

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

M. RAE, INC., d/b/a FENICCI'S OF : **CIVIL ACTION NO. 1:20-CV-2366**
HERSHEY, PORTABELLA'S INC., :
d/b/a RIVER HOUSE BAR & GRILL, : **(Judge Conner)**
and HERSHEY INDEPENDENT :
RESTAURANT ASSOCIATION, :

Plaintiffs

V.

**THOMAS W. WOLF, in his
official capacity as Governor of the
Commonwealth of Pennsylvania,
and RACHEL LEVINE, MD, in her
official capacity as Secretary of the
Pennsylvania Department of Health,**

Defendants

MEMORANDUM

On December 10, 2020, Governor Tom Wolf and Secretary of Health

Rachel Levine issued limited-time mitigation orders in attempt to stem the rising tide of COVID-19¹ cases and hospitalizations in the Commonwealth of Pennsylvania.

Among other things, those orders prohibit indoor dining at businesses in the retail food services industry through January 4, 2021. (See Doc. 1-2 at 3; Doc. 1-3 at 3).

¹ The COVID-19 virus is also known as “severe acute respiratory syndrome coronavirus 2” and “SARS-CoV-2.” *Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It*, WORLD HEALTH ORG., [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) (last visited Dec. 23, 2020). We refer to the virus herein as “the COVID-19 virus” and to the disease it causes as “COVID-19.”

Plaintiffs are two local restaurants and a nonprofit restaurant association affected by defendants' limited-time mitigation orders. Relevant here, plaintiffs contend that, by temporarily suspending indoor dining but allowing other indoor retail businesses to remain open, the orders violate their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Four days ago, plaintiffs filed an emergency motion for temporary restraining order and preliminary injunction, asking the court to immediately halt enforcement of the indoor-dining ban. For the reasons that follow, we will deny plaintiffs' motion.

I. Findings of Fact

The COVID-19 virus has caused a global pandemic of unprecedented scale. The United States Centers for Disease Control and Prevention ("CDC") reported the first travel-related case of the COVID-19 virus in the United States in January 2020.² By January 30, the CDC had confirmed the first instance of person-to-person spread in the country.³ On March 6, with 233 confirmed or presumed positive cases in the United States and two presumed positive cases in Pennsylvania, Governor

² See *First Travel-Related Case of 2019 Novel Coronavirus Detected in United States*, CTRS. FOR DISEASE CONTROL AND PREVENTION ("CDC") (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

³ See *CDC Confirms Person-to-Person Spread of New Coronavirus in United States*, CDC (Jan. 30, 2020), <https://www.cdc.gov/media/releases/2020/p0130-coronavirus-spread.html> (last reviewed Jan. 30, 2020).

Wolf declared a state of emergency in the Commonwealth.⁴ The state of emergency has since been extended three times, most recently one month ago.⁵

Mitigation measures quickly followed the March 6 declaration. On March 13, Governor Wolf announced the temporary closure of all K-12 schools in the Commonwealth.⁶ Six days later, Governor Wolf issued an executive order closing all businesses designated “non-life-sustaining.”⁷ With respect to restaurants and bars, the order provided that “[b]usinesses that offer carry-out, delivery, and drive-through food and beverage service may continue, so long as social distancing and other mitigation measures are employed.”⁸ By April 1, each of the Commonwealth’s

⁴ See Proclamation of Disaster Emergency, COMMONWEALTH OF PA., OFFICE OF THE GOVERNOR (Mar. 6, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf>.

⁵ See Amendment to Proclamation of Disaster Emergency, COMMONWEALTH OF PA., OFFICE OF THE GOVERNOR (June 3, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/06/20200603-TWW-amendment-to-COVID-disaster-emergency-proclamation.pdf>; Amendment to Proclamation of Disaster Emergency, COMMONWEALTH OF PA., OFFICE OF THE GOVERNOR (Aug. 31, 2020), <https://www.pema.pa.gov/Governor-Proclamations/Documents/Amendment-COVID19-Disaster-Emergency-083120.pdf>; Amendment to Proclamation of Disaster Emergency, COMMONWEALTH OF PA., OFFICE OF THE GOVERNOR (Nov. 24, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/11/20201124-TWW-3rd-Amendment-COVID-19-Proclamation.pdf>.

⁶ See *Governor Wolf Announces Closure of Pennsylvania Schools*, GOVERNOR TOM WOLF (Mar. 13, 2020), <https://www.governor.pa.gov/newsroom/governor-wolf-announces-closure-of-pennsylvania-schools/#:~:text=Today%2C%20Governor%20Tom%20Wolf%20announced,gather%20input%20on%20this%20decision.>

⁷ See Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses that Are Not Life Sustaining, COMMONWEALTH OF PA., OFFICE OF THE GOVERNOR (Mar. 19, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf>.

⁸ *Id.* at 2.

67 counties were under a gubernatorial stay-at-home order.⁹ On April 9, the Governor extended the K-12 school closure through the remainder of the academic year.¹⁰

As the initial wave of COVID-19 cases stabilized, Governor Wolf began reopening of the state. The reopening process saw counties progress through “red,” “yellow,” and “green” phases, with the red phase being the most restrictive, and the green phase being the least restrictive.¹¹ Restrictions on indoor dining were lessened as well, with restaurants in green-phase counties permitted to operate at up to 50 percent of the maximum capacity stated on their certificate of occupancy, so long as they complied with defendants’ mitigation guidance.¹² By July 3, every county in the Commonwealth had moved to the green phase of reopening.¹³

⁹ See Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay At Home, COMMONWEALTH OF PA., OFFICE OF THE GOVERNOR (Apr. 1, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf>.

¹⁰ See *Governor Wolf Extends School Closure for Remainder of Academic Year*, GOVERNOR TOM WOLF (Apr. 9, 2020), <https://www.governor.pa.gov/newsroom/governor-wolf-extends-school-closure-for-remainder-of-academic-year/#:~:text=Governor%20Wolf%20Extends%20School%20Closure%20for%20Remainder%20of%20Academic%20Year,-April%2009%2C%202020&text=Continuing%20his%20efforts%20to%20protect,the%202019%2D20%20academic%20year>.

¹¹ See, e.g., *Gov. Wolf Announces Reopening of 24 Counties Beginning May 8*, GOVERNOR TOM WOLF (May 1, 2020), <https://www.governor.pa.gov/newsroom/gov-wolf-announces-reopening-of-24-counties-beginning-may-8/>.

¹² See Order of the Governor of the Commonwealth of Pennsylvania for the Continued Reopening of the Commonwealth, COMMONWEALTH OF PA., OFFICE OF THE GOVERNOR (May 29, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200527-TWW-green-phase-order.pdf>.

¹³ See *Gov. Wolf: Last PA County Will Move to Green on July 3*, COMMONWEALTH OF PA., OFFICE OF THE GOVERNOR (June 26, 2020), <https://www.governor.pa.gov/newsroom/gov-wolf-last-pa-county-will-move-to-green-on-july-3/#:~:text=Governor%20Tom%20Wolf%20announced%20today,Wolf%20said>.

Following an “unsettling climb in new COVID-19 cases” in early summer, Governor Wolf issued a “targeted mitigation” order on July 15.¹⁴ Among other things, this order reduced capacity at bars and indoor-dining establishments to 25 percent, reiterated physical distancing and mask mandates, and imposed certain restrictions on alcohol sales.¹⁵ Two months later, on September 17, Governor Wolf amended his July 15 order to allow restaurants and bars to return to 50 percent capacity if they enrolled in and complied with the Commonwealth’s “Open & Certified Pennsylvania” program, self-certifying their compliance with masking, physical-distancing, and digital-menu requirements.¹⁶ In announcing the Open & Certified Pennsylvania program, Governor Wolf “recognize[d] that this pandemic has taken a significant toll on the food services industry, so we must balance public health and economic recovery.”¹⁷

¹⁴ See Order of the Governor of the Commonwealth of Pennsylvania Directing Targeted Mitigation Measures, COMMONWEALTH OF PA., OFFICE OF THE GOVERNOR (June 15, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/07/20200715-TWW-targeted-mitigation-order.pdf>.

¹⁵ *Id.* at 2-3.

¹⁶ See Amendment to the Order of the Governor of the Commonwealth of Pennsylvania Directing Targeted Mitigation Measures, COMMONWEALTH OF PA., OFFICE OF THE GOVERNOR (Sept. 17, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/09/20200917-TWW-amendment-to-targeted-mitigation-order.pdf>; see also *Open & Certified Pennsylvania*, COMMONWEALTH OF PA., <https://www.pa.gov/covid/open-and-certified-pennsylvania/> (last visited Dec. 23, 2020).

¹⁷ See *Wolf Administration Signs Orders that Restaurants May Increase Indoor Occupancy to 50 Percent*, GOVERNOR TOM WOLF (Sept. 17, 2020), <https://www.governor.pa.gov/newsroom/wolf-administration-signs-orders-that-restaurants-may-increase-indoor-occupancy-to-50-percent/>.

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