Received 6/19/2020 11:21:03 AM Supreme Court Middle District

Filed 6/19/2020 11:21:00 AM Supreme Court Middle District
104 MM 2020

IN THE SUPREME COURT OF PENNSYLVANIA

THE HONORABLE TOM WOLF, GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, Petitioner, v. SENATOR JOSEPH B. SCARNATI, III, SENATOR JAKE CORMAN, and SENATE REPUBLICAN CAUCUS, Respondents.	:	No. 104 MM 2020

APPLICATION FOR LEAVE TO FILE REPLY BRIEF

Senator Joseph B. Scarnati, III, Senator Jake Corman, and the Senate Republican Caucus (collectively, "the Senators") file this application seeking leave to file of record the reply brief attached hereto as Exhibit 1, and in support of this request, the Senators aver as follows:

1. On June 17, 2020, the Court granted Governor Wolf's request to exercise King's Bench jurisdiction.

2. At the time the Court granted the Governor's request, the Senators had a pending Application for Expedited Summary Relief pending in the Commonwealth Court in docket number 344 MD 2020.

3. Briefing on the Application had not yet concluded at the time this Court accepted jurisdiction.

4. Accordingly, the Senators had not yet filed a reply brief in further support of their Application.

5. With the benefit of having reviewed the Governor's King's Bench application, the Senators learned the arguments the Governor has in opposition to the Senators' Application for Expedited Summary Relief.

6. In response to those arguments, the Senators began drafting and would have filed in the Commonwealth Court the reply brief attached hereto as Exhibit 1.

7. Given the significance of issues now before the Court, the Senators respectfully submit the responses set forth in the attached reply brief would aid the Court in this disposition of this matter.

8. Accordingly, the Senators ask the Court to deem the reply brief as filed of record, and ask the Court to review the same during the disposition of this matter.

WHEREFORE, the Senators respectfully request that the Court GRANT this application and accept the reply brief attached hereto as part of the record in this matter.

Respectfully submitted,

Dated: June 19, 2020

/s/ Matthew H. Haverstick
Matthew H. Haverstick (No. 85072)
Mark E. Seiberling (No. 91256)
Joshua J. Voss (No. 306853)
Shohin H. Vance (No. 323551)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com

Attorneys for Senator Joseph B. Scarnati, III, Senator Jake Corman, and the Senate Republican Caucus

Exhibit 1

IN THE SUPREME COURT OF PENNSYLVANIA

No. 104 MM 2020

THE HONORABLE TOM WOLF, GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

SENATOR JOSEPH B. SCARNATI, III, SENATOR JAKE CORMAN, and SENATE REPUBLICAN CAUCUS,

Respondents.

REPLY BRIEF OF SENATOR JOSEPH B. SCARNATI, III, SENATOR JAKE CORMAN, AND SENATE REPUBLICAN CAUCUS IN FURTHER SUPPORT OF APPLICATION FOR EXPEDITED SUMMARY RELIEF

Matthew H. Haverstick (No. 85072)
Mark E. Seiberling (No. 91256)
Joshua J. Voss (No. 306853)
Shohin H. Vance (No. 323551)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000 | Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com
Attorneys for Senator Joseph B. Scarnati, III, Senator Jake Corman, and Senate Republican Caucus

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Constitutional Provisions

Attorney General Opinions

Other Authorities

I. INTRODUCTION

The parties have reached a limited accord on what this matter is truly about: separation of powers. But more divergent views on that principle likely could not exist. To the Governor, separation of powers means he can control the lives and livelihoods of Pennsylvania's citizens until such time as he unilaterally decides otherwise. He believes he alone can say how and where we go, who we gather with and why, and even dictate the conditions under which we worship. To the Senators, this fundamental principle means when the General Assembly gives away limited emergency powers, they are just that, *limited*. And when the restraint on those powers is invoked by a bipartisan majority of the legislature as written in the very law upon which the Governor claims supreme authority, it is incumbent upon him to enforce that law *as written*, and do those things that the people's representatives have commanded.

In the end, the fight here is about no less than the fundamental balance of power between the people and their Governor. In times of crisis, does he rule alone, or does he govern in partnership with the legislature? This Court must decide.

For the reasons set forth below, and in their opening brief, Senator Joseph B. Scarnati, III, Senator Jake Corman, and Senate Republican Caucus (collectively, the "Senators") respectfully submit Governor Wolf should be immediately ordered to end the state of disaster emergency related to COVID-19.

II. ARGUMENT

A. If Governor Wolf's arguments are adopted, then Section 7301 violates the Constitution on non-delegation grounds and under the presentment clause.

Governor Wolf argues that if the Court adopts his views on presentment, then this dispute is over and he prevails. But that is not so. His arguments, if accepted, in fact render 35 Pa.C.S. § 7301 constitutionally infirm on non-delegation grounds and under the presentment clause. Thus, if the Court supports the Governor's threshold views on presentment, then the constitutional issues, explained here, must also be addressed.

1. This Court should reject Governor Wolf's proposed framework because it renders the Emergency Code unconstitutional under non-delegation principles.

In an effort to establish that HR 836 was an exercise of legislative power, Governor Wolf contends his emergency proclamations were

"laws" under this Court's jurisprudence, such that their termination by resolution is a repeal of a law and therefore subject to presentment under Article III, Section 9. As detailed in the Senators' opening brief and further developed in Section II(C), *infra*, this argument is unsupportable as a matter of law.

More fundamentally still, however, Governor Wolf's suggestion that his emergency proclamations were "laws" is predicated on an interpretation of the Emergency Code that calls the constitutionality of the entire statute into doubt and, thus, is untenable under the constitutional avoidance doctrine. *Com. v. Herman*, 161 A.3d 194, 212 (Pa. 2017) ("Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction."). Specifically, to the extent this Court is inclined to agree that the March 6 and June 3 Proclamations prescribed laws – rather than declared sufficient facts triggering Governor Wolf's

power to *execute* previously-enacted laws – they are the product of an unconstitutional delegation of legislative authority.[1]

In this regard, it is well-settled that the legislative power – *i.e.*, the power "to make, alter and repeal laws" – cannot be delegated to another branch of government. *Blackwell v. Com., State Ethics Comm'n*, 567 A.2d 630, 636 (Pa. 1989) (defining "legislative power" as "the power to make, alter and repeal laws" while cautioning "[i]t is axiomatic that the Legislature cannot constitutionally delegate [such powers] to any other branch of government or to any other body or authority" (internal quotation marks and citations omitted)). As aptly articulated by this Court, the proscription against improper delegation applies "[r]egardless of exigencies which at times arise or of how trying our economic or social conditions become," and thus, "neither the urgency of the necessity at hand nor the gravity of the situation allow the legislature to abdicate, transfer or delegate its authority or duty to

[1] Notably, this Court has previously applied this doctrine specifically to avoid a construction of a statute that implicated anti-delegation concerns. *See Ruch v. Wilhelm*, 43 A.2d 894, 896-97 (Pa. 1945) (declining to adopt a proposed construction of a statute because it could "render the constitutionality of the act extremely doubtful" because "the legislature cannot delegate its power to make a law").

another branch of the government." *Holgate Bros. Co. v. Bashore*, 200 A. 672, 675 (Pa. 1938).

Nevertheless, "in some instances," the General Assembly may "assign the authority and discretion to execute or administer a law," subject to "two fundamental limitations." *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 833 (Pa. 2017) (internal quotation marks and brackets omitted).[2] Specifically, the legislature must make "the basic policy choices," and include "adequate standards which will guide and restrain the exercise of the delegated administrative functions." *Id.* Governor Wolf's construct, however,

[2] The General Assembly may also delegate to another branch "the duty to determine whether the facts exist to which the law is itself restricted." *Holgate Bros.*, 200 A. at 675. In rejoinder, however, the Governor disputes this formulation of the power delegated to him, maintaining that the power conferred by the Emergency Code is not merely one of determining the facts that implicate the enacted laws. Moreover, to the extent the Governor will seek to reverse course and embrace the characterization of his proclamations as a factual determination, construing them as "laws" would nonetheless be an improper delegation of legislative power because in assigning a fact-finding duty in connection with laws, the legislature cannot "empower a fact-finding body to create the conditions which constitute the fact." *In re Marshall*, 69 A.2d 619, 626 (Pa. 1949). Here, as framed by the Governor, he not only has the power to determine whether a fact (*i.e.*, an emergency) exists to which the law (*i.e.*, the Emergency Code) is limited, but also unfettered discretion to determine the conditions under which an emergency is found to exist. Accordingly, even when characterized in factual terms, the emergency proclamations cannot properly be construed as laws, absent an attendant conclusion that they are the product of an unconstitutional delegation of legislative authority.

violates both limits on such delegation and, thus, would render the Emergency Code unconstitutional.

First, under Governor Wolf's formulation of the powers given to him by the Emergency Code, the "basic policy choices" have been – and continue to be – made *by him*, rather than the General Assembly. Specifically, Governor Wolf's insistence that the emergency measures implemented over the course of the last several months were *prescribed by* the proclamations, rather than by statutes triggered *as a result* of the factual findings in the proclamation, is predicated on a reading of the statute that grants the Governor control over all policy decisions independent of any statute. Indeed, under Governor Wolf's theory, the executive appears to be the sole arbiter of policy, making it difficult to discern any policy choices made by the General Assembly.

Second, Governor Wolf's statutory construct is wholly devoid of any standards that would guide and restrain the exercise of his emergency powers, since under his theory, the emergency measures themselves – and not merely the power to declare the existence of an emergency – may be established at his discretion. Such a transfer of virtually unrestricted power to the executive branch, including the

power to suspend laws, without any standards that would guide and restrain his powers would plainly render the Emergency Code unconstitutional. Indeed, as framed by Governor Wolf, the Emergency Code violates the central purpose of the non-delegation doctrine, which is "to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 291 (Pa. 1975).

In short, therefore, adopting the Governor's assertion that his emergency proclamations satisfy the definitional criteria of a "law" necessarily requires a finding that the Emergency Code is unconstitutional. On the other hand, the Senators' framework would preserve the validity of the statute. As such, this Court should reject the Governor's proposed construct. *Accord Ruch*, 43 A.2d at 896-97.

2. If HR 836 needs to be presented, then Section 7301(c) of the Emergency Code violates the presentment clause and the entirety of Section 7301 must be declared unconstitutional.

The Court should also disregard and reject the Governor's invitation to read a non-existent presentment requirement into the plain language of Section 7301(c), or to read existing law as requiring any such presentment. *See* Pet. App. at 14-27. Nevertheless, if the

Court accepts the Governor's position that concurrent resolutions under Section 7301(c) need to be presented, the Court must not only invalidate the single sentence regarding concurrent resolutions, but also *declare the balance of Section 7301 unconstitutional*, since the offending provision cannot be severed from the constitutional ones.

(a) The Court cannot imply a reference to Article III, Section 9 in Section 7301(c).

Despite the plain text of Section 7301(c) (with its use of "at any time"; "thereupon"; and "shall issue"), the Governor suggests a presentment requirement should be read into the statute. *See* Pet. App. at 17-21. To this end, the Governor relies primarily on the 1987 decision from this Court in *Commonwealth v. Sessoms*, 532 A.2d 775, 782 (Pa. 1987), in which the Court noted it could "imply" a presentment requirement in the enabling statute for the Pennsylvania Commission on Sentencing "to avoid finding the statute unconstitutional on its face." *See* Pet. App. at 18-20. According to the Governor, pursuant to *Sessoms*, this Court should merely declare HR 836 a "legal nullity" for failure to present, instead of declaring Section 7301(c) in violation of the

presentment clause of Article III, Section 9 and invalidating the statute.[3] *See id.*

But a careful reading of that decision demonstrates that Governor Wolf misconstrues its holding. Specifically, while the *Sessoms* Court noted that the statute's failure to explicitly require presentment was not fatal in of itself – since the Court "may imply such a condition to avoid finding the statute unconstitutional on its face" – the panel did not ultimately reach a conclusion in this regard. Rather, assuming *arguendo* that presentment could be inferred, the Court held that the guidelines were nevertheless invalid because "[i]n actual application … it [was] clear that the present guidelines [were] the direct product of a

---

[3] Notably, the enabling statute at issue in *Sessoms* was amended by the General Assembly in 1988, a few months after the Court decided *Sessoms*, to expressly require presentment of concurrent resolutions under the statute. *See* 42 Pa.C.S. § 2155 ("*Subject to gubernatorial review pursuant to section 9 of Article III of the Constitution of Pennsylvania*, the General Assembly may by concurrent resolution reject in their entirety any guidelines, risk assessment instrument or recommitment ranges adopted by the commission within 90 days of their publication in the Pennsylvania Bulletin pursuant to subsection (a)(2).") (emphasis added). As is evident from this amendment, the General Assembly clearly knows how to expressly require presentment to the Governor of concurrent resolutions if that is its intent.

In this regard, it also bears reiterating that legislative action by concurrent resolution is permitted by numerous statutes, but presentment is included in only a handful of such enactments. *Compare, e.g.*, 71 P.S. § 745.7 (requiring presentment); 53 P.S. § 42206 (same); 53 P.S. § 28206 (same); 53 P.S. § 12720.206 (same), *with, e.g.*, 35 P.S. § 7130.309 (making no reference to presentment of gubernatorial action); 35 P.S. § 6020.501 (same); 46 P.S. § 145.12 (same); 53 Pa.C.S. § 1137 (same); 71 P.S. § 720.2 (same).

violation of this constitutional requirement of presentment." *Sessoms*, 532 A.2d at 782. As such, the passage cited by Governor Wolf merely clarified that the basis for the Court's decision was not merely the absence of a presentment requirement in the statute, but rather, the process by which the guidelines under which the defendant had been sentenced were established. In short, the single-sentence observation to which Governor Wolf ascribes dispositive weight is a quintessential example of dicta, which this Court has cautioned "often present risks of unforeseen complications and unintended consequences, which is why reliance upon them to resolve those same complications can be difficult to justify, if not ill-advised." *See Com. v. Romero*, 183 A.3d 364, 400 n.18 (Pa. 2018).[4]

To the contrary, six years *after* the decision in *Sessoms*, this Court actually reached the issue of implied presentment and held that absent express language, presentment could *not* be inferred. *See West Shore School District v. Pennsylvania Labor Relations Board*, 626 A.2d 1131

[4] Indeed, Justice Hutchinson was the only member of the Court who would have expressly decided the issue. *See Sessoms*, 532 A.2d at 786 (Hutchinson, J., concurring) ("I do not, however, agree with those members of the lower court who would require that the procedure for adopting concurrent resolutions must of necessity be reiterated in the legislation itself in order for that requirement to be understood.").

(Pa. 1993). Specifically, faced with a presentment challenge to a concurrent resolution authorized under a statute (this time under the Sunset Act), the Court declined to read a presentment requirement into the statute, as the *Sessoms* Court suggested and, instead not only invalidated the offending provision of the statute, but also held that the remainder of the statute could not be severed and had to be invalidated too.[5] *See West Shore*, 626 A.2d at 1136. In this regard, the Court found that without the "procedures available to implement the recommendations" of the legislative branch, "the intended purpose of the Act is thwarted" and, thus, concluded that "the legislature would have enacted the remaining valid provisions without … the resolution process." *Id.*

---

[5] Notably, the offending provision in the Sunset Act at issue in *West Shore* clearly and unambiguously provided:

> *Unless legislation is enacted* prior to November 1, reestablishing an agency as provided in subsection (a), the presiding officer of each House shall cause to be placed on their respective calendars for the first legislative day in November, the question, in the form of a resolution, of whether an agency scheduled for termination on December 31 of that year shall be continued. If a majority of the members elected to each House approve such a resolution prior to the scheduled termination date of December 31, the agency shall be continued until the next review and termination cycle scheduled for said agency.

71 P.S. § 1795.7(b) (emphasis added). Thus, given the clear legislative intent on the face of the statute, the *West Shore* Court, as is the case here, did not and could not read a presentment requirement into the statute.

Against this backdrop, *West Shore*, not *Sessoms*, is controlling in this matter. Here, as in *West Shore*, no presentment requirement can or should be "implied" by the Court in order to avoid finding Section 7301(c) facially unconstitutional and invalid. This Court, as in *West Shore*, cannot simply declare the concurrent resolution in HR 836 a "legal nullity," as the Governor suggests, without declaring Section 7301(c) unconstitutional and invalid under the presentment clause of Article III, Section 9. Therefore, if the Court determines the concurrent resolution in Section 7301(c) must be presented, then the Court must declare that provision facially unconstitutional under the guidance of *West Shore*, and then the Court must determine whether Section 7301(c) can be severed from the remainder of Section 7301. As in *West Shore*, the answer here to that question is that the offending provision is not severable.

(b) The concurrent resolution provision of Section 7301(c) is not severable from the remainder of Section 7301.

Section 7301(c), and its clear intent to allow the General Assembly to unilaterally end a state of disaster emergency at any time without presentment, cannot be severed from the remainder of Section 7301

and, therefore, the entirety of Section 7301 must be declared invalid if the concurrent resolution is deemed invalid. To explain, Section 1925 of the Statutory Construction Act states that, notwithstanding the general rule that statutes should be severed when possible, a provision cannot be severed from the whole where: (1) the remaining valid provisions depend on and are "so essentially and inseparably connected" with the voided provision that the court cannot presume that the General Assembly would have enacted the valid portion without the now-voided portion; or (2) the remaining portions of the statute are incomplete and incapable of being executed in accordance with legislative intent. *See* 1 Pa.C.S. § 1925. If one or both of these exceptions apply, then the Court is mandated to invalidate the statute in its entirety, and not just the offending provision. *See id.*[6]

Important here, "[t]he legislature's intent is of primary significance in determining severability." *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1229 (Pa. Cmwlth. 2018). "The touchstone of legislative intent is whether, with the unconstitutional

[6] Of note, the Emergency Code has no severability clause.

portion of a statute removed, the legislature would prefer what remains of the statute to no statute at all." *Id.*

Here, the intent of the General Assembly is clear and unambiguous on the face of Section 7301(c) – the General Assembly reserved its ability to terminate a state of disaster emergency by concurrent resolution "at any time" without having to present that resolution to the Governor for consideration. *See* 35 Pa.C.S. § 7301(c). To this end, the remaining provisions of Section 7301 are "so essentially and inseparably connected with, and so dependent upon" Section 7301(c) that, if the Court invalidates Section 7301(c), then the Court cannot presume the General Assembly would have enacted the remaining valid provisions of Section 7301.

Indeed, the General Assembly's power to unilaterally and immediately terminate a state of disaster emergency without the Governor's approval was essential to the enactment of the entire statutory scheme of Section 7301. And, but-for this specifically reserved power in Section 7301(c) to unilaterally end an emergency declaration by the Governor, the delegations of authority made to the Governor in Section 7301 would not have been made by the General Assembly in the

first place, since common sense and experience dictate that each branch of government seeks to protect its institutional powers to the greatest degree practicable. *See West Shore*, 626 A.2d at 1136 (invalidating entirety of Sunset Act because General Assembly "would not have enacted the remaining valid provisions" without the relevant concurrent resolution provisions); *see also New York & Erie R. Co. v. Sabin*, 26 Pa. 242, 245 (1856) (holding that, even where delegation of legislative power is constitutionally appropriate, "the surrender is not to be presumed, but must be evinced by terms so explicit as to leave no doubt of the legislative intention to part with it").

Moreover, it is undeniable that, with the concurrent resolution provision of Section 7301(c) removed from Section 7301, the General Assembly would prefer no Section 7301 at all. Without the concurrent resolution provision, the Governor's delegated powers under Section 7301 are virtually limitless and unrestrained, rendering the General Assembly a mere advisory body during emergencies declared by the Governor, thereby consolidating both executive and legislative power

into a single branch of government.[7] The delegation of broad authority to the Governor to declare emergencies and the General Assembly's clear reservation of its right to terminate those declarations by concurrent resolution within Section 7301 were plainly "conditions, consideration, and compensation for each other, as to warrant a belief that the legislature intended them as a whole[.]" *See Stilp v. Com.*, 905 A.2d 918, 971-72 (Pa. 2006) (internal quotation marks omitted). Thus, if "some parts" of Section 7301 are found to be facially unconstitutional, then "all of the provisions which are thus dependent, conditional or connected, must fall with them." *Id.*

Accordingly, the concurrent resolution provision of Section 7301(c) is clearly not severable from the remainder of Section 7301. As such, to the extent the Court voids and invalidates Section 7301(c) for violating the presentment clause of Article III, Section 9 of the Pennsylvania

[7] Any delegation of exclusive constitutional power by the General Assembly can only be lawfully done by guiding and restraining the exercise of the delegated power. *See Protz*, 161 A.3d at 831. If the General Assembly is stripped of its unilateral power to immediately end a state of disaster emergency under Subsection 7301(c), then there is no restraint on the Governor, and he is able to freely and unilaterally exercise powers of the General Assembly, which unlawfully violates basic separation of powers principles.

Constitution, then the Court also must void and invalidate the entirety of Section 7301.

B. Governor Wolf's argument that all concurrent resolutions must be presented ignores settled precedent and runs contrary to the Governor's own actions.

The central thesis of Governor Wolf's brief is that *all* concurrent resolutions – "whether a law or not" – need to be presented to the Governor per se under Article III, Section 9. *See* Pet. Br. at 16, 25. In other words, he believes Article III has no threshold gating condition. This is not correct.

Indeed, all relevant cases, even the ones cited by the Governor, show that only acts of legislating – i.e., *lawmaking* – are subject to Article III. *See West Shore*, 626 A.2d at 1135; *Sessoms*, 532 A.2d at 782, 788; *Russ v. Com.*, 60 A. 169, 171 (Pa. 1905); *Com. ex rel. Atty. Gen. v. Griest*, 46 A. 505, 508 (Pa. 1900); *Fabrizio v. Kopriver*, 73 Dauph. 345, 348 (1959); *see also Pa. Prison Soc'y v. Com.*, 776 A.2d 971, 978 (Pa. 2001); *Mellow v. Pizzingrilli*, 800 A.2d 350, 359 (Pa. Cmwlth. 2002). In

other words, caselaw supplies no support for the Governor's per se position.[8]

Next, even Governor Wolf must acknowledge that Article III has a threshold condition to applicability because otherwise the initial March 6 Proclamation itself would be unlawful, as would all orders issued under the Governor's Proclamation. This is so because Article III, Section 1 says "*No law* shall be passed, except by bill," *see* Pa. Const. art. III, § 1, and the March 6 Proclamation, which Governor Wolf claims is a law, *see* Pet. Br. at 23, was issued as a proclamation and not as a bill. Thus, plainly Governor Wolf believes that Article III has some kind of gating condition; were it otherwise, the "law" he claims he passed on March 6 and the various "law" he claims he enacted under the orders related thereto would per force be invalid under Article III, Section 1. In short, the Governor's own arguments against a limiting condition in

[8] Moreover, the word "every" in Article III, Section 9 cannot be read out of context. Sometimes an encompassing word, like "every" or "all," actually means less than all when context provides otherwise. *See League of Women Voters of Greater Pittsburgh v. Allegheny County*, 819 A.2d 155, 157 n.3 (Pa. Cmwlth. 2003) (noting the phrase "all employees of the County" in Allegheny's Home Rule Chart "does *not* mean *every* County employee" since other provisions of Charter excluded certain employees); *see also Snyder Bros., Inc. v. Pennsylvania Pub. Util. Comm'n*, 198 A.3d 1056, 1080 (Pa. 2018) (Wecht, J., concurring) (noting the "maddening complexities" attendant in interpreting the term "any"), *order amended on reconsideration,* 203 A.3d 964 (Pa. 2019).

Article III, if accepted as law by this Court, would mean his own orders and proclamations would be constitutionally infirm and this matter would reach the same end: the COVID-19 state of disaster emergency would be ended.

C. The Governor advances a number of miscellaneous positions that do not nullify his duty to act.

Finally, Governor Wolf's response brief contains a number of incorrect arguments that allegedly support denying summary relief; six of them are responded to here.

First, Governor Wolf appears to suggest that *both* his March 6 Proclamation as amended and HR 836 standing alone have the effect of "orders," *see* Pet. Br. at 22, 23, 26-28, but that is fundamentally not so. Importantly, the March 6 Proclamation has as its *first* declaration an administrative declaration of a state of disaster emergency; i.e., a finding of fact: "NOW THEREFORE, pursuant to the provisions of Subsection 7301(c) of the Emergency Management Services Code, 35 Pa. C.S. § 7101, *et seq*., I do hereby proclaim the existence of a disaster emergency throughout the Commonwealth." *See* March 6 Proclamation at 2. That administrative declaration of fact is then followed by commands that only have force of law because of 35 Pa.C.S.

7301(b); that is, *without Section 7301, the balance of the commands in March 6 Proclamation would be meaningless*.[9] And, critically, those subsequent commands only have effect under Section 7301 because of the threshold finding of fact that there exists a state of disaster emergency.[10] That finding of fact is not of itself a law, under any

---

[9] "(b) Executive orders, proclamations and regulations.--Under this part, the Governor may issue, amend and rescind executive orders, proclamations and regulations which shall have the force and effect of law." 35 Pa.C.S. § 7301(b).

[10] Each command in the March 6 Proclamation is predicated on the factual pronouncement that an emergency exists and a corresponding statutory provision that gives the fact meaning and effect:

- The Pennsylvania Emergency Management Agency Director to assume command and control of all statewide emergency operations, including the power to direct all Commonwealth departments and agencies deemed necessary to cope with the emergency. *See* 35 Pa.C.S. § 7301(f)(3).
- Transfer of $20 million in unused, appropriated funds to the Pennsylvania Emergency Management Agency for associated in-state response costs and $5 million for costs associated with the Emergency Management Assistance Compact which permits the Commonwealth to pay for assistance from other states to combat the disaster. *See* 72 P.S. § 1508(a); 35 Pa.C.S. § 7604(a).
- All agencies to utilize emergency procurement procedures. *See* 35 Pa.C.S. § 7308.
- Suspension of the provisions of any regulatory statute, order, rule or regulation prescribing the procedures for conduct of Commonwealth business by any Commonwealth agency to the extent any regulatory statute, order, rule or regulation prevents, hinders or delays necessary action in coping with the emergency. *See* 35 Pa.C.S. § 7301(f)(1).
- The Adjutant General to place National Guard members on active duty. *See* 35 Pa.C.S. § 7301(e); *see also* 51 Pa.C.S. § 508.
- The Commissioner of the State Police to use all available resources and personnel as necessary to assist the Pennsylvania Emergency Management Agency. *See* 35 Pa.C.S. § 7301(f)(9).
- The Secretary of the Department of Education to suspend or waive any provision of law or regulation necessary to respond to this emergency. *See* 35 Pa.C.S. § 7301(f)(1); *see also* 24 P.S. § 15-1505.

definition of the word. *See In re Baldwin Township Allegheny County Annexation*, 158 A. 272, 272-73 (Pa. 1931).

Accordingly, when the General Assembly by HR 836 administratively terminated Governor Wolf's finding of fact, the resolution by itself likewise had no effect as an order or law. Indeed, the only *ordering* caused by HR 836 is the command found in Section 7301(c) that Governor Wolf now formally terminate his finding of fact, which is a command enacted after legislative and executive action in 1978, and not in 2020. In sum, standing alone neither the March 6 Proclamation as amended nor HR 836 have the effect of orders or laws, and both represent, at their core, a mere finding of fact that has meaning only because of duly enacted and presented acts of the General Assembly.

Second, despite Governor Wolf championing *Sessoms* as the "seminal case" on the issues presented here, Pet. Br. at 18, the case does

---

- The Department of Transportation to waive or suspend any laws or regulations related to the drivers of commercial vehicles if greater flexibility was needed. *See* 35 Pa.C.S. § 7301(f)(1); *see also* 75 Pa.C.S. § 6108.
- The applicable emergency response and recovery plans of local governments be activated. *See* 35 Pa.C.S. § 7301(d).
- The local governments to coordinate with the Pennsylvania Emergency Management Agency. *See* 35 Pa.C.S. §§ 7501-7504.

not, in fact, do anything more than show an *application* of a rule as opposed to *supplying* the rule to be applied. Indeed, as Justice Larsen observed in his dissent, the majority in *Sessoms* found the law at issue to be an instance of lawmaking, but the majority did not state and apply *the test* for lawmaking (which is what is called for here). *See Sessoms*, 532 A.2d at 788. To the contrary, assuming – without explaining – that the concurrent resolution was an exercise of the lawmaking power, the *Sessoms* Court chiefly focused on whether the Sentencing Commission's designation as a "legislative agency" altered the analysis. *Sessoms*, 532 A.2d at 781 ("If the [*INS v.*] *Chadha*[, 462 U.S. 919 (1983)] rationale may be summarized as holding that nothing less than legislation duly enacted may suffice to override the rulemaking power of an administrative agency, *the question raised by this case is whether the same necessarily holds true for a legislative agency*." (emphasis added)). Thus, while *Sessoms* is material insofar as it shows an example of lawmaking, it is not "seminal" in that it does not provide this Court the rubric that must be applied to reach a conclusion about whether HR 836 is an example of lawmaking.

Third, the Governor argues *Griest* has but one "focused and limited" holding concerning constitutional amendment, *see* Pet. Br. at 20, but that is a misreading of the opinion. Indeed, the Court in *Griest* reached *two* conclusions on why the resolution at issue there did not need to be presented. The first was that the resolution was an exercise of the legislature's exclusive power to amend the Constitution. *See Griest*, 46 A. at 507. But then the Court continued its analysis, separately holding the resolution did not need to be presented because it was not an act creating legislation, stating: "independently of [the first holding], which seems conclusive, it is perfectly manifest that the orders, resolutions, and votes which must be so submitted are, and can only be, such as relate to and are a part of the business of legislation, as provided for and regulated by the terms of article 3." *See Griest*, 46 A. at 508. The Supreme Court itself read *Griest* as having *two* holdings just four years later in *Russ v. Commonwealth*, 60 A. 169, 171 (Pa. 1905), as did two different near-contemporaneous Attorneys General. *See Joint or Concurrent Resolutions*, 24 Pa. D. 721 (Pa. Att'y Gen. June 9, 1915) (Attorney General Brown); *Concurrent Resolutions*, 7 Pa. D. & C. 672, 1926 WL 64605, at *1 (Pa. Att'y Gen. Feb. 3, 1926) (Attorney General

Woodruff). Thus, *Griest* is not nearly as narrow as Governor Wolf argues.

Fourth, Governor Wolf's formulation of Article I, Section 12 relegates the provision to meaningless constitutional text that is, ironically, subordinate to the power of the Governor under Article III, Section 9. *See* Pet. Br. at 28-30. But a few points bear re-emphasizing as it concerns Article I, Sections 12. One, it is in the Declaration of Rights, meaning it is a fundamental right of the people of the Commonwealth, necessary to, among other things, prevent tyranny of the Governor in capriciously ordering citizens to do something through the suspension of laws. Two, it is an exclusive power *of the Legislature* that needs no involvement of the Governor to give it meaning and effect. In this sense, it is just like Article XI (concerning constitutional amendments) and Article VI, Sections 4 & 5 (concerning impeachment), which likewise exclusively grant the Legislature powers that depend on nothing from the Governor to give them life and force.[11] Further, the exclusive power

[11] Pa. Const. art. XI, § 1: "Amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by a majority of the members elected to each House…."

Pa. Const. art. VI, § 4: "The House of Representatives shall have the sole power of impeachment."

of the Legislature in Article 1, Section 12 is being exercised in this case by the *Legislature itself*, which means resort to other provisions of the Constitution is further unnecessary. *Cf. West Philadelphia Achievement Charter School v. Sch. Dist. of Philadelphia*, 132 A.3d 957, 968 (Pa. 2016) (striking down law under non-delegation rule where School Reform Commission was granted power to suspend laws without guidance or restraint).

Indeed, Governor Wolf's reliance on *West Philadelphia Achievement Charter School* is largely misplaced. That case stands for the proposition that *all* powers entrusted to the General Assembly – whether it is the power to make laws under Article III or suspend them Article I, Section 12 – can only be delegated subject to the restrictions reflected in existing non-delegation principles drawn from Article II, Section 1. *See West Philadelphia*, 132 A.3d at 968 (finding "unavailing [the] non-delegation rule does not presently apply because only statutory suspensions are involved" because Article I, Section 12's "implication that suspensions may only occur per legislative

---

Pa. Const. art. VI, § 5; "All impeachments shall be tried by the Senate. When sitting for that purpose the Senators shall be upon oath or affirmation. No person shall be convicted without the concurrence of two-thirds of the members present."

authorization does not alter the restrictions on delegating legislative decision making as embodied in Article II, Section 1"). Contrary to Governor Wolf's argument, however, nothing in that case suggests that the General Assembly's own exercise of its suspension powers are subordinate to the procedural dictates of Article III.

In short, in 1978 when the General Assembly granted the Governor limited power to suspend certain laws, it did so with a proviso, as was its right under Article I, Section 12, that it could withdraw that power "at any time," and that "thereupon" the Governor would need to undo his law suspensions.[12] *See* 35 Pa.C.S. § 7301(c). With HR 836, the General Assembly is attempting to vindicate its exclusive rights under Article I, Section 12 to control the suspension of laws: that right is not subject to the Governor's review.

Fifth, Governor Wolf attempts to downplay the emphasis placed by this Court in *Friends of DeVito* on the General Assembly's authority to terminate emergency proclamations by resolution. Contrary to his suggestion, however, the reference to the legislative check on the

[12] Notably, Governor Wolf readily acknowledges he has suspended laws using Section 7301. *See* Pet. Br. at 22.

Governor's vast powers was not a "single, separate sentence," *see* Pet. Br. at 23, but rather, a lynchpin of the Court's analysis. Specifically, in rejecting the petitioners' regulatory taking claim, the Court found that Governor Wolf's emergency proclamation "result[ed] in only a temporary loss of the use of the Petitioners' business premises." *Friends of DeVito v. Wolf*, 68 MM 2020, 2020 WL 1847100, at *17 (Pa. 2020). In this respect, the Court relied principally on the fact that the Emergency Code limits the Governor's declaration in its duration "and provides the General Assembly with the ability to terminate the order at any time." *Id.* The Court's exposition of the General Assembly's powers, therefore, was not merely a prefatory sentence commenting on the general nature of the statute, but was, in fact, repeated as a central aspect of its holding.

Sixth and finally, Governor Wolf's reliance on the Legislative Procedures Manual to suggest HR 836 – a concurrent resolution under 35 Pa.C.S. § 7301(c) – needs to be presented is misguided. *See* Pet. Br. at 16 n.17. The passage cited by the Governor, 101 Pa. Code § 9.245, was published in 1974. *See id.*, Credits (noting adopted Sept. 30, 1974). But of course the entirety of the Emergency Code, including Section

7301(c) was published some four years later in 1978, *see* Act 323 of 1978; thus the text of the Manual is immaterial to the present dispute. In addition, of course regulations cannot be inconsistent with a statute (let alone the Constitution), so the provisions of the Legislative Manual, even if they controlled, would not dictate the outcome here. *Cf. Consulting Engineers Council of Pennsylvania v. State Architects Licensure Bd.*, 560 A.2d 1375, 1376 (Pa. 1989) ("A regulation cannot be upheld if it is contrary to the statute under which it was promulgated.").

D. The arguments from the amicus parties do not justify denying relief to the Senators.

In response to arguments advanced by the various amicus parties supporting Governor Wolf, the Senators briefly reply as follows.

To begin, the Members of the Democratic Caucuses of the Pennsylvania House and Senate (collectively, "the Members"), in Parts I and II of their brief simply restate arguments or positions already advanced by Governor Wolf, and which are rebutted by the Senators in their opening brief and above.

Next, in Part III of their brief, the Members argue the Senators "do not represent the institutional interests of the Pennsylvania General Assembly as a whole," *see* Members Br. at 18-20, but that

argument is irrelevant. As a threshold matter, the Senators are not before the Court claiming standing on behalf of the General Assembly as a whole; indeed, the Petition for Review filed in the Commonwealth Court alleged *personal* injuries to the Senators in their individual, official capacities, *see* PFR at ¶ 5(a)-(c), for which they have clear standing to seek relief. *See* Senators Brief in Support of Summary Relief at 13-15; *see also Goldwater v. Carter*, 617 F.2d 697, 701-03 (D.C. Cir. 1979), *vacated on other grounds by*, 444 U.S. 996 (1979). Thus, unlike in *Corman v. Torres*, 287 F. Supp. 3d 558 (M.D. Pa. 2018), upon which the Members rely, the Senators are not advancing strictly institutional interests. *See id.* at 59.

Further, unlike in *Corman*, the Senators are not before the Court claiming injury related to *future or prospective* legislation, *see id.* at 568, they are before the Court seeking relief on a concurrent resolution that has *already been adopted* by a majority of the members in each chamber of the General Assembly. Hence, that the Senators "fall short of the required majority needed in both houses to enact or defeat legislation" is immaterial since the relevant action has already occurred. *See* Members Br. at 19-20. And critically, on this point, HR 836 was adopted

with bipartisan majorities in each chamber, including with affirmative votes from members of each of the House and Senate Democratic Caucuses (2 members in the Senate; 12 members in the House).[13] As such, to the extent the Members are claiming the General Assembly as a whole has not spoken at all, they are quite incorrect: a majority of the Legislature has definitively demanded that Governor Wolf fulfill his mandatory duty under Section 7301(c). In sum, the Court can ignore the "institutional interests" arguments advanced by the Members.

Finally, the other amicus parties supporting Governor Wolf advance arguments about why terminating the state of disaster is, in their view, the wrong public policy, *see* SEIU Healthcare PA Br. at 11-15; CAUSE-PA Br. at 6-14; PBPC Br. at 7-19; yet, while the impact of this event is no doubt important, setting public policy is properly done in the General Assembly and not in this Court. *See Program Admin.*

[13] Affirmative votes to HR 836 were cast by the following members of the Senate Democratic Caucus: (1) Sen. James Brewster (Dist. 45); and (2) Sen. Judy Schwank (Dist. 11). Similarly, affirmative votes were case by the following members of the House Democratic Causes: (1) Rep. Ryan Bizzarro (Dist. 3); (2) Rep. Frank Burns (Dist. 72); (3) Rep. Scott Conklin (Dist. 77); (4) Rep. Patrick Harkins (Dist. 1); (5) Rep. William Kortz (Dist. 38); (6) Rep. Anita Kulick (Dist. 45); (7) Rep. Brandon Markosek (Dist. 25); (8) Rep. Robert Merski (Dist. 2); (9) Rep. Gerald Mullery (Dist. 119); (10) Rep. Joseph Petrarca (Dist. 55); (11) Rep. Harry Readshaw (Dist. 36); and (12) Rep. Pam Snyder (Dist. 50).

Services, Inc. v. Dauphin County Gen. Auth., 928 A.2d 1013, 1017-18 (Pa. 2007) ("It is the Legislature's chief function to set public policy and the courts' role to enforce that policy, subject to constitutional limitations."); *see also Parker v. Children's Hosp. of Philadelphia*, 394 A.2d 932, 937 (Pa. 1978) ("'Time and again, we have taken the position that the judiciary does not question the Wisdom of the action of a legislative body.'"). Further, the Senators stand ready to address any public policy issues that arise once the state of disaster emergency is ended. And, as they have done through the many pieces of legislation they have sent to the Governor during this crisis (which, unfortunately, have met his veto[14]), they will continue to support Pennsylvania's response to this crisis in a studied and thoughtful way, as is their constitutional mandate.

III. CONCLUSION

Therefore, the Court should order Governor Wolf to satisfy his mandatory duty under Section 7301(c) and issue a proclamation or order ending the state of disaster emergency related to COVID-19.

[14] *See* SB 613 (PN 1636) (vetoed April 20, 2020); HB 2388 (PN 3719) (vetoed May 19, 2020); HB 2412 (PN 3720) (vetoed May 19, 2020); SB 327 (PN 1700) (vetoed May 19, 2020).

Respectfully submitted,

Dated: June 19, 2020

/s/ Matthew H. Haverstick

Matthew H. Haverstick (No. 85072)
Mark E. Seiberling (No. 91256)
Joshua J. Voss (No. 306853)
Shohin H. Vance (No. 323551)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com

Attorneys for Attorneys for Senator Joseph B. Scarnati, III, Senator Jake Corman, and Senate Republican Caucus