

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF :
PENNSYLVANIA, DEPARTMENT :
OF HEALTH, :
Petitioner :
: No. _____ MD 2020
v. :
: OLDE HICKORY GRILL, COUNTY :
FARE RESTAURANT, SNMA REITZ, :
INC. D.B.A. 230 CAFÉ, JUKE BOX :
CAFÉ, LETTERMAN'S DINER, MAD :
DOGS KUTZTOWN, QUALITY :
SHOPPE, OLEY TURNPIKE DAIRY :
DINER, FRANK'S PIZZA, DELUXE :
RESTAURANT, MAD DOGS HOT :
DOGS MACUNGIE, :
THOMPSONTOWN CORNER DELI, :
COUNTY LINE CAFÉ, GIANNA'S :
TRADITIONAL PIZZA, MIKE'S :
PLACE, THE GREENVILLE :
JUNCTION, SHARKY'S CAFÉ, FAT :
BOYS SUMMIT DINER, DUTCH :
OVEN, WESTY BAR & GRILL, HOT :
DOG HOUSE, *and* RT. 220 DINER :
Respondents :

PETITION FOR REVIEW IN THE NATURE OF A
COMPLAINT IN EQUITY

SARS-CoV-2, which causes the Coronavirus disease 2019 ("COVID-19"), is a highly contagious virus that is a serious threat to public health and has impacted every part of the globe. Pennsylvania has seen a similar unprecedented burden of COVID-19 and has taken equally unprecedented measures to save lives and reduce the number of deaths caused by the COVID-19 virus. This response has included

Orders issued by the Secretary of the Department of Health that, *inter alia*, limit the size of public gatherings, and more recently, to close certain public establishments including the indoor, in-person dining services of restaurants (while still permitting take-out services and outdoor dining) until 8 a.m. on January 4, 2021, to reduce the spread of this virus and alleviate the stress on our healthcare system.

This decision to respond aggressively has proven to be an essential and effective measure to reduce the spread of COVID-19 and ultimately save an unrealized number of Pennsylvanians' lives. When individuals choose to ignore those safeguards—by conducting business with no social distancing in place and holding indoor, in-person dining contrary to those orders—they put the lives of Pennsylvanians at risk and threaten to reverse the significant progress that has been made to resolve this crisis. This dangerous conduct must be stopped. As a result, the Commonwealth of Pennsylvania, Department of Health ("Department of Health" or "Department"), by and through its undersigned counsel, submits this Petition for Review in the Nature of a Complaint in Equity, and in support thereof avers as follows:

STATEMENT OF JURISDICTION

1. This Court has original jurisdiction over this action pursuant to 42 Pa. C.S. § 761(a)(2).

PARTY SEEKING RELIEF

2. The Department of Health is an executive agency of the Commonwealth that is charged by the General Assembly with the responsibility to “protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease.” 71 P.S. § 532 (a).

3. The Department of Health has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. *See* 35 P.S. § 521.5; 71 P.S. § 532(a); 28 Pa. Code § 27.60. The Secretary of Health, who is the head of the Department of Health, “shall . . . exercise the powers and perform the duties by law vested in and imposed upon the department.” 71 P.S. §§ 66, 1401(b).

PARTIES WHOSE ACTION IS AT ISSUE

4. Respondent Olde Hickory Grill is a restaurant located at 709 Olde Hickory Road in Lancaster, Pennsylvania.

5. Respondent County Fare Restaurant is located at 498 East Lincoln Avenue in Myerstown, Pennsylvania.

6. Respondent SNMA Reitz is doing business as “230 Cafe” at 398 Second Street in Highspire, Pennsylvania.

7. Respondent Juke Box Café is a restaurant located at 535 South Reading Avenue in Boyerstown, Pennsylvania.

8. Respondent Letterman's Diner is located at 242 West Main Street in Kutztown, Pennsylvania.

9. Respondent Mad Dogs Kutztown is a restaurant located at 100 Constitution Boulevard in Kutztown, Pennsylvania.

10. Respondent Quality Shoppe is a restaurant located at 45 Constitution Boulevard in Kutztown, Pennsylvania.

11. Respondent Oley Turnpike Dairy Diner is located at 6213 Oley Turnpike Road in Oley, Pennsylvania.

12. Respondent Frank's Pizza is a restaurant located at 2550 Perkiomen Avenue in Reading, Pennsylvania.

13. Respondent Deluxe Restaurant is located at 2295 Lancaster Avenue in Shillington, Pennsylvania.

14. Respondent Mad Dogs Hot Dogs Macungie is a restaurant located at 14 North Poplar Street in Macungie, Pennsylvania.

15. Respondent Thompsontown Corner Deli is located at 217 East Main Street in Thompsontown, Pennsylvania.

16. Respondent County Line Café is located at 3806 Perry Highway in Hadley, Pennsylvania.

17. Respondent Gianna's Traditional Pizza is located at 1187 Perry Highway in Meadville, Pennsylvania.

18. Respondent Mike's Place is a restaurant located at 8301 Clear Ridge Road in Clearville, Pennsylvania.

19. Respondent The Greenville Junction is a restaurant located at 36 Hadley Road in Greenville, Pennsylvania.

20. Respondent Sharky's Café is located in Sharky's Plaza at 3960 State Route 30 in Latrobe, Pennsylvania.

21. Respondent Fat Boys Summit Diner is located at 791 North Center Avenue in Somerset, Pennsylvania.

22. Respondent Dutch Oven is a restaurant located at 110 Liberty Street in Jamestown, Pennsylvania.

23. Respondent Westy Bar & Grill is located at 279 West State Street in Hamburg, Pennsylvania.

24. Respondent Hot Dog House is located at 745 Willowbank Street in Bellefonte, Pennsylvania.

25. Respondent Rt. 220 Diner is located at 4292 Business US 220 in Bedford, Pennsylvania.

26. Respondents operate restaurants with in-person, indoor dining including offering food and beverage for consumption on-site.

STATEMENT OF MATERIAL FACTS

COVID-19 TRANSMISSION

27. SARS-CoV-2 is a highly contagious virus that is a serious threat to public health. (*See* Exhibit A, Declaration by the Secretary of Health, at ¶4).

28. SARS-CoV-2 is spread mainly from person to person from respiratory droplets produced by an infected person, and is spread from both symptomatic and asymptomatic persons. *Id.* at ¶6.

29. Due to the manner of transmission, spread of SARS-CoV-2 is more likely to occur when people are in close contact with one another, such as within about six (6) feet, especially when people are not wearing masks. *Id.* at ¶7.

30. An individual who is in close contact, meaning within six feet of another person for fifteen or more minutes, with another person is at an increased risk of transmitting and/or obtaining the virus. (*See* Exhibit B, Parker PI Transcript at 7:24-25, 8:2-4)

31. On-site dining has been associated with an increased risk for acquiring COVID-19. *See* <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html> (accessed Dec. 20, 2020).

32. Current CDC guidelines state that the risk of COVID-19 spread increases in a restaurant or bar setting as interactions within six (6) feet of others increase:

- **Lowest Risk:** Food service limited to drive-through, delivery, take-out, and curb-side pick-up.
- **More Risk:** Drive-through, delivery, take-out, and curb-side pick-up emphasized. On-site dining limited to outdoor seating. Seating capacity reduced to allow tables to be spaced at least 6 feet apart.
- **Higher Risk:** On-site dining with indoor seating capacity reduced to allow tables to be spaced at least 6 feet apart. And/or on-site dining with outdoor seating, but tables not spaced at least 6 feet apart.
- **Highest Risk:** On-site dining with indoor seating. Seating capacity not reduced and tables not spaced at least 6 feet apart.

Id. Individuals who participate in in-person, indoor dining are at a higher risk for transmission of COVID-19 because they are sedentary in a compact location for an extended period of time while eating—an activity that requires individuals to remove their masks and repeatedly touch the areas around their mouths and noses, activities that are known to increase the risk of spreading the virus. (Exhibit A, ¶12).

33. Current CDC guidelines further state that “[i]n general, being outdoors and in spaces with good ventilation reduces the risk of exposure to the virus that causes COVID-19.” *Id.*

ORDERS FOR MITIGATION OF THE SPREAD OF COVID-19

34. Paragraphs 1-33 are incorporated as if set out herein.

35. As a result of COVID-19, the Governor and Secretary of Health issued a series of orders to protect the public health.

36. By fall and early winter 2020, COVID-19 made a drastic resurgence in a second wave, as evidenced by a great increase in the number of infected individuals. (Exhibit B, Parker PI Transcript at 82:18-25.)

37. The Commonwealth recently has been recording daily COVID-19 cases and hospitalizations in greater numbers than at any other time during the pandemic including record high counts since the end of November. (Exhibit A – Attachment 1, Executive Order, at 1).

38. As of December 10, 2020, the number of positive or probable cases of COVID-19 was 457,289 and the number of deaths from COVID-19 was 12,010. *Id.* at 1.

39. Across the Commonwealth, hospitals are nearing maximum capacity due to the recent surge of COVID-19, and the increase in hospitalizations is making it difficult for hospitals to provide care to persons who need it. *Id.* at 1.

40. On December 10, 2020, the Secretary issued a Limited-Time Targeted Mitigation Order prohibiting in-person, indoor dining services.¹ (Exhibit A – Attachment 2, Order by the Secretary of Health).

41. The Department implemented this Mitigation Order with three goals in mind: (1) stopping the spread of COVID-19 in the Commonwealth, (2) keeping our health care systems from becoming overwhelmed, and (3) helping Pennsylvanians get through the holiday season, and closer to a vaccine, as safely as possible. (Exhibit A – Attachment 2, Order by the Secretary of Health).

42. On December 10, 2020, the Governor of Pennsylvania signed into law Executive Order 20201210 (Executive Order), thereby mandating these same restrictions in response to the COVID-19 pandemic in an effort to provide protective mitigation measures throughout the Commonwealth. (Exhibit A – Attachment 1).

43. The Executive Order, which took effect at 12:01 a.m. on December 12, 2020, and remains in effect until 8:00 a.m. on January 4, 2021, requires the following, as is relevant to this Motion:

- a. “All in-person indoor dining at businesses in the retail food services industry, including, but not limited to, bars, restaurants, breweries, wineries, distilleries, social clubs, and private catered events is prohibited.” Executive Order at Section 2(A).

¹ The Order similarly prohibited indoor gatherings of more than ten persons.

- b. "Outdoor dining, take-out food service and take-out alcohol sales are permitted and may continue, subject to any limitations or restrictions imposed by Pennsylvania law, or this or any other Order issued by me or by the Secretary of Health." Executive Order at Section 2(B).
- c. "Indoor gatherings and events of more than 10 persons are prohibited." Executive Order at Section 3(A).
- d. "Outdoor gatherings and events of more than 50 persons are prohibited." Executive Order at Section 4.
- e. "All in-person businesses serving the public within a building or defined area may only operate at up to 50% of the maximum capacity stated on the applicable certificate of occupancy, except as limited by existing orders to a smaller capacity limit." Executive Order at Section 5.

**CONTINUED ACTS IN DEFIANCE
OF THE MITIGATION ORDERS**

- 44. Paragraphs 1-43 are incorporated as if set out herein.
- 45. The Department of Agriculture, through its Bureau of Food Safety and Laboratory Services ("Bureau"), and in coordination with the Department of Health²,

² The Bureau is authorized to enforce the December 10 Order pursuant to Section 501 of the Pennsylvania Administrative Code. *See* 71 P.S. § 181 (The head of a Pennsylvania administrative department may empower an employee of another administrative department, subject to the consent of its department head, to perform any duty in which it requires of the employees of its own department.)

conducted in-person inspections of Respondents' establishments on December 16 and 17, 2020, to determine whether the facilities were compliant with current requirements.

46. During the inspection, Respondents' establishments were determined to be out of compliance as follows:

- a. Respondents Olde Hickory Grill, County Fare Restaurant, Letterman's Diner, Oley Turnpike Dairy Diner, Deluxe Restaurant, County line Café, Gianna's Traditional Pizza, The Greenville Junction, Sharky's Café, Fat Boys Summit Diner, Dutch Oven, Westy Bar & Grill, and Hot Dog House refuse to comply with the December 10 Order by continuing to host in-person, indoor dining at their facilities.
- b. Respondents 230 Café and Mike's Place refuse to comply with the December 10 Order by:
 - (A) not maintaining a social distance of six (6) feet between customers at check-out and counter lines;
 - (B) not separating employees from customers using physical barriers; and
 - (C) hosting in-person, indoor dining within their facilities.

c. Respondent Rt. 220 Diner refuses to comply with the December 10 Order by:

- (A) failing to follow CDC guidelines to enforce masks to be worn by employees while on the premise of its facility;
- (B) failing to have barriers between tables or markings indicating that certain tables are not to be used; and
- (C) hosting in-person, indoor dining within its facility.

d. Respondent Juke Box Café refuses to comply with the December 10 Order by:

- (A) not following CDC guidelines to enforce masks to be worn by employees while on the premise of the facility; and
- (B) hosting in-person, indoor dining within its facility.

e. Respondents Mad Dogs Kutztown, Quality Shoppe, and Mad Dogs Hot Dogs Macungie refuse to comply with the December 10 Order by continuing to host in-person, indoor dining at their facilities. It is noted that these establishments are still actively practicing social distancing within their facilities by limiting occupancy to 50% of the fire

code capacity and while requiring masks for all employees and customers.

f. Respondent Thompsontown Corner Deli refuses to comply with the December 10 Order by:

- (A) failing to post signage relating to COVID-19 safety measures for customers and employees; and
- (B) hosting in-person, indoor dining within its facility.

g. Respondent Frank's Pizza refuses to comply with the December 10 Order by:

- (A) failing to post signage relating to COVID-19 safety measures for customers and employees;
- (B) failing to follow CDC guidelines to enforce masks to be worn by employees while on the premise of its facility;
- (C) failing to have barriers between tables or markings indicating that certain tables are not to be used; and
- (D) hosting in-person, indoor dining within its facility.

47. After completing the onsite inspection, the Bureau representatives provided a copy of the Inspection Report to Respondents and requested that they close their in-person indoor dining services.

48. When the Respondents refused to close their in-person indoor dining services, the Bureau representatives provided the Respondents with a with a “Closed by Order Notice,” which directed that the establishments shall not reopen until approved to do so by the Bureau.

49. A copy of the Inspection Report was provided to Respondents with a “Closed by Order Notice.”

50. The establishments shall not reopen until approved to do so by the Bureau.

51. The Closure Order was to be posted at the establishments and not removed, altered, or concealed, under penalty of law.

52. Despite receiving the “Closed by Order Notice” from the Bureau, Respondents refused to stop the in-person, indoor dining services at their facilities.

53. Respondents have continued to hold indoor dining services despite:

- a. Widely publicized information and knowledge that close or direct contact makes transmission of COVID-19 extremely likely;
- b. People who are contagious for COVID-19 may present with few symptoms, resembling a minor cold, or may be entirely asymptomatic;
- c. The prospect of spreading a highly infectious disease to its staff, customers, and the general public;

d. Having full knowledge that what they are doing is in violation of the Order.

54. Based on the declaration of the Secretary of Health, if Respondents are allowed to continue serving customers through indoor, in-person dining, it creates a high risk of spreading COVID-19 and constitutes a public health threat. (Exhibit A, ¶19).

COUNT I –INJUNCTIVE RELIEF

55. Paragraphs 1-54 are incorporated as if set out herein.

56. The Department of Health has the duty to administer the health laws of the Commonwealth. 71 P.S. § 532(a).

57. If this Honorable Court does not issue a preliminary injunction immediately enjoining Respondents from permitting indoor dining within their establishments, the Commonwealth will be immediately and irreparably harmed.

58. Respondents' refusal to abide by the December 10 Order is an irreparable harm *per se*, as a violation of law. *See Philips Bros. Elec. Contractors, Inc.* v. 999 A.2d at 657-58 (Pa. Cmwlth. 2010); *see also* Exhibit A, Attachment 1.

59. If such actions by Respondents are permitted to continue, Respondents will continue to intentionally and purposefully violate the Orders of the Secretary.

60. The Department of Health has no adequate remedy at law to redress its harm as a result of Respondents' anticipated continued violation of the current Order.

61. Injunctive relief is necessary to prevent the substantial injury and immediate and irreparable harm that the Department of Health would suffer if Respondents are permitted to continue to violate the current Order.

62. A greater injury would occur in refusing the injunction than in granting it because Respondents may help facilitate the spread of COVID-19.

63. The Court shall issue a preliminary or special injunction only after written notice and hearing unless it appears to the satisfaction of the Court that immediate and irreparable injury will be sustained before notice can be given or a hearing held, in which case the Court may issue a preliminary special injunction without a hearing or without notice. *See Greater Nanticoke Area Educ. Ass'n v. Greater Nanticoke Area Sch. Dist.*, 938 A2d 1177, 1182 (Pa. Cmwlth. Ct. 2007).

64. The injunction that is requested is limited to compliance with the Department of Health's Order and necessary to protect the health and safety of the citizens of the Commonwealth.

65. Given Respondents' repeated violations of the Act, the Court is justified in entering an injunction enjoining Respondents from committing further such violations.

66. By entering an injunction against Respondents in this matter, the persistent and continuing illegal conduct will finally be abated and stopped.

67. If a preliminary injunction is issued, Respondents will not suffer any cognizable harm given that they are not permitted by Order to conduct indoor dining within their establishment regardless of any injunction being imposed by this Court.

WHEREFORE, the Department of Health respectfully requests entry of an order in its favor and against Respondents: (1) requiring that Respondents comply with the Secretary's Order, including closing its establishment to in-person dining and (2) awarding costs, and such other relief as this Court deems appropriate.

REQUEST FOR DAMAGES

68. Paragraphs 1-67 are incorporated as if set out herein.

69. Based on Respondents' continued violations of the Secretary's Order, Petitioner requests the Court to award damages in favor of Petitioner and against Respondents, including, but not limited to:

- a. Compensatory damages and all costs relative to enforcing the provisions of the Order;
- b. All damages permitted by law;
- c. Punitive damages for the willful and wanton violation of the Order in which Respondents have engaged despite knowledge that its actions are in violation of the Order;
- d. All such other damages as this Court deems fit and applicable given the Respondents' acts against the

Commonwealth.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

By: /s/ *Lindsey A. Bedell*
LINDSEY A. BEDELL
Deputy Attorney General
Attorney ID #308158

KAREN M. ROMANO
Chief Deputy Attorney General
Civil Litigation Section

Counsel for Plaintiff Commonwealth of Pennsylvania, Department of Health

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 772-3561

lbedell@attorneygeneral.gov

Date: December 23, 2020

CONFIDENTIAL INFORMATION CERTIFICATION

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

/s/ Lindsey A. Bedell
LINDSEY A. BEDELL
Deputy Attorney General

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COMMONWEALTH OF :
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:
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Respondents :

PROOF OF SERVICE

I hereby certify that on December 23, 2020, I will have the foregoing document directed upon the Respondents by email as indicated below with a request to waive the requirement for mailed service. If they do not waive service by December 29, 2020, hard copies will be sent via overnight mail to the addresses indicated. Two Respondents, as indicated, will be served by hand delivery. This service will satisfy the requirement of Pa. R.A.P. 121 and 1514(c).

Olde Hickory Grill
c/o Olde Hickory Grill
709 Olde Hickory Road
Lancaster, PA 17601
REDAAMIN3368@GMAIL.COM

County Fare Restaurant
c/o Hoover Incorporated, LLC
498 East Lincoln Avenue
Myerstown, PA 17067
KELLY@COUNTRYFARERESTAURANT.COM

230 Café
c/o SNMA Reitz, Inc.

398 Second Street
Highspire, PA 17034
SREITZ89@YAHOO.COM

Juke Box Café
c/o Hilberts Jukebox Café, Ltd.
535 South Reading Avenue
Boyertown, PA 19512
SJAHLBERT@COMCAST.NET

Letterman's Diner
c/o Douglas Letterman
242 West Main Street
Kutztown, PA 19530
VIA HAND DELIVERY

Mad Dogs Kutztown
c/o CLM Squared, LLC
100 Constitution Boulevard
Kutztown, PA 19530
pinkfloydshark@yahoo.com

Quality Shoppe
c/o Belladom, LLC
45 Constitution Boulevard
Kutztown, PA 19530
SOCCER6719@AOL.COM

Oley Turnpike Dairy Diner
c/o Oley Turnpike Dairy Diner, Inc.
6213 Oley Turnpike Road
Oley, PA 19547
ehouir@yahoo.com

Frank's Pizza
c/o On The Mend, LLC
2550 Perkiomen Avenue
Reading, PA 19606
FRANKSPIZZAMOUNTPENN@GMAIL.COM

Deluxe Restaurant

c/o Chios Associates Inc./DBA Deluxe Restaurant
2295 Lancaster Pike
Shillington, PA 19607

DELUXEDINER2295@GMAIL.COM

Mad Dogs Hot Dogs Macungie

c/o CLM Squared, LLC
14 North Poplar Street
Macungie, PA 18062

pinkfloydshark@yahoo.com

Thompsonstown Corner Deli

c/o Richard L. Hart
217 East Main Street
Thompsonstown, PA 17094

RSHART@NMAX.NET

County Line Café

c/o Renee Rice
3806 Perry Highway
Hadley, PA 16130

reneerice1966@gmail.com

Gianna's Traditional Pizza

c/o Tasty Pizza, LLC
1187 Perry Highway
Meadville, PA 16335

billpalumbo63@gmail.com

Mike's Place

c/o Mike's Place, LLC
8301 Clear Ridge Road
Clearville, PA 15535

mmplace2@embarqmail.com

The Greenville Junction

c/o Lanciotti, Ltd.
36 Hadley Road
Greenville, PA 16125

gvillejunction@gmail.com

Sharky's Café
c/o John Hueme
Sharky's Plaza
3960 State Route 30
Latrobe, PA 15650
jhuemme@sharkyscafe.com

Fat Boys Summit Diner
c/o Mitzi Foy
791 North Center Avenue
Somerset, PA 15501
TABASCO43@YAHOO.COM

Dutch Oven
c/o Daniel E. Hostetler
110 Liberty Street
Jamestown, PA 16134
VIA HAND DELIVERY

Westy Bar & Grill
c/o L&M Tavern
279 West State Street
Hamburg, PA 19526
pbfranklinpa@hotmail.com

Hot Dog House
c/o Jeff Grimes
745 Willowbank Street
Bellefonte, PA 16823
SEIBERTMAN@YAHOO.COM

Rt. 220 Diner
c/o Jelboss Enterprises, LLC
4292 Business US 220
Bedford, PA 15522
BUTCHVETTE1@GMAIL.COM

*/s/ **Lindsey A. Bedell***

LINDSEY A. BEDELL

Deputy Attorney General

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EXHIBIT LIST

EXHIBIT A

Declaration of Dr. Rachel Levine

Attachment 2 Order by Dr. Levine, Dec. 10, 2020

EXHIBIT B

Hr'g Transcript, Parker v. Wolf, No.20-cv-1601

EXHIBIT A

Declaration of Dr. Rachel Levine

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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DECLARATION BY DR. RACHEL LEVINE

1. I, Rachel Levine, M.D., am licensed to practice medicine in the Commonwealth of Pennsylvania.
2. I currently serve as Secretary of Health for the Commonwealth of Pennsylvania.
3. My duties as Secretary of Health include the duty to protect the health of the people of the Commonwealth and to determine and employ the most efficient and practical means for the prevention and suppression of communicable diseases.
4. In this capacity I received notice from the Center for Disease Control (“CDC”) that SARS-CoV-2, which causes Coronavirus Disease 2019 (“COVID-19”), is a highly contagious virus that is a serious threat to public health. <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed Dec. 20, 2020).
5. Symptoms of COVID-19 may include fever, chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of

taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea.

<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>

(accessed Dec. 20, 2020).

6. SARS-CoV-2 is spread mainly from person to person from respiratory droplets produced when an infected person coughs or sneezes.

<https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed Dec. 20, 2020).

7. Due to the manner of transmission, spread of the SARS-CoV-2 is more likely to occur when people are in close contact with one another, such as within about six (6) feet. *Id.*

8. Current CDC guidelines state that the more an individual interacts with others and the longer that interaction lasts, the higher the potential risk of becoming infected with COVID-19 and COVID-19 spreading.

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html> (accessed Dec. 20, 2020).

9. Current CDC guidelines state that the higher the level of community transmission in the area that the gathering is being held, the higher the risk of COVID-19 spreading during interactions.

10. Current CDC guidelines state that in-person gatherings where it is difficult for individuals to remain spaced at least six (6) feet apart are at high risk of spreading COVID-19.

11. On-site dining has been associated with an increased risk for acquiring COVID-19.

12. Current CDC guidelines state that the risk of COVID-19 being spread increases in a restaurant or bar setting as interactions within six (6) feet of others increase:

- **Lowest Risk:** Food service limited to drive-through, delivery, take-out, and curb-side pick-up.
- **More Risk:** Drive-through, delivery, take-out, and curb-side pick-up emphasized. On-site dining limited to outdoor seating. Seating capacity reduced to allow tables to be spaced at least 6 feet apart.
- **Higher Risk:** On-site dining with indoor seating capacity reduced to allow tables to be spaced at least 6 feet apart. And/or on-site dining with outdoor seating, but tables not spaced at least 6 feet apart.
- **Highest Risk:** On-site dining with indoor seating. Seating capacity not reduced and tables not spaced at least 6 feet apart.

Id.

13. Current CDC guidelines further state that “[t]here is evidence that under certain conditions, people with COVID-19 seem to have infected others who were more than 6 feet away. This is called airborne transmission. These transmissions occurred within enclosed spaces that had inadequate ventilation.” *Id.*

14. Current CDC guidelines further state that “[i]n general, being outdoors and in spaces with good ventilation reduces the risk of exposure to the virus that causes COVID-19.” *Id.*

15. Current CDC guidelines further state that “[r]espiratory droplets can also land on surfaces and objects. It is possible that a person could get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or eyes. Spread from touching surfaces is not thought to be a common way that COVID-19 spreads.” *Id.*

16. On December 10, 2020, by Executive Order, the Governor of Pennsylvania ordered “[a]ll in-person indoor dining at businesses in the retail food services industry, including, but not limited to, bars, restaurants, breweries, wineries, distilleries, social clubs, and private catered events” to cease across the Commonwealth to help stop the spread of the virus. A true and correct copy of the December 10 Executive Order is attached hereto as Attachment 1.

17. The December 10, 2020 Executive Order took effect at 12:01 a.m. on December 12, 2020, and will remain in effect until 8:00 a.m. on January 4, 2021. *Id.*

18. By Order dated December 10, 2020, I imposed the same restrictions on in-person, indoor dining on businesses that had been ordered to close to prevent the spread of COVID-19. A true and correct copy of the December 10 Order is attached hereto as Attachment 2.

19. Pursuant to guidance from the CDC and pursuant to my experience as a medical professional and the Secretary of Health, restaurants that are allowing in-person, indoor dining in their facilities are at a high risk of spreading COVID-19 and constitute a public health threat.

I verify that the statements in this document are true and correct to the best of my knowledge, information, and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

A handwritten signature in black ink, appearing to read "R. Levine, M.D." The signature is fluid and cursive, with "R. Levine" on the top line and "M.D." on the bottom line to the right.

Dr. Rachel Levine, M.D.,
Secretary of Health for the
Commonwealth of Pennsylvania

Dated: December 23, 2020

ATTACHMENT 1

Wolf Executive Order -12/10/20



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR

**ORDER OF
THE GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA
DIRECTING LIMITED-TIME MITIGATION**

WHEREAS, the World Health Organization and the Centers for Disease Control and Prevention declared the coronavirus disease 2019 (“COVID-19”) a pandemic; and

WHEREAS, the COVID-19 pandemic has created a national emergency in the United States of America; and

WHEREAS, pursuant to section 7301(a) of the Emergency Management Services Code, 35 Pa. C.S. § 7301(a), I am charged with the responsibility to address dangers facing the Commonwealth of Pennsylvania (“Commonwealth”) that result from disasters; and

WHEREAS, on March 6, 2020, pursuant to section 7301(c) of the Emergency Management Services Code, 35 Pa. C.S. § 7301(c), I proclaimed the existence of a disaster emergency throughout the Commonwealth as a result of COVID-19, and further extended the disaster emergency by Amendment on June 3, 2020, August 31, 2020, and November 24, 2020; and

WHEREAS, in executing the extraordinary responsibility outlined above, I am authorized during a disaster emergency to issue, amend and rescind executive orders, proclamations and regulations and those directives shall have the force and effect of law pursuant to 35 Pa. C.S. § 7301(b); and

WHEREAS, in addition to my authority, the Secretary of Health may order general control measures, including, but not limited to, closure, isolation, and quarantine; and

WHEREAS, this authority is granted to the Secretary of Health pursuant to Pennsylvania law. See section 5 of the Disease Prevention and Control Law, 35 P.S. § 521.5; sections 2102(a) and 2106 of the Administrative Code of 1929, 71 P.S. §§ 532(a), and 536; and the Department of Health’s regulations at 28 Pa. Code §§ 27.60-27.68 (relating to disease control measures; isolation; quarantine; movement of persons subject to isolation or quarantine; and release from isolation and quarantine). Particularly, the Department of Health has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. See 35 P.S. § 521.5; 71 P.S. §§ 532(a), and 1403(a); 28 Pa. Code § 27.60; and

WHEREAS, following an initial curtailing of COVID-19 spread due to the Commonwealth’s mitigation efforts, a second wave of COVID-19 cases began in the summer months; and

WHEREAS, despite all efforts taken to date, the pandemic continues to spread, and taking action to prevent that spread while continuing to allow for necessary resumption of economic and social activity requires the Commonwealth to take steps to minimize the danger to Pennsylvanians as a result of participating in that activity; and

WHEREAS, further immediate action is required to mitigate the imminent spread of the disease, and associated health hazards presented by COVID-19, and to enforce the protections necessary to support the response of the Commonwealth to the threat of COVID-19; and

WHEREAS, as of December 10, 2020, the Commonwealth has 457,289 positive cases of COVID-19 in all sixty-seven counties and 12,010 deaths from COVID-19; and

WHEREAS, the Commonwealth is now recording daily COVID-19 cases and hospitalizations in greater numbers than at any other time during this pandemic; and

WHEREAS, in addition to my general powers, during a disaster emergency I am authorized specifically to:

- *suspend any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency;*
- *utilize all resources of the Commonwealth and each political subdivision as reasonably necessary;*
- *transfer the direction, personnel, or functions of Commonwealth agencies or units thereof for performing or facilitating emergency services;*
- *direct and compel the evacuation of all or part of the population from any stricken or threatened area;*
- *control ingress and egress to and from a disaster area and the movement of persons within the area and the occupancy of premises therein;*
- *suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles. 35 Pa. C.S. § 7301(f).*

NOW, THEREFORE, pursuant to the authority vested in me and my Administration by the laws of the Commonwealth of Pennsylvania, I do hereby ORDER and PROCLAIM as follows:

Section 1: Definitions

“Extracurricular activities” means voluntary activities sponsored, approved or permitted by a school entity or local education agency or an organization sanctioned by the local education agency other than sports and athletics, and include, but are not limited to, preparation for and involvement in public performances, contests, demonstrations, displays, and club activities. For purposes of this Order, extracurricular activities include activities involving the physical presence of persons from the same state or from other states.

“Gatherings and events” mean a temporary grouping of individuals for defined purposes, that takes place over a limited timeframe, such as hours or days. For example, events and gatherings include fairs, festivals, concerts, or shows and groupings that occur within larger, more permanent businesses, such as shows or performances within amusement parks, individual showings of movies on a single screen/auditorium within a multiplex, business meetings or conferences, or each party or reception within a multi-room venue. Classroom instruction by school entities is not a “gathering” or “event” for purposes of this Order. Nor is a meeting of electors, including any preparation, to perform the duties enjoined upon them by the Constitution and the laws of the Commonwealth and of the United States a “gathering” or “event” for purposes of this Order.

“Interscholastic athletics” means all athletic contests, competitions, scrimmages, or practices conducted between or among school entities.

“Intrascholastic athletics” means all athletic contests, competitions, scrimmages, or practices conducted within a school entity.

“Intrastate and Interstate sports leagues or tournaments” means all organized athletic contests, competitions, scrimmages, or practices regardless of what they are called and shall include, but not be limited to, club, travel, recreational, intermural, and intramural sports, and includes physical presence of persons from the same state or other states.

“School entity” means a public school, school district, charter school, cyber charter school, career and technology center, nonpublic school or private school in this Commonwealth that serves students that are typically in kindergarten through grade 12.

Section 2: In-person Dining and Alcohol Sales

- A. *All in-person indoor dining at businesses in the retail food services industry, including, but not limited to, bars, restaurants, breweries, wineries, distilleries, social clubs, and private catered events is prohibited.*
- B. *Outdoor dining, take-out food service and take-out alcohol sales are permitted and may continue, subject to any limitations or restrictions imposed by Pennsylvania law, or this or any other Order issued by me or by the Secretary of Health.*

Section 3: Indoor Gatherings and Events

- A. *Indoor gatherings and events of more than 10 persons are prohibited.*
- B. *Churches, synagogues, temples, mosques and other places of congregate worship are specifically excluded from the limitations set forth above during religious services. These institutions are strongly encouraged to enforce physical distancing and other mitigation measures at their gatherings.*

Conventions, retreats, and other gatherings that may be sponsored or held by these religious entities that are not the actual worship service are required to comply with this Order.

Section 4: Outdoor Gatherings and Events

Outdoor gatherings and events of more than 50 persons are prohibited.

Section 5: Capacity Limits for Businesses

All in-person businesses serving the public within a building or defined area may only operate at up to 50% of the maximum capacity stated on the applicable certificate of occupancy, except as limited by existing orders to a smaller capacity limit.

Section 6: Gyms and Fitness Facilities

Indoor operations at gyms and fitness facilities are prohibited. Outdoor operations may continue, but all participants must wear face coverings in accordance with the Secretary of Health's Updated Order Requiring Universal Face Coverings, including any subsequent amendments, and practice physical distancing requirements.

Section 7: Entertainment Industry

All in-person businesses in the entertainment industry serving the public within a building or indoor defined area, including, but not limited to, theaters, concert venues, museums, movie theaters, arcades, casinos, bowling alleys, private clubs, and all other similar entertainment, recreational or social facilities, are prohibited from operation.

Section 8: Interscholastic Athletics, Intrascholastic Athletics, and Intrastate and Interstate Sports Leagues and Tournaments

Interscholastic athletics, intrascholastic athletics, and intrastate and interstate sports leagues and tournaments are suspended for all sports.

Section 9: Professional and Collegiate Sports

Professional or collegiate sports activities may continue in accordance with guidance from the CDC and the Department of Health, without regard for the limitations set forth in sections 3 and 4 above; however, spectators may not attend such sports activities in person.

Section 10: In-Person Extracurricular Activities

In-person extracurricular activities are suspended. These extracurricular activities may be held virtually.

Section 11: Effect on Existing Orders

This Order suspends and supersedes any provisions of my prior Orders and Advisories that are in conflict with its requirements, including Sections 3, 4, 5, 7 and 9 of my [Order for Mitigation, Enforcement, and Immunity Protections](#), dated November 23, 2020, for the period of time this Order is in effect. Those provisions shall resume effect in their entirety upon this Order's termination. All other provisions of the November 23, 2020 Orders remain in full effect.

Section 12: Authority of Local Departments and Boards of Health

Local governments and authorities may issue rules or orders relating to disease prevention and control which do not conflict with and are no less strict than the provisions of this Order.

Section 13: Effective Date and Duration

This Order shall take effect at 12:01 a.m. on December 12, 2020, and shall remain in effect until 8:00 a.m. on January 4, 2021.



GIVEN under my hand and the Seal of the Governor, at the city of Harrisburg, on this tenth day of December two thousand twenty, the year of the commonwealth the two hundred and forty-fifth.

TOM WOLF
Governor

ATTACHMENT 2

Levine Order -12/10/20



Order of the Secretary of the Pennsylvania Department of Health Directing Limited-Time Targeted Mitigation

The 2019 novel coronavirus (COVID-19) is a contagious disease that is spreading rapidly from person to person in the world, the United States, and this Commonwealth. COVID-19 can be transmitted from any person who is infected, even if they have no symptoms. Additionally, exposure is possible by touching a surface or object that has the virus on it and then touching one's mouth, nose, or eyes. Symptoms of COVID-19 may include fever or chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea. Older adults and people who have serious chronic medical conditions are at a higher risk for serious illness. Illness in children and young adults has become more common as the face of the pandemic continues to change. After a brief respite in the summer months, case counts and the number of hospitalizations have been rising throughout the Commonwealth, its surrounding states, and the world. There have been 457,289 cases and 12,010 deaths in this Commonwealth caused by the still present and ongoing pandemic.

Despite the efforts taken to date, the virus continues to spread, and taking action to prevent that spread while continuing to allow for necessary resumption of economic and social activity requires the Commonwealth to take steps to minimize the danger to Pennsylvanians as a result of participating in that activity. In response to these concerns, on November 23, 2020, the Governor and I issued new Orders intended to slow the spread of the disease. These Orders include the *Governor of the Commonwealth of Pennsylvania's Order for Mitigation, Enforcement and Immunity Protections*, my *Order for Mitigation and Enforcement*, the Governor's *Order Directing Public School Entities in Counties with Substantial Community Transmission to Attest to Health and Safety Protocols*, and my *Order* of the same name. The Governor and I also each issued a *Limited-Time Stay At Home Limited-Time\ Advisory*. These Orders and Advisories were followed by an updated travel mitigation order issued by each of us on November 25, 2020. *See Amended Order Of The Governor Of The Commonwealth Of Pennsylvania Directing Travel Mitigation, as amended.* I also issued an *Updated Order Requiring Universal Face Coverings*, dated November 17, 2020. All of these new mitigation orders were issued because of the continuing increase in the number of COVID-19 cases, the increase in hospitalizations that is beginning to make it difficult for hospitals to provide care to persons who need it, increases in the number of cases in long-term care facilities, and increases in deaths Commonwealth-wide. Despite these efforts, the case numbers and number of deaths continue to rise, and the Commonwealth has seen record high case counts since the end of November.

COVID-19 is a threat to the public's health, for which the Secretary of Health may order general control measures, including, but not limited to, closure, isolation, and quarantine. This authority is granted to the Secretary of Health pursuant to Pennsylvania law. *See section 5 of the Disease Prevention and Control Law, 35 P.S. § 521.5; sections 2102(a) and 2106 of the Administrative Code of 1929, 71 P.S. §§ 532(a), and 536; and the Department of Health's regulations at 28 Pa. Code §§ 27.60-27.68 (relating to disease control measures; isolation; quarantine; movement of persons subject to isolation or quarantine; and release from isolation and quarantine).* Particularly, the Department of Health has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. *See 35 P.S. § 521.5; 71 P.S. §§ 532(a), and 1403(a); 28 Pa. Code § 27.60.*



Under circumstances where physical distancing, mask wearing and quarantine are the first line of defense against the disease's spread, and where large and small gatherings are spreading disease,¹ the experiences of the Commonwealth, and its and the country's health experts and recommendations of the Centers for Disease Control and Prevention (CDC) regarding travel and gatherings with persons not habitually together lead me to issue this Order as further protection against the spread of disease.

Accordingly, on this day, December 10, 2020, to prevent and control the spread of disease, I hereby order:

¹ Christie Aschwanden, "How 'Superspreading' Events Drive Most COVID-19 Spread," *Scientific American*, <https://www.scientificamerican.com/article/how-superspreading-events-drive-most-covid-19-spread1/> (June 23, 2020); 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); 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); 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/>; 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/mm6919e6.htm> (May 15, 2020); "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); Laxminarayan, *et al.*, Epidemiology and transmission dynamics of COVID-19 in two Indian states," *Science*, <https://science.sciencemag.org/content/early/2020/09/29/science.abd7672> (September 30, 2020). Fisher KA, Tenforde MW, Feldstein LR, *et al.* Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥ 18 Years in 11 Outpatient Health Care Facilities — United States, July 2020. *MMWR Morb Mortal Wkly Rep* 2020;69:1258–1264. DOI: <http://dx.doi.org/10.15585/mmwr.mm6936a5><https://www.cdc.gov/mmwr/volumes/69/wr/mm6936a5.htm>; Hutchins HJ, Wolff B, Leeb R, *et al.* COVID-19 Mitigation Behaviors by Age Group — United States, April–June 2020. *MMWR Morb Mortal Wkly Rep* 2020;69:1584–1590. DOI: <http://dx.doi.org/10.15585/mmwr.mm6943e4>; Kanu FA, Smith EE, Offutt-Powell T, *et al.* Declines in SARS-CoV-2 Transmission, Hospitalizations, and Mortality After Implementation of Mitigation Measures – Delaware, March–June 2020. *MMWR Morb Mortal Wkly Rep* 2020;69:1691–1694. DOI: https://www.cdc.gov/mmwr/volumes/69/wr/mm6945e1.htm?s_cid=mm6945e1_w; Mahale P, Rothfuss C, Bly S, *et al.* Multiple COVID-19 Outbreaks Linked to a Wedding Reception in Rural Maine – August 7–September 14, 2020. *MMWR Morb Mortal Wkly Rep* 2020;69:1686–1690. DOI: https://www.cdc.gov/mmwr/volumes/69/wr/mm6945a5.htm?s_cid=mm6945a5_w; Honein MA, Christie A, *et al.* Summary of Guidance for Public Health Strategies to Address High Levels of Community Transmission of SARS-CoV-2 and Related Deaths, December 2020. *MMWR Morb Mortal Wkly Early Release* December 4, 2020/69. DOI: https://www.cdc.gov/mmwr/volumes/69/wr/mm6949e2.htm?s_cid=mm6949e2_w.



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“Gatherings and events” mean a temporary grouping of individuals for defined purposes, that takes place over a limited timeframe, such as hours or days. For example, events and gatherings include fairs, festivals, concerts, or shows and groupings that occur within larger, more permanent businesses, such as shows or performances within amusement parks, individual showings of movies on a single screen/auditorium within a multiplex, business meetings or conferences, or each party or reception within a multi-room venue. Classroom instruction by school entities is not a “gathering” or “event” for purposes of this Order. Nor is a meeting of electors, including any preparation, to perform the duties enjoined upon them by the Constitution and the laws of the Commonwealth and of the United States a “gathering” or “event” for purposes of this Order.

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- A. All in-person indoor dining at businesses in the retail food services industry, including, but not limited to, bars, restaurants, breweries, wineries, distilleries, social clubs, and private catered events is prohibited.
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- A. Indoor gatherings and events of more than 10 persons are prohibited.
- B. Churches, synagogues, temples, mosques and other places of congregate worship are specifically excluded from the limitations set forth above during religious services. These institutions are strongly encouraged to enforce physical distancing and other mitigation measures at their gatherings.

Conventions, retreats, and other gatherings that may be sponsored or held by these religious entities that are not the actual worship service are required to comply with this Order.

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Section 6: Gyms and Fitness Facilities

Indoor operations at gyms and fitness facilities are prohibited. Outdoor operations may continue, but all participants must wear face coverings in accordance with my [Updated Order Requiring Universal Face Coverings](#), including any subsequent amendments, and practice physical distancing requirements.

Section 7: Entertainment Industry

All in-person businesses in the entertainment industry serving the public within a building or indoor defined area, including, but not limited to, theaters, concert venues, museums, movie theaters, arcades, casinos, bowling alleys, private clubs, and all other similar entertainment, recreational or social facilities, are prohibited from operation.

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Interscholastic athletics, intrascholastic athletics, and intrastate and interstate sports leagues and tournaments are suspended for all sports.



Section 9: Professional and Collegiate Sports

Professional or collegiate sports activities may continue in accordance with guidance from the CDC and the Department of Health, without regard for the limitations set forth in sections 3 and 4 above; however, spectators may not attend such sports activities in person.

Section 10: In-Person Extracurricular Activities

In-person extracurricular activities are suspended. These extracurricular activities may be held virtually.

Section 11: Effect on Existing Orders

This Order suspends and supersedes any provisions of my prior Orders and Advisories that are in conflict with its requirements, including Sections 3, 4, 5, 7 and 9 of my [Order for Mitigation and Enforcement](#), dated November 23, 2020, for the period of time this Order is in effect. Those provisions shall resume effect in their entirety upon this Order's termination. All other provisions of the November 23, 2020 Orders remain in full effect.

Section 12: Authority of Local Departments and Boards of Health

Local governments and authorities may issue rules or orders relating to disease prevention and control, which do not conflict with and are no less strict than the provisions of this Order.

Section 13: Effective Date and Duration

This Order shall take effect at 12:01 a.m. on December 12, 2020, and shall remain in effect until 8:00 a.m. on January 4, 2021.

A handwritten signature in black ink, appearing to read 'CL 22 MP'.

Rachel Levine, MD
Secretary of Health

EXHIBIT B

Parker v. Wolf – Hearing Transcript

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

CHAD PARKER, ET AL	:	CASE NO.
v.		
TOM WOLF, ET AL	:	1:20-CV-1601

TRANSCRIPT OF PROCEEDINGS
PRELIMINARY INJUNCTION

Held before the HONORABLE JOHN E. JONES, III
November 24, 2020, commencing at 9:30 a.m.
Via WebEx

APPEARANCES VIA WEBEX:

14 ROBERT J. MUISE, ESQUIRE
American Freedom Law Center
15 PO Box 131098
Ann Arbor, MI 48113
16 For the Plaintiffs

17 KAREN MASCIO ROMANO, ESQUIRE
18 NICOLE J. BOLAND, ESQUIRE
19 KELI M. NEARY, ESQUIRE
Pennsylvania Office of Attorney General
20 Strawberry Square, 15th Floor
Harrisburg, PA 17101
21 For the Defendants

Proceedings recorded by machine shorthand; transcript produced by computer-aided transcription.

Wendy C. Yinger, RMR, CRR
Official Court Reporter
wendy.yinger@pamd.uscourts.gov

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1 THE COURT: All right. It's just about 9:30, which
2 is the appointed time for the hearing in the matter of Parker,
3 et al versus Wolf, et al. And we'll be on the record unless I
4 indicate otherwise.

5 And what I'd like to do to start is just an
6 instruction, which is that for those of you who are --
7 everyone, I guess, participating by WebEx or iPhone, I would
8 ask that unless you are going to be speaking to me immediately,
9 and you can unmute yourself when you do that, please mute
10 because we have found through long and torturous experience
11 with WebEx, that if somebody is unmuted -- as if to give me an
12 example, I hear a baby crying in the background.

13 So please do me the favor of muting so that we don't
14 have those episodes. It just tends to burden the connection
15 particularly when we have a great number of people who are on
16 board. And it appears that we do have a fair number of people
17 joining us in this proceeding.

18 So let's start, before we get into a discussion about
19 what we're going to do this morning, let's start with having
20 counsel enter their appearances. And we can start with counsel
21 for the Plaintiffs.

22 MR. MUISE: Good morning, Your Honor. Robert Muise
23 on behalf of the Plaintiffs.

24 THE COURT: Good morning. And anybody joining you,
25 Mr. Muise?

1 MR. MUISE: No, Your Honor, just me.

2 THE COURT: All right. And for the defense?

3 MS. NEARY: Good morning, Your Honor. Keli Neary
4 here for the Office of Attorney General. And I'm here in
5 support only, Your Honor. Karen Romano and Nicole Boland will
6 be conducting this matter today.

7 THE COURT: All right. And they're on board as well?
8 Correct, I see them.

9 MS. ROMANO: Yes, Your Honor.

10 MS. BOLAND: Yes, Your Honor.

11 THE COURT: All right, thanks. So noted. And my
12 understanding is that we're going to have some testimony, and
13 then I'd like to have some argument after that, if everybody is
14 willing to do that. So do we have some testimony that we're
15 going to present?

16 MR. MUISE: Your Honor, Robert Muise from the
17 Plaintiffs. My understanding is that the Defendants had a
18 witness that they were going to present this morning. I
19 believe the Plaintiffs have submitted their evidence by way of
20 declarations and exhibits that are already before the Court.

21 THE COURT: That's what I thought on the Plaintiffs'
22 side. On the defense side, Ms. Romano or anybody, are you
23 prepared to present a witness?

24 MS. ROMANO: Yes, Your Honor, we are prepared to
25 present Sarah Boateng. I will do the questioning of that

1 witness.

2 THE COURT: All right. And do we have Ms. Boateng on
3 board? Has she joined this proceeding?

4 MS. ROMANO: Yes, she is now just coming on camera
5 labeled Pennsylvania Department of Health.

6 THE COURT: Perfect. Thank you. I see. Thanks so
7 much. I'm going to have my deputy swear in the Deputy
8 Secretary at this time. Liz, I'll turn it over to you for
9 Secretary Boateng.

10 **SARAH NEWMAN BOATENG, DEFENDANTS' WITNESS, SWORN**

11 COURTROOM DEPUTY: If you could just state your name
12 for the record, please?

13 THE WITNESS: My name is Sarah Newman Boateng.

14 THE COURT: You may proceed.

15 MS. ROMANO: Thank you, Your Honor.

16 **DIRECT EXAMINATION**

17 BY MS. ROMANO:

18 Q. Good morning, Ms. Boateng. Could you please tell the
19 Court how you are employed?

20 A. I'm the Executive Deputy Secretary of the Pennsylvania
21 Department of Health.

22 Q. How long have you been employed by the Pennsylvania
23 Department of Health?

24 A. Since 2015. I came to the Department in June of 2015. At
25 that time, I was the Special Assistant to the Physician

1 General, who was at that time Dr. Rachel Levine. Then in 2017,
2 I assumed the role I am in now.

3 Q. As Executive Deputy Secretary for the Pennsylvania
4 Department of Health, are you familiar with the mitigation
5 efforts taken by Governor Wolf and Secretary Levine to combat
6 COVID-19?

7 A. Yes.

8 Q. Are you familiar with the July 1, 2020, order calling for
9 universal face coverings?

10 A. I am, yes.

11 MS. ROMANO: Your Honor, that document has been filed
12 as document 1-2 attached to Plaintiffs' complaint.

13 THE COURT: Very well.

14 BY MS. ROMANO:

15 Q. Ms. Boateng, do you have a copy of that order with you?

16 A. I do, yes.

17 Q. Could you please tell the Court why this order was issued?

18 A. So in July, the state was going through a reopening phase.
19 Numerous regions of the state had reopened, and we were
20 reopening the final portions of the state. And so we issued
21 this order requiring universal masking because we knew that
22 masking was an effective way to slow the spread of COVID-19.

23 And we issued it at that time because as the state was
24 reopening, we wanted to balance that reopening, getting the
25 economy and social interaction back with the need to continue

1 to prevent the spread of the disease so we didn't see a
2 resurgence.

3 Q. What is it that allows the Secretary to issue such an
4 order?

5 A. So the Disease Control and Prevention Law gives us the
6 authority to issue the order.

7 Q. Can you tell the Court what information the Department
8 relied upon in deciding to issue this order?

9 A. The Department relied upon information provided by the
10 CDC. We looked at the journal articles that were published in
11 journals on influenza and other respiratory disease. We looked
12 at information provided in other journal articles. And we
13 followed the data that showed that entities and places where
14 people were wearing masks stopped or slowed the spread of
15 COVID-19.

16 Q. Did the July 1 order require individuals to wear a face
17 covering every time you stepped foot outside of their home?

18 A. No. The July 1 order required individuals to wear a mask
19 when they were outside their home and within close distance of
20 someone who was not part of their household.

21 Q. What do you mean when you say, close distance?

22 A. Sure. So COVID-19, the disease, the masking order was
23 issued to prevent the spread of, is spread through respiratory
24 droplets passed person to person primarily. There's some
25 limited evidence that it can be spread from surfaces, but

1 primarily from person to person.

2 And the CDC has indicated that a close contact, the way
3 that it's spread, is someone who is within six feet for 15
4 minutes. So close contact with someone outside your household
5 who has been within six feet for 15 minutes pertaining to the
6 masking order.

7 Q. Did this July 1 order contain exceptions for the wearing
8 of the face coverings?

9 A. Yes, it did.

10 Q. Why were there exceptions included?

11 A. We felt it was important to balance the need to have
12 universal masking with some other considerations that might
13 impact Pennsylvanians. For example, one of the exceptions is
14 that there is an exception for people who wearing a mask would
15 create an unsafe condition in which they operate equipment or
16 execute a task as determined by the local, state, or federal
17 regulators or within the workplace safety guidelines.

18 Q. Does the July 1 order include any enforcement provisions
19 for individuals who are not wearing face coverings?

20 A. The order itself doesn't outline enforcement provisions
21 though, as I stated before, the order was issued under the
22 Disease Control and Prevention Law, which has enforcement
23 provisions included in it. So the order itself doesn't outline
24 them, but those enforcement provisions, which have been
25 primarily taken by agencies outside of the Department, such as

1 Pennsylvania State Police, so it's not explicit, but you can
2 enforce the order.

3 Q. Did the Department of Health actually take any action to
4 enforce the July 1 order?

5 A. The Department of Health itself did not take or issue any
6 citations related to the masking order, no.

7 Q. Did you issue any warnings?

8 A. The Department of Health has issued warnings to
9 businesses, not people, but businesses that have not complied
10 with a number of the different mitigation orders that we have
11 issued, so we have issued warning letters. But never to an
12 individual.

13 Q. Mr. Redman's declaration talks about, he refers to it as,
14 a snitch line to allow reporting of violations of this order.
15 Are you familiar with that?

16 A. I am familiar -- I mean, I would assume that he's
17 referring to the complaint portal that we have on our website.
18 I am familiar with the complaint portal, yes.

19 Q. What is it?

20 A. The complaint portal is a place where Pennsylvanians can
21 file a complaint related to a business regarding all of our
22 mitigation orders, so not just the masking order. There was a
23 number of other mitigation orders that we issued that put
24 requirements on businesses. And they can use that tool to file
25 a complaint with the Department.

1 Q. Was that portal designed for the reporting of an
2 individual person not wearing a mask?

3 A. No.

4 Q. Now at some point, did the Department of Health update
5 that July 1 order?

6 A. Yes.

7 Q. Do you recall when that was done?

8 A. We issued on November 17th an updated -- yeah.

9 MS. ROMANO: Your Honor, this updated order has
10 already been filed as document 29-1.

11 THE COURT: All right, thank you.

12 BY MS. ROMANO:

13 Q. Ms. Boateng, do you have a copy of that November 17th
14 order?

15 A. I do, yes.

16 Q. Why was it necessary to update the order?

17 A. We found it was necessary to update the order. We have
18 seen an increasing number of new cases of COVID-19 spreading
19 across the Commonwealth. We also need people to wear masks to
20 slow the spread of the disease. We thought it was important to
21 update and strengthen the original July 1 order with this
22 November 17th order.

23 Q. What was updated in the November order?

24 A. Primarily, we included clarifications on what constitutes
25 a face covering. So new literature had emerged from the CDC

1 around the use of cloth masks are more effective than face
2 shields, so we provided that update. We provided some
3 clarification that a mask should be worn in other places where
4 there had been previous confusion, such as in a gym. We
5 included a section for business and school entities regarding
6 their obligations to the order. Those were the primary
7 updates.

8 Q. What information was relied upon in creating this update?

9 A. We relied on emerging data that had been coming out from
10 the CDC about the continued effectiveness of mask wearing. We
11 also relied on information that was published in subsequent
12 journal articles that came out over the summer to issue the
13 order.

14 Q. Does the November 17th update continue to include
15 exceptions?

16 A. (Inaudible)

17 Q. I'm sorry, I didn't hear your answer?

18 A. The updated order includes exceptions, yes.

19 Q. Does the November 17th order include any enforcement
20 provisions for individuals who are not wearing face coverings?

21 A. The updated order does include more specifics on the
22 requirements, the obligations. So the term used is business
23 and school entities to require people to wear the masks such as
24 require all people, including their employers, customers,
25 teachers, students, and visitors to wear face coverings and

1 take reasonable steps to enforce the requirement. That's new
2 from the previous order.

3 Q. Now it's my understanding there were some new orders or
4 advisories issued yesterday. Is that right?

5 A. Correct.

6 Q. Did any of those orders change universal masking
7 requirements as set forth in the November 17th update?

8 A. They did not change the November 17th update. They did
9 put more obligations on businesses. They strengthened the
10 ability to enforce businesses' obligations to uphold their
11 employees' and the customers' need to wear a mask when
12 utilizing their services, provide them a reasonable
13 accommodation.

14 Q. Ms. Boateng, are you familiar with the Department of
15 Health's COVID-19 contact tracing program?

16 A. Yes.

17 Q. What is it?

18 A. So contact tracing -- case investigation and contact
19 tracing is a matter of public health work. It is a two-part
20 process where, first, a positive case of COVID-19, so someone
21 who has COVID-19, is contacted. And they are asked questions
22 about where they work, who they live with, who their close
23 contacts had been through their infectious period.

24 Once those contacts are identified, that information is
25 passed off to contact tracers to do outreach to those who have

1 been in contact with someone with a communicable disease, in
2 this case COVID-19, and let's them know they were in contact
3 with someone during the infectious period. It advises them to
4 quarantine.

5 Q. Why is contact tracing used?

6 A. So contact tracing has been used for decades in public
7 health to slow the spread of communicable disease. It
8 certainly is a key strategy in our effort to prevent the spread
9 of COVID-19. So there's three ways you can stop a global
10 pandemic, this communicable disease. You can mitigate it, you
11 know, that being the masking order we talked about. You can
12 contain it through this contact tracing and case investigation.
13 And then, you know, of course, the nation waits for the
14 vaccine.

15 Q. What are some other contacts in which the Department of
16 Health has used contact tracing?

17 A. We've used contact tracing for TB, tuberculosis
18 investigation. We use contact tracing for STD's and HIV
19 outbreak investigations. We, as a Department, didn't use it
20 for Ebola, but it was used nationally and internationally to
21 contain and stop the spread of Ebola.

22 Q. Have you reviewed the declarations submitted by the
23 Plaintiffs in this case?

24 A. I have, yes.

25 Q. They talk in those declarations about quarantine. What

1 does the Department of Health mean when it uses the term
2 quarantine?

3 A. So quarantine and isolation, these are two public health
4 terms. So isolation is the separation of a person who had a
5 communicable disease, who's known to have a communicable
6 disease, separates them, isolates them from others so they
7 can't continue to shed virus and spread disease.

8 Quarantine is a public health term. It's used to indicate
9 someone who has been in contact with someone who has a
10 communicable disease, hasn't yet developed the disease, but
11 might be in their incubation period. So therefore, it's
12 quarantined away from others so that they can't spread the
13 disease.

14 This is particularly important with COVID-19 as we know
15 that COVID-19 can be spread during a pre-symptomatic incubation
16 period. Someone might be feeling fine, but they are able to
17 shed that virus and spread it. And so it's used for COVID-19.

18 Q. In the context of COVID-19, how is isolation accomplished?

19 A. So isolation is accomplished through either direction from
20 our public health professionals that work at the Pennsylvania
21 Department of Health or county and municipal health directors,
22 public health people who reach out to positive cases and advise
23 them to isolate.

24 Q. Are individuals advised to isolate removed from their
25 homes?

1 A. No.

2 Q. How long is the isolation period?

3 A. Isolation period for COVID-19 is 10 days.

4 Q. Why?

5 A. So 10 days is a time period established by the CDC, by
6 scientists and others. That is the course of time, the known
7 course of time that an individual can be shedding the virus.
8 So most individuals develop -- once exposed, they develop
9 symptoms three to five days after that exposure, but they can
10 continue to shed virus all the way up to the tenth day. So
11 they are isolated for that period of time.

12 Q. When we talk about quarantine in the context of the
13 COVID-19, how is that accomplished?

14 A. So quarantine is accomplished by individuals who work
15 under contract from the Department of Health who reach out to
16 named close contacts, advise them that they've been in close
17 contact of someone with COVID-19, and advises them to
18 quarantine.

19 Q. How long is the quarantine period?

20 A. The quarantine period is 14 days from the last time you
21 were exposed to someone who was in their infectious period.

22 Q. Why 14 days?

23 A. So 14 days is also a metric established by the CDC.
24 Fourteen days is what is the known incubation period. So as I
25 said before, you know, many people develop symptoms three to

1 five days after being exposed, but not all. And so over that
2 course of that 14 days, at any point inside that window an
3 individual might develop symptoms of COVID-19 or develop the
4 disease itself.

5 Q. Okay. Let's talk about Mr. Parker's case specifically.
6 In his declaration, he says that he was experiencing symptoms
7 associated with a sinus infection on July 14th, was tested for
8 COVID on July 19th, received a positive result on July 24th.
9 He indicates he was cleared to return to work on July 25th.
10 Does that fall in line with the Department's protocols?

11 A. Yes.

12 Q. How so?

13 MR. MUISE: I'm sorry, I didn't -- I'm having a hard
14 time hearing sometimes. I don't know if she said yes or no.
15 I'm sorry to interrupt.

16 THE WITNESS: Do you want to ask the question again,
17 Karen?

18 MS. ROMANO: Sure.

19 BY MS. ROMANO:

20 Q. So I asked if those time lines in the release of Mr.
21 Parker to return to work on July 25th, based on the dates in
22 his declaration, is that consistent with Department protocols?

23 A. Yes.

24 Q. How so?

25 A. Mr. Parker isolated for 10 days.

1 Q. When does that 10-day period start to run?

2 A. So the 10-day period started with his symptoms, when he
3 shared his symptoms.

4 Q. Mr. Parker indicates that his family received a letter.

5 MS. ROMANO: Your Honor, this letter is filed as
6 document 1-3. The letter is entitled Close Contacts of Persons
7 With Coronavirus Disease 2019 (COVID-19).

8 BY MS. ROMANO:

9 Q. Ms. Boateng, are you familiar with this letter?

10 A. Yes.

11 Q. Why was this letter sent?

12 A. This is a practice that we do when we contact a family or
13 an individual who has been identified as a close contact. We
14 send a letter.

15 Q. Is COVID-19 the first time the Department has used such a
16 letter?

17 A. It is not, no.

18 Q. What are some other times the Department has used a letter
19 like this?

20 A. For TB, tuberculosis investigations, we've used letters.
21 We've contacted people during measles outbreak via letter.

22 Q. This letter is dated July 25th, 2020, and it instructs the
23 Parker family to quarantine for 14 days from that date. Why
24 was that necessary?

25 A. So as I explained before, a close contact is identified as

1 anyone who has been in contact with an individual during their
2 infectious period. So if we're talking about this individual
3 specifically, this individual's infectious period ran until
4 July 24th. The individuals that live with him there in his
5 household remain close contacts of him until July 24th.

6 Therefore, their quarantine period starts the 14 days
7 after that previous -- after the last time they were in close
8 contact with an individual during their infectious period,
9 running that 25th date out.

10 Q. Where does the Department derive its authority to issue a
11 letter like this?

12 A. This authority is written in the Disease Control and
13 Prevention Law.

14 Q. Ms. Boateng, do you have that letter in front of you?

15 A. I do.

16 Q. I'd like to direct your attention to the last page of the
17 letter, the next to last paragraph that begins, "you must
18 immediately adhere." Do you see that paragraph?

19 A. I do, yes.

20 Q. Why is this language in this paragraph included in the
21 letter?

22 A. Because we do. We need individuals who are at risk of
23 having a communicable disease such as COVID-19 to quarantine to
24 not continue the spread of that infectious disease in the
25 community.

1 Q. The paragraph indicates, "if you do not cooperate with
2 this directive, the Secretary of Health can petition the Court
3 to have you confined to an appropriate place chosen by the
4 Department to make certain you are not able to infect the
5 public and to make certain that you receive proper care." Did
6 I read that correctly?

7 A. Yes.

8 Q. Where does the Secretary get the authority to take such an
9 action?

10 A. That authority is derived from the Disease Control and
11 Prevention Law.

12 Q. In this specific situation related to the Parkers, did the
13 Department actually petition the Court to quarantine any member
14 of the Parker family?

15 A. No, we did not.

16 Q. Did the Department petition the Court to isolate any
17 member of that family?

18 A. No, we did not.

19 Q. Has the Department petitioned the Court to quarantine or
20 isolate anyone with respect to COVID-19?

21 A. We have not, no.

22 Q. Let me back up. We talked a little bit about the contact
23 tracing. Is an individual required to cooperate with contact
24 tracing?

25 A. We advise individuals that they are required to -- that

1 they should participate in contact tracing. It helps us stop
2 and slow the spread of the disease. But we can't require
3 someone to answer the phone or to provide us any information.

4 Q. Did the Department of Health take any action to compel the
5 Parker/Kenwick family to cooperate with contact tracing?

6 A. We did not, no.

7 Q. Mr. Parker talks about receiving text messages from the
8 Department. Did you review that part of his declaration?

9 A. I did, yes.

10 Q. Do you know what those text messages would have related
11 to?

12 A. So as part of the COVID-19 response, we use a tool called
13 Sara Alert. This is a tool used by Pennsylvania. It's also
14 used by other states. It is a symptom tracker tool. So
15 individuals are enrolled into the symptom tracker, and it sends
16 them either daily e-mail or a daily text, it's their choice,
17 where they can report their symptoms to the Department.

18 If someone during their quarantine period develops
19 symptoms of COVID-19, it prompts a public health nurse to do
20 outreach; talk to them about their symptoms, help connect them
21 with testing, if that's necessary, connect them for further
22 medical care they might need.

23 Q. How is an individual enrolled in the Sara Alert system?

24 A. When an individual is contacted by a contact tracer,
25 they're asked if they want to enroll into this system. And if

1 they agree, their either e-mail or phone number is entered into
2 the system.

3 Q. There's also reference in the declarations, I believe it's
4 Mr. Redman's, about technology put out by Apple or Google as a
5 tracer or a tracker. Is that the same thing as the Sara Alert?

6 A. No, that's not the same tool.

7 Q. Do you know what the difference is?

8 A. So Sara Alert is a system that you enroll into that we
9 use, and it really does only one thing. It sends you these
10 texts or this e-mail that asks about your symptoms, and then
11 you respond. And if you have the symptoms, a public health
12 official can reach out.

13 The Apple Google technology is technology developed by
14 Apple Google. It's national, maybe even international
15 technology, certainly national technology, that Apple Google
16 has developed. It runs on Bluetooth wavelengths or Bluetooth.
17 And it allows someone to be notified if they have been in close
18 contact of someone with COVID-19.

19 Q. Does the Department of Health have an application similar
20 to that?

21 A. So the Department of Health has an application that runs
22 on that technology. So the technology was developed by Apple
23 Google. It's on people's phones, so it's there, if people
24 opt-in. I think you have to tell Apple, yes, I want this. And
25 then if you say, yes, you want it, then here in Pennsylvania,

1 we developed an app that can run on that technology called the
2 COVID Alert PA app. People voluntarily download it onto their
3 cell phone, and that app uses the technology that Apple Google
4 created.

5 Q. Can a user opt-out of these services?

6 A. Yeah, all of them. Sara Alert is voluntary. The app, you
7 have to proactively download onto your phone. And Apple
8 Google, I'm not Apple or Google, but you can, I know, opt-out
9 of it.

10 Q. Has the Department of Health taken any enforcement action
11 against any of the Plaintiffs due to failure to wear masks?

12 A. The Department of Health has not, no.

13 Q. Thank you.

14 MS. ROMANO: I have nothing further.

15 THE COURT: All right. Mr. Muise, your witness.

16 MR. MUISE: Thank you, Your Honor.

17 **CROSS EXAMINATION**

18 BY MR. MUISE:

19 Q. Ma'am, you testified you are currently the Executive
20 Deputy Secretary at the Pennsylvania Department of Health.
21 Correct?

22 A. That is correct, yes.

23 Q. And then prior to serving in your current position, you
24 served as a Special Assistant to the Physician General at the
25 Department of Health. Is that right?

1 A. Yes, correct.

2 Q. According to your online biography, it says you were
3 Director of Public Affairs at Planned Parenthood Keystone. Is
4 that right?

5 A. Correct.

6 Q. And I believe you have a Master's degree in healthcare
7 administration. Is that right?

8 A. Yes.

9 Q. Was that a yes? I'm having a hard time understanding
10 whether it's an affirmative or a negative response. I'm sorry.

11 A. The answer is, yes, I have a degree in healthcare
12 administration.

13 Q. So essentially, you're a healthcare administrator. Is
14 that right?

15 A. I guess you could qualify it as that, sure.

16 Q. You're not an infectious disease physician. Is that
17 right?

18 A. That is correct, I am not an infectious disease physician.

19 Q. And you are not an epidemiologist. Is that correct?

20 A. That is correct, I am not an epidemiologist.

21 Q. You have no medical degree. Is that correct?

22 A. I have no medical degree, that is correct. Though I do
23 work at an agency that has -- I work under a physician, and I
24 work at an agency that has a number of public health physicians
25 and, I believe, 29 epidemiologists.

1 Q. My question was, you do not have a medical degree.

2 Correct, ma'am?

3 A. I do not have a medical degree, correct.

4 Q. And you're not a medical expert on infectious disease.

5 Isn't that correct?

6 A. I am not a medical expert in infectious disease, correct.

7 Q. And so you understand here today, Plaintiffs are
8 challenging what's been described as a mask mandate. You
9 understand that, ma'am?

10 A. I understand, yes.

11 Q. Okay. And this mandate, based on your direct testimony,
12 was recently updated, I believe, November 17th of 2020. Is
13 that right?

14 A. That is correct, yes.

15 Q. And that is referred to in ECF document 29-1, which you've
16 already testified about. Correct?

17 A. Yes. I don't know exactly the document number, sir, but,
18 yes, I testified about the updated order of the Secretary, yes.

19 Q. I just want to make sure, if you look at the documents, I
20 believe Ms. Romano referenced it as document 29-1. I just want
21 to make sure -- you should have it in front of you. I believe
22 you testified to its contents in your direct. Do you have it
23 in front of you, ma'am?

24 A. Yes, it says document 29-1, yes.

25 Q. Correct. So this was essentially an updated version of

1 the July mask mandate, which a copy was attached to the
2 complaint, which you testified to. Is that correct?

3 A. That is correct.

4 Q. It contains similar mandates for individuals, including
5 mandates that are being imposed upon the Plaintiffs in this
6 case with regard to the wearing of masks. Is that correct?

7 A. That is correct.

8 Q. And this mask mandate is a government program that is
9 initiated and enforced by the State of Pennsylvania through the
10 Department of Health. Is that correct?

11 A. I don't know if I would say it's a program. This is an
12 order issued from the Secretary by the Department of Health.

13 Q. You said this order can be enforced by the state police.
14 Is that correct?

15 A. Yes.

16 Q. And there are penalties that are associated with violating
17 this order. Correct?

18 A. So there are penalties outlined in the Disease Control and
19 Prevention Law, correct.

20 Q. And those penalties would apply to a violation of this
21 order that we're talking about. Correct?

22 A. Those penalties would apply if the Department issued an
23 order. Those penalties could be appealed should someone
24 disagree with the issuance of that order.

25 Q. But you testified, I believe, that there has been no

1 action taken to enforce this order against any individual to
2 date. Is that correct?

3 A. I testified that the Department of Health has not taken
4 any actions against any individual related to the order, that
5 is correct.

6 Q. Okay. If this order is so important, why not?

7 A. So to issue a -- to effectuate, to use the enforcement
8 provisions of the Disease Control and Prevention Act, the
9 Department would need to issue an order against an individual.
10 They would have to then petition a court to effectuate that
11 order. And the Department has not felt that necessary to take
12 that step.

13 Q. So how did the state police enforce this order?

14 A. I don't have details of how state police do that.

15 Q. But it's your understanding they have the authority to do
16 so?

17 A. It's my understanding they do have the authority to do so,
18 yes.

19 Q. Now you testified about a portal that was designed to make
20 reports of violation of various orders to the Department of
21 Health. Correct?

22 A. That is correct. The complaint portal, yep.

23 Q. I believe you testified that it wasn't initially designed
24 to report violations of the mask mandate. Correct?

25 A. It is not -- it is designed to report complaints against

1 businesses for their failure to adhere to the various orders,
2 which could include the mask order, but also the business
3 order, the worker safety order, other orders that we have
4 issued.

5 Q. Complaints could be made against individuals through that
6 portal, could they not?

7 A. Not feasibly. So the way the complaint portal works is,
8 it is online and individuals list information. It's like a
9 survey kind of, you know, they ask you to provide information.
10 And so it's asking for business names and information. So
11 there's not a place to say, I'd like to file a complaint
12 against a person.

13 Q. Somebody could call the Department of Health and issue a
14 complaint, could they not?

15 A. They could, yes.

16 Q. I believe you understand from your direct testimony that
17 the Plaintiffs are also challenging what we described as the
18 contact tracing program. You understand that, correct, ma'am?

19 A. Yes.

20 Q. And you should have in front of you document number 18-3.
21 It should have an Exhibit B on the front cover. I believe you
22 already testified to the contents of this letter. Do you see
23 it?

24 A. Yes, I believe 18.3.

25 Q. And this was the letter that was sent to the

1 Parker/Kenwick family that you testified about. Correct?

2 A. Yes.

3 Q. And this was issued pursuant to the Department of Health
4 contact tracing program?

5 A. Correct.

6 Q. I believe you described in your direct testimony that the
7 contact tracing program and this mask mandate are mitigation
8 efforts. Is that right?

9 A. So the mask effort is mitigation. Contact tracing and
10 case investigation are containment.

11 Q. Is there a difference between containment and mitigation?

12 A. Yes. So containment is the, you know, wrapping your arms
13 around, or a lot of public health professionals have been
14 talking about boxing it in, infectious disease. Mitigation are
15 steps that you can take to slow or stop the spread of disease.

16 Q. Neither of these programs are a cure for COVID-19.
17 Correct?

18 A. That's correct.

19 Q. Neither of these actually prevent somebody from getting
20 COVID-19. Isn't that correct?

21 A. No, that's not correct.

22 Q. How does wearing a mask guarantee that somebody will not
23 get COVID-19?

24 A. It does not guarantee, but there is numerous scientific
25 and published articles the CDC has indicated that mask mandate,

1 such as the universal masking order, reduces transmission of
2 the disease.

3 The way it works plainly is that, you know, this disease
4 is transferred from particles, person to person. So if someone
5 coughs, sneezes. And what happens is when individuals are
6 wearing a face covering, it blocks the ability for those
7 particles to disperse and prevent the others from being hit and
8 then having go into their body those particles which might
9 contain disease.

10 So just four days ago, the CDC put out an ~~MMWR~~, that's a
11 tool the CDC uses to communicate to public health
12 professionals, that they looked at Kansas. And in Kansas,
13 counties that had a masking order in place saw a 6 percent
14 reduction in disease, and counties that did not saw a hundred
15 percent increase of cases of COVID-19.

16 Q. Can you guarantee an individual if they wear a mask, that
17 they're not going to get COVID-19?

18 A. No, I can't guarantee someone that. And it's important to
19 be -- so the mask is to protect others. So there's some new
20 literature now that says the mask also provides some protective
21 factor for the wearer itself. But primarily, it protects
22 others. My mask protects you, your mask protects me.

23 Q. Okay. And so you wearing your mask, can you guarantee
24 that somebody else is not going to get COVID-19?

25 A. No.

1 Q. Are you aware that a study dated September 11th, 2020,
2 reported on the CDC website, based on the data, it said, "in
3 the 14 days before illness onset, 71 percent of case patients
4 and 74 percent of control patients reported always using cloth
5 face coverings or other mask types when in public." Are you
6 aware of that?

7 A. I'm not personally aware of that study, no.

8 Q. The mask wearing mandate -- the mask mandate and the
9 contact tracing program, these aren't vaccines. Correct?

10 A. No, no.

11 Q. If and when a vaccine is available, is the Department of
12 Health planning on ending the mask mandate and the contact
13 tracing program?

14 A. Well, contact tracing is a disease control measure we've
15 used for all kinds of diseases, you know. There's a vaccine
16 for measles, but we still do disease investigation when there
17 are measles outbreaks because not everyone chooses to get
18 vaccinated and there still is the spread of measles --

19 MR. MUISE: Your Honor, I'm going to object as
20 nonresponsive. I'm asking direct questions, and we're going
21 off to narratives. I would appreciate an answer to what my
22 question was.

23 THE COURT: Madam Secretary, just try to stay within
24 the question that Mr. Muise is asking. You're volunteering a
25 little bit, and I appreciate why you want to do that, but he

1 has you on cross examination. So try to focus on the question
2 at hand, if you would, please. You want to re-ask the
3 question, Mr. Muise?

4 MR. MUISE: Thank you, Your Honor.

5 BY MR. MUISE:

6 Q. So ma'am, if and when a vaccine is available, is the
7 Department of Health going to end the mask mandate and the
8 contact tracing program?

9 A. We have not made a decision on that point.

10 Q. When the government is forcing somebody to wear a mask
11 under penalty, would you agree that the government is imposing
12 a burden upon that person?

13 A. I would not agree.

14 Q. Well, they're not free to do what they want to do, which
15 would be to not wear a mask. Is that correct?

16 A. That is correct.

17 Q. As you testified, you worked for Planned Parenthood for a
18 period of time. Correct?

19 A. I did, correct.

20 Q. And now we hear all the time from those that plan to be
21 pro-choice, it's my body, it's my choice. Do you agree with
22 that proposition?

23 A. I do agree.

24 Q. So if it's my client's body, why shouldn't it be their
25 choice as to whether or not to invade it by wearing a mask?

1 A. I think -- I might equate wearing a mask similar to how
2 you may wear glasses while driving. The government requires I
3 wear glasses. I wear them while driving to protect myself and
4 others. Perhaps the same could be said about headlights as
5 opposed to a specific medical procedure that you are talking
6 about in your line of questioning.

7 Q. Is there a plan for when the Department of Health is going
8 to end the mask mandate?

9 A. No.

10 Q. Do you have any objective criteria that you might be
11 looking at or relying upon as to when you are going to end this
12 mask mandate?

13 A. Well, right now we're seeing cases go up. We need to
14 start seeing cases go down, significantly down, prior to
15 reducing any of our current mitigation efforts.

16 Q. And by what number do you want to see those reduced by?

17 A. I would like to see them reduced as far as possible. We
18 have not determined a specific number.

19 Q. So there's no plan published anywhere publicly where the
20 public might be aware of when they'll be free from these
21 restrictions, the contact tracing program or the mask mandate?

22 A. There is not a public plan at this time as we are actually
23 focused on the increasing amount of cases and steps that we
24 took like yesterday to increase mitigation.

25 Q. Is the Department of Health intending to limit the

1 restriction of the mask mandate to just the COVID-19 pandemic
2 or is this going to be some new normal for, you know, the flu
3 virus, for example?

4 A. So the masks are related to the COVID-19 pandemic.

5 Q. Now at the onset of this pandemic, Pennsylvanians were
6 told that these restrictions on their liberties, whether being
7 quarantined or having to wear a mask, were necessary to do two
8 things, flatten the curve and to reduce hospitalizations.

9 Isn't that correct?

10 A. Yes, correct.

11 Q. And did that not happen through the summer months, this
12 past summer, July and August?

13 A. It did, through the summer months, yes.

14 Q. So the curve was flattened and hospitalizations were
15 reduced by July of 2020. Isn't that correct?

16 A. That's correct.

17 Q. Yet the mask mandate that was originally issued was issued
18 July 1 of 2020. Is that correct?

19 A. That's correct.

20 Q. And the Parker/Kenwick family letter that we looked at,
21 document 18-3, that was issued July 25th, 2020. Correct?

22 A. That's correct.

23 Q. What is the main criteria that the Department of Health is
24 using to continue to impose these restrictions on their
25 liberty? Is it number of cases? Is that what you rely on?

1 A. Yeah, we reissued the mask order on November 17th because
2 we had seen -- we were seeing 6000, 7000 new cases a day or up
3 over 300,000 of cases.

4 Q. And how does the Department of Health determine a case?

5 A. So a case -- so the case definition is determined by CDC.
6 So a case of COVID-19 either has a positive PCR test, has a
7 positive antigen test, or meets the clinical criteria as
8 determined by the CDC.

9 Q. What is the cycle rate that the Department of Health uses
10 for determining whether or not a PCR test is positive?

11 A. So that information is reported to us from laboratories.

12 Q. Okay. Is there a standard for the cycle rate that you use
13 to determine whether or not the person is a case?

14 A. Could you explain cycle rate? I'm not understanding.

15 Q. Well, there's plenty of evidence that if you test at too
16 high a cycle rate, you might have a positive test or a case of
17 an individual who is not infectious at all. Plenty of studies
18 out there reports on it. Aren't you aware of that information,
19 ma'am?

20 A. So all of the case information we get comes from positive
21 PCR or antigen tests that meet FDA approval or FDCA EUA. So
22 these tests are determined not by the Department of Health, but
23 determined by the federal FDA are approved to diagnosis someone
24 with COVID-19.

25 Q. Right. I understand that the test might be approved, but

1 you can determine what factors within the test determine
2 whether the person is positive, and that's based on cycle rate.
3 Aren't you aware of that, ma'am?

4 A. So we don't interpret the test -- well, like the
5 Department of Health receives information of positive test
6 results from laboratories.

7 Q. So are you saying that there is no objective standard
8 cycle rate for a positive PCR test in the State of
9 Pennsylvania?

10 A. Those standards are established by the FDA when they
11 approve the test.

12 Q. Okay. So what is the cycle rate that the State of
13 Pennsylvania considers to be a positive COVID-19 PCR test?

14 A. A test that is done by an approved FDA test at an EUA
15 laboratory is then reported to the Department of Health. Upon
16 report, we count it as a positive case.

17 Q. Is it fair to say, ma'am, you don't know what that cycle
18 rate is?

19 A. I'm not familiar with the term cycle rate, that is fair.

20 Q. Now the cases that are reported by the Department of
21 Health, do they include confirmed with probable cases?

22 A. We separate out confirmed cases from probable cases, and
23 then we add them all together to give the top line number of
24 cases in Pennsylvania.

25 Q. So looking at the updated mask mandate, document number

1 29-1. Do you see that, ma'am?

2 A. Yes.

3 Q. In the first paragraph, fourth line from the bottom of
4 that paragraph, it says, "as of November 16, 2020, there have
5 been 269,613 cases." Do you see that?

6 A. Yes.

7 Q. Is that the top line number you're referring to that
8 includes both confirmed and probable?

9 A. Yes.

10 Q. The population in Pennsylvania is approximately 12.8
11 million. Correct?

12 A. Correct.

13 Q. So as of November 16th, there would have been about 2.1
14 percent of the population has been considered a case, which is
15 both confirmed and probable. Correct?

16 A. I'll take your word for it on the math, but that sounds
17 accurate.

18 Q. Okay. And it also says that there's been 9325 deaths in
19 the Commonwealth. Do you see that, ma'am?

20 A. I do, yes.

21 Q. So using our population number of 12.8 million, that
22 equates to approximately .072 percent of the population in
23 Pennsylvania died with some bases related to COVID-19. Is that
24 right?

25 A. I take your word on the math, but it sounds accurate.

1 Q. Now you said cases are also determined by the antigen
2 test?

3 A. Yes, cases can be determined by antigen tests.

4 Q. Are you aware the Department of Health admits on its own
5 website that the antigen test is not an accurate test?

6 A. The antigen tests are not as specific as the PCR test,
7 correct.

8 Q. Seemingly high number of false positives with the antigen
9 test. Isn't that correct?

10 A. Well, I would not say there's an exceedingly high number.
11 There can be false positive or false negative with the antigen
12 test, correct.

13 Q. But the Department of Health had some concern about the
14 reliability of the antigen test. Correct?

15 A. We do. And we provide some clinical information that
16 tests should be confirmed by PCR in certain circumstances.

17 Q. So again, just to review. We had this first mandate --
18 the first mask mandate came in July when hospitalizations and
19 death rates were on the decline. Correct?

20 A. The first mask order was implemented when we were
21 reopening Pennsylvania.

22 Q. Right. And my question, going back again to the judge's
23 instructions, my questions were that that first mandate in July
24 came when there was low hospitalization and low death rate, the
25 curve had flattened. Correct?

1 A. Correct.

2 Q. So there was a surge in November, which has prompted this
3 update mask mandate. Correct?

4 A. Correct.

5 Q. But this surge in November occurred while this mask
6 mandate of July was in effect, was it not?

7 A. The surge occurred when the July 1st mask mandate was in
8 effect, correct.

9 Q. Okay. So the July 1 mask mandate had no impact at all on
10 the surge in November. Correct?

11 MS. ROMANO: Objection.

12 THE COURT: Wait a minute. Secretary Boateng, wait.
13 Do you want to argue the objection, please?

14 MS. ROMANO: Your Honor, I think there's a lack of
15 foundation for that question.

16 THE COURT: Mr. Muise.

17 MR. MUISE: Your Honor, I mean, she's the witness
18 testifying. If she doesn't have knowledge or information about
19 that, then I guess that's what her answer will be.

20 THE COURT: I'll overrule the objection. Mr. Muise
21 has her on cross. She can answer the question. Do you recall
22 the question, Secretary Boateng?

23 THE WITNESS: If it could be repeated again, I would
24 appreciate it.

25 THE COURT: Certainly. Mr. Muise, if you could

1 repeat the question?

2 MR. MUISE: Your Honor, any chance we have a court
3 reporter that could read that back?

4 THE COURT: I'm sure we do. Wendy, do you want to
5 read that back for us, please.

6 (Court reporter read back the referred-to question.)

7 THE COURT: And you may answer the question. Thanks,
8 Wendy.

9 THE WITNESS: No, I would say incorrect.

10 BY MR. MUISE:

11 Q. And did you do a study on that to make that determination,
12 ma'am?

13 A. No, I have not personally though I would refer to the
14 study the CDC published on.

15 Q. Did the Department of Health do any study with regard to
16 Pennsylvania specific regarding whether or not the July 1 mask
17 mandate had any effect whatsoever?

18 A. No.

19 Q. Now you indicated COVID-19 is a virus that attacks the
20 respiratory system. Correct?

21 A. Yes.

22 Q. And we know from science and data that the elderly
23 constitute a vulnerable population to COVID-19. Correct?

24 A. Yes.

25 Q. We know from science and data that people with

1 comorbidities are also a vulnerable population to COVID-19.

2 Correct?

3 A. Yes.

4 Q. And based on the data, healthy people are at a low risk of

5 dying from COVID-19. Isn't that true?

6 A. At a lower risk, yes.

7 Q. And in fact, young people are almost at no risk of dying

8 from this disease. Isn't that true?

9 A. Yes.

10 Q. According to the Department of Health statistics, there

11 have been zero deaths in Pennsylvania for individuals 19 and

12 younger. Isn't that correct?

13 A. I believe that we have the number suppressed because it is

14 below five.

15 Q. So it's definitely below five then?

16 A. If it's suppressed, it is below five, that's correct.

17 Q. Isn't it true that in healthy and young people, COVID-19

18 acts more like the seasonal flu for them?

19 A. No.

20 Q. If you don't have the -- so how does it affect the healthy

21 and the young when you have very little to no deaths?

22 A. So COVID-19 is different than the flu. There's still a

23 lot of science that we are learning. But it impacts

24 respiratory, there can be neurological impact of COVID-19,

25 other physical impacts. It impacts people differently. But I

1 would not equate COVID-19 to the flu.

2 Q. You certainly probably have seen maybe studies of it, and
3 perhaps anecdotally, where a large number of people who are
4 positive with COVID-19 have what amount to cold symptoms.

5 Right?

6 A. Some individuals do have that experience, correct.

7 Q. So we do know based on science and data which populations
8 are the most vulnerable, that being the elderly and those with
9 comorbidities. Is that fair to say?

10 A. Yes.

11 Q. The mask mandate applies to everyone regardless of age or
12 existence of comorbidities. Correct?

13 A. With the exception of people under the age of 2.

14 Q. And also with regard to the mask mandate exception, you
15 have an exception with people with respiratory illnesses.

16 Correct?

17 A. That's correct.

18 Q. And COVID-19 is a respiratory disease. Aren't they the
19 ones that are most susceptible to the disease?

20 A. I don't think I would call them the most susceptible to
21 the disease, but, yes, some people with respiratory meet the
22 criteria for being at an increased risk.

23 Q. You won't accept the most, but how about a very high risk
24 of succumbing to COVID-19 if you have a prior condition of
25 respiratory illness? Is that fair to say?

1 A. Yes. Yeah, the CDC says they're at a higher risk,
2 correct.

3 Q. So applying these mandates across the board, is that the
4 easiest way for the government to affect whatever objective
5 it's trying to affect by this mandate and the contact tracing
6 program?

7 A. So I had testified before that the mask -- my mask
8 protects you, and your mask protects me. So by me wearing a
9 mask, I'm protecting others who might be at increased risk.
10 They might be elderly. They might have these respiratory
11 conditions. I'm wearing my mask to protect them.

12 Q. If you don't have COVID-19, how is it that you are
13 protecting somebody else from COVID-19 by wearing a mask?

14 A. We don't all know -- COVID-19 is the disease that has
15 pre-symptomatic and asymptomatic transmission. So outside of
16 testing every Pennsylvanian every day, I can't say for
17 certainty that a specific individual does or does not or is not
18 a carrier of COVID-19.

19 Q. Are you aware of any studies where somebody who is not
20 infected, infected somebody with COVID-19?

21 A. No, someone who is not infected cannot infect someone with
22 COVID-19.

23 Q. According to the Centers For Disease Control, in 2017,
24 which I believe are the last numbers available, there are over
25 32,000 people who died in the State of Pennsylvania for heart

1 disease, heart illness. Are you aware of that, ma'am?

2 A. Not that number specific, but I'll take your word for it.

3 Q. Well, that's right now, that's more than three times the
4 number of people who have passed as a result of COVID-19.

5 Isn't that right?

6 A. That's correct.

7 Q. Obesity is the leading cause of heart illness, is it not?

8 A. Yes.

9 Q. You don't think the Department of Health is considering
10 issuing mandates on people to be a certain height and certain
11 weight?

12 A. We are not.

13 Q. That would save lives, wouldn't it?

14 A. The Department of Health -- there are numerous programs
15 that the Department of Health implements to reduce obesity
16 which, to your point, would save lives.

17 Q. So a mandate to have a certain height and weight would be
18 a way to save lives, wouldn't it?

19 A. I don't know that that specifically is a public health
20 measure to save lives, to require any individual to be a
21 certain height or weight.

22 Q. You don't think that would save lives?

23 A. I don't think we can make a blanket declaration that all
24 individuals should be the same height and weight. Certainly
25 height, that's something that's not controlled by the

1 individual. They grow tall or not tall as they grow.

2 Q. But you make a blanket mandate for everybody to wear masks
3 whether they have the disease or not have the disease though.

4 Right?

5 A. Back to the same way we would make a restaurant put on
6 their menu a calorie count so that individuals are more
7 informed and can make healthy eating choices.

8 Q. But my clients, for example, they don't have the option of
9 whether or not they think they're at risk of getting COVID.

10 You require them to have to wear masks. Correct?

11 A. The masking order requires someone to wear a mask
12 providing some protective measures to them, but more protective
13 measures to others. This is why we require them to wear the
14 mask when they're with others outside their household.

15 Q. You're not giving that option to my clients who do not
16 have COVID-19 whether they can or cannot wear a mask, you're
17 mandating them to wear a mask whether they have the disease or
18 not. Correct?

19 A. The order requires individuals to wear a mask because they
20 may be asymptomatic or pre-symptomatic carriers of the disease,
21 and the mask protects them from infecting others.

22 Q. For example, Chad Parker already was positive with
23 COVID-19, so there's no risk of him passing it onto anyone
24 else. Why does he have to wear a mask?

25 A. That's not accurate. It is not scientifically proven that

1 someone cannot be reinfected with COVID-19.

2 Q. So you're saying then there's no chance of a vaccine then
3 being effective to stop COVID-19. Is that true?

4 A. No.

5 Q. There's two ways you can stop the spread of viruses,
6 right? You either have your natural immunities, which tend to
7 be far more powerful and long lasting, or you have vaccines.
8 Aren't those the two ways you control the spread of viruses?

9 A. No, no.

10 Q. Well, natural immunity is not one of the ways to control
11 viruses?

12 A. So COVID-19 is kind of like the flu that you gave. Flu is
13 an annual, seasonal. An individual gets the flu multiple times
14 in their lifetime. We're still learning a lot about COVID-19.
15 But at this point, outside of the 90 days -- so an individual
16 who has been infected for 90 days, the CDC has said they cannot
17 become reinfected. Outside of that 90 days, we do not know.
18 And there has been studies and articles published about
19 individuals who have experienced reinfection of COVID-19.

20 Q. Those reinfections have been the result of a false
21 positive to begin with?

22 A. I would refer you to the specific article that talks about
23 those cases, but that was not the findings by those individuals
24 who published those articles.

25 Q. So based on your testimony though, there is a 90-day

1 period where you are not going to convey or spread the virus if
2 you already had it. Correct?

3 A. Yes. So the CDC has said that for 90 days, an individual
4 is not -- cannot be reinfected.

5 Q. But yet under your one-size-fits-all mask mandate, my
6 client, Chad Parker, for example, had COVID-19 but still had to
7 wear the mask during that 90-day period. Correct?

8 A. Correct.

9 Q. And all these individuals, the 269,613 cases that you
10 report as people having COVID-19, every one of those 269,613
11 have to wear a mask even within the 90-day period after they've
12 had a positive for COVID-19 under your one-size-fits-all mask
13 mandate. Correct?

14 A. So in this group, it would be only cases that have been in
15 their 90-day period. So it's not the entirety of the 269,000.

16 Q. So whatever percentage that is though, they're still
17 required under the mask mandate, even though for 90 days at
18 least, based on your testimony, they are not infectious.

19 Correct?

20 A. For 90 days, they can't be reinfected. For the first 10
21 days, they are able to infect, they're in their infectious
22 period.

23 Q. Then for at least 80 days, there's no chance of them
24 spreading or getting COVID-19. Right?

25 A. Yes, correct.

1 Q. But they still have to wear a mask?

2 A. Correct.

3 Q. Are you aware that the CDC announced on August 26th that
4 only 6 percent of the total deaths that had been reported
5 attributed to COVID-19 were without comorbidities?

6 A. I'm not familiar with that specific, specific you're
7 referencing.

8 Q. Well, based on that, then that means that 94 percent of
9 the deaths were people with comorbidities. Are you aware of
10 that?

11 A. I'm not aware of that specific statistic that you're
12 referencing, but the math there, I understand.

13 Q. Well, if you use that math, and that study is part of the
14 record that was put in with the exhibits, if you use that math,
15 6 percent of the 9325 deaths that were listed in the mask
16 mandate in 29-1, that would mean in the total State of
17 Pennsylvania, 560 deaths were related just to COVID-19 out of
18 12.8 million people. Does that seem about right to you?

19 A. I don't think it's quite right the way you explained it
20 there. You know, an individual who -- you're saying that an
21 individual who had a comorbidity then died of COVID-19. I
22 don't think you can assume that the comorbidity was also a
23 contributing factor to their death.

24 Q. Are you saying the CDC was wrong?

25 A. No.

1 Q. When we talk about comorbidities, we're talking about the
2 simultaneous presence of two or more diseases or a medical
3 condition. Is that right?

4 A. Correct.

5 Q. And the principal comorbidities that are a problem for
6 COVID-19 are cancer, kidney disease, COPD, and heart disease.
7 Does that sound right?

8 A. That sounds like some. There's also asthma, obesity,
9 other contributing factors.

10 Q. So we know that there's a vulnerable population with
11 comorbidities and a vulnerable population with the elderly.
12 Why not focus your mitigation to isolate and protect those
13 demographics rather than these broad programs that apply to
14 everyone?

15 A. So again, the mask, I wear the mask to protect others, so
16 it's necessary. I'm not an elderly person, but by wearing a
17 mask, if I'm around someone who is elderly and who has one of
18 those conditions that makes them more susceptible to serious
19 disease, I'm providing protection to them.

20 Q. All right. I'll use your isolation mitigation factor.
21 Isolate those who have problems, the comorbidities and the
22 elderly, and let the other people be free?

23 A. That was not the policy decision that we made.

24 Q. Now an epidemic is not driven by asymptomatic carriers.
25 Correct?

1 A. The asymptomatic carriers can transmit the disease.

2 Q. But an epidemic is not driven by asymptomatic carriers.

3 Correct?

4 A. They contribute. Could you ask the question another way?

5 Q. Sure. Dr. Anthony Fauci said that an epidemic is not
6 driven by asymptomatic carriers. Do you agree with Dr. Anthony
7 Fauci?

8 A. I generally agree with Dr. Anthony Fauci. And I think
9 that they are not -- so individuals who are asymptomatic are
10 not the primary drivers of the pandemic.

11 Q. Dr. Maria Van Kerkhove -- I hope I'm pronouncing that
12 correctly, it's spelled K-E-R-K-H-O-V-E -- who is the technical
13 lead for the World Health Organization on the COVID-19 pandemic
14 stated that secondary transmission from asymptomatic
15 individuals is "very rare." Do you agree with her assessment?

16 A. No.

17 Q. You don't?

18 A. So the World Health Organization has put out information
19 that says asymptomatic transmission of COVID-19 does occur.

20 Q. Saying that it does occur though is different from having
21 a pandemic or an epidemic where you're imposing all of these
22 extreme emergency orders. Right?

23 A. The global pandemic that we're experiencing is a
24 significant pandemic which has required the Secretary to take
25 action such as this universal masking order that she has not

1 taken during other outbreaks of disease, correct.

2 Q. So this global pandemic though is not driven by
3 asymptomatic carriers. Correct?

4 A. It is not primarily driven by asymptomatic carriers,
5 correct.

6 Q. Has the Department of Health done any studies on the
7 long-term adverse effects of wearing masks?

8 A. The Department of Health has not, no.

9 Q. Has the Department of Health had done any studies on the
10 short-term adverse effects of wearing a mask?

11 A. The Department of Health has not, no.

12 Q. Has the Department of Health done any studies on long-term
13 adverse effects for forcing children to wear a mask for the
14 entire school day?

15 A. No.

16 Q. Why haven't they done those studies?

17 A. We're a public health department, we're not clinical
18 researchers, academic researchers. That type of research is
19 traditionally done in an academic or clinical setting.

20 Q. Is the Department of Health not concerned about whether or
21 not these mitigation efforts they're imposing may be actually
22 causing more harm to the people?

23 A. The Department of Health would not have taken these steps
24 if we were not confident that these efforts provide protection
25 for people from the communicable disease in the least impactful

1 way as possible.

2 Q. Okay, but you've done no studies to show these things may
3 not have long-term adverse consequences that could be worse
4 than the virus?

5 A. So the Pennsylvania Department of Health did not do those
6 studies, no.

7 Q. I want to look at the contact tracing letter that was
8 issued to the Kenwick/Parker family. It's document number
9 18-3. Do you have that in front of you, ma'am?

10 A. Yes, I do. I sat it up here, but I got it. All right,
11 18-3.

12 Q. And I believe you testified previously, this was issued
13 pursuant to the contact tracing program?

14 A. Yes.

15 Q. And this letter was issued to the entire Parker/Kenwick
16 family. Correct?

17 A. Correct.

18 Q. And in the first sentence, it says, "the Secretary of
19 Health is directing you, as a close contact, to follow the
20 terms of this letter." Correct?

21 A. Correct.

22 Q. What was set forth in this letter wasn't just a
23 suggestion, it was a direction by the Department of Health.
24 Correct?

25 A. Correct.

1 Q. Now the Department of Health contact tracing -- and this
2 is a direct quote from paragraph 24 of the Redman declaration,
3 Exhibit K -- "contact tracing is the process of identifying,
4 notifying, and monitoring anyone who came in close contact with
5 an individual who tested positive for COVID-19 while they were
6 infectious." Does that sound correct?

7 A. Yes.

8 Q. And continuing on. This is on Exhibit F of paragraph 27
9 from the Redman declaration. "A case investigation is the
10 identification and investigation of patients who are classified
11 as being a confirmed or probable case of COVID-19." Does that
12 sound familiar?

13 A. Yes.

14 Q. You could be contact traced if you are just a probable
15 case of COVID-19, not even a positive?

16 A. So probable and confirmed are public health terms. Both
17 confirmed and probable cases are cases of COVID-19. And, yes,
18 both probable and confirmed have case investigation.

19 Q. So what is the difference there between a probable and a
20 confirmed case?

21 A. So a probable case -- so this definition comes from the
22 CDC that works together with the counsel on state and
23 territorial health officials -- state and territorial
24 epidemiologists, excuse me. They develop the COVID-19 case
25 definition.

1 In that case definition, a confirmed case is a positive
2 PCR result. A probable case is a result from an antigen test
3 or another symptom and other clinical criteria such as you've
4 been in close contact of a confirmed case. That definition
5 used in Pennsylvania and across the nation, both confirmed and
6 probable are both cases of COVID-19.

7 Q. Continuing on from that same Exhibit M of paragraph 27
8 from the Redman declaration. It says, "contact tracing is the
9 subsequent verification, monitoring, and support of their
10 contacts who have been exposed to and possibly infected with
11 the virus." Is that correct?

12 A. That's correct.

13 Q. So even -- so if you are possibly infected, then you could
14 be subject to this contact tracing. Correct?

15 A. Right. And contact tracing is outreach to individuals who
16 might be affected.

17 Q. And this is from Exhibit Q from the Redman declaration
18 referenced in paragraph 35. It says, "Within 24 hours
19 of receiving the positive result, trained public health staff
20 conduct an interview with the case to obtain a list of close
21 contacts they had while infectious." Is that correct?

22 A. Correct.

23 Q. Who are the trained public health staff that are doing
24 this contact tracing referenced in that quote I just gave you?

25 A. These are public health nurses that's work in our Bureau

1 of Community Health Services.

2 Q. You probably saw on the documents, there was somewhere
3 along the lines of the Department of Health hired 4000 contact
4 tracers. Is that correct?

5 A. We have hired 1600 contact tracers.

6 Q. Are these the trained public health staff referred to in
7 that quote I just read to you?

8 A. So the quote you just read was about case investigation.
9 That is done by our community health nurses, public health
10 professionals. Those cases, those contacts are then given for
11 contact tracing and, no, those are not public health trained --
12 not completely. Some of them may have public health training,
13 but it is not a requirement of the position to have been a
14 trained public health professional.

15 Q. Are the contact tracers then the case investigators?

16 A. I'll explain -- I'll re-explain. I didn't do a good job.
17 So case investigation, part one, of contact tracing is the
18 outreach by a public health professional -- at the Department
19 of Health, we use community health nurses -- to positive cases
20 for COVID-19. Those individuals are interviewed. They provide
21 information. Those public health individuals make a
22 determination if a specific interaction resulted in a close
23 contact. If it did, they collect that information.

24 All of that information on the close contact only is then
25 handed off to a group of contact tracers who reach out to the

1 individuals who have been identified as close contact and
2 advises them that they've been in close contact and that they
3 should quarantine.

4 Q. Continuing on that Exhibit Q. It says, "The cases
5 are encouraged to utilize calendars, social media, etc. To
6 remember where and who they were around during their infectious
7 period. During the case investigation, the public health staff
8 attempt to obtain as much information as possible on the
9 contacts (address, phone, e-mail, etc.) and then share the
10 contact information with the designated contact tracers."

11 Is that correct?

12 A. That's correct.

13 Q. And pursuant to the contact tracing program, the
14 businesses and employees are encouraged to keep information
15 regarding individuals who may visit that business or may
16 frequent that business or be employed to report to the
17 Department of Health if contact tracing is necessary. Is that
18 correct?

19 A. So a business could collect that information. That would
20 make our -- yes, that would make the process more efficient.

21 Q. But you referenced a recent order that was issued by the
22 Governor, I believe it was either yesterday or the day before.
23 And it's titled Order of the Governor of the Commonwealth of
24 Pennsylvania for Mitigation Enforcement and Immunity
25 Protections. Correct?

1 A. Yes.

2 Q. And I believe that order goes into effect November the
3 27th of 2020. Correct?

4 A. That's correct.

5 Q. And in this order, it has a section on general
6 requirements for businesses maintaining in-person operations
7 other than healthcare providers at Section 1. Sound familiar?

8 A. Yes.

9 Q. And under that, it has a section entitled contact tracing.
10 Correct?

11 A. Correct.

12 Q. And in this most recent order, it says, "identify
13 employees and customers, to the extent possible, who are in
14 close contact, within about six feet, for about 15 minutes with
15 a person with COVID-19 from the period 48 hours before symptoms
16 onset or 48 hours prior to test date if asymptomatic to the
17 time at which the patient isolated and, upon request, provide
18 those names and contact information to the Pennsylvania
19 Department of Health or local Health Department." Is that
20 correct?

21 A. That's correct.

22 Q. The Department of Health can request this information
23 informing that these employees in businesses need to collect
24 people who frequent their businesses. Correct?

25 A. We can -- yes, we can request information the businesses

1 have collected, when feasible, yes.

2 Q. And when you request it, they're required to provide it.

3 Correct?

4 A. There's not -- there's no way that we can force them to
5 provide that information outside of issuing a petition and
6 taking them to court. We want them to provide it to us because
7 it makes our job more efficient.

8 Q. But the Public Health Law allows you to petition the court
9 to be able to get that information from them. Correct?

10 A. Correct.

11 Q. I'm referring to here now it's Exhibit T in paragraph 39
12 of the Redman declaration. This is a quote from the Department
13 of Health. "During the case investigation, public health
14 professionals spend 30 to 60 minutes asking questions to ensure
15 all potential close contacts are identified. They collect
16 information about who the case came in contact with and where
17 they went while they were infectious." Does that sound
18 correct?

19 A. Yes, yes.

20 Q. So these close contacts would include family members.

21 Correct?

22 A. It could, yes.

23 Q. Friends?

24 A. They could, yes.

25 Q. Fellow church worshippers?

1 A. It could, yes.

2 Q. Business associates?

3 A. It could, yes.

4 Q. Political associates?

5 A. It could, yes.

6 Q. Potentially anyone the case, the person identified, has
7 associated with during the alleged period of infection. Right?

8 A. Correct.

9 Q. Going back to this letter, the document number 18-3 --

10 MR. MUISE: Your Honor, I still have a little bit
11 more to go. I don't know if the witness wants to take a break
12 or if the Court wants to take a short break?

13 THE COURT: Yeah, I was going to jump in. I don't
14 want to rush you, but this might be a good time. How much more
15 do you have, Mr. Muise, do you think?

16 MR. MUISE: It's always a dangerous question to ask
17 the lawyer; correct, Judge?

18 THE COURT: I know, I know. Best guess?

19 MR. MUISE: Best guess, maybe another 45 minutes.

20 THE COURT: All right. Well, we're definitely going
21 to want to take a break then. I think what I would ask you to
22 do, we'll break until 11:15. And then if I can ask you to wrap
23 it up by noon, kind of give you a rough deadline, I think
24 that's fair, that's pretty ample questioning. If you can try
25 to target that, I won't hold you to the exact time, but do

1 that. Then we'll see about redirect at that point.

2 And we'll probably, just to let everybody know,
3 because I want to do some argument, so we will break, and we
4 will probably, you know, break and let everybody take a
5 breather and grab a quick bite if they want to, and then we'll
6 have argument after that. So let's take 15. We'll stand down,
7 and then we'll resume with Mr. Muise's cross at about 11:15.
8 All right. Thanks.

9 (Recess taken at 11:13 a.m. and proceedings
10 reconvened at 11:16 a.m.)

11 THE COURT: All right. I see Mr. Muise is on board.
12 And I think our witness is there. So we're a minute past the
13 appointed restart time. Do we have counsel on board? I'm not
14 sure, I can't see.

15 MS. ROMANO: Yes, Your Honor, we're here.

16 THE COURT: I'm sorry, I couldn't see. There you
17 are. The wonders of WebEx. All right. So Mr. Muise, we
18 return to you.

19 MR. MUISE: Thank you, Your Honor.

20 **CROSS EXAMINATION (CONTINUED)**

21 BY MR. MUISE:

22 Q. Ma'am, when we left off, I asked you if you could have in
23 front of you document 18-3, which was the letter sent to the
24 Parker/Kenwick family. Do you have it, ma'am?

25 A. I do. I have it here.

1 Q. Okay. Again, this letter was issued on July 25th of 2020.
2 Correct?
3 A. Correct.
4 Q. Now it's signed by Secretary of Health Rachel Levine, M.D.
5 Do you see that, ma'am?
6 A. Yes, I do.
7 Q. I take it she wasn't actually the one that did the
8 investigation, made the determination to send this particular
9 letter out. Is that correct?
10 A. She did not personally do the investigation, correct.
11 Q. Do you know who made that decision?
12 A. I do not know who did the investigation of the Chad Parker
13 case.
14 Q. Who authorizes the sending of these letters signed under
15 the Secretary's hand?
16 A. So these are issued by our community health nurses.
17 Q. What controls do you have in place that these letters were
18 sent out appropriately by your community health nurses?
19 A. So the community health nurses are employees of the
20 Department. They report through a supervisor and then up to a
21 bureau chief who then reports. So a similar supervisory
22 structure that we have across the Department.
23 Q. Does the community health nurse, does she have to get
24 authorization from somebody higher than at her level before she
25 sends out one of these letters?

1 A. I don't personally know how that approval process works.
2 It does not come to the Executive Deputy Secretary level for
3 approval.

4 Q. Do you have any idea how high of a level it has to go
5 before it's approved?

6 A. I don't personally, no.

7 Q. Do you know if there are any controls in place to make
8 sure these letters are sent out properly?

9 A. Yeah, absolutely. I mean, these letters go to individuals
10 who have been identified as a case or a close contact, so that
11 information comes to the Department and then the nurse does the
12 investigation.

13 Q. So in this case, what triggered this letter to the
14 Kenwick/Parker family?

15 A. So it's my understanding that the case themselves, Chad
16 Parker, was interviewed, identified that he had had various
17 close contacts, and then the letter was issued to those close
18 contacts. And in this case, that was family members of his.

19 Q. Was it triggered by his positive test that was somehow
20 reported to the Department of Health?

21 A. Yeah. The way we knew how to reach out to Mr. Parker was
22 we got a positive test result reported here to the Department.
23 COVID-19 is a reportable disease. Healthcare providers, in
24 this case mostly laboratory, report that information to the
25 Department.

1 Q. Before sending out a letter like this, like the one sent
2 to the Parker/Kenwick family, is there any verification done at
3 the Department of Health level to make sure that test is, in
4 fact, a verified positive and not a false positive?

5 A. So that verification process is done by laboratory
6 directors. And laboratory directors' labs in Pennsylvania are
7 licensed and regulated by the Pennsylvania Department of
8 Health. So we provide a level of oversight, but we instill
9 that direct oversight into the lab director who determines a
10 case, a positive case is a positive case.

11 Q. Do false positive cases get sent up, and then individuals
12 get letters like the one to Kenwick/Parker? That's possible,
13 is it not?

14 A. So the letter that we have here, document 18-3, that is a
15 letter that went to someone who was a close contact. So this
16 letter is not to an individual who's a positive case. This is
17 a letter to a close contact, you know, I'm assuming here this
18 is his wife and children. And that information we gleaned
19 through our case investigation of Mr. Parker himself.

20 Q. Right. But it goes to the point that it was triggered
21 though by Mr. Parker's positive COVID-19 test. Correct?

22 A. Correct, correct.

23 Q. In your case investigation, does anybody confirm that that
24 test was, in fact, positive -- a true positive and not a false
25 positive?

1 A. That's not the responsibility of the Department, that's
2 the responsibility of the lab director. Once a case is
3 determined to be a positive, it is then reported to the
4 Department of Health.

5 Q. I believe you testified previously -- let me ask you this.
6 Do you know if Mr. Parker's test was a PCR test?

7 A. I do not know the details of Mr. Parker's test.

8 Q. Do you accept positive antigen tests to be the basis for
9 sending out these close contact letters?

10 A. We could, yes.

11 Q. That's despite knowing that that test has problems with
12 identifying positives and false positives?

13 A. Sure. So we -- when the antigen test came on, you know,
14 available -- so again, these tests are FDA approved, the
15 antigen tests. We send clinical information along to providers
16 about the risk of false positive and negatives and then
17 guidance should they, you know, question the results of the
18 antigen tests, they should go forward and have a PCR test.

19 And then, you know, those positive results would come to
20 the Department. So, for example, an antigen test -- if I'm a
21 positive case, and I live with my spouse, and they develop
22 symptoms consistent with COVID-19, and they have a positive PCR
23 test, well there's two factors there to make it likely that
24 they have COVID-19. That is then assumed to be a positive.

25 Say I live all by myself, I've been self-quarantined, I've

1 teleworked, I haven't gone out at all, I get my groceries
2 delivered, but I end up with a positive antigen test. My
3 provider would say those factors -- they might send me for a
4 subsequent PCR confirmatory test to then determine if that was
5 a false positive result.

6 Q. Do you know if there was a confirmatory test done in the
7 case of Mr. Parker?

8 A. I don't know the details of how Mr. Parker was tested.

9 Q. And there's no requirement that there be a confirmatory
10 test for a positive PCR test. Correct?

11 A. A PCR is the gold standard. A PCR, a positive is a
12 positive.

13 Q. Okay. And I believe you testified that you don't know
14 what the number of cycle thresholds are used in PCR tests
15 deployed and used in Pennsylvania. Correct?

16 A. I'm just not familiar with that term cycle threshold.
17 That's not a term we use here at the Pennsylvania Department of
18 Health.

19 Q. Are you aware that there was a study, recently a study
20 that found that PCR tests with a cycle threshold of 35 resulted
21 in a 97 percent false positive rate?

22 A. I am not familiar with that term cycle threshold.

23 Q. But do you know what the standard -- you described the PCR
24 test as the gold standard for Pennsylvania. What are the
25 standards that Pennsylvania uses for the PCR testing threshold?

1 A. So there are numerous -- so PCR is a method in which
2 testing is done, Positive Chain Reaction. There are then
3 manufacturers who manufacture tests in that. So kind of like I
4 have a cell phone, and then I have an Android cell phone or an
5 Apple cell phone, then each of those manufacturers have PCR
6 tests.

7 So then they have a specific specificity and sensitivity
8 associated with them. All of the PCR's for COVID are way up in
9 the 90's, so 99.7, 98.9. But each manufacturer has a slightly
10 different nuance. In antigen, it is the same. There are
11 numerous companies that make various antigen testings. And
12 then each of those have a slightly different specificity and
13 sensitivity to them. Some of them are in the 90's. Some of
14 them are 88, 89. It depends on the manufacturer.

15 Q. That's all fine and well, ma'am. My question is though,
16 what is the standard? The government must have a particular
17 standard that these tests must relate to. Do you have a
18 standard of the cycle threshold for the PCR test in the State
19 of Pennsylvania?

20 A. I'm not familiar with the term cycle threshold, but it is
21 the FDA that gets used in approval that a test is appropriate
22 to be sold on the market. And we here, you know, test results
23 from FDA are either approved or because of the pandemic
24 emergency use authorized test.

25 Q. Are you aware the New York Times reported on August 29th,

1 2020, that there is significant problems with COVID-19 test
2 results noting that "the standard tests are diagnosed in huge
3 numbers of people who may be carrying relatively insignificant
4 amounts of the virus." Are you aware of that problem?

5 A. I'm not familiar with that article though I guess I want
6 to say that just because someone has a low level of viable
7 threshold, they still have a viral threshold, and they can
8 still spread virus and spread disease. It's actually good for
9 us to have a test that is that sensitive to be able to identify
10 if someone is shedding virus.

11 Q. Well, the point of the article is that you are so low of a
12 threshold that you are, in fact, not spreading the virus. You
13 are detecting and identifying people as positive who have no
14 chance of actually spreading the virus. Are you aware of that?

15 A. I'm not aware of that specific article, no.

16 Q. Are you aware of that specific problem that was identified
17 in the article that is apparently nationwide?

18 A. No, I'm not familiar with that.

19 Q. Are you aware that on November 11th, a court of appeals in
20 Portugal held that the PCR tests are unreliable and cannot be
21 used as a basis for a quarantine. Are you aware of that?

22 A. No, I'm not familiar with that. Of course, Portugal
23 doesn't have the FDA, so I can't say what PCR test they're
24 using.

25 Q. Before you send out these quarantine letters that we were

1 just referring to, do you rely on a single positive test?

2 A. So the quarantine letter, like this one here, this goes to
3 close contacts, information we glean from conversation with
4 positive cases.

5 Q. And those positive cases are determined by a single
6 positive test. Correct?

7 A. Correct.

8 Q. And again, no verification by the Department of Health
9 that that was a true positive. Correct?

10 A. That would not be the responsibility of the Department of
11 Health. Clinicians who run the tests report positive results
12 to us.

13 Q. And this letter mandated that the entire Kenwick/Parker
14 family quarantine for 14 days beginning on July 25th, 2020,
15 even though Mr. Parker had lived in close contact with his
16 family members prior to, during, and after his period of
17 infection. Correct?

18 A. That's correct.

19 Q. And, in fact, then he worked for the state, he worked for
20 the very state that's ordering his family to quarantine, and he
21 was allowed to go back to work on July 24th. Correct?

22 A. Yes, that's as I understand from the record, yes.

23 Q. Now did the Department of Health make any efforts to
24 determine whether or not any of the members of the Parker
25 family who were subject to this 14-day quarantine may have had

1 antibodies or not infectious at all?

2 A. So quarantine is specifically when we take people who have
3 been exposed to a communicable disease, but are not yet
4 diagnosed with the disease, and we quarantine them to see if
5 they develop the disease. So in the case of the Parker family,
6 we quarantine the family starting from their last date of being
7 in close contact of a case.

8 Q. So then is your answer, no, nobody did any verification to
9 see if anybody had antibodies or were not infectious during
10 that period of time?

11 A. The Department did not review any antibody test results
12 the family might have, correct.

13 Q. And they did nothing to insure that anybody was
14 potentially infectious during that 14-day period. Correct?

15 A. No. The family, in their declaration, indicated that they
16 voluntarily enrolled in the Sara Alert system, which tracked
17 their symptoms. And so if any of the family members had
18 developed a symptom during the course of their quarantine
19 period, and they self-reported that using the Sara Alert tool,
20 then the Department would reach out and perhaps connect them
21 with testing to find out if they had become infectious.

22 Q. Okay. And I just need to correct you because there's
23 nowhere in the declaration that said they voluntarily enrolled
24 in anything. In fact, if you look at the letter, the demand on
25 page 2 of the letter, it says, "you are directed to do the

1 following." And if you look at 7, "cooperate with the
2 monitoring and other contacts of the Department or its
3 representatives." Do you see that, ma'am?

4 A. I do, yes.

5 Q. And so all these questions about contacts and responding
6 to texts and everything else were part of these directives
7 under penalty of law enforcement, if you look at page 3, and
8 that the Parkers had to comply with. Correct?

9 A. No. You didn't have to enroll in the Sara Alert tool. If
10 individuals don't enroll, then public health nurses manually
11 call them to follow-up on their symptoms.

12 Q. Well, look at the declarations. You agree that's
13 certainly not what the Plaintiffs understood. Correct?

14 A. I can't say what the Plaintiffs understood or didn't
15 understand. I wasn't on the phone during those conversations.
16 But the Sara Alert is a voluntary tool.

17 Q. Now staying with this letter, document 18-3. This letter
18 requires individual family members to maintain social
19 distancing with each other. Correct?

20 A. Correct.

21 Q. Again under penalty of law enforcement. Correct?

22 A. The letter says that if they do not cooperate with the
23 directive, we may petition a court. So we would petition a
24 court if they were not following the directive of this letter.

25 Q. All right. On page 3, it says, "law enforcement may be

1 called upon, to the extent necessary, to insure your compliance
2 with this directive." Correct?

3 A. On page 3?

4 Q. Yes, ma'am.

5 A. Correct.

6 Q. This letter contains no exemptions, correct, for the
7 directive to maintain social distancing of at least six feet
8 from family members?

9 A. The letter is a public health directive, correct. It does
10 not create an exception.

11 Q. So all the family members had to maintain six feet of
12 social distancing from each other during this 14-day period?

13 A. To protect themselves from the spread of COVID-19, that is
14 the public health directive, yes.

15 Q. In their own home. Correct?

16 A. Yes.

17 Q. Are you aware on June 3rd of 2020, that Governor Wolf
18 participated in a Black Lives Matter protest joining hundreds
19 of demonstrators as they marched through Harrisburg,
20 Pennsylvania?

21 A. I'm familiar with the fact the Governor participated. I'm
22 not confident of the date, but I'll take your word for it.

23 Q. And his doing so was in violation of one of his executive
24 orders with regard to mass gatherings. Correct?

25 A. No.

1 Q. So we have court documents where they admitted that it was
2 a violation of an executive order, was it not?

3 A. So the Governor has said, and said publicly then, and the
4 Secretary said as well, that the various orders were not --
5 could not prohibit first amendment protective rights such as
6 protesting.

7 Q. So there is a first amendment exception to whatever
8 executive order that he may have allegedly violated. Is that
9 right?

10 A. I know that the Governor said that publicly, correct.

11 Q. Is there any first amendment exemption to the contact
12 tracing program?

13 A. So the contact tracing program -- is there a first
14 amendment --

15 Q. Yeah. It's a straight question, ma'am. It's a yes or no
16 question. Is there a first amendment exemption to the contact
17 tracing program?

18 A. So the contact tracing program is, you know, outside of
19 petitioning a court to force participation, it is outreach from
20 the Department, you know, if individuals answer the phone or
21 not is determined by that.

22 Q. My question is a simple question. Does the contact
23 tracing program have a first amendment exemption?

24 A. I don't know that it needs an exemption, the program
25 itself. I don't believe the program would need an exemption.

1 Q. Okay. So is that the same as saying it does not have one?
2 A. No. I'm saying -- could you -- I'm not understanding what
3 it would violate of the first amendment to know it would need
4 an exemption to that.

5 Q. The Governor allowed the first amendment exemption for
6 this mass protest that would spread the disease. Do you
7 provide similar exemptions for other restrictions?

8 A. So the gathering order said a gathering can't happen above
9 certain thresholds of which, of course, you know, he was
10 referring to an event that had individuals that were above that
11 threshold. I'm having trouble understanding how to apply that
12 same principle to, you know, a contact tracing program.

13 Q. Well, let's just go right to this letter, document 18-3.
14 There's nothing in this letter that provides an express
15 exemption for first amendment protected activity. Correct?

16 A. Yes, that's correct.

17 Q. And there's none posted or listed anywhere in any of the
18 Department of Health regulations. Correct?

19 A. Not that I'm aware of, correct.

20 Q. Okay. And let's look at the mask mandate, document number
21 29-1?

22 A. Yes, I have it here.

23 Q. Just briefly going back to that mass public protest that
24 the Governor participated in. There was a threat that COVID-19
25 would be spread amongst those that participated. Correct?

1 A. Certainly.

2 Q. Do you know if there was an increased number of cases as a
3 result of that mass protest?

4 A. We did not see an increase in cases related to the
5 protest.

6 Q. But the concerns of these mitigation efforts and isolation
7 efforts that we're talking about are the same concerns you
8 would have about a mass protest in that it could result in the
9 spread of COVID-19. Correct?

10 A. Any times individuals are, you know -- COVID 19, yes, is
11 transmitted person to person. When people gather, there is
12 risk of transmission.

13 Q. That's the government objective you're trying to
14 accomplish through the mask mandate and the contact tracing
15 program is to reduce the spread of COVID-19. Is that correct?

16 A. That's correct.

17 Q. Now in looking at this mask mandate, document 29-1, on the
18 Section 4, it says, "businesses and schools must provide
19 reasonable accommodations to people, including their employees,
20 teachers, students, customers, and visitors, who state they
21 have a medical condition, mental health condition, or
22 disability that makes it unreasonable for the person to
23 maintain a face covering." Do you see that?

24 A. Yes.

25 Q. Does the mask mandate have any reasonable accommodation

1 for someone who might have a religious objection to wearing a
2 face covering?

3 A. It does not.

4 Q. Does it have an exemption or a reasonable accommodation
5 for a person who might have a first amendment objection to
6 wearing a mask?

7 A. It does not explicitly say that in the document. It does
8 not explicitly say that in the document.

9 Q. Is there anywhere in the Department of Health regulations
10 that you provide a first amendment exemption to somebody who
11 doesn't want to wear a mask?

12 A. We don't list that explicitly anywhere on our website or
13 in the document.

14 Q. Is your testimony then today that there is a first
15 amendment exemption to wearing a face mask?

16 A. No, I'm not testifying to that. I'm saying that the
17 document itself does not provide that as an explicit protection
18 or exemption, as you're asking. I guess I'm still having
19 trouble understanding how it would apply in this circumstance.

20 Q. A person doesn't want to wear a mask on first amendment
21 grounds, the same reason why the Governor wanted to march in
22 these Black Lives Matter protests, on first amendment grounds.
23 The exemption that the Governor had, is that exemption
24 applicable to any of these mandates we're talking about today?

25 A. I used the example like glasses before. I think this is

1 much more similar to someone wearing glasses while driving
2 because it protects them and it protects others. So I'm not
3 sure how to apply, you know, because I didn't want to wear my
4 glasses while driving, how that would apply to be a first
5 amendment protection to that.

6 Q. We're not talking about glasses. We're talking about your
7 mask mandate and your contact tracing program, which the
8 Department of Health enforces. Is the Department of Health or
9 the Governor going to allow an exemption for first amendment
10 objections for those two programs?

11 A. So the order requires everyone to wear a mask unless they
12 fit under the exemptions listed in the order.

13 Q. So the answer is no?

14 A. So the answer is no.

15 Q. Ma'am, are you familiar with a recent study published in
16 the Annals of Internal Medicine that was conducted at the
17 University of Copenhagen in Denmark which had over 6000
18 participants? This study just came out within the last week or
19 so where half wore surgical masks and half did not. People who
20 wore the mask were at a 1.8 percent infection rate; those who
21 did not had a 2.1. And the difference was not significant. In
22 fact, the doctor who was the lead author of this study publicly
23 stated "our study gives an indication of how much you gain from
24 wearing a mask. Not a lot." Are you familiar with that study?

25 A. I'm not familiar with that study.

1 Q. Did the Department of Health consider that study when it's
2 making its determinations on these mandates?

3 A. So primarily, we rely on the CDC journals that are
4 published here in the United States when we are making our
5 decisions.

6 Q. Now per the mask mandate, again, it's Exhibit 29-1, "face
7 covering can be made of a variety of synthetic or natural
8 fabrics, including cotton, silk, or linen." Correct?

9 A. You're talking about the updated mask order?

10 Q. Yes, ma'am, 29-1.

11 A. Yes, a face covering can be made of a variety of synthetic
12 or natural fabrics.

13 Q. It could include scarves, bandanas, t-shirts, sweatshirts,
14 or towels. Correct?

15 A. That's correct.

16 Q. So could somebody just pull up their t-shirt over their
17 nose and mouth and walk into a business and they're covered by
18 this order?

19 A. It has to -- there's a sentence that comes before that
20 that says, covers the nose or mouth with material that is
21 secured to the head with ties, straps, or loops over the ears,
22 or wraps around the lower face. So someone could take a
23 t-shirt, fashion it into a face covering, but it must have
24 ties, straps, or loops over the ears or is wrapped around the
25 lower face.

1 Q. This order actually discourages people from wearing an N95
2 mask. Correct?

3 A. Yes.

4 Q. Now based on the signs and data that you've looked at, the
5 N95 is probably the most effective of these type of face
6 coverings, is it not?

7 A. An N95 is an effective mask, yes.

8 Q. Are you aware that according to the Association of
9 American Physicians and Surgeons, it said that the cloth that
10 serves as the filtration for these cloth masks serves as a
11 barrier to air movement because it forces the air to take the
12 path of least resistance resulting in the aerosols going in and
13 out of the sides of the masks. Are you aware that's a problem
14 with cloth masks?

15 A. Could you say the question again?

16 Q. Yes. Are you aware that the Association of American
17 Physicians and Surgeons said that the cloth that serves as the
18 filtration for the cloth masks serves as a barrier to air
19 movement because it forces the air to take the path of least
20 resistance resulting in the aerosol going in and out of the
21 sides of the masks? Are you aware of that?

22 A. I'm not familiar with that article. It's hard to hear the
23 articles without the entire context to them. I haven't read
24 that specific article that you are referencing.

25 Q. Has the study shown that the N95 mask is more effective

1 than these handmade cloth t-shirt masks?

2 A. So the CDC publishes on their website a comparison of
3 masks and which masks should be used in which setting. It is
4 recommended that N95 masks, that require fit testing, you have
5 to have a proper training to put on an N95 mask, be used by
6 healthcare professionals, and cloth masks and like the ones
7 described in our order are appropriate to be used by the
8 general public.

9 Q. But my question was, based on the science and data, the
10 N95 mask is far more effective than the homemade cloth masks.
11 Is that correct?

12 A. An N95 mask put on by an individual who's properly trained
13 with fit testing is the most efficient mask available, yes,
14 correct.

15 Q. So why doesn't the Department of Health issue those masks
16 to the vulnerable populations that we know based on science and
17 data?

18 A. So two things. First, an N95 mask requires specific fit
19 training and fit testing. So I couldn't hand out a, you know,
20 a box of N95 masks to the public and them effectively use them.
21 Without that proper fit training and fit testing, the mask
22 would not be effective.

23 Q. So the -- could the Department of Health provide that
24 training?

25 A. Well, the second piece I wanted to say is that the mask is

1 to protect others not so much to protect themselves. There are
2 some protective qualities of wearing a mask yourself. But my
3 mask protects you, your mask protects me. So we encourage
4 everyone, we require by the order everyone to wear the mask to
5 protect others not just individuals who are, you know, elderly
6 or have some of those convictions that we talked about before
7 to wear the mask because we're actually asking and ordering
8 everyone to wear the mask to protect those individuals and for
9 them to protect others.

10 Q. And you're ordering people to wear the mask even if they
11 are not -- it's not possible for them to spread the infection.
12 Correct?

13 A. We're ordering everyone to wear the mask.

14 Q. One-size-fits-all, correct, ma'am?

15 A. Could you say it again?

16 Q. A one-size-fits-all?

17 A. We are requiring everyone to wear the mask unless they fit
18 into the exceptions of the order, correct.

19 Q. In your experience as a healthcare manager, is it true
20 that people who already had a virus don't get vaccines for that
21 virus?

22 A. No, no.

23 Q. So for example, if your child already had chickenpox, do
24 you think most people vaccinate their child for chickenpox
25 after having the virus?

1 A. I would say every year people get the flu shot even if
2 they had the flu last year.

3 Q. Okay. But the flu changes, right, each year? It's a
4 different strain of the flu, it's not the same flu. Correct?

5 A. Yes, it changes over time, yes.

6 Q. So like, for example, with COVID-19, the vaccine is going
7 to be focused on the COVID-19 virus and not maybe even the
8 seasonal flu. Correct?

9 A. Yes, it will not be focused on the seasonal flu. But what
10 we don't know about COVID-19 is if it will evolve or not.

11 Q. Isn't it true that the best way to fight a virus is to
12 have natural immunity?

13 A. I don't know that I would say that's true. I mean, we
14 would like people to get vaccinated. We find vaccination is
15 the number one way to slow the spread of communicable disease
16 without having people become sick first.

17 Q. Does the Department of Health require children who have
18 already had chickenpox to get a vaccine for chickenpox?

19 A. We do require some childhood immunizations for the
20 enrollment in school. There are exemptions to that in specific
21 circumstances. I don't know if the chicken -- I think the
22 chickenpox virus is on that list that requires immunization,
23 but I'm not positive.

24 Q. Even if the child had chickenpox, he might have to get
25 vaccinated in Pennsylvania for it?

1 A. Well, we require childhood immunizations for the
2 enrollment in school, but there's exemptions to that. Most
3 children at this point get the chickenpox vaccine. I don't
4 know is the answer to your question.

5 Q. Do you know if the Department of Health, if a vaccine
6 comes out, are they going to allow an exemption for people who
7 have already tested positive for COVID-19 to not have to get
8 the vaccine?

9 A. Yeah, the vaccine will be voluntary. The Department of
10 Health is not requiring anyone to get the vaccine.

11 Q. Do you know if that's going to be the case in the future,
12 that there won't be a mandate of the vaccine for people in
13 Pennsylvania?

14 A. I can't predict the future though we don't require, you
15 know, there's -- we don't require other vaccines. We highly
16 encourage everyone to get the flu shot every year, this year
17 particularly. We don't require them to get the flu shot.

18 Q. So right now the Department of Health of Pennsylvania
19 doesn't have any plans to mandate individuals to get the
20 vaccine once it comes out for COVID-19?

21 A. No.

22 Q. I'm sorry, your answer got cut off to me. I didn't hear
23 what you said?

24 A. No, there's no plans to mandate the vaccine at this time.

25 MR. MUISE: Just one moment, Judge. I think I'm

1 meeting your noon deadline here. I'm just doing a quick review
2 of my notes.

3 THE COURT: Certainly.

4 MR. MUISE: Those are all the questions I have on
5 cross, Your Honor.

6 THE COURT: All right. Thanks, Mr. Muise. Do we
7 have any redirect from Ms. Boland?

8 MS. BOLAND: From Ms. Romano, Your Honor.

9 THE COURT: Pardon me.

10 MS. ROMANO: Very briefly, if I may?

11 THE COURT: Certainly.

12 **REDIRECT EXAMINATION**

13 By MS. ROMANO:

14 Q. Ms. Boateng, you were asked some questions about the fact
15 that the curve had been flattened by July. Do you remember
16 that testimony?

17 A. I do, yes.

18 Q. Why was it necessary to continue mitigation efforts at
19 that point?

20 A. So what we anticipated, and actually what we have seen, is
21 that there is a resurgence of the virus; that we flattened the
22 curve through the summer, but there was a resurgence of the
23 virus. So it was necessary to continue to take mitigation
24 efforts to either slow that resurgence or have the resurgence
25 peak be less extreme than it could have been.

1 Q. Why was it specifically necessary to issue a masking order
2 at that point?

3 A. So the July 1st timeline was related to the reopening of
4 the state. So as you recall in the spring, the Governor and
5 the Secretary took additional mitigation efforts by closing
6 businesses. At various times, schools were closed. And
7 needing to balance the need to reopen the economy or restart
8 the society interaction, the Governor lifted many of those
9 mitigation orders.

10 This was the red, yellow, green phases. When we were
11 lifting those, he thought it was necessary to put in place this
12 masking order so that as what we knew would happen as more and
13 more people come together, they go to businesses, they see each
14 other out in society, they would be wearing masks to slow the
15 spread of transmission amongst those at those interactions.

16 Q. You were asked some questions about whether you're a
17 medical professional. Could you please tell the Court about
18 the medical professionals whose knowledge goes into developing
19 the Department's policies and mitigation efforts?

20 A. Sure, yeah. So I would qualify myself as a public health
21 professional. I have a degree in healthcare administration.
22 But we have a department of about 1400 public health
23 professionals. We have a group of epidemiologists. We have
24 public health physicians. We have more than 200 community
25 health nurses. I work directly for Dr. Levine, who is a

1 physician. She leads the Department.

2 So all of those individuals, particularly for COVID-19,
3 our epidemiology team and our public health nurses contribute
4 and influence the overall decision making in all the
5 departments and, obviously, Dr. Levine.

6 Q. You mentioned that the Department continues to learn new
7 information about COVID-19. Is that accurate?

8 A. That's correct.

9 Q. Is the Department's mitigation efforts, are they evolving
10 with that information?

11 A. Yes, we are. So as an example I highlighted in the
12 updated masking order, we did differentiate around face
13 shields. So in our initial mitigation order, the science at
14 the time was not as clear about the effectiveness of cloth
15 masking versus face shields. They seemed about the same.

16 What we've learned now is that a cloth mask is much more
17 effective than a face shield by itself. So we have clarified
18 that in our updated order on November 17th.

19 Q. You talked earlier about the Disease Prevention and
20 Control Law enabling the Department to isolate an individual
21 who is infected with a communicable disease. Does the
22 Department have the authority to isolate a person who is not
23 infected?

24 A. No.

25 Q. So the Department can't simply isolate a vulnerable

1 population?

2 A. Yeah, isolation is a term used for somebody who is a
3 confirmed case, a positive case.

4 Q. You were asked a number of questions --

5 THE COURT: Well, the question was, do you have any
6 authority to isolate somebody who is not an infectious case?

7 THE WITNESS: No. We would quarantine individuals
8 who are non-infectious but who have been exposed to somebody
9 with a communicable disease.

10 THE COURT: Go ahead, counsel. Thank you.

11 MR. MUISE: Thank you.

12 MS. ROMANO: Thank you, Your Honor.

13 BY MS. ROMANO:

14 Q. You were asked some questions about measures that could be
15 taken about preventing obesity and heart disease. Are those
16 communicable diseases?

17 A. No, obesity is not a communicable disease.

18 Q. When a close contact is -- when the Department reaches out
19 to a close contact to tell them they have come in contact with
20 someone who has tested positive, is the identity of the person
21 made known to them?

22 A. No, no. So we -- if you are reached out to and identified
23 that you are a close contact, we do not reveal who is the
24 positive COVID case or where you were in contact with the
25 person. We protect the positive case's confidentiality.

1 Q. Ms. Boateng, what is the Department of Health's overall
2 goal when issuing mitigation efforts for COVID-19?

3 A. To slow or stop the spread of COVID-19 in Pennsylvania.

4 MS. ROMANO: Thank you. Your Honor. I have nothing
5 further.

6 THE COURT: Thank you, Ms. Romano. And Mr. Muise,
7 any redirect out of that -- any recross rather out of that
8 brief redirect?

9 MR. MUISE: Yeah, just very briefly, Your Honor.

10 **RECROSS EXAMINATION**

11 BY MR. MUISE:

12 Q. The Department of Health could take measures, could they
13 not, to protect the vulnerable population such as those that
14 we've identified as being vulnerable to COVID-19? Correct?

15 A. Yeah, correct.

16 Q. It may not technically qualify as an isolation, which you
17 said you don't have authority to do, but you certainly have
18 authority to quarantine as necessary. Correct?

19 A. We have the authority to quarantine individuals who have
20 been exposed to infectious disease, correct.

21 Q. Are there other measures besides isolation and quarantine
22 you could take to protect the vulnerable population, such as
23 not sending infected people back to nursing homes, which is
24 what Secretary Levine did early on during COVID-19? Correct?

25 A. So following CMS guidance and directive, the Department

1 issued guidance and directives that allowed individuals who are
2 COVID positive and being discharged from a hospital to return
3 to their home. In the case of -- and not being quarantined at
4 an isolation facility.

5 In the case of individuals who live in skilled nursing
6 facilities, that would be their home, and they were allowed to
7 be released to their home. That guidance was taken from the
8 CDC -- excuse me, from CMS.

9 Q. That guidance resulted in many many deaths in the State of
10 Pennsylvania, did it not?

11 A. There has been no studies that have proven that.

12 Q. So nobody died from the elderly going back into these
13 nursing homes in the State of Pennsylvania? Is that your sworn
14 testimony?

15 A. I have not seen any published studies that say that
16 someone coming back to a nursing home from a discharge from a
17 hospital contributed to death. Primarily the studies that are
18 published, and what we see, is that COVID-19 enters nursing
19 homes from the dedicated and hard-working asymptomatic staff
20 people who go in and out of the home to community and back.

21 MR. MUISE: I have no further questions, Your Honor.

22 THE COURT: All right. Thank you, Mr. Muise. So
23 what I want to do is, we'll take a break until 12:45. And I
24 would ask you all to just stay connected. Do not disconnect.
25 You can mute and you can turn your camera off, if you choose.

1 We will reconvene at 12:45. I want to have argument at that
2 point. And that will wrap up, unless there's another witness
3 that I'm unaware of. Anybody have a witness that I'm not
4 familiar with? Mr. Muise is saying no, shaking his head. How
5 about on the defense side? Is that your single witness, as I
6 understand it?

7 MS. ROMANO: That is our only witness, Your Honor.

8 THE COURT: All right. So let's stand down, and you
9 can take a break, grab a bite, if you want, and we'll restart
10 at 12:45. Thanks, all.

11 (Lunch recess taken at 12:05 p.m. and proceedings
12 reconvened at 12:45 p.m.)

13 THE COURT: All right. We're back on the record.
14 And I see counsel, so I think we're ready to go. So Mr. Muise,
15 we'll start with you, obviously. Your motion. And you can
16 take the areas in whatever order you want to with the idea that
17 we'll try to have about a half an hour of argument per side, I
18 think would be best.

19 Then we'll go to -- that's an imprecise calculation,
20 obviously, but we'll do the best we can. We'll go back to Mr.
21 Muise for any rebuttal after the defense argument. So Mr.
22 Muise, all yours.

23 MR. MUISE: Thank you, Your Honor. And Your Honor,
24 I'd like to begin with a quote that Justice Alito made in
25 dissent in the *Calvary Chapel Dayton Valley* case, which we

1 cited in our reply. And he said, "as more medical and
2 scientific evidence becomes available, and as states have time
3 to craft policies in light of that evidence, courts should
4 expect policies that more carefully account the constitutional
5 rights." And he's exactly correct.

6 What we have here, and we heard through the testimony
7 of the Defendants' witness, is we have these mandates where
8 it's one-size-fits-all. We have no exit date. We have no
9 objective criteria for easing these restrictions. We have no
10 plan for easing these restrictions.

11 And even by the witness's own testimony, at least 80
12 days after somebody who is a positive of COVID-19, there's no
13 risk of them transmitting the disease. Yet these individuals,
14 and we see all the numbers of cases they have, 200 some odd
15 thousand, all those individuals are still subject to the same
16 mandates, are still subject to the same quarantine
17 restrictions.

18 There's absolutely zero effort on the part of the
19 government to narrowly tailor in any way these restrictions.

20 THE COURT: Well, let me ask you. In that vein, you
21 argue that, for example, the citizens of the Commonwealth
22 should be sort of separated into groups. And your questioning
23 and your brief stresses the fact that individuals with comorbid
24 conditions are far more likely to contract COVID. So if you
25 put the burden on the government to try to determine comorbid

1 decisions, isn't that intrusive in and of itself?

2 You take somebody's word for it that they don't have
3 a comorbid condition? Wouldn't that put the burden on the
4 state to drill into medical records and other things that
5 typically and traditionally are kept private?

6 MR. MUISE: Well, Your Honor, I mean, that's
7 happening right now even with individuals. That's one of the
8 problems we have with this contact tracing is getting into that
9 private information. Quite frankly --

10 THE COURT: Not their medical records. Not
11 requesting a release, for example, from their doctor to find
12 out their assertion that they don't have a comorbid condition.
13 Would you agree that a number of people could be walking around
14 with comorbid conditions and you can't tell on sight whether
15 they have comorbid conditions or not other than obviously, you
16 know, let's take obesity. But aside from that, there are
17 plenty of comorbid conditions that you have to look at medical
18 records to determine, don't you?

19 MR. MUISE: I agree, Your Honor, but the point being,
20 right, is that we're having the government demanding these
21 things on the people. They could put in place -- again, let me
22 just -- I want to qualify this response with, I think, a very
23 important point. We're not asking this Court to be the policy
24 maker. That's not the role of the Court. That's not my role
25 as the Plaintiffs' attorney.

1 We're asking you to evaluate the constitutionality of
2 programs that are before us, and it is the government's burden
3 to establish and put in place constitutionally sound policies.
4 Those might be just to put in place measures and protections
5 that people with comorbidities can take advantage of, that they
6 can use to protect themselves.

7 The tradition here in the United States is that we
8 are free people. We're not forced to be patients of the
9 government whether we have comorbidities or not. People take
10 certain risks every single day because we are free people. The
11 point is, the government is not the one that should be imposing
12 all these restrictions upon us whether you have a comorbidity
13 or not.

14 THE COURT: That's a lofty and a noble argument, you
15 know, in gross when you look at it. But you have cases like
16 *Jacobson*, admittedly, you know, a hundred years ago, but still,
17 do we not have cases that stand for the proposition that using
18 the least restrictive means, the government does have the right
19 to drop mandates that are in furtherance of public health?

20 You say we're free people, of course, but we're free
21 with limitations, aren't we, in the sense that we don't have
22 the right, do we, to infect our fellow citizens? Do we?

23 MR. MUISE: Well, Judge, you made the point about
24 least restrictive means. That's the problem here.

25 THE COURT: So is any masking acceptable

1 constitutionally or would you say masks optional in every case?

2 MR. MUISE: Your Honor, I would say masks optional in
3 every case. And with the government, those who have the
4 greatest risk, they have the option of wearing a mask or not
5 wearing a mask. Certainly if businesses, they're private
6 entities, if they want to have masks based on recommendations
7 from the Department of Health, you know, they're private
8 entities, they can do what they want. When you are having the
9 government mandating it, that's a problem.

10 THE COURT: Is any quarantining of a demonstrably ill
11 person acceptable?

12 MR. MUISE: The key word there, Judge, is
13 demonstrably ill. There's nothing in their contact tracing
14 program that requires them to verify whether the positive that
15 then triggers entire families to be under house arrest for 14
16 days is actually a true positive. There's no --

17 THE COURT: How do you -- let me stop you because I
18 noted that in your brief and I hear that in your argument. So
19 again, if you don't accept the fact that an individual gets a
20 test, and he or she finds out that the test is positive, then
21 isn't it intrusive for the government to drill further into
22 their health records to verify whether they are, in fact,
23 positive or not? Is that what you're asking to have happen?

24 MR. MUISE: What I'm saying, Judge, is virtually
25 every other situation where you have, for example, you know, we

1 cited cases where they commit somebody for mental health
2 reasons or for some other medical conditions. The government
3 has to meet a certain threshold of burden before they restrict
4 a person's liberty. And that's their burden. It's not a
5 private citizen's burden to demonstrate their freedom. Yet
6 they don't have any of that in place.

7 THE COURT: So in your -- in that regime then, you
8 have a plausibly positive test. I feel symptoms. I go and I
9 get a test at an urgent care center. The test comes back
10 positive. Now under the current strictures, I mean, what
11 happens? You contact trace. You got to report that. You
12 know, you got to get out of the mainstream. You're restricted
13 in your home. What would you have the government do that the
14 government isn't doing now?

15 MR. MUISE: To verify that the test is a true
16 positive. Judge, there are a lot of people that have cold
17 symptoms who have had positive tests, and then when they retest
18 them, they're negative. I mean, the amount -- we don't even
19 know --

20 THE COURT: How does the government verify that it's
21 a positive test? That's what I'm asking. Because my question
22 is, isn't that intrusive in and of itself? Why can't the
23 government accept at face value in the interest of caution that
24 an individual has tested positive? Of course it could be a
25 false positive. Admittedly that can happen.

1 But -- so you report that you're positive, and then
2 the government drills in further. I'm not sure what you would
3 have the government do. Retest the individual?

4 MR. MUISE: They could retest the individual. They
5 could give the individual that option. But, Judge, they're
6 putting them under house arrest for 14 days. I'm not aware of
7 any other circumstance where the government can impose these
8 sorts of restrictions on their liberty, and they don't have to
9 prove anything beyond they've got a report of a test.

10 And the witness wasn't even sure what the cycle
11 threshold was for the PCR test. That's significant as to
12 whether or not that's even a true positive.

13 THE COURT: Were your clients arrested? Were they
14 charged? Were they cited at any time?

15 MR. MUISE: No. They were ordered to quarantine for
16 14 days under threat of law enforcement per the order. They
17 were ordered to cooperate and disclose all their close contacts
18 per the program.

19 THE COURT: Do you have any evidence, and I'm sure
20 you looked at this, that anybody has been cited or charged with
21 an offense or hauled into court because they've broken
22 quarantine?

23 MR. MUISE: I don't see how that cuts in favor of
24 this policy. If anything, it just shows absurdities if they're
25 not going to actually enforce the policy. They are just

1 threatening people with enforcement.

2 THE COURT: I didn't ask you to argue the point, I
3 asked you if you had any evidence. Do you have any evidence of
4 it?

5 MR. MUISE: Do I have evidence of somebody being --
6 no, I don't have. I don't have evidence because I, quite
7 frankly, I haven't gone looking for it because from a
8 constitutional perspective, it doesn't matter. They've been
9 threatened with law enforcement and were quarantined for 14
10 days without the due process requirements that are normally in
11 place in virtually any other circumstance where the government
12 places you on house arrest for two weeks.

13 And just getting to *Jacobson*. *Jacobson* makes the
14 point as well that there is a critical role for the courts.
15 You are the safeguards.

16 THE COURT: Right. And you could -- couldn't you --
17 I mean, there's a post -- if you say that this is a detention,
18 and it may be, the quarantine for 14 days, are there not cases
19 that stand for the proposition that a post-detention remedy, if
20 a post-detention remedy is available, that that's sufficient?
21 For example, if you found yourself in quarantine for 14 days,
22 you found out it was a mistaken test or that you were
23 improperly confined to your house, do you not have a cause of
24 action in that event?

25 MR. MUISE: I mean, we've got a cause of action right

1 before you, Judge, that this is an unconstitutional
2 infringement upon their liberty. There are no in-place
3 post-deprivation of liberty procedures put in place by this
4 because the government never has to prove anything to begin
5 with.

6 THE COURT: Well, let's go back. There are certain
7 enabling legislation, you obviously would agree to that, that
8 allows the Secretary of Health to take certain measures. You
9 have a constitutional issue with the measures, of course. But
10 the enabling legislation, you're not claiming that that's, or
11 are you, that that's unconstitutional in and of itself, are
12 you?

13 MR. MUISE: Well, quite frankly, I think the
14 emergency order's authority is a guarantee clause issue, which
15 we didn't raise for the preliminary injunction. My point
16 being, we've only challenged here what has been the outcome of
17 enabling legislation in terms of the mask mandate and the
18 contact tracing program. But the fact that the enabling
19 legislation might be constitutional doesn't then, you know,
20 necessarily follow that the policies and programs that are
21 derived from it are constitutional.

22 THE COURT: Of course. I didn't mean --

23 MR. MUISE: Yeah, I'm sorry.

24 THE COURT: I didn't mean -- no, I'm sorry. I didn't
25 mean to imply that one followed the other. And it doesn't,

1 obviously. So your quarrel is with the measures themselves,
2 the constitutionality of the measures themselves? I just want
3 to clarify. Is that right?

4 MR. MUISE: For purposes of a preliminary injunction
5 motion. We have a broader claim in the complaint dealing with
6 that authority, but that's not raised here for the purposes of
7 a preliminary injunction. Quite frankly, the guarantee clause
8 claim is going to have to go higher up as it were in light of
9 what the existing case law is, but we're preserving that for
10 ultimate resolution of this case. For purposes of preliminary
11 injunction, we're just dealing with the mask mandate and the
12 contact tracing program.

13 THE COURT: I understand. Keep going.

14 MR. MUISE: Your Honor, just to continue on this
15 point. Aristotle made this very important point that, you
16 know, there is nothing so unequal as the equal treatment of
17 unequals. And right here we have these blanket prohibitions
18 and restrictions on individuals' liberties that there aren't
19 exceptions that provide for, for example, somebody who is not
20 infected can go without wearing a mask.

21 Even the witness said -- and quite frankly, I think
22 the science shows otherwise. But at least she admitted that
23 for 80 days after you're a positive, you're not infectious at
24 all. Yet all these people still have to wear masks.

25 The contact tracing program has no constitutional

1 safeguards in place to protect my clients or any other private
2 citizen. We also heard -- and again, just getting to the point
3 about the policy. And just to be clear, we're not asking this
4 Court to be a policy maker. The Court -- even in *Jacobson*, the
5 Supreme Court made the point that the courts have a critical
6 role even in a pandemic to give effect to the constitution.

7 That's all we're asking is, give effect to the
8 constitution. And with regards to *Jacobson*, I understand this
9 was, you know, a 1905 case, right. We had no development of
10 Supreme Court jurisprudence in a sense for what we have today.
11 Not even the right to privacy. The *Griswold* case was even
12 recognized by that point.

13 So *Jacobson* has, quite frankly, has very limited
14 impact. But even continuing that to, you know, to its, quite
15 frankly, logical event, if the Court is going to give such
16 great deference under *Jacobson*, as noted in our reply brief,
17 then the government can say, you know, we're going to order
18 everybody to inject bleach into their arms because we believe
19 that bleach somehow stops this COVID-19.

20 Well, of course, a court could step in and say, wait
21 a second, that's not, you know, *Jacobson* doesn't give you cart
22 blanche. The point being --

23 THE COURT: And I would agree, you know, *Jacobson*
24 happened, you know, in the stone age as it relates to the right
25 to privacy, of course. And, you know, you invoke *Griswold*.

1 But, you know, if you look at *Griswold* with the constitutional
2 violation and the fear, which was real, which was that the
3 authorities, the police were going to batten down bedroom doors
4 and, you know, view the most private of acts. We don't have
5 that here, do we?

6 MR. MUISE: What you have, Judge, you have an order
7 that orders married couples, the Parkers, for example, to
8 maintain social distancing for two weeks under threat of
9 enforcement of law enforcement. That's what they're saying in
10 their order.

11 THE COURT: Why isn't that the least restrictive
12 means? What would you have the government do to protect the
13 health of citizens? Doesn't the government have an obligation
14 to do that? I mean, you're all about telling me, and I
15 understand why, what the government can't do and what's
16 constitutionally infirmed, but is the government powerless to
17 protect the rights of its citizens and the health of its
18 citizens?

19 MR. MUISE: Well, Judge, that's at a 10,000 foot
20 level as well. Certainly the government has --

21 THE COURT: Well, you're getting lofty, so I want to
22 get lofty, too.

23 MR. MUISE: I'm not lofty. Judge, the 14 days, six
24 foot social distancing among family members, there's nothing
25 lofty about that. That's very narrow. That's very specific.

1 That's in the order that carries with it, you know, the threat
2 of law enforcement. You can't -- under that order, you can't
3 have -- you know, a mother has to stay six feet away from her
4 child. It's just the absurdity of this order.

5 These are orders that are issuing from the government
6 under their authority to impose restrictions on people. That's
7 not at a 10,000 foot level. That's at the exhibit that we have
8 right in front of us. It's written in black and white. And
9 it's very draconian. And that hangs over, you know, the head
10 of not only the Parkers during that time, but every other
11 private citizen who says, okay, you know, I went to this store
12 and they had me write down my name and address and everything
13 else.

14 Next thing I know, I'm going to be getting a letter
15 from the Department of Health that's going to quarantine me for
16 14 days. Or I'm the one who's going to be -- we even heard the
17 witness agreed and acknowledged that the contact tracers, they
18 want the names of your close associates, family members,
19 friends, fellow church worshippers, political associates,
20 business associates, anyone that he associates with.

21 And they're required by that law to provide it. They
22 are directed to cooperate with all the monitors. That's a
23 problem. That's a problem under the first and fourteenth
24 amendments. You got people living in fear now because they're
25 out there and they don't know if the next day they're going to

1 get one of these letters from the Department of Health telling
2 me that my entire family has to be under house arrest for 14
3 days because I went to church with somebody who eventually
4 showed up as a positive PCR test, we don't even know what the
5 cycle rate is, or even a positive antigen test, so they're a
6 probable, even though they acknowledge the antigen test is not
7 that accurate, has a lot of false positives, and yet here I am,
8 I'm going to be under house arrest for 14 days.

9 This is -- I mean, to use the term Orwellian,
10 Orwellian is directly on point. This is an Orwellian program
11 that they have in place that is undermining the fundamental
12 right to association. Compelled disclosure, regardless of the
13 nature of the Government's program, compelled disclosure
14 triggers constitutional protection. We saw that in the
15 *Fraternal Order of Police* case in the Third Circuit and in the
16 *Salvation Army* case in the Third Circuit. And that's this in
17 spades.

18 And they don't even know. Everyone in the Parker
19 family could have already had the disease 30 days ago, so
20 they're within that 80-day period where they're not infectious.
21 Yet the government doesn't care. They send out this
22 one-size-fits-all letter without getting into any details as to
23 whether or not the people they're quarantining are necessary to
24 quarantine, telling them all to social distance for the entire
25 time from family members, regardless of whether you have a

1 child with special needs, for example, diabetes, or whatever.

2 Okay, I'm technically violating the law now because I
3 have to give my child their insulin shot. This is not a
4 narrowly tailored program. This is an overly broad restriction
5 that burdens fundamental rights. It's the government's burden,
6 it's not my burden, it's not your burden to rewrite the law as
7 to what it could be, should be, or, you know, how they might
8 come up with a more narrowly tailored policy.

9 The issue is, these programs, both the mask mandate
10 and the contact tracing program, are not narrowly tailored.
11 And the government must at least adhere to those basic
12 fundamentals when they want to impose their burdens upon
13 fundamental freedoms of American citizens.

14 THE COURT: The lofty comment by me, by the way, was
15 meant to charge you for citing Aristotle, not for anything
16 else. So points to you for that. But you know, when I get on
17 an airplane, I have to go through TSA screening. And you do,
18 too, obviously, infrequently as that is these days.

19 But, you know, I can be pulled out of line for no
20 other reason than my number is up and have my carry-on bag
21 thoroughly searched. I can have my person searched. I can be
22 pulled into a room at the airport. I can be asked to take, you
23 know, articles of clothing off only because of a TSA screener's
24 desire to, you know, test further.

25 There's no requirement of -- there's no fourth

1 amendment rights that you have when you get on an airplane.
2 You give those up. You give up a certain measure of liberty to
3 keep everybody safe on an airplane. Why is this not analogous?
4 So yes, you might be detained, you know, on a false positive.
5 Other family members might be as well.

6 Do you doubt that we have a, you know, a re-emerging
7 and raging pandemic that requires -- and I understand, I'm not
8 here to make policy, I absolutely agree with you -- but do you
9 doubt that we have a situation that is a public health crisis,
10 a pandemic, that cries out for the government to do something?

11 MR. MUISE: Your Honor, look, there's a pandemic.
12 The government can do things, but they have to do things within
13 constitutional limitations. That's obviously the main point.
14 But let me just talk with the plane issue. Number one, I don't
15 think you surrender your fourth amendment rights to TSA
16 necessarily. But just as a matter of law --

17 THE COURT: Where do you have a right to a pre-search
18 hearing? You don't, do you? You say, wait a minute, I want a
19 hearing before the TSA screening board? Well, there isn't one.
20 They're going to search you. And you're not going to have --
21 you know, your redress is, if you think it was wrongly done or
22 they became too intrusive, I guess you can claim a battery or
23 you can file suit afterwards. You don't have any pre-search
24 process that you can engage in, do you?

25 MR. MUISE: Your Honor, if the TSA put in place a

1 policy that everybody who, you know, third in line had to be
2 strip searched behind closed doors before they could get on a
3 plane, you would have a pre-enforcement challenge to that
4 policy regardless of whether or not --

5 THE COURT: I'm not talking about that.

6 MR. MUISE: No, but that's the point. You have a
7 policy that they have in place that is unconstitutional.
8 That's my point. I want to just address the point with the
9 plane. The plane situation and the current situation are not
10 the same. You have a choice as a private citizen as to whether
11 you want to go on a plane or not. We're not given that choice
12 here.

13 The fact that you live and breathe in the State of
14 Pennsylvania, you're subject to these restrictions. If you
15 said that everybody had to be searched -- so to use your plane
16 example. Everybody had to run through a TSA screening whether
17 or not they were going on or off the plane because they could
18 potentially go on the plane sometime in the future, therefore
19 you have to be searched. That doesn't raise fourth amendment
20 violations? I think it certainly would, and I would challenge
21 a program like that.

22 We have this one-size-fits-all blanket that applies
23 to everyone who's living and breathing in the State of
24 Pennsylvania whether they are vulnerable population or whether
25 they're sick or whether they're even subject to this illness.

1 And they can't do under the constitution.

2 THE COURT: You indicate or you argue that the mask
3 requirement constitutes impermissible compelled speech. Can
4 you tie that up for me? Explain that for me.

5 MR. MUISE: Sure, absolutely. I think we cited, you
6 know, examples, including the lofty journal cartoon, and
7 certainly our client's position that the mask has become a
8 symbol. We even saw that with, you know, with that hot mic
9 between Governor Wolf and that other legislator when they were
10 making a comment about, well, we're going to keep our masks on
11 until the cameras go off because this is good political
12 theater.

13 The masks have become a symbol. They've become a
14 symbol, and certainly from our perspective, they've become a
15 symbol of oppression. It's not the same thing as eyeglasses.
16 It's not even the same context. You have to look at first
17 amendment cases and their factual context, right. The Supreme
18 Court has said time and again the limits of the first amendment
19 are determined by the facts they are held to embrace. That
20 mask has become a symbol during this time.

21 We see it in all the -- whether it be the debates or
22 the candidates. You know, some candidates want to wear the
23 mask all the time. They're always trying to catch President
24 Trump with the mask on to make the point. That has become a
25 symbol.

1 And it's compelling our clients to use their bodies
2 as billboards to promote this idea that this pandemic -- if you
3 look at the statistics, yeah, it's a pandemic, but .072 percent
4 of the population in Pennsylvania have died? One-third less
5 than people who are going to die from heart disease next year.

6 I think there's a sense of fear and panic that's
7 created by the mask mandate, and that allows government
8 officials to retain power when you keep people in fear. So I
9 do think when you --

10 THE COURT: Well, that's sort of a polemical
11 exercise. I mean, I think you're untethered from your
12 constitutional argument. You want to label it a fear gesture
13 or that it amps up, you know, public anxiety. Of course,
14 that's an opinion, and it's fair to do that. But, I mean, it's
15 aside from the constitutional argument.

16 I mean, look, you know, I had counsel in another case
17 make a similar argument by reducing this to percentages. As of
18 yesterday, there are 10,000 Pennsylvanians that are dead
19 because of this coronavirus. I mean, you can reduce it to a
20 statistic and a percentage of the entire population, but it's a
21 pretty stunning number since the beginning of the pandemic.

22 Now again, we don't make policy here, but it seems to
23 me in your argument, by using a percentage of the overall
24 population, aren't you minimizing what is taking place here in
25 Pennsylvania? For example, that hospitalizations are up almost

1 a hundred percent over the last 14 days? That we're arcing
2 over 320,000 cases? A hundred percent increase in cases over
3 the last 14 days, new cases?

4 I mean, would you have the Department of Health just
5 ad hoc this or say, look, it's every man and woman for
6 themselves? You want to wear a mask, you can wear a mask.
7 Despite the CDC guidance and the research? I mean, this isn't
8 about making policy, but do we not have exigent circumstances
9 that allow these measures that may be annoying and may be
10 troublesome to people, but are in the public interest? You
11 don't see that?

12 MR. MUISE: Judge, it's not -- that's not what I'm
13 saying. First of all, that mask mandate was in place since
14 July, right. And so was the contact tracing. These were all
15 in July. All of a sudden, we have these spikes in November. I
16 think that's evidence that calls into question like how
17 efficacious these programs are. And the fact is, they're not
18 narrowly tailoring them to go to the heart of what the issue
19 is.

20 But again, I'm not asking this Court to decide which
21 policy is the right one, just which ones are constitutional and
22 which ones are unconstitutional. So then there's the whole
23 argument of herd immunity. But that's getting into, I think, a
24 separate issue.

25 But this ties into, you mentioned while saying, you

1 know, it's polemic, dealing with the mask being compelled
2 speech. But I was just making the point that in the broader
3 context, the mask has become a symbol, unlike the wearing of
4 eyeglasses or even of a seat belt. There's certainly a lot of
5 people that object to the mask, including my clients, because
6 they consider it to be a symbol of oppression from the
7 government.

8 THE COURT: You could write Wolf Sucks on the front
9 of your mask, couldn't you? Nobody is going to prosecute you,
10 are they?

11 MR. MUISE: No, but that's not my point. Why is it
12 -- let me ask you this, Judge -- well, not ask you this, but
13 make this point. It's interesting that you cite how horrific
14 this is, you know, 10,000 -- one death is unfortunate
15 regardless, I totally agree. I am totally pro-life, any life,
16 all life is precious. So I agree, 10,000 deaths is 10,000 too
17 many.

18 But why was it in June when they had these mass Black
19 Lives Matter protests, people not wearing masks, people not
20 social distancing, but yet the message that they wanted to
21 convey was apparently so important that the spread of the virus
22 amongst these hundreds, if not thousands, of people was
23 apparently okay? Why is that?

24 Why is there a first amendment exception there where
25 Governor Wolf can on his own say, we have these executive

1 orders, they apparently don't apply when it's a social message
2 that I want to get out?

3 THE COURT: Yeah, I might agree that had I been the
4 Governor of Pennsylvania, that might have been something that I
5 wouldn't do. But your argument seems to be, and I'm just not
6 sure how to read it, that he defaults into unconstitutionality
7 because he makes a bad judgment and decides to March in a
8 parade. I mean, I don't know what else, what utility that
9 has --

10 MR. MUISE: That's not it, Judge, at all.

11 THE COURT: Okay.

12 MR. MUISE: And these are admissions that were made
13 in a prior court filing, which we have before the Court, and
14 the statements from Secretary Levine. This isn't a matter of,
15 oops, I made a constitutional -- I made a violation of my
16 order. No, they defended it. They said, there is -- you even
17 heard from the witness, there was a first amendment exception
18 apparently for that restriction that happened to coincide with
19 the political views that the Governor wants to provide.

20 But there's no first amendment exception for my
21 clients from not wanting to wear a mask because they consider
22 that to be a symbol of oppression that the government is using.
23 And obviously, the evidence doesn't support it. But the same,
24 the same government interest that they are claiming during the
25 Black Lives Matter protest is the same government interest

1 they're doing here.

2 But yet Governor Wolf is given a first amendment
3 exemption, not an acknowledgment of a constitutional violation
4 or an executive order violation. But they said, look, he's
5 exempt from that, that's an exemption from the first amendment
6 activity, but they're not extending it to my client in this
7 case. Even Chad Parker, who was positive, for at least 80
8 days, he should have been able to not have to wear a mask.
9 It's this one-size-fits-all.

10 Just because it's easier for the government doesn't
11 make it the least restrictive means. They have the burden to
12 demonstrate the restrictions. We don't have a burden to
13 demonstrate our freedom. And that's the problem here. And
14 they've got this one-size-fits-all that is encroaching upon
15 fundamental liberties.

16 And as Justice Alito said, look, we've been through
17 this now long enough. I can understand maybe March, April.
18 But here we are in November. They need to narrowly tailor
19 their restrictions in a way that really mitigates the disease.
20 And we know who these populations are that are affected. We
21 need to take measures to protect them.

22 THE COURT: Is that my Circuit Justice Alito in an
23 opinion or is that my Circuit Justice Alito in a speech that
24 you are citing?

25 MR. MUISE: It's your Circuit Judge Alito in a

1 dissent, which we cited in our reply brief. As we know,
2 dissents often become majorities as courts change over. Kind
3 of a little bit of change in this court.

4 THE COURT: There has been a change in the court.
5 But it also is reflected in Justice Alito's speech as well. I
6 mean, his thoughts in this area are well-known, obviously.
7 Well, that's a good segue. So let's go to the -- thank you,
8 Mr. Muise. Let's go to the defense. Who's going to argue for
9 the defense?

10 MS. BOLAND: Attorney Boland, Your Honor.

11 THE COURT: All right, you're up.

12 MS. BOLAND: Thank you, Your Honor. As we are all
13 painfully aware, we do have exigent circumstances. We are in
14 the middle of a deadly pandemic. And as of today, nearly
15 10,000 people have lost their lives to COVID-19. And every
16 single one of those lives counted. Every single one of those
17 lives was somebody's son, daughter, mother, father, sister, or
18 brother. Those lives counted.

19 Moving forward, Your Honor, it appears as though
20 we're experiencing a resurgence of the pandemic. And right
21 now, we're expecting a projected 22,000 new cases of COVID in
22 the Commonwealth per day. In the past week, the number of
23 COVID-19 attributable deaths has quadrupled. And the average
24 daily case count is seven times higher than it was only two
25 months ago.

1 THE COURT: Well, we have those statistics, and I
2 don't think I heard Mr. Muise gainsay the ugly statistics that
3 are clearly climbing. I want you to focus on what Mr. Muise
4 said, which is that there is this one-size-fits-all that fails
5 constitutionally because it's not narrowly tailored, it's not,
6 you know, it doesn't carve out, for example, someone who's had
7 COVID, who has had a positive test and need not wear a mask for
8 the ensuing 80 days, that he or she is still required to wear a
9 mask, just to use an example that Mr. Muise cited. What about
10 that?

11 MS. BOLAND: Your Honor, the Department isn't held to
12 a standard of perfection. The standard is whether or not it's
13 narrowly tailored. And in this case, we put in place an order
14 that prevents us from having to impose more draconian measures.
15 As you're aware, Your Honor, we went from temporary closures of
16 businesses, and then we went through the color scheme
17 reopening, and now we're in this position.

18 And the mask mandate is a way to allow the economy to
19 reopen, to allow people to somewhat get back to normal lives
20 while this pandemic is raging, but yet protect the public and
21 stop the spread of disease. So this is narrowly tailored.

22 And just because it's not perfect, and just because
23 counsel identified one small discreet situation where there are
24 a group of people personally may not benefit by wearing it, it
25 doesn't mean that the whole thing by default then is

1 unconstitutional. These restrictive means narrowly tailored
2 does not equate to a standard of perfection. In this case,
3 it's not really one --

4 THE COURT: I'm sorry. Mr. Muise, while saying, of
5 course, that the courts shouldn't make policy -- although
6 sometimes, admittedly, we do in a vacuum, and that's not what I
7 want to do here, obviously -- but Mr. Muise said that in his
8 view, what would pass constitutional muster would be a
9 voluntary masking requirement, that citizens can be left to
10 their own designs with respect to a mask. What do you say
11 about that?

12 MS. BOLAND: Respectfully, Your Honor, it's not Mr.
13 Muise's prerogative or the Plaintiffs' prerogative. They are
14 not elected officials. They did not even bring before you any
15 public health officials. They are just providing their lay
16 personal opinions and thoughts on how business should be
17 conducted in Pennsylvania.

18 But in Pennsylvania, we don't rely on the thoughts
19 and opinions of lay people. We rely on experts. We rely on
20 the agency with expertise that's led by a doctor. We rely on
21 policy that has 29 epidemiologists ready to jump into action
22 and prevent the spread of disease.

23 So respectfully -- and it's understandable. I mean,
24 a lot of the time people just disagree with different policy
25 choices made by the government. But that doesn't mean that the

1 policy choice is wrong, and that doesn't mean that the
2 individual's voice is better or should be given a higher
3 priority.

4 In fact, the law holds oppositely, Your Honor, that
5 it's the people with the expertise, that is the people who are
6 elected, that are voted into office, who have this prerogative
7 to make the choices. And Your Honor, the one-size-fits-all
8 description is patently false on its face because built right
9 into the order are exceptions.

10 And the exceptions are quite reasonable. You don't
11 have to wear a mask if you have some sort of respiratory
12 problem and it could make your situation worse. You don't have
13 to wear a mask -- small children don't have to wear masks. You
14 don't have to wear a mask if you are outside away from others
15 engaged in vigorous activity.

16 So it's not true that it's one-size-fits-all. It
17 doesn't say you have to wear a mask every day, all the time,
18 24/7, in your sleep. That's simply not the case. It's only
19 required in certain circumstances when you could potentially be
20 a threat to other people because you're maintaining a certain
21 distance with them over 15 minutes at least and could spread
22 the disease.

23 So it's patently false to say that this is
24 one-size-fits-all because if you just look right at the order
25 itself, it explicitly contains exceptions, Your Honor. And to

1 go through the elements of the injunction, normally, Your
2 Honor, when I argue an injunction, I start off with the right
3 to relief.

4 But in this case, I'd like to just start with arguing
5 the balance of the harms because it seems especially
6 appropriate in this instance where we are literally dealing
7 with a matter of life and death. Your Honor, granting an
8 injunction in this case would jeopardize the public interest.

9 On the one hand, Your Honor, we have two programs
10 that are in place that are reasonable and work to stop the
11 deadly pandemic. On the other hand, you have the Plaintiffs
12 who believe that they've suffered some indignities. The harm
13 to the public in removing the mask mandate will cost actual
14 lives, and that's what the evidence shows.

15 And that's what Ms. Boateng cited, the evidence from
16 the CDC which confirms that mask wearing helps prevent the
17 spread of disease. So if you take the masks away, that means
18 that the disease is going to spread at an increased rate, more
19 people are going to get sick, and more people are going to die
20 in this Commonwealth.

21 On the other hand, the Plaintiffs will be minimal ly
22 inconvenienced. They have to wear a mask in certain
23 circumstances, not all the time, not in their own homes if they
24 don't have outsiders there. So this minimal burden up against
25 life or death, people dying, people suffering, compels the

1 results that this injunction, Your Honor, should be denied.

2 But moving along to the merits. First, we heard
3 about the freedom of association with the contact tracing
4 program. I'd like to start there, Your Honor. There's no
5 actionable burden here. Contact tracing merely involves
6 notifying someone that they came in close contact with someone
7 who tested positive.

8 The program applies equally to all Pennsylvanians.
9 It is not targeted to a specific group or race or class. The
10 contact tracing program doesn't stop people from associating
11 with one another. In fact, it's not concerned with who you
12 associate with, it's only concerned with who you came in
13 contact with.

14 The contact tracing program doesn't punish people
15 based upon who they interacted with. So if the Department of
16 Health comes to learn that you hang around with your neighbor
17 down the street a lot, that's the end of it. They're not going
18 to investigate that relationship further and use that
19 information against you. It's a content neutral program with
20 one purpose, and the purpose is to stop the spread of disease.

21 It's not to disassociate anybody. It's not to break
22 up groups of people. It's not to interfere with group
23 membership. And I would like to point out, Your Honor, that
24 all of the cases cited by the Plaintiffs have to do with
25 membership in a group.

1 The NAACP case that they rely on, that had to do with
2 the Mississippi Attorney General trying to oust the group back
3 in the segregation era from the state. And there was a finding
4 that releasing information about the members would jeopardize
5 the members and chill their speech because they had in the past
6 been threatened financially and physically when people learned
7 they were part of that group.

8 So that's the case that they cite, and it's just
9 completely distinguishable. We're not dealing with group
10 membership here. We're not dealing with threats. We're not
11 actually dealing with a chilling effect on an association
12 because the government isn't concerned with who you associated
13 with, just who you came in contact with.

14 THE COURT: Well, Mr. Muise might argue that, and, I
15 guess, effectively has argued, that it does impair your
16 associations because you're divulging them, your intimate
17 associations are being revealed to the government, and that
18 there needs to be a less intrusive and restrictive means of
19 doing that.

20 MS. BOLAND: The fact that we're review alone, Your
21 Honor, doesn't implicate any sort of actual burden when the
22 government isn't using that information to actually harm
23 anybody. There are many situations that -- of course, one is
24 not coming immediately to mind -- but where the government may
25 learn who you associate with. That's just life.

1 I mean, especially now with social media and the
2 internet, you know, you can easily ascertain who people
3 associate with and hang around with. The question isn't
4 necessarily that the government knows, it's what they do with
5 that information. Are they trying to stop you from engaging in
6 some sort of speech? Are they trying to kick you out of a
7 group? Are they trying to stop you from going to your
8 neighbor's house to hang out every once in a while?

9 That's when the law becomes involved. But the fact
10 that a fact becomes known is inactionable. So, Your Honor, the
11 contact tracing program just simply doesn't implicate any sort
12 of freedom of association. The Department of Health is not out
13 there busting down doors and breaking up meetings. The theory
14 doesn't even really squarely apply based upon the cases that
15 are cited.

16 THE COURT: By the way, and I didn't ask Mr. Muise
17 this because I think I understand, he wants to apply strict
18 scrutiny here. I don't think you expressly indicate the
19 limited scrutiny in your filings, but I could infer that you
20 think more intermediate scrutiny is applicable. But tell me
21 what you think. What level of scrutiny?

22 MS. BOLAND: Your Honor, we would think rational
23 basis would apply here, but *Jacobson* would apply to impose the
24 reasonableness standard of scrutiny. In *Jacobson*, the Court
25 sort of carved out its own standard for a pandemic because, of

1 course, it's hard dealing with a pandemic. You don't want to
2 get into a situation where you're micromanaging public
3 officials.

4 So in the *Jacobson* case, they came up with a
5 reasonableness standard. So that's the standard I would
6 actually argue applies here. And under the reasonableness
7 standard, of course, both of these programs pass muster. They
8 are motivated by saving lives. They are motivated by stopping
9 the spread of disease. And they're backed by evidence.

10 You heard Ms. Boateng testify. She gathered, you
11 know, they frequently or they routinely keep up with the CDC.
12 They stay aware of updated medical information. So there is
13 evidence confirming that these programs work and they stop the
14 spread of disease and they protect people. So under the
15 reasonableness standard, certainly these programs pass muster.

16 But even if you would apply strict scrutiny, Your
17 Honor, the orders would still pass scrutiny. There's nothing
18 here that shocks the conscience, and that's the standard that
19 would apply; again, for the same reasons. We're saving lives.
20 These programs aren't meant to harass people, they're meant to
21 deal with a very serious situation that collectively we all
22 have been dealing with as a society and that we've all made
23 very big sacrifices for.

24 And since we're on the topic of *Jacobson*, *Jacobson*
25 applies to their substantive due process claim as well. And I

1 would just like to take a moment here, Your Honor, and really
2 emphasize that for the substantive due process claim, they're
3 advancing a liberty interest. And the Plaintiffs are arguing
4 that, you know, they have the liberty to do as they please, to
5 proceed without caution. They don't feel like wearing masks,
6 so they don't want to wear a mask.

7 Well, the *Jacobson* court spoke almost exactly to this
8 situation. They said, when the liberty of the individual
9 reigns over the group, there is no liberty for anybody at all.
10 And that is the exact boat that we're in. It would be
11 unbridled liberty to just allow people to do whatever they
12 want. If you want to wear a mask, fine; if they don't, fine.
13 At a certain point, that starts running into the liberties of
14 everybody else, and then there is no liberty, Your Honor.

15 THE COURT: Has the developed right of privacy that
16 arose after *Jacobson*, as Mr. Muise and I discussed, this sort
17 of burgeoning right to privacy that occurred in the second
18 half, jurisprudentially in the second half of the 20th century,
19 does that change *Jacobson*? Does it alter its impact?

20 MS. BOLAND: No, Your Honor.

21 THE COURT: As it relates to this case?

22 MS. BOLAND: No, Your Honor. And I don't believe the
23 right to privacy has actually been implicated here. While the
24 deadline of jurisprudence has certainly developed over the
25 years, there is no case law indicating it's extended to a

1 situation like this. The developed case law indicates that the
2 right to privacy extends to your medical records and what goes
3 on in your bedroom, not to just generic information that we're
4 speaking to here.

5 But even if the right to privacy was triggered, there
6 are balancing tests that have to be put in place because,
7 again, the right of the individual doesn't in every case reign
8 over everybody else's rights. So, you know, in this instance,
9 I don't think that there is a right to privacy. But even if
10 there was, under the *Jacobson* reasonableness standard,
11 requiring a mask -- and, Your Honor, just to be clear, I
12 believe they only raise the right to privacy with the mask
13 order not the contact tracing program.

14 But to the extent the right to privacy exists with
15 the mask, again, this is a reasonable governmental intrusion
16 because the mask stops the spread of the droplets, you know,
17 from -- it's a -- it stops the spread of disease. So even if,
18 Your Honor, the right to privacy was implicated, *Jacobson*,
19 again, reasonableness standard would compel the result that our
20 orders are constitutional.

21 THE COURT: Anything further?

22 MS. BOLAND: I don't think so, Your Honor. I guess
23 I'll just wrap it up to say that the Department of Health and
24 the Defendants have worked very hard over the last couple of
25 months to save lives and stop the spread of disease. The mask

1 order and the contact tracing program are two very reasonable
2 tools that are used to stop the pandemic with very minimal
3 burden.

4 And in light of that, Your Honor, the injunction
5 should be denied. Like Secretary Boateng said, my mask
6 protects you, your mask protects me. And it's a common sense
7 requirement just like a seat belt. There is no need for an
8 injunction in this case. Thank you, Your Honor.

9 THE COURT: Very well. Thank you, Ms. Boland. We
10 will go back to Mr. Muise. And you have the last word.

11 (No audible response.)

12 THE COURT: You may be muted, Mr. Muise. I think
13 you're muted.

14 MR. MUISE: Thank you. Your Honor, as I was saying,
15 the opposing counsel, she creates a false dichotomy. It's not
16 mask or death, right. That's the problem. That's why narrow
17 tailoring is so important. With regard to the right of
18 association, and the *Fraternal Order of Police* make this point
19 as well, and I think, Your Honor, you picked up on it as well,
20 is that forced disclosure itself constitutes a first amendment,
21 fourteenth amendment right of association issue.

22 That's plainly what we have here. We have a forced
23 disclosure because the forced disclosure itself chills the
24 membership. In the *Fraternal Order of Police*, that was a
25 question that the police were presenting to the officers that

1 they had to answer if they were going to be part of this
2 special unit.

3 So the courts say, look, there's a right of
4 association issue just by presenting the question of what their
5 associations are. And the Court emphasized the point that, you
6 know, forced disclosure itself can chill the memberships. And
7 that's plainly what we have here.

8 Regarding *Jacobson*. Remember *Jacobson* dealt with a
9 vaccine, too. It didn't deal with a mask mandate. It didn't
10 deal with this overbroad contact tracing programs. It dealt
11 specifically with a vaccine for smallpox. Again, this was a
12 1905 decision. So much more has been developed in the case
13 law. They didn't even have levels of constitutional scrutiny
14 at that time. And not to mention the Incorporation Doctrine
15 wasn't even in effect at the time.

16 So the first amendment wasn't even applied or
17 incorporated as against the states. That's why it was only a
18 substantive due process case. And, quite frankly, it's very
19 limited and narrow to the specific facts and circumstances at
20 the time.

21 THE COURT: What concerns me about the argument that
22 you make -- and you certainly articulate constitutional
23 concerns, and I get that -- is this, I guess, if we boil it
24 down. We create a Department of Health. We create a CDC. To
25 some degree, when we do that, and we populate them with experts

1 and people who are, in fact, epidemiologists, others who are
2 specialists in the area of communicable diseases, we rely on
3 their expertise to come up with programs.

4 What I am concerned about in this case is that
5 opposing that, you know, it is all well and good, and certainly
6 your clients may be and likely are very sincere in their
7 beliefs that, look, it's a free country and we can do as we
8 want to, we don't want to wear masks, we don't like government
9 mandates, and we're not going to accept government mandates.

10 But, you know, their imposition of how they think
11 this pandemic is unfolding and how virulent it is, how
12 communicable it is, it seems to me that we run the risk of
13 supplanting the experts that we've created through these
14 government agencies with simply a sense that, you know, we're
15 Americans and we have freedom and we can do what we want to do.
16 Why is that not the case?

17 MR. MUISE: Well, Your Honor, while we have created
18 departments of health and centers for disease control, article
19 III of the constitution also creates courts. While they have
20 medical experts, the courts have constitutional experts. And
21 the constitution still remains the supreme law of the land. So
22 it's not the fiat of a governor or it's not the fiat of a
23 department of health specialist that is the supreme law of the
24 land, it's the constitution that's the supreme law of the land.

25 And that's why I've been taking pains to make the

1 point I'm not asking the Court to be the policy maker. You can
2 strike down these restrictions or enjoin these restrictions.
3 It doesn't prevent them from encouraging people to wear masks,
4 for providing masks to all individuals, or preventing
5 individuals who want to wear the masks who have, you know,
6 they're part of a vulnerable population to do so.

7 It doesn't prevent them from having a contact tracing
8 program that protects fundamental liberties, it puts in place
9 those procedural requirements that we've outlined and argued in
10 our brief. So the government can do what they're doing, but
11 the government can't do it in a way that violates fundamental
12 rights.

13 I think we quoted from Ben Franklin, I think it was
14 quoted on the steps of Harrisburg, "those who give up essential
15 liberties for a little temporary safety deserve neither." So
16 this isn't just some platitude. This is the core of who we are
17 as free people. And the Governor can't claim a pandemic
18 exception to fundamental liberties, and that's what they're
19 doing, and that's a problem, and we're challenging it and
20 asking the courts to step in.

21 THE COURT: If you had a disease such as Ebola, which
22 I think arguably is, I think, much more communicable than this
23 airborne disease, leprosy, some hideous horrible disease, and
24 there was an outbreak, could the government take measures in
25 those cases if it was spreading like wild fire through the

1 community to segregate people to quarantine them to set them
2 aside?

3 Is this disease-specific or are you arguing for the
4 principle that all public health initiative should be
5 voluntary? I need to know because I'm not sure.

6 MR. MUISE: Yeah, Judge, and I'm sorry I haven't been
7 clear on all of this. The government -- you know, the
8 government has a claimed interest, whether it be compelling or
9 substantial, but the fact is, their restrictions have to be
10 narrowly tailored to meet that specific objective. And how,
11 for example, does it having people who have zero infection of
12 spreading or getting the disease, you know, 80 days, how is it
13 narrowly tailored to force them to surrender? It's
14 disease-specific in a matter because the facts do matter.

15 THE COURT: Of course, they do. I would not disagree
16 with you on that point. All right. So accepting that, and
17 taking the facts as we have them, or apparently have them,
18 although there are disagreements, obviously, about COVID and
19 its etiology and other respects, but you're saying it's not --
20 you say that it's not incumbent upon you, and you're correct
21 technically, to come up with an alternative policy nor should I
22 come up with an alternative policy.

23 But I want to press you. Given the facts as we know
24 them, given the statistics as we know them, given what we know
25 that appears in certain areas to be agreed upon by experts, is

1 any mandatory masking or any mandatory quarantining acceptable
2 constitutionally? Does it pass constitutional muster, any of
3 it?

4 MR. MUISE: I think the masking, in light of the
5 facts that we have, there should be a first amendment exemption
6 just like that was allowed for Governor Wolf's protest. So I
7 think that -- and to not extend that exemption in this case
8 when the harms are exactly the same, I think, is a
9 constitutional problem. I think they could narrowly tailor
10 their exemption.

11 People who have already been positive should not have
12 to wear masks. And they should encourage -- again, the people
13 who have these susceptibilities, that should be the
14 encouragement for them -- I think any mask mandate is
15 problematic, but if you are going to narrowly tailor it, it
16 should be narrowly tailored to address these specific harms and
17 not just broad brush.

18 Regarding quarantining, if you quarantine sick
19 people, the problem is they're not quarantining sick people,
20 they're not even verifying the positive was a true positive
21 before they order the entire family to be quarantined.

22 THE COURT: Let me go back to the masking issue for a
23 moment. I understand what you're saying about quarantining.
24 On the masking issue, you're saying there should be a first
25 amendment exemption. Does that mean that I get to choose

1 whether I wear a mask or not? There can't be a mandate?

2 MR. MUISE: No, I think you ought to choose. If
3 they're going to grant that exemption to Governor Wolf for his
4 Black Lives Matter protest, then that, as the Court has said in
5 *City of Ladue*, exemptions from an otherwise legitimate scheme
6 calls into question the underlying basis for the restriction to
7 begin with.

8 THE COURT: All right.

9 MR. MUISE: That's what we have, right. Why can't
10 they -- all of a sudden, you know -- it's interesting to me, it
11 was like, wow, I guess the way you cure a pandemic is you ride
12 in the streets and have mass protests because apparently all
13 these things that we've been put under, placed under, went away
14 during these Black Lives Matter protests by certain governors.

15 Was the virus that occurred in June different than
16 the virus that we're facing now in November? I don't think so.
17 But you're allowing those exemptions, but not for somebody who
18 says, you know what, I don't like the government forcing me to
19 put something on my face, interfering with my personal
20 autonomy, my personal integrity. They shouldn't be permitted
21 to do so, especially if I've already had the disease, I'm not
22 infectious, I don't even have any symptoms.

23 As we've read, and you've seen the evidence,
24 pandemics aren't promoted by asymptomatic people. This idea
25 we're treating these asymptomatic people like everybody else is

1 a problem and just is not narrowly tailored. Again, I think
2 there should be a first amendment exemption --

3 THE COURT: Yeah, and what I was trying to ascertain
4 is, so you think, in effect, an exemption eats up the mandate,
5 doesn't it, essentially? There is no mandate, it's basically,
6 we would like you to wear masks, but if your personal beliefs
7 are such that you don't want to wear a mask, you don't have to
8 wear a mask. That's the perfect world for you
9 constitutionally, isn't it?

10 MR. MUISE: Yeah. And in this context, in this case
11 with the fact that they had a first amendment exemption for
12 those gathering with the Black Lives Matter protests, yes, I
13 would say that by not extending that exemption is problematic
14 under the facts of this particular case.

15 THE COURT: All right. I think we've heard ample
16 argument, and I thank you for that. Good to see you again, Mr.
17 Muise. You got a little facial hair since the last time I saw
18 you. It looks fine. It looks like you must be hunting.
19 You're stalking the deer apparently.

20 MR. MUISE: Yeah, can't wait to get back out there
21 again pretty soon. Old wounds there, Judge.

22 THE COURT: I didn't mean to do that. That wasn't --
23 I wasn't trying to be gratuitous. It actually is good to see
24 you.

25 MR. MUISE: Same here, Your Honor. Same here.

1 THE COURT: Thank you. Thanks for your argument.
2 And for all counsel on the defense side, we appreciate your
3 presentations. Does anybody, and I guess starting with Mr.
4 Muise, I don't think we need any supplementations, and I don't
5 want to put you to that burden particularly over the
6 Thanksgiving holiday, but do you want to do anything, Mr.
7 Muise? I don't think we need anything. You pretty thoroughly
8 briefed this. But are you all right with that?

9 MR. MUISE: I'm fine with that, Your Honor.

10 THE COURT: All right. So it would be you going
11 first anyway. I think on the defense side, given that, you
12 don't need to file anything either unless you have a burning
13 need to do that. Do you?

14 MS. BOLAND: No, Your Honor, we do not.

15 THE COURT: All right. So we'll button it up at this
16 point on the injunction part of the case. We'll get a ruling
17 out promptly. I wish all of you safety and a Happy
18 Thanksgiving. Thank you for joining me this week. I know it's
19 a short week, and it's tough for everybody, but thanks for
20 assembling and for your crisp arguments and presentations. I
21 appreciate it very much. Everybody, take care. Thank you.

22 MR. MUISE: Thank you, Your Honor.

23 MS. BOLAND: Thank you, Your Honor.

24 (Proceeding adjourned at 1:50 p.m.)

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