation of the Code is wrong; and it can substitute its own view of what should be deemed the better interpretation (i.e. viral illnesses, such as COVID-19, are communicable diseases and are governed by the Disease Act, not the Code).⁴

**THE GOVERNOR'S REOPEN PLAN AND STAY-AT-HOME ORDER PROVIDE
FURTHER EVIDENCE THAT THE ORDER DOES NOT SATISFY THE
LAWTON V. STEELE**

17. Assuming for the sake of argument that the Code does provide the Governor with the authority for his Order, the Order exceeds the permissible scope

⁴ The lower court chose not to analyze the Disease Act or decide whether COVID-19 is or is not properly governed by the Disease Act.

of scope of his police powers under *Lawton v. Steele*, and thus violated Petitioners' rights guaranteed by the U.S. Constitution.

18. On May 1, 2020, the Governor announced the "reopening" of some counties moving them from red, meaning non-life sustaining businesses remain closed, to yellow, meaning some restrictions on work and social interaction will cease (hereinafter the "Announcement").⁵ The Announcement references the Governor's full plan to reopen Pennsylvania (hereinafter the "Plan").⁶

19. The Announcement and the Plan, when compared to the Order, reveal the Order did not satisfy the three-prong police power test of *Lawton v. Steele*, 152 U.S. 133 (1894).

a. In his Announcement, the Governor claims his reopening is based upon a "balancing [of] economic benefits and public health risks..." However, no such balancing was employed in his Order.⁷ A review of the Order and the pleadings in this case reveals the Governor did not consider the economic effects of his Order. The economic effects upon Petitioners and all similarly situated Pennsylvania businesses have been severe.

b. The Announcement and Plan are based upon a county-by-county or regional approach to the reopening, based upon the Governor's selected data pertaining to each respective county. However, no such county-by-

⁵ <https://www.governor.pa.gov/newsroom/gov-wolf-announces-reopening-of-24-counties-beginning-may-8/>

⁶ <https://www.governor.pa.gov/process-to-reopen-pennsylvania/>

⁷ <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf>

county or regional approach was employed in the Governor's Order; it was simply a statewide mandate.

c. In the Governor's Plan, he states, "Just as the administration took **a measured, county-by-county approach** to the Stay at Home order before expanding the order statewide, it will do the same to ease restrictions and reopen the state." (emphasis added). However, the Governor did not employ "a measured, county-by-county approach" in his Order. The fact that the Governor touts his "measured, county-by-county approach" to the Stay-At-Home order and his Plan, when he did not do the same with this Order, is a glaring admission.

d. In his Announcement, the Governor states that, "The administration partnered with Carnegie Mellon University (CMU) to create a Risk-Based Decision Support Tool that enables decision makers **to strike a balance between maximizing the results of our economy while minimizing public health risks.**" (emphasis added). However, the Order did not even attempt to strike a balance between maximizing the results of our economy while minimizing public health risks. The Governor did keep certain industries he deemed "life-sustaining" open but that was, according to the Governor, because those industries sustain life during a pandemic; it was not because that was the way to "maximize[e] the results of our economy."

e. In his Announcement, the Governor stated, "If we see an outbreak occur **in one of the communities** that has been moved to yellow,

we will need to take swift action, and revert to the red category until the new case count falls again.” (emphasis added). However, the Order did not employ a community-based approach to address outbreaks in particular communities; instead it ordered the closure of all businesses in the state deemed to be non-life-sustaining.

f. Thus, the measures the Governor included in his Plan and the Stay-At-Home Order, which he describes as “reasonable” and “balanced,” put into sharp contrast the Order in question because he failed to include those same measures in the Order.

g. All of the above are additional examples of how and why the Order was (1) not required by the public; (2) not reasonably necessary; and (3) is unduly oppressive and thus fails to satisfy the *Lawton* test.

THERE IS ADDITIONAL SCIENTIFIC EVIDENCE PROVING THE ORDER DOES NOT SATISFY LAWTON V. STEELE

20. Actual scientific evidence, not the projections used to form the basis of the Order, reveals that the Order does not satisfy *Lawton*.⁸ On April 30, 2020, Professor Johan Giesecke, one of the world’s most senior epidemiologists, an advisor to the Swedish government, the first Chief Scientist of the European Centre for

⁸ In Footnote 4 of the Brief for Respondents in Opposition to Emergency Application for Extraordinary Relief, the Governor cites a New York Times article based upon the infamously flawed Imperial College study, which modeled outcomes with a mortality rate of nearly four times the current CDC estimate of .26% of infected individuals. This flaw was well known prior to the Governor’s reliance upon it, as the study failed to properly account for asymptomatic cases and symptomatic cases that were untested, due to a known early shortage of testing in China, which resulted in China restricting testing to almost exclusively those cases which resulted in severe respiratory symptoms, fever, and a chest x-ray, inflating mortality rate estimates. <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html>

Disease Prevention and Control, and an advisor to the director general of the World Health Organization, stated that:

- a. lockdown policies are not evidence-based;⁹
- b. the models used to support the lockdowns are a dubious basis for public policy;
- c. the flattening of the curve is due to the most vulnerable dying first as much as the lockdown;
- d. COVID-19 is a “mild disease” and similar to the flu;¹⁰
- e. the mortality rate will be much lower than the projected numbers because most people who get the disease will never even notice they were infected;
- f. it was the novelty of the disease that scared people and made political leaders want to look strong and decisive by ordering lockdowns; and
- g. the correct policy would have been to protect the elderly and the infirm and to allow the disease to have spread through the population so that herd immunity can work to build the immunity of healthy Pennsylvanians.¹¹

⁹ In Footnote 19 of his Answer to Application for Extraordinary Relief, the Governor cites to a New York Times article in which Dr. Tom Inglesby, an expert on pandemics at Johns Hopkins, agrees that even Japan has had success in “flattening the curve” despite nearly no lockdown procedure at all.

¹⁰ Despite early estimates of a mortality rate as high as 7%, global estimates for the mortality rate of COVID-19 have approached 0.1-0.2%, similar to seasonal influenza after vaccination and other interventions. <https://www.pennlive.com/news/2020/04/umpc-argues-covid-19-not-as-deadly-as-feared-says-its-hospitals-will-shift-back-to-normal.html>

¹¹ <https://www.aier.org/article/lockdown-free-sweden-had-it-right-says-world-health-organization-interview-with-prof-johan-giesecke/>

21. In a May 2, 2020 interview, Professor Michael Levitt, Professor of Structural Biology at the Stanford School of Medicine, and winner of the 2013 Nobel Prize for Chemistry, stated the indiscriminate lockdown measures are “a huge mistake;” he advocates a “smart lockdown” policy, focused on more effective measures, focused on protecting elderly people; and he is unconvinced that the explanation for flattening the curve is the result of social distancing and lockdowns. He believes the “herd immunity” is the right approach and states, “There is no doubt in my mind, that when we come to look back on this, the damage done by lockdown will exceed any saving of lives by a huge factor.”¹²

22. Additional concerns have been raised regarding the societal costs of lockdown orders, such as the Order in question, in the context of domestic violence,¹³ cancer,¹⁴ stroke,¹⁵ vaccinations,¹⁶ overdoses,¹⁷ and other ailments. This is further evidence that the Order was (1) not required by the public; (2) not reasonably necessary; and (3) is unduly oppressive and thus fails to satisfy the *Lawton* test.

¹² <https://unherd.com/the-post/nobel-prize-winning-scientist-the-covid-19-epidemic-was-never-exponential/>

¹³ <https://www.nytimes.com/2020/04/06/world/coronavirus-domestic-violence.html>

¹⁴ Lai, Alvina & Pasea, et al. (2020). Estimating excess mortality in people with cancer and multimorbidity in the COVID-19 emergency. 10.13140/RG.2.2.34254.82242 (estimating 45-66% drop in chemotherapy appointments and 70-89% drop in new cancer screenings in the U.S. and U.K. due to lockdown efforts, which may result in an additional 33,890 cancer deaths in the near future)

¹⁵ <https://thehill.com/opinion/healthcare/498180-were-risking-national-suicide-if-we-dont-adjust-our-pandemic-response> (emergency stroke evaluations down 40%)

¹⁶ https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e2.htm?s_cid=mm6919e2_w

¹⁷ <https://local21news.com/news/local/overdose-deaths-skyrocket-in-pennsylvania-during-covid-19-pandemic>

Respectfully submitted,

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Certificate of Word Count

The undersigned counsel certifies the word count for the foregoing Brief is 2,999.

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CERTIFICATE OF SERVICE

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