United States Court of Appeals
for the
Third Circuit

Case No. 20-2936

COUNTY OF BUTLER; COUNTY OF FAYETTE; COUNTY OF GREENE; COUNTY OF WASHINGTON; NANCY GIFFORD; MIKE GIFFORD, husband and wife doing business as Double Image Styling Salon; PRIMA CAPELLI INC, a Pennsylvania Corporation; MIKE KELLY; MARCI MUSTELLO; DARYL METCALFE; TIM BONNER; STEVEN SCHOEFFEL; PAUL F. CRAWFORD, trading and doing business as Marigold Farm; CATHY HOSKINS, trading and doing business as Classy Cuts Hair Salon; RW MCDONALD & SONS INC; STARLIGHT DRIVE IN LLC, a Pennsylvania Corporation; SKYVIEW DRIVE IN LLC, a Pennsylvania Limited Liability Company,

Appellees,

– v. –

GOVERNOR OF PENNSYLVANIA; SECRETARY PENNSYLVANIA DEPARTMENT OF HEALTH,

Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 2-20-CV-00677, HONORABLE WILLIAM S. STICKMAN, IV, DISTRICT JUDGE

RESPONSE TO APPELLANTS' MOTION FOR STAY

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1. "Cases in the U.S.," Centers for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/last visited 9/24/20

2. "CDC COVID Data Tracker," CDC, https://covid.cdc.gov/covid-data-tracker (last visited 9/23/2020)

3. "Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others," Center for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited 9/24/20)

4. "COVID-19 Data for Pennsylvania," Pa. Dept. of Health, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last visited 9/25/20)

5. "COVID-19 Data for Pennsylvania," Pa. Dept. of Health, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Coronavirus.aspx (last visited 9/24/2020)

6. "Process to Reopen Pennsylvania," Governor of Pennsylvania's Website, https://www.governor.pa.gov/process-to-reopen-pennsylvania/ (last visited 9/25/20)

7. "Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States, February 4-April 21, 2020," CDC, https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e2.htm (May 8, 2020)

8. "Responding to COVID-19 in Pennsylvania," Commonwealth of Pennsylvania Website,https://www.pa.gov/guides/responding-to-covid-19/#PhasedReopening (last visited 9/25/20)

9. Cancer State Facts: Common Cancer Sites, National Cancer Institute, https://seer.cancer.gov/statfacts/html/common.html (last visited 9/15/2020)

10. Christine M. Szablewski, DVM, et al., "SARS-CoV-2 Transmission and Infection Among Attendees of an Overnight Camp–Georgia, June 2020," CDC, https://www.cdc.gov/mmwr/volumes/69/wr/mm6931e1.htm (Aug. 7, 2020)

11. Dr. Thomas Friden, et al., "Identifying and Interrupting Superspreading Events–Implications for Control of Severe Acute Respiratory Syndrome Coronavirus 2," CDC, https://wwwnc.cdc.gov/eid/article/26/6/20-0495_article (June 2020)

12. Hiroshi Nishiura, et al, "Closed environments facilitate secondary transmission of coronavirus disease 2019 (COVID-19)," medRXiv.org, https://www.medrxiv.org/content/10.1101/2020.02.28.20029272v2 (April 16, 2020)

13. Lea Hamner, et al., "High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice–Skagit County, Washington, March 2020," CDC, https://www.cdc.gov/mmwr/volumes/69/wr/mm691936.htm (May 15, 2020)

14. Megan Lewis, et al., "COVID-19 Outbreak Among College Students After a Spring Break Trip to Mexica–Austin, Texas, March 26-April 5, 2020," CDC https://www.cdc/gov/mmwr/volumes/69/wr/mm692e1.htm (July 3, 2020)

15. Nor Fazila Che Mat, et al., "A single mass gathering resulted in massive Transmission of COVID-19 infections in Malaysia with further international spread," National Library of Medicine, https://pubmed.ncbi.nlm.nih.gov/32307549/ (May 18, 2020)

16. Pa Dept. Of Health, COVID-19 Trajectory Animations, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Data-Animations.aspx (last visited 9/25/20)

17. Shahul Ebrahim, et al., "COVID-19–the role of mass gatherings," National Library of Medicine, https://pubmed.ncbi.nlm.nih.gov/32165283/ (Mar.-Apr. 2020)

18. 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, 14 (Feb. 2020)

19. "Federal Judge says Gov. Wolf's lockdown 'well-intentioned' but unconstitutional," PennLive, https://www.pennlive.com/news/2020/09/federal-judge-says-gov-wolfs-lockdown-well-intentioned-but-unconstitutional.html (9/24/2020)

20. Carl Zimmer, "One Meeting in Boston Seeded Tens of Thousands of Infections, Study Finds," New York Times, https://www.nytimes.com/2020/08/26/health/covid-19-superspreaders-boston.html (Aug. 26, 2020)

21. Chas Danner, "CDC's Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead," New York Magazine, https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html (last visited 3/20/2020)

22. Christie Aschwander, "How 'Superspreading' Events Drive Most COVID-19 Spread," Scientific America, https://www.scientificamerican.com/article/how-superspreading-events-drive-most-covid-19-spread1 (June 23, 2020)

23. Haisten Willis, et al., "A funeral is thought to have sparked a covid-19 outbreak in Albany, Ga.–and led to many more funerals," Washington Post, https://www.washingtonpost.com/politics/a-funeral-sparked-a-covid-19-outbreak–and-led-to-many-more-funerals/2020/04/03/546fa0cc-74e6-11ea-87da 77a8136c1a6d_story.html (April 4, 2020)

24. Jacqueline Howard, et al., "Covid-19 superspreading event in Boston may have led to 20,000 cases, researcher says," CNN, https://www.cnn.com/2020/08/25/health/covid-19-superspreading-boston study/index.html (Aug. 25, 2020)

25. Paul Gough, "Allegheny County: 40 Covid-19 cases linked to one teen," Pittsburgh Business Times, https://www.bizjournals.com/pittsburgh/news/2020/09/02/allegheny-county-covid-19-cases.html (Sept. 2, 2020)

26. Travis Anderson, "7 coronavirus-related deaths now connected to Maine wedding," The Boston Globe, https://www.bostonglobe.com/2020/09/15/nation/coronavirus-death-toll-linked-maine-wedding-grows-five/(915/2020)

INTRODUCTION

Across the United States, numerous cases have been filed regarding the COVID-19 pandemic; however, this case is distinguishable because it contains a full and complete evidentiary record. As noted by the District Court,

> "… [T]he Court's judgment did not arise out of proceedings on a temporary restraining order or even a preliminary injunction, but rather, the parties had the opportunity to develop a full evidentiary record under Rule 57. Despite this opportunity, Defendants did not proffer any specific evidence to differentiate between the danger allegedly posed by gatherings governed by specific numeric limitations and gatherings governed by occupancy limitations. The appellate court will be bound by the same record upon which the Court premised this decision. Despite Defendants having every opportunity to make a record, there is simply no evidence that would justify, from a constitutional perspective, the disparate treatment of gatherings." (Dkt. 91, pp. 4-5).

The Court went on to note:

> "Defendants' Brief in Support of Stay cites to several newspaper and magazine articles that purport to show the justification for limitations of gatherings. Some of these articles predate the evidentiary hearing in this case, but they were neither discussed nor used as exhibits. Defendants never moved to supplement the record to submit the articles to the Court (as Plaintiffs did on multiple occasions). These articles are not part of the record. Defendants cannot rely upon them to buttress or supplement the record that was properly before the Court and which will be before the Third Circuit on appeal." (Dkt. 91, p. 5, FN 3).

Here is an excerpt from the record:

> THE COURT: Do you have any knowledge whether there has been any correlation between one of these mega spreading events and any of the protests that were held over the last couple of months?

> Mr. Robinson: ***I'm not aware specifically***. I have not seen…press coverage or…CDC information about that. I have not seen information linking a spread specifically to protests.

(Dkt. 75 pp. 154-155) (Dkt. 79 p. 31) (emphasis added).[1] This excerpt is one of many that do not support a stay.[2] This is why Defendants supplemented their Motion with 26 sources that are not a part of the record.[3]

The actual record before this Court demonstrates that Plaintiffs were prohibited from operating their businesses and campaigning, but were allowed to attend the Carlisle Car Show with 20,000 other people. (Dkt. 79 p. 24) (Dkt. 64-1 p. 2). R.W. McDonald & Sons was prohibited from selling furniture, but Walmart was allowed to sell furniture and more. (Dkt. 74 p. 136). The Starlight drive-in was prohibited from operating or holding church services, but had to watch their neighbors sell food that they would normally sell at their concession stands. (Dkt. 74 p. 190). The waiver program was shut down because businesses became too skilled at obtaining waivers. (Dkt. 75 p. 228). The ordinary healthy citizens of this Commonwealth were placed on lockdown under red, allegedly released under green, but could be placed on lockdown again at any time at the sole discretion of the Governor. (Dkt. 79 p. 38) (Dkt. 75 p. 38).

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[1] Citations to the District Court will be indicated as "Dkt. #."

[2] Citations to the "Motion for Stay of the District Court's Order Pending Appeal," will be indicated as "Doc. 18 p. #." The page number will refer to the page number on the header of the electronically filed copy.

[3] *See* Appendix "1" citing 26 sources outside the record.

Defendants Motion sternly warns the Court, primarily by admonishing the District Court, that lives will be lost if a stay is not granted. They also make much of one line in the District Court's opinion regarding *Lochner*, but they ignore the traditional cannons of scrutiny available post *Jacobson*.

The text before the Court contained in the record is important. The text contained in the Constitution is critical. The text in Defendants' Motion asks the Court to erase both and rewrite them with justification for Defendants' "new normal." (Dkt. 75 p. 70) (Dkt. 79 p. 18).

PROCEDURAL HISTORY

As indicated above, the District Court heard this matter on an expedited basis under Rule 57 of the Federal Rules of Civil Procedure. The parties were provided an opportunity to "develop a full evidentiary record." (Dkt. 91 p. 4). On September 14, 2020, the District Court issued its Opinion and Order (Dkts. 79 and 80) after considering written direct testimony from the parties (Dkts. 20-34, 37-39, 46), exhibits (Dkts. 42, 47, 48, 54, 60, 64, 73), testimony (Dkts. 74 and 75), and briefs (Dkts. 10, 13, 56, 66, and 69). On September 16, 2020, Defendants filed a Motion for Entry of Judgment (Dkt. 82), and a Motion to Stay (Dkt. 84). On September 22, 2020, the District Court entered a Final Declaratory Judgment (Dkt. 90) on Plaintiffs' claims at Count II (Violation of Substantive Due Process), Count IV (Violation of Equal Protection), and Count V (Violation of First Amendment). The

District Court also entered an Order denying the request for Stay (Dkt. 91). Defendants Appeal was filed this Court (Dkt. 92) and Defendants' second Motion for Stay is pending before the Court (Doc. 18).

REASONS FOR THIS COURT TO DENY A STAY

1. Defendants are Unlikely to Succeed on the Merits.

a. Defendants' Motion Attempts to Improperly Remake and/or Supplement the Record.

For a second time, Defendants have cited to materials outside of the record before the District Court, (Doc. 18 pp. 8-11), notwithstanding the fact that "*[t]he only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court.*" *Fassett v. Delta Kappa Epsilon (New York)*, 807 F.2d 1150, 1165 (3rd Cir. 1986) (emphasis added). *See also,*

> *McCreary v. Redevelopment Auth. of City of Erie*, 427 Fed. Appx. 211, 216, fn. 7 (3rd Cir. 2011)(unpublished) (where the Court affirmed the district court's judgment and struck other documents attached to Appellant's brief that were not part of the record); *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 96 (3rd Cir. 1990) (where the Court concluded that "by including in its appendix a number of items that were not part of the district court record, [Defendants]…violated…several provisions of…Rule 10(a)."); *Sewak v. I.N.S.*, 900 F.2d 667, 673 (3rd Cir. 1990) (where the Court stated "we do not take testimony, hear evidence or determine disputed facts in the first instance…[i]nstead, we rely upon a record developed in those fora that do take evidence and find facts."); and *U.S. ex rel. Mulvaney v. Rush*, 487 F.2d 684, 687 (3rd Cir. 1973) (where the Court held that they "***are not a fact-finding body***.") (emphasis added).

Despite the provisions of Rule 10(a), along with corresponding jurisprudence, Defendants urge the Court to consider materials outside of the District Court record in their Motion. *See* Attachment "1." Defendants then caution, if this Court fails to consider materials outside of the record, lives will be lost; however, there is no evidence within the record to support their assertions and the materials put forth by Defendants would not survive Rule 701 - Opinion Testimony by Lay Witnesses and/or Rule 802 - The Rule Against Hearsay objections, even if proffered in an evidentiary hearing. Defendants continued attempts to circumvent the Federal Rules of Evidence and Rules of Appellate Procedure should be met with a summary dismissal of their Motion.

b. The District Court Appropriately Considered the July 15 Order.

Defendants also argue that, "the District Court reached beyond the pleadings to invalidate [the July 15 Order] that was not challenged in the complaint." (Doc. 18 p. 22). However, the July 15th Order is of record and it was admitted without objection by the Defendants. (Dkt. 48-5 and Dkt. 54-1).

The July 15 Order was issued 2 days before the July 17, 2020 hearing (Dkt. 74). It prohibited indoor events and gatherings of more than 25 people, and outdoor events and gatherings of more than 250 people. (Dkt. 48-5). Defendants claim that Plaintiffs, "never amended their complaint to challenge this order[,]" and that "the District Court took the extraordinary step of considering, and then invalidating the

order." (Doc. 18 p. 23). Defendants overstate the applicable pleading requirements and misstate the effect of the July 15 Order.

The Federal Rules of Civil Procedure, F.R.C.P. Rule 8, merely requires "notice pleading," a "short and plain statement of the claim showing that the pleader is entitled to relief," and "a demand for the relief sought." A complaint, therefore, must give defendants "fair notice" of what claims a plaintiff is raising against the defendants and the grounds upon which the claims rest. *Carpenters Health v. Mgmt. Res. Sys. Inc.,* 837 F.3d 378, 384 (3rd Cir. 2016) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

In this case, Defendants cannot reasonably claim that they did not have "fair notice" that the Plaintiffs would challenge the restrictions contained in the July 15 Order, or that the Order was "outside the scope of the case." Plaintiffs' Complaint addressed the Defendants' March 19 "Business Shutdown Order," (Dkt. 1 ¶ 24). It also alleged that the March 19 Order unlawfully restricted the movement of Pennsylvania residents (*Id.* ¶ 26), unlawfully ordered them not to utilize their private property (*Id.*), and unlawfully prohibited businesses that were not deemed "life sustaining" from fully-operating their physical locations – all in violation of the United States Constitution. (*Id.* ¶ 28).

The Complaint also addressed Defendants' May 1, 2020 Order containing a "Plan" to begin reopening Pennsylvania. It specifically alleged that the Plan involved

a phased reopening that violated several provisions of the United States Constitution (*Id.* ¶ 33-34). The Complaint also contained a declaratory Request for Relief that encompassed the July 15 Order (*Id.* p. 25 ¶ 3) ("a declaration that the rights of the Plaintiffs…have been violated by the various actions of the Defendants and the said Defendants are enjoined from engaging in such violations and declaring them to be null and void ab initio, and in addition thereto with respect to the First Amendment rights of assembly and worship as provided in the Constitution of the United States of America."). More importantly, Plaintiffs pled that "*the harm being perpetrated is on-going and will continue or may continue in the future*…" (*Id.* ¶ 121) (emphasis added).

In addition to the Complaint, Plaintiffs identified the July 15 Order as an exhibit to their case on July 16 (Dkt. 48-5). At no time before, or during, the July 17 hearing did the Defendants object to the entry of the July 15 Order into the record. Instead, Defendants' witnesses conceded at the July 17 hearing that the July 15 Order contained provisions that were unchanged from prior orders. (Dkt. 74 p. 54) ("[t]he 250 limit was originally—actually, is unchanged from the original green order, so that's not a change in the July 15th order."). Finally, Defendants raised this issue for the first time on appeal and in doing so, waived the same. *See e.g. Tri–M Grp., L.L.C. v. Sharp,* 638 F.3d 406, 416 (3rd Cir. 2011) ("[i]t is axiomatic that arguments asserted

for the first time on appeal are deemed to be waived and…are not susceptible to review…absent exceptional circumstances.”).

When read as a whole, the Complaint gave Defendants “fair notice” that the Plaintiffs challenged their ongoing restrictions on movement, business operation, and congregation violated their constitutional rights. (*See also,* F.R.C.P. 15(b)(2) “[w]hen an issue not raised by the pleadings is tried by the parties’ express *or implied* consent, it must be treated in all respects as if raised in the pleadings.”) (emphasis added). Moreover, the District Court thoroughly examined this issue in its Opinion, rightly determining that:

> the application of the voluntary cessation doctrine precludes a determination that the loosening of restrictions in subsequent orders renders moot Plaintiffs’ constitutional challenges to elements of Defendants’ March 19, 2020 Business Closure Orders and the March 23, 2020 Stay-at-Home Orders. *The language of all subsequent orders merely amends the operation of those orders*. It does not completely abrogate them. They remain in place, incorporated into the existing orders and are only “suspended.” (Dkt. 79 p. 38) (emphasis added).[4]

c. The District Court did not “Revive” or rely upon *Lochner*.

Defendants claim that the District Court revived and relied on *Lochner v. New York*, 198 U.S. 45 (1905). However, the District Court’s only mention of *Lochner* was in the context of noting that in the century following its decision, *Lochner* has

[4] Defendants’ testimony at the hearing also made clear that the prior orders were merely suspended, and could be reinstated. (Dkt. 79 p. 38 fn. 18). *See also* (Dkt. 79 p. 22).

been "considerably recalibrated and de-emphasized…" (Dkt. 79 p. 52). Nevertheless, the District Court correctly noted that the Supreme Court has never repudiated the recognition that economic liberty is a protected, fundamental right. *Id*. Focusing on *Lochner*, Defendants conclude that "[t]oday, alleged deprivations of economic liberty no longer give rise to viable substantive due process claims." (Doc. 18 p. 20). However, Defendants fail to provide any authority for this position, because while the judicial philosophies of *Lochner* and its line have been rolled back, it remains unquestionable that economic liberty is recognized and protected by the Fourteenth Amendment.

For decades, the Supreme Court has consistently held that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 847 (1992) (*quoting Whitney v. California,* 274 U.S. 357, 373 (1927)). Although the Supreme Court "has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment]", the Supreme Court has consistently recognized that liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, *to engage in any of the common occupations of life*, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential

to the orderly pursuit of happiness by free men." *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972), quoting, *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972), citing, *Bolling* v. *Sharpe,* 347 U.S. 497, (1954); and, *Stanley* v. *Illinois,* 405 U.S. 645 (1972) (emphasis added).

As the District Court correctly stated, the "dispositive question is not whether such a right exists, but rather, the level of infringement upon the right that may be tolerated." (Dkt. 79 p. 53). In support of its holding that the Fourteenth Amendment recognizes a liberty interest in citizens to pursue their chosen occupation**,** the District Court cited *Piecknick v. Comm. of Pa.*, 36 F.3d 1250 (3d Cir. 1994). There, *Piecknick*, a tow operator, sued the Commonwealth alleging a deprivation of his Fourteenth Amendment due process rights because the State Police had allegedly established a policy and practice of limiting the assignment of towing services to a designated operator to only one zone. *Id*. at 1253. In analyzing whether *Piecknick's* claims, if proven, would constitute the denial of a constitutionally-protected property or liberty interest, the Third Circuit Court set forth the well-established distinction between the right to pursue an occupation, and *Piecknick's* claimed right to a specific job:

> "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes

> within both the 'liberty' and 'property' concepts of the Fifth [and Fourteenth Amendments]." *Greene v. McElroy,* 360 U.S. 474, 492 (1959).

In affirming dismissal of *Piecknick's* action, the Third Circuit succinctly encapsulated the issue before this Court: "[i]t is the liberty to pursue a particular calling or occupation and not the right to a specific job that is protected by the Fourteenth Amendment." *Id.* at 1262, citing *Bernard v. United Tp. High School Dist. No. 30,* 5 F.3d 1090, 1092 (7th Cir. 1993).

Defendants' assertions related to *Lochner* and *Piecknick* are misplaced.

d. The District Court Analyzed and Distinguished *Jacobson*.

In addition to Defendants' critique of the District Court's single mention of the 1905 *Lochner* case, they urge this Court to disregard a century of jurisprudence regarding the appropriate level of Constitutional scrutiny to apply the analysis articulated in *Jacobson v. Massachusetts,* 197 U.S. 11 (1905).

In *Jacobson*, the Supreme Court considered the Constitutional validity of a Massachusetts statute requiring universal smallpox vaccination of its citizens. Jacobson was prosecuted for refusing to comply with the City of Cambridge's vaccination mandate, and contended that the measure violated the Fourteenth Amendment. As the District Court correctly held, *Jacobson* does not stand for unfettered use of police powers by the state, but that "the police power of a state must be held to embrace, at least, such reasonable regulations established directly

by legislative enactment as will protect the public health and the public safety." *Jacobson* at 25. Although the Jacobson Court unquestionably afforded a substantial level of deference to the discretion of state and local officials in matters of public health, it did not hold that deference is limitless. Rather—it closed its opinion with a *caveat* to the contrary:

> Before closing this opinion we deem it appropriate, in order to prevent misapprehension [of] our views, to observe perhaps to repeat a thought already sufficiently expressed, namely that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression. *Jacobson* at 38.

As articulated by the District Court, "There is no question, therefore, that even under the plain language of Jacobson, a public health measure may violate the Constitution." (Dkt. 79 p. 13).

The Sixth Circuit Court of Appeals recently analyzed the applicability of *Jacobson* in the case of *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020). There, the Court affirmed a Preliminary Injunction enjoining the application of an executive order mandating a three-week postponement of elective and non-urgent surgical and invasive procedures. The *Adams & Boyle* Court stated as follows:

> "If *Jacobson* teaches us anything, it is that context matters. And as noted in Section B, *infra*, we have tried to accommodate for that context here. What we will not countenance, however, is the notion that COVID-19 has somehow demoted *Roe* and *Casey* to second-class rights, enforceable against only the most extreme and outlandish

> violations. Such a notion is incompatible not only with *Jacobson*, but also with American constitutional law writ large. *See generally, e.g.*, *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 76, 18 L.Ed. 281 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.")." *Adams & Boyle* at 927.

Defendants' argument for *Jacobson's* relevance fundamentally ignores the disparate impact of the governmental orders at issue. Defendants have not cited, and Plaintiffs have been unable to locate, any precedential case where *Jacobson* was applied to uphold governmental action that acted to treat persons or business differently than persons or businesses that were similarly situated.

Additionally, the Kansas District Court recently addressed *Jacobson*, and found it inapplicable: "Based on the relatively unique circumstances herein presented, the court concludes that *Smith, Abbott, Jacobson*, and similar cases do not provide the best framework in which to evaluate the Governor's executive orders because all those cases deal with laws that are facially neutral and generally applicable." *First Baptist Church v. Kelly*, 2020 WL 1910021 (D. Kansas 2020).

The disparate applicability of the governmental orders at-issue in this case contrasts with other cases that applied *Jacobson* in a COVID-19 context. *See*: *Page v. Cuomo*, 2020 WL 4589329 (N.D. New York 2020) (addressing a "fourteen-day quarantine requirement that is equally applicable to residents and non-residents alike"); *Carmichael v. Ige*, 2020 WL 3630738 (D. Hawaii 2020) (addressing a

universal 14-day quarantine mandate); *Geller v. DeBlasio*, 2020 WL 2520711 (S.D. New York 2020) (addressing a blanket prohibition against mass gatherings).

In the present case, the Orders at issue are neither facially neutral nor generally applicable. The issue before this Court is not whether the state may order businesses to close temporarily in the face of a pandemic; it is whether that order is applied equally to similarly situated persons and businesses. As the District Court found, even under a rational basis analysis, the Plaintiffs have been denied equal protection of the law. (Dkt. 79 pp. 62-66). Further, Defendants argue that Defendants' Business Closure Rules are consistent with Equal Protection. Instead of analyzing the issue, Defendants engage in *ad hominem* attacks on the District Court, calling the Decision below "nonsensical." However, Defendants' post hoc justifications for the Business Closure Orders were succinctly and accurately described as unconstitutional by the District Court:

> "… the manner in which Defendants' orders divided businesses into "life-sustaining" and "non-life-sustaining" classifications, permitting the former to remain open and requiring the latter to close, fails rational basis scrutiny. The Court outlined at length above the facts of record demonstrating that Defendants' determination as to which businesses they would deem "life-sustaining" and which would be deemed "non-life-sustaining" was an arbitrary, *ad hoc,* process that they were never able to reduce to a set, objective and measurable definition. As stated above in reference to the Business Plaintiffs' due process challenge, to the extent that Defendants were going to exercise an unprecedented degree of immediate power over businesses and livelihoods; to the extent that they were going to singlehandedly pick which businesses could stay open and which must close; and to the extent that they were picking winners and

losers, they had an obligation to do so based on objective definitions and measurable criteria. The Equal Protection Clause cannot countenance the exercise of such raw authority to make critical determinations where the government could not, at least, "enshrine a definition somewhere." (ECF No. 75 p. 95).

"Finally, the record shows that Defendants' shutdown of "non-life-sustaining" businesses did not rationally relate to Defendants' stated purpose. The purpose of closing the "non-life-sustaining" businesses was to limit personal interactions. Ms. Boateng averred: '[i]n an effort to minimize the spread of COVID-19 throughout Pennsylvania, the Department [of Health] sought to limit the scale and scope of personal interaction as much as possible in order to reduce the number of new infections.'[5] (ECF No. 37, p. 2). "Accordingly, it was determined that the most effective way to limit personal interactions was to allow only businesses that provide life-sustaining services or products to remain open and to issue stay-at-home orders directing that people leave their homes only when necessary." (ECF No. 37, p. 3). But Defendants' actions did not rationally relate to this end. Closing R.W. McDonald & Sons did not keep at home a consumer looking to buy a new chair or lamp, it just sent him to Walmart. Refusing to allow the Salon Plaintiffs to sell shampoo or hairbrushes did not eliminate the demand for those products, it just sent the consumer to Walgreens or Target. In fact, while attempting to limit interactions, the arbitrary method of distinction used by Defendants almost universally favored businesses which offered more, rather than fewer products. As such, the largest retailers remained open to attract large crowds, while smaller specialty retailers—like some of the Business Plaintiffs here—were required to close. The distinctions were arbitrary in origin and application. They do not rationally relate to Defendants' own stated goal. They violate the Equal Protection Clause of the Fourteenth Amendment." (*Op.* at 64-65.)

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[5] Ms. Boateng is a non-expert, lay witness, with no medical degree, background or training and the opinion offered in the Motion to Stay misstates Ms. Boateng's Declaration. (Dkt. 37, at 6-9)

The District Court was correct in its analysis, and despite Defendants' protests to the contrary, the Defendants' classification of life-sustaining and non-life sustaining businesses was arbitrary and irrational – justifying the District Court's decision.

2. Defendants Will Not Suffer Irreparable Harm if the Stay is Denied by the Court.

Defendants' argument also criticizes the District Court for bypassing well-established precedents when reviewing their claims for irreparable harm. Not so. The District Court more than adequately opined that Defendants failed to demonstrate that they met the standard as set forth in *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d. Cir. 2015). (Dk. 91 pp. 2-5). However, to reiterate here, "[t]he comparison of harm to the Government as opposed to the harm to [Plaintiffs] turns mostly on matters of public interest because these considerations "merge when the Government is the opposing party." *Hope v. Warden York County Prison*, 20-1784, 2020 WL 5001785, at *14 (3d Cir. Aug. 25, 2020) (citation omitted).

At the beginning of the July 22, 2020 hearing, an objection was placed on the record regarding Defendants' witnesses not offering any expert opinions. (Dkt. 75 pp. 4-11). Defendants concurred. (Dkt. 75 p. 8) ("First of all none of our witnesses are offering expert opinions here today."). Despite this fact, the Motion argues that, "[b]ecause COVID-19 spreads primarily from person-to-person, medical ***experts***, scientists, and public health officials agree that, in the absence of a vaccine, there is

only one proven method of preventing further spread of the virus: limiting person-to-person interactions through social distancing." (Doc. 18 p. 13) (emphasis added). This is not supported by the record. Rather, the record shows that Defendants' decision makers were not experts:

> Q: My question was: Is any one of that group we identified an expert in infection control?
>
> A: I don't believe any of them are specifically expert[s] in infection control.
>
> Q: Thank you. And to your knowledge, none of them have any medical training?
>
> A: I believe that is correct.

(Dkt. 75 p. 25).

Now, Defendants seek to invalidate the District Court's analysis in one broad sweeping stroke in the form of their Motion without ever submitting any medical testimony as to why their request would cause irreparable harm.

3. Plaintiffs Will Suffer Irreparable Harm if the Stay is Granted by the Court.

The District Court addressed this issue when it granted Plaintiffs' initial request for a Motion for Speedy Hearing of Declaratory Judgment Action, in stating:

> violations of substantive due process and equal protection that interfere with important or fundamental rights, including the right to operate a legitimate business and/or earn a living, are serious deprivations that could, as Plaintiffs argue, cause continuing, ongoing and perhaps irreparable harm.… (Dkt. 15 p. 9).

After a finding of such violations, one could hardly argue that Plaintiffs will not suffer serious and irreparable harm if a stay is granted by the Court. This harm may very well be irreparable since Plaintiffs' Declaratory Judgment does not provide for monetary relief.

4. The Public Interest Favors Denial of the Stay.

There is no time in our history that the continued infringement upon and violation of the citizens' constitutional rights can be said to further the public's interest. "The strongest public interest is in protection of civil rights guaranteed to all by the Constitution of the United States. Society in general, as well as those in custody, are severely harmed when persons are held under conditions of confinement that are arguably in violation of the Eighth Amendment." *Harris v. Pernsley*, 654 F. Supp. 1057, 1058, 1065 (E.D. Pa. 1987). As noted in *Harris*, the strongest public interest is served by protecting the civil rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. "The First Amendment enshrines the most fundamental rights held by a free people. Moreover, violations of substantive due process and equal protection that interfere with important or fundamental rights, including the right to operate a legitimate business and/or earn a living, are serious deprivations that could, as Plaintiffs argue, cause continuing, ongoing and perhaps irreparable harm." (Dkt. 15 p. 9). These constitutional

violations are no less severe and offensive to the public interest than the confinement of inmates in conditions that are arguably in violation of the Eighth Amendment.

The public interest here certainly does not countenance continued constitutional violations. Indeed, the only argument that Defendants make on this point is Defendants' "effort to protect Pennsylvanians from the virus." As previously noted herein, there is no evidence in the record that any steps that the Defendants took had any impact on the spread of the virus. Indeed, the District Court plainly noted, "the [congregant] limitations are not narrowly tailored in that they do not address the specific experience of the virus across the Commonwealth." The District Court rightly noted the odd methods that Defendants imposed in order to attempt to restrict the spread of the virus, calling the Defendants' creation, a "topsy-turvy world where Plaintiffs are more restricted in areas traditionally protected by the first Amendment than in areas which usually receive far less, if any, protection." (Dkt. 80 pp. 31-32).

Further, when asked on cross-examination whether he was aware of "a single wedding reception or wedding celebration" that has been "identified as a source of the spread of either COVID or the virus, of the SARS virus?", Defendants, via Deputy Chief of Staff, Sam Robinson, testified "I am not aware". (Dkt. 75 p. 55).

Further, when the Court asked Mr. Robinson whether Defendants had any knowledge of "whether there has been any correlation between one of these mega

spreading events and any of the protests that were held over the last couple months?", Defendants, via Deputy Chief of Staff, Sam Robinson, testified "I'm not aware specifically. I have not seen sort of press coverage or, you know, CDC information about that. I have not seen information linking a spread specifically to protests … I have not seen coverage or, you know, scientific literature or information along those lines." (Dkt. 75 pp. 154-155).

CONCLUSION

This Court should refrain from the extraordinary relief sought by the Defendants. They have failed to balance the equities in their favor as required by this Court in evaluating Motions to Stay.

Defendants have not sustained their burden and are left with multiple arrows in their public health quiver. This case does not eliminate public health measures such as masks, gloves, social distancing , or uniform percentage occupancies applied in a constitutionally permissible manner. However, it does reverse the constitutional violations asserted before the District Court under the First and Fourteenth Amendments.

Granting a Stay would reimpose those same constitutional violations. For these reasons, the Motion for Stay should be denied by this Court.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am admitted to the United States Court of Appeals for the Third Circuit, and am in good standing.

Respectfully submitted,

/s/ Thomas W. King, III

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 5,126 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2008 version of Microsoft Word in 14 point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: September 30, 2020

/s/ Thomas W. King, III

CERTIFICATE OF FILING AND SERVICE

I, Elissa Diaz, hereby certify pursuant to Fed. R. App. P. 25(d) that, on September 30, 2020, the foregoing Response to Appellants' Motion for Stay was filed through the CM/ECF system and served electronically.

In light of the Court's March 17, 2020 COVID-19 Notice, the submission of paper copies of the foregoing documents is being deferred until further direction of the Court.

/s/ Elissa Diaz
Elissa Diaz