

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JACOB DOYLE CORMAN, III, *et al.*,
Petitioners

NO. 294 MD 2021

v.

ACTING SECRETARY OF THE
PENNSYLVANIA DEPARTMENT OF
HEALTH,

Respondent

**RESPONDENT'S BRIEF ADDRESSING LEGAL ISSUES FRAMED IN
THE COURT'S SEPTEMBER 13, 2021 ORDER**

Respectfully submitted,

JOSH SHAPIRO
Attorney General

BY: KELI M. NEARY
Executive Deputy Attorney General
Director, Civil Law Division

KAREN M. ROMANO
Chief Deputy Attorney General
Chief, Civil Litigation Section

RYAN B. SMITH
Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 787-2717
kneary@attorneygeneral.gov
kromano@attorneygeneral.gov
rbsmith@attorneygeneral.gov

DATE: September 23, 2021

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COUNTER STATEMENT OF THE CASE

As of August 31, 2021, there were 1,300,368 cases and 28,235 deaths in this Commonwealth caused by COVID-19. *Petition*, Exhibit A. The risk to the unvaccinated population, including children under 12 who are not eligible to receive vaccines, was rising. *Id.* Between July, when schools first began discussing health and safety plans, and the end of August, Pennsylvania’s COVID-19 case count increased by an order of magnitude—from less than 300 cases per day to more than 3,000 cases per day.¹ This included a significant increase in cases among school-aged children—that number increased by more than 11,000 in a one-month period and by more than 79,000 since the beginning of the year.² “As of August 26, 2021, the total number of cumulative cases reported in children in the Commonwealth was 23,974 in the 0-4 years of age cohort, 56,039 in the 5-12 years of age cohort, and 88,205 in the 12-18 years of age cohort.” *Petition*, Exhibit A. Moreover, the Delta variant, known to be more infectious, has been leading to increased transmissibility. *Id.* Balancing this data with the importance of in-person education for our children,

¹ With each passing day, the numbers continue to rise. As of September 22, 2021, there are 1,392,266 cases and 28,998 deaths in the Commonwealth from COVID-19.

² “*Wolf Administration Requires Masking In Schools, Early Learning and Child Care Settings To Keep Students Safely In Classrooms and Delta Variant Out*,” Department of Health press release, <https://www.media.pa.gov/pages/health-details.aspx?newsid=1580> (last visited 9/18/2021).

the Acting Secretary of Health (hereinafter “the Secretary”)—following recommendations from the Centers for Disease Control and Prevention and the American Academy of Pediatrics—issued an order directing the use of face coverings in school entities. *Id.*

Petitioners, private schools and parents of school-aged children, seek to overturn this widely accepted disease control measure. Knowing such a challenge could not succeed, Petitioners note their lawsuit is not about “the efficacy of universal face covering[s] nor the seriousness of the COVID-19 pandemic.” *Petitioners’ Brief* at 3. Instead, they frame their argument purely as a challenge to the authority of the Department of Health to issue the Order. There is no legal basis for this challenge. The Disease Prevention and Control Law, the Administrative Code, and the Department of Health’s regulations clearly and explicitly grant authority to the Department of Health to issue disease control measures like the *Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities* (hereinafter “the Order”). Petitioners seem to believe they know best how to protect the health and safety of school-aged children in the midst of a global pandemic. To that end, they seek to place their hands on the proverbial scales of justice and, in so doing, bypass the Secretary of Health. But Petitioners’ self-centered gambit – which fails to take the power of the executive

into account – cannot carry the day. This Court should reject Petitioners’ attempt to circumvent controlling legal principles.

QUESTIONS PRESENTED

- I. WHETHER THE AUGUST 31, 2021 “ORDER OF THE ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH DIRECTING FACE COVERINGS IN SCHOOL ENTITIES” CONSTITUTES A RULE OR REGULATION SUBJECT TO THE PROVISIONS OF THE REGULATORY REVIEW ACT, ACT OF JUNE 25, 1982, P.L. 633, *AS AMENDED*, 71 P.S. §§745.1 - 745.15?
- II. WHETHER THE AUGUST 31, 2021 “ORDER OF THE ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH DIRECTING FACE COVERINGS IN SCHOOL ENTITIES” VIOLATES THE PRINCIPLES GOVERNING THE DELEGATION OF ADMINISTRATIVE AUTHORITY?

Suggested Response: No to both questions.

ARGUMENT

- I. **THE AUGUST 31, 2021 “ORDER OF THE ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH DIRECTING FACE COVERINGS IN SCHOOL ENTITIES” (ORDER) DOES NOT CONSTITUTE A RULE OR REGULATION SUBJECT TO THE PROVISIONS OF THE REGULATORY REVIEW ACT**

Petitioners argue the Secretary lacked authority to issue the Order and that the Order constitutes a rule or regulation. Petitioners are incorrect. Petitioners fail to recognize that the Department’s existing regulations provide the Secretary with the necessary authority. Moreover, Petitioners conveniently ignore portions of the

relevant law in formulating their arguments. Because the Secretary has the legal authority to issue disease control measures, the Order was lawfully entered. Moreover, the Secretary's power is not contingent upon the existence of a proclamation of disaster declaration. Finally, the recent vote of the House Health Committee does not illuminate the legal question at issue here.

A. The Secretary of Health has legal authority to issue disease control measures.

Contrary to Petitioners' contention, the Order is based on a triad of statutory provisions, which, when read together, grant the Department of Health (hereinafter "the Department") authority to take broad action to protect the well-being of the citizens of this Commonwealth. In interpreting these statutes, the Department is entitled to "strong deference." *Bethenergy Mines Inc. v. Com., Dept. of Env't Prot.*, 676 A.2d 711, 715 (Pa. Commw. Ct. 1996).

First, the Disease Prevention and Control Law (hereinafter "DPCL") grants the Department the authority to "carry out the appropriate control measures" in response to a disease. The law provides:

[u]pon the receipt by a local board or department of health or by the department, as the case may be, of a report of a disease which is subject to isolation, quarantine, or any other control measure, the local board or department of health or the department shall carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation.

35 P.S. § 521.5.

Second, the Administrative Code of Pennsylvania mandates that it is the duty of the Department “[t]o protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease.” 71 P.S. §§ 532(a), 1403(a). *See also* 71 P.S. § 1403(a) (“It shall be the duty of the Department of Health to protect the health of the people of the State, and to determine and employ the most efficient and practical means for the prevention and suppression of disease.”). It is the duty of the Department of Health “to declare certain diseases to be communicable” and “to establish such regulations for the prevention of the spread of such diseases.” 71 P.S. § 536(a).

Third, under the authority of these sections, the Department promulgated a regulation, which provides:

The Department or local health authority shall direct isolation of a person or an animal with a communicable disease or infection; surveillance, segregation, quarantine or modified quarantine of contacts of a person or an animal with a communicable disease or infection; and *any other disease control measure the Department or the local health authority considers to be appropriate for the surveillance of disease, when the disease control measure is necessary to protect the public from the spread of infectious agents.*

28 Pa. Code § 27.60(a) (emphasis added).

Additionally, the Department’s regulations further permit the Department to “determine the *appropriate disease control measure based upon the disease or infection*, the patient’s circumstances, the type of facility available and any other

available information relating to the patient and the disease or infection. 28 Pa. Code 27.60(b) (emphasis added).

In promulgating this regulation, the Department clearly stated its intention: “[t]his proposed section is important to the Department's disease control and prevention function, in that *it would allow the Department the discretion to implement the most appropriate disease control measures for the situation.*” 30 Pa. B. 2715 at § 27.60.³ The final regulation, which was subject to the Regulatory Review Act, was approved by the Independent Regulatory Review Commission (hereinafter “IRRC”) as proposed on December 20, 2001. The IRRC found the regulation “consistent with the statutory authority of the Department of Health . . . and the intention of the General Assembly,” and that its promulgation was “in the public interest.” Approval Order, IRRC, Regulation No. 10-156 (IRRC No. 2119) (Dec. 20, 2001).⁴ Moreover, as part of this regulatory promulgation process, this

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<http://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol30/30-22/930.html&search=1&searchunitkeywords=communicable,noncommunicable>
(last visited 9/18/2021)

⁴ <http://www.irrc.state.pa.us/docs/2119/IRRC/2119%2012-20-01%20APPROVAL.pdf>

regulation was submitted to the House Health and Human Services Committee and the Senate Public Health Committee, and was deemed approved by both.⁵

In sum, as the existing law and regulations already provided the Secretary with authority to implement appropriate disease control measures, it was not necessary for the Department to promulgate a new regulation to effectuate the Order.

The existing regulation provides the Department with three distinct options for the control of disease: (1) isolation; (2) surveillance, segregation, quarantine; and (3) other disease control measures. 28 Pa. Code § 27.60(b) Petitioners' argument focuses solely on the first two options but completely ignores the third, which explicitly authorizes the Department to direct "any other disease control measure the Department . . . considers to be appropriate . . . when the disease control measure is necessary to protect the public from the spread of infectious agents." 28 Pa. Code § 27.60. Indeed, Petitioners even ignore that the regulation exists in the first place ("[s]uch a regulation is not currently in existence in the Commonwealth

⁵ See 32 Pa.B. 520 (January 26, 2002); <https://www.pacodeandbulletin.gov/secure/pabulletin/data/vol32/32-4/32-4.pdf>; <http://www.irrc.state.pa.us/regulations/RegSrchRslts.cfm?ID=2080> ; see also Regulatory Transmittal Sheet at <http://www.irrc.state.pa.us/docs/2119/AGENCY/2119FF.pdf>

of Pennsylvania.” *Petitioners’ Brief* at 13). Both arguments take a myopic view of the legal landscape and must be rejected.

To effectively combat a contagion, the experts within the Department must be allowed the discretion to determine “the most appropriate disease control measures for the situation” and to implement that measure immediately. For COVID-19, a virus transmitted through the spread of respiratory droplets, those experts have determined that requiring the use of face coverings within school entities is the appropriate disease control measure to protect the public from the spread of the virus—a rather modest measure when compared with the explicit options of isolation and quarantine. While Petitioners may not agree, that disagreement amounts to nothing more than a policy dispute.

B. The Department is responsible for disease control in public and private schools.

Petitioners also suggest that regulations of the Department of Health are not enough to authorize the Order; rather, the Secretary of Health needed to have authority under the regulations of the Department of *Education* (“there is no existing ‘rule’ or ‘regulation’ of the Department of Education that authorizes Respondent to issue her August 31, 2021, Order.” *Petitioners’ Brief* at 15). Much like the prior arguments, this argument ignores the clear language of the law.

The DPCL mandates that that Department of Health “shall be responsible for the prevention and control of communicable and non-communicable disease in any

municipality which is not served by a local board or department of health, *including disease control in public and private schools.*” 35 P.S. § 521.3(b) (emphasis added). And even in municipalities that do have a local board or department of health, those entities operate under the guidance and supervision of the department and do not have unfettered discretion. 35 P.S. § 521.4(a). Rather, the Department sets the floor for any disease control measures. When it does so, the local board or department of health may enact more stringent measures, but not less. 35 P.S. § 521.16 (“[m]unicipalities which have . . . county departments of health may enact ordinances or issue rules and regulations relating to disease prevention and control, which are not less strict than the provisions of this act or the rules and regulations issued thereunder by the [Health Advisory] board.”); *see also* 71 P.S. § 541 (rules and regulations of the Health Advisory Board become the regulations of the Department). Further, “if a local health authority is not [a local morbidity reporting office], it shall consult with and receive approval from the Department prior to taking any disease control measure.” 28 Pa. Code § 27.60. As a result, the Order was lawfully enacted to prevent the spread of disease within all public and private schools.

C. The Department has independent authority to issue disease control measures outside of a proclamation of disaster emergency.

In rejecting the persuasive value of this Court’s holding in *County of Allegheny v. Cracked Egg, LLC*, No. 101 C.D. 2021, 2020 WL 3124248 (Pa.

Commw. Ct. July 23, 2021) (finding the trial court did not err in concluding that the mandatory rule-making procedures were not applicable to other COVID-19 Control Measure Orders.), Petitioners argue the opinion has no value because the Governor's emergency powers were not in effect when the Order was entered. *Petitioners' Brief* at 20-21. This argument misses the mark. As discussed *supra*, and as recognized by the trial court in *Cracked Egg*, the Secretary of Health has independent authority to issue disease control measures. *Cracked Egg*, No. 101 C.D. 2021, slip op. at 10, n.10. Neither the expiration of the Governor's proclamation of disaster emergency nor the recent constitutional amendment limiting the Governor's power in this regard affects the authority of *the Department*. Petitioners' attempt to argue otherwise is a red herring that must be ignored.

D. The recent vote of the House Health Committee is not dispositive and ignored the existing regulation.

Petitioners spill much ink discussing the Pennsylvania House of Representatives House Health Committee's recent vote to submit the question of whether the Order violates the Regulatory Review Act to the Joint Committee on Documents. But that vote is neither dispositive of the issue nor binding on this Court. Pursuant to the Regulatory Review Act, the determination of whether the Order should have been promulgated as a regulation rests with the Joint Committee

on Documents.⁶ 71 P.S. § 745.7a. Moreover, the analysis of the House Health Committee, much like the argument set forth by Petitioners, ignores the fact that a lawfully promulgated regulation authorizing the Order *already exists*. The vote of the House Health Committee should be considered for nothing more than what it is—a partisan attempt to further strip authority from the Executive Branch in the midst of a global pandemic.

A combined reading of the DPCL, the Administrative Code, and the Department’s existing regulations make it clear that the Department had the independent authority to issue the Order pursuant to *existing* regulations. The law requires nothing else.

II. THE AUGUST 31, 2021 “ORDER OF THE ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH DIRECTING FACE COVERINGS IN SCHOOL ENTITIES” DOES NOT VIOLATE THE PRINCIPLES GOVERNING THE DELEGATION OF ADMINISTRATIVE AUTHORITY

⁶ It is worth noting that even the chair of the Joint Committee on Documents recognizes the Committee is not the final decision maker. In a recent media article, he acknowledged that the decision of the Committee is appealable to this Court. *See* “Pa. House panel seeks ruling on health secretary’s authority to issue school mask order,” PennLive, <https://www.pennlive.com/news/2021/09/pa-house-panel-seeks-ruling-on-health-secretarys-authority-to-issue-school-mask-order.html> (last visited 9/18/2021).

Petitioners contend the Order violates the constitutional separation-of-powers principle that only the General Assembly may exercise legislative power, called the non-delegation doctrine. *See Petitioners' Brief* at 32-34. They are confused. The Order cannot violate the non-delegation doctrine because it is not a delegation of authority by the General Assembly to another body. Instead, Petitioners apparently mean to argue that, if the DPCL and the Administrative Code authorize the Order, then one or both of the statutes is an impermissible delegation of legislative authority. While couched in legal terms, this challenge is yet another politically motivated attempt to undermine the Executive Branch's authority and responsibility to respond to the worst pandemic in over a century, which has claimed the lives of tens of thousands of Pennsylvanians.⁷ The fact that Petitioners disagree with the mitigation measures chosen by the Secretary does not render the measures an impermissible exercise of the legislative power. A delegation of authority to execute or administer law is permissible if the General Assembly makes the basic policy choices and provides adequate standards to guide and restrain the exercise of the delegated functions. Such is the case here.

⁷ Gillian Brockell, 250,000 lives lost: How the pandemic compares to other deadly events in U.S. history, *The Washington Post* (Nov. 19, 2020), <https://www.washingtonpost.com/history/2020/11/19/ranking-covid-deaths-american-history/> (citing *Past Pandemics*, Centers for Disease Control and Prevention, <https://www.cdc.gov/flu/pandemic-resources/basics/past-pandemics.html>) (visited Sept. 20, 2021).

A. The Secretary relied on statutory and regulatory authority in issuing the Order.

In entering the Order, the Secretary relied on the authority granted by the DPCL, 35 P.S. § 521.5; section 2102(a) of the Administrative Code of 1929, 71 P.S. § 532(a); and the Department of Health’s regulation at 28 Pa. Code § 27.60 (relating to disease control measures), as discussed *supra*. As the entry of the Order is clearly authorized by law, it cannot violate the non-delegation doctrine.

B. The delegation of authority to execute and administer the DPCL is necessary and appropriate.

The non-delegation doctrine stems from Article II, Section 1 of the Pennsylvania Constitution, which grants the General Assembly the legislative power. Article II, Section 1 provides: “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” The Supreme Court has interpreted the provision to be an exclusive grant of the “power to make law”; thus, only the legislative branch may exercise “legislative power.” *Wolf v. Scarnati*, 233 A.3d 679, 704 (Pa. 2020) (citing *Protz v. Workers’ Comp. Appeal Bd.*, 161 A.3d 827, 833 (Pa. 2017)). Notably, the doctrine has already been invoked during the COVID-19 pandemic in unsuccessful challenges to the Governor’s emergency powers (prior to the passage of Art. 4, Section 20, limiting the Governor’s emergency authority). *Compare Wolf v. Scarnati*, 233 A.3d at 706 (upholding Governor’s Proclamation of

Disaster Emergency against challenge from Senators) and *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 892-93 (Pa. 2020) (upholding Governor’s order closing non-life-sustaining businesses against challenge from businesses and individuals) with *Pa. AFL-CIO v. Commw.*, 219 A.3d 306, 315-16 (Pa. Commw. Ct. 2019) (explaining that *Protz* prohibited “the *adoption, sight unseen of future* standards or editions, without guidance by the General Assembly as to the basic policy decisions and standards to restrain the discretion of the entity setting those standards”) (cleaned up).

The General Assembly may delegate the execution or administration of law (including the power to issue orders or regulations that have the force of law), subject to only two constraints. *Wolf v. Scarnati*, 233 A.3d at 704 (citing *Bell Tel. Co. of Pa. v. Lewis*, 177 A. 36 (1935)). *First*, the General Assembly “must make the basic policy choices.” *Protz*, 161 A.3d at 834 (cleaned up). *Second*, the “legislation must include adequate standards which will guide and restrain the exercise of the delegated administrative functions.” *Id.* “This does not mean, however, that all details of administration must be precisely or separately enumerated in the statute.” *Gilligan v. Pa. Horse Racing Comm’n*, 422 A.2d 487, 489 (Pa. 1980) (citations omitted).

1. The General Assembly made the basic policy choices in the DCPL and Administrative Code.

The first requirement that the legislature “make the basic policy choices” is necessary to maintain the separation of powers, ensuring “that duly authorized and politically responsible officials make all of the necessary policy decisions, as is their mandate per the electorate.” *Protz*, 161 A.3d at 833 (citing *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 291 (Pa. 1975) (plurality opinion)). It also protects “against the arbitrary exercise of unnecessary and uncontrolled discretionary power.” *Id.* (citation omitted).

In addressing the Governor’s proclamation of disaster emergency, the Supreme Court held that the General Assembly made the “basic policy choice” when it “decided that the Governor should be able to exercise certain powers when he or she makes a ‘finding that a disaster has occurred or that the occurrence of the threat of a disaster is imminent.’” *Wolf v. Scarnati*, 233 A.3d at 704 (quoting 35 Pa.C.S. § 7301(c)). That the Court “relied upon the statute itself to make this ruling shows that the General Assembly, not the Governor, made the basic policy choices about which circumstances are necessary to trigger the Governor’s powers under the statute.” *Id.* (discussing *Friends of Danny DeVito*, 227 A.3d at 885-92). And in the *Pennsylvania Horse Racing Commission* case, the statute at issue “reflect[ed] a clear legislative policy to vest the Commission with broad general supervisory powers over the previously unlawful activity of thoroughbred horse racing.” *Gilligan*, 422

A.2d at 489 (concluding that “promulgation by the Commission of the jockey fee schedule falls clearly within its broad grant of legislative authority” despite the statute’s silence on the issue).⁸

Much like the proclamation at issue in *Wolf v. Scarnati*, the General Assembly, in enacting the DPCL, “made the basic policy choices.” It made the decision that the Department, and local boards of health, should be responsible for preventing and controlling disease. 35 P.S. § 521.3. The General Assembly specifically granted the Department the power and duty to “carry out the appropriate control measures” upon receiving a report of disease, 35 P.S. § 521.5, and provided

⁸ The Act in question provided:

The State Horse Racing Commission . . . shall have general jurisdiction over all pari-mutuel thoroughbred horse racing activities in the State and the corporations engaged therein. 15 P.S. § 2651.

(a) Pursuant to the provisions of this act, the State Horse Racing Commission shall have power to supervise generally all thoroughbred horse race meetings in this State at which pari-mutuel betting is conducted. The commission may adopt rules and regulations not inconsistent with this act to carry into effect its purposes and provisions and to prevent circumvention or evasion thereof.

(b) Without limiting the generality of the foregoing, and in addition to its other powers :

(The Act goes on to describe specific powers of the Commission. The power to promulgate fee schedules is not among them.) 15 P.S. § 2652.

Gilligan, 422 A.2d at 489 n.7 (cleaned up).

definitions to guide the Secretary's interpretation of the DPCL and subsequent regulations, 35 P.S. § 521.2(k)(b) [sic] (defining, e.g., a "reportable disease" as "any unusual or group expression of illness which, in the opinion of the secretary, may be a public health emergency."). A straightforward reading of the DPCL makes it clear that the General Assembly made the policy choices and charged the Secretary with carrying them out, thus exemplifying the typical relationship between the Legislative and Executive Branches.

2. The General Assembly provided adequate standards to guide and restrain the exercise of the delegated authority under the DPCL and the Administrative Code.

The General Assembly provided adequate standards by requiring a "receipt . . . of a report of a disease which is subject to isolation, quarantine, or any other control measure" and requiring the Department to follow certain procedures when promulgating regulations. The Secretary issued the Order pursuant to the Department's powers and duties enumerated in the DPCL, the Administrative Code, and its lawfully promulgated regulations. The Department's delegated authority is broad enough to enable the Department to carry out its critical task of preventing and controlling disease, but it is far from standardless and, thus, permissible.

The General Assembly must provide "adequate standards which will guide and restrain" the exercise of authority. *Wolf v. Scarnati*, 233 A.3d at 704 (citing *Protz*, 161 A.3d at 834). "The power and authority to be exercised . . . must be

conferred by legislative language clear and unmistakable.” *Gilligan*, 422 A.2d at 490 (quoting *Pa. Human Relations Comm’n v. St. Joe Mins. Corp.*, 382 A.2d 731, 735 (Pa. 1978)). In other words, the General Assembly must provide standards to “confine the exercise of discretion, thus guarding against its arbitrary exercise.” *Pennsylvanians Against Gambling Expansion Fund v. Pennsylvania*, 877 A.2d 383, 334 (Pa. 2005) (“PAGE”) (quoting *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d at 292). Yet, in evaluating whether the General Assembly provided adequate standards, the Court is “not limited to the mere letter of the law, but must look to the underlying purpose of the statute and its reasonable effect.” *Gilligan*, 422 A.2d at 490 (quoting *St. Joe Mins. Corp.*, 382 A.2d at 735); *see also Dauphin Deposit Tr. Co. v. Myers*, 130 A.2d 686, 688 (Pa. 1957) (“Significantly, in reviewing the adequacy of guiding standards incorporated in a law, this Court looks to the law as a whole, considering its purpose and scope, the subject matters covered therein, the duties prescribed and the broad or narrow powers granted.” The General Assembly may provide for a “pervasive system of regulation and supervision” through a “broad legislative mandate,” including “clearly and unmistakably confer[ing]” a “general rule making power.” *Gilligan*, 422 A.2d at 490 (quoting *St. Joe Mins. Corp.*, 382 A.2d at 735). It is “not required to provide a detailed how-to manual within each and every legislative act in order to supply adequate standards . . . and all details of administration need not be precisely or separately enumerated in

the statute.” *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 970 (cleaned up) (Baer, (then) J., dissenting).

When the legislature delegated the authority to the courts to determine if a tax was “excessive and unreasonable,” the structure of the courts, including precedential opinions and appellate review, provided adequate safeguards to protect against unmitigated discretion. *PAGE*, 877 A.2d at 334 (discussing *Wm. Penn Parking Garage, Inc.*, 346 A.2d at 291-92). On the other hand, when the General Assembly delegated power to determine zoning issues to the Gaming Control Board with instructions to “consider local zoning ordinances” but without guidance “as to [their] import,” the Court found the provision lacked adequate standards and held it was unconstitutional. *Id.* at 334-35. Here, the legislature ensured the appropriate safeguards were in place.

In evaluating the Governor’s emergency powers, the Court recently explained:

The powers delegated to the Governor are admittedly far-reaching, but nonetheless are specific. For example, the Governor can “[s]uspend the provisions of any regulatory statute . . . if strict compliance with the provisions . . . would in any way prevent, hinder or delay necessary action in coping with the emergency.” Broad discretion and standardless discretion are not the same thing.

Wolf v. Scarnati, 233 A.3d at 705 (quoting 35 Pa.C.S. § 7301(f)(1)). *See also Gilligan*, 422 A.2d at 490 (“The latitude of the standards controlling exercise of the

rulemaking powers expressly conferred on the Commission must be viewed in light of the broad supervisory task necessary to accomplish the express legislative purpose.”). Thus, the General Assembly may delegate broad powers to the executive branch so long as it does not impart limitless discretion.

The clear and unmistakable purpose of the DPCL is to empower and charge the Department with controlling and preventing disease. This critical mission requires wide discretion on the part of the Secretary, but that discretion is not limitless. The General Assembly provided that the Department’s actions must be in response to actual disease and, other than isolation, quarantine, or modified quarantine (including “the exclusion of children from school”) must be authorized by rule or regulation. 35 P.S. §§ 521.2, 521.5. In response to the deadliest pandemic in United States history,⁹ the Secretary acted pursuant to the Department’s lawfully enacted regulation to take the rather modest step of requiring masks while indoors at schools. The Order is well within the Secretary’s legislatively-conferred discretion.

⁹ “More Americans lost to coronavirus than 1918 flu pandemic, Johns Hopkins University data reveals.” ABC News, <https://www.abc.net.au/news/2021-09-21/more-americans-have-died-from-covid-19-than-1918-flu-pandemic/100480600> (last visited 9/21/21).

C. The Order was issued pursuant to a valid delegation of authority from the General Assembly.

The Order was issued pursuant to the Secretary’s regulatory and statutory authority, subject to adequate standards provided by the General Assembly. The Court must examine the “underlying purpose of the statute and its reasonable effect.” *Gilligan*, 422 A.2d at 490. The substantive provision through which the General Assembly delegated the execution and administration of the law to the Secretary is the DPCL. The “basic policy choice” of the statute is clear—the General Assembly created and empowered the Department to prevent and control disease. In fact, it explicitly *obligated* the Department to do so, providing that it “shall carry out the appropriate control measures . . . as is provided by rule or regulation.” *Id.* Indeed, the legislature buttressed this grant of authority by charging the Secretary with the “duty . . . to protect the health of the people of the State, and to determine and employ the most efficient and practical means for the prevention and suppression of disease.” 71 P.S. § 1403(a).

Moreover, that power is broad but expressly limited as the Secretary may only act in the realm of public health, upon receipt of “a report of a disease which is subject to isolation, quarantine, or any other control measure.” 35 P.S. § 521.5. And the Department cannot implement any control measure it wishes; its action is confined to those allowed under an existing rule or regulation—in this case, 28 Pa. Code § 27.60. The Secretary’s powers are much more limited than the Governor’s

former emergency powers to suspend law, *Wolf v. Scarnati*, 233 A.3d at 705, and specifically enumerated, unlike the broad powers of the Pennsylvania Horse Racing Commission, *Gilligan*, 422 A.2d at 490.

Petitioners' reliance on *Protz* is misplaced. There, the Supreme Court issued the relatively narrow holding that the General Assembly may not give a private entity “*de facto, unfettered control* over a formula that ultimately will determine whether a claimant’s partial[]disability benefits will cease after 500 weeks.” *Pa. AFL-CIO v. Commw.*, 219 A.3d at 314 (quoting *Protz*, 161 A.3d at 835-36). Aside from the obvious—that the Department is a government agency and not a private, non-governmental entity—there are other distinguishing characteristics. The law at issue in *Protz* adopted the “most recent edition” of a guide promulgated by the American Medical Association (“AMA”) to determine a workers’ compensation claimant’s degree of impairment. The Court held that, because the AMA could adopt a new guide at any time and was not bound by any standard set by the General Assembly, adopting the guide sight unseen was an impermissible delegation of legislative power. *Pa. AFL-CIO v. Commonwealth*, 219 A.3d at 311 (discussing *Protz*, 161 A.3d at 835-36, 838-39). The DPCL and the Administrative Code do no such thing. Instead, the General Assembly has provided clear instructions to the Department about its duties and powers, and how to exercise them. The Department lawfully exercised that power in issuing its regulations, including 28 Pa. Code § 27.60.

Pursuant to that authority, the Secretary issued the Order. While Petitioners contend the Order goes too far under the Department’s authority, the statute permits the Secretary to go much farther and take much more drastic action without any enabling regulation, if necessary. *See, e.g.*, 35 P.S. § 521.2(i)(1) (defining “modified quarantine” to include “the exclusion of children from school”); *id.* § 521.5 (empowering the Department to order “isolation, quarantine, or any other control measure”); Pennsylvania Department of Health, Order of the Secretary of Health Requiring All Persons Submitting, Performing or Receiving Results of an Antigen Test for SARA-CoV-2 (effective Oct. 15, 2020);¹⁰ Pennsylvania Department of Health, Order of the Secretary for Mitigation and Enforcement (effective Nov. 27, 2020).¹¹

The Order does not represent an unconstitutional delegation of legislative power; it is precisely the sort of reasoned measure to protect the public health that the General Assembly empowered the Secretary to carry out. “Current members of the General Assembly,” and Petitioners, “may regret that decision, but they cannot .

¹⁰

<https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/SOH%20Order%20Antigen%20Testing%20Reporting.pdf>.

¹¹

<https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Order%20of%20the%20Secretary%20for%20Mitigation%20and%20Enforcement.pdf>

. . . give that regret legal effect.” *Wolf v. Scarnati*, 233 A.3d at 706 (holding legislature’s joint resolution without presentment to the Governor unconstitutional).

CONCLUSION

For the foregoing reasons, the Court should hold the *Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities* was lawfully entered and dismiss the Petition for Review in its entirety.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

KELI M. NEARY
Executive Deputy Attorney General
Civil Law Division

By: /s/ Karen M. Romano
KAREN M. ROMANO
Chief Deputy Attorney General
Chief, Litigation Section
Pa. Bar # 88848

Office of Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 787-2717
kromano@attorneygeneral.gov

RYAN B. SMITH
Deputy Attorney General
Pa. Bar # 324643

DATE: September 23, 2021

CERTIFICATE OF COUNSEL

I 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/ Karen M. Romano

KAREN M. ROMANO
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I, Karen M. Romano, Chief Deputy Attorney General, do hereby certify that I have this day caused to be served the foregoing Respondent's Brief, via PACFile notification, on the following:

COUNSEL FOR PETITIONERS:

Thomas W. King, III, Esquire

Thomas E. Breth, Esquire

Ronald T. Elliott, Esquire

Jordan P. Shuber, Esquire

DILLON, McCANDLESS, KING, COULTER & GRAHAM, L.L.P.

tking@dmkcg.com

tbreth@dmkcg.com

relliott@dmkcg.com

jshuber@dmkcg.com

/s/ Karen M. Romano

KAREN M. ROMANO
Chief Deputy Attorney General

DATE: September 23, 2021