



**GOVERNANCE BY WEB UPDATES: THE COMMONWEALTH OF PENNSYLVANIA'S REGULATION BY WEBSITE GUIDANCE IN RESPONSE TO COVID-19 AND OTHER TRANSPARENCY CONCERNS**

*Kevin M. Levy\**

ABSTRACT

*The world is a much different place than it was just a few months ago due to the omnipresence of the novel coronavirus known as COVID-19. Businesses have opened, closed, reopened, and reclosed. In the Commonwealth of Pennsylvania, residents and businesses have urgently looked to government officials for guidance and hope. And while Commonwealth officials have performed steadfastly in combatting the scourge of COVID-19, their practice of governing by multiple overlapping government orders, guidance, other sorts of regulatory actions, and even quasi- or non-binding recommendations has been confusing, delayed, contradictory, or otherwise insufficient at times. This Commentary discusses the lightning speed at which policy has been developed in Pennsylvania to combat COVID-19, the lack of recourse to which Pennsylvania constituents have been entitled during the ongoing pandemic, and the issues raised by continuous, constant, and silent implied changes to Pennsylvania COVID-19 compliance requirements.*

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\* J.D. Rutgers Law School, Camden 2019. Levy is an associate in Saul Ewing Arnstein & Lehr LLP's Philadelphia office and its commercial real estate practice. Levy is a member of the firm's COVID-19 Task Force. The opinions expressed herein are solely those of the author.

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## I. INTRODUCTION

The governments of the United States, the Commonwealth of Pennsylvania, and the world, frankly, were ill-equipped to respond to a pandemic like COVID-19.<sup>1</sup> Due to the sheer level of societal buy-in required by the response to COVID-19, such as mandated shelter-in-place orders,<sup>2</sup> mandatory mask-wearing requirements,<sup>3</sup> and draconian closures of all non-life sustaining businesses without regard to whether a business was or is capable of operating safely,<sup>4</sup> perhaps our governments *should not* have been prepared to respond to COVID-19, at least with any ease.<sup>5</sup> In any event, the virus came, and with it came forceful responses from government.<sup>6</sup>

1. Wayne Lewis, *Disaster Response Expert Explains Why the U.S. Wasn't More Prepared for the Pandemic*, USC DORNSIFE (Mar. 24, 2020), <https://dornsife.usc.edu/news/stories/3182/why-u-s-wasnt-better-prepared-for-the-coronavirus/>.

2. *E.g.* *Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home* (Mar. 23, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/03.23.20-TWW-COVID-19-Stay-at-Home-Order.pdf>.

3. *Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings* (July 1, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/07/20200701-SOH-Universal-Face-Coverings-Order.pdf>.

4. *Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses that are Not Life Sustaining* (Mar. 17, 2020), <https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order> [hereinafter *Business Closure Order*].

5. *See, e.g.*, Yale Univ., *Democracy & Rise of Authoritarianism in COVID-19 World*, YOUTUBE (May 5, 2020), <https://www.youtube.com/watch?v=weWzfa-52Ew&feature=youtu.be> (discussing anti-democratic processes arising in various countries with regard to the government power grabs in nations around the world).

6. *E.g.* Barbara Barr, *Gov. Tom Wolf Says His Administration, Police Have Power to Enforce COVID-19 Orders*, WGAL, <https://www.wgal.com/article/gov-tom-wolf-says-police-have-power-to-enforce-coronavirus-orders/33520289/#> (last updated Aug. 6, 2020); Bill

Pennsylvania was one of the first states to declare a state of emergency due to the arrival of COVID-19 in the Commonwealth.<sup>7</sup> Governor Tom Wolf issued his initial “Proclamation of Disaster Emergency” on March 6 pursuant to the Pennsylvania Emergency Management Services Code which, among other things, enabled him to

Suspend the provisions of 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.<sup>8</sup>

This emergency power largely makes sense: a Governor should not be hampered by arbitrary notice and comment provisions of obscure administrative laws before issuing life-saving orders.<sup>9</sup> Hypertechnical notice statutes are not built for emergency responses, and their strict interpretation can place populations at risk.<sup>10</sup> But those regulatory statutes do not exist merely for the benefit of challenging government actions—rather, a cornerstone of due process in the United States is that people should be informed of the law prior to its application against them.<sup>11</sup>

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DuHart, *N.J. Recommends \$10K Daily Fines, Jail For Defiant Owners Who Kicked in the Door of Their Closed Their Closed Gym*, NJ.COM (Aug. 3, 2020), <https://www.nj.com/coronavirus/2020/08/nj-recommends-10k-daily-fines-jail-for-defiant-owners-who-kicked-in-the-door-of-their-closed-gym.html>; Anita Chabria, *Newsom Vows Crackdown on Coronavirus Scofflaws. Will Law Enforcement Cooperate?*, L.A. TIMES (July 4, 2020), <https://www.latimes.com/california/story/2020-07-04/newsom-vows-crackdown-on-coronavirus-scofflaws-what-enforcement-tools-does-he-have>.

7. *Proclamation of Disaster Emergency* (Mar. 6, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf>; see also Marc Levy, *Pa. Gov. Wolf Signs Emergency Declaration After 2 Confirmed Coronavirus Cases*, ASSOCIATED PRESS (Mar. 6, 2020), <https://whyy.org/articles/pennsylvania-now-has-2-confirmed-cases-of-coronavirus/>.

8. 35 PA. CONS. STAT. § 7301(f)(1) (2014).

9. *But see generally* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1428 (1989).

10. *See, e.g.*, *Wis. Legislature v. Palm*, 942 N.W.2d 900, 911 (Wis. 2020) (invalidating the Wisconsin Secretary of Health Services-designee’s emergency stay-at-home order on administrative rulemaking procedure grounds in a cacophonous collection of opinions which resulted in one majority opinion, three concurrences, and three dissents); Neil Vigdor, *Wisconsin Supreme Court Strikes Down Stay-at-Home Order*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/13/us/coronavirus-wisconsin-supreme-court.html>.

11. *E.g.* *Wells Fargo Bank Minn. Nat’l Ass’n v. Barron*, No. 1113 MDA 2019, 2020 WL 1527090, at \*2 (Pa. Super. Ct. Mar. 31, 2020) (quoting *First E. Bank, N.A. v. Campstead*,

The applicable gubernatorial order across the Commonwealth of Pennsylvania during its current green phase was issued on May 27, 2020.<sup>12</sup> That order, the proverbial “Green Phase Order,” requires businesses to comply with, among other things, two additional orders: a building safety order<sup>13</sup> issued by Pennsylvania Secretary of Health Rachel Levine and an employee safety order<sup>14</sup> also issued by Secretary Levine. These orders are relatively clear,<sup>15</sup> ascertainable, and identifiable. Furthermore, and as I would argue more importantly, they are final and signed by a public official accountable to the people of the Commonwealth of Pennsylvania.

Where the propensity for trouble comes is a seemingly innocuous clause in Governor Wolf’s Green Phase Order. That clause provides that businesses that reopen in the state’s green phase are liable to comply with “all existing and future applicable guidance issued by my Administration, the Department of Health . . . and Centers for Disease Control and Prevention.”<sup>16</sup> This tricky provision has led to the introduction of a mischievous government guidance mechanism which I refer to as “website guidance.”<sup>17</sup> One of those website guidance

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Inc., 637 A.2d 1364, 1366 (Pa. Super. Ct. 1994) (recognizing that “notice is ‘the most basic requirement of due process’”).

12. *Order of the Governor of the Commonwealth of Pennsylvania for the Continued Reopening of the Commonwealth* (May 27, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200527-TWW-green-phase-order.pdf> [hereinafter *Green Phase Order*]. Governor Wolf’s phased plan of reopening the Commonwealth of Pennsylvania focused on a county-by-county reopening—Governor Wolf’s green phase reopening orders were amended piecemeal until the last county (Lebanon County) entered the state’s green phase on July 3, 2020. *Amendment to the Order of the Governor of the Commonwealth of Pennsylvania for the Continued Reopening of the Commonwealth* (July 2, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/07/20200702-TWW-amendment-to-green-phase-order.pdf>.

13. *Order of the Secretary of the Pennsylvania Department of Health Directing Building Safety Measures* (Apr. 5, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200405-SOH-Building-Safety-Measures.pdf> [hereinafter *Building Safety Order*].

14. *Order of the Secretary of the Pennsylvania Department of Health Directing Public Health Safety Measures for Businesses Permitted to Maintain In-Person Operations* (Apr. 15, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200415-SOH-worker-safety-order.pdf> [hereinafter *Worker Safety Order*].

15. The orders are not quite as clear as possible, for practitioners and businesses alike; consider for example whether a commercial landlord has no rights under an applicable triple net lease for a building (i.e., has no right to enter the premises or control its operation)—does a landlord have an obligation to require its tenants to implement the myriad COVID-19 orders?

16. *Green Phase Order*, *supra* note 12, § 1(B).

17. I distinguish website guidance from more formalized and final government guidance documents which are signed and are presented as uneditable PDF documents for public review and consumption. The Centers for Disease Control and Prevention have

documents is an often-updated government website, “COVID-19 Guidance for Businesses.”<sup>18</sup> The “guide includes the basics our businesses and workers need to safely get back to work. As [businesses] reopen, [they] will need to follow all federal, state, and local laws and regulations.”<sup>19</sup> The COVID-19 Guidance for Businesses references the relevant state level executive orders but is mostly framed as mandatory obligations imposed on businesses and workers.<sup>20</sup>

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exclusively used such website guidance since the beginning of the pandemic for its *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, May 2020, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last updated May 6, 2020). The CDC guidance is distinguishable from Pennsylvania website guidances in at least two major respects: first, the CDC guidance clearly informs readers which guidance has changed since its last update, and second, the CDC guidance is not patently mandatory, though some Pennsylvania website guidances mandate compliance with CDC guidelines. See, e.g., *Responding to COVID-19 in Pennsylvania*, COMMW. OF PA., <https://www.pa.gov/guides/responding-to-covid-19/> (last updated Sept. 8, 2020, 11:30 AM) (“All businesses must follow CDC and DOH guidance for social distancing and cleaning”) [hereinafter *Responding to COVID-19 Website Guidance*].

18. *Responding to COVID-19 Website Guidance*, *supra* note 17 (as of September 9, 2020, the website guidance notes that it was last updated 11:30 a.m., on September 8, 2020 but does not indicate any material that has changed from its last update—it is very likely that this website guidance will be updated at least once more by publication of this Commentary).

19. *Id.*

20. The first arguable website guidance took the form of Governor Wolf’s list of life-sustaining businesses which were authorized to operate under the state’s red phase of recovery—this list, deemed the Industry Operation Guidance, was covertly changed (sometimes multiple times during a week) to reflect the Administration’s changing position on whether a certain industry (broken down by North American Industry Classification System (NAICS) category) was “life sustaining.” See generally *North American Industry Classification System*, EXEC. OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET (2017), [https://www.census.gov/eos/www/naics/2017NAICS/2017\\_NAICS\\_Manual.pdf](https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf). This Industry Operation Guidance changed frequently, without announcement, and has since disappeared in most forms. See *04.01.20 Industry Operation Guidance*, SCRIBD.COM (Apr. 1, 2020), <https://www.scribd.com/document/454418385/04-01-20-Industry-Operation-Guidance>; see also *UPDATED 9:00am May 28, 2020 Industry Operation Guidance*, SCRIBD.COM (May 28, 2020), <https://www.scribd.com/document/452553026/UPDATED-9-00am-May-28-2020-Industry-Operation-Guidance#download> (“Sorry! This document is not publicly available. The owner has set this document to private. You will not be able to read it unless the owner changes it to **public** on their uploads page, or sends you a direct link.”) (emphasis in original).

II. WEBSITE GUIDANCE ENABLES A GOVERNMENT TO RESPOND QUICKLY  
(BUT QUIETLY) TO RAPIDLY CHANGING CIRCUMSTANCES BUT FAILS TO  
PUT THE PUBLIC ON NOTICE OF NEW LAW

During the first several weeks and months of the Commonwealth's response to COVID-19, Governor Wolf's administration issued standardized PDF documents to direct businesses on their responsibilities to reopen.<sup>21</sup> These sorts of finalized documents are what practitioners and businesses are accustomed to reviewing and understanding in attempting to comply with government requirements. In the beginning of June 2020, however, more than three months into the Commonwealth's COVID-19 response, Governor Wolf's administration shifted to the website guidance mechanism—instead of issuing a finalized and formal PDF document which was downloadable and sharable, the Governor began issuing new COVID-19 guidance in the form of plain text available on the Pennsylvania government's website. The first iteration of this website guidance came for sporting activities.<sup>22</sup> Soon thereafter, Governor Wolf's administration began removing links to the initially-issued PDF guidance documents and replacing them with website guidance.<sup>23</sup> Admittedly, and in fairness to the Governor and his administration, the Commonwealth has been very good with updating a newly modified website guidance with a "Last Updated" tag.

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21. *E.g.* Press Release, Gov. of Pa., Wolf Admin. Issues Guidance as Constr. Indus. Prepares to Resume Work May 1 (Apr. 23, 2020), <https://www.governor.pa.gov/newsroom/wolf-administration-issues-guidance-as-construction-industry-prepares-to-resume-work-may-1/> (announcing binding guidance for the construction industry alongside a now-broken PDF guidance document); Press Release, Gov. of Pa., Gov. Wolf Issues Green Phase Order, Guidance on Dining and Prof'l Sports (May 27, 2020), <https://www.governor.pa.gov/newsroom/gov-wolf-issues-updated-green-phase-order-guidance-on-dining-and-professional-sports/> (same, for restaurants and professional sports organizations).

22. *Guidance for All Sports Permitted to Operate During the COVID-19 Disaster Emergency to Ensure the Safety and Health of Employees, Athletes and the Public*, COMMW. OF PA., <https://www.governor.pa.gov/covid-19/sports-guidance/> (last updated Sept. 2, 2020).

23. Compare the link contained in the construction industry guidance Press Release discussed *supra* note 21 posted at <https://www.governor.pa.gov/wp-content/uploads/2020/06/Construction-industry-guidance-041920.pdf> (the original construction guidance pdf), with *Guidance for Businesses in the Construction Industry Permitted to Operate During the COVID-19 Disaster Emergency*, COMMW. OF PA. (July 15, 2020), <https://www.governor.pa.gov/covid-19/construction-industry-guidance/> (this construction website guidance does not actually note previous iterations' existence, rather it claims that it was simply "issued" on July 15, 2020, despite its several evolutions since April 23, 2020).

Unfortunately, the Commonwealth has been dismally bad at noting what has changed from iteration to iteration of updated website guidance.<sup>24</sup>

What is the purpose of these website guidances? The Governor has not said anything about it. Of course, it is highly probable (and fair) that the Governor has no idea that the Commonwealth is issuing guidance “documents” in this way. But there seems to be at least some motivation to this change in government practice. Someone somewhere made an affirmative decision to stop issuing finalized PDF government guidance related to COVID-19. Why?

Potentially, it allows the Governor to issue quicker changes in policy without having to recall a PDF document, edit it, then post a new document while marking that it has changed. Regrettably, it also allows the administration to issue updates under the radar without fanfare (or notice to businesses subject to those changes).<sup>25</sup> The COVID-19 Guidance

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24. Cf. Greg Pickel, *Pa. High School Sports Get New Guidance on How Many Fans Can Attend Games, Other Events, This Fall*, PENN. LIVE (Sept. 2, 2020), <https://www.pennlive.com/highschoolsports/2020/09/pa-high-school-sports-get-new-guidance-on-how-many-fans-can-attend-games-other-events-this-fall.html> (comparing deletions from the previous iteration of this website guidance issued on August 6, 2020 to the most current guidance). But see *Public Health Guidance for School Communities*, PA. DEPT OF EDUC., <https://www.education.pa.gov/Schools/safeschools/emergencyplanning/COVID-19/SchoolReopeningGuidance/ReopeningPreKto12/PublicHealthGuidance/Pages/default.aspx#face> (last updated Aug. 17, 2020) (showing with red asterisk marks what content was added to the Department of Education’s website guidance on schools related to reopening K-12 schools and closing schools that were exposed to a COVID-19 case); *Guidance on COVID-19 for Skilled Nursing Facilities in Pennsylvania*, PA. DEPT OF HEALTH, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Guidance/SNF-Guidance.aspx> (last updated Sept. 3, 2020) (marking in red new introductions to the Health Department’s guidance for nursing facilities).

25. Virtually every new guidance document or other policy in the Commonwealth of Pennsylvania has been first announced on Governor Wolf’s Twitter account with a link to a press release discussing (and containing a link to) the new guidance. *E.g.* Tom Wolf (@GovernorTomWolf), TWITTER (May 7, 2020, 1:07 PM), <https://twitter.com/GovernorTomWolf/status/1258443342393806849> (announcing the extension of the statewide moratorium on residential evictions and foreclosures until July 10—this moratorium was extended to August 31, 2020 at the state level); Tom Wolf (@GovernorTomWolf), TWITTER (Jul. 9, 2020, 11:50 AM), <https://twitter.com/GovernorsOffice/status/1281254495687770112?s=20> (extending the eviction moratorium until Aug. 31, 2020); Tom Wolf (@GovernorTomWolf), TWITTER (Apr. 20, 2020, 1:11 PM), <https://twitter.com/GovernorTomWolf/status/1252283792603168779> (announcing the allowance of construction projects to resume on May 8—the Governor later announced at a press conference that construction projects could resume May 1, 2020); Tom Wolf (@GovernorTomWolf), TWITTER (Apr. 15, 2020, 2:40 PM), <https://twitter.com/GovernorTomWolf/status/1250494332706140164> (announcing Secretary Levine’s *Worker Safety Order*). Changes to existing website guidances are not announced on Governor Wolf’s or Secretary Levine’s Twitter accounts. See Pickel, *supra* note 24 (manually comparing quietly added deletions and insertions to the sports guidance cited *supra* note 22).

for Businesses specifically states that the “guidelines may change over time, so be sure to check back for updates,”<sup>26</sup> shifting the burden to informing the public of new changes in COVID-19 law to businesses (or their counsel).

In the era before COVID-19, practitioners could expect to find newly announced executive actions in the Commonwealth of Pennsylvania’s version of the Federal Register: The Pennsylvania Bulletin. In fact, Pennsylvania law requires such changes, deemed regulations, to be published prior to taking effect.<sup>27</sup> These publication requirements are important because they provide a “safeguard against the unwise or improper exercise of discretionary administrative power.”<sup>28</sup> Notably, Pennsylvania law allows for certain exceptions to the above blanket rule, such as regulations or changes related to “(i) military affairs; (ii) agency organization, management or personnel; (iii) agency procedure or practice; (iv) Commonwealth property, loans, grants, benefits or contracts; or (v) the interpretation of a self-executing act of [the Pennsylvania General Assembly] or administrative regulation.”<sup>29</sup> Although “emergency” or “disaster” does not appear in the enumerated list of exceptions, the Commonwealth Documents Law of 1968<sup>30</sup> does specifically provide a “good cause” exception which enables a regulation-issuing agency to make a finding of good cause, justify the cause, and subsequently *publish* the order adopting the administrative regulation or change resulting from the order.<sup>31</sup> Though issuing swift COVID-19 guidance is necessary to respond to rapidly changing facts on the ground, the current administration has made no attempts to comply with Pennsylvania Bulletin notice requirements, even as a *post hoc* clean-up effort.

The ever-changing executive orders and quasi-regulations contained in website guidance are additionally problematic because there is no central database of Pennsylvania gubernatorial proclamations. Since

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26. *Responding to COVID-19 Website Guidance*, *supra* note 17.

27. 45 PA. STAT. AND CONS. STAT. ANN. § 1201 (West 1968); William W. Warren, Jr., *Statements of Policy or Disguised Rulemakings: Bedford v. Commonwealth DEP Revisited* 5, (Aug. 17, 2020) (unpublished manuscript), <https://www.saul.com/sites/default/files/PDFs/Article%20on%20Statements%20of%20Policy.pdf>.

28. *Marcellus Shale Coal. v. Dep’t of Env’tl. Prot.*, 193 A.3d 447, 476 (Pa. Commw. Ct. 2018) (quoting *Commonwealth v. Colonial Nissan, Inc.*, 691 A.2d 1005, 1009 (Pa. Commw. Ct. 1997)).

29. 45 PA. STAT. AND CONS. STAT. ANN. § 1204(1) (West 1968).

30. 1968 Pa. Laws 769, Pub. L. No. 1968-240 (codified as amended at 45 PA. STAT. AND CONS. STAT. ANN. § 1101 (West 1968) (repealed 1976) and 45 PA. STAT. AND CONS. STAT. ANN. § 501 (West 2014)).

31. 45 PA. STAT. AND CONS. STAT. ANN. § 1204(2) (West 1968).



Governor Wolf's initial Proclamation of Disaster Declaration on March 6, 2020, the Governor has issued at least another twenty-five executive orders.<sup>32</sup> Many of the Governor's orders, especially those closing and reopening various Pennsylvania counties, have been accompanied by a parallel order<sup>33</sup> from Pennsylvania Secretary of Health Levine pursuant to her separate and concurrent authority under the Pennsylvania Disease Prevention and Control Law of 1955.<sup>34</sup> But a layperson or a loyal adherent to regular order might be shocked to learn about all of this executive action: according to the Governor's publicly available website collecting all of his executive orders, Governor Wolf's last executive order was issued on August 16, 2019, geared at reducing gun violence in the Commonwealth of Pennsylvania.<sup>35</sup> To find all of Governor Wolf's executive orders related to COVID-19 (including some not related to COVID-19),<sup>36</sup> one would need to peruse through almost one hundred pages of Pennsylvania gubernatorial press releases, each page containing

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32. These executive orders are wide ranging and cover subjects from evictions and foreclosures to waiving statutory provisions requiring Commonwealth agencies from holding in-person hearings. See, e.g., *Order of the Governor of the Commonwealth of Pennsylvania Staying Notice Requirements For Specified Actions Related to the Dispossession of Property* (July 9, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/07/20200709-TWW-eviction-order.pdf>; *Order of the Governor of the Commonwealth of Pennsylvania Authorizing Commonwealth Agencies to Conduct Administrative Proceedings Online By Video or Telephonic Means* (July 10, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/07/20200710-TWW-agency-administrative-proceedings-order.pdf>.

The Governor's phased reopening plan allowed counties to reopen in a piecemeal fashion. See *Green Phase Order*, *supra* note 12—this phased reopening constituted six separate executive orders to move every Pennsylvania county from the yellow to the green phase (plus an additional six orders from Secretary of Health Levine).

33. E.g., *Order of the Secretary for the Continued Reopening of the Commonwealth* (May 27, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200527-SOH-Green-Phase-Order.pdf> (running parallel and reading verbatim to the Governor's *Green Phase Order*, discussed *supra* note 12).

34. 35 PA. STAT. AND CONS. STAT. ANN. § 521.5 (West 1955). See also 71 PA. STAT. AND CONS. STAT. ANN. § 532 (West 1996).

35. *Executive Order Archives - News*, COMMW. OF PA., <https://www.governor.pa.gov/topic/executive-order/> (last visited Sept. 2, 2020)

36. For example, in the wake of protests across the United States, including in Pennsylvania, related to the death of George Floyd, an African American man killed by police officers in Minneapolis, Governor Wolf signed an executive order to create a State Law Enforcement Citizen Advisory Commission in conjunction with the passage of two pieces of legislation aimed at reforming police operations in the Commonwealth. Press Release, Gov. of Pa., Gov. Wolf Signs Executive Order to Create Pennsylvania State Law Enforcement Citizen Advisory Commission (July 17, 2020), <https://www.governor.pa.gov/newsroom/gov-wolf-signs-executive-order-to-create-pennsylvania-state-law-enforcement-citizen-advisory-commission/>. This non-COVID related executive order does not appear on the public Pennsylvania government website containing the Governor's executive orders cited *supra* note 35.

five (or more) press releases themselves.<sup>37</sup> Public access to the laws to which they are subject is vital,<sup>38</sup> and unfortunately Governor Wolf's lack of a central database<sup>39</sup> containing his executive pronouncements does a real disservice to Pennsylvanians and their right to due process and fair notice.<sup>40</sup>

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37. As of September 3, 2020, the Governor's first press release on COVID-19, announcing his Proclamation of Disaster Emergency, *see supra* note 7, after the first two positive cases of COVID-19 in the Commonwealth were confirmed, appears on page 114 of the Governor's press releases. *See News*, COMMW. OF PA., <https://www.governor.pa.gov/newsroom/page/114/> (last visited Sept. 2, 2020). Due to the sheer volume of press releases coming out of the Governor's office during the COVID-19 pandemic, this page number will change frequently.

38. *See Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020) (rejecting the State of Georgia's claim for copyright protections on the state's official annotated code because "no one can own the law"); *see also* Ann E. Marimow, *Should The Public Pay A Dime For Access To Court Records?*, WASH. POST. (Feb. 3, 2020), [https://www.washingtonpost.com/local/legal-issues/should-the-public-pay-a-dime-for-access-to-court-records/2020/02/02/578fa488-42d1-11ea-b5fc-efa848cde99\\_story.html](https://www.washingtonpost.com/local/legal-issues/should-the-public-pay-a-dime-for-access-to-court-records/2020/02/02/578fa488-42d1-11ea-b5fc-efa848cde99_story.html) (discussing—and condemning—the government paywall preventing public access to PACER, the federal judiciary's repository for electronically filed court documents); *Nat'l Veterans Legal Servs. Program v. United States*, No. 2019-1081, 2020 WL 4516079, at \*12 (Fed. Cir. Aug. 6, 2020) (holding that PACER fees have been set too high under the program's authorizing legislation because "if large swaths of the public cannot afford the fees required to access court records, it will diminish the public's ability 'to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government'").

39. In fairness to Governor Wolf, Mayor Jim Kenney of Philadelphia similarly has not supposedly released an executive order since March 2020, despite the multiple phased reopening executive orders released and visible through the Philadelphia "Publications & Forms" tab on its website. *Compare Executive Orders*, CITY OF PHILA., <https://www.phila.gov/executiveorders/pages/default.aspx> (last visited Sept. 2, 2020) (showing the last issued executive order as Mayor Kenney's initial March 20 declaration of emergency related to COVID-19), *with Publications & Forms*, CITY OF PHILA., <https://www.phila.gov/documents/> (last visited Sept. 2, 2020) (searching with the term "order" in the search bar reveals an additional eight executive orders from Mayor Kenney since March 17, 2020).

40. A central repository containing Pennsylvania's executive actions related to COVID-19 would not be groundbreaking, either. Every single one of Pennsylvania's neighboring states of New York, New Jersey, Delaware, Maryland, West Virginia, and Ohio all centralize their state's executive orders. *Executive Orders*, STATE OF N.Y., <https://www.governor.ny.gov/executive-orders> (last visited Sept. 2, 2020); *Executive Orders*, STATE OF N.J., <https://nj.gov/infobank/eo/056murphy/> (last visited Sept. 2, 2020); *Public Health State of Emergency Declarations*, STATE OF DEL., <https://governor.delaware.gov/health-soe/> (last visited Sept. 2, 2020); *COVID-19 Pandemic: Orders and Guidance*, STATE OF MD., <https://governor.maryland.gov/covid-19-pandemic-orders-and-guidance/> (last visited Sept. 2, 2020); *West Virginia's Response to COVID-19*, STATE OF W.VA., <https://governor.wv.gov/Pages/WV-COVID-19-actions-and-executive-orders.aspx> (last visited Sept. 2, 2020); *Public Health Orders*, STATE OF OHIO, <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/public-health-orders/public-health-orders> (last visited Sept. 2, 2020). Delaware, Maryland, and Ohio have also segregated their COVID-19 related orders from executive orders issued in the ordinary course of governance. Moreover, the Pennsylvania

### III. RAPIDLY CHANGING GOVERNING GUIDANCE, INCLUDING WEBSITE GUIDANCE, DEPRIVES BUSINESSES OF OPPORTUNITIES AND HARMS THE PUBLIC

Restaurants and other businesses in the food and beverage and hospitality industries have been particularly harmed by the impact COVID-19 has had on the national and state economy. Restaurants have also been some of the most heavily regulated industries by the Wolf administration during its COVID-19 response: presently, restaurants are subject to no less than five executive orders,<sup>41</sup> a website guidance which incorporates most of those orders,<sup>42</sup> and at least two local restrictions that supersede some of the above guidance.<sup>43</sup> This patchwork of guidance requires intense focus and a tuned attention paid to the Governor's—and the government's—every move.<sup>44</sup> For example, on September 8, 2020,

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Department of Education stands out among Pennsylvania cabinet agencies for collecting all of its orders in one accessible location. See *Orders and Waivers*, PA. DEP'T OF EDUC., <https://www.education.pa.gov/Schools/safeschools/emergencyplanning/COVID-19/Waivers/Pages/default.aspx> (last visited Sept. 2, 2020) (listing the various orders issued by the Pennsylvania Secretary of Education since the beginning of the COVID-19 pandemic, along with relevant waiver applications to be exempted from compliance with such orders).

41. See *Building Safety Order*, *supra* note 13; *Worker Safety Order*, *supra* note 14; *Green Phase Order*, *supra* note 12; *Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings* (July 1, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/07/20200701-SOH-Universal-Face-Coverings-Order.pdf>; *Order of the Governor of the Commonwealth of Pennsylvania Directing Targeted Mitigation Measures* (July 15, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/07/20200715-TWW-targeted-mitigation-order.pdf> [hereinafter *Targeted Mitigation Order*].

42. *Guidance for Businesses in the Restaurant Industry Permitted to Operate During the COVID-19 Disaster Emergency to Ensure the Safety and Health of Employees and the Public*, COMMW. OF PA., <https://www.governor.pa.gov/covid-19/restaurant-industry-guidance/> (last updated July 15, 2020) [hereinafter *Restaurant Website Guidance*].

43. *COVID-19 Commercial Recovery: Outdoor Dining Guidelines* (July 23, 2020), <https://www.phila.gov/media/20200611105211/Guidelines-for-Outdoor-Dining.pdf>; *Order of the Director of the Allegheny County Health Department to Help Prevent the Spread of COVID-19* (July 17, 2020), [https://www.alleghenycounty.us/uploadedFiles/Allegheny\\_Home/Health\\_Department/Resources/COVID-19/Docs/071720\\_Order%20of%20the%20Director%20of%20ACHD%20to%20Help%20Prevent%20the%20Spread%20of%20COVID-19.pdf](https://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/Health_Department/Resources/COVID-19/Docs/071720_Order%20of%20the%20Director%20of%20ACHD%20to%20Help%20Prevent%20the%20Spread%20of%20COVID-19.pdf) (imposing restrictions on restaurants and bars in Allegheny County (which includes Pittsburgh, Pennsylvania) and also lifting restrictions issued just several weeks prior). On August 20, 2020, the City of Philadelphia announced that indoor dining would be permitted to reopen on September 8, 2020 so long as restaurants follow strict City and Pennsylvania state guidance. Linda Huss, *Indoor Dining is Back on September 8 in Philadelphia*, CITY OF PHILA. (Aug. 20, 2020), <https://www.phila.gov/2020-08-20-indoor-dining-is-back-on-september-8-in-philadelphia/>.

44. By way of further example, I co-authored a client alert with colleagues on May 28, 2020 which explained the then-PDF restaurant guidance document issued by the Wolf Administration (the guidance is now a website guidance which has been updated a number

Governor Wolf announced that Pennsylvania restaurants may increase indoor dining room capacity to fifty percent so long as they complete a self-certification process attesting to their compliance with the many restaurant-related COVID-19 restrictions.<sup>45</sup> As of publication of this Commentary, the restaurant guidance has not been updated to reflect this contemplated self-certification process. Will this new capacity limit be memorialized in an executive order, or will it merely be reflected in an updated website guidance?<sup>46</sup> Query if the website guidance is subsequently amended in a fashion not originally contemplated by the order, can it still be incorporated by reference?<sup>47</sup>

These rapid governmental policy changes have come at a cost to Pennsylvanians. Take for example, Governor Wolf's initial executive order to close non-life sustaining businesses in mid-March.<sup>48</sup> Recognizing the broad brush with which he shut down the physical operations of the vast majority of businesses in Pennsylvania, Governor Wolf offered a waiver process to businesses to submit to the Pennsylvania Department of Community & Economic Development (DCED) in order to continue in-person operations despite the otherwise applicable business shutdown

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of times). Jonathan A. Havens, Kermit J. Nash, Dena B. Calo & Kevin M. Levy, *Restaurants Given a Green Light in Pennsylvania's Green Phase, Other Colorful Limitations Follow*, SAUL EWING ARNSTEIN & LEHR LLP (May 28, 2020), <https://www.saul.com/publications/alerts/restaurants-given-green-light-pennsylvania%E2%80%99s-green-phase-other-colorful-limitations-follow>. We issued an update to the article the very next day to reflect a new change in Philadelphia's approach to outdoor and indoor dining. See also March Vetri, Opinion, *We're Paying Huge Costs for Not Reopening Restaurants*, PHILA. INQUIRER (July 28, 2020), <https://www.inquirer.com/news/coronavirus-restaurants-indoor-dining-philadelphia-pennsylvania-20200728.html> (expressing frustration by one restaurant owner of the "pump fake" and "false start[s]" from the City's announcements to allow, then delay, then allow, then delay the reopening of indoor dining after restaurant operators prepared to reopen and spent significant sums of money ordering foodstuffs and configuring interior spaces to comply with the Governor's (many) restaurant guidances).

45. Press Release, Gov. of Pa., Governor Wolf Announces Restaurants May Increase Indoor Occupancy to 50 Percent Starting September 21 (Sept. 8, 2020), <https://www.governor.pa.gov/newsroom/governor-wolf-announces-restaurants-may-increase-indoor-occupancy-to-50-percent-starting-september-21/>.

46. See *Green Phase Order*, *supra* note 12 (requiring ". . . restaurants and bars, which are operating in [green phase counties to] adhere to the [Restaurant Website Guidance], issued May 27, 2020, which is incorporated by reference herein").

47. See *Bernotas v. Super Fresh Food Mkts., Inc.*, 816 A.2d 225, 231–32 (Pa. Super. Ct. 2002), *rev'd on other grounds*, 863 A.2d 478, 483–84 (Pa. 2004) ("As a matter of contract law, incorporation by reference is generally effective to accomplish its intended purpose where . . . the provision to which reference is made has a reasonably clear and ascertainable meaning").

48. *Business Closure Order*, *supra* note 4.

order.<sup>49</sup> The process by which businesses were granted waivers from DCED was much criticized by business leaders,<sup>50</sup> editorial boards,<sup>51</sup> and Republicans and many Democrats in the state legislature.<sup>52</sup> DCED eventually acquiesced to public demands for transparency in issuing a list of all (6124) businesses which received waivers from the business closure order.<sup>53</sup> The deliberative processes or criteria used by DCED to flesh out and grant waiver applications has not yet been revealed.<sup>54</sup>

#### IV. CONCLUSION

Disasters reinforce the need for government transparency rather than vitiate that need. As a matter of course, government officials are accountable to the public. That statement becomes all the more important when governments exercise a bewildering amount of power at almost unaccountable levels.<sup>55</sup> The Pennsylvania General Assembly

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49. Press Release, Gov. of Pa., WAIVER EXTENSION, REVISED TIMING OF ENFORCEMENT: Monday, March 23 at 8:00 AM (Mar. 20, 2020), <https://www.governor.pa.gov/newsroom/waiver-extension-revised-timing-of-enforcement-monday-march-23-at-800-am/>.

50. Benjamin Pontz, *Business Owners Express Confusion, Frustration About Waiver Process*, PA. POST (May 18, 2020), <https://papost.org/2020/05/18/business-owners-express-confusion-frustration-about-waiver-process/>.

51. Editorial Board, *What Is Essential?: State Needs Clear Criteria for Business Waivers*, PITTSBURGH POST-GAZETTE (Apr. 7, 2020), <https://www.post-gazette.com/opinion/editorials/2020/04/07/Pennsylvania-essential-business-waivers-clear-criteria/stories/202003310030>.

52. See Cynthia Fernandez, *Republicans Subpoena Wolf Administration for Documents Related to Controversial Business Waiver Process*, SPOTLIGHT PA (Apr. 30, 2020), <https://www.spotlightpa.org/news/2020/04/business-waivers-list-audit-subpoena-tom-wolf/>.

53. *Businesses that Received an Exemption from Closure*, DEP'T OF CMTY. & ECON. DEVEL., <https://dced.pa.gov/covid-19-exempt-businesses/> (last visited Sept. 2, 2020).

54. See *Paradise Concepts, Inc. v. Wolf*, No. CV 20-2161, 2020 WL 5121345 (E.D. Pa. Aug. 31, 2020) (partially denying Governor Wolf's motion to dismiss a federal lawsuit alleging constitutional equal protections violations related to the issuance of DCED waivers).

55. See *Friends of Danny Devito v. Wolf*, 227 A.3d 872, 895–96 (Pa. 2020) (rejecting a challenge to Governor Wolf's *Business Closure Order* by a political campaign and a number of small businesses because the order "result[ed] in only a temporary loss of the use of the Petitioners' business premises" and because the executive order was limited "to ninety days unless renewed and provides the General Assembly with the ability to terminate the order at any time"). One wonders if the Pennsylvania Supreme Court anticipated in the beginning of April that the pandemic would continue in the United States for another four months (as of this writing), and that the General Assembly *would* in fact vote to terminate the state of emergency but was met with a gubernatorial veto. The procedurally bizarre route that the General Assembly attempted to chart to terminate the Governor's Proclamation of Disaster Emergency was discussed in *Wolf v. Scarnati*, where a divided Supreme Court upheld the

noted the importance of public access to government information during emergencies when it introduced and passed *unanimously* House Bill 2463 which clarified that the Governor may not suspend the statutorily-mandated Right to Know Law.<sup>56</sup> The new legislative amendment was predicated on the notion that Pennsylvanians should have a right to see the data being used by its government to issue new policy.<sup>57</sup> Despite his stated opposition to the bill,<sup>58</sup> Governor Wolf ultimately allowed the bill to become law without his signature because of his desire to “err on the side of transparency.”<sup>59</sup>

Most businesses will not stay closed forever.<sup>60</sup> In advance of future COVID-19 impacted reopenings,<sup>61</sup> businesses can reasonably be expected

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Governor’s ability to veto General Assembly-led attempts to terminate disaster emergencies. No. 104 MM 2020, 2020 WL 3567269 (Pa. July 1, 2020).

56. See Andrew T. Bockis, John R. Dixon & Kevin M. Levy, *Pennsylvania Amends Law Governing Access to Agency Records During Emergency Declarations*, SAUL EWING ARNSTEIN & LEHR LLP (July 30, 2020), [https://www.saul.com/sites/default/files/Energy\\_Real%20Estate\\_073020.pdf](https://www.saul.com/sites/default/files/Energy_Real%20Estate_073020.pdf); Editorial Board, *Government Transparency Must Be Central to the New Normal of Coronavirus*, PHILA. INQUIRER (July 29, 2020), <https://www.inquirer.com/opinion/editorials/transperancy-right-to-know-requests-governor-tom-wolf-pennsylvania-philadelphia-20200729.html> (“There are just too many outstanding questions on recent decision-making, both on the state level and the city level, for excuses.”).

57. See Memorandum from Rep. Seth M. Grove of the Pa. House of Reps., House Co-Sponsorship Memorandum (Apr. 24, 2020, 10:32 AM), <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20190&cosponId=31654> (“While transparency between government and people is critical during normal times it is even more important during times of emergency.”).

58. Stephen Caruso, *Wolf Says He Opposes Open Records Bill, Despite Unanimous Support*, PENN CAPITAL-STAR (July 16, 2020), <https://www.penncapital-star.com/blog/wolf-says-he-opposes-open-records-bill-despite-unanimous-support/>.

59. Press Release, Gov. of Pa., Gov. Wolf Allows HB 2463 To Become Law (July 26, 2020), <https://www.governor.pa.gov/newsroom/gov-wolf-allows-hb-2463-to-become-law/>. Governor Wolf did not sign HB 2463 into law, but rather allowed it to become law despite withholding his signature. See PA. CONST. art. IV, § 15 (“If any bill shall not be returned [vetoed] by the Governor within ten days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it.”).

60. *But see Targeted Mitigation Order*, *supra* note 41 (requiring all businesses to conduct operations remotely (i.e., telework) “[u]nless not possible” until further notice).

61. Or, unfortunately, in anticipation of future law suits, the Governor should consider the effect of making past executive website guidance inaccessible to the public. Consider, for example, a hypothetical business that reopened against the Governor’s red phase orders (because it did not qualify as “life-sustaining” or did not receive a waiver under DCED’s waiver program) and later suffered damages as a result of a COVID-19 infection or otherwise. An insurance carrier would have great difficulty in sleuthing out whether the business actually reopened illegally because the Governor’s *Industry Operation Guidance*, *see supra* note 20, is largely no longer accessible to the public. Unless a practitioner has dutifully downloaded every iteration of the Governor’s website guidance, it would be difficult to ascertain what was legal and what was considered life-sustaining, and when.

to rely on the public pronouncements of their government officials—businesses, practitioners, and residents that wish to follow all applicable government guidance documents should be able to readily discern what the law is and where to find it. Pennsylvania’s byzantine system of organizing (or not) government orders and guidance, with an emphasis on its suspect website guidance, helps no one, least of all the businesses and the public supposed to benefit from the guidance.<sup>62</sup>

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62. See Michael Rubinkam & Mark Scolforo, *Pennsylvania School Leaders To State: We Need More Help*, ASSOCIATED PRESS (July 27, 2020), <https://apnews.com/d357c0d93260254df12db76ca6ccde55> (“No tools have been given to school districts. Guidelines are best practices and suggestions and ideas. They are not specific recommendations.”).

[Editor’s Note: On September 14, 2020, in *County of Butler v. Wolf*, Civil Action No. 2:20-cv-677, 2020 WL 5510690 (W.D. Pa. Sept. 14, 2020) a federal judge struck down Governor Wolf’s Stay at Home Order, *supra* note 2, *Business Closure Order*, *supra* note 4, and certain gathering limit provisions outlined in the *Targeted Mitigation Order*, *supra* note 41. The author discussed and analyzed the opinion in a twitter thread. Kevin M. Levy (@LegalLevy), TWITTER (Sept. 14, 2020, 12:47 PM), <https://twitter.com/LegalLevy/status/1305548667139522560?s=20>; see also John L. Micek, *Federal Judge in Pittsburgh Declares Wolf’s Key COVID-19 Restrictions Unconstitutional*, PA. CAPITAL-STAR (Sept. 14, 2020), <https://www.penncapital-star.com/covid-19/federal-court-in-pittsburgh-declares-wolfs-key-covid-19-restrictions-unconstitutional/>]