

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

FRIENDS OF DANNY DEVITO,	:	
KATHY GREGORY, B&J LAUNDRY,	:	
LLC, BLUEBERRY HILL PUBLIC	:	
GOLF COURSE & LOUNGE, and	:	
CALEDONIA LAND COMPANY,	:	No. 68 MM 2020
Petitioners	:	
v.	:	
	:	
TOM WOLF, GOVERNOR and	:	
RACHEL LEVINE, SECRETARY OF	:	
PA. DEPARTMENT OF HEALTH,	:	
Respondent	:	

**BRIEF FOR *AMICUS CURIAE* CITY OF PHILADELPHIA
IN SUPPORT OF GOVERNOR WOLF’S ORDER RELATING TO
BUSINESSES THAT ARE NOT LIFE-SUSTAINING**

I. STATEMENT OF INTEREST OF AMICUS CURIAE

This matter is a challenge to the Governor’s Emergency Order that all non-life-sustaining businesses must temporarily cease physical operations due to the exponential spread of Covid-19 within the Commonwealth. If the relief requested by Petitioners is granted, then non-life-sustaining businesses throughout the Commonwealth, including in Philadelphia, will be permitted to resume physical operations, increasing person-to-person contact within Philadelphia and the probability of exponential spread of Covid-19.

The City of Philadelphia (“City” or “Philadelphia”) has a crucial

interest in and perspective on this matter. Philadelphia is one of the ten most populous cities in the United States of America.¹ Philadelphia is the largest city in the Commonwealth of Pennsylvania and the only City of the First Class², with a population of 1.5 million as of the 2010 United States Census.³ The 7.7-square-mile central section of Philadelphia, extending out from City Hall, South toward Tasker Street and North toward Spring Garden Street, between the Delaware and Schuylkill Rivers, is second only to Midtown Manhattan in the United States in residential density.⁴

As more fully-explained below, more densely-populated urban areas like the City are at great risk of having the disease spread aggressively within their communities.⁵ Indeed, over the past few weeks, confirmed

¹ See U.S. Census Bureau Quickfacts, Philadelphia, Pennsylvania (<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>) (Last visited March 21, 2020).)

² See Section 1 of the General Municipal Law, Act of June 25, 1895, P.L. 275, *as amended*, 53 P.S. §§ 101-11703.8.

³ See U.S. Census Bureau Quickfacts, Philadelphia, Pennsylvania (<https://www.census.gov/quickfacts/philadelphiacitypennsylvania>) (last visited March 21, 2020).)

⁴ See Maria Panaritis, *(Greater) Center City's Population Second Only to Midtown Manhattan's*, Philadelphia Inquirer (April 20, 2015) https://www.inquirer.com/philly/news/20150421_Greater_Center_City_s_population_now_second_only_to_Midtown_Manhattan_s.html; see also *State of Center City 2019*, Center City District, Central Philadelphia Development Corporation (April 23, 2019) <https://centercityphila.org/research-reports/state-of-center-city-2019>.

⁵ See Conference of State Bank Supervisors, *Information on COVID-19 Coronavirus*, <https://www.csbs.org/information-covid-19-coronavirus> (Last Visited March 21, 2020);

cases of Covid-19 have risen exponentially in Philadelphia. On March 10, 2020, Philadelphia confirmed its first case of Covid-19. As of April 2, 2020, there were 2,100 confirmed cases in Philadelphia, a 23-day increase of 209,900%.⁶ Unsurprisingly given its population and density, Philadelphia has more confirmed cases than any other county in Pennsylvania.⁷ The confirmed cases “likely account for only a fraction of the number of infected people in the city due to the speed at which the disease is spreading, the time it takes infected people to show symptoms, and the widespread shortages of testing kits.”⁸

The Governor’s Order charges all of Pennsylvania’s local municipalities, like the City, with enforcing it. Thus, the Governor’s Order empowers the City to prevent non-life-sustaining businesses from engaging in physical operations, which causes the disease to spread person-to-person by drawing clients and customers from their homes to physical places of

see also Laura Bliss, Kriston Capps, *Are Suburbs Safer From Coronavirus? Probably Not* City Labs (March 13, 2020) <https://www.citylab.com/life/2020/03/coronavirus-data-cities-rural-areas-pandemic-health-risks/607783/>.

⁶ Laura McCrystal, *Philadelphia beginning to see increased number of hospitalized coronavirus patients*, Philadelphia Inquirer (April 2, 2020) <https://www.inquirer.com/health/coronavirus/live>.

⁷ *Coronavirus Around Philly: Tracking the Spread*, Philadelphia Inquirer (April 2, 2020) <https://www.inquirer.com/health/coronavirus/live>.

⁸ Sean Collins Walsh, *Philly confirms first case of coronavirus in a nursing home*, Philadelphia Inquirer (March 21, 2020) <https://www.inquirer.com/health/coronavirus/live/>.

business. If local municipalities, like the City of Philadelphia, are prohibited from enforcing the Governor's Order, the public health consequences to the City and the Commonwealth would be devastating.

II. ARGUMENT

Amicus Curiae the City of Philadelphia wholly concurs in the Argument contained in Governor Wolf's Answer and Brief and Supplemental Brief. The City writes separately in order to express its pressing interest in the enforcement of emergency measures to prevent the spread of Covid-19 within the Commonwealth's most densely-populated county. As explained below, Governor Wolf's Order closing non-life-sustaining businesses is particularly crucial for the City's Covid-19 response strategy for a number of reasons: (1) the novel coronavirus spreads efficiently, especially in densely populated urban environments; (2) the City faces significant challenges mitigating the virus through mass-testing and tracing or other means; and (3) enforcing physical distancing between individuals while the City returns to "business as usual" would be impractical and would endanger City officers and employees charged with enforcement, as well as City residents.

The City believes that its ability to enforce Governor Wolf's Order is crucial to flatten the curve, or minimize the uncontrolled spike in cases that

other densely populated cities in this country are experiencing. It is imperative that the City continue to enforce this Order during the Covid-19 pandemic.

A. The Governor’s Order Is A Necessary Tool for Ensuring Social Distancing

At this point in time, social distancing is the only way to reduce the infection and hospitalization rate. In the absence of mass testing and the ability to enforce physical distance among individuals throughout the City, the Governor’s Order is a necessary tool for the City to ensure that its residents are not endangering themselves and others by unnecessarily congregating and increasing the spread of Covid-19.

Covid-19 is a pandemic; the novel coronavirus has swept across the globe, with approximately one million cases worldwide as of April 2, 2020.⁹ Covid-19 is highly communicable and efficient. The virus is spread when a person with Covid-19 coughs or exhales, releasing droplets from the nose or mouth.¹⁰ People in close proximity may breathe in these droplets or the

⁹ Johns Hopkins University Coronavirus Resource Center, Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering, Cumulative Confirmed Cases World Map, <https://coronavirus.jhu.edu/map.html> (Last visited April 2, 2020).

¹⁰ See Centers For Disease Control, *Coronavirus Disease 2019: How it Spreads* (<https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html> (Last visited April 2, 2020)); Pennsylvania Department of Health: Coronavirus (<https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Coronavirus.pdf> (Last visited April 2, 2020)); City of Philadelphia, Department of Health,

droplets may land on objects or surfaces, which in turn are touched by people who also touch their nose, eyes, or mouth.¹¹ The virus is also spread by people who are infected but have no symptoms of the virus or those who have only mild symptoms.¹² The efficient manner of spread allows people to infect each other unknowingly.

By the time the first person tested positive with Covid-19 in Philadelphia, numerous other people had already been exposed to the virus for an indeterminate period of time. The City has approximately 11,340 people per square mile.¹³ The density within the City coupled with the efficient manner of spread quickly overwhelmed the City's ability to trace where people *known* to be infected with the virus went and who they interacted with, and where those people went and who they interacted with. Even if tracing was still feasible, the City continues to have a limited ability

Coronavirus Disease 2019 (COVID-19): Overview
(<https://www.phila.gov/services/mental-physical-health/environmental-health-hazards/covid-19/overview/>) (Last visited April 2, 2020).

¹¹ *Id.*

¹² *Id.*

¹³ *See* U.S. Census Bureau Quickfacts, Philadelphia, Pennsylvania (<https://www.census.gov/quickfacts/philadelphiacitypennsylvania>) (last visited April 2, 2020).

to test people to confirm whether or not they have the virus.¹⁴ In the absence of widespread testing and tracing, Governor Wolf’s Order helps limit the person-to-person contact within the City, thereby reducing the spread of Covid-19.

In addition, the City relies on Governor Wolf’s Order because the alternative – enforcing social distancing in all stores and businesses in Philadelphia – would be both unsafe and impossible. The City faces incredible barriers to maintaining sufficient personal protective equipment (“PPE”) and manpower to safely monitor business owners’ and residents’ adherence to physical distancing and hygiene requirements.¹⁵ With Governor Wolf’s Order in place, City police and inspectors may monitor compliance by simply checking whether non-life-sustaining businesses are

¹⁴ See City of Philadelphia Daily Press Conference, April 1, 2020, Health Commissioner Dr. Thomas Farley, 45:57-47:23, available at <https://twitter.com/PHLPublicHealth/status/1245396909755424770> (Last Visited April 2, 2020); City of Philadelphia, Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions: *What you should do if you think you have COVID-19?* <https://www.phila.gov/programs/coronavirus-disease-2019-covid-19/guidance/about-covid-19/> (Last visited April 2, 2020); see also Steven Mufson, Juliet Eilperin and Josh Dawsey, *The Scramble for the rapid coronavirus tests everybody wants*, The Washington Post, April 1, 2020, <https://www.washingtonpost.com/health/2020/04/01/scramble-rapid-coronavirus-tests-everybody-wants/>; The Covid Tracking Project, Pennsylvania <https://covidtracking.com/data/state/pennsylvania> (Last Visited April 2, 2020).

¹⁵ City of Philadelphia, *Personal Protective Equipment Needed for Covid-19 Response* <https://www.phila.gov/2020-03-23-personal-protective-equipment-needed-for-covid-19-response/> (Last Visited April 2, 2020); See City of Philadelphia Daily Press Conference, March 31, 2020, Managing Director Brian Abernathy, 33:23-34:43, available at <https://twitter.com/PHLPublicHealth/status/1245033757721022470> (Last visited April 2, 2020).

open or closed. To enforce physical distancing at all businesses and stores in the City *without* Governor Wolf's Order would require City police and inspectors to enter all physical premises and closely observe whether physical distancing and hygiene requirements are satisfied, which would mean more person-to-person contact and spread of Covid-19. Thus, returning to business as usual in the City would mean more person-to-person contact between and among business owners, customers, and City employees.

The safety risk to City employees and the public cannot be alleviated by using PPE during inspections of stores and businesses. At this time, PPE is scarce and is urgently needed by the City's hospitals and first responders.¹⁶ To allocate protective gear to police and inspectors for social distancing monitoring would further reduce the PPE available to the healthcare workers and first responders.

Second, as a practical matter, effective enforcement of physical distancing measures in all stores and businesses within the densely packed City cannot be done. Already, the City must protect the safety of its citizens as they go out to acquire life-sustaining food and supplies, get fresh air and

¹⁶ The City's shortage of PPE is so serious that the City is asking for donations of masks and gowns for healthcare workers. See <https://www.phila.gov/2020-03-23-personal-protective-equipment-needed-for-covid-19-response/>.

exercise, and engage in essential work. This is a challenging task. An inspector at a grocery store, for example, can only observe one area of the store at a time and cannot be present at all hours that the store is open. The re-opening of non-life-sustaining businesses in Philadelphia would multiply the movement and congregation of people in the City and thus the need for adherence to social distancing by the public and enforcement of distancing by the City. Given the difficulty of adhering to appropriate distancing in a busy city and the impossibility of effective enforcement of distancing requirements within stores and businesses, this is not a risk that the City can take. Governor Wolf's Order is necessary to protect the safety of Philadelphians during this pandemic.

B. The Governor's Order Has Saved Lives

The convergence of these factors – lack of testing, lack of PPE, population density, and difficulty enforcing physical distancing—makes Governor Wolf's Order an essential tool for the City at this time. Without the Governor's Order it is likely that infections would have already begun to spike, akin to the curve evidenced in New York and New Jersey.

The Coordinator of the United States Coronavirus Task Force, Deborah L. Birx, M.D., presented a series of slides at the White House press briefing on March 31, 2020 showcasing data supporting the social distancing

and mitigation measures underlying Governor Wolf's Order and similar orders being implemented by Governors across the United States.¹⁷ The first slide presented by Dr. Birx modeled what could have occurred across the United States had mitigation not taken place, showing a decrease in a likely 1.5 to 2.2. million deaths because of mitigation to a current likelihood of 100,000 to 240,000 deaths across the United States.¹⁸ It should be stressed that this likelihood is not fixed and current mitigation efforts could still flatten the curve modeling daily mortality rates across the United States in the coming days. The third slide shows the varying curves of cumulative cases per 100,000 residents in March 2020 for five states, including New

¹⁷ See Birx Briefing March 31, 2020, Slides 1-5 (available at <https://www.documentcloud.org/documents/6823042-0331-Briefing-BIRX-Final.html>); As of April 2, 2020, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and the District of Columbia as well as the Navajo Nation and a number of Cities and Counties in Alabama, Massachusetts, Missouri, Oklahoma, South Carolina, Texas, Utah, and Wyoming have issued stay at home orders. See Sarah Mervosh, Denise Lum and Vanessa Swales, *See which states and cities have told residents to stay at home*, The New York Times (Updated April 1, 2020) <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>; see also William Wan Josh Dawsey, Ashley Parker and Joel Achenbach, *Experts and Trump's advisors doubt White House's 240,000 coronavirus deaths estimate*, The Washington Post (April 2, 2020), <https://www.washingtonpost.com/health/2020/04/02/experts-trumps-advisers-doubt-white-houses-240000-coronavirus-deaths-estimate/>.

¹⁸ See Birx Briefing March 31, 2020, Slide 1 (available at <https://www.documentcloud.org/documents/6823042-0331-Briefing-BIRX-Final.html>).

Jersey and New York.¹⁹ Because of Governor Wolf’s actions to protect public safety – by ordering non-essential businesses to close and individuals to stay at home – Pennsylvania’s curve does not replicate the steep climb in cumulative cases found in New Jersey and New York.²⁰

While much is still to be learned about the nature of Covid-19 and the efforts to contain and mitigate its spread, the City believes the early proactive steps taken by the Governor and the City, including issuance and enforcement of the Governor’s Order on non-life-sustaining businesses, have led to better outcomes for the citizens of Philadelphia and the Commonwealth. In fact, on April 2, 2020, the Philadelphia Inquirer reported that “[t]he rate of increase for known coronavirus cases in Philadelphia is showing signs of slowing. For the first time since mid-March, cases are doubling between every two to three days, instead of doubling faster than every two days.”²¹ To continue to flatten the curve, the City must retain its ability to enforce Governor Wolf’s Order.

Mayor Kenney has repeatedly reinforced the need for this measure, making clear that “the more you can stay home, the better you are serving

¹⁹ *Id.* at Slide 3.

²⁰ *Id.* at Slide 4.

²¹ Laura McCrystal, *Philadelphia beginning to see increased number of hospitalized coronavirus patients*, Philadelphia Inquirer (April 2, 2020) <https://www.inquirer.com/health/coronavirus/live>

your fellow Philadelphian.”²² The scientific evidence we have available and the public health consensus the world over tells us this is true both within and amongst communities across the Commonwealth. Covid-19 does not stop at borders. Philadelphia is the City of Brotherly Love and Sisterly Affection and this virus has called upon all of us to show love and affection for each other by sacrificing now so that more of us can be free of this virus in the future.

III. CONCLUSION

For all of the reasons set forth above and by the Respondent, the Court should deny the Petitioners’ application for relief.

²² See City of Philadelphia Daily Press Conference, March 30, 2020, Mayor Jim Kenney, 22:48-23:10, *available at* <https://twitter.com/PHLPublicHealth/status/1244672027362902018>.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this brief contains 2,428 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

I hereby certify that I served this Application and accompanying Amicus Brief upon counsel of record by electronic service.

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