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

PARADISE CONCEPTS, INC., T/A KENWOOD POOLS, *et al*,	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	No. 20-2161
THOMAS W. WOLF, *et al.*,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Dated: January 29, 2021

Respectfully submitted,

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Defendants Thomas W. Wolf ("Gov. Wolf"), Rachel Levine, M.D. ("Sec. Levine"), Dennis M. Davin ("Sec. Davin"), and Kalonji Johnson ("Commissioner Johnson") (collectively "Defendants"), by counsel, respectfully submit this memorandum of law in support of their Motion for Summary Judgment.

I. INTRODUCTION

On March 19, 2020, as the COVID-19 pandemic began to surge in Pennsylvania, Gov. Wolf and Sec. Levine issued orders that, among other things, closed all "non-life sustaining" businesses in Pennsylvania. The orders identified businesses by reference to industry categories in the North American Industry Classification System ("NAICS"), and each NAICS industry category was determined to be either "life sustaining" or "non-life sustaining." If a business was in a life sustaining category, it could continue operation, with some restrictions; if it was non-life sustaining, it must close all in-person operation.

Around that same time, Gov. Wolf worked with Sec. Davin and the Pennsylvania Department of Community and Economic Development ("DCED") to create a waiver system for non-life sustaining businesses. For any business whose NAICS category was non-life sustaining, it could submit a request for a waiver that would allow continued in-person operation because its specific business function was actually life sustaining. This case arises from this waiver system.

There is no dispute in this case that Plaintiff Paradise Concepts, Inc. t/a Kenwood Pools ("Kenwood Pools") submitted a waiver request that was denied. There is also no dispute that LA Pools Inc. ("LA Pools"), which Plaintiff contends is a competitor, submitted a waiver request that was granted. The only remaining issue before the Court is whether the decision to deny Kenwood Pools' waiver while granting LA Pools' waiver was a violation of the Equal Protection Clause. It was not. Each company submitted substantially different waiver requests, and DCED responded appropriately to each request. Further, this Court now lacks jurisdiction to adjudicate

this dispute because, for at least six months, there has been no difference in how Kenwood Pools and LA Pools can conduct their businesses. There is no ongoing dispute for this Court to adjudicate. Summary judgment should be entered in Defendants' favor.

First, this Court lacks subject matter jurisdiction due to Pennsylvania's Eleventh Amendment immunity. This Court may only enter injunctive or declaratory relief if there is an *ongoing* violation of federal law by a state official, but, indisputably, the policy challenged here was only in effect for a few weeks during March and April 2020, and it will not return. Significantly, in a case in which another district court entered a broad injunction against other COVID-19 restrictions, the court held in May 2020 that the same waiver policy at issue here was no longer ongoing and thus not subject to declaratory relief. ***Second***, the equal protection claim here is moot. Although voluntary cessation often does not require a finding of mootness, the specific circumstances of this case—for example, that the challenged policy started nearly a year ago, arose suddenly at the outset of the pandemic, and lasted for less than a month—merit dismissal here. ***Third***, there was no equal protection violation in how the waivers were handled. The waiver submissions by Kenwood Pools and LA Pools were substantially different, and further, DCED had a justifiable basis for treating the two submissions differently. Specifically, Kenwood Pools presented itself as a pool product retail company, while LA Pools sought a waiver for pool construction and repair. Particularly under the circumstances existing in March 2020, there is no evidence that DCED violated equal protection by denying Kenwood Pools' waiver while granting one to LA Pools.

For these reasons, Defendants are entitled to summary judgment.

II. FACTS

A. A Global Pandemic Unexpectedly Struck in Early 2020 and Gov. Wolf Responded

On the eve of a new year, researchers in China identified a new disease caused by a novel coronavirus. On January 21, 2020, the first case was confirmed in the United States. Ten days later, the World Health Organization declared a global health emergency. Over the next month, COVID-19 swept the globe.[1] Medical experts, scientists, and public health officials agreed that the best, and perhaps only, method of preventing spread of the virus was limiting person-to-person interactions through social distancing.[2] Accordingly, to protect the lives and health of millions of Pennsylvanians, Governor Wolf, on March 6, 2020, issued an executive order proclaiming the existence of a disaster emergency throughout the Commonwealth.[3] The executive order invoked three separate statutory grounds for his authority: the Emergency Management Services Code, 35 Pa. C.S. § 7101 *et seq.*; the Disease Prevention and Control Law ("DPCL"), 35 P.S. § 521.1 *et seq.*; Sections 532(a) and 1404(a) of the Administrative Code, which outline the powers and responsibility of the Department of Health, 71 P.S. § 532; 71 P.S. § 1403(a). He followed this with an order closing all non-life sustaining businesses on March 19, 2020 (the "Closure Order"). Second Amended Complaint ("SAC"), ECF No. 4, ¶ 10. In the

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[1] Derrick Bryson Taylor, "A Timeline of the Coronavirus," *The New York Times*, https://www.nytimes.com/article/coronavirus-timeline.html (last visited 3/20/2020).

[2] Yascha Mounk, "Cancel Everything: Social distancing is the only way to stop the coronavirus. We must start immediately," *The Atlantic Monthly*, https://www.theatlantic.com/ideas/archive/2020/03/coronavirus-cancel-everything/607675/ (last visited 3/23/20).

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

Closure Order, Gov. Wolf listed in detail those businesses considered life sustaining and those that are not.[4]

To allow businesses to challenge their classification as non-life sustaining, Gov. Wolf and the DCED developed a program to allow business to apply for a waiver from the Closure Order (the "Waiver Program"). Declaration of Sam Robinson, dated January 29, 2021 ("Robinson Decl."), ¶¶ 5-6.[5] The Waiver Program "allow[ed] businesses in an industry that had been classified as non-life sustaining to show that the business served a life sustaining function and thus should remain open to the public." *Id.* The Waiver Program began shortly after the Closure Order on March 19, and it ended a few weeks later on April 3, 2020. Robinson Decl. ¶ 7. This Waiver Program "will not return under any circumstances." Robinson Decl. ¶ 8.

In the following months, Gov. Wolf, in consultation with health experts, ordered a phased relaxing of the restrictions in the Closure Order. This "Plan for Pennsylvania" placed individual counties into one of three tiers: Red, Yellow, or Green.[6] A county in the Red phase allowed only "life sustaining businesses" to open to the public.[7] That is because "[t]he red phase has the sole

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[4] The Governor's Order references a list of business separated by industry as commonly used by the U.S. Bureau of Labor Statistics. *See* Industries by Supersector and North American Industry Classification System (NAICS) Main (NAICS) Code, U.S. Bureau of Labor Statistics https://www.bls.gov/iag/tgs/iag_index_naics.htm (last visited 3/20/2020). Business already know which sector they occupy and the corresponding NAICS code. Additionally, the Pennsylvania Department of Community and Economic Development provides resources to assist businesses. COVID-19 Business Resources, https://dced.pa.gov/resources/ (last visited 3/20/2020).

[5] *See also* Richard E. Coe, "Pennsylvania Grants Waivers Allowing Non-'Life-Sustaining' Businesses to Resume Operations," (Apr. 1, 2020), https://www.natlawreview.com/article/pennsylvania-grants-waivers-allowing-non-life-sustaining-businesses-to-resume.

[6] Gov. Tom Wolf, Process to Reopen Pennsylvania, https://www.governor.pa.gov/process-to-reopen-pennsylvania/ (last visited 7/29/2020).

[7] *Id.*

purpose of minimizing the spread of COVID-19 through strict social distancing, non-life sustaining business, school closures, and building safety protocols."[8] In the Yellow phase, retail stores were permitted to open but limited to 50% capacity.[9] "The purpose of this phase is to begin to allow limited resumption of social activity while keeping a close eye on the public health data to ensure the spread of disease remains contained to the greatest extent possible."[10] Finally, in the Green phase, all businesses were permitted to reopen, with many retail stores permitted to expand to 75% capacity and subject to additional guidance.[11] As of July 3, 2020, all Pennsylvania counties were in the Green phase.[12] Thus, no business has needed a waiver to operate since at least July 2020. Robinson Decl. ¶ 9.

B. Kenwood Pools' and Its Competitors' Waiver Requests

Kenwood Pools "operates a retail store in Levittown, Bucks County, that sells pool and spa chemicals, filtration systems, heat pumps, gas heaters, pool toys and accessories, and maintenance equipment to the public." SAC ¶ 32. On March 26, 2020, Kenwood Pools submitted a request for a waiver through the DCED portal. Declaration of Neil Weaver, dated January 29, 2021 ("Weaver Decl."), ¶ 7 & Ex. B. Kenwood Pools described its business as

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8 *Id.*

9 Gov. Tom Wolf, COVID-19 Guidance for Business, https://www.governor.pa.gov/covid-19/business-guidance/ (last visited 7/29/2020).

10 Gov. Tom Wolf, Process to Reopen Pennsylvania, https://www.governor.pa.gov/process-to-reopen-pennsylvania/ (last visited 7/29/2020).

11 Gov. Tom Wolf, COVID-19 Guidance for Business, https://www.governor.pa.gov/covid-19/business-guidance/ (last visited 7/29/2020).

12 Gov. Tom Wolf, "Gov. Wolf: Last PA County will Move to Green on July 3," June 26, 2020, https://www.governor.pa.gov/newsroom/gov-wolf-last-pa-county-will-move-to-green-on-july-3/#:~:text=Governor%20Tom%20Wolf%20announced%20today,%2C%E2%80%9D%20Gov.%20Wolf%20said. (last visited 7/1/2020).

"Swimming pools retail and wholesale." Weaver Decl. Ex. B. It asked for a waiver due to customer requests for "pools equipment and chemicals," which it said were "imperative" because customers need to "run their filtration systems and keep proper chemicals balance in the water to prevent spread of West Nile virus." *Id.* Kenwood Pools also noted that it supplied pool service companies, "Lower Bucks municipal authorities and Falls township public works with Liquid chlorine and other chemicals" *Id.* Kenwood Pools described how they would attempt to limit the spread of COVID-19 in its 5,000 square foot retail shop through social distancing, cleaning, and making hygiene products available. *Id.*

LA Pools, Inc. ("LA Pools") submitted a request for a waiver on March 21, 2020. Weaver Decl. ¶ 8 & Ex. C. It described its business as "Swimming Pool Maintenance & Construction." Weaver Decl. Ex. C. It asked for a waiver because "Unmaintained Pools Become a Health Hazard and Constructions Projects Present a Safaty Hazard." *Id.* LA Pools said that its five employees would "travel in individual trucks and not share equipment and tools." *Id.*

DCED never received a request for a waiver from Leslie's Pool Supplies and Service Repairs ("Leslie's"). Weaver Decl. ¶ 9. Thus, Leslie's never received a waiver.

III. STANDARD OF REVIEW

The summary judgment standard is well established. A party is entitled to summary judgment if it can show "that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A movant that will not bear the burden of proof on an issue at trial satisfies its initial responsibility on summary judgment by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325

(1986). In that situation, a movant is entitled to summary judgment if the nonmoving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case." *Id.* at 322. This factual showing must be based on evidence in the factual record and not on conjecture or speculation. *Wharton v. Danberg*, 854 F.3d 234, 244-45 (3d Cir. 2017); *see also* Fed. R. Civ. P. 56(c) (evidence must be admissible to be considered at summary judgment). But in deciding whether the movant is entitled to judgment as a matter of law, the Court must view all admissible evidence in the record in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255. A party may file a motion for summary judgment "at any time" until, at least, 30 days after the close of discovery. Fed. R. Civ. P. 56(b).

IV. ARGUMENT

A. Plaintiffs' Claims Are Barred by Eleventh Amendment Immunity

The assertion of immunity under the Eleventh Amendment challenges the court's subject matter jurisdiction. *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 694 n.2 (3d Cir. 1996). Thus, Eleventh Amendment immunity presents one of the "threshold barriers to federal court review of a controversy." *Silver v. Court of Common Pleas of Allegheny Cty.*, 802 Fed. Appx. 55, 58 (3d Cir. 2020). "An actual determination must be made whether subject matter jurisdiction exists before a court may turn to the merits of a case." *Tagayun v. Lever & Stolzenberg*, 239 Fed. Appx. 708, 710 (3d Cir. 2007); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The Court may revisit its subject matter jurisdiction at any time. Fed. R. Civ. P. 12(h)(3).

It has been long established that the Eleventh Amendment of the United States Constitution bars all private lawsuits against non-consenting states in federal court. *Karns v. Shanahan*, 879 F.3d 504, 512 (3d Cir. 2018) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). Eleventh Amendment immunity "is designed to preserve the delicate and 'proper balance

between the supremacy of federal law and the separate sovereignty of the States.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 757 (1999)). The courts have developed a limited exception to a state's Eleventh Amendment immunity for certain claims. To "ensure[ ] that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law," *see Puerto Rico Aqueduct*, 506 U.S. at 146, a federal court "may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan*, 440 U.S. 332, 337 (1979). This exception allowing certain kinds of declaratory or injunctive relief against state officials in their official capacity—initially noted in *Ex parte Young*, 209 U.S. 123 (1908)—is "narrow," in that it "applies only to prospective relief, [and] does not permit judgments against state officers declaring that they violated federal law in the past." *Puerto Rico Aqueduct*, 506 U.S. at 146. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in judgment)).

Here, the Eleventh Amendment bars the declaratory and injunctive relief that Plaintiff seeks related to the Waiver Program because there is no ongoing violation of the law such that this claim would fit within the *Ex parte Young* exception. There is no dispute that the Waiver Program ended in April 2020, and that it will not return. *See* Robinson Decl. ¶¶ 7-9. Further, any effect of the Waiver Program is no longer ongoing—since entering the Green phase, all businesses have been treated the same regardless of their waiver status. *Id.* This case presents a

classic example of a plaintiff improperly seeking declaratory relief for *past* conduct. *See Puerto Rico Aqueduct*, 506 U.S. at 146.

Defendants' immunity is distinct from the issue of whether there remains a case or controversy under Article III. "Eleventh Amendment immunity and the mootness doctrine are distinct concepts." *McCloskey v. Biehler*, No. 07-cv-291, 2009 WL 10689848, at *2 (W.D. Pa. July 27, 2009). "[T]he absence of mootness does not equate to an allegation of an ongoing or continuing violation necessary to invoke relief under the *Ex Parte Young* exception to Eleventh Amendment immunity." *Id.* Thus, a claim that does not allege "a continuing violation, an action that is ongoing," will still be barred by Eleventh Amendment immunity notwithstanding that it may be "capable of repetition yet evading review." 2009 WL 10689848, at *2. As the Court held in *McCloskey*, a case that is not moot may still be barred by the Eleventh Amendment if the allegedly offensive conduct ongoing. *Id.*

In *County of Butler v. Wolf*, the Court reached the conclusion in ***May 2020*** that a challenge to the Waiver Program presented no ongoing controversy. At that time, on the plaintiffs' motion for expedited consideration, the Court noted that "the process to request and receive a waiver is closed" and that "[n]o new waivers are being granted," concluding that "[d]eclaratory relief is simply not an appropriate avenue to challenge violations of rights that have already occurred." *County of Butler v. Wolf*, No. 2:20-cv-677, 2020 WL 2769105, at *4 (W.D. Pa. May 28, 2020). While not foreclosing a damages action, the Court held that the same remedy that is being sought here was improper because the plaintiff sought "a declaration from the Court that Defendants' *prior conduct* in the manner in which they gave, or withheld, waivers violated constitutional rights." *Id.* (emphasis in original).

Since May 2020, evolving circumstances have only lent further support to this ruling in *County of Butler*. Now, as then, the waiver process is closed. Now, as then, no new waivers are being granted. But now, ***unlike*** then, all Pennsylvania counties are in the Green phase, and have been since July 2020, meaning there is no distinction between a business with a waiver and one without. Robinson Decl. ¶ 8. Further, there is no dispute that the previous Waiver Program will not return. Robinson Decl. ¶ 9.[13] As in *County of Butler*, there is no basis for this case to fit within the "narrow" exception under *Ex parte Young* to Pennsylvania's Eleventh Amendment immunity. *See Puerto Rico Aqueduct*, 506 U.S. at 146. It should therefore dismiss this claim for lack of subject matter jurisdiction without reaching any of the merits in this action.

B. Plaintiffs' Claims Are Moot

Article III limits the power of the federal courts to "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)). "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id.* "Mootness ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit." *Freedom from Relig. Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016) (internal quotations omitted). A case is moot where there is no effective relief for the district court to grant. *Id.* "When a plaintiff seeks declaratory relief, a defendant arguing mootness must show that there is no reasonable likelihood that a declaratory judgment would affect the parties' future conduct."

[13] If circumstances unexpectedly change and a new closure order is entered requiring a new, different waiver system, Plaintiffs would be free to file a claim based on that system.

Hartnett v. Pennsylvania State Educ. Ass'n, 963 F.3d 301, 306 (3d Cir. 2020). "[T]he defendant's reason for changing its behavior is often probative of whether it is likely to change its behavior again." *Id.*

The overall circumstances of the decision to end the Waiver Program, along with the declaration from the Governor's office that it will not return, demonstrate why Plaintiffs' claim is moot. This is not a typical situation of voluntary cessation, where an established or longstanding practice was suddenly halted after litigation was filed; in that situation, there might be valid concerns that offending conduct might resume. But the Waiver Program existed only from March 19 to April 3, 2020. It was, admittedly, put together hastily in a rapidly changing world, during an emerging and largely unknown global pandemic, but this background provides strong evidence that any closure and waiver system that might exist in the future would look different. And the declaration from the Governor's office that the previous program will not return provides strong and indisputable evidence that, in fact, it will not. *See* Robinson Decl. ¶ 9; *see also Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012) (applying *Friends of the Earth* but noting that voluntary cessation "by government officials has been treated with more solicitude by the courts than similar action by private parties"). Because LA Pools will not operate under its previously granted waiver again, Kenwood Pools no longer has a live equal protection case or controversy.

Further, the Waiver Program did not come about in a vacuum—it existed only because Gov. Wolf first made a decision to suddenly and dramatically limit business activity. It is only with this kind of suspension of business activity that there would be any need for an exception for life sustaining activities. So, for the Waiver Program to return, the conditions necessitating severe and wide scale business closures must also return. Plus, even if widespread closures did

return, the Governor has decided that any new waiver system—while currently completely unknown and hopefully unnecessary—will be different than the old system challenged here. Because Plaintiffs' claim relies on specific facts of the Waiver Program as well as facts related specific waiver requests, a judgment would not resolve any live case or controversy.

C. Plaintiffs Cannot Establish an Equal Protection Claim

Section 1983 provides a cause of action against any "person" who, under color of state law, "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The statute "is not itself a source of substantive rights, but [rather] a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979). To state a Section 1983 claim, a plaintiff must show that a person acted under color of state law and that this person violated the plaintiff's federal constitutional or statutory rights. *Elmore v. Cleary*, 399 F.3d 279, 281 (3d Cir. 2005).

1. This Court Should Apply the *Jacobson* Standard to Plaintiff's Equal Protection Claim

Particularly because this case involves a challenge to government action at the beginning of the COVID-19 pandemic, the governing standard is provided by *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), a case challenging mandatory vaccinations following the smallpox outbreak. "The overwhelming majority of federal courts that have adjudicated constitutional challenges to COVID-19 mitigation efforts have utilized a two-part test based on *Jacobson's* text." *Parker v. Wolf*, __ F. Supp. 3d __, No. 20-cv-1601, 2020 WL 7295831, at *15 n.20 (M.D. Pa. Dec. 11, 2020); *see also M. Rae, Inc. v. Wolf*, No. 1:20-cv-2366, 2020 WL 7642596, at *5 (M.D. Pa. Dec.

23, 2020).[14] Under the *Jacobson* test, "a plaintiff must show that the challenged order either (1) has 'no real or substantial relation' to protecting public health, or (2) that it is 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Parker*, 2020 WL 7295831, at *15 n.20 (quoting *Jacobson*, 197 U.S. at 31).

2. If *Jacobson* Does Not Apply, the Court Should Apply Traditional Equal Protection Scrutiny for a Class-of-One Claim

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. Under a "class of one" theory of equal protection, "a plaintiff must allege that (1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment." *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006); *see also Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (per curiam). While there may be differences between the standards, "*Jacobson* is easily reconciled with the rational-basis standard of review that would otherwise apply to [a] class-of-one [equal protection] claim." *M. Rae, Inc.*, 2020 WL 7642596, at *6; *accord Big Tyme Investments, L.L.C. v. Edwards*, __ F.3d __, 20-30526, 2021 WL 118628 (5th Cir. Jan. 13, 2021) (*Jacobson* does not "compel a lower level of scrutiny than rational basis review" on an equal protection challenge).

[14] The exception to this rule appears to be the district court's final decision in *County of Butler v. Wolf*, __ F. Supp. 3d __, No. 2:20-cv-677, 2020 WL 5510690 (W.D. Pa. Sept. 14, 2020). However, that decision has been stayed pending appeal. *Cty. of Butler v. Governor of Pennsylvania*, 20-2936, 2020 WL 5868393 (3d Cir. Oct. 1, 2020). And even if it were not, *County of Butler* expressly distinguished COVID-19-related restrictions in place in September 2020 from those six months earlier, at the outset of the pandemic. 2020 WL 5510690, at *9 ("[C]ourts may provide state and local officials greater deference when making time-sensitive decisions in the maelstrom of an emergency. . . . It is no longer March. It is now September."). By its own terms, the reasoning of that opinion would not apply to this case.

3. Plaintiffs' Claim Fails Both *Jacobson* and Traditional Equal Protection Scrutiny

Whether or not the Court applies the deferential standards of *Jacobson* or rational basis review, Plaintiffs cannot demonstrate that their claim could withstand constitutional scrutiny.[15]

a) Kenwood Pools' Waiver Submission Presented a Different Business Model than LA Pools' Submission

Under traditional equal protection analysis, Kenwood Pools' claim fails the first part of the equal protection test because its waiver submission was not similarly situated to that of LA Pools.[16] "Persons are similarly situated under the Equal Protection Clause when they are alike 'in all relevant aspects.'" *Startzell v. City of Philadelphia, Pennsylvania*, 533 F.3d 183, 203 (3d Cir. 2008) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

On the face of their submissions, the two companies presented different business models: while both were in the swimming pool business, Kenwood Pools described its business as "retail and wholesale," *see* Weaver Decl., Ex. B, while LA Pools described its business as "[m]aintenance & [c]onstruction," *see* Weaver Decl., Ex. C. This distinction was supported by each business's description of its justification for a waiver and implementation plan. Kenwood Pools said that it intended to provide "pools equipment and chemicals" in an in-person retail environment. *See* Weaver Decl., Ex. B. By contrast, LA Pools did not mention any in-person product sales or retail store. Instead, it pointed to the health and safety hazard created by unmaintained pools, and its safety measures described employees traveling in separate trucks to

[15] There is no colorable argument that the Business Closure Orders and Waiver Program had "'no real or substantial relation' to protecting public health." *See Parker*, 2020 WL 7295831, at *15 n.20. These were measures taken directly in response to a substantial global pandemic. Thus, the first prong of *Jacobson* is clearly satisfied.

[16] Leslie's cannot be a comparator because it did not submit a waiver application and thus never received a waiver. *See* Weaver Decl. ¶ 9.

work sites. *See* Weaver Decl., Ex. C.[17] These two waiver submissions were not similarly situated, and this conclusion alone requires summary judgment. *See Startzell*, 533 F.3d at 203 (the similarly situation requirement is an "essential element" of an equal protection claim).

b) There Was a Rational Basis to Treat Kenwood Pools' Waiver Submission Differently than LA Pools' Submission

Even if Kenwood Pools and LA Pools were similarly situated, there was a rational basis to treat each differently, meaning there was no plain, palpable violation of rights. "Rational basis review is a very deferential standard." *Newark Cab Ass'n*, 901 F.3d at 156. Government action survives rational basis review under the equal protection clause "if there is any reasonably conceivable state of facts that could provide a rational basis" for treating the plaintiff differently. *United States v. Walker*, 473 F.3d 71, 77 (3d Cir. 2007) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). "[T]he principles of equal protection are satisfied 'so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.'" *Id.* (quoting *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 107 (2003)). Further, the Constitution does not require state officials to treat all entities "alike where differentiation is necessary to avoid an imminent threat" to health and safety. *Jones v. N. Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies."). When state officials "undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially

[17] Whether or not Kenwood Pools or LA Pools fully and accurately described its business on their waiver submissions is not the issue. The only information that DCED had to consider was on the waiver submissions. In other words, it does not matter whether the two *businesses* were actually similar, but rather whether their respective *waiver requests* were.

broad," which means that generally "they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *S. Bay United Pentecostal Church v Newsom*, __ U.S. __, 140 S.Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring in the denial of the application for injunctive relief) (internal citations, quotation marks, and alterations omitted).

Here, there were justifiable reasons to treat Kenwood Pools differently than LA Pools. First, LA Pools' pool maintenance service did not involve nearly as many potential person-to-person contacts as Kenwood Pools' retail environment. Although both might involve contacts between employees and between an employee and a customer, only Kenwood Pools' request suggested that there may be a substantial number of *customer-to-customer* contacts. Second, in-person pool maintenance services are more likely needed to address an emergency safety hazard—like a structural issue—than would a pool retail product company. It makes sense to allow home maintenance while not allowing retail. Third, even with business closures in place, customers could still get pool products via home delivery; customers who needed pool chemicals, for example, could still get them. By contrast, home maintenance projects, including for pools, could not be accomplished any way other than in person. Thus, there may be a "plausible policy reason" to allow LA Pools' request while not allowing Kenwood Pools' request. *See Walker*, 473 F.3d at 77.

Whether through the *Jacobson* lens or using the rational basis test, the decision to deny Kenwood Pools' waiver request while granting the request of LA Pools satisfies equal protection scrutiny.[18]

[18] Plaintiff has conducted no discovery with respect to the claim that WIN Home Inspection ("WIN") was treated differently than its competitor, Trimmer Home Inspections ("Trimmer"). Likely, the reason is that they were not treated differently because neither was granted a waiver.

V. CONCLUSION

Wherefore, this Court should grant the Defendants summary judgment and dismiss all claims against Defendants Thomas W. Wolf, Rachel Levine, M.D., Dennis M. Davin, and Kalonji Johnson.

Dated: January 29, 2021

Respectfully submitted,

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Trimmer simply appears on a list of companies for whom a waiver was not required, which was a category for "a business that was included in a life sustaining industry subsector on the business closure list, or described an activity that was already permitted under the orders (e.g., emergency repairs)." *See* DCED website, Exemptions Not Required By County, https://dced.pa.gov/download/exemptions-not-required-by-county/?wpdmdl=94752 (last visited 1/29/2021). In other words, WIN and Trimmer never had a change in status, because at all times each would have been permitted to perform certain services with or without any express statement by DCED. *See id.* Defendants are entitled to summary judgment on WIN's claim.