

IN THE SUPREME COURT OF PENNSYLVANIA

THE HONORABLE TOM WOLF,
Governor of the Commonwealth of
Pennsylvania,

Petitioner,

v.

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

Respondents.

No. 104 MM 2020

**APPLICATION FOR LEAVE TO
FILE AMICUS CURIAE BRIEF
ON BEHALF OF THE
COMMONWEALTH
FOUNDATION FOR PUBLIC
POLICY ALTERNATIVES**

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(1), the Commonwealth Foundation for Public Policy Alternatives (“Commonwealth Foundation”) requests leave to file the accompanying amicus curiae brief and attached exhibits for this Court’s consideration in the above-captioned matter. In support thereof, Commonwealth states:

1. The Commonwealth Foundation transforms free-market ideas into public policies so all Pennsylvanians can flourish. The Commonwealth Foundation’s vision is that Pennsylvania once again writes a new chapter in America's story by ensuring all people have equal opportunity to pursue their dreams and earn success.

2. Since the Commonwealth Foundation began fighting for freedom in Pennsylvania in 1988, it has saved taxpayers billions of dollars, brought greater knowledge of free-market principles and happenings in Harrisburg to millions of fellow citizens, and helped enable hundreds of thousands of families to choose a school for themselves.

3. The Commonwealth Foundation has studied the issues presented, has closely followed the executive actions taken following the declaration of emergency and the impact of these actions, has carefully watched public debate between the General Assembly and Governor Wolf, and believes that the Court will benefit from its perspective.

WHEREFORE, the Commonwealth Foundation respectfully requests that this Court grant its request to file an amicus curiae brief as attached hereto.

Respectfully Submitted,

June 22, 2020

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Respondents.

BRIEF OF AMICUS CURIAE, THE COMMONWEALTH FOUNDATION FOR PUBLIC POLICY ALTERNATIVES, IN SUPPORT OF RESPONDENTS

On Application for Extraordinary Relief
(344 MD 2020)

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, the Commonwealth Foundation for Public Policy Alternatives (“Commonwealth Foundation”), files this brief in support of Respondents Senator Joseph B. Scarnati, III, Senator Jake Corman, and Senate Republican Caucus (“Legislators”), who sought a writ of mandamus directing Petitioner the Honorable Tom Wolf (“Governor Wolf”) to issue an executive order or proclamation ending his previous declaration of disaster emergency pursuant to section 7301(c) of the Emergency Management Services Code (“section 7301(c)"). See 35 Pa.C.S. § 7301(c) (“The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency.”).

The Commonwealth Foundation transforms free-market ideas into public policies so all Pennsylvanians can flourish. The Commonwealth Foundation’s vision is that Pennsylvania once again writes a new chapter in America's story by ensuring all people have equal opportunity to pursue their dreams and earn success. Since the Commonwealth Foundation began fighting for freedom in Pennsylvania in 1988, it has saved taxpayers billions of dollars, brought greater knowledge of free-market principles and

happenings in Harrisburg to millions of fellow citizens, and helped enable hundreds of thousands of families to choose a school for themselves.

The Commonwealth Foundation has studied the issues presented, has closely followed the executive actions taken following the declaration of emergency and the impact of these actions, has carefully watched public debate between the General Assembly and Governor Wolf, and believes that the Court will benefit from its perspective.

FACTS

I. SUMMARY TIMELINE¹ OF THE DISASTER DECLARATION AND BUSINESS CLOSURE ORDERS

On March 6, 2020, Governor Tom Wolf proclaimed a disaster emergency throughout Pennsylvania “pursuant to the provisions of Subsection 7301(c) of the Emergency Management Services Code” based on the threat to public health caused by COVID-19.²

Thereafter, on March 19 at 5:00 p.m., Governor Wolf ordered that all “non-life-sustaining businesses” close indefinitely at 8 p.m., with enforcement actions for non-compliance beginning 12:01 a.m. on Saturday,

¹ A more detailed timeline is attached hereto as “Exhibit A.”

² See Proclamation of Disaster Emergency (Mar. 6, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf>.

March 21.³ Enforcement was later delayed, however, until 8 a.m. on March 23. The life-sustaining-business list was modified at least four times between March 19 and April 3.⁴

Governor Wolf's public justification for the business closure order was to "flatten the curve"—that is, limiting the number of hospitalized cases during the initial peak to prevent hospitals from being overwhelmed.⁵ Over the long term, this strategy does not reduce the total number of cases of individuals infected.⁶

³ See Press Release, Governor Tom Wolf, All Non-Life-Sustaining Businesses in Pennsylvania to Close Physical Locations as of 8 PM Today to Slow Spread of COVID-19 (Mar. 19, 2020), <https://www.governor.pa.gov/newsroom/all-non-life-sustaining-businesses-in-pennsylvania-to-close-physical-locations-as-of-8-pm-today-to-slow-spread-of-covid-19/>; Order of the Governor of the Commonwealth of Pa. Regarding the Closure of All Businesses That Are Not Life Sustaining (Mar. 19, 2020), <https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order>.

⁴ Various iterations are available on at Scribd (Office of Governor Wolf Account), <https://www.scribd.com/document/452553026/UPDATED-9-00am-May-28-2020-Industry-Operation-Guidance>; Scribd (PennLive Account), <https://www.scribd.com/document/452417159/20200319-Life-Sustaining-Business>; Carlisle Sentinel, https://cumberlink.com/news/local/govt-and-politics/gov-tom-wolfs-updated-list-of-businesses-considered-life-sustaining/article_ecaf44d3-2941-53b4-8a35-22f3e11fcca0.html; and Pittsburgh Post-Gazette, https://www.post-gazette.com/business/pittsburgh-company-news/2020/03/20/Gov-Wolf-revises-list-of-which-businesses-qualify-as-life-sustaining/stories/202003200140_

⁵ For example, in his press release from March 26, 2020, Governor Wolf stated that "[t]he commonwealth, and the nation, is facing an unprecedented and uncertain time, and as we work to flatten the curve we must also ramp up efforts to provide Pennsylvania's health care system with the critical supplies it needs to treat individuals with COVID-19." Press Release, Governor Tom Wolf, Wolf Administration Launches Commonwealth of Pennsylvania Critical Medical Supplies Procurement Portal (Mar. 26, 2020), <https://www.governor.pa.gov/newsroom/wolf-administration-launches-commonwealth-of-pennsylvania-critical-medical-supplies-procurement-portal/>.

⁶ See, e.g., University of Michigan Health, Flattening the Curve for COVID-19: What Does It Mean and How Can You Help? (Mar. 11, 2020),

Following the business closure order on March 19, Governor Wolf also created a waiver process by which businesses not considered life-sustaining could apply to the Department of Community and Economic Development (“DCED”) to reopen.⁷ At the end of the process, nearly 43,000 waiver applications were submitted and more than 6,000 businesses received a waiver, though many businesses waited weeks without receiving a response. As was widely reported, the waiver process was secretive and fraught with concerns about impropriety, causing “widespread frustration, anger, and confusion.”⁸

On April 29, Republican Senators asked Auditor General Eugene DePasquale to investigate the DCED waiver process.⁹ The following day, April 30, the Auditor General announced he would be conducting an audit of the waiver process.¹⁰

https://healthblog.uofmhealth.org/wellness-prevention/flattening-curve-for-covid-19-what-does-it-mean-and-how-can-you-help_

⁷ See DCED, Businesses that Received an Exemption from Closure, <https://dced.pa.gov/covid-19-exempt-businesses/>

⁸ Brad Bumstead and Angela Couloumbis, Pa. to Close Waiver Process for Businesses Affected by Coronavirus Shutdown as Calls for Transparency Mount, Spotlight PA, Apr. 3, 2020, <https://www.mcall.com/news/pennsylvania/mc-nws-coronavirus-waivers-republicans-20200403-p7xmu35g3rbx5gsgkhfffjwjq-story.html>.

⁹ See Barbara Miller, Republican Senators Ask Auditor General to Look Into DCED's Coronavirus Response, Washington Observer Reporter, Apr. 30, 2020, https://observer-reporter.com/news/localnews/republican-senators-ask-auditor-general-to-look-into-dceds-coronavirus-response/article_8698841a-8a35-11ea-babc-473df3fd680d.html_

¹⁰ See Press Release, Pa. Auditor General, Auditor General DePasquale to Audit State's Handling of COVID-19 Business Shutdown Waivers (Apr. 30, 2020),

Also on April 30, the Senate Veteran Affairs and Disaster Preparedness Committee issued a subpoena to Governor Wolf for documents and records related to the waiver process.¹¹ However, on May 8, Governor Wolf announced he would not comply with the Senate subpoena; instead, he announced a partial posting of businesses that received waivers.¹² Additional information was later added to this list. In the following days, news stories revealed that DCED had—the night before posting the full list—revoked certain business waivers that had been granted weeks earlier.¹³ Those businesses from which waivers were revoked were not publicly disclosed.¹⁴

https://www.paauditor.gov/press-releases/auditor-general-depasquale-to-audit-state-s-handling-of-covid-19-business-shutdown-waivers_

¹¹ See Press Release, Sen. Mike Regan, Committee Votes to Subpoena Information after Wolf Administration Fails to Provide (Apr. 30, 2020), <https://www.senatormikereganpa.com/2020/04/30/committee-votes-to-subpoena-information-after-wolf-administration-fails-to-provide/>. The subpoena has been uploaded to Ed Mahon's Scribd account:

https://www.scribd.com/document/459229333/Subpoena-Gov-Wolf-April-2020#from_embed

¹² See Angela Couloubis and Cynthia Fernandez, Gov. Tom Wolf Rejects GOP Subpoena for Business Waiver Records, But Releases Some Information Online, Spotlight PA, May 9, 2020, <https://www.pennlive.com/news/2020/05/gov-tom-wolf-rejects-gop-subpoena-for-business-waiver-records-but-releases-some-information-online.html>

¹³ See Angela Couloubis and Charlotte Keith, Pa. Officials Revoked Business Waivers the Night Before Publishing List of Recipients, Spotlight PA, May 13, 2020, https://lancasteronline.com/news/politics/pa-officials-revoked-business-waivers-the-night-before-publishing-list-of-recipients/article_62de6c0e-9513-11ea-824e-d7729601cd64.html.

¹⁴ See id.

On June 3, 2020, Governor Wolf renewed his proclamation of disaster emergency “pursuant to the provisions of section 7301(c) of the Emergency Management Services Code” for another 90 days,¹⁵ and announced that he would allow the statewide “stay at home order,” to expire on June 4.¹⁶

On June 9, 2020, the House and Senate independently adopted a concurrent resolution (“HR 836”), which, pursuant to section 7301(c), terminated the state of disaster emergency declared by Governor Wolf.¹⁷ However, Governor Wolf has refused to “issue an executive order or proclamation ending the state of disaster emergency” as required by section 7301(c).

II. KEY HEALTH CARE AND ECONOMIC TRENDS RELATED TO GUBERNATORIAL AND LEGISLATIVE ACTION¹⁸

As of June 16, 794 hospital beds were occupied with COVID-19 patients, representing less than 2.2 percent of approximately 37,000 total

¹⁵ Amendment to Proclamation of Disaster Emergency (June 3, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/06/20200603-TWW-amendment-to-COVID-disaster-emergency-proclamation.pdf>.

¹⁶ See Press Release, Governor Tom Wolf, Gov. Wolf Renews COVID-19 Disaster Declaration for State Response and Recovery, Stay-at-Home Order Ends June 4” (June 3, 2020), <https://www.governor.pa.gov/newsroom/gov-wolf-renews-covid-19-disaster-declaration-for-state-response-and-recovery-stay-at-home-order-ends-june-4/>.

¹⁷ The text, history, and voting record relative to HR 836 are available at <https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?sYear=2019&sInd=0&body=H&type=R&bn=836>.

¹⁸ Charts illustrating these trends are attached hereto as “Exhibit B.”

hospital beds in Pennsylvania. At the peak, on April 27, 2020, 2,796 hospital beds were occupied, or 7.6 percent of the total. On every day from April 9 through June 16, the Pennsylvania Department of Health reported at least 40 percent of hospital beds were open.

Meanwhile, 167 invasive ventilators were in use on June 16 by COVID-19 patients, representing 3.1% of the total available in Pennsylvania. At the peak, on April 27, 962 were in use, or 11.8% of the ventilators that were then available for use. On every day from April 9 through June 16, the Pennsylvania Department of Health reported at least 69.6 percent of available ventilators were not being used by patients of any kind.¹⁹

Through June 16, 68.3 percent of the COVID-19 deaths in Pennsylvania have been from residents in nursing homes or personal care facilities.²⁰ This disproportionate impact on older populations and those in nursing homes was predicted, yet, as we later learned, Governor Wolf's

¹⁹ See Pennsylvania Department of Health, Pennsylvania COVID-19 Dashboard, Hospital Preparedness, <https://experience.arcgis.com/experience/cfb3803eb93d42f7ab1c2cfccca78bf7>; For trends, see Commonwealth Foundation, Tracking COVID-19 in Pennsylvania, https://infogram.com/tracking-covid-19-in-pennsylvania-1hke60w8rnm145r?live_

²⁰ See Press Release, Pennsylvania Department of Health, Department of Health Provides Update on COVID-19, 362 Positives Bring Statewide Total to 79,483 (June 16, 2020), <https://www.media.pa.gov/Pages/Health-Details.aspx?newsid=864>; For trends, see Commonwealth Foundation, Tracking COVID-19 in Pennsylvania, https://infogram.com/tracking-covid-19-in-pennsylvania-1hke60w8rnm145r?live_

administration had created—yet never implemented—a plan in mid-March to respond to outbreaks in nursing homes.²¹

From March 15 to June 15, Pennsylvania residents have filed 1.975 million traditional unemployment claims and another 609,769 Pandemic Unemployment Assistance claims—the total of 2.5 million claims represents both payroll jobs lost and self-employed/contractors out of work. By comparison, prior to 2020, the most claims in a year was 1.87 million in 2009—nearly 600,000 fewer in twelve months than the claims filed in the last three months.²²

Pennsylvania’s official unemployment rate, calculated by the U.S. Bureau of Labor Statistics, reached 15.1 percent in April. This is the highest level on record in Pennsylvania, and the highest since the estimated unemployment rate during the Great Depression.²³

²¹ Aneri Pattani and Rebecca Moss, Pa. Had an Early Plan to Protect Nursing Home Residents from COVID-19, But Never Fully Implemented It, Spotlight PA, May 11, 2020, https://www.post-gazette.com/news/health/2020/05/11/Pennsylvania-plan-nursing-homes-long-term-care-coronavirus-COVID-19-cases-deaths-response/stories/202005090064_

²² See Pennsylvania Department of Labor, Unemployment Compensation Claim Statistics & COVID-19, <https://www.uc.pa.gov/COVID-19/Pages/UC-Claim-Statistics.aspx>, Pandemic Unemployment Assistance (PUA) Claim Statistics, <https://www.uc.pa.gov/COVID-19/Statistics/Pages/PUA-Claim-Statistics.aspx>; U.S. Department of Labor, Unemployment Insurance Weekly Claims Data, https://oui.doleta.gov/unemploy/claims.asp_

²³ See Press Release, U.S. Bureau of Labor Statistics, State Employment and Unemployment—May 2020 (June 19, 2020), <https://www.bls.gov/news.release/laus.nr0.htm>.

A recent report from the Federal Reserve Bank of Philadelphia finds Pennsylvania's initial unemployment insurance claims "were exceptionally high" compared to other states, attributing the disparity to Pennsylvania's shutdown being earlier, more expansive, and having fewer exemptions than most other states.²⁴ More than 60 percent of Pennsylvania small businesses indicated that they are at risk of closing, permanently, within the next five months, according to a survey conducted by Main Street American in early April.²⁵

The Independent Fiscal Office projects Pennsylvania General Fund revenue loss over the 2019-20 and 2020-21 fiscal years will total approximately \$4.9 billion.²⁶ With this projected, yet uncertain, revenue shortfall in mind the General Assembly passed an "interim budget," signed by Governor Wolf on May 29, that funds most parts of state government at five months of the prior year's budget. This represents a 58.3 percent

²⁴ See Paul R. Flora and Ryan Michaels, Federal Reserve Bank of Philadelphia, Why Were Pennsylvania's Initial UI Claims so High? 1, June 2020, https://www.philadelphiafed.org/-/media/research-and-data/publications/research-brief/rb_20200601.pdf.

²⁵ See ABC 27 News, More Than 60% of Surveyed Small Businesses in Pa. at Risk of Closure in Five Months, Apr. 17, 2020, <https://www.abc27.com/news/local/harrisburg/more-than-60-of-surveyed-small-businesses-in-pa-at-risk-of-closure-in-five-months/>

²⁶ See Pennsylvania Independent Fiscal Office, Initial Revenue Estimate FY 2020-21 (May 26, 2020), <http://www.ifo.state.pa.us/releases/374/Initial-Revenue-Estimate-FY-2020-21/>.

spending reduction for most agencies²⁷—including the judiciary and the Legislature—with the intent to revisit the budget later this year.

SUMMARY OF ARGUMENT

This Court should direct Governor Wolf to issue an executive order or proclamation consistent with section 7301(c). Legislators have a clear right to relief and Governor Wolf has a corresponding duty to issue an executive order or proclamation: section 7301(c) promises that “[t]he General Assembly by concurrent resolution may terminate a state of disaster emergency at any time,” and that, “[t]hereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency.” By ignoring this resolution, Governor Wolf is suspending law without the authorization of the General Assembly.

In his defense, Governor Wolf now argues that section 7301(c) is unconstitutional in part because it allows the General Assembly to effectively end his declaration of disaster emergency without giving him the opportunity to veto it. However, Governor Wolf fails to understand the constitutional context surrounding section 7301(c). The Governor’s

²⁷ See Pennsylvania Office of the Budget, 2020-21 Enacted Budget Line-Item Appropriations (Interim Budget) (May 29, 2020), <https://www.budget.pa.gov/PublicationsAndReports/CommonwealthBudget/Pages/default.aspx>.

exercise of power under section 7301(c) is, in the first instance, a delegation of otherwise-legislative authority to the executive, allowing the Governor to respond quickly where the General Assembly cannot. The fact that the General Assembly limited its delegation only during a state of emergency disaster is not only constitutional, it is required as a “procedural mechanism[] that serve[s] to limit or prevent the arbitrary and capricious exercise of the delegated power.”²⁸ Indeed, were the General Assembly not permitted to end the state of disaster emergency and its limited delegation, it would appear nothing could stop him—or any future Governor—from assuming immense power merely predicated on an emergency disaster declaration. Section 7301(c)’s delegation would be constitutionally impermissible under the nondelegation doctrine.

Finally, Governor Wolf appears to believe that the urgency of the moment justifies his assumption of unilateral, unchecked authority and his selective ignorance of section 7301(c). But the power to suspend law can only be exercised by the General Assembly or with its “authority” under Article I, Section 12, of the Pennsylvania Constitution.

²⁸ Protz v. Workers’ Comp. Appeal Bd., 161 A.3d 827, 834 (Pa. 2017).

ARGUMENT

This Court should grant mandamus relief to Legislators and order Governor Wolf to comply with his duty under section 7301(c). Governor Wolf's illogical insistence that the very statute empowering him to declare a state of disaster emergency can only confer unbridled authority must be rejected as contrary to our constitutional framework.

This Court's "standard by which a grant of mandamus relief must be evaluated is well-settled" Kegeise v. Delgrande, 183 A.3d 997, 1004 (Pa. 2018):

Mandamus is an extraordinary writ that will only lie to compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate or adequate remedy. It may be used to compel performance of a ministerial duty, or to compel action in a matter involving judgment or discretion. However, it may not be used to direct the exercise of judgment or discretion in a particular way, or to direct the retraction or reversal of an action already taken.

Id. (quoting Chanceford Aviation Props., L.L.P. v. Chanceford Twp. Bd. of Supervisors, 923 A.2d 1099, 1107-08 (Pa. 2007)).

I. LEGISLATORS HAVE A CLEAR LEGAL RIGHT, AND GOVERNOR WOLF HAS A CORRESPONDING MINISTERIAL DUTY TO ACT

This is an easy mandamus case. The plain language of section 7301(c) entitles Legislators to relief and imposes on Governor Wolf a

ministerial duty to enter an executive order or proclamation ending the state of disaster emergency. This Court must grant relief to Legislators.

Under section 7301(c), the General Assembly can terminate the Governor's state of disaster emergency by concurrent resolution passed by a simple majority. When such a resolution is passed, "the Governor shall issue an executive order or proclamation ending the state of disaster emergency." This language does not say he may issue and order or proclamation:

(c) Declaration of disaster emergency.--A disaster emergency shall be declared by executive order or proclamation of the Governor upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent. . . . The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency.
...

(Emphasis added).

Critically, section 7301(c)'s "shall issue" directive is not found in other laws permitting the General Assembly to end executive action by resolution. For instance, section 7(d) of the Regulatory Review Act, 71 P.S. § 745.7, provides a process by which a concurrent resolution can effectively end agency action, but it also provides that the Governor can veto such a resolution:

(d) Upon receipt of the commission's order pursuant to subsection (c.1) or at the expiration of the commission's review period if the commission does not act on the regulation or does not deliver its order pursuant to subsection (c.1), one or both of the committees may, within 14 calendar days, report to the House of Representatives or Senate a concurrent resolution and notify the agency. During the 14-calendar-day period, the agency may not promulgate the final-form or final-omitted regulation. If, by the expiration of the 14-calendar-day period, neither committee reports a concurrent resolution, the committees shall be deemed to have approved the final-form or final-omitted regulation, and the agency may promulgate that regulation. If either committee reports a concurrent resolution before the expiration of the 14-day period, the Senate and the House of Representatives shall each have 30 calendar days or ten legislative days, whichever is longer, from the date on which the concurrent resolution has been reported, to adopt the concurrent resolution. If the General Assembly adopts the concurrent resolution by majority vote in both the Senate and the House of Representatives, the concurrent resolution shall be presented to the Governor in accordance with section 9 of Article III of the Constitution of Pennsylvania. If the Governor does not return the concurrent resolution to the General Assembly within ten calendar days after it is presented, the Governor shall be deemed to have approved the concurrent resolution. If the Governor vetoes the concurrent resolution, the General Assembly may override that veto by a two-thirds vote in each house. The Senate and the House of Representatives shall each have 30 calendar days or ten legislative days, whichever is longer, to override the veto. If the General Assembly does not adopt the concurrent resolution

or override the veto in the time prescribed in this subsection, it shall be deemed to have approved the final-form or final-omitted regulation. Notice as to any final disposition of a concurrent resolution considered in accordance with this section shall be published in the Pennsylvania Bulletin. The bar on promulgation of the final-form or final-omitted regulation shall continue until that regulation has been approved or deemed approved in accordance with this subsection. If the General Assembly adopts the concurrent resolution and the Governor approves or is deemed to have approved the concurrent resolution or if the General Assembly overrides the Governor's veto of the concurrent resolution, the agency shall be barred from promulgating the final-form or final-omitted regulation. If the General Assembly does not adopt the concurrent resolution or if the Governor vetoes the concurrent resolution and the General Assembly does not override the Governor's veto, the agency may promulgate the final-form or final-omitted regulation. The General Assembly may, at its discretion, adopt a concurrent resolution disapproving the final-form or final-omitted regulation to indicate the intent of the General Assembly but permit the agency to promulgate that regulation.

(Emphasis added).

The General Assembly purposely declined to include such a veto mechanism in section 7301(c) and thereby made manifest its intent to require ministerial gubernatorial action whenever a concurrent resolution ends a state of disaster emergency. Accordingly, this Court should order Governor Wolf to comply with section 7301(c).

II. SECTION 7301(c) IS EITHER A CONSTITUTIONAL DELEGATION OF LIMITED POWER TO THE EXECUTIVE OR SECTION 7301 IS UNCONSTITUTIONAL IN ITS ENTIRETY

A. Section 7301(c) Delegates Legislative Authority Only to the Extent a Disaster Emergency Exists

As this Court has recognized, section 7301(c) reflects a careful balancing of delegated legislative and executive authority to timely respond to disaster emergencies. In so doing, the General Assembly never relinquished its right to end the disaster emergency declaration and reassume its legislative authority upon concurrent resolution. In fact, such a procedural mechanism would be required under the nondelegation doctrine. See Protz, 161 A.3d at 834 (“In many non-delegation cases, this Court also has stressed the importance of procedural mechanisms that serve to limit or prevent the arbitrary and capricious exercise of delegated power.”).

In Friends of Danny DeVito v. Wolf, No. 68 MM 2020, 2020 WL 1847100, at *8-9 (Pa. Apr. 13, 2020), this Court recognized that the Emergency Management Services Code (“Emergency Code”) includes a legislative delegation of authority to Governor Wolf, specifically, “vest[ing him] with broad emergency management powers” and “empower[ing him] to ‘issue, amend and rescind executive orders, proclamations and regulations which shall have the force and effect of law.’” This Court’s

determinations that Governor Wolf's actions did not violate the separation of powers doctrine or constitute a regulatory taking were premised on the reality that "the General Assembly, by and through its enactment of the Emergency Code, specifically and expressly authorize[d]" such actions and that the General Assembly's authorization "provides the General Assembly with the ability to terminate the order at any time." Id. at *15, 17.

Furthermore, this Court recognized that such "broad powers granted to the Governor" were necessarily "counterbalance[d]" by the General Assembly's statutory reservation of the right to terminate the state of disaster emergency "at any time." Id. at *9. Nowhere did this Court even question the General Assembly's ability to do so by concurrent resolution.²⁹

Now, Governor Wolf argues that the General Assembly's limited delegation is somehow unconstitutional. But Governor Wolf refuses to

²⁹ By default, concurrent resolutions are not subject to gubernatorial veto. Some recent examples:

- SR 399 of 2018; a concurrent resolution passed by the House and Senate, and transmitted, but without action taken by the Governor. See https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syearch=2017&searchbody=S&searchtype=R&searchbn=399.
- SR 148 of 2011; a concurrent resolution accepting redistricting data, passed by the House and Senate, but without action taken by the Governor. See https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syearch=2011&searchbody=S&searchtype=R&searchbn=148.
- SR 246 of 2012; a concurrent resolution urging Congressional action, passed by the House and Senate, and transmitted, but without action taken by the Governor. See https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syearch=2011&searchbody=S&searchtype=R&searchbn=246.

acknowledge that the Emergency Code represents a grant of delegated authority to the executive in the first instance. See id. The fact that such delegation also included a limitation—namely, the existence of a disaster emergency as a condition precedent—to the Governor’s exercise of power under section 7301(c) simply means that the delegation is not unfettered. The concurrent resolution ended that condition precedent and made clear that the delegation of otherwise-legislative authority was no longer needed.

B. If Governor Wolf is Correct That It Would Be Unconstitutional to Allow for a Concurrent Resolution to End a State of Disaster Emergency, Section 1703 is Unconstitutional in Its Entirety

Were this Court inclined to accept Governor Wolf’s argument that non-presentment makes section 1703(c) unconstitutional in part, it must accept the logical consequence of that argument. That is, without any check on executive authority, section 1703 would be unconstitutional in its entirety.

Section 1703 reflects the fact that Governor Wolf has constitutional authority to respond to disasters, but it specifically grants greater-than-constitutional authority to Governor Wolf to, for example, “issue, amend and rescind . . . regulations,” “[s]uspend the provisions of any regulatory statute,” “commandeer or utilize any private, public or quasi-public property,” “[s]uspend or limit the sale, dispensing or transportation” of

certain goods, and “[c]onfer the power of arrest on the law enforcement personnel serving as part of the emergency forces.” 35 Pa.C.S. § 7301(b), (f). The only “counterbalance to the exercise of the broad powers granted to the Governor” under section 7301 is the ability of the General Assembly to independently determine that the state of disaster emergency is over. DeVito, 2020 WL 1847100, at *9.

Indeed, without such limitation, section 7301 would violate the nondelegation doctrine, which requires that “the General Assembly must make ‘the basic policy choices,’” that the grant of authority be accompanied by “adequate standards which will guide and restrain the exercise of the delegated administrative functions,” and that the General Assembly specify “procedural mechanisms that serve to limit or prevent the arbitrary and capricious exercise of delegated power.” Protz, 161 A.3d at 834 (quoting Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 418 (Pa. 2005)). Without the General Assembly’s ability to end a disaster emergency declaration, Governor Wolf—or some future Governor— would be permitted to renew his or her declaration of disaster emergency every 90 days in perpetuity and exercise near-unlimited power well outside the scope of his constitutional office.

Dreaming up and superimposing on section 7301(c) a presentment requirement would not save the rest of section 7301 from its resulting problems under the nondelegation doctrine. In practice, such a ruling would give the Governor the authority to suspend law indefinitely under the Emergency Code, until two-thirds of both the House and Senate would vote to override a Governor's veto of the concurrent resolution. By comparison, a lower threshold—a majority of House members voting and two-thirds of Senators voting—would be required for the impeachment of a Governor.

C. Only the General Assembly Has the Constitutional Power of Suspending Law

Finally, Governor Wolf seems to believe he can suspend the law whenever there is an emergency. But Article I, Section 12, of the Pennsylvania Constitution makes clear that “[n]o power of suspending laws shall be exercised unless by the Legislature or by its authority.”

Governor Wolf has, following the declaration of emergency, used executive order to suspend many laws and regulations,³⁰ delay deadlines required by law and regulation, and exercise authority granted him using emergency powers to issue orders he would not otherwise be able do, including ordering the closure of schools and businesses.

³⁰ See, for instance, a list of Department of State regulations suspended by executive action: <https://www.dos.pa.gov/Pages/COVID-19-Waivers.aspx>

By passing the concurrent resolution HR 836, the Legislature has made it clear it no longer grants Governor Wolf the authority to suspend law under the Proclamation of Disaster Emergency. The Court should defer to the Legislature what “by its authority” means.

CONCLUSION

For these reasons, the Court should order Governor Wolf to issue an executive order or proclamation consistent with section 7301(c). Such a ruling would be entirely consistent with the Pennsylvania Constitution and the needs of our Commonwealth.

Respectfully Submitted,

June 22, 2020

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CERTIFICATION OF COMPLIANCE WITH RULE 127

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

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EXHIBIT A

Timeline of Gov. Wolf Emergency Actions and Business Closure and Response by the Pennsylvania General Assembly

Initial Gov. Wolf Orders

- March 4 – Wolf ordered the activation of the Commonwealth Response Coordination Center to support the Department of Health’s Department Operations Center to coordinate COVID-19 responses across Pennsylvania.
- March 6 – Wolf proclaimed a **disaster emergency** throughout Pennsylvania, allowing additional measures to be taken to protect public safety and health.
- March 13 – Wolf ordered the closure of all K-12 schools for 10 business days starting March 16.
- March 14 – Wolf **strongly urged**, through the Department of Community and Economic Development and Department of Health, closing non-essential businesses in mitigation counties (Bucks, Chester, Delaware, and Montgomery).
- March 17 – Wolf expanded upon this mitigation and *recommended and issued guidance for the closure of all non-essential businesses* for 14 days across all 67 counties, in addition to supporting no-visitor policies for certain facilities and suspension of gatherings of more than 10 people. While non-essential businesses still had the choice to remain open or comply with the recommendations, he *ordered* restaurant and bar dine-in facilities to close, under threat of penalty, and for state employees to work virtually as able.
- March 19 – Wolf **ordered**, at 5 p.m., all "non-life-sustaining businesses" to close at 8 p.m., with enforcement actions for non-compliance beginning 12 a.m. on Saturday, March 21. Enforcement was **delayed**, however, until 8 a.m. on March 23 due to waiver requests **approaching 10,000** over the weekend. *This order superseded previous business closure recommendations.*
 - The life sustaining business list was modified at least four times between March 19 and April 3.
- March 23 – Wolf **extended** school closures another two weeks and issued a stay-at-home order in seven counties. Roads, pharmacies, grocery stores, and essential businesses remain open.
 - The stay-at-home list has since **been extended** to all 67 counties.
- March 30 – The governor **closed** businesses and school indefinitely.
- March 31 – The president **approved** part of Wolf's request for a major disaster declaration, providing federal funding for all levels of Pennsylvania government to respond to COVID-19.

Wolf Doubles Down

- April 1 – The administration announced the **waiver application process would close** on April 3, at 5 p.m.
- April 7 – Pa House amends SB 613 to align business closures with federal guidelines, using the CISA of essential infrastructure rather than Gov. Wolf’s “life sustaining business” list.
- April 9 – Wolf **extended school closures** for the remainder of the academic year.
- April 13 - Wolf announces **PA is joining multi-state council** with other northeast (Democratic) governors to coordinate plan to reopen.
- April 13 – Wolf holds **7-minute long evening televised address** to encourage residents to stay at home and says “By doing nothing, we are doing something truly extraordinary.”

- April 14-15 – Pa House and Senate pass SB 613, with [support of Commonwealth Foundation](#), along party lines.
- April 15 – Wolf orders all open businesses to [require workers and customers to wear masks](#) at all times.
- April 17—As unemployment claims reach roughly 1 in 4 workers, Wolf indicates he will veto SB 613, but also says [he has a plan for recovery](#). This plan has no details about reopening, but a long list of unrelated priorities, including higher minimum wage, paid leave mandates, and more government spending.
- April 20—Wolf [vetoes SB 613](#) and [extends stay-at-home order until May 8](#).

Gov. Wolf Changes Course, Seemingly as Result of Political Pressure

- April 20
 - Grassroots “reopen PA” rally at the Capitol.
 - Wolf [announces PLCB curbside service, opening residential construction on the May 8, and allowing online car sales](#) with changes to the notary law, but [stops short of transparency](#).
- April 21
 - Pa House passes [HB 2400](#) to open up construction work, [HB 2376](#) to allow smaller retailers who would otherwise be closed to offer curbside pickup, and [HB 2388](#) to allow car dealers to reopen, all with bipartisan support.
 - PA Senate passes the telemedicine bill, [SB 857](#), despite threat of veto from Wolf because of lack of abortion provisions.
 - UPMC—the largest hospital system in Pennsylvania, announced [they would resume elective surgeries](#).
- April 22
 - Wolf outlines a [“regional approach” to reopening](#).
 - Wolf moves up the date for [construction reopening to May 1](#).
- April 25
 - [Wolf clarifies reopening plan](#) to include the 50 new confirmed cases per 100,000 population reported to the department in the previous 14 days requirement.
- April 27
 - Wolf says that the [regional approach was a misunderstanding](#).
 - Wolf announces that [hospitals may resume elective procedures](#), many of which are medically necessary.
 - Wolf announces [golf and other outdoor recreational activities can resume](#).
- April 28
 - PA House passed [HB 2412](#) to reopen real estate transactions and activities—with an increasingly large bipartisan majority.
 - Wolf [announces relaxing restrictions on real estate](#)—transactions in progress, and those for individuals who have sold their prior home or who terminated a lease [may proceed immediately](#); all others may resume when a county move into the “yellow” category.
 - Wolf [changes his approach](#) to reopening to a county-by-county decision—says that any indication the reopening will occur by region was a

“misunderstanding”—and indicates the first counties to reopen **will be announced** Friday, May 1.

Tension and Conflict Escalates

April 29:

- Wolf **vetoes telemedicine bill**—bill would open up telemedicine across most aspects of health care, except for prescribing certain medication (including abortion drug, which was reason for Wolf’s veto).
- Lawmakers ask Auditor General to **investigate DCED business waivers**.

April 30:

- Auditor General announces **he will audit DCED’s business waiver process**.
- Pa Senate committee **votes to subpoena** Wolf administration about business waivers.

May 1

- Governor Wolf **announces** 24 counties may move into the “yellow phase”, beginning on May 8, using mostly a regional plan.

May 4

- Gov. Wolf **provides guidance** on what Yellow phase is.

May 5

- Pa Senate holds hearing on **business closures and planned reopening**. Senators ask the administration about nursing homes, and the idea of focusing on nursing homes with testing and contact tracing. The administration says that it is “an interesting thought” but that it would be challenging to test all staff and residents.
- Pa House **passes legislation** requiring state government to respond to open records requests in a declared emergency. The bill passed unanimously, with support of the **ACLU** and **PA NewsMedia Association**.

May 6:

- Pa Senate holds **hearing on unemployment compensation issues**, with nearly 500,000 applicants yet to receive payment.
- Sen. Disanto **calls for resignation of Labor and Industry Secretary**.

May 7:

- Pa Senate holds hearing on **administration’s support for nursing homes** (or lack thereof). Several questions focused on whether the administration should focus on nursing homes, and have targeted testing, isolation for nursing home employees and residents. The Wolf administration suggests this is currently impossible to do.

May 8:

- After Wolf announced a few more counties could move into the Yellow Phase next week, and extended the stay at home order for “Red Counties” until June 4
- Several counties declare they said they are moving into “yellow phase” **without Wolf’s permission**: **Lebanon, Dauphin, Franklin, Schuylkill, and Lancaster**. District attorneys in **York** and **Beaver** counties say they won’t prosecute anyone who violates Wolf’s orders.

- Wolf said he **refuses to comply** with a Pa. Senate Subpoena regarding waivers and waiver process, putting only the **list of companies with waivers** online (in a not-user-friendly database. A WITF story notes **Crayons, flowers, and taxidermy** are among the “life sustaining businesses” to get waivers.

May 11:

- Wolf **scolds counties** as “selfish,” “cowardly,” “deserters” and threatens to withhold federal funds.
- **Senate goes to court to enforce Subpoena.**

May 12:

- Gov. **Wolf announces a plan to focus on nursing homes**, and have targeted testing, isolation for nursing home employees and residents; exactly what others had been calling for for weeks.

May 13:

- Wolf sends **letter with implied threat to companies** that applied for business waivers, suggesting proprietary business info could be publicly leaked, because of the Senate subpoena.
- News story breaks that the **Wolf administration revoked certain business waivers** that had been granted for weeks *the night before* providing the full list. Those businesses that were redacted were not publicly disclosed.
- Senate passes **HB 2388** (Mihalek): Opens car dealers (original bill), lawn and garden centers, cosmetology salons and barber shops (specific health guidance for those), messenger services, animal grooming, and manufacturing operations. Senate passes **HB 2412** (Polinchock): Opens real estate (original bill) and legal services. Senate passes **SB 327**: Requires governor to notify the legislature about regulations he suspends, orders debt cost reduction review, creates a coronavirus task force, slows regulation process during crisis, and allows counties to create their own emergency mitigation plan.

May 14:

- House passes HB 2388, HB 2412, and SB 327

May 15

- Wolf announces 12 more counties—including several who planned to move into “yellow phase” without his approval—could in fact move into the yellow phase (even though some didn’t fit the established criteria) in one week.

May 19:

- Wolf vetoes HB 2388, HB 2412, and SB 327
- Wolf announced he *will* allow real estate to open statewide with social distancing guidance from Dept of Health.

May 20:

- House attempts veto override on HB 2388. Six Democrats vote yes, eight who voted yes on passage vote no on veto override.

Continued Tension and Movement of HR 836

May 21

- House Committee passes **HR 836**, concurrent resolution to end the declaration of disaster emergency with one Democrat joining all the Republicans on the committee.

May 22:

- Wolf announces all counties will be in “yellow phases” by June 5.

May 28

- Pa State Police **report** issuing over 350 warnings and 3 citations to businesses defying shut down orders.
- House amends HR 836 to only end the disaster declaration at it relates to business closures.
- House passes HR 836 by a 117-85 vote.

May 29:

- Wolf vetoes **SB 1027** because it limits the executive authority of governor to revoke licenses from businesses that re-opened in violation of his shut-down orders.
- Wolf **announces** 16 more counties can move to Green Phase on June 5

June 1:

- Wolf issues order stating that **6 counties can continue to accept mail in ballots** for the June 2 primary election. Under this order, counties may accept ballots postmarked by June 2 if they are received by June 9. Under law, which would apply to the remaining 61 counties, mail in ballots must be *received* by 8 p.m. on the day of the election.
- Wolf **amends disaster declaration** to address counties affected by mass protests, rioting, and looting.

June 3:

- Wolf **extends disaster declaration** for another 90 days, officially declares end of statewide “stay at home order” beginning June 4.
- Wolf marches in **Black Lives Matter protest**; admits **his actions were inconsistent**, but argues he can use his judgement.

June 5

- Wolf **announces** more counties can enter the “Green Phase” beginning June 12.

June 8:

- Senate committee amends HR 836 back to a “full version”—terminating Wolf’s declaration of emergency for COVID-19

June 9:

- **Senate passes HR 836 by a 31-19 majority; with two Democrats joining all the Republicans in supporting it.**
- **House concurs in HR 836 by a 121-81 vote, with 12 Democrats joining all the Republicans present in supporting it.**
- Senate passes **SB 1166**—a proposed constitutional amendment that would limit declared emergencies to 30 days, and require a concurrent resolution to extend the declaration of emergency.

June 10:

- Wolf announces intention to ignore concurrent resolution and fight in court.

- Senate [files petition](#) for mandamus action in Commonwealth Court, asking the court to order Gov. Wolf to adhere to the concurrent resolution and end the declaration of emergency. (Case Docket number 34 MD 2020).
- House Health committee holds a hearing on COVID-19 response with Sec. Levine. Conversations reveal continued confusion over face mask recommendations and that a plan for moving counties past green is still in development.

June 12:

- Gov. Wolf files [request to Pa. Supreme Court](#) to use King's Bench to assume jurisdiction over the litigation surrounding HR 836 (Case Docket number 104 MM 2022).
- Wolf [announces](#) 8 more counties can go into the "Green Phase" beginning June 19 leaving 13 counties in the yellow phase.

Tracking Pa. COVID-19 Cases

- 6,267 individuals have died as of Jun 16. Dates with asterisks (*) include unrecorded deaths from prior days.
- 75% of cases have recovered, as defined by DOH. 86.8% of coronavirus tests have come back negative.

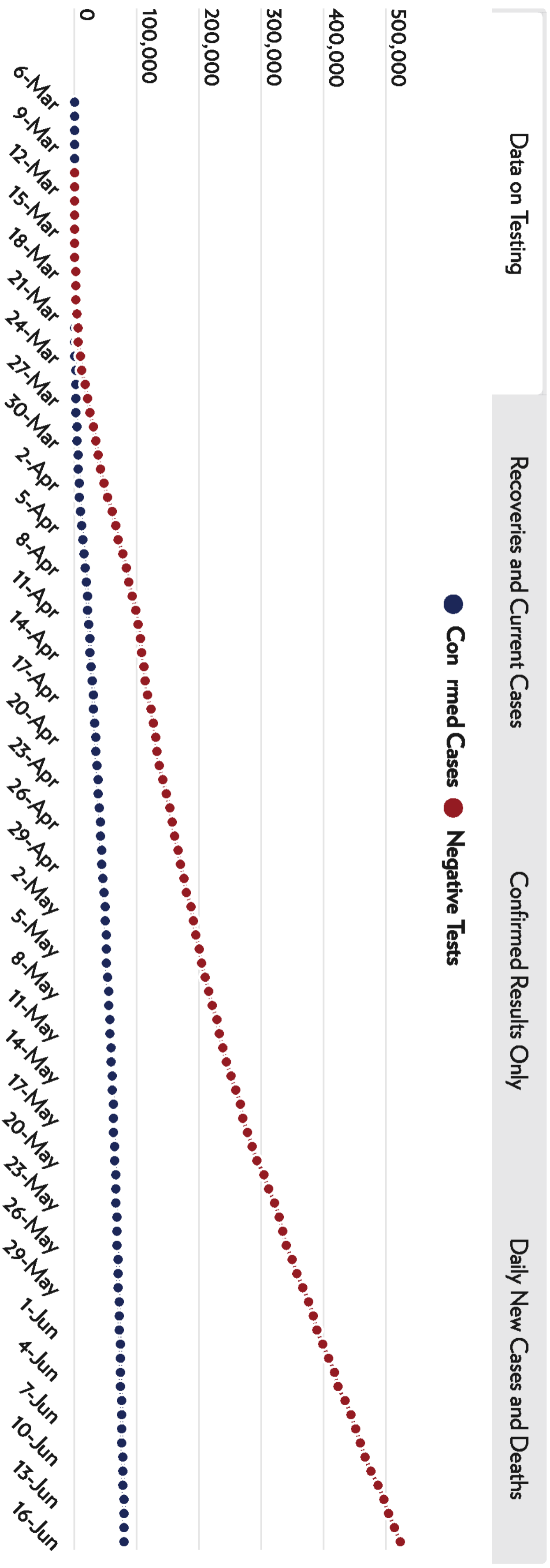


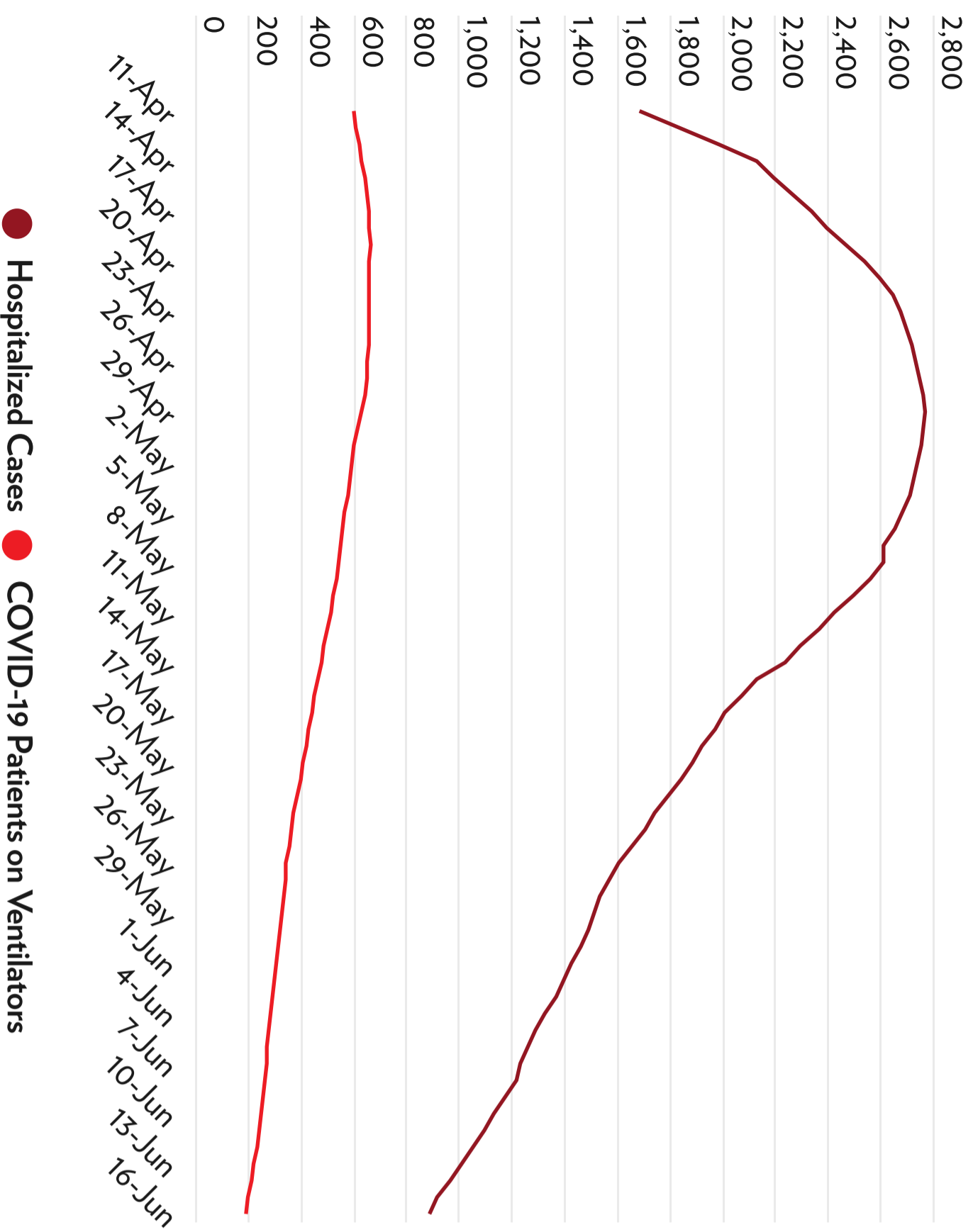
EXHIBIT B

Source: [Pa. Department of Health](#)

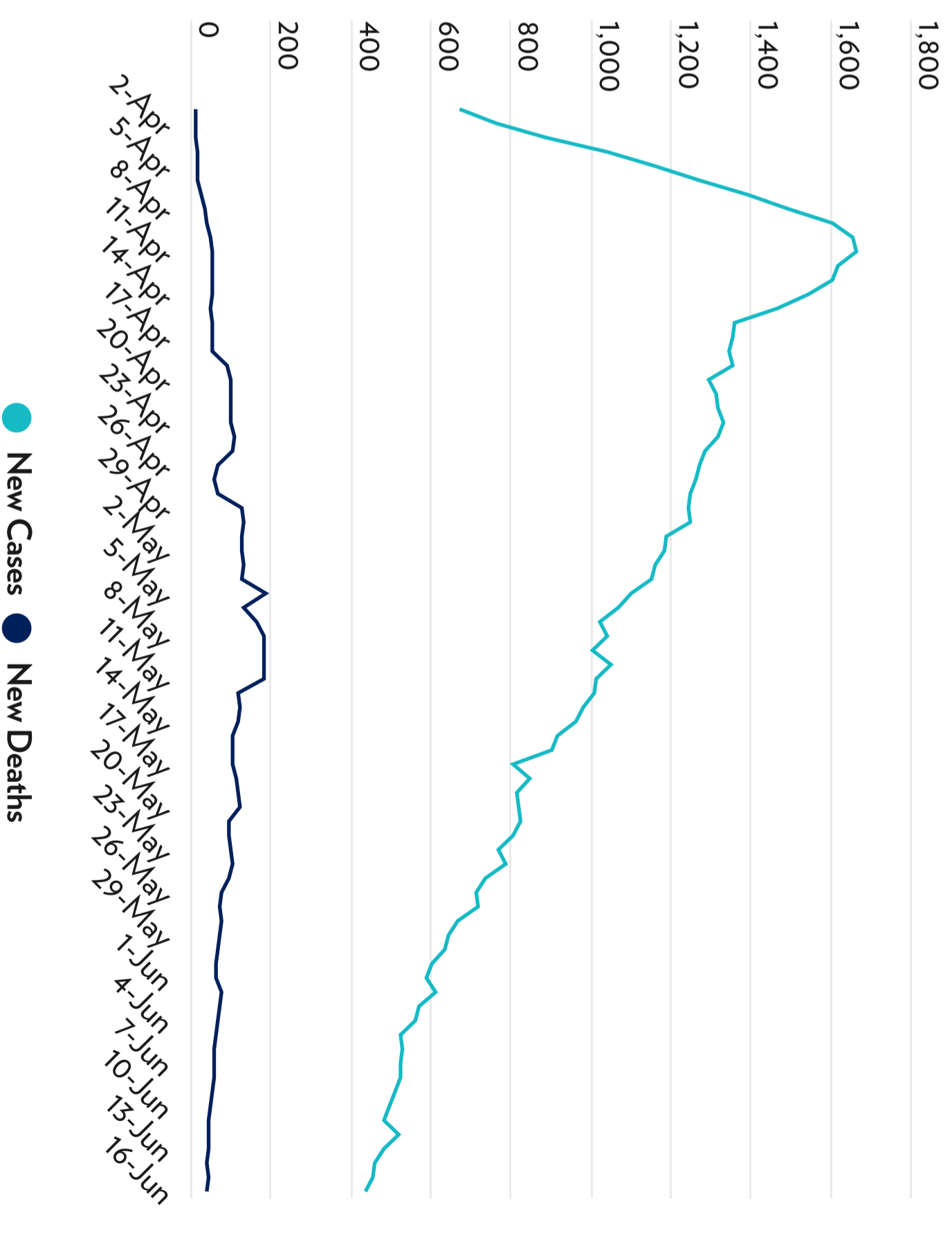
Flattening the Curve? Seven-Day Average Trends

(As of June 16, 2020)

Hospital Usage, 7 Day Averages



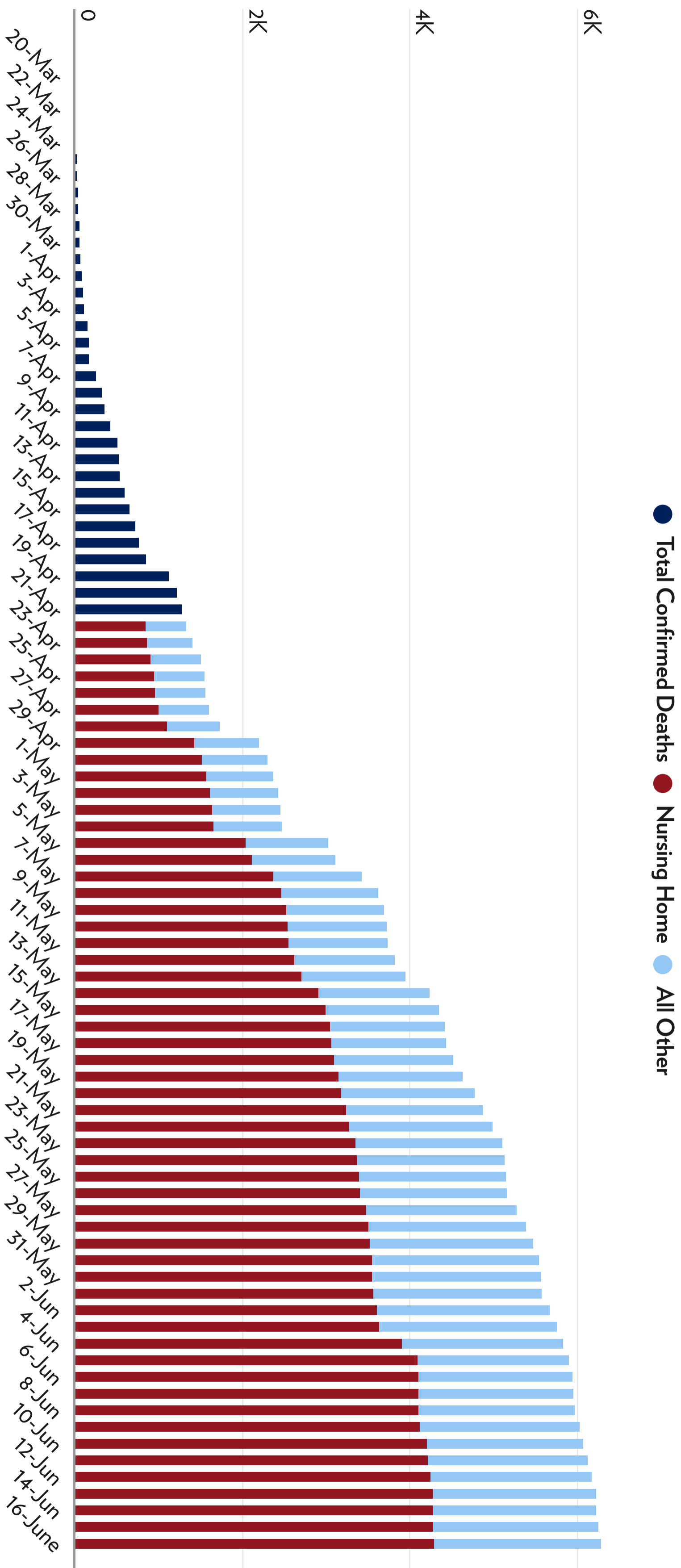
New Cases and Deaths, 7 Day Averages



Source: [Pa. Department of Health](#)

Pa. COVID-19 Deaths

6,267 individuals have died as of June 16. 68.3% are nursing home related (daily changes include new deaths and re-attribution)



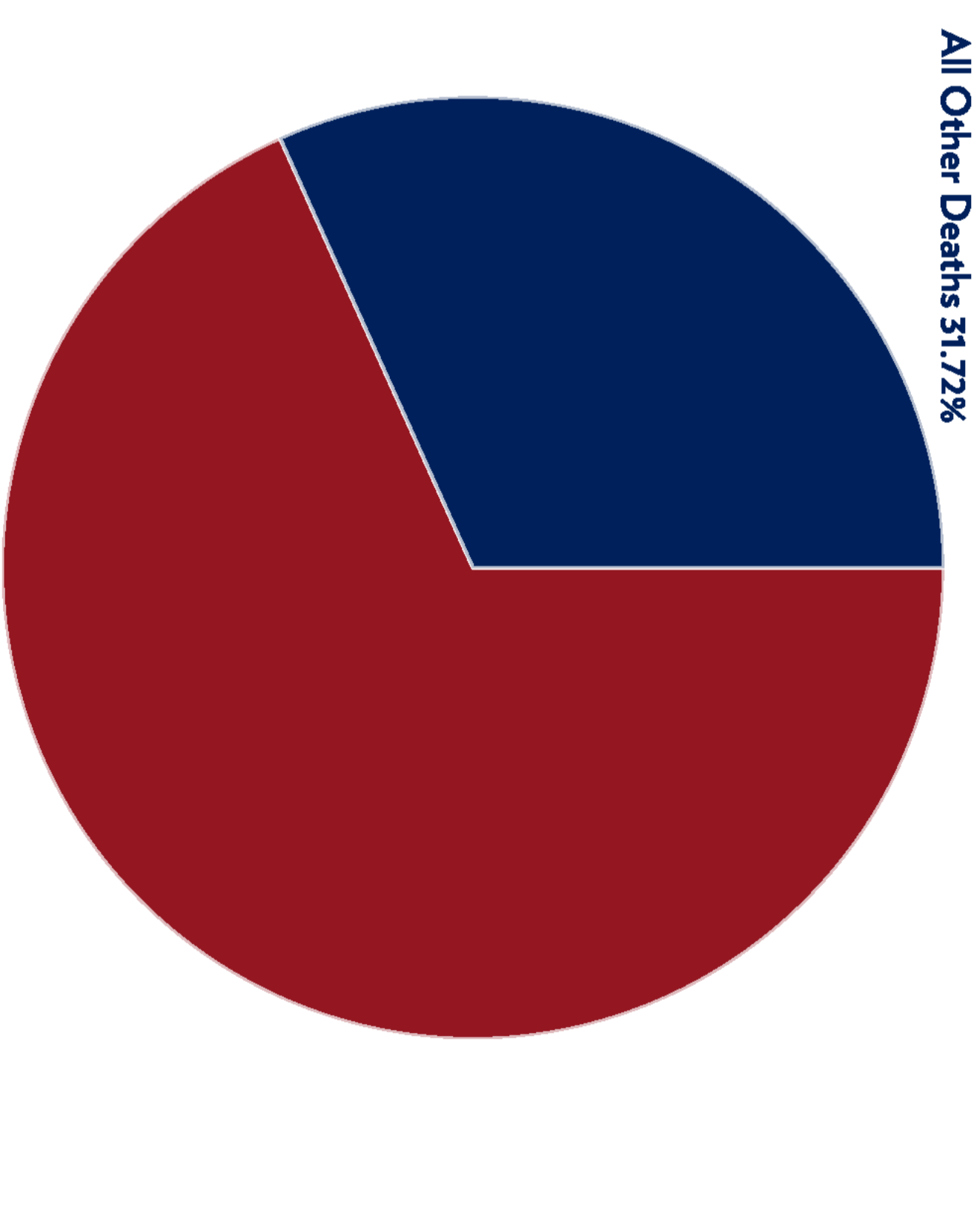
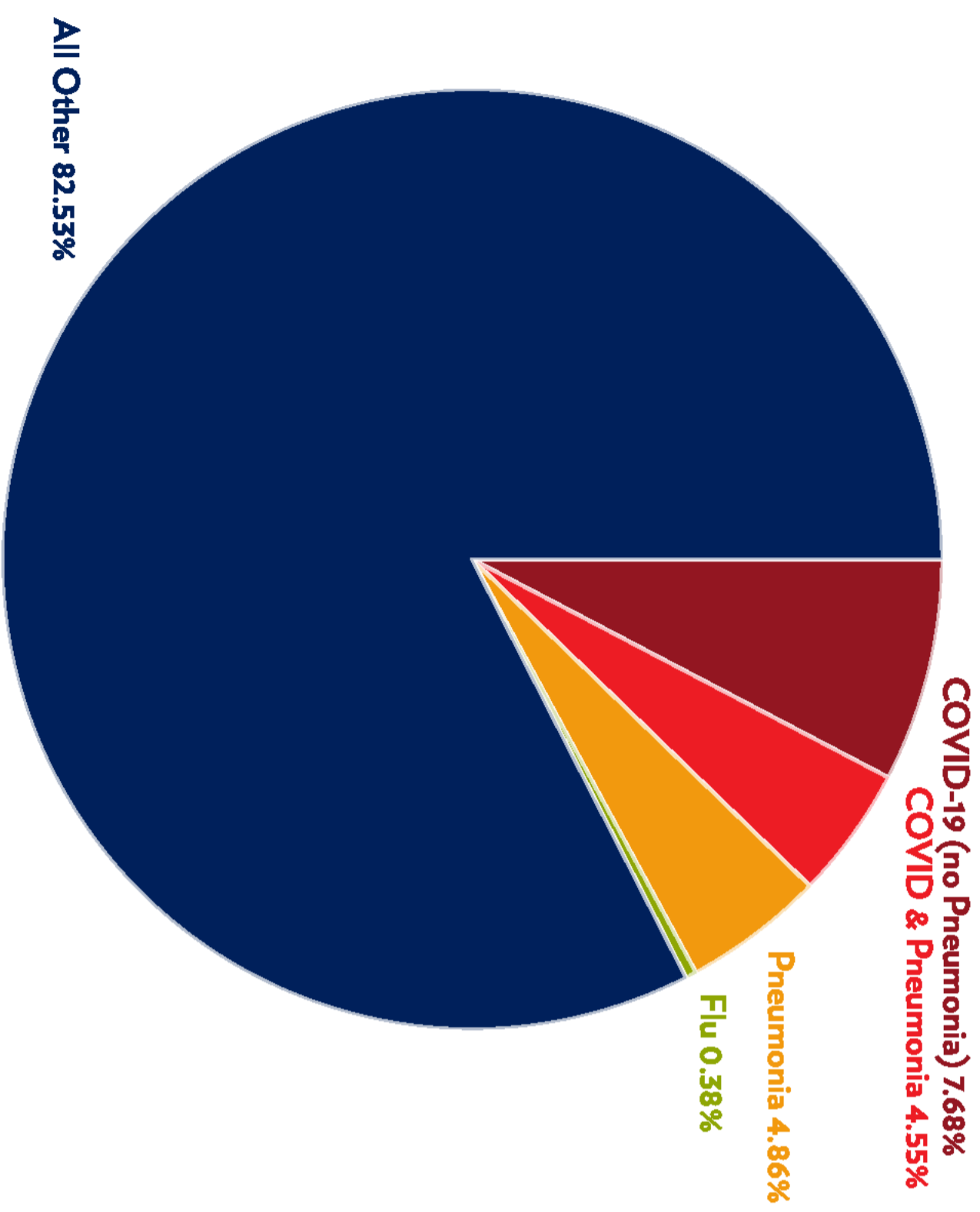
Source: [Pa. Department of Health](#)

Pennsylvania Death Data

(As of June 16, 2020)

Deaths by Cause, 2/1/2020 to 6/13/20 (preliminary)

COVID-19 Deaths Associated with Nursing Homes

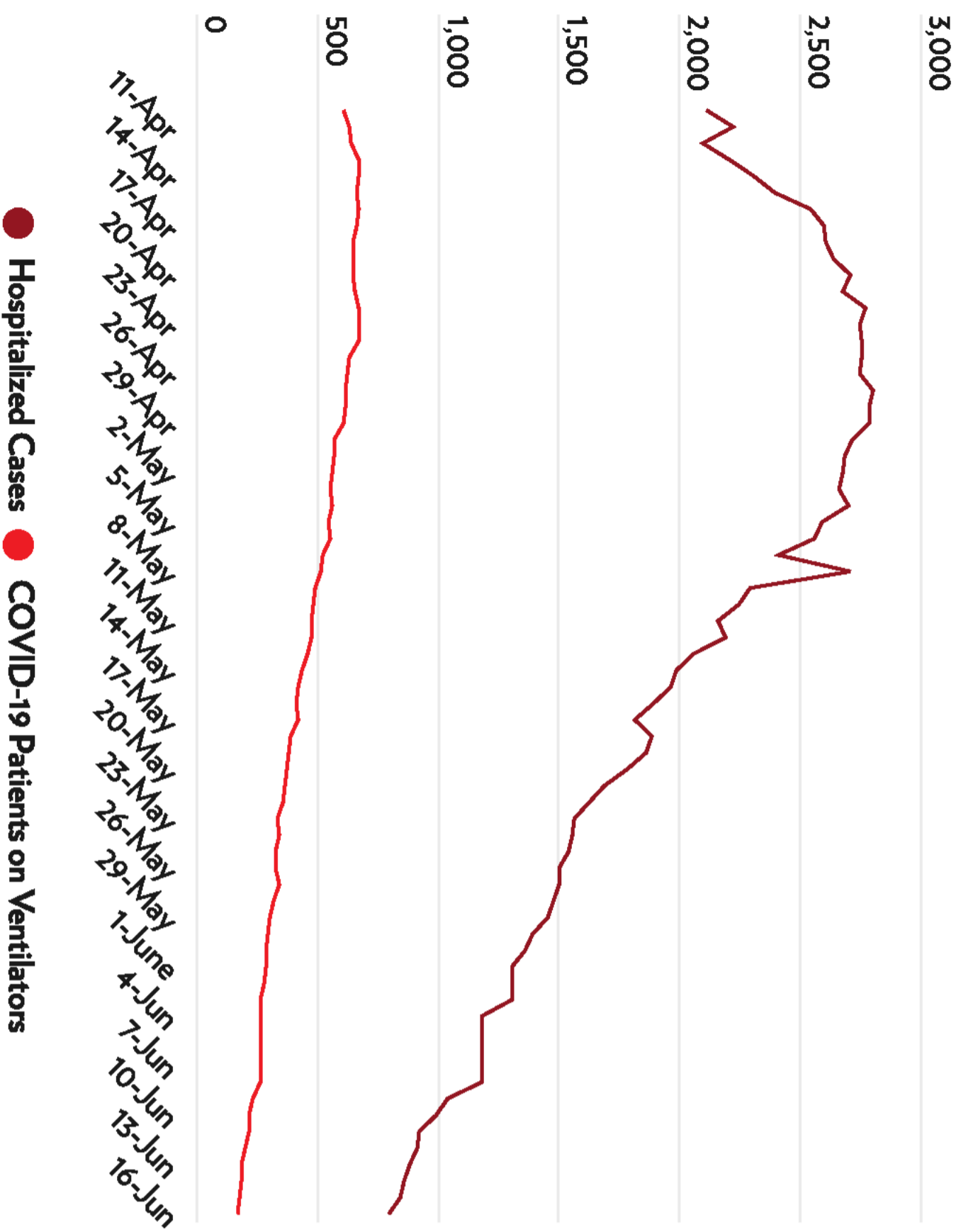


Source: [Pa. Department of Health](#); [CDC Provisional Death Counts](#)

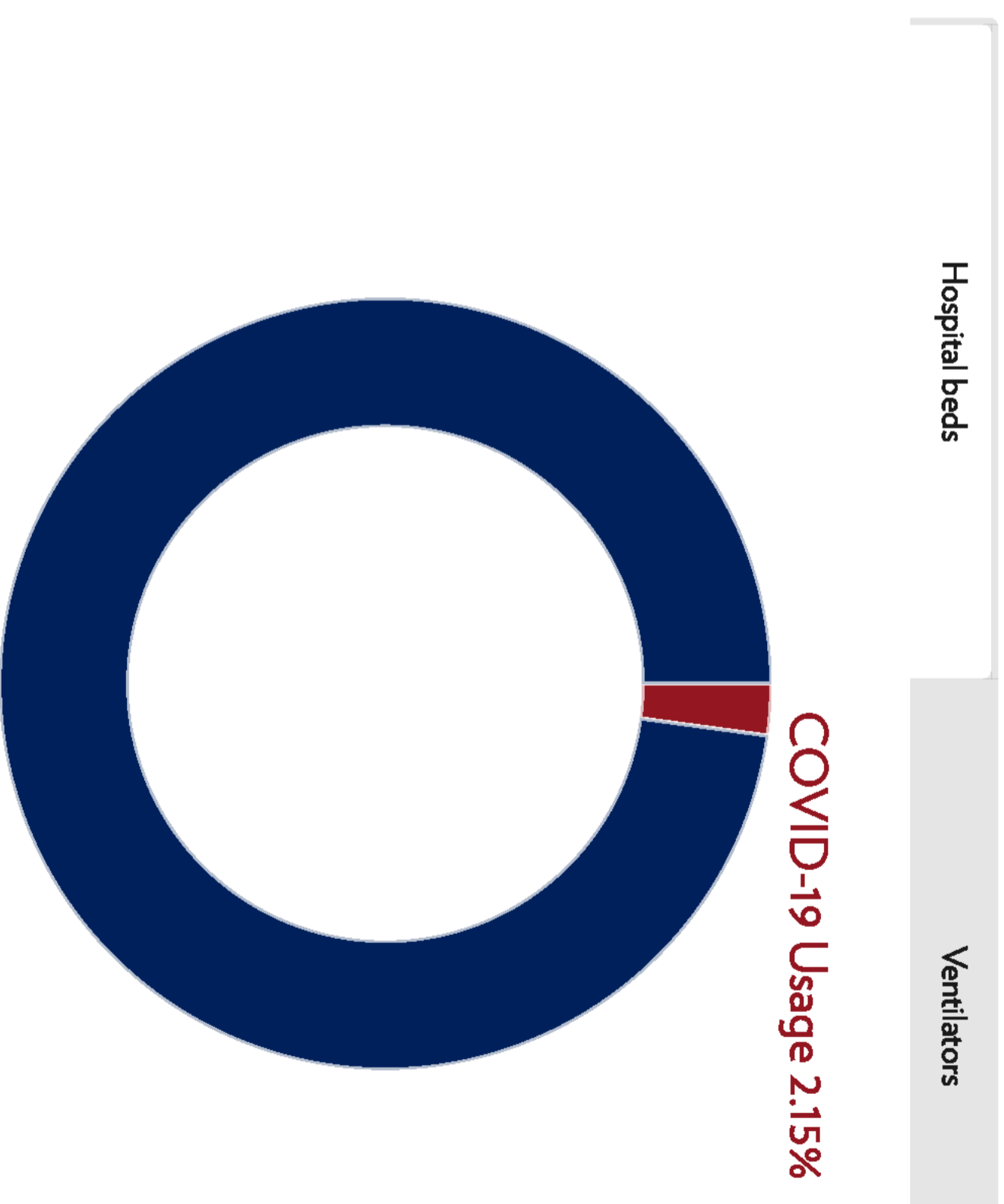
Hospitalization Capacity

794 individuals are hospitalized with COVID (Using 2.15% of hospital beds). 167 are on ventilators (3.1% of total ventilators).

Hospitalized COVID-19 Cases



Hospital Usage



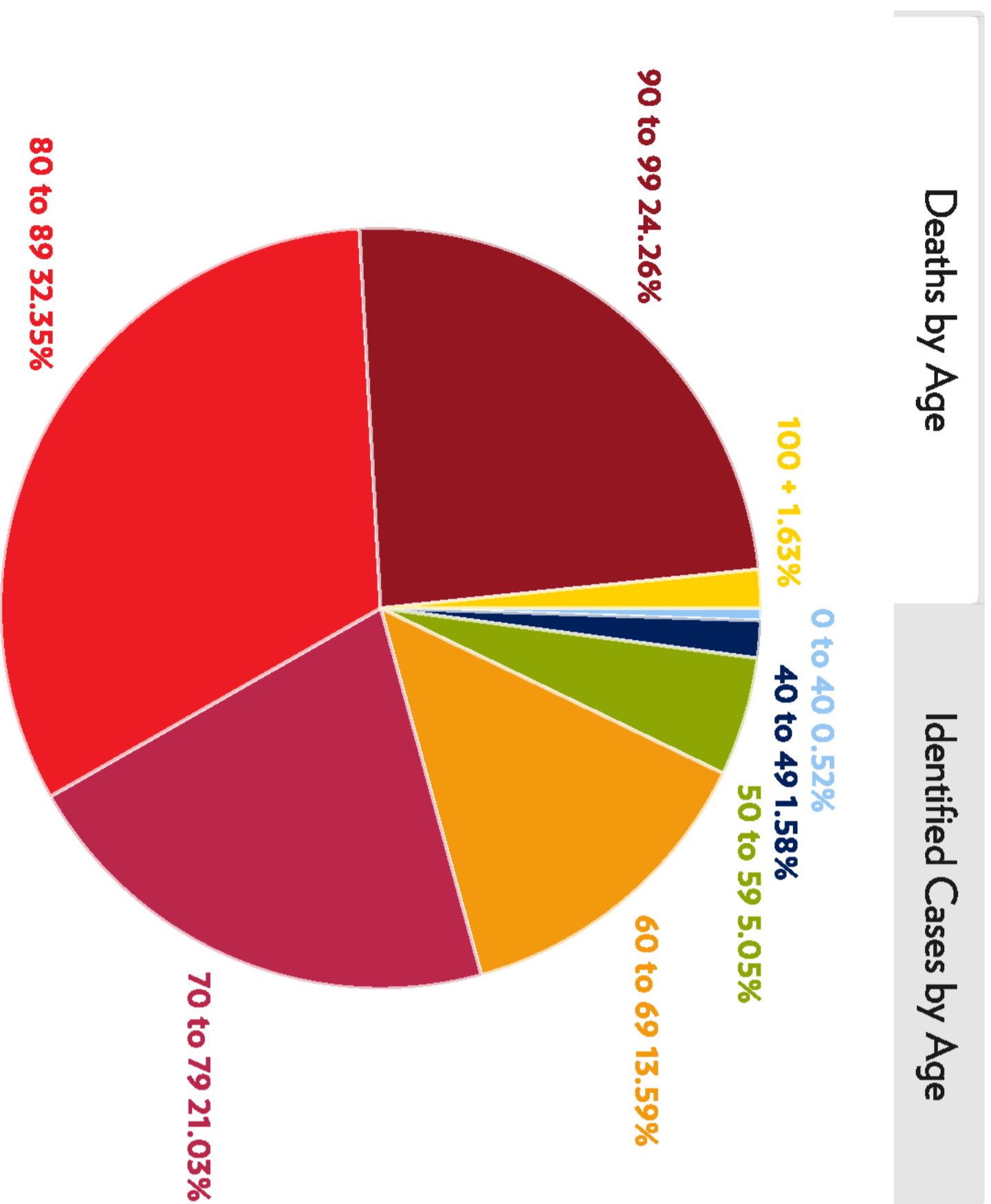
Open/Other Usage 97.85%

Source: [Pa. Department of Health](#)

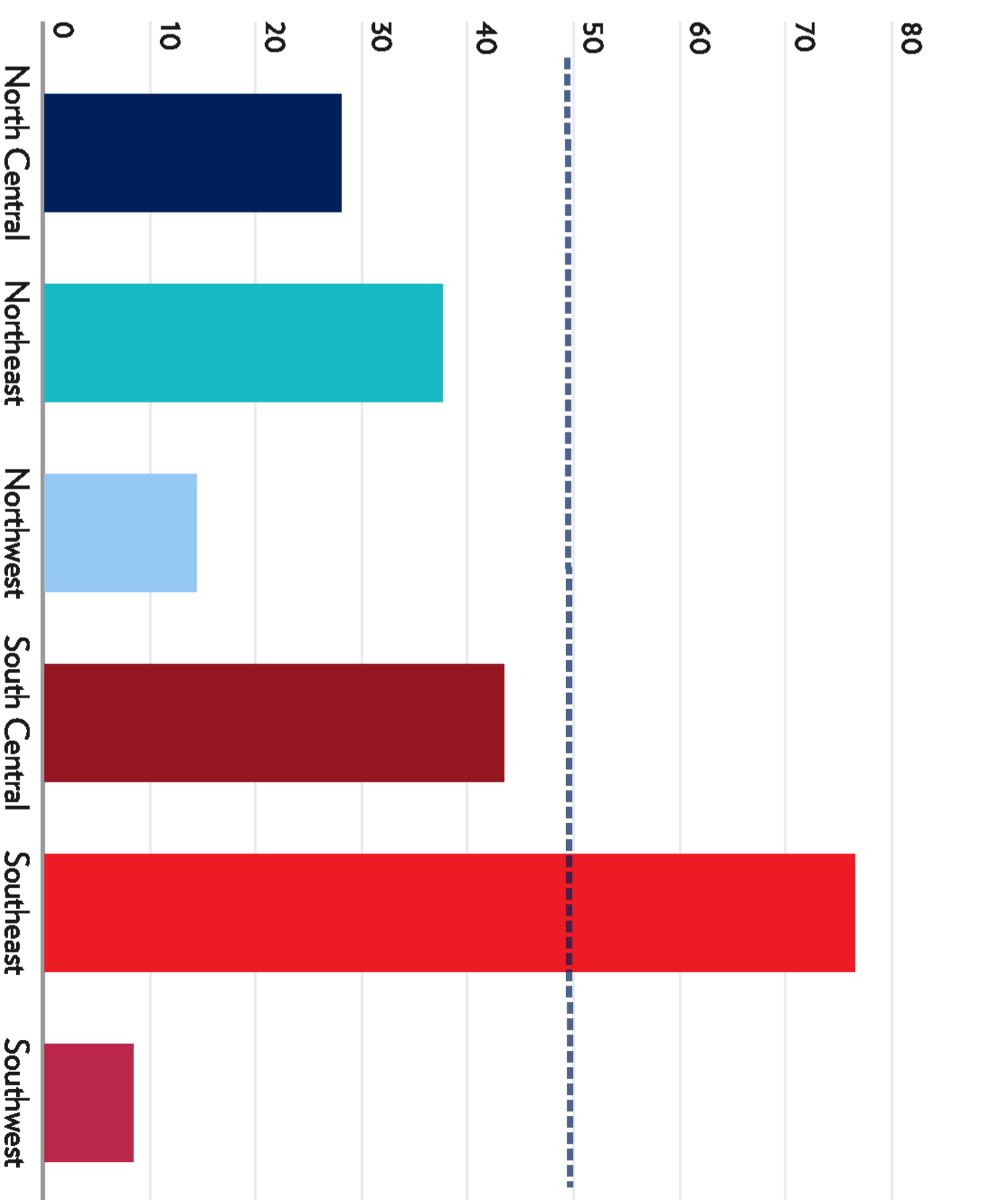
Additional Case Data

(As of June 16, 2020)

Age Breakdown



Avg New Cases per 100K, Last 14 Days, by Region

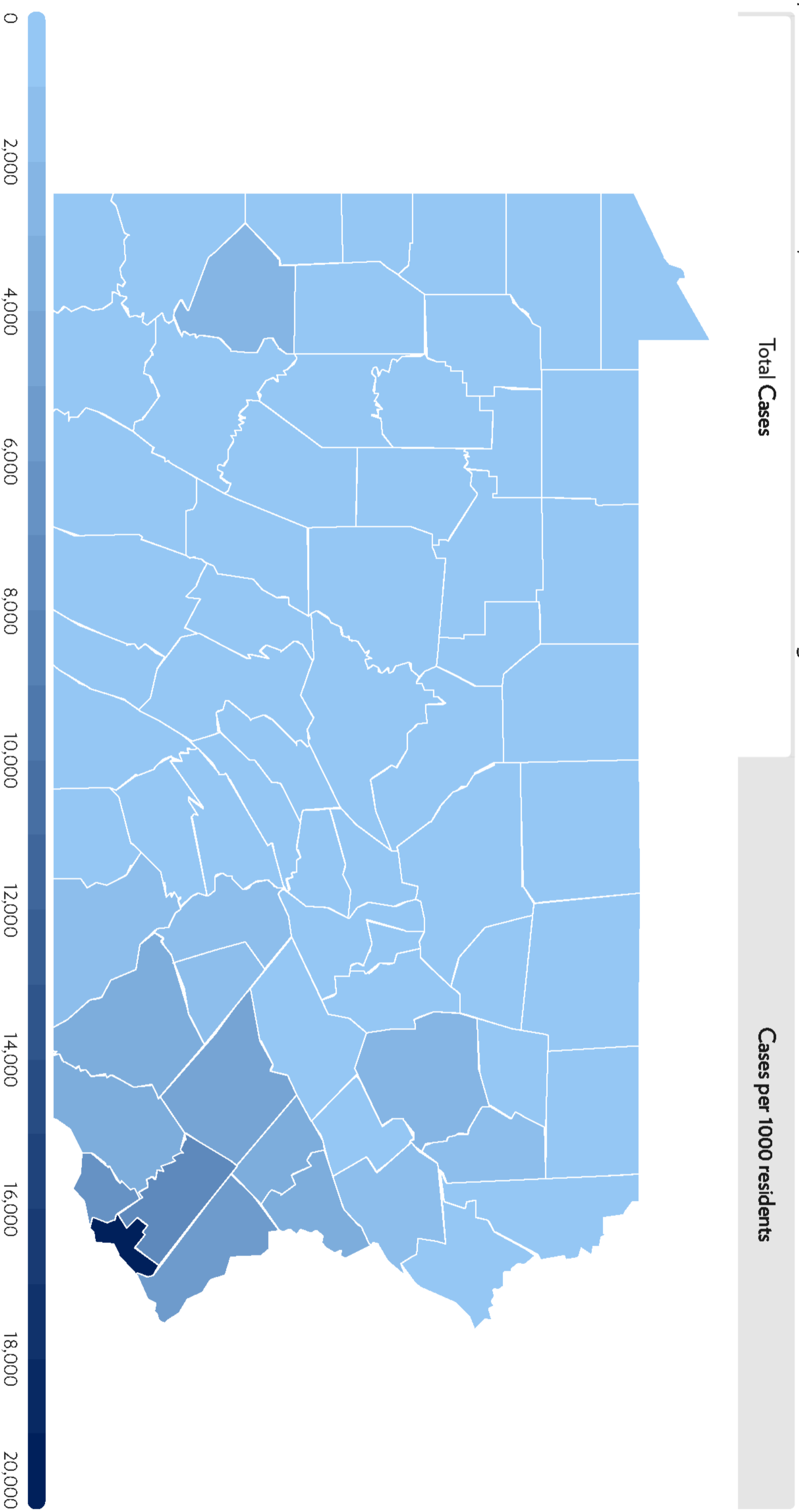


Source: [Pa. Department of Health](#)

Total Cases by County

(As of June 16, 2020)

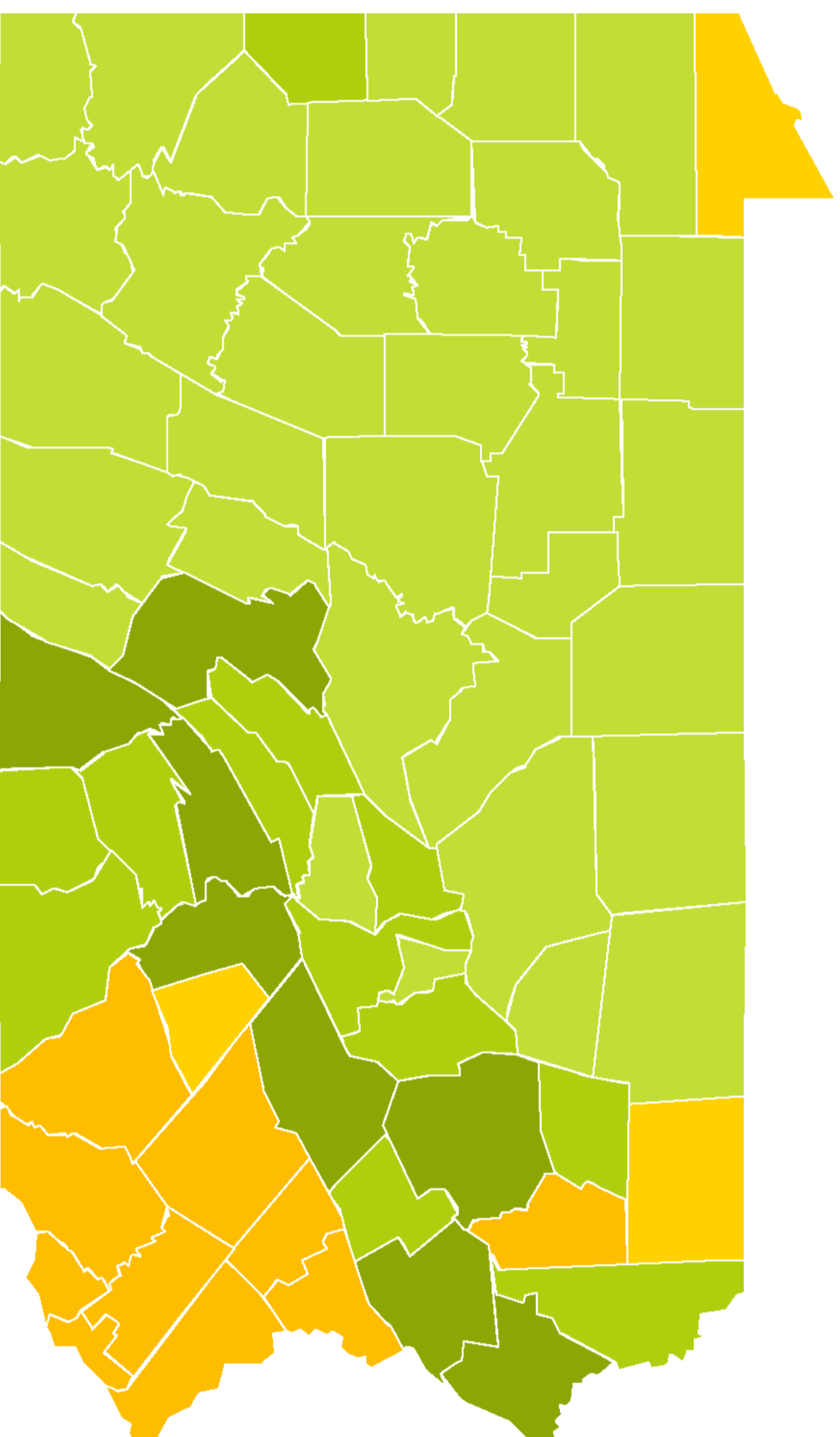
Totals represent the number of residents who have **ever** been diagnosed with COVID-19.



Source: [Pa. Department of Health](#)

County Reopening

(As of June 16, 2020)

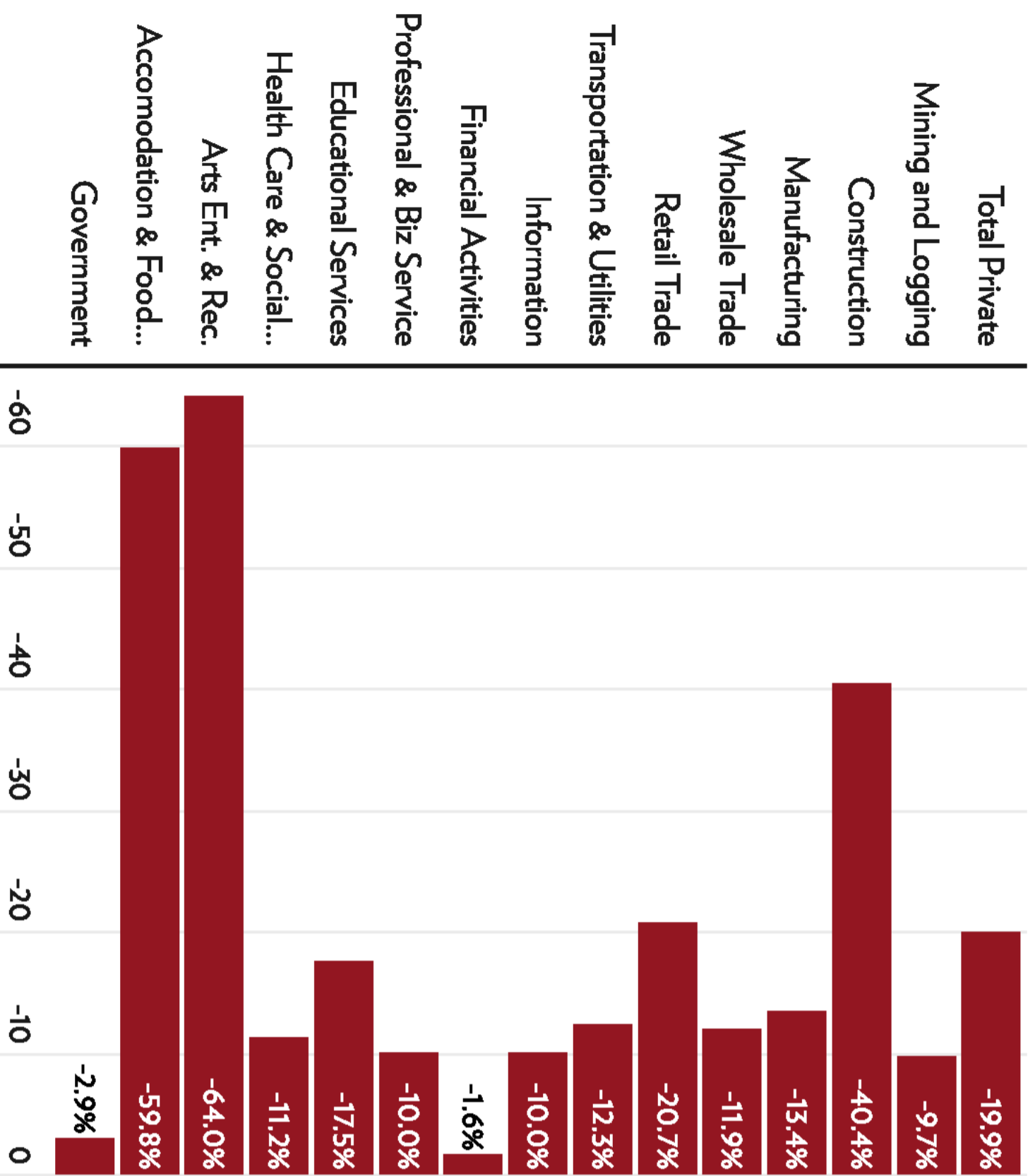


- Green, June 12
- Green, June 5
- Yellow, June 5
- Green, May 29
- Green, June 19
- Yellow, May 8
- Yellow, May 29
- Yellow, May 22

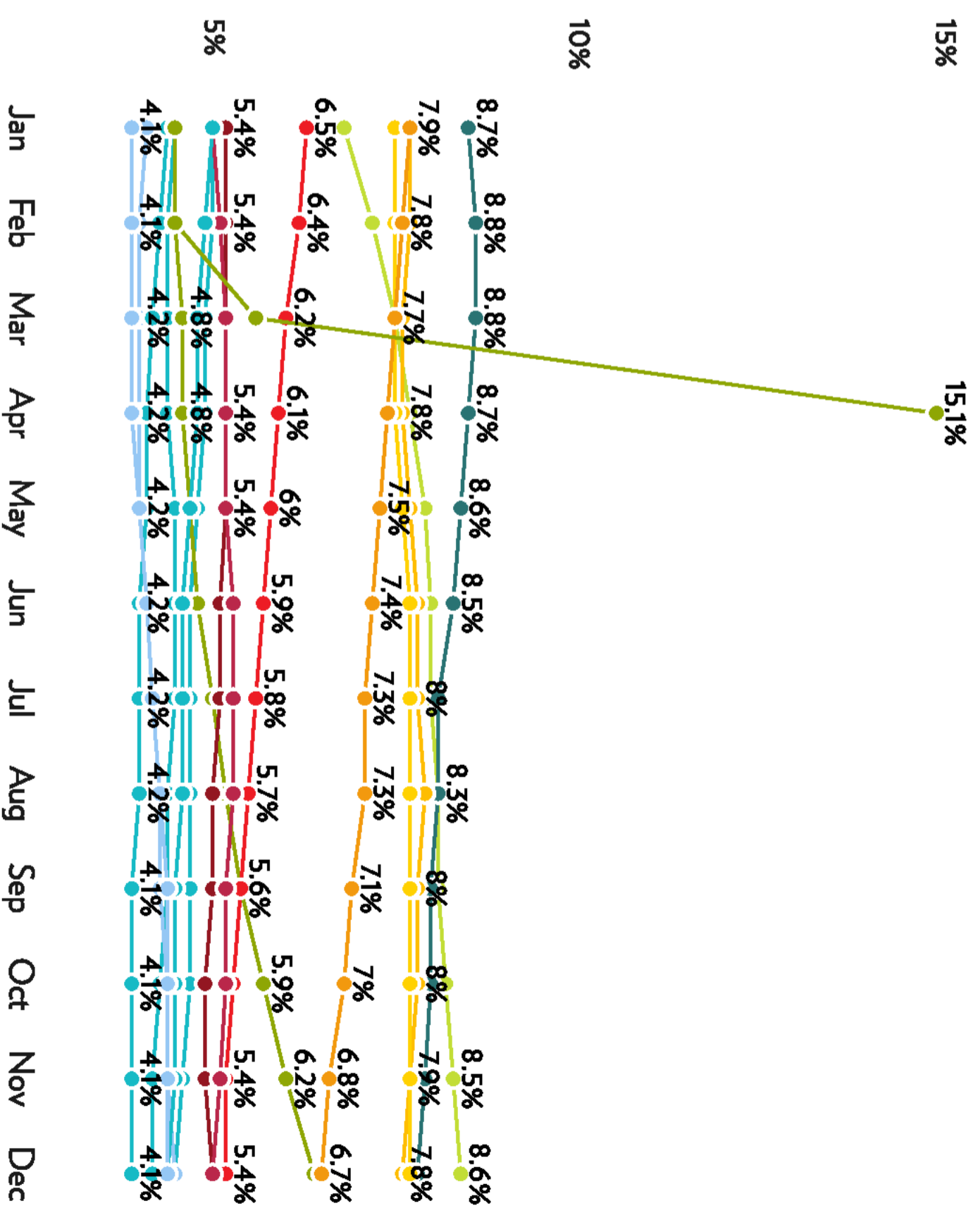
Source: [Pa. Department of Health](#); [Governor Wolf](#)

Pennsylvania Unemployment

Pa. payroll job losses by sector, Feb to April 2020



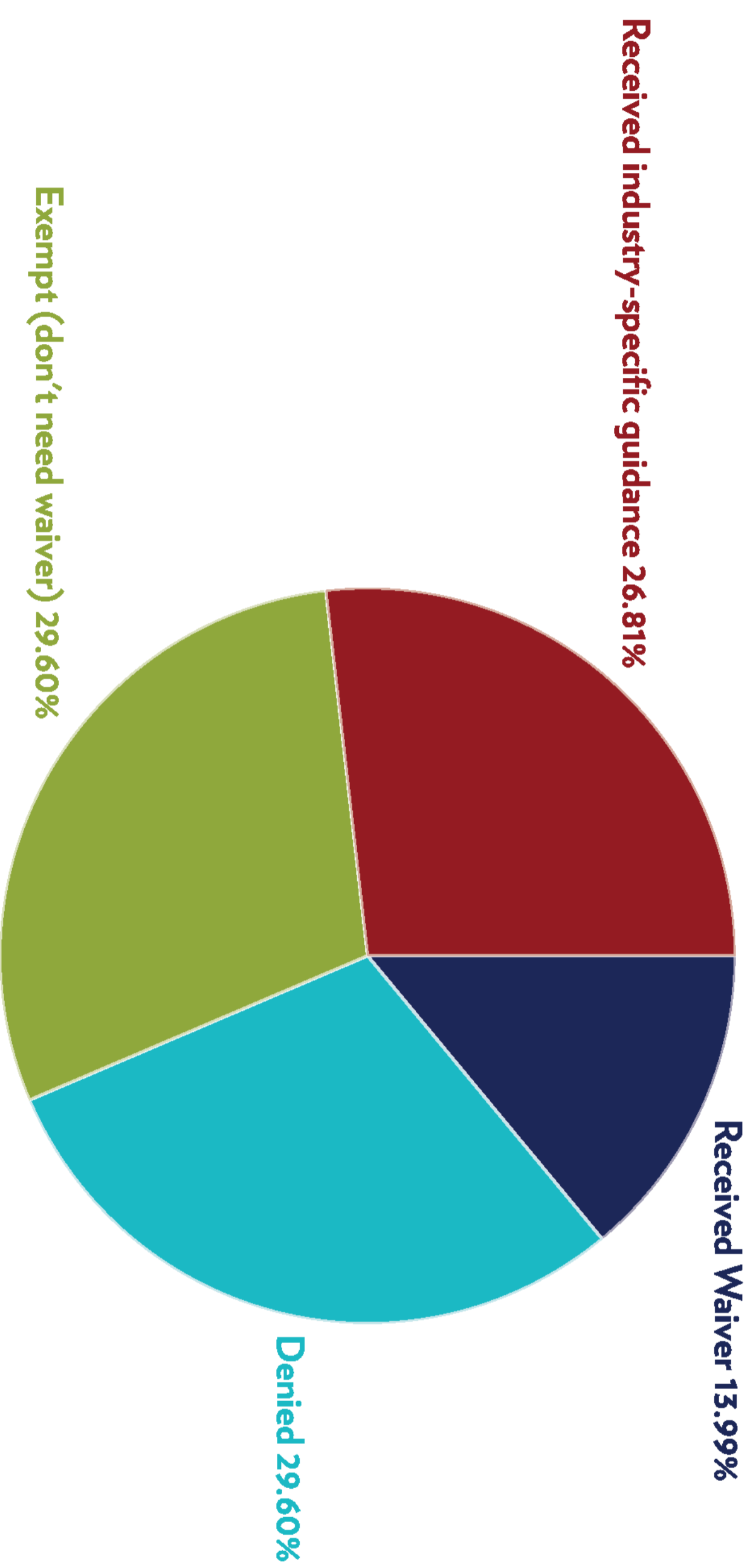
Unemployment Rate, by month and year



Source: Bureau of Labor Statistics

Business Waivers Granted by Wolf Administration

- On March 19, Gov. Wolf ordered all “non-life-sustaining” businesses to close office operations. This list was updated multiple times. Businesses can apply for a waiver. He closed the waiver process on Friday, April 3.
- **42,380 businesses applied for waivers.** After weeks, Gov. Wolf finally released the list of companies receiving waivers.



Source: [DCED](#)