Exhibit A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 104 MM 2020

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

Petitioner,

v.

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

Respondents.

Application to the Court to Exercise Jurisdiction
Pursuant to Its King's Bench Powers
or Powers to Grant Extraordinary Relief

BRIEF OF AMICUS CURIAE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF RESPONDENTS

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Interest of Amicus Curiae

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by elected lawmakers through constitutionally prescribed channels rather than by a governor who is acting outside those channels and who refuses to share power with the duly elected legislature. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because leaders like Governor Wolf have trampled them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Pennsylvania and U.S. Constitutions were designed to prevent. This unconstitutional state within state and federal governments is the focus of NCLA's concern.

No one other than the *amicus curiae*, its members, or its counsel authored any part of this brief, or financed the preparation of this brief.

Introduction

Section 7301(c) of the Emergency Management Services Code authorizes the governor to declare or proclaim a disaster emergency. *See* 35 Pa. C.S. § 7301(c). Section 7301(c) also allows the state of disaster emergency to be terminated *either* by the governor (by executive order or proclamation) *or* by the general assembly (by concurrent resolution).

The general assembly has passed a concurrent resolution that terminates the state of disaster emergency that Governor Wolf proclaimed on March 6, 2020, and renewed on June 3, 2020. But the governor refuses to honor the concurrent resolution that terminated his proclamation of disaster emergency, because he claims that the termination resolution must be "presented" to him for his signature and veto under Article III, § 9 of the Pennsylvania Constitution.

The Governor's argument is straightforward. The Presentment Clause states:

> Every order, resolution or vote, to which the concurrence of both Houses may be *necessary*, except on the question of adjournment, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.

Pa. Const. Art. III, § 9 (emphasis added). The governor contends that the concurrent resolution terminating his proclamation of disaster emergency is a "resolution … to which the concurrence of both Houses may be necessary." And because the resolution does not concern a question of adjournment, the

governor contends that it must be presented to the governor for his signature or veto "before it shall take effect."

But the governor's textual argument is mistaken. Section 7301(c) establishes *three* different mechanisms for terminating a proclamation of disaster emergency: (1) An executive order terminating the state of disaster emergency, issued unilaterally by the governor; (2) A proclamation terminating the state of disaster emergency, issued unilaterally by the governor; or (3) A concurrent resolution passed by both houses of the general assembly.[1] Hence, it is not "necessary" for a termination edict to receive "the concurrence of both Houses," because termination can be effected unilaterally by the governor in a proclamation or executive order. The concurrence of both Houses is *sufficient* to terminate a proclamation of disaster emergency under section 7301(c), but it is not *necessary* to do so.

There is a second and more serious problem with the governor's argument. If the governor wants to insist that the general assembly's decision to terminate a proclamation of disaster emergency is an exercise of "legislative power" that can only be accomplished through the bicameralism-and-

1. *See* 35 Pa. C.S. § 7301(c) ("The state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time.").

presentment requirements of Article III, § 9, then the Governor's own decision to proclaim or terminate a disaster emergency must likewise be considered a "legislative" act—and the entire regime that allows the governor to unilaterally proclaim or terminate a disaster emergency must be regarded as an unconstitutional delegation of legislative power. The only way that the governor might salvage the constitutionality of his powers to unilaterally proclaim and terminate emergencies is by acknowledging that the general assembly may likewise exercise those powers when authorized by statute to do so.

Argument

I. "The Concurrence of Both Houses" Is Not "Necessary" for a Termination of Disaster Emergency Under § 7301(c)

Article III, § 9 of the Pennsylvania Constitution requires presentment to the governor only when "the concurrence of both Houses may be necessary" to an "order, resolution, or vote." The Presentment Clause states:

> Every order, resolution or vote, to which the concurrence of both Houses may be necessary, except on the question of adjournment, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.

Pa. Const. Art. III, § 9. But the "concurrence of both Houses" is not "necessary" to a termination of disaster emergency under section 7301(c).

A proclamation of disaster emergency may be terminated by *either* (1) a proclamation or executive order issued unilaterally by the governor; *or* (2) a concurrent resolution passed by both houses of the general assembly. The text of section 7301(c) provides:

> The state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time.

35 Pa. C.S. § 7301(c). Hence, it is not "necessary" for a termination-of-emergency edict to obtain "the concurrence of both houses" in the general assembly. The approval of both houses is *sufficient* to terminate a proclamation of disaster emergency under section 7301(c), but it is not *necessary* to do so. Termination may also be effectuated by the unilateral decree of the governor, without any need to surmount the bicameralism-and-presentment hurdles of Article III, § 9.

The governor therefore cannot show that section 7301(c) violates the presentment clause. Nor can the governor maintain that section 7301(c) should be "interpreted" to require presentment by invoking the canon of constitutional avoidance. The presentment requirement of article III, § 9 is simply inapplicable because section 7301(c) does not make "the concurrence of both Houses" a "necessary" condition for an "order, resolution, or vote"

terminating a disaster emergency to take effect. Section 7301(c) allows the disaster emergency to be terminated *either* by the governor's unilateral order *or* by a concurrent resolution that passes both Houses; it does not require bicameral approval of a termination decree.

II. The Governor's Argument Renders His Own Disaster-Emergency Decree an Unconstitutional Exercise of Legislative Power

The governor insists that there is a constitutional problem with the general assembly's "terminating" a disaster-emergency decree by approving a concurrent resolution that does not follow the bicameralism-and-presentment procedures described in Article III, § 9 of the Pennsylvania Constitution. Yet the governor sees nothing wrong with the fact that section 7301(c) simultaneously grants him the authority to unilaterally proclaim and terminate states of disaster emergency without *any* legislative involvement whatsoever. The governor cannot argue that the general assembly's decision to terminate a proclamation of disaster emergency is an exercise of "legislative power" that must surmount the bicameralism-and-presentment hurdles of Article III, § 9, while simultaneously insisting that he may exercise *those very same powers* without any need to comply with bicameralism and presentment himself. If the general assembly is constitutionally obligated to use bicameralism and presentment when terminating a disaster-emergency decree, then so must the governor use those procedures rather than act unilat-

erally without legislative involvement. Any such obligation must run both ways.

And if the governor believes it is constitutionally acceptable for the legislature to authorize *him* to act unilaterally in announcing and terminating emergencies under section 7301(c), then there is no reason why the general assembly should be constitutionally forbidden to confer unilateral powers of that sort upon itself without any need for the governor's involvement. The decision to announce or terminate an emergency disaster is either a legislative act—which must go through bicameralism and presentment—or else it is an act of administration, which may be exercised by any person or entity authorized by statute to carry it out. But the governor cannot plausibly contend that the act of termination is "legislative" when performed by the general assembly but somehow becomes "administrative" whenever he performs it.

The only way that the governor can ward off a nondelegation challenge to section 7301(c) is to say that those who announce and terminate disaster emergencies are merely administering the laws rather than legislating. *Cf.* Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1723 (2002) ("[A]gents acting within the terms of such a statutory grant are exercising executive power, not legislative power."). But if that is the case, then there is no reason why the general assembly cannot partake in the administration of the laws so long as it is authorized by statute to do so. Only by characterizing the termination decision as a "legislative" act

can the governor insist that the bicameralism-and-presentment procedures of Article III, § 9 be used. But that move knocks out any possible constitutional defense of the legislature's decision to transfer the emergency proclamation and termination powers to the governor to exercise on a unilateral basis.

Finally, the Governor must explain how an unfettered power to declare and sustain a state of disaster emergency—which cannot be revoked unless the general assembly secures veto-proof supermajorities in each of its two chambers—can possibly be characterized as anything other than a divestiture of the general assembly's lawmaking powers. The state constitution vests the legislative and lawmaking powers in the general assembly, not the governor. *See* Pa. Const. Art. II, § 1 ("The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."). The legislature is constitutionally forbidden to divest these powers by authorizing the governor to rule by executive decree and then prevent the general assembly from overriding his decisions unless it takes the extraordinary step of assembling veto-proof supermajorities in *each* of its two legislative chambers.

This arrangement goes beyond a mere "delegation" of lawmaking powers—a practice that is controversial enough in its own right. A person or entity that "delegates" authority *retains* its authority to unilaterally revoke that delegation at will. A cabinet secretary, for example, who "delegates" statutorily authorized powers to his subordinates has the right to terminate that ar-

rangement at any time, for any reason, and without any need to secure the assent of the delegatee or any other person or institution.

The governor's interpretation of section 7301(c) would effectuate a *divestiture* of the general assembly's lawmaking powers. On the governor's view, the only way the general assembly can reclaim its lawmaking prerogatives in the face of a gubernatorial emergency proclamation is by overriding the governor's veto with a two-thirds supermajority in each house. A transfer of lawmaking power of this kind thus ties the hands of the general assembly, because it cannot easily recall the transferred power. This is not mere delegation but utter and complete divestment, and it is an affront to constitutional government. Indeed, it is precisely *because* the general assembly does not have to secure the governor's assent to its cancellation of a state of disaster emergency that any temporary delegation of powers to the governor can pass constitutional muster.

III. Allowing the Governor to Establish and Perpetuate a State of Disaster Emergency, Without Any Checks Imposed by the Legislature, Would also Give the Governor an Unconstitutional Power to Suspend the Laws

The governor's argument runs into a deeper and even more serious constitutional problem: If the governor is allowed to unilaterally establish and perpetuate a state of disaster emergency, and if the general assembly is unable to countermand the governor's edicts unless it can assemble a veto-proof

majority in each of the two houses, then the governor has effectively been given a unilateral prerogative to suspend the laws. A suspension power of this sort is anathema to constitutional government. English monarchs repeatedly misused this power before the Glorious Revolution, and the Pennsylvania Constitution—like the Constitution of the United States—squelches any possibility of a suspension power by obligating the executive to "take care that the laws be faithfully executed." Pa. Const. Art. IV, § 2.

The executive suspension power had a long and sordid history in England. James I and other sixteenth- and seventeenth-century English monarchs claimed a power to "suspend" the laws, or at least "dispense" with them. *See* Philip Hamburger, *The Administrative Threat* 13 (2017).[2] This maneuver enabled the king to circumvent and usurp the prerogatives of Parliament. By relieving subjects of their duty to comply with Parliament's enactments, the king could effectively repeal or amend those statutes without Parliament's involvement.

The suspension power was widely criticized, and it was vulnerable to corruption and political favoritism. *See id.* at 13. After the Glorious Revolution, the English Declaration of Rights in 1689 abolished the suspending and dispensing powers unless exercised with Parliamentary consent. *See id.* at 13–14. This was the first step in establishing the fundamental principle that royal

2. The "suspending" power allowed the king to suspend a statute's obligation for all persons; the "dispensing" power enabled him to dispense with its obligation for particular named persons. *See* Philip Hamburger, *The Administrative Threat* 13 (2017).

(or executive) power could never include the power to unmake duly enacted laws.

The governor's argument would revive the suspension power, because it would enable the governor to suspend the laws and rule by unilateral decree whenever he announces a state of disaster emergency—and there would be no check on his powers unless the general assembly can assemble a veto-proof supermajority in each of the two legislative chambers. This view portends a dangerous and unconstitutional regime of executive power not seen in this Commonwealth in nearly 250 years. The governor's mere say-so—and nothing more—is all that is required to initiate and sustain a state of disaster emergency under the statute. *See* 35 Pa. C.S. § 7301(c). And without an effective legislative check the governor can allow these emergency powers to continue for as long as one-third of at least one of the two legislative chambers is unwilling to override his actions. History is replete with examples of supposed "emergency" proclamations that last long past the putative "emergency" that was used to justify the need for rule by executive decree. *See, e.g.*, Reichstag Fire Decree (February 28, 1933), available at: https://bit.ly/2AhfOKW (last visited on July 1, 2020). History shows that preventing the legislature from revoking an emergency proclamation—or requiring an extraordinary bicameral supermajority before the proclamation can be revoked—allows the executive to perpetuate an "emergency" state of affairs for as long as he pleases.

IV. The Governor's Interpretation of § 7301(c) Raises Concerns Under the United States Constitution's Republican-Form-of-Government Clause

Finally, the governor's interpretation of section 7301(c) may even raise federal constitutional issues, because Article IV of the U.S. Constitution guarantees to the people of every state a "republican form of government." U.S. Const. Art. IV, § 2. Although the federal judiciary has often regarded the clause as non-justiciable, *see Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019), the Supreme Court has not entirely ruled out the possibility of adjudicating such claims. *See New York v. United States*, 505 U.S. 144, 185 (1992) ("[P]erhaps not all claims under the Guarantee Clause present non-justiciable political questions."). Rule by executive decree is quite plainly not republican government, and a regime that allows the executive to rule by decree until the legislature can muster veto-proof majorities enables a governor to prolong his "emergency" powers until long after the purported emergency has ended. Such a blatant abdication of republican government—one that revives the forbidden suspending and dispensing powers—could well revive the U.S. Supreme Court's willingness to police the boundaries of state governing structures.

Conclusion

The Court should deny the governor's request for relief and order him to issue a proclamation or executive order terminating the disaster emergency.

Respectfully submitted.

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Certificate of Compliance

I certify that this brief contains 2,854 words and complies with the word-count limit under Pa. R. App. P. 531(b)(3) and Pa. R. App. P. 2135(a)(1).

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Certificate of Service

I certify that I have served via PAC file and first-class mail, postage prepaid, this brief upon the following individuals, which satisfies the requirements of Pa. R. App. P. 121:

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