

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J.W., individually and on behalf of minor :
children C.W., D.W. and M.W.; S.H., :
individually and on behalf of minor children :
C.H. and D.H.; C.H., individually and on :
behalf of minor child M.J.L.; N.J., :
individually and on behalf of minor :
children J.J. and J.K.; R.M., individually :
and on behalf of minor child M.M.; C.A., :
individually and on behalf of minor child :
F.J.A., :

Petitioners, :

v. :

No. 297 MD 2021

Acting Secretary of the Pennsylvania :
Department of Health, Alison Beam :

Respondent. :

ORDER

AND NOW, this ___ day of _____, 2021, upon consideration of
Petitioner’s Application for Reconsideration, Petitioner’s Application is hereby
GRANTED. The November 10, 2021 Order and Opinion in this matter is hereby
amended to state that the Petitioners Petition for Review is Granted.

, J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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and on behalf of minor child M.M.; C.A., :
individually and on behalf of minor child :
F.J.A., :
Petitioners, :
v. : No. 297 MD 2021
Acting Secretary of the Pennsylvania :
Department of Health, Alison Beam :
Respondent. :

PETITIONERS' APPLICATION FOR RECONSIDERATION

Petitioners J.W., individually and on behalf of minor children C.W., D.W. and M.W.; S.H., individually and on behalf of minor children C.H. and D.H; C.H., individually and on behalf of minor child M.J.L.; N.J., individually and on behalf of minor children J.J. and J.K.; R.M., individually and on behalf of minor child M.M.; C.A., individually and on behalf of minor child F.J.A., by and through their attorneys, and hereby files this Application for Reconsideration, averring as follows:

1. On September 8, 2021, Petitioners filed a Petition for Review (“Petition”) challenging the Acting Secretary of Health’s August 31, 2021 order

requiring students and others to wear face coverings in schools across the Commonwealth (“Order”).

2. In relevant part, the Petition sought (1) a declaratory judgment that the Order does not apply in any county in which a county health department exists by virtue of the Disease Prevention and Control Law of 1955 and the Local Health Administration Law (Count I); (2) a declaratory judgment that the Acting Secretary of Health lacks the legal authority to require face coverings under the Disease Prevention and Control Law (Count II); (3) a declaratory judgment that the Order violates Article I, Section III of the Pennsylvania Constitution, the Public School Code and the Religious Freedom Protection Act by not allowing for even the consideration of religious objections to face coverings (Counts III and V); and (4) a declaratory judgment that the Order violates procedural due process rights because it was issued without notice and an opportunity to respond and in the absence of a declared disaster emergency (Count IV).

3. Following dueling applications for summary relief, briefs and argument, this Court issued an opinion and order on November 10, 2021 that dismissed Petitioners’ Petition and the Secretary’s Application for Summary Relief as moot. The November 10, 2021 order and opinion is attached hereto as Exhibit A.

4. Petitioners seek reconsideration of the order to the extent that it dismissed their Petition as moot.

PROCEDURALLY, THE ISSUES RAISED BY PETITIONERS WILL BE LOST

5. As a procedural matter, there is likely no need for the Secretary to file an appeal of this Court's decision in this matter because this Court dismissed the Petition as moot.

6. While the Secretary may (and likely will) file an appeal of the decision issued in *Corman v. Acting Secretary of the Pennsylvania Department of Health* (Pa. Cmwlth., No. 294 M.D. 2021, filed November 10, 2021), there is likely no logical need for the Secretary to appeal the order entered in this docket, even though it is premised upon the same reasoning set forth in *Corman*.

7. While some of the issues raised in the Petition are similar to those raised in *Corman*, the questions concerning Counts I, III, IV and V¹ will be forever lost if neither party files an appeal of the order issued in this case.

8. In other words, the questions of whether the Secretary can supplant the power of county health departments, whether the Secretary's Order violates the religious freedom and whether the issuance of the Order violates procedural due

¹ With respect to Count II, Petitioners concede that the *Corman* decision addresses this issue.

process rights will not be before the Pennsylvania Supreme Court in the event an appeal of only the *Corman* case is filed.

9. As a result, Petitioners respectfully ask this Honorable Court to revise the November 10, 2021 order and opinion in this matter to grant its Petition for the reasons set forth in the *Corman* matter so that the unique issues raised by Petitioners can be heard by the Pennsylvania Supreme Court if the Secretary files an appeal.

WHEREFORE, Petitioners respectfully ask this Honorable Court to issue an amended order granting Petitioners' Petition for Review for the same reasons cited in its *Corman* decision.

PETITIONERS' CLAIMS FALL WITHIN AN EXCEPTION TO THE MOOTNESS DOCTRINE

10. To the extent that Petitioners claims have been rendered moot as a result of the decision in the *Corman* matter, the exception to the mootness doctrine applies with respect to Petitioners claims as set forth in Counts I, III, IV and V.

11. The exception to the mootness doctrine applies “where the conduct complained of is capable of repetition yet likely to evade review, where the case involves issues important to the public interest[,], or where a party will suffer some detriment without the court's decision.” *Sierra Club v. Pennsylvania Public Utility Com'n*, 702 A.2d 1131, 1134 (Pa. Commw. 1997).

12. Here, earlier this week, Governor Tom Wolf and the Secretary announced the intention to issue a new order that continues to require at least some form of masking in January. *See* Gov. Wolf: State Anticipates Returning K-12 School Mask Requirement to Local Leaders January 17, 2022, available at <https://www.governor.pa.gov/newsroom/gov-wolf-state-anticipates-returning-k-12-school-mask-requirement-to-local-leaders%e2%80%afjanuary-17-2022/>.

13. From a practical matter, the Secretary's August 31, 2021 Order was not invalidated until today (November 10, 2021), nearly two and a half months after it was issued.²

14. If the issues raised by Petitioners are not addressed, the Secretary could issue a new masking order (or, potentially, a vaccine order) that would go into effect immediately without the ability to obtain a judicial resolution for months.

15. As there has been a publicly stated intention to issue a new order under the auspicious of the Disease Prevention and Control Law of 1955, this matter is capable of repetition yet likely to evade review.

16. Notably, the Secretary did not address whether the proposed January order will address whether the Secretary can supplant the powers of county health

² Petitioners very much sincerely appreciate the speed in which this Court issued its order and opinion in this matter.

departments without following the procedures set forth in the Disease Prevention and Control Law and the Local Health Administration Law.

17. Additionally, the Secretary did not address whether religious exceptions will be allowed for any new order issued by the Secretary.

18. These issues have not been resolved and, based on the Secretary's stated intention earlier this week, will escape review here unless this Court finds that the exception to the mootness doctrine applies.

19. These issues also involve matters important to the public interest in that the Order applied to all persons in schools across the Commonwealth – regardless of whether they were situation in an area with a county health department or if they had religious or philosophical objections to masking requirements.

20. Further, without this Court's intervention, Petitioners will be harmed in that their claims will be lost if their issues are either not addressed here or if its Petition remains "dismissed as moot," rather than "granted" for the reasons set forth in *Corman*.

WHEREFORE, Petitioners respectfully ask this Honorable Court to issue an amended order granting Petitioners' Petition for Review for the same reasons cited in its *Corman* decision.

LAW OFFICE OF TUCKER R. HULL, LLC

Date: November 10, 2021

By: /s/ J. Chadwick Schnee, Esq.

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Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

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

J. Chadwick Schnee, Esq.
J. Chadwick Schnee, Esq. (PA 306907)

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J.W., individually and on behalf of minor:	:	
children C.W., D.W. and M.W.; S.H.,	:	
individually and on behalf of minor	:	
children C.H. and D.H., C.H.,	:	
individually and on behalf of minor	:	
child M.J.L.; N.J., individually and on	:	
behalf of minor children J.J. and J.K.;	:	
R.M., individually and on behalf of	:	
minor child M.M.; C.A., individually	:	
and on behalf of minor child F.J.A.,	:	
Petitioners	:	
	:	
v.	:	
	:	
Acting Secretary of the Pennsylvania	:	
Department of Health, Alison Beam,	:	No. 297 M.D. 2021
Respondent	:	Argued: October 20, 2021

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FIZZANO CANNON

FILED: November 10, 2021

This case presents a challenge by five Petitioners (J.W., S.H., N.J., R.M., and C.A.), individually and on behalf of their minor children (collectively, Petitioners), to the “Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities” (Masking Order) issued on August 31, 2021, by Alison M. Beam, the Acting Secretary of Health (Acting

Secretary or Respondent), which imposed an open-ended general masking requirement effective September 7, 2021, on all teachers, students, school staff, and visitors within Pennsylvania’s schools, regardless of vaccination status, with certain exceptions. Petitioners’ underlying Petition for Review in the Nature of a Complaint (Petition for Review) seeks declarations: (1) that the Acting Secretary lacks the legal authority to require individuals to wear masks in Pennsylvania’s schools; (2) that the Masking Order does not apply in any county with a local health department; (3) that the Masking Order violates Article I, Section 3 of the Pennsylvania Constitution, Pa. Const. art. I, § 3, providing for freedom of religion within the Commonwealth;¹ and (4) that the Masking Order violates procedural due process.² Ultimately, the Petition for Review requests that this Court reverse and vacate the Masking Order.

Before the Court currently are Petitioners’ Application for Summary Relief (Petitioners’ Application) and Respondent’s Application for Summary Relief (Respondent’s Application) filed by the Acting Secretary.³ For the reasons set forth herein, we dismiss this matter as moot.

¹ Count V of the Petition for Review also brings a non-declaratory judgment claim that the Masking Order violates Section 4 of the Religious Freedom Protection Act, Act of December 2, 2012, P.L. 9, 71 P.S. § 2404, which protects the free exercise of religion. *See* Petition for Review at 27-28.

² As we did in our recent decision in *Corman v. Acting Secretary of the Pennsylvania Department of Health* (Pa. Cmwlth., No. 294 M.D. 2021, filed November 10, 2021), we note preliminarily that we express herein no opinion regarding the science or efficacy of mask-wearing or the politics underlying the considerable controversy the subject continues to engender. *See Corman*, slip op. at 3. Instead, we decide herein only the narrow legal question of whether the Acting Secretary acted properly in issuing the Masking Order.

³ On October 27, 2021, the Acting Secretary also filed “Respondents’ [sic] Application for Relief in the Nature of a Motion for Leave to Supplement the Record” in this matter, No. 297 M.D. 2021 (Application to Supplement Record), seeking to add the Joint Committee on Documents’ October 21, 2021 Order in Favor of Respondent Department of Health (Joint Committee Order) to the record of this matter. *See* Application to Supplement Record. This Application to Supplement

This Court explained the background of the Masking Order at length in our recent decision *Corman v. Acting Secretary of the Pennsylvania Department of Health* (Pa. Cmwlth., No. 294 M.D. 2021, filed November 10, 2021), as follows:

On March 6, 2020, Governor Wolf issued a Proclamation of Disaster Emergency (Disaster Proclamation) pursuant to Section 7301(c) of the Emergency Management Services Code (Emergency Code), 35 Pa.C.S. § 7301(c), regarding the novel coronavirus (COVID-19) pandemic. Thereafter, the Governor implemented numerous orders designed to mitigate and stop the spread of COVID-19, which orders, *inter alia*, closed restaurants and bars in Pennsylvania for in-person dining, closed non-essential businesses, limited the size of in-person gatherings within the Commonwealth, and directed citizens to stay at home. Governor Wolf also issued multiple periodic amendments to the Disaster Proclamation, each of which renewed the Disaster Proclamation for an additional 90 days.

On May 18, 2021, the voters of the Commonwealth approved two amendments to the Pennsylvania Constitution that limit the Governor's power under the Emergency Code (collectively, the Constitutional Amendments). The first of the Constitutional Amendments amended Section 9 of Article III of the Constitution to allow the General Assembly, by a simple majority vote, to extend or terminate a gubernatorial disaster emergency declaration, or a portion thereof, as declared by an executive order or proclamation. *See* Pa. Const. art. III, § 9. The second of the Constitutional Amendments added new Section 20 to Article IV of the Pennsylvania Constitution, which section limits the

the Record was treated as an application pursuant to Rule of Appellate Procedure 2501(a) and was granted on October 29, 2021, as a post-submission communication to the Court advising the Court of the Joint Committee Order. *See* Pa.R.A.P. 2501(a).

duration of a gubernatorial disaster emergency declaration to 21 days absent an extension by concurrent resolution of the General Assembly. *See* Pa. Const. art. IV, § 20.

Following the adoption of the Constitutional Amendments, on June 10, 2021, the General Assembly approved a concurrent resolution terminating the Disaster Proclamation (Concurrent Resolution). Governor Wolf did not issue a new proclamation of disaster emergency following the approval of the Concurrent Resolution.

However, on August 31, 2021, in anticipation of a Commonwealth-wide return to in-person learning in the 2021-2022 school year, the Acting Secretary issued the Masking Order, effective September 7, 2021. Initially, the Masking Order provides an introductory statement that explains the Acting Secretary imposed the Masking Order to protect the health and safety of Pennsylvania's schoolchildren. *See* Masking Order at 1-3. The introductory statement outlines the Acting Secretary's purported authority to impose the Masking Order as follows:

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* [S]ection 5 of the Disease Prevention and Control Law [Act of April 23, 1956, P.L. (1955) 1510 (Disease Control Law)], 35 P.S. § 521.5; [S]ection 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 [] 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 [Section 8 of the Act of April 27, 1905,

P.L. 312, *as amended*, 71 P.S. §] 1403(a); 28 Pa. Code § 27.60.

Masking Order at 3. Section 2 of the Masking Order contains a “General Masking Requirement” that requires:

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.

Masking Order at 4. Regarding the duration of the Masking Order, Section 6 indicates that, once effective, the Masking Order “shall remain in effect until otherwise terminated.” Masking Order at 6.

Corman, slip op. at 3-9 (footnotes omitted).

Petitioners filed the Petition for Review in this matter on September 8, 2021, followed by an Application for Emergency Relief Seeking a Preliminary Injunction (Preliminary Injunction Application) on September 13, 2021, which seeks a preliminary injunction staying the implementation of the Masking Order and enjoining Respondent from issuing further school masking directives until the Court can determine the issues raised in the Petition for Review. The Acting Secretary filed Respondent’s Answer to Petitioners’ Application for Emergency Relief Seeking a Preliminary Injunction on September 20, 2021.

Following a pre-hearing conference conducted on September 28, 2021, on agreement of the parties, by order dated September 29, 2021, the Court stayed the hearing on the Preliminary Injunction Application and directed the parties to file

applications for summary relief.⁴ *See* Order dated September 29, 2021, at 1-2. On October 4, 2021, the parties filed Petitioners’ Application and Respondent’s Application, and the Court scheduled the matters for oral argument *en banc* to be argued seriatim with *Corman*, which presented the same legal question regarding the Acting Secretary’s issuance of the Masking Order.

Following oral argument, the Court issued its decision in *Corman* holding that the Acting Secretary improperly issued the Masking Order without complying with the rulemaking requirements of the Regulatory Review Act, Act of June 25, 1982, P.L. 633, *as amended*, 71 P.S. §§ 745.1-745.15, and in the absence of a gubernatorially-declared disaster emergency issued pursuant to the Emergency Code, 35 Pa.C.S. § 7301(c). *See Corman*, slip op. at 11-30. As a result, the Court declared the Masking Order to be void *ab initio*, an outcome which renders the claims of the instant matter moot. *See Corman*, slip op. at 30-31.

Accordingly, based on this Court’s decision in *Corman*,⁵ we dismiss both Petitioners’ Application and Respondent’s Application as moot and dismiss the Petition for Review.

s/Christine Fizzano Cannon

CHRISTINE FIZZANO CANNON, Judge

President Judge Brobson and Judges Cohn Jubelirer, Covey, and Crompton did not participate in this decision.

⁴ The order further directed, on agreement of the parties, that the Prothonotary mark Count VI of the Petition for Review, which sought to invoke this Court’s appellate jurisdiction, as withdrawn. *See* Order dated September 29, 2021, at 2.

⁵ As a result of finding the current matter moot for the reasons stated in *Corman*, we need not reach the claims based on the Pennsylvania Constitution or the primacy of local health departments presented by Petitioners in the instant matter.

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individually and on behalf of minor	:
children C.H. and D.H., C.H.,	:
individually and on behalf of minor	:
child M.J.L.; N.J., individually and on	:
behalf of minor children J.J. and J.K.;	:
R.M., individually and on behalf of	:
minor child M.M.; C.A., individually	:
and on behalf of minor child F.J.A.,	:
Petitioners	:
	:
v.	:
	:
Acting Secretary of the Pennsylvania	:
Department of Health, Alison Beam,	:
Respondent	:
	No. 297 M.D. 2021

ORDER

AND NOW, this 10th day of November, 2021, Petitioners’ Application for Summary relief filed by J.W., S.H., N.J., R.M., and C.A. (collectively, Petitioners), individually and on behalf of their minor children, and Respondent’s Application for Summary Relief filed by Alison M. Beam, the Acting Secretary of Health, are DISMISSED as moot.

Petitioners’ Petition for Review in the Nature of a Complaint is DISMISSED as moot.

s/Christine Fizzano Cannon

CHRISTINE FIZZANO CANNON, Judge