



operations when such businesses have similar, if not greater, person-to-person contact and have significantly higher rates of infection associated with their business operations.

Defendants' rationale for permitting other businesses to continue business operations is not the lack of person-to-person contact associated with the other businesses, but Defendants' inexplicable position that those businesses can continue to operate if mitigation efforts are implemented – while at the same time Defendants shut down Plaintiffs' business operations without consideration of Plaintiffs' demonstrated ability to effectively implement the same mitigation measures. Plaintiffs have successfully implemented, and will continue to successfully implement, the same mitigation measures that Defendants have asked other businesses to implement, in exchange for Defendants permitting them to continue their business operations.

Defendants severe treatment of Plaintiffs' business operations, while granting preferential treatment to other businesses, is unsupported in fact and law. Defendants' Shutdown Orders treat Plaintiffs' waterpark business operations differently by requiring them to shut down while other businesses are allowed to continue to operate at 50% capacity or greater. Defendants' Shutdown Orders and actions violate Plaintiffs' equal protection, substantive due process, and procedural due process rights.

## **II. ARGUMENT.**

### **A. Legal Standard.**

While this case is in its early stage, the facts are quite clear. The challenged Shutdown Orders at issue are written and easily available for judicial review. Moreover, a cursory review of the Shutdown Orders will demonstrate the clear violations of constitutional provisions as described herein.

The relief requested by Plaintiffs is a declaration that the Defendants' actions, in several respects, violated provisions of the United States Constitution. The remedy requested herein is available pursuant to the following:

In a case of actual controversy within its jurisdiction...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C.A. § 2201.

Rule 57, relating to declaratory judgments, provides:

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory judgment action.

Fed. R. Civ. P. 57.

**B. This Case is Ripe for Review.**

As set forth in Plaintiffs' Motion, the issues involved in this case are straightforward and well defined. There is very little discovery needed. There are important legal issues that have severely impacted, and continue to impact, Plaintiffs. Every day that passes is another day in which Plaintiffs' constitutional rights are violated. Moreover, as set forth below, the merits of this case are such that Plaintiffs are entitled to speedy relief.

In general, there is no emergency or "pandemic" exception to the constitutional rights enjoyed by the citizens of this Commonwealth. *See generally Berean Baptist Church, et al. v. Cooper, et al.*, Docket Number 4:20-cv-81-D (ED NC, 2020), Document 18, Page 2. Defendants have been given enough time and have collected enough data to properly respond in a constitutionally appropriate manner.

**C. The Defendants' Orders violate the Due Process provisions, both substantive and procedural, of the Fourteenth Amendment.**

The Fourteenth Amendment to the Constitution forbids a state from depriving anyone of life, liberty, or property without due process of law. Without a deprivation of life, liberty or property, there can be no due process claim. *See Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); *Finley v. Giacobbe*, 79 F.3d 1285, 1296 (2d Cir.1996); *Federico v. Board of Educ.*, 955 F.Supp. 194, 198-99 (S.D.N.Y.1997).

The substantive component of the Due Process Clause guarantees that “all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927)). The Supreme Court has stated,

While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.” *Meyer v. Nebraska*, 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of “liberty” must be broad indeed. See, e. g., *Bolling v. Sharpe*, 347 U.S. 497, 499-500; *Stanley v. Illinois*, 405 U.S. 645.

*Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).

**1. The Defendants' Orders violate the substantive due process provision of the Fourteenth Amendment.**

In determining whether a plaintiff has a viable substantive due process claim, courts must be mindful of the Supreme Court's commands in addressing the interplay of constitutional and state tort law. *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 400 (3d Cir. 2000). First, the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Second, it must be remembered that "[a]s a general matter, the [Supreme] Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended."

When examining the conduct of governmental entities and officials, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense . . .'" *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1992). The Supreme Court has "for half a century now . . . spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Id.* Determining whether the challenged action rises to this level has been described as a "threshold" question in a challenge to governmental action. *Id.* at 847 n.8. The Third Circuit held that the "shock the conscience" standard applies to substantive due process claims. *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003). "Since *Lewis* our cases have repeatedly acknowledged that executive action violates substantive due process only when it shocks the conscience..." *Id.* at 399, 400.

In this case, it is clear that Defendants' actions "shock the conscious." The CDC has issued comprehensive guidelines related to COVID-19. Part of those guidelines includes "Consideration for Aquatic Venues." According to the CDC guidelines, "[t]here is no evidence that COVID-19 can spread to humans through the use of recreational waters." *See* <https://www.cdc.gov/coronavirus/2019-ncov/community/parks-rec/aquatic-venues.html>. The

CDC expressly includes “waterparks.” *Id.* Despite the CDC guidance, the Pennsylvania Department of Health prohibits operation of swimming pools. Below is a screen shot from their website:<sup>1</sup>



In addition to Consideration for Aquatic Venues, Plaintiffs’ follow all other CDC guidelines to ensure the safety of their employees and guests when operating their facilities. Plaintiffs’ compliance with CDC guidelines is more thoroughly set forth in the Complaint.

The Shutdown Orders issued by Defendants constitutes arbitrary, capricious, irrational, and abusive conduct that interferes with Plaintiffs’ liberty and property interests protected by the due process clause of the Fourteenth Amendment to the United States Constitution. Defendants’ actions constitute official policy, custom, and practice of the Commonwealth of Pennsylvania. Defendants’ actions do not comport with the traditional ideas of fair play and decency. Plaintiffs have the right to operate their businesses free from governmental interference, and the Shutdown Orders prevent Plaintiffs from doing so.

**2. The Governor’s actions violate the Procedural Due Process provisions of the Fourteenth Amendment.**

The Fourteenth Amendment to the United States Constitution forbids a state from depriving anyone of life, liberty, or property without due process of law. In order to establish a

---

<sup>1</sup> The following screen shot was taken from the Pennsylvania Department of Health website on December 14, 2020 located at <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Guidance/Targeted-Mitigation-FAQ.aspx?fbclid=IwAR1KP02n6Yf7N6ZvUnQFqe4asm78dgitAYhclZ49QSmqRVRzJgeaTe9Rciw>.

violation of his/her right to procedural due process, a plaintiff must plead and prove the following two elements: (1) that a person acting under color of state law deprived him or her of a protected property or liberty interest, and (2) that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. *Bello v. Walker*, 840 F.2d 1124 (3d Cir.1988); *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667 (3d Cir.1991). If the plaintiff cannot establish either kind of interest, then his/her procedural due process claim must fail. *Poteat v. Harrisburg School District*, 33 F.Supp.2d 384, 390 (M.D. Pa. 1999) (citing *Abbott v. Latshaw*, 164 F.3d 141, 146 (3d Cir. 1998)). A liberty interest can arise either from the federal constitution or from state law. *Poteat*, 33 F.Supp.2d at 390 (citing *Layton v. Beyer*, 953 F.2d 839, 842 (3d Cir. 1992)). A property interest, on the other hand, arises only from state law. *Id.* (citing *Larsen v. Senate of the Commonwealth of Pennsylvania*, 154 F.3d 82, 92 (3d Cir. 1998)).

A state provides constitutionally adequate procedural due process when it provides reasonable remedies to rectify a legal error by a local administrative body. In other words, when a state affords a full judicial mechanism with which to challenge the administrative decision in question, the state provides adequate procedural due process, whether or not the plaintiff avails him or herself of the provided appeal mechanism. *DeBlasio v. Zoning Board of Adjustment for Township of West Amwell*, 53 F.3d 592, 596-7 (3d Cir. 1995) (citations omitted). At its core, procedural due process requires notice of allegations and an opportunity to respond to those allegations. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

It is clear that Plaintiffs have a fundamental property right to use and enjoy land in which they hold an interest. *Horne v. Dept. of Agriculture*, 576 U.S. 350, 358-359, 135 S. Ct. at 2426 (2015). Government actors must provide adequate due process procedures before a citizen can be divested of fundamental rights, such as property rights. *Locan v. Zimmerman Brush Co.*, 455 U.S.

422, 432-33 (1982); *Vitek v. Jones*, 445 U.S. 480, 495-96 (1980) *Tillman v. Lebanon County Correctional Facility*, 221 F.3d 410, 421 (3<sup>rd</sup> Cir. 2000). The procedural due process claim of private interests must be weighed against the burdens of providing procedures on the government. *Rogin v. Bensalem Township*, 616 F.2d 680, 694 (3<sup>rd</sup> Cir. 1980).

Procedural due process analysis requires consideration of whether the following has been provided: notice, a neutral arbiter, an opportunity to make an oral presentation, a means of presenting evidence, ability to cross-examine witnesses and respond to evidence, representation by counsel, and a decision based on the records complete with reasoning. *Id.*

The Fourteenth Amendment to the United States Constitution forbids a state from depriving anyone of life, liberty, or property without due process of law. Defendants have issued Shutdown Orders without any due process of law. There is no administrative process in Pennsylvania for Plaintiffs to challenge Defendants' Shutdown Orders.

Defendants have not provided Plaintiffs an opportunity to request an exemption to the Shutdown Orders; to have an evaluation by a neutral arbitrator; to present witnesses on their behalf; to cross examine witnesses; or, to appeal the factual and/or legal determinations affecting their businesses. Defendants' Shutdown Orders are completely devoid of any due process protections.

**D. The Defendants' Orders Violate the Equal Protection clause of the Fourteenth Amendment.**

Under the Equal Protection clause, Section I of the Fourteenth Amendment, “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S.C.A. Const. Amend. XIV, § I; *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). The purpose of the Equal Protection Clause of the Fourteenth Amendment is to secure every person within a state’s jurisdiction against intentional and arbitrary discrimination, whether occasioned



by express terms of a statute or by its improper execution through duly constituted agents. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073 (2000).

The first issue in the Equal Protection analysis is the determination of which standard of review applies to Plaintiff's claim. "It is generally accepted by both the courts and commentators that in cases involving equal protection challenges that Supreme Court applies three levels of review in ruling on the validity of the challenged statute. The three tiers of review are the rational basis test, intermediate or 'middle-tier' scrutiny and strict scrutiny." *Brown v. Heckler*, 589 F.Supp. 985, 989 (E.D. Pa. 1984) (citations omitted). In general, the term "heightened scrutiny" refers to either level of review above rational basis. *Brown*, at 989.

The Court uses a strict scrutiny standard if a classification impermissibly interferes with the exercise of a fundamental right, such as the right to vote or procreate, or if a suspect class is disadvantaged. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). A suspect class is one that is "saddled with disabilities, or subjected to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313-314 (1976). Racial or ancestral minorities as well as alienage have qualified as classes or groups which clearly qualify as suspect, requiring strict scrutiny. *Brown*, at 989. Under strict scrutiny, the government has the burden of proving that the suspect classifications "are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

If the plaintiff is not a member of a suspect class and there is not claimed interference with a fundamental right, the Court should analyze the claim under a rational basis standard. *Sellers v. School Board of Manassas Virginia*, 141 F.3d 524 (4<sup>th</sup> Cir. 1988). This test provides a presumption

of constitutionality and only requires that the law or action have a legitimate purpose and a rational relationship to the fulfillment of that purpose. *Brown, supra*.

Intermediate, or middle-tier scrutiny, falls somewhere between rational basis and strict scrutiny. The Supreme Court articulated the standard by stating that the challenged law must be “substantially related” to “important governmental objectives.” *Craig v. Boren*, 429 U.S. 451 (1976). Previous Supreme Court cases have established that classifications that distinguish between males and females are subject to this middle-tier scrutiny under the Equal Protection clause. *Craig*, 429 U.S. at 457; *Reed v. Reed*, 404 U.S. 71, 75 (1971). Gender classifications must serve important governmental objections and must be substantially related to those objectives in order to withstand constitutional challenge. *Craig*, at 457.

These different standards of equal protection review set different bars for the magnitude of the governmental interest that justifies the statutory classification. Heightened scrutiny demands that the governmental interest served by the classification be “important,” see, e.g., *Virginia, supra*, at 533, 116 S.Ct. 2264, whereas rational basis scrutiny requires only that the end be “legitimate,” see, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992). Strict scrutiny requires that the government interest be “compelling.” *Adarand, supra*, at 227.

“The most important difference between heightened scrutiny and rational basis review, of course, is the required fit between the means employed and the ends served. Under heightened scrutiny, the discriminatory means must be “substantially related” to an actual and important governmental interest. Under rational basis scrutiny, the means need only be “rationally related” to a conceivable and legitimate state end.” *Tuan Anh Nguyen v. I.N.S.*, 533 US 53, 77 (2001) (citations omitted). Strict scrutiny requires that the means be “narrowly tailored” to further a compelling governmental interest. *Adarand, supra*, at 227.

Plaintiffs have a fundamental right “to work for a living in the common occupations of the community” and that such right “is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.” *Truax v. Raich*, 239 U.S. 33, 41 (1915). Further, the Fourteenth Amendment guarantees Plaintiffs the right to “engage in any of the common occupations of life ...” *Meyer v. Nabaska*, 262 U.S. 390, 399 (1923).

Regardless of the standard of scrutiny used by the Court, Defendants’ Shutdown Orders cannot survive judicial review. While Defendants’ have ordered the closure of Plaintiffs’ facilities, Defendants have permitted similar facilities to continue business operations with tremendous person-to-person contact and interaction. For example, Carlisle Productions, Inc. d/b/a Carlisle Events, has been permitted to operate with up to 20,000 patrons per day in attendance pursuant to a Confidential Agreement with Defendants. Recreational and entertainment facilities, such as, Seven Springs Mountain Resort has been permitted to operate, including, but limited to its swimming pool, arcade, bowling alley, and other indoor recreational and entertainment activities.

These examples and countless others serve to illustrate that there is no rational basis for Defendants’ Shutdown Orders as applied to Plaintiffs, and the Shutdown Orders are not narrowly tailored to meet the asserted governmental interest.

### **III. CONCLUSION.**

For the reasons set forth herein, this Court should grant the Plaintiffs’ Motion; enter an Order scheduling a speedy hearing on the Motion; and such other relief as this Court deems appropriate.

Respectfully Submitted,

**DILLON, MCCANDLESS, KING,  
COULTER & GRAHAM, LLP**

Dated: December 14, 2020

By: /s/ Thomas W. King, III

Thomas W. King, III  
PA. I.D. No. 21580  
[tking@dmkcg.com](mailto:tking@dmkcg.com)  
Thomas E. Breth  
PA. I.D. No. 66350  
[tbreth@dmkcg.com](mailto:tbreth@dmkcg.com)  
Jordan P. Shuber  
PA. I.D. No. 317823  
[jshuber@dmkcg.com](mailto:jshuber@dmkcg.com)

*Counsel for Plaintiffs*