

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

| | | |
|-----------------------------|---|----------------|
| CIVIL RIGHTS DEFENSE FIRM | : | |
| P.C., <i>et al.</i> | : | No. 63 MM 2020 |
| Petitioners | : | |
| v. | : | |
| | : | |
| GOVERNOR TOM WOLF, | : | |
| Respondent | : | |
| | : | |
| IN RE: GOVERNOR TOM WOLF’S | : | |
| ORDER OF MARCH 19, 2020 | : | No. 64 MM 2020 |
| CLOSING ALL “NON-ESSENTIAL” | : | |
| BUSINESSES | : | |
| | : | |
| PETITION OF: COSTOPOULOS | : | |
| FOSTER & FIELDS, A LAW FIRM | : | |
| | : | |

**APPLICATION FOR LEAVE OF THE
CITY OF PHILADELPHIA TO FILE AMICUS BRIEF**

1. On March 20, 2020, Petitioners filed an Emergency, *Ex Parte* Application For Extraordinary Relief Pursuant To The Court’s King’s Bench Jurisdiction seeking to enjoin Governor Tom Wolf’s Order in response to the coronavirus pandemic requiring the closure of all businesses that are not life-sustaining.
2. On the same day, Governor Wolf filed an Answer opposing Petitioners’ Emergency *Ex Parte* Application.

3. As the most densely populated county in the Commonwealth, the City has a unique perspective on the importance of the emergency measures taken by the Governor to combat Covid-19 and challenged by the Petitioners.

4. Given the importance of this issue and the unique perspective the City can offer, the City respectfully asks the Court for permission to file an amicus brief in this matter.¹

5. Given the emergent nature of this matter, the City has attached the Brief it proposes to file as Exhibit A.

Respectfully submitted,

CITY OF PHILA. LAW DEP'T
Marcel S. Pratt, City Solicitor

/s/ Lydia Furst
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March 22, 2020

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City of Philadelphia

¹ The City recognizes that under P.R.A.P. 531, amicus briefs should be filed on the same date as that of the party amicus seeks to support. However, given that this is an emergency filing that the Commonwealth responded to on the same day it was filed; and the City just learned of this matter yesterday, the City seeks leave to file its Brief two days late.

Exhibit A

**IN THE SUPREME COURT OF PENNSYLVANIA
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**BRIEF FOR *AMICUS CURIAE* CITY OF PHILADELPHIA
IN SUPPORT OF GOVERNOR WOLF’S ANSWER
TO THE PETITIONS FOR EXTRAORDINARY RELEIF**

I. STATEMENT OF INTEREST OF AMICUS CURIAE

This matter is a challenge to the Governor’s Emergency Order that all non-life-sustaining businesses must temporarily cease operations due to the exponential spread of Covid-19 within the Commonwealth.

The City of Philadelphia (“City”) has a crucial interest in and perspective on this matter. It is one of the ten most populous cities in the

United States of America.² Philadelphia is the largest city in the Commonwealth of Pennsylvania and the only City of the First Class³, with a population of 1.5 million as of the 2010 United States Census, a figure the United States Census Bureau estimates rose by 3.8% between 2010 and 2018.⁴ The 7.7-square-mile central section of Philadelphia, extending out from City Hall, South toward Tasker Street and North toward Spring Garden Street, between the Delaware and Schuylkill Rivers, is second only to Midtown Manhattan in the United States in residential density.⁵

As more fully-explained below, more densely-populated urban areas like the City are at great risk of having the disease spread aggressively within their communities.⁶ Indeed, over the past two weeks, confirmed

² See U.S. Census Bureau Quickfacts, Philadelphia, Pennsylvania (<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>) (Last visited March 21, 2020).)

³ See Section 1 of the General Municipal Law, Act of June 25, 1895, P.L. 275, *as amended*, 53 P.S. §§ 101-11703.8.

⁴ See U.S. Census Bureau Quickfacts, Philadelphia, Pennsylvania (<https://www.census.gov/quickfacts/philadelphiacitypennsylvania>) (last visited March 21, 2020).)

⁵ See Maria Panaritis, *(Greater) Center City's Population Second Only to Midtown Manhattan's*, Philadelphia Inquirer (April 20, 2015) https://www.inquirer.com/philly/news/20150421_Greater_Center_City_s_population_now_second_only_to_Midtown_Manhattan_s.html; see also *State of Center City 2019*, Center City District, Central Philadelphia Development Corporation (April 23, 2019) <https://centercityphila.org/research-reports/state-of-center-city-2019>.

⁶ See Conference of State Bank Supervisors, *Information on COVID-19 Coronavirus*, <https://www.csbs.org/information-covid-19-coronavirus> (Last Visited March 21, 2020);

cases of Covid-19 have risen exponentially in Philadelphia. On March 10, 2020, Philadelphia confirmed its first case of Covid-19. As of March 21, 2020, there were 85 confirmed cases in Philadelphia – which represents an 840% increase in confirmed cases in eleven days.⁷ The confirmed cases “likely account for only a fraction of the number of infected people in the city due to the speed at which the disease is spreading, the time it takes infected people to show symptoms, and the widespread shortages of testing kits.”⁸

In addition, the City has an important interest in this matter because the Governor’s Order charges the City and all other local jurisdictions within the Commonwealth with enforcing it. The current risk to public health is clear. We have and must be able to continue to take action that is medically effective to protect the public. If the City of Philadelphia is prohibited from enforcing the Governor’s Order, the City would be forced anew to sort through effective means to achieve the necessary end of protecting its

see also Laura Bliss, Kriston Capps, *Are Suburbs Safer From Coronavirus? Probably Not* City Labs (March 13, 2020) <https://www.citylab.com/life/2020/03/coronavirus-data-cities-rural-areas-pandemic-health-risks/607783/>

⁷ Andrew Seidman, Maddie Hanna, *Local coronavirus cases by county*, Philadelphia Inquirer (March 21, 2020) <https://www.inquirer.com/health/coronavirus/live/>.

⁸ Sean Collins Walsh, *Philly confirms first case of coronavirus in a nursing home*, Philadelphia Inquirer (March 21, 2020) <https://www.inquirer.com/health/coronavirus/live/>.

citizens, squandering its resources and the expertise of its public health officials at a time when it is imperative for the City to act. The Governor's Order enables the City of Philadelphia to fulfill its obligation to its citizens by focusing all of its resources on mitigating the spread of Covid-19 and sustaining life.

II. ARGUMENT

Amicus Curiae the City of Philadelphia wholly concurs in the Argument contained in Governor Wolf's Answer. The City writes separately in order to express its crucial interest in the enforcement of emergency measures to prevent spread of Covid-19 within the Commonwealth's most densely-populated county. In addition, the City seeks to expand on two arguments made by the Governor – the importance of the closure order to stopping the spread of Covid-19 within the Commonwealth and the lack of merit to Petitioners' Second Amendment challenge.

A. Necessity of Closure Order

The Commonwealth and its counties are in the midst of a global pandemic. The density found within Philadelphia's borders presents a unique challenge as the Commonwealth and the City focus all resources upon flattening the curve representing the acceleration of positive cases of

Covid-19 and sustaining life. Our public health officials have spoken in unison; they have made clear the danger posed by Covid-19 and the steps we know we can take now to save lives. (See March 19, 2020 Order of the Secretary of the Pennsylvania Department of Health *Regarding the Closure of All Businesses That Are Not Life Sustaining*; see also Emergency Order of the Office of the Mayor and Department of Health of the City of Philadelphia March 17, 2020 *Temporarily Prohibiting Operation of Non-Essential Businesses to Prevent the Spread of 2019 Novel Coronavirus (COVID-19)*.) Action now to enforce social distancing is imperative.

On March 19, 2020, Governor Wolf issued an Order Regarding the Closure of All Businesses that are not Life Sustaining (“March 19 Order”). The March 19 Order provides that “[n]o person or entity shall operate a place of business in the Commonwealth that is not a life-sustaining business regardless of whether the business is open to members of the public” and further provides that “[e]nforcement actions will be taken against non-life-sustaining businesses that are out of compliance effective March 21, 2020, at 12:01 a.m. See March 19 Order, Ex. A to Petitioners’ Kings’ Bench App. Governor Wolf has directed local officials to use their resources to “enforce closure orders within their jurisdictions.” See March 19, 2020 Press Release, Ex. B to Petitioners’ Kings’ Bench App.

We *must* be able to put distance between our citizens by temporarily limiting the movement of people and transaction of goods; the Governor’s March 19 Order enables the City of Philadelphia to do so and to take uniform action with the surrounding counties. Presently, scientists believe Covid-19 is likely spread person-to-person through airborne respiratory droplets by individuals who are within 6 feet of each other; and through contact with contaminated surfaces.⁹ The virus is spread by symptomatic and asymptomatic individuals, which means that people have and continue to spread Covid-19 unknowingly. *Id.* To mitigate the spread of this pandemic—both to ensure that those who have become sick from the virus have access to medical care and to prevent others from becoming sick—public health officials at the Centers for Disease Control, the Pennsylvania Department of Health, the City of Philadelphia Health Department and around the world recommend individuals avoid close contact and keep distance from other people.¹⁰ Social distancing, the only possible solution *at*

⁹ See Centers For Disease Control, *Coronavirus Disease 2019: How it Spreads* (<https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html> (Last visited March 21, 2020)); Pennsylvania Department of Health: Coronavirus (<https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Coronavirus.pdf> (Last visited March 21, 2020)); City of Philadelphia, Department of Health, Coronavirus Disease 2019 (COVID-19): Overview (<https://www.phila.gov/services/mental-physical-health/environmental-health-hazards/covid-19/overview/> (Last visited March 21, 2020)).

¹⁰ See Centers For Disease Control, *Coronavirus Disease 2019: How it Spreads* (<https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html> (Last visited

this moment in time, is not complicated, but it is onerous, and the Commonwealth's ability to withstand this global health crisis without significant loss of life depends upon the proper execution of this extreme measure.

The City of Philadelphia is charged with protecting the health, safety, and welfare of its residents during this pandemic by enforcing the March 19 Order. The closure of businesses that are not life-sustaining is a necessity for Philadelphians; the reality of a small geographic area teeming with people is the impossibility of going about your daily life without bumping up against a multitude of others doing the same. Indeed, unnecessary physical contact and abandoning of social distancing rules occurs when, for example, long lines form outside of retail stores.¹¹ Much of the City of

March 21, 2020)); Pennsylvania Department of Health: Coronavirus (<https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Coronavirus.pdf> (Last visited March 21, 2020)); City of Philadelphia, Department of Health, Coronavirus Disease 2019 (COVID-19): Overview (<https://www.phila.gov/services/mental-physical-health/environmental-health-hazards/covid-19/overview/> (Last visited March 21, 2020); *see also* World Health Organization, Coronavirus Disease 2019, Advice for the Public (<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public> (Last visited March 21, 2020)).

¹¹ *See, e.g.* William Bender, Bob Fernandez, 'I'm looking to get an AR-15': Gun shops are busy as coronavirus spreads, despite state-ordered shutdown, Philadelphia Inquirer (March 18, 2020) <https://www.inquirer.com/health/coronavirus/coronavirus-philadelphia-guns-ammunition-police-gun-range-20200318.html> (photograph by Jessica Griffin depicting dozens of people spilling out of a business determined not to be life-sustaining by the March 19 Order, lined up elbow-to-elbow, blocking the public right-of-way in a mixed-use area of the City).

Philadelphia is attached houses mixed with commercial uses.¹² Sidewalks and buildings date back to the founding of our country; they are narrow, small, and close. Over half a million people in the City take buses, subways, trains and trolleys rather than travel by private car.¹³ The City simply does not have the square footage both inside and outside of its built environment to maintain the social distance necessary to protect the public health if the movement of people and the transaction of goods that are not life-sustaining continues unabated.¹⁴

If our citizens are permitted to continue to congregate in spaces beyond that which is absolutely necessary to sustain us through this

¹² See generally City of Philadelphia Zoning Map, reference point One Parkway Building, 1515 Arch Street, Philadelphia, PA 19102 (<https://atlas.phila.gov/#/1401%20JOHN%20F%20KENNEDY%20BLVD/zoning> (Last visited March 21, 2020)); see also City of Philadelphia Code, Chapter 14 Zoning and Planning.

¹³ SEPTA March 2020 Revenue & Ridership Report (<https://septa.org/strategic-plan/reports/revenue-ride.pdf> (Last visited March 21, 2020)); see also Henry Olsen *The United States might have a secret weapon against coronavirus*, The Washington Post (March 19, 2020) <https://www.washingtonpost.com/opinions/2020/03/19/united-states-might-have-secret-weapon-against-coronavirus/> (opinion piece discussing the role public transportation may play in the spread of Covid-19 and identifying the density of Wuhan province in China as 3,200 people per square mile) compare Statistical Atlas for Philadelphia available at <https://statisticalatlas.com/place/Pennsylvania/Philadelphia/Population> (Last visited March 22, 2020 (Philadelphia has a population density of 11.63 thousand per square mile).

¹⁴ Philadelphia is 134.10 square miles with approximately 11,379 people per square mile as of the 2010 Census. See U.S. Census Bureau Quickfacts, Philadelphia, Pennsylvania (<https://www.census.gov/quickfacts/philadelphiacitypennsylvania> (Last visited March 22, 2020)).

temporary intrusion upon our lives, too many Philadelphians will bear a disproportionate cost. The opening of some businesses that are not life-sustaining will put pressure on others to open, on employees to return to work, and will further strain the City's ability to enforce social distancing within its borders. The unnecessary spread of the virus will lengthen the period of time this epidemic will engulf our City and intensify the impact on our healthcare system.¹⁵ With the closing of Hahnemann University Hospital in the summer of 2019, the City lost a 496-bed hospital serving 150 or more daily in its emergency room.¹⁶ The city does not have the healthcare infrastructure to withstand the onslaught of Covid-19 cases that will arise should we fail to flatten the curve.

Our duty to act now, to act expeditiously, and to ensure that our citizens are protected from the danger to the public health posed by Covid-19 is a core function of state and local government. This is why it was well within the Governor's authority to preclude non-life-sustaining businesses like those operated by the Petitioners from remaining open during this crisis.

¹⁵ Tom Avril, *Coronavirus could mean even hospital-rich Philly won't have enough intensive-care beds, experts warn*, Philadelphia Inquirer (March 14, 2020) <https://www.inquirer.com/health/coronavirus/coronavirus-covid19-ventilators-icu-surge-20200314.html>.

¹⁶ Nina Feldman, *Hahnemann building eyed as option for overflow in cases of COVID-19 outbreak*, WHYY (March 11, 2020) (<https://whyy.org/articles/hahnemann-building-eyed-as-option-for-overflow-in-case-of-covid-19-outbreak/>).

B. Petitioners' Second Amendment Challenge

Petitioners argue that the March 19 Order should be enjoined because it “directly infringes on the right of Pennsylvanians to lawfully sell and acquire arms for defense of their home and hearth in direct contravention to Article 1, Section 21 and the Second Amendment.” Petitioners’ Kings’ Bench App. at 24. This claim is not likely to succeed on the merits. First, because this is a temporary closure order applicable to all non-life-sustaining businesses across numerous industries, Petitioners do not meet their threshold burden to establish that this temporary measure substantially burdens the rights of gun owners. Second, even assuming it does, the Order easily passes muster under intermediate scrutiny because it serves the Commonwealth’s compelling safety interest in protecting the lives of its citizens from threat of a deadly pandemic; and this immediate temporary closure is as narrowly tailored as possible to protect this interest by keeping customers out of proximity with one another and with store employees.

1. Standard for Analyzing Challenges Under the Second Amendment and Article 1, Section 21

Both the Third Circuit and Pennsylvania courts have adopted a two-step test for analyzing Second Amendment challenges. Under this well-established test, the court must first “ask whether the challenged law imposes a burden on conduct falling within the scope of the Second

Amendment's guarantee.” *Beers v. Attorney Gen. United States*, 927 F.3d 150, 154 (3d Cir. 2019). If the challenged law does not burden conduct that is protected by the Second Amendment, then there is no violation of the Second Amendment and the inquiry ends. *Id.*; see also *In re Keyes*, 83 A.3d 1016, 1025 (Pa Super. Ct. 2013).

Second, if the challenged law burdens conduct that is protected by the Second Amendment, then the law is assessed under heightened scrutiny. *Beers*, 927 F.3d at 150; *In re Keyes*, 83 A.3d at 1025. If the law survives heightened scrutiny, then it is constitutional. *Id.* A law should be subject to intermediate scrutiny when it does not severely limit the possession of firearms. *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to statute barring removal of serial numbers from firearms). Under intermediate scrutiny, the challenged law must be reasonably related to an important state interest. *Id.* at 97-98.

The plaintiff bears the threshold burden of establishing that a challenged law burdens conduct protected by the Second Amendment. *Beers*, 927 F.3d at 157 (placing threshold burden on plaintiff). Put simply, if the plaintiff has not provided evidence showing that the challenged law burdens the right to bear arms, then the challenge fails.

2. The March 19 Order Does Not Burden the Right to Bear Arms

The acquisition of new firearms from local gun stores during a public health emergency is not a right that is protected by the Second Amendment or by Article 1, Section 21 of the Pennsylvania Constitution. The Second Amendment to the United States Constitution provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. 2nd Amend. The core right protected by the Second Amendment is the right to keep and bear arms for self-defense. *See District of Columbia v. Heller*, 554 U.S. 570 (2008) (stating that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home”); *see also Marzzarella*, 614 F.3d at 90 (3d Cir. 2010) (“The Court concluded the Second Amendment confer[s] an individual right to keep and bear arms, at least for the core purpose of allowing law-abiding citizens to use arms in defense of hearth and home.”) (quotations and citations omitted).

Article 1, Section 21 of the Pennsylvania Constitution provides that “[t]he right of the citizens to bear arms in defense of themselves and the State shall not be questioned.” Pa. Const. Art. 1 § 21. Pennsylvania courts have held that “although the right to bear arms is a constitutional right, it is

not unlimited, and restrictions are a proper exercise of police power if they are intended to protect society.” *Caba v. Weaknecht*, 64 A.3d 39, 50 (Pa. Commw. Ct. 2013).

The March 19 Order does not infringe upon the core rights protected by the Second Amendment and Article 1, Section 21 of the Pennsylvania Constitution. The March 19 Order temporarily requires closure of all non-essential businesses, including gun shops and countless other types of businesses. Because of the unprecedented immediate public health crisis facing Pennsylvania, all non-essential businesses, including gun stores, must temporarily close to limit the person-to-person contact that is known to spread the deadly novel coronavirus. These temporary restrictions do not target gun commerce; rather unquestionably, their goal is to “flatten the curve” so that Covid-19 cases are spread out over a longer period of time such that hospitals across the Commonwealth can accommodate those who fall seriously ill.¹⁷

Ordinarily, Philadelphia residents may freely acquire guns from the various gun stores located in the City. The restriction at issue here is temporary and only restricts the ability of Pennsylvanians to acquire new

¹⁷ Nathaniel Lash, Brett Sholtis, *Demand for ICU beds will greatly outstrip availability if coronavirus hits Pa. hard*, Spotlight PA/Philadelphia Inquirer (March 20, 2020) <https://www.inquirer.com/health/coronavirus/spl/pennsylvania-icu-beds-coronavirus-hospital-capacity-20200320.html>.

guns from Pennsylvania gun stores until the emergency has lifted. It also obviously does not prevent Pennsylvanians from having access to firearms they already possess.

Further, the Second Amendment does not encompass a right to sell guns. As the Supreme Court explained in *Heller*, the regulation of sales of firearms is presumptively lawful. 554 U.S. at 626-27 (“nothing in our opinion should be taken to cast doubt on ... laws imposing conditions and qualifications on the commercial sale of arms”). The Third Circuit has held that the identification of certain “presumptively lawful” regulations (including regulation of the sale of firearms) in *Heller* means that the enumerated types of regulations are entirely outside the scope of the Second Amendment’s guarantee. *Marzzarella*, 614 F.3d at 91–92. Similarly, Pennsylvania law does not recognize a right to sell guns. *See in re Keyes*, 83 A.3d at 1026 (adopting the Third Circuit’s analysis in *Marzzarella*, holding that the types of regulations identified in *Heller* as “presumptively lawful” are outside the scope of the Second Amendment).

Thus, the petitioning gun shop has not made out a threshold Second Amendment claim. Further, neither has the petitioning gun owner, whose bare allegations that he cannot purchase a firearm temporarily during an unprecedented global pandemic fall well short of articulating a substantial

burden on his rights to possess firearms.

The March 19 Order does not burden conduct that falls within the guarantees of the Second Amendment or Article 1, Section 21 because there is no protected right to buy firearms at local gun stores during a public health emergency nor is there any freestanding constitutional right to sell firearms. Accordingly, Petitioners fail to meet their burden of showing that the March 19 Order infringes on protected conduct and their Second Amendment and Article 1, Section 21 challenge fails.

3. The March 19 Order Survives Intermediate Scrutiny

Even if the Court were to undertake an intermediate scrutiny analysis (which it should not), the March 19 Order easily survives. The Commonwealth (and City) have not just an important governmental interest in the closure of all but life-sustaining businesses; they have a compelling interest in the success of this measure. Further, for the reasons discussed above, severely limiting all commercial activity involving social contact is as narrowly-tailored a measure as possible to prevent the spread of this deadly disease.

Intermediate scrutiny requires the asserted governmental end to be more than just legitimate, either “significant,” “substantial,” or “important” and that the fit between the challenged regulation and the asserted objective

be reasonable, not perfect. *See, e.g., Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 662 (1994); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001). The regulation need not be the least restrictive means of serving the interest, *see, e.g., Turner Broad. Sys.*, 512 U.S. at 662. Here, the government interest is the preservation of human life in a pandemic. The novel coronavirus is highly communicable and current data indicates that the disease it causes leads to death in at least 1.4 percent of cases.¹⁸ At this point in the coronavirus pandemic, the only way to curtail spread of the disease is to severely limit person-to-person contact. Governments all over the country and the world have ordered the closure of non-essential business. These measures are necessary to maintain social distancing. Prior to the March 19 Order, retail establishments in Philadelphia, including gun stores, were crowded with shoppers standing in long lines to stock up on supplies.¹⁹ The temporary regulation imposed by the March 19 Order to close all businesses that are not life-sustaining is reasonably related to the important government interest of curtailing the spread of coronavirus.²⁰

¹⁸ “Coronavirus Death Rate in Wuhan Is Lower than Previously Thought, Study Finds,” N.Y. Times (March 19, 2019).

¹⁹ *See, e.g.*, “Residents stocking up on guns amid COVID-19 outbreak,” 6abc.com (March 18, 2020).

²⁰ The March 19 Order survives even strict scrutiny. The preservation of human life during a pandemic is a compelling government interest and the temporary closure of non-

III. CONCLUSION

For all of the reasons set forth above and by the Respondent, the Court should deny the Application.

Respectfully submitted,

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March 22, 2020

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essential businesses is narrowly tailored to limit person-to-person contact to contain the spread of disease.

CERTIFICATE OF COUNSEL

I hereby certify that this brief contains 3,464 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

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

/s/ Lydia Furst
Lydia Furst
Deputy City Solicitor
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CERTIFICATE OF SERVICE

I hereby certify that I served this Application and accompanying Amicus Brief upon counsel of record by electronic service.

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