

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JACOB DOYLE CORMAN, III,
individually and as a parent of two
minor school children; **JESSE
WILLS TOPPER**, individually and
as a parent of two minor school
children; **CALVARY BAPTIST
CHURCH; HILLCREST
CHRISTIAN ACADEMY; JAMES
AND MICHELLE REICH**,
individually and as parents of three
minor school children; **ADAM AND
CHELSEA McCLURE**, individually
and as parents of one minor
special needs school child,
VICTORIA T. BAPTISTE,
individually and as a parent of two
special needs school children,
JENNIFER D. BALDACCI,
individually and as a parent of one
school child; **KLINT NEIMAN and
ANDREA PALMER**, parents of two
minor school children,

Petitioners,

v.

**SECRETARY OF THE
PENNSYLVANIA DEPARTMENT
OF HEALTH**,

Respondent.

No.: 294 M.D. 2021

ORIGINAL JURISDICTION

**PETITIONERS' MOTION FOR
LEAVE TO FILE AMENDED
PETITION FOR REVIEW**

**PETITIONERS' MOTION FOR LEAVE TO FILE AMENDED PETITION
FOR REVIEW**

AND NOW, come the Petitioners, by and through their attorneys, DILLON McCANDLESS KING COULTER & GRAHAM, LLP, and file the within Motion for Leave to File an Amended Petition for Review, averring as follows:

1. Petitioners filed the above captioned Petition for Review on September 3, 2021, seeking to challenge the Acting Secretary of Health's Order dated August 31, 2021, requiring the wearing of face coverings by individuals entering a school entity.

2. Petitioners are currently comprised of individual parents of school-aged children who will be affected by Respondent's Order as well as private school entities that will be subject to and required to enforce the Respondent's Order.

3. Since the filing of Petitioners' Petition for Review on September 3, 2021, multiple public school entities have contacted the offices of Petitioners' counsel, seeking to join the lawsuit and challenge the Respondent's Order.

4. Specifically, Penncrest School District, in Crawford County, Pennsylvania; Chestnut Ridge School District, in Bedford County, Pennsylvania; and West York Area School District, in York County,

Pennsylvania wish to join the present litigation challenging the Respondent's August 31, 2021 Order, and have taken public action at their respective school board meetings to authorize their joinder in this case.

5. Penncrest School District is a public school organized and existing in accordance with the laws of the Commonwealth of Pennsylvania with an address of 18741 State Highway 198, Saegertown, PA 16433.

6. Chestnut Ridge School District is a public school organized and existing in accordance with the laws of the Commonwealth of Pennsylvania with an address of 3281 Valley Road, Fishertown, PA 15539.

7. West York Area School District is a public school organized and existing in accordance with the laws of the Commonwealth of Pennsylvania with an address of 1891 Loucks Road, Suite 100, York, PA 17408.

8. The Pennsylvania Rules of Civil Procedure provide that a party, either by filed consent of the adverse party or by leave of court, may change the form of action, add a person as a party, correct the name of a party, or otherwise amend the pleading. See Pa. R.C.P. No. 1033(a).

9. It is well-settled law that Pennsylvania Rule of Civil Procedure No. 1033 is to be liberally interpreted.

10. Counsel for Respondent was consulted and indicated that they do not consent to the filing of an Amended Petition for Review.

11. Accordingly, Petitioners respectfully request that this Court grant the Petitioners' Motion for Leave to Amend their Petition for Review to add: Penncrest School District, Chestnut Ridge School District, and West York Area School District as Petitioners to this action. All three proposed Petitioners request to join the existing case and incorporate the previously filed pleadings in the litigation pursuant to Pa. R.C.P. No. 1019(g).

12. A true and correct copy of Petitioners' proposed Amended Petition for Review is attached hereto as "Exhibit A."

WHEREFORE, Petitioners respectfully request that this Honorable Court grant Leave to file the attached Amended Petition for Review.

Respectfully submitted,

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

/s/ Thomas W. King, III
Thomas W. King, III
Attorneys for Petitioners

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Petitioners,

v.

ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH,

Respondent.

No.: 294 M.D. 2021

ORIGINAL JURISDICTION

FIRST AMENDED PETITION FOR REVIEW



NOTICE

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days after this Petition for Review and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Dauphin County Lawyer Referral Service
213 North Front Street
Harrisburg, Pennsylvania 17101
(717) 232-7536

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ORIGINAL JURISDICTION

FIRST AMENDED PETITION
FOR REVIEW

NOTICE TO PLEAD

TO: RESPONDENT.

You are hereby notified to file a written response to the enclosed Petition for Review within thirty (30) days from service hereof or a judgment may be entered against you.

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

Dated: September 24, 2021

By: /s/ Thomas W. King, III

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INTRODUCTION

This case requires a detailed analysis of the authority granted the Secretary of Health under the Disease Prevention and Control Law of 1955, 35 P.S. §521.1, et seq.; the procedural mechanisms that serve to limit or prevent the arbitrary and capricious exercise of delegated power; the rules and regulations lawfully promulgated thereunder; and the judiciary's role in protecting the public against the arbitrariness of *ad hoc* decision making by an administrative agency.

Pursuant to the non-delegation Doctrine, the General Assembly is prohibited from granting or delegating "to any other branch of government or to any other body or authority" the power to make law. *Blackwell*, 567 A.2d at 636; *State Bd. of Chiropractic Exam'rs v. Life Fellowship of Pa.*, 441 Pa. 293, 272 A.2d 478, 480 (1971). The General Assembly is the sole branch of government vested with the authority "to make laws, and not to make legislators." John Locke, *Second Treatise of Government* 87 (R. Cox ed.1982). See *Dep't of Transp. v. Ass'n of Am. Rail-roads*, — U.S. —, 135 S.Ct. 1225, 1237, 191 L.Ed.2d 153 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested power exists to protect liberty."); see also *The Federalist* No. 47, at 301 (J. Cooke ed.

1961) (J. *656 Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.”).

This does not mean that the General Assembly is unable to delegate to administrative agencies the authority to administer and/or execute the laws of the Commonwealth of Pennsylvania. To the contrary, numerous administrative agencies, commission and boards within the Commonwealth regularly exercise such authority consistent with the limitations and procedures established by the General Assembly. *Blackwell*, 567 A.2d at 637.

When the General Assembly delegates authority to administrative agencies, Pennsylvania’s Constitution requires the General Assembly to make the policy decisions and to establish “adequate standards which will guide and restrain the exercise of the delegated administrative functions.” *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 877 A.2d 383, 418 (2005); *State Bd. of Chiropractic Exam’rs*, 272 A.2d at 481 (quoting *Chartiers Valley Joint Sch. v. Cty. Bd. of Sch. Dirs. of Allegheny Cty.*, 418 Pa. 520, 211 A.2d 487, 492–93 (1965)).

The standards guiding and restraining the exercise of the delegated administrative authority are an essential protection against the arbitrary and

capricious exercise of the authority. *Tosto*, 331 A.2d at 203; see *W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist. of Phila.*, 132 A.3d 957, 966 (2016). Absent appropriate and meaningful standards to guide and restrain the exercise of the delegated administrative functions, the legislation violates the non-delegation Doctrine. *Protz v. Workers' Compen. App. Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 833–35 (Pa. 2017)

In furtherance of this legal principal, the General Assembly passed the Regulatory Review Act which contains a Legislative Intent section that states in relevant part as follows:

“The General Assembly has enacted a large number of statutes and has conferred on boards, commissions, departments and agencies within the executive branch of government the authority to adopt rules and regulations to implement those statutes. The General Assembly has found that this delegation of its authority has resulted in regulations being promulgated without undergoing effective review concerning ... conformity to legislative intent. The General Assembly finds that it must establish a procedure for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania. It is the intent of this act to establish a method for ongoing and effective legislative review and oversight in order to foster executive branch accountability; to provide for primary review by a commission with sufficient authority, expertise, independence and time to perform that function; to provide ultimate review of regulations by the General Assembly; and to

assist the Governor, the Attorney General and the General Assembly in their supervisory and oversight functions. ..." 71 P.S. §745.2

On August 31, 2021, the Acting Secretary of the Pennsylvania Department of Health, Alison V. Beam (the "**Secretary of Health**"), issued an Order, effective September 7, 2021, entitled, "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities" (the "**Order**"). A copy of the Order is attached and incorporated by reference as if fully set forth at length herein as Exhibit "**A.**"

The Order imposes a "General Masking Requirement" upon Petitioners. Pursuant to the terms contained within the Order, the Secretary of Health asserts that she has the authority to issue the Order under the provisions of the Disease Prevention and Control Law of 1955, 35 P.S. §521.1, et seq. Petitioners challenge such alleged authority and ask this Honorable Court to review the Secretary of Health's authority under the Disease Prevention and Control Law of 1955 as well as her failure to comply with Pennsylvania law in regard to the promulgation of such "Order" (or rule or regulation).

This Petition for Review further addresses the failure of the Secretary to comply with the requirements of the Disease Prevention and Control Law

of 1955 in the particulars therein contained, it further challenges the ability of the Executive Branch to circumvent the Pennsylvania Constitution and the actions of the Legislature in declaring an end to the Governor's Emergency Declaration.

The Petition further challenges the right of the Secretary of Health to enforce the provisions of her Order in either public or private schools and to enforce such Order with regard to students, staff and visitors from such schools in regard to the application of her Order.

STATEMENT OF JURISDICTION

1. This Court has original jurisdiction over this action pursuant to 42 Pa.C.S.A. § 761(a)(1).

2. This action is in the nature of a Declaratory Judgment action pursuant to 42 Pa.C.S.A. § 7531, *et seq.*

3. Petitioners filed an Application for Special Relief in the form of an Emergency Preliminary Injunction pursuant to Pennsylvania Rule of Appellate Procedure 1532(a). A copy of the Application for Special Relief is attached and incorporated by reference as if fully set forth at length herein as Exhibit "B."

PARTIES SEEKING RELIEF

4. Petitioner, Jacob Doyle Corman, III ("**Mr. Corman**"), is an adult individual residing in the Commonwealth of Pennsylvania and is the parent of two minor school children, DTC and JCC, enrolled in the Bellefonte Area School District and brings this action as parent and guardian of said children and as a taxpayer.

5. Petitioner, Jesse Wills Topper ("**Mr. Topper**"), is an adult individual residing in the Commonwealth of Pennsylvania and is a parent of two minor school children, JT and JT, enrolled in the Bedford Area School District and brings this action as parent and guardian of said children and as a taxpayer.

6. Petitioner, Calvary Academy ("**Calvary**"), is a private school organized and existing in accordance with the laws of the Commonwealth of Pennsylvania with an address of 199 Great Belt Road, Butler, PA 16002.

7. Petitioner, Hillcrest Christian Academy ("**Hillcrest**"), is a private school organized and existing in accordance with the laws of the Commonwealth of Pennsylvania with an address of 2500 Bethel Church Road, Bethel Park, PA 15102.

8. Petitioner, Penncrest School District ("**Penncrest**") is a public school organized and existing in accordance with the laws of the

Commonwealth of Pennsylvania with an address of 18741 State Highway 198, Saegertown, PA 16433, and is directly affected by the Order which is the subject of this Petition.

9. Petitioner, Chestnut Ridge School District ("**Chestnut Ridge**") is a public school organized and existing in accordance with the laws of the Commonwealth of Pennsylvania with an address of 3281 Valley Road, Fishertown, PA 15539, and is directly affected by the Order which is the subject of this Petition.

10. Petitioner, West York Area School District ("**West York**") is a public school organized and existing in accordance with the laws of the Commonwealth of Pennsylvania with an address of 1891 Loucks Road, Suite 100, York, PA 17408, and is directly affected by the Order which is the subject of this Petition.

11. Petitioners, James and Michelle Reich (the "**Reichs**"), are husband and wife with three sons in the Slippery Rock Area School District in grades 6, 7, and 9. The Reichs are suing as parents and guardians of said children and as taxpayers.

12. Petitioners, Adam and Chelsea McClure (the "**McClures**"), are husband and wife with one son who is a special need student in the Butler

Area School District in grade 2. The McClures are suing as parents and guardians of said children and as taxpayers.

13. Petitioner, Victoria T. Baptiste ("**Ms. Baptiste**"), is a parent with two daughters, one of whom is a special need student in the Butler Area School District in kindergarten. Ms. Baptiste is suing as parent and guardian of said child and as a taxpayer.

14. Petitioner, Jennifer D. Baldacci ("**Ms. Baldacci**"), is a parent with one daughter in the Butler Area School District in pre-school and is suing as parent and guardian of said child and as a taxpayer.

15. Petitioners, Klint Neiman ("**Mr. Neiman**") and Amanda Palmer ("**Ms. Palmer**"), are parents of two minor school children enrolled in the Wyomissing Area School District and is suing as parents and guardians of said children and as taxpayers.

16. The above parties will be collectively referred to herein as "**Petitioners.**"

GOVERNMENTAL UNIT WHOSE ACTION IS AT ISSUE

17. Petitioners seek appeal from and review and reversal of the Acting Secretary of Health's Order, Ex. A., based upon the factual allegations and reasons as more fully set forth below.

MATERIAL FACTS UPON WHICH THE CAUSE OF ACTION IS BASED

18. On March 6, 2020, the Governor issued a Proclamation of Disaster Emergency regarding the COVID-19 pandemic.

19. On May 18, 2021, the citizens of the Commonwealth of Pennsylvania approved two constitutional amendments that curtailed the Governor's emergency powers under Pennsylvania's Emergency Management Services Act.

20. On June 10, 2021, the General Assembly approved a Concurrent Resolution terminating the Governor's March 6, 2020, Proclamation. A copy of the Concurrent Resolution is attached and incorporated by reference as if fully set forth at length herein as Exhibit "C."

21. The Concurrent Resolution was approved in the Pennsylvania Senate by a 30-20 vote and in the Pennsylvania House of Representatives by a 121-81 vote.

22. The Governor's administration maintains that "dissolving the disaster emergency does not affect a health secretary's disease-prevention authority to issue **mask-wearing** and stay-at-home orders or shut down schools and nonessential businesses." See Marc Levy, Lawmakers vote to end emergency declaration, extend waivers, The Associated Press: PA Wire (June 10, 2021), <https://apnews.com/article/pa-state-wire-health->

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23. On August 31, 2021, the Secretary of Health issued her Order, which among other things, contains a "General Masking Requirement."

24. Section 2 - General Masking Requirement of the Order states, "[e]ach teacher, child/student, staff, or visitor working, attending, or visiting a School Entity shall wear a face covering, regardless of vaccination status, except as set forth in Section 3." See Ex. A, p. 4.

25. The term "School Entity" is defined by the Order as follows:

"'School Entity' means any of the following:

1. A public PreK-12 school.
2. A brick and mortar or cyber charter school.
3. A private or parochial school.
4. A career and technical center (CTC).
5. An intermediate unit (IU).
6. A PA Pre-K Counts program, Head Start Program, Preschool Early Intervention program, or Family Center.
7. A private academic nursery school and locally-funded prekindergarten activities.
8. A childcare provider licensed by the Department of Human Services of the Commonwealth." *Id.* pp. 3-4.

26. Section 3 - Exceptions to Coverings Requirement of the Order

lists exceptions to the face covering requires in Section 2, as follows:

A. If wearing a face covering while working would create an unsafe condition in which to operate equipment or execute a task as determined by local, state, or federal regulators or workplace safety guidelines.

B. If wearing a face covering would either cause a medical condition, or exacerbate an existing one, including respiratory issues that impede breathing, a mental health condition or a disability.

C. When necessary to confirm the individual's identity.

D. When working alone and isolated from interaction with other people with little or no expectation of in-person interaction.

E. If an individual is communicating or seeking to communicate with someone who is hearing-impaired or has another disability, where the ability to see the mouth is essential for communication.

F. When the individual is under two (2) years of age.

G. When an individual is:

1) Engaged in an activity that cannot be performed while wearing a mask, such as eating and drinking, or playing an instrument that would be obstructed by the face covering; or

2) Participating in high intensity aerobic or anerobic activities, including during a physical education class in a well-ventilated location and

able to maintain a physical distance of six feet from all other individuals.

H. When a child/student is participating in a sports practice activity or event, whether indoors or outdoors." *Id.* pp. 4-5.

27. Section 4 - School Entity Obligations of the Order states in relevant part as follows:

A. A School Entity must:

1. Require and enforce the requirement that all teachers, children/students, staff, and visitors (subject to the exceptions in Section 3) wear a face covering indoors, regardless of whether this Order is reflected in a school entity's Health and Safety Plan.

2. [Order does not contain a Paragraph 4(A)(2)].

3. Post prominent signs in conspicuous locations for teachers, children/students, staff, and visitors stating that face coverings are required by the Order of the Secretary of Health.

4. Provide reasonable accommodations for individuals who state they have a medical condition, mental health condition, or disability that makes it unreasonable for the person to maintain a face covering." *Id.* p. 5.

28. As authority for her Order, the Acting Secretary of Health indicates as follows:

"... This authority is granted to the Secretary of Health pursuant to Pennsylvania law. See section 5 of the Disease Prevention and Control Law, 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). Particularly, the Department of Health (Department) has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. See 35 P.S. § 521.5; 71 P.S. §§ 532(a), and 1403(a); 28 Pa. Code § 27.60. ..." *Id.* p. 3.

29. Section 521.5 - Control Measures of the Disease Prevention and Control Law of 1955, as cited by Respondent, states as follows:

"Upon 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 measures in such manner and in such place ***as is provided by rule or regulation.***" 35 P.S. §521.5. (emphasis added).

30. Pursuant to Section 521.5, the Secretary of Health has the authority to utilize "isolation, quarantine, or any other control measures" but only "in such manner and in such place as is provided by rule or regulation." 35 P.S. §521.5.

31. Since the Secretary of Health's Order does not mandate "isolation" or "quarantine," it must and does rely upon the term "any other control measures." 35 P.S. §521.5.

32. The "other control measure" at-issue is the Secretary of Health's mandated wearing of face coverings by teachers, children,

students, staff, or visitors working, attending, or visiting a School Entity which must be "in such manner and in such place as is provided by rule or regulation." 35 P.S. §521.5.

33. There is no rule or regulation that exists within the Commonwealth of Pennsylvania that provides for a mask mandate.

PETITIONERS' OBJECTIONS TO THE ORDER

The Order fails to Comply with the Requirements of the Regulatory Review Act.

34. Paragraphs 1 through 33 of this Petition are incorporated herein by reference as if fully set forth.

35. When the General Assembly delegates authority to administrative agencies, Pennsylvania's Constitution requires the General Assembly to make the policy decisions and to establish "adequate standards which will guide and restrain the exercise of the delegated administrative functions." *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 877 A.2d 383, 418 (2005); *State Bd. of Chiropractic Exam'rs*, 272 A.2d at 481 (quoting *Chartiers Valley Joint Sch. v. Cty. Bd. of Sch. Dirs. of Allegheny Cty.*, 418 Pa. 520, 211 A.2d 487, 492–93 (1965)).

36. The standards guiding and restraining the exercise of the delegated administrative authority are an essential protection against the

arbitrary and capricious exercise of the authority. *Tosto*, 331 A.2d at 203; see *W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist. of Phila.*, 132 A.3d 957, 966 (2016). Absent appropriate and meaningful standards to guide and restrain the exercise of the delegated administrative functions, the legislation violates the non-delegation Doctrine. *Protz v. Workers' Compen. App. Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 833–35 (Pa. 2017)

37. In furtherance of this legal principal, the General Assembly passed the Regulatory Review Act which contains a Legislative Intent section that states in relevant part as follows:

“The General Assembly has enacted a large number of statutes and has conferred on boards, commissions, departments and agencies within the executive branch of government the authority to adopt rules and regulations to implement those statutes. The General Assembly has found that this delegation of its authority has resulted in regulations being promulgated without undergoing effective review concerning ... conformity to legislative intent. The General Assembly finds that it must establish a procedure for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania. It is the intent of this act to establish a method for ongoing and effective legislative review and oversight in order to foster executive branch accountability; to provide for primary review by a commission with sufficient authority, expertise,

independence and time to perform that function; to provide ultimate review of regulations by the General Assembly; and to assist the Governor, the Attorney General and the General Assembly in their supervisory and oversight functions. ..." 71 P.S. §745.2

38. Section 745.5a of the Act establishes the procedure by which a proposed regulation is to be reviewed, including, but not limited to, the obligation to publish and republish the proposed rule or regulation, various opportunities for public comment, and extensive review and input regarding the appropriateness of the proposed rule or regulation. 71 P.S. §745.5a.

39. Section 745.5b of the Act establishes the criteria to be applied in the review of a proposed regulation and states in relevant part as follows:

"In determining whether a proposed, final-form, final-omitted or existing regulation is in the public interest, the commission shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based. In making its determination, the commission shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General." 71 P.S. §745.5b.

40. The Regulatory Review Act defines the term "regulation" as follows:

"Any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating

to the agency or amending, revising or otherwise altering the terms and provisions of an existing regulation, or prescribing the practice or procedure before such agency. ... The term shall not include a proclamation, executive order, directive or similar document issued by the Governor, but shall include a regulation which may be promulgated by an agency, only with the approval of the Governor." 71 P.S. §745.3.

41. As authority for her Order, the Acting Secretary of Health indicates as follows:

"... This authority is granted to the Secretary of Health pursuant to Pennsylvania law. See section 5 of the Disease Prevention and Control Law, 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). Particularly, the Department of Health (Department) has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. See 35 P.S. § 521.5; 71 P.S. §§ 532(a), and 1403(a); 28 Pa. Code § 27.60. ..." *Id.* p. 3.

42. Section 521.5 - Control Measures of the Disease Prevention and Control Law of 1955, as cited by Respondent, states as follows:

"Upon 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 measures in such manner and in such place **as is provided by rule or regulation**." 35 P.S. §521.5. (emphasis added).

43. As discussed in greater detail below, Petitioners assert that there is no existing rule or regulation granting the Secretary of Health the authority to issue her Order.

44. Without an existing rule or regulation, the Secretary of Health is required to comply with the requirements of the Regulatory Review Act prior to issuing her Order which is included within the definition of a regulation under the Regulatory Review Act. *71 P.S. §745.3.*

45. The rule making function set forth in the Regulatory Review Act is not waivable and is not impacted by any emergency declaration of the Governor inasmuch as any and all emergency declarations relative to COVID-19 have expired, and/or have been revoked by the General Assembly.

46. The Secretary of Health has no authority and/or ability to issue regulations, as the term is defined by the Act, except through the requirements of the Regulatory Review Act.

47. By failing to comply with the Regulatory Review Act, the Secretary of Health has issued an invalid and unenforceable Order under Pennsylvania's Regulatory Review Act and the Order is therefore void *ab initio*.

Insufficient Regulatory Support for a Mask Mandate.

48. Paragraph 1 through 47 of this Petition are incorporated herein by reference as if fully set forth.

49. The Secretary of Health's Order cites Paragraph (a) of Regulation 27.60 - Disease control measures, of the Department of Health's regulations, 28 Pa. Code §27.60(a), which states in relevant part as follows:

"(a) 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 animal with a communicable disease or infection; and any other disease control measure the Department or 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." See 28 Pa. Code §27.60(a).

50. The term "isolation," as used in Regulation 27.60(a), is defined as follows:

The separation for the communicable period of an infected person or animal from other persons or animals, in such a manner as to prevent the direct or indirect transmission of the infectious agent from infected persons or animals to other persons or animals who are susceptible or who may spread the disease to others. See 28 Pa. Code §27.1.

51. The Secretary of Health's Order does not utilize, or mandate the imposition of isolation as permitted by the Regulations.

52. The term "surveillance" as used in Regulation 27.60(a) is defined as follows:

Surveillance of disease – The continuing scrutiny of all aspects of occurrence and spread of disease that are pertinent to effective control. See 28 Pa. Code §27.1

53. The Secretary of Health's Order mandating the wearing of face coverings by teachers, children, students, staff, or visitors working, attending, or visiting a School Entity does not constitute "continuing scrutiny" or the "surveillance of disease" as the term is use in Regulation 27.60(a). See 28 Pa. Code §27.60(a).

54. Instead, the Secretary of Health's Order subjects health, non-infected teachers, children, students, staff, and visitors working at, attending, or visiting School Entities to the wearing of face coverings, regardless of vaccination status.

55. The term "segregation," as used in Regulation 27.60(a), is defined as follows:

The separation for special control and observation of one or more persons or animals from other persons or animals to facilitate the control of a communicable disease. See 28 Pa. Code §27.1.

56. Regulation 27.60 - Disease control measures, Paragraph (b), of the Department of Health's regulations, 28 Pa. Code §27.60(b), as cited by The Secretary of Health, states in relevant part as follows:

(b) The Department or local health authority will 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. See 28 Pa. Code §27.60(b).

57. Petitioners' are not patients, they are healthy, non-infected teachers, children, students, staff, visitors, and schools covered by The Secretary of Health's Order.

58. Although Respondent cites Regulation 27.60 as authority for her August 31, 2021, Order Directing Face Coverings in School Entities, such assertion is misplaced.

59. Nowhere in the clear and unambiguous language of Regulation 27.60, does it provide Respondent with the authority to mandate the wearing of face coverings in School Entities for healthy, non-infected teachers, children, students, staff, and visitors.

60. Although Respondent cites Regulation 27.60, Respondent ignores Regulation 27.71 - Exclusion of children, and staff having contact with children, for specified diseases and infectious conditions, which states in relevant part as follows:

A person in charge of a public, private, parochial, Sunday or other school or college shall exclude from school a child, or a staff person, including a volunteer, who has contact with children, who is suspected by a physician or the school nurse of having any of the communicable diseases, infections or conditions. . . . See 28 Pa. Code §27.71.

61. Further, Regulation 27.72 - Exclusion of children, and staff having contact with children, for showing symptoms, which states in relevant part as follows:

“A person in charge of a public, private, parochial, Sunday or other school or college shall, following consultation with a physician or school nurse, exclude immediately a child, or staff person, including a volunteer, having contact with children, showing any of the following symptoms, unless that person is determined by the school nurse, or a physician, to be noncommunicable: ...” See 28 Pa. Code §27.72.

62. Both of the above-referenced Regulations vest in the persons in charge of public, private, parochial, and other schools the authority and control over persons suspected of having a communicable disease and/or persons exhibiting symptoms of a communicable disease.

Respondent lacks the Authority to mandate the wearing of face coverings in Schools.

63. Paragraphs 1 through 62 of this Petition are incorporated herein by reference as if fully set forth.

64. Petitioners assert that Respondent is without the statutory or regulatory authority to mandate the wearing of face coverings by teachers, children, students, staff, or visitors working, attending, or visiting a School Entity.

65. Petitioner's assertion that Section 521.5 - Control Measures of the Disease Prevention and Control Law of 1955, provides her to issue her August 31, 2021, Order is misplaced.

66. Pursuant to Section 521.5, Respondent has the authority to utilize "isolation, quarantine, or any other control measures" but only "in such manner and in such place as is provided by rule or regulation." 35 P.S. §521.5.

67. Since Respondent's Order does not mandate "isolation" or "quarantine," it must and does rely upon the term "any other control measures." 35 P.S. §521.5.

68. The "other control measure" at-issue is Respondent's mandated wearing of face coverings by teachers, children, students, staff, or visitors working, attending, or visiting a School Entity which must be "in such manner and in such place as is provided by rule or regulation." 35 P.S. §521.5.

69. Petitioners assert that Respondent's Order fails to cite any such rule or regulation, and that, no such rule or regulation exists within the Commonwealth of Pennsylvania.

Respondent's Order usurps the exclusive powers and authority granted to Schools under the Public School Code.

70. Paragraphs 1 through 69 of this Petition are incorporated herein by reference as if fully set forth.

71. Section 2-211 of the School Code states, “[t]he several school districts in this Commonwealth shall be, and hereby are vested as, bodies corporate, with all necessary powers to enable them to carry out the provisions of [the School Code].”

72. Section 3-301 of the School Code states, “[t]he public school system of the Commonwealth shall be administered by a board of school directors, to be elected or appointed...” (emphasis added).

73. Section 4-407 of the School Code states, “[e]ach board of school directors may adopt reasonable rules and regulations for its government and control.”

74. Section 5-510 of the School Code states, “[t]he board of school directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs and the conduct and deportment of all superintendents, teachers, and other appointees or employes[sic] during the time they are engaged in their duties to the district, as well as regarding the conduct and deportment of all pupils attending the public schools in the district, during such time as they are under the supervision of the board of

school directors and teachers, including the time necessarily spent in coming to and returning from school.”

75. Section 5-515 of the School Code states, “[i]n every school district the board of school directors shall continue to have and possess, all the powers, rights, and privileges, not inconsistent with this act...”

76. Boards of School Directors are authorized to act during war. See 24 P.S. § 5-520 (“any board of school directors may—[k]eep the schools of the district in session such days and number of days per week as they deem necessary or desirable...”). (emphasis added).

77. Boards of School Directors are authorized to act during temporary emergencies. See 24 P.S. § 5-520.1 (“any board of school directors may—[k]eep the schools of the district in session such days and number of days per week as they deem necessary or desirable...”). (emphasis added).

78. Department of Health Regulation 27.71 - Exclusion of children, and staff having contact with children, for specified diseases and infectious conditions, states in relevant part as follows:

“A person in charge of a public, private, parochial, Sunday or other school or college shall exclude from school a child, or a staff person, including a volunteer, who has contact with children, who is suspected by a physician or the school nurse of having any of the communicable diseases, infections or conditions. ...” *28 Pa. Code §27.71*

79. Further, Regulation 27.72 - Exclusion of children, and staff having contact with children, for showing symptoms, states in relevant part as follows:

"A person in charge of a public, private, parochial, Sunday or other school or college shall, following consultation with a physician or school nurse, exclude immediately a child, or staff person, including a volunteer, having contact with children, showing any of the following symptoms, unless that person is determined by the school nurse, or a physician, to be noncommunicable: ..." 28 Pa. Code §27.72

80. Both of these Regulations vest in the persons in charge of public, private, parochial, and other schools the authority and control over persons suspected of having a communicable disease and/or persons exhibiting symptoms of a communicable disease.

81. Pursuant to the Public School Code, as amended, 24 P.S. §§1-101, *et seq.*, grants the sole and exclusive authority over the operation of public school, its student, staff, volunteers and visitors with the Board of School Directors and superintendents of school appointed thereby.

STATEMENT OF RELIEF SOUGHT

1. Petitioners seek a declaration of their rights under the circumstances set forth in this Petition and a declaration addressing the lack of compliance by the Secretary with Pennsylvania law. Petitioners further seek relief in the nature of an injunction as is more fully set forth in the Petition for Special Relief attached hereto;

2. An Order reversing the Secretary of Health's August 31, 2021 Order, declaring such Order and any subsequent Amendments thereto to be void ab initio;

3. An Order granting a preliminary and/or permanent injunction to enjoin the Secretary of Health from issuing such Order as is the subject of this Petition and further enjoining the Secretary of Health from attempting to enforce the provisions of such Order; and

4. An Order granting any such further relief as may be just under the circumstances, with costs on the Secretary of Health.

Respectfully Submitted,

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

Dated: September 24, 2021

By: /s/ Thomas W. King, III

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Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities

The 2019 novel coronavirus (COVID-19) is a contagious disease that continues spreading rapidly from person to person in the world, the United States, and this Commonwealth. Despite periods of time when the virus seemed to wane, it, like all viruses, has continued to mutate, and spread. As of the date of this Order, there have been 1,300,368 cases and 28,235 deaths in this Commonwealth caused by the still present and ongoing pandemic. At this time, the Centers for Disease Control and Prevention (CDC) estimates that the Delta variant is the predominant strain in the Commonwealth. COVID-19 can be transmitted from any person who is infected, even if they have no symptoms and, with the Delta variant, even if they have been vaccinated.¹ Symptoms of COVID-19 may include fever or chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea. Older adults and people who have serious chronic medical conditions were considered to be at higher risk for serious illness. Now, because of the rise of the Delta variant, increasing disease and hospitalizations, and the inability to obtain vaccines for a large part of that vulnerable group, children are more and more at risk.

There are several reasons for the increasing risk to children from COVID-19. The risk overall to the unvaccinated population is rising. Given the rise in hospitalizations and deaths, and despite COVID-19 vaccines being available, the Delta variant of the SARS-CoV-2 virus is causing the rate of cases of COVID-19 to increase.² The Delta variant is more infectious, and it is leading to increased transmissibility.³ Additionally, data is suggesting that the Delta variant may cause more severe illness than previous strains of SARS-CoV-2.⁴ Vaccination remains the most effective protection against all strains of SARS-CoV-2; however, not all of our population is able to get vaccinated. As of yet, no vaccine has been approved for children under the age of 12. 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.

¹ Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts, July 2021, *Weekly* / August 6, 2021 / 70(31):1059-1062 (last visited, August 26, 2021); Key Things to Know About COVID-19 Vaccines, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html> (Updated August 19, 2021) (last visited August 26, 2021).

² Delta Variant: What we Know about the Science, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/variant/delta-variant.html> (last visited Aug. 9, 2021); Rachel Herlihy, et al., "Rapid Increase in Circulation of SARS-CoV-2 B.1.617.2 (Delta) Variant," Aug. 6, 2021, CDC, https://www.cdc.gov/mmwr/volumes/70/wr/mm7032e2.htm?cid=mm7032e2_w (last visited Aug. 9, 2021); Megan Scudellari, "How the Coronavirus Infects Cells — and Why Delta is so Dangerous," *Nature*, <https://www.nature.com/article/d41586-021-02039-y> (last visited Aug. 11, 2021).

³ *Id.*

⁴ *Id.*

In addition to the concern that COVID-19 spreads quickly and dangerously among children, there are concerns that school closures create health issues for children, too. Maintaining in-person instruction at schools is imperative, since it has also been shown that in-person instruction and socialization are necessary for the health and well-being of our children.^{5,6,7} In view of this serious concern for our nation's children, the CDC has issued a strong recommendation for masking of all persons, teachers, students and staff, within the nation's schools, regardless of vaccination status, to create a multi-layered approach for fighting COVID and to keep our schools open for in-person education. In addition, the American Academy of Pediatrics (AAP) has also strongly recommended masking in schools. Finally, recent studies have shown that mask-wearing in schools has contributed to lower levels of COVID-19 transmission among students and staff and allowed for the continued in-person attendance.⁸ Requiring face coverings in schools, therefore, balances the concerns for the mental health of our children with the need to protect them against a disease that is growing more virulent as we struggle to protect the most vulnerable members of our population. In accordance with the recommendations of the CDC and the AAP and based upon the rising case numbers and hospitalizations in general in the Commonwealth, including the number of cases in our children, as well as the need to protect and maintain in-person education for the health and well-being of those children, I am issuing this Order to protect the ability of our schools to continue to educate our children, and of our children to receive in-person instruction in the safest environment possible.

⁵ Engzell P., Frey A., Verhagen M.D., "Learning loss due to school closures during the COVID-19 pandemic," *Proc Natl Acad Sci* 2021;118(17), <https://www.pnas.org/content/118/17/e2022376118> (last visited August 26, 2021).

⁶ Barnett W.S., Jung, K., "Seven Impacts of the Pandemic on Young Children and their Parents: Initial Findings from NIEER's December 2020 Preschool Learning Activities Survey. 2021," New Brunswick, NJ: National Institute for Early Education Research.

⁷ Verlenden J.V., Pampati S., Rasberry C.N., et al., "Association of Children's Mode of School Instruction with Child and Parent Experiences and Well-Being During the COVID-19 Pandemic — COVID Experiences Survey, United States, October 8–November 13, 2020," *MMWR Morb Mortal Wkly Rep* 2021;70:369–376, <https://www.cdc.gov/mmwr/volumes/70/wr/mm7011a1.htm> (last visited August 26, 2021).

⁸ Zimmerman KO, Akinboyo IC, Brookhart MA, et al., "Incidence and Secondary Transmission of SARS-CoV-2 Infections in Schools," *Pediatrics* 2021;147(4), <https://pubmed.ncbi.nlm.nih.gov/33419869/> (last visited August 26, 2021); Hershov R.B., Wu K., Lewis NM, et al., "Low SARS-CoV-2 Transmission in Elementary Schools – Salt Lake County, Utah, December 3, 2020–January 31, 2021," *MMWR Morb Mortal Wkly Rep* 2021;70(12):442–448, <https://www.cdc.gov/mmwr/volumes/70/wr/mm7012e3.htm> (last visited August 26, 2021); Falk A., Benda A., Falk P., et al., "COVID-19 Cases and Transmission in 17 K-12 Schools – Wood County, Wisconsin, August 31–November 29, 2020," *MMWR Morb Mortal Wkly Rep* 2021;70(4):136–140, <https://www.cdc.gov/mmwr/volumes/70/wr/mm7004e3.htm> (last visited August 26, 2021); Dawson P., Worrell M.C., Malone S., et al., "Pilot Investigation of SARS-CoV-2 Secondary Transmission in Kindergarten Through Grade 12 Schools Implementing Mitigation Strategies – St. Louis County and City of Springfield, Missouri, December 2020," *MMWR Morb Mortal Wkly Rep* 2021;70(12):449–455, <https://www.cdc.gov/mmwr/volumes/70/wr/mm7012e4.htm> (last visited August 26, 2021).

COVID-19 is a threat to the public's health, for which the Secretary of Health may order general control measures. This authority is granted to the Secretary of Health pursuant to Pennsylvania law. See section 5 of the Disease Prevention and Control Law, 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). Particularly, the Department of Health (Department) has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. See 35 P.S. § 521.5; 71 P.S. §§ 532(a), and 1403(a); 28 Pa. Code § 27.60. With the opening of the 2021 school year at hand, and case counts and hospitalizations continuing to rise, there is a need for additional action to protect our Commonwealth's children.

Accordingly, on this day, August 31, 2021, in order to prevent and control the spread of disease, I hereby order:

Section 1. Definitions

For purposes of this Order, the listed terms have the following meanings:

"Alternative to a face covering" may include a plastic face shield that covers the nose and mouth, extends below the chin and to the ears, and leaves no exposed gap between the forehead and the shield's headpiece. The Centers for Disease Control and Prevention (CDC) has advised there is currently not enough evidence to determine how much protection a face shield provides to individuals around the person wearing the face shield because of gaps where respiratory droplets may escape. The CDC does state, however, that face shields may still be an option in situations where wearing a cloth face covering is not otherwise feasible.

"Department" means the Department of Health of the Commonwealth.

"Face covering" means covering of the nose and mouth with material that is secured to the head with ties, straps, or loops over the ears or is wrapped around the lower face. A "face covering" can be made of a variety of synthetic or natural fabrics, including cotton, silk, or linen. A "face covering" may be factory-made, sewn by hand, or be improvised from household items, including, but not limited to, scarfs, bandanas, t-shirts, sweatshirts, or towels. While procedural and surgical masks intended for health care providers and first responders, such as N95 respirators, meet those requirements, these specialized masks should be reserved for appropriate occupational and health care personnel.

"School Entity" means any of the following:

- (1) A public PreK-12 school.
- (2) A brick and mortar or cyber charter school.
- (3) A private or parochial school.
- (4) A career and technical center (CTC).

- (5) An intermedlate unit (IU).
- (6) A PA Pre-K Counts program, Head Start Program, Preschool Early Intervention program, or Family Center.
- (7) A private academic nursery school and locally-funded prekindergarten activities.
- (8) A child care provider licensed by the Department of Human Services of the Commonwealth.

Section 2: General Masking Requirement

Each teacher, child/student, staff, or visitor working, attending, or visiting a School Entity shall wear a face covering indoors, regardless of vaccination status, except as set forth in Section 3.

Section 3: Exceptions to Covering Requirement

The following are exceptions to the face covering requirements in Section 2. All alternatives to a face covering, including the use of a face shield, should be exhausted before an individual is excepted from this Order.

- A. If wearing a face covering while working would create an unsafe condition in which to operate equipment or execute a task as determined by local, state, or federal regulators or workplace safety guidellnes.
- B. If wearing a face covering would elther cause a medical condition, or exacerbate an existing one, including respiratory issues that impede breathing, a mental health condition or a disability.
- C. When necessary to confirm the individual's identity.
- D. When working alone and isolated from interaction with other people with little or no expectation of in-person interaction.
- E. If an individual is communicating or seeking to communicate with someone who is hearing-impaired or has another disability, where the ability to see the mouth is essential for communication.
- F. When the individual is under two (2) years of age.
- G. When an individual is:
 - (1) Engaged in an activity that cannot be performed while wearing a mask, such as eating and drinking, or playing an instrument that would be obstructed by the face covering; or



- (2) Participating in high intensity aerobic or anerobic activities, including during a physical education class in a well-ventilated location and able to maintain a physical distance of six feet from all other individuals.
- H. When a child/student is participating in a sports practice activity or event, whether indoors or outdoors.

Section 4. School Entity Obligations

A. A School Entity must:

- 1. Require and enforce the requirement that all teachers, children/students, staff, and visitors (subject to the exceptions in Section 3) wear a face covering indoors, regardless of whether this Order is reflected in a school entity's Health and Safety Plan.
- 3. Post prominent signs in conspicuous locations for teachers, children/students, staff, and visitors stating that face coverings are required by the Order of the Secretary of Health.
- 4. Provide reasonable accommodations for individuals who state they have a medical condition, mental health condition, or disability that makes it unreasonable for the person to maintain a face covering.
- 5. A School Entity should not:
 - a. Enforce face covering requirements when there is an exception under Section 3 or if it is unsafe to do so.
 - b. Restrain, use force, or physically remove, teachers, children/students, staff, or visitors who refuse to comply with this Order when it would not otherwise be legal to do so.
 - c. Violate other laws, including state and federal anti-discrimination laws.



Section 5. Federal Requirements Relating to Transportation

This Order shall not impact the obligation of any School Entity to comply with requirements issued by the CDC, including requirements for masking on public transportation conveyances, such as school district transportation.

Section 6. Effective Date and Duration

This Order shall take effect at 12:01 a.m. on September 7, 2021, and shall remain in effect until otherwise terminated.

A handwritten signature in black ink that reads "Alison V. Beam".

Alison V. Beam
Acting Secretary of Health

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JACOB DOYLE CORMAN, III,
individually and as a parent of two
minor school children; **JESSE
WILLS TOPPER**, individually and
as a parent of two minor school
children; **CALVARY BAPTIST
CHURCH; HILLCREST
CHRISTIAN ACADEMY; JAMES
AND MICHELLE REICH**,
individually and as parents of three
minor school children; **ADAM AND
CHELSEA McCLURE**, individually
and as parents of one minor
special needs school child,
VICTORA T. BAPTISTE,
individually and as a parent of two
special needs school children,
JENNIFER D. BALDACCI,
individually and as a parent of one
school child; **KLINT NEIMAN and
AMANDA PALMER**, individually
and as parents of two minor school
children,

Petitioners,

v.

**ACTING SECRETARY OF THE
PENNSYLVANIA DEPARTMENT
OF HEALTH**,

Respondent.

No.: _____

ORIGINAL JURISDICTION

PETITIONERS' APPLICATION
FOR SPECIAL RELIEF IN THE
FORM OF AN EMERGENCY
PRELIMINARY INJUNCTION
UNDER PA.R.A.P. 1532

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JACOB DOYLE CORMAN, III, individually and as a parent of two minor school children; **JESSE WILLS TOPPER**, individually and as a parent of two minor school children; **CALVARY ACADEMY**; **HILLCREST CHRISTIAN ACADEMY**; **JAMES AND MICHELLE REICH**, individually and as parents of three minor school children; **ADAM AND CHELSEA McCLURE**, individually and as parents of one minor special needs school child, **VICTORA T. BAPTISTE**, individually and as a parent of two special needs school children, **JENNIFER D. BALDACCI**, individually and as a parent of one school child; **KLINT NEIMAN and AMANDA PALMER**, individually and as parents of two minor school children,

Petitioners,

v.

ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH,

Respondent.

No.: _____

ORIGINAL JURISDICTION

PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF AN EMERGENCY PRELIMINARY INJUNCTION UNDER PA.R.A.P. 1532

INTRODUCTION

Petitioners file the within Application for Special Relief in the Form of An Emergency Injunction Pursuant to Pa.R.A.P. 1532 to enjoin the Acting Secretary of the Pennsylvania Department of Health, Alison V. Beam (the "**Secretary of Health**"), from enforcing her August 31, 2021 Order, effective September 7, 2021, entitled, "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities" (the "**Order**").

BACKGROUND

1. As set forth more fully in Petitioners' Petition for Review, filed contemporaneously with the within Application for Special Relief, Petitioners seek an emergency injunction to enjoin and prevent the Secretary of Health's Order from taking effect in this Commonwealth.

2. Section 2 - General Masking Requirement of the Order states, "[e]ach teacher, child/student, staff, or visitor working, attending, or visiting a School Entity shall wear a face covering, regardless of vaccination status, except as set forth in Section 3." See Petition for Review Ex. A, p. 4.

3. There is no rule or regulation that exists within the Commonwealth of Pennsylvania that provides for a mask mandate.

4. Despite there being no rule or regulation that exists within the Commonwealth of Pennsylvania that provides for a mask mandate, the Secretary of Health's Order imposes a mask mandate set to begin in four (4) days on September 7, 2021.

INJUNCTIVE RELIEF

5. Stated in summary form, the prerequisites of a preliminary injunction are: 1) the injunction is necessary to prevent immediate and irreparable harm not compensable by money damages; 2) greater injury will result from refusing the injunction than from granting it; 3) the injunction restores the parties to the status quo; and 4) the activity sought to be restrained is actionable and the petitioners' right to relief is clear.

6. Petitioners meet all the elements for entering a preliminary injunction in this case.

7. First, an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages because Petitioners are under a threat of immediate and irreparable harm as the Secretary of Health's Order goes into effect in a matter of four (4) days.

8. Petitioners allege clear immediate and irreparable harm in each of their respective affidavits incorporated as if fully set forth at length herein as Exhibit "1."

9. If the Secretary of Health's Order is allowed to stand the respective children of the Petitioners may:

- a. be denied their right to a free appropriate public education;
- b. be deprived of their right to an education in a non-public facility;
- c. have their education disrupted by an illegal Order;
- d. be prevented from exercising their decision to not wear a mask;
- e. be prevented from entering the school of their choice in the manner of their choosing;
- f. be subjected to a last minute change in the way and manner they will receive their education;
- g. be forced to wear masks in their Sunday School classes while exercising their religious freedom; and
- h. significantly alter how educational programming will occur in schools.

10. If the Secretary of Health's Order is allowed to stand each school Petitioner faces chaos on Tuesday, September 7, 2021 in that numerous

parents and children have advised that they will refuse to wear masks in school.

11. In addition the school Petitioners have no policies regarding the exclusion of children from school absent the wearing of facemasks and there is insufficient time for the boards of school directors to meet to even consider such policies.

12. Second, greater injury will result from refusing the injunction than granting it due to each of the averments contained in Petitioners' affidavits.

13. If the injunction is refused, each school district is forced to alter their original plans to return to school on the eve of the beginning of the year.

14. Third, Petitioners' request seeks to preserve the status quo of the decisions made by each of their respective individual school district as to prevent the harm contained in each of the averments in their affidavits.

15. If the Secretary of Health's Order is allowed to stand the status quo will be completely disrupted and will create the chaotic implementation of the Order on September 7, 2021.

16. Fourth, and for all the reasons as set forth in the Petition for Review, Petitioners' are likely to prevail on the merits of the underlying claims in this case.

17. Based upon the foregoing, Petitioners seek an Order granting a preliminary and/or permanent injunction to enjoin the Secretary of Health from issuing such Order as is the subject of this Petition and further enjoining the Secretary of Health from attempting to enforce the provisions of such Order.

18. Notice is being provided to Respondent and a request for an immediate hearing is included with Petitioners' Application for Special Relief.

WHEREFORE, Petitioners seek a preliminary and/or permanent injunction to enjoin the Secretary of Health from issuing such Order as is the subject of this Petition and further enjoining the Secretary of Health from attempting to enforce the provisions of such Order.

Respectfully Submitted,

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

Dated: September 3, 2021

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Thomas More Society*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jacob Doyle Corman, III, et al.,	:	Docket Number
Petitioners	:	
v.	:	
Secretary of Health	:	
Respondent	:	

AFFIDAVIT OF KLINT NEIMAN AND AMANDA PALMER

COMMONWEALTH OF PENNSYLVANIA	:	
COUNTY OF BUTLER	:	ss.

AFFIDAVIT OF KLINT NEIMAN AND AMANDA PALMER

1. Our names are Klint Neiman and Amanda Palmer. We reside at 125 S. 4th Avenue, West Reading, Pennsylvania 19611.
2. We have a daughter who is nine (9) years old and in the 4th grade in the Wyomissing Area School District. We also have a son who is six (6) years old and in the First Grade in the Wyomissing Area School District.
3. We are aware of the Commonwealth of Pennsylvania Secretary of Health's Order dated August 31, 2021, which requires students/teachers/visitors to Pennsylvania schools to wear a mask/face covering.
4. We intend to send our children to school without a face covering or mask.
5. We do not intend to comply with the Secretary of Health's Order regarding the mask/face covering mandates. We believe this action would be proscribed by the Secretary of Health's Order regarding masks/face coverings.

6. We believe the Secretary of Health's Order regarding mask face covering mandates to be illegal and we do not intend to comply with such Order and believe it to be illegal. We intend to engage in a course of conduct allegedly proscribed by such Order.

I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I declare, certify, verify, or state under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. Section 1746, relating to unsworn declarations under penalty of perjury.

9-3-2021
Date

Klint Neiman
Klint Neiman

9-3-2021
Date

Amanda Palmer
Amanda Palmer

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jacob Doyle Corman, III, et al.,	:	Docket Number
	:	
Petitioners	:	
	:	
vs.	:	
	:	
Secretary of Health	:	
	:	
Respondent	:	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA	:	SS:
COUNTY OF BUTLER	:	

AFFIDAVIT OF JENNIFER DIMIT BALDACCI

1. My name is Jennifer Dimit Baldacci. I reside at 235 Oak Street in Butler, Pennsylvania 16001.
2. I have a daughter, NALL, who is enrolled in preschool at St. Mark's Lutheran Church in Butler, Pennsylvania. I am also a teacher at St. Mark's Lutheran Church where my daughter attends preschool.
3. I am aware of the Commonwealth of Pennsylvania Secretary of Health's Order dated August 31, 2021, which requires students teachers visitors to Pennsylvania schools to wear a mask face covering.
4. I intend to send our children to school without a face covering or mask.
5. I do not intend to comply with the Secretary of Health's Order regarding the mask face covering mandates. I believe this action would be proscribed by the Secretary of Health's Order regarding masks face coverings.

6. I believe the Secretary of Health's Order regarding mask face covering mandates to be illegal and I do not intend to comply with such Order and believe it to be illegal. I intend to engage in a course of conduct allegedly proscribed by such Order.

I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I declare, certify, verify, or state under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. Section 1746, relating to unsworn declarations under penalty of perjury.

September 3, 2021
Date

Timothy Albert Baker

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jacob Doyle Corman, III, et al.,	:	Docket Number
Petitioners	:	
v.	:	
Secretary of Health	:	
Respondent	:	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA	:	
COUNTY OF BUTLER	:	ss.

AFFIDAVIT OF VICTORIA T BAPTISTE

1. My name is Victoria T. Baptiste. I reside at 106 Rivers Lane in Butler, Pennsylvania 16002.
2. I have a daughter who is five (5) years old and in Kindergarten at First Baptist Christian School.
3. I am aware of the Commonwealth of Pennsylvania Secretary of Health's Order dated August 31, 2021, which requires students/teachers/visitors to Pennsylvania schools to wear a mask/face covering.
4. I intend to send my child to school without a face covering or mask.
5. I do not intend to comply with the Secretary of Health's Order regarding the mask/face covering mandates. I believe this action would be proscribed by the Secretary of Health's Order regarding masks/face coverings.

6. I believe the Secretary of Health's Order regarding mask/face covering mandates to be illegal and we do not intend to comply with such Order and believe it to be illegal. I intend to engage in a course of conduct allegedly proscribed by such Order.

I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I declare, certify, verify, or state under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. Section 1746, relating to unsworn declarations under penalty of perjury.

1-3-2021
Date

Alastair J. Prohaska

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jacob Doyle Corman, III, et al.,

Docket Number

Petitioners

v.

Secretary of Health

Respondent

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA

ss.

COUNTY OF BUTLER

AFFIDAVIT OF ADAM AND CHELSEA MCCLURE

1. Our names are Adam and Chelsea McClure. We reside at 329 S Home Ave in Butler, Pennsylvania 16001.
2. We have a son, RM, who in the Second Grade and attends Northwest Elementary School, which is in Buller Area School District.
3. We are aware of the Commonwealth of Pennsylvania Secretary of Health's Order dated August 31, 2021, which requires students/teachers/visitors to Pennsylvania schools to wear a mask/face covering.
4. We intend to send our child to school without a face covering or mask.
5. We do not intend to comply with the Secretary of Health's Order regarding the mask/face covering mandates. We believe this action would be proscribed by the Secretary of Health's Order regarding masks/face coverings.

6 We believe the Secretary of Health's Order regarding mask, face covering mandates to be illegal and we do not intend to comply with such Order and believe it to be illegal. We intend to engage in a course of conduct allegedly proscribed by such Order.

I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I declare, certify, verify, or state under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. Section 1746, relating to unsworn declarations under penalty of perjury.

9/3/21
Date

Adm. McCune

9/3/21
Date

Chelsea R. McCune

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jacob Doyle Corman, III, et al., : Docket Number
: :
Petitioners : :
: :
v. : :
: :
Secretary of Health : :
: :
Respondent : :

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF BUTLER :

AFFIDAVIT OF JAMES AND MICHELLE REICH

1. Our names are James and Michelle Reich. We reside at 200 Cherry Falls Lane in Prospect, Pennsylvania 16052.

2. We have a son, MR, who is eleven (11) years old and in the Sixth Grade in the Slippery Rock School District. We have a son, PR, who is twelve (12) years old and in the Seventh Grade in the Slippery Rock School District. We also have a son, DR, who is fifteen (15) years old and in the Ninth Grade in the Slippery Rock School District.

3. We are aware of the Commonwealth of Pennsylvania Secretary of Health's Order dated August 31, 2021, which requires students/teachers/visitors to Pennsylvania schools to wear a mask/face covering.

4. We intend to send our children to school without a face covering or mask.

5. We do not intend to comply with the Secretary of Health's Order regarding the mask/face covering mandates. We believe this action would be proscribed by the Secretary of Health's Order regarding masks/face coverings.

6. We believe the Secretary of Health's Order regarding mask/face covering mandates to be illegal and we do not intend to comply with such Order and believe it to be illegal. We intend to engage in a course of conduct allegedly proscribed by such Order.

I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I declare, certify, verify, or state under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. Section 1746, relating to unsworn declarations under penalty of perjury.

James O. Reuter
9.3.21

Date

Michelle Clerici
9.3.21

Date

VERIFICATION

I, Adam McClure, am authorized to make this verification. I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I understand that the statements herein are made subject to the penalties of perjury of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Adam McClure

CERTIFICATE OF COMPLIANCE

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/ Thomas W. King, III
Thomas W. King, III

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JACOB DOYLE CORMAN, III,
individually and as a parent of two
minor school children; **JESSE
WILLS TOPPER**, individually and
as a parent of two minor school
children; **CALVARY BAPTIST
CHURCH; HILLCREST
CHRISTIAN ACADEMY; JAMES
AND MICHELLE REICH**,
individually and as parents of three
minor school children; **ADAM AND
CHELSEA McCLURE**, individually
and as parents of one minor
special needs school child,
VICTORA T. BAPTISTE,
individually and as a parent of two
special needs school children,
JENNIFER D. BALDACCI,
individually and as a parent of one
school child; **KLINT NEIMAN and
AMANDA PALMER**, individually
and as parents of two minor school
children,

Petitioners,

v.

**ACTING SECRETARY OF THE
PENNSYLVANIA DEPARTMENT
OF HEALTH**,

Respondent.

No.: _____

ORIGINAL JURISDICTION

PROPOSED SCHEDULING
ORDER

PROPOSED SCHEDULING ORDER

AND NOW, this ___ day of _____ 2021, upon consideration of **PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF AN EMERGENCY PRELIMINARY INJUNCTION UNDER PA.R.A.P. 1532**, and any opposition thereto, it is hereby ORDERED that a hearing on Petitioners' Application for Special Relief will be held on _____ at _____ a.m./p.m. before the Honorable _____ at _____.

_____. J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JACOB DOYLE CORMAN, III,
individually and as a parent of two
minor school children; **JESSE
WILLS TOPPER**, individually and
as a parent of two minor school
children; **CALVARY BAPTIST
CHURCH; HILLCREST
CHRISTIAN ACADEMY; JAMES
AND MICHELLE REICH**,
individually and as parents of three
minor school children; **ADAM AND
CHELSEA McCLURE**, individually
and as parents of one minor
special needs school child,
VICTORA T. BAPTISTE,
individually and as a parent of two
special needs school children,
JENNIFER D. BALDACCI,
individually and as a parent of one
school child; **KLINT NEIMAN and
AMANDA PALMER**, individually
and as parents of two minor school
children,

Petitioners,

v.

**ACTING SECRETARY OF THE
PENNSYLVANIA DEPARTMENT
OF HEALTH**,

Respondent.

No.: _____

ORIGINAL JURISDICTION

PROPOSED ORDER

PROPOSED ORDER

AND NOW, this ___ day of _____ 2021, upon consideration of PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF AN EMERGENCY PRELIMINARY INJUNCTION UNDER PA.R.A.P. 1532, and any opposition thereto, it is hereby ORDERED that the Petitioners' Application is GRANTED and the Secretary of Health's Order is hereby stayed pending final disposition of Petitioners' Petition for Review.

_____ J.

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE RESOLUTION

No. 106 Session of
2021

INTRODUCED BY BENNINGHOFF AND DAVANZO, MAY 24, 2021

AS AMENDED, IN SENATE, JUNE 10, 2021

A CONCURRENT RESOLUTION

1 ~~Terminating~~ EXTENDING IN PART AND ~~TERMINATING IN PART~~ <--
2 TERMINATING the March 6, 2020, proclamation of disaster <--
3 emergency, as amended and renewed, issued under the hand and
4 seal of the Governor, Thomas Westerman Wolf.

5 WHEREAS, On March 6, 2020, the Governor issued a proclamation
6 declaring a disaster emergency in response to the existence of
7 COVID-19 cases in Pennsylvania; and

8 WHEREAS, On June 3, 2020, the Governor issued an amendment to
9 the proclamation of disaster emergency renewing the March 6,
10 2020, declaration for an additional 90 days; and

11 WHEREAS, On August 31, 2020, the Governor issued an amendment
12 to the proclamation of disaster emergency renewing the
13 declaration for an additional 90 days; and

14 WHEREAS, On November 24, 2020, the Governor issued an
15 amendment to the proclamation of disaster emergency renewing the
16 declaration for an additional 90 days; and

17 WHEREAS, On February 19, 2021, the Governor issued an
18 amendment to the proclamation of disaster emergency renewing the

1 declaration for an additional 90 days; and

2 WHEREAS, On May 20, 2021, the Governor issued an amendment to
3 the proclamation of disaster emergency renewing the declaration;
4 and

5 WHEREAS, On May 18, 2021, the People of Pennsylvania adopted
6 an amendment to section 9 of Article III of the Constitution of
7 Pennsylvania which provides, AS AMENDED, that orders, <--
8 resolutions or votes "to which the concurrence of both Houses
9 may be necessary, except on the questions of ... termination or
10 extension of a disaster emergency declaration as declared by an
11 executive order or proclamation, or portion of a disaster
12 emergency declaration as declared by an executive order or
13 proclamation, shall be presented to the Governor" for his
14 approval or veto; and

15 WHEREAS, On May 18, 2021, the People of Pennsylvania adopted
16 section 20(c) of Article IV of the Constitution of Pennsylvania
17 which provides, in relevant part, "A disaster emergency
18 declaration under subsection (a) shall be in effect for no more
19 than twenty-one (21) days, unless otherwise extended in whole or
20 part by concurrent resolution of the General Assembly";
21 therefore be it

22 RESOLVED (The Senate concurring), That the General Assembly,
23 in accordance with ~~section 20 of Article IV of the Constitution~~ <--
24 ~~of Pennsylvania~~ ITS AUTHORITY, hereby terminates the disaster <--
25 emergency declared on March 6, 2020, as amended and renewed, in
26 response to COVID-19; and be it further

27 RESOLVED, That upon adoption of this concurrent resolution by
28 both chambers of the General Assembly, the Chief Clerk of the
29 House of Representatives shall notify the Governor of the
30 General Assembly's action; and be it further

1 RESOLVED, That the Chief Clerk of the House of
2 Representatives shall transmit this concurrent resolution to the
3 Legislative Reference Bureau for publication in the Pennsylvania
4 Bulletin under 45 Pa.C.S. § 725(a)(4); AND BE IT FURTHER <--
5 RESOLVED, THAT THIS CONCURRENT RESOLUTION SHALL TAKE EFFECT
6 IMMEDIATELY.

VERIFICATION

I, Luigi DeFrancesco, President of the Penncrest School Board am authorized to make this verification. I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I understand that the statements herein are made subject to the penalties of perjury of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.



Luigi DeFrancesco
President of Penncrest
School Board

VERIFICATION

I, William S. Pataki, President of the Board of School Directors of Chestnut Ridge School District, hereby verify that the facts contained in the foregoing document are true and correct to the best of my knowledge, information and belief, and are made subject to the penalties of 18 Pa. Con. Stat. Ann. Section 4904 relating to unsworn falsification to authorities.




William S. Pataki

Dated: 9/12/2021

VERIFICATION

I, Jeanne Herman, President of the West York Area School Board am authorized to make this verification. I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I understand that the statements herein are made subject to the penalties of perjury of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.



Jeanne Herman
President of West York Area
School Board

CERTIFICATE OF COMPLIANCE

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/ Thomas W. King, III
Thomas W. King, III

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JACOB DOYLE CORMAN, III,
individually and as a parent of two
minor school children; **JESSE
WILLS TOPPER**, individually and
as a parent of two minor school
children; **CALVARY BAPTIST
CHURCH; HILLCREST
CHRISTIAN ACADEMY; JAMES
AND MICHELLE REICH**,
individually and as parents of three
minor school children; **ADAM AND
CHELSEA McCLURE**, individually
and as parents of one minor
special needs school child,
VICTORIA T. BAPTISTE,
individually and as a parent of two
special needs school children,
JENNIFER D. BALDACCI,
individually and as a parent of one
school child; **KLINT NEIMAN and
ANDREA PALMER**, parents of two
minor school children,

Petitioners,

v.

**SECRETARY OF THE
PENNSYLVANIA DEPARTMENT
OF HEALTH**,

Respondent.

No.: 294 M.D. 2021

ORIGINAL JURISDICTION

ORDER

AND NOW, this ___ day of _____, 2021, in consideration of the Petitioners' Motion for Leave to File an Amended Petition for Review, it is hereby Ordered that the Motion is GRANTED. Petitioners shall file the Amended Petition for Review, as attached to Petitioners' Motion. The Prothonotary is directed amend the caption on the docket as set forth in the Amended Petition.

By the Court,

_____ J.