
IN THE

Supreme Court of Pennsylvania

83 MAP 2021

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 REICH and MICHELLE REICH, individually and as parents of three minor school children; ADAM McCLURE and

(For Continuation of Caption See Inside Cover)

*On Appeal from the Order, dated November 10, 2021,
in the Commonwealth Court of Pennsylvania at No. 294 MD 2021*

BRIEF FOR APPELLEES

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Appellees,

– v. –

ACTING SECRETARY OF THE PENNSYLVANIA
DEPARTMENT OF HEALTH,

Appellant.

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COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Whether Appellant’s August 31, 2021 “Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities” (Masking Order) represents a rule or regulation subject to the formal requirements for regulatory rulemaking?

LOWER COURT ANSWER: Affirmative.

SUGGESTED ANSWER: Affirmative.

2. If the Order represents a rule or regulation subject to the formal requirements for regulatory rulemaking, was Appellant authorized by statute or regulation to promulgate the Masking Order without first complying with the formal requirements of the Commonwealth Documents Law and the Regulatory Review Act?

LOWER COURT ANSWER: Negative.

SUGGESTED ANSWER: Negative.

3. Whether the Non-Delegation Doctrine prohibits the General Assembly from granting Appellant the unilateral authority to issue rules or regulations without making the basic policy choices underlying the Appellant’s authority and without providing adequate standards to guide and restrain the exercise of the delegated authority?

LOWER COURT ANSWER: Did not address.

SUGGESTED ANSWER: Affirmative.

SUMMARY OF ARGUMENT

As consistently articulated by Appellees, this case involves critically important legal issues directly related to the power and authority of the Acting Secretary of Health to impose an Order mandating the wearing of face coverings in school entities within the Commonwealth of Pennsylvania. This case does not involve challenges to the efficacy of universal face coverings or the seriousness of the COVID-19 pandemic.

Despite the very narrow legal issues addressed by the Court below in its Memorandum Opinion and Order, dated November 10, 2021, Appellant's Statement of the Case continues to mischaracterize the issues before this Court as non-legal, factual determinations which the Appellant acknowledged were not at-issue before the Commonwealth Court. Appellant inappropriately cites a myriad of anonymous, unsupported, and unattributed opinions, newspaper articles and other pronouncements not contained in the record and not properly before this Court.

The matter before this Court is quite simple: whether Appellant's August 31, 2021 "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities" (Masking Order) represents a rule or regulation subject to the formal requirements for regulatory rulemaking, and if so, whether Appellant was authorized by

statute or regulation to promulgate the Masking Order without complying with the formal requirements of the Commonwealth Documents Law and the Regulatory Review Act? This issue requires a thorough legal review and analysis of the authority granted to the Secretary of Health under and pursuant to the Disease Control and Prevention Law of 1955, 35 P.S. § 521.1, *et seq.*, *et al.*; Regulation 27.60, 28 Pa. Code § 27.60; and, the Regulatory Review Act, 71 P.S. §745.1, *et seq.*, *et al.* This issue does not involve any review or analysis of the efficacy of universal face coverings or the seriousness of the COVID-19 pandemic.

It is undisputed that the Governor has not issued a proclamation declaring a disaster emergency since the termination of his prior proclamation by the General Assembly on June 10, 2021. R. 16a.

As purported authority for her Masking Order, the Appellant cites,

... 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...

R. 60a.

As recognized by the Court below, these statutory and regulatory provisions do not provide Appellant with the authority to issue her Masking Order. R. 28a. Given the absence of a proclamation of a disaster emergency by the Governor and the Appellant's lack of statutory or regulatory authority, Appellant was required to comply with the mandatory rulemaking procedures established by the General Assembly. Appellant's failure to subject her Masking Order to the public review and analysis procedures contained in Commonwealth's Documents Law and the Regulatory Review Act renders Appellant's Masking Order void ab initio.

As stated by the Court below,

[f]or this Court to rule otherwise would be tantamount to giving the Acting Secretary unbridled authority to issue orders with the effect of regulations in the absence of either a gubernatorial proclamation of disaster emergency or compliance with the Commonwealth Documents Law and the Regulatory Review Act, as passed by the General Assembly. As this would be contrary to Pennsylvania's existing law, we decline to do so.

R. 30a.

ARGUMENT

- I. **The Court below properly held that Appellant’s Masking Order Dated August 31, 2021, is void *ab initio* as Appellant does not possess the requisite authority to issue the Order and has failed to subject the Order to the requirements and procedures of Pennsylvania’s Commonwealth Documents Law and the Regulatory Review Act.**
 - A. **The Acting Secretary of Health did not possess the authority to issue her Masking Order Dated August 31, 2021.**

Appellant asked the Commonwealth Court to find that she had limitless authority to create and implement disease control measures at her sole discretion. The Commonwealth Court correctly rejected this position. To rule otherwise would grant the Secretary limitless authority to introduce and define new terms, to introduce and define new procedures for the implementation of new disease control measures, to introduce and define enforcement provisions, to introduce and impose disease control measures on healthy, non-infected individuals, and any other matter the Secretary wishes to include within the disease control measure. If so permitted, these newly created disease control measures would circumvent the scrutiny of the regulatory review process as set forth in the Regulatory Review Act.

Just as argued before the Commonwealth Court, Appellant asks this Court to ignore the clear and unambiguous language of the Disease Prevention and Control Act of 1955, and to blindly acquiesce to the

Secretary's interpretation of Regulation 27.60 related to disease control measures. Appellant would have this Court hold that an administrative agency's regulation trumps a clear and unambiguous statute; and that when an administrative agency believes there is a conflict between an agency regulation purporting to implement a statute, it is the statute that must give way to the agency's interpretation of its own regulation. Such an assertion is misplaced and contrary to the law.

“[A] statute is law and trumps an administrative agency's regulation.” *Victory Bank v. Commonwealth of Pennsylvania*, 219 A.3d 1236, 1239 (Pa. 2019); *citing Commonwealth v. Kerstetter*, 62 A.3d 1065, 1069 (Pa. Commw. 2013), *aff'd*, 94 A.3d 991 (2014); *see also Success Against All Odds v. Department of Public Welfare*, 700 A.2d 1340, 1351 n.6 (Pa. Commw. 1997). If “there is a conflict between a statute and regulation which purports to implement the statute's provisions the regulation must give way.” *Id.*

With respect to Appellant's assertion that Section 521.5 – Control Measures of the Disease Prevention and Control Law of 1955, permits her to impose other control measures, the Commonwealth Court correctly held that the other control measures available to Appellant are limited to the control measures permitted under existing rules and regulations. R. 24a.

In the Commonwealth Court, the Attorney General clearly agreed with this assertion. In Appellant's/Respondent's Brief Addressing Legal Issues Framed in the [Commonwealth] Court's September 13, 2021, Order, the Attorney General acknowledged to the Commonwealth Court that:

“... the Department cannot implement any control measure it wishes; its action is confined to those allowed under an existing rule or regulation – in this case.”

Appellant's/Respondent's Brief to Commonwealth Court, p. 21.

With respect to Appellant's assertion that Regulation 27.60 further permits her to impose other control measures, the Commonwealth Court correctly held that the other control measures referenced in Regulation 27.60 are expressly limited to those related to the surveillance of disease. R. 27a.

It bears repeating, Appellant acknowledged “... the Department cannot implement any control measure it wishes; its action is confined to those allowed under an existing rule or regulation ...” Appellant's/Respondent's Brief to Commonwealth Court, p. 21. Appellant has pointed to Regulation 27.60 as the existing regulation that provided her with the authority to issue her Order. If Appellant is correct, then the Secretary has limitless authority to create and implement other disease control measures at her sole discretion.

The alleged authority, as asserted by the Appellant, would also include the authority to define new terms, to define procedures for the implementation of the new disease control measure, to define the enforcement provisions, to impose the disease control measure on healthy, non-infected individuals, and any other matters the Secretary wishes to include with the disease control measure. All of which would circumvent the scrutiny of the regulatory review process as set forth in the Regulatory Review Act.

If there are limitations to the Appellant's asserted authority, none have been articulated by the Appellant. There is no aspect of Appellant's Order that can be found in any existing regulation, except Appellant's reference to disease control measures. If that's the case, then as long as any future Secretary characterizes his or her Order as a disease control measure, he or she is free to define new terms, procedures, obligations, etc., and impose the same on healthy, non-infected citizens of the Commonwealth. One could only imagine what future disease control measures would be implemented from such a result. Perhaps one need look no further than Justice Holmes's infamous decision in *Buck v. Bell*, 274 U.S. 200 (1927), which following the United States Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), permitted the sterilization of mentally incompetent persons

under the same principle sustaining compulsory vaccination. See *Buck v. Bell*, 274 U.S. 200, 208 (1927) (holding: “[t]he principle that sustains compulsory vaccination is broad enough to cover cutting Fallopian tubes”).

The Acting Secretary’s Order is exactly the type of action that the General Assembly intended to prevent when it approved the Regulatory Review Act. The intent section of the Act 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; ...

71 P.S. § 745.2

Appellant’s Order is an attempt to amend Regulation 27.60 to create and implement a previously non-existent disease control measure in violation of Section 521.5 of the Disease Prevention and Control Law of 1955. “A provision of the regulation may only be amended by promulgation

of a new regulation.” Comments of the Independent Regulatory Review Commission, July 27, 2000, p.1. Notice of Final Rule Making, Title 28. Health and Safety, Department of Health [28 Pa. Code CH. 27] Communicable and Noncommunicable Diseases, p. 78. (emphasis added).

An agency’s obligation to promulgate its regulations has been succinctly set forth by the Commonwealth Court and affirmed by this Court in the case of *Germantown Cab Co. v. Phila. Parking Auth.*, 36 A.3d 105 (Pa. 2012). In setting forth the process for the promulgation of regulations by administrative agencies, the Commonwealth Court stated,

[a]n agency derives its power to promulgate regulations from its enabling act. An agency’s regulations are valid and binding only if they are: (a) adopted within the agency’s granted power, (b) issued pursuant to proper procedure, and (c) reasonable . . . when promulgating a regulation, an agency must comply with the requirements set forth in the Commonwealth Documents Law [Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §§ 1102-1602, and 45 Pa.C.S. §§ 501-907, which, collectively, are known as the “Commonwealth Documents Law”], the Commonwealth Attorneys Act [Act of October 15, 1980, P.L. 950, as amended, 71 P.S. §§ 732-101-732-506] and the Regulatory Review Act. Regulations promulgated in accordance with these requirements have the force and effect of law. A regulation not promulgated in accordance with the statutory requirements will be declared a nullity.

In general, the purpose of the Commonwealth Documents Law is to promote public participation in the promulgation of a regulation. To that end, an agency must invite, accept, review, and consider written comments from the public regarding the proposed regulation; it may hold public hearings if appropriate.

45 P.S. § 1202. After an agency obtains the Attorney General's approval of the form and legality of the proposed regulation, the agency must deposit the text of the regulation with the Legislative Reference Bureau for publication in the Pennsylvania Bulletin. 45 P.S. §§ 1205, 1207.

Germantown Cab Co. v. Phila. Parking Auth., 993 A.2d 933, 937-38 (Pa. Commw. 2010), *aff'd*, 36 A.3d 105 (Pa. 2012) (footnotes, quotations, and emphasis omitted).

The procedures contained in the Regulatory Review Act are mandatory and are required for the promulgation of regulations. 71 P.S. § 745.5. This Court has recognized that the procedures contained in the Regulatory Review Act may be suspended pursuant to a proclamation of a disaster emergency pursuant to 35 Pa.C.S. § 7301(c). However, no such proclamation was in effect at the time the Appellant issued her Masking Order. As such, in the absence of an emergency proclamation and existing statutory authority for the issuance of Appellant's Masking Order, the Masking Order must have been subjected to the procedures contained in Pennsylvania's Commonwealth Documents Law and the Regulatory Review Act as the Masking Order constitutes a rule or regulation subject to the formal requirements for regulatory rulemaking.

1. Appellant's Masking Order constitutes a rule or regulation subject to Pennsylvania's formal rulemaking procedures.

As correctly noted by the Court below, Appellant's Masking Order is a rule or regulation subject to the formal requirements for regulatory rulemaking. R. 20a. Pennsylvania's Regulatory Review Act defines a regulation subject to Pennsylvania's rulemaking process as,

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.

As noted by this Court, agency pronouncements can be classified as a substantive rule required to be promulgated through the rule-making process or as statements of policy, which require no such procedures. In setting forth the distinction between these two pronouncements, this Court provided,

The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. . . A properly adopted substantive rule establishes a standard of conduct which has the force of law. . . The underlying policy embodied in the rule is not generally subject to

challenge before the agency. A general statement of policy, on the other hand, does not establish a 'binding norm'. . . A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.

PHRC v. Norristown Area School Dist., 374 A.2d 671, 679 (Pa. 1977); *citing Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33 (D.C. App. 1974).

As noted by the Court below in its Memorandum Opinion and Order dated November 10, 2021, Appellant's masking order clearly dictates the standards of conduct of citizens within Pennsylvania's schools. R. 19a. The language of the Order sets forth clear mandates which require any individual entering a School Entity to wear a face covering, regardless of the individual's vaccination status or potential immunity through prior infection with COVID-19. Such language prescribing a mandatory course of conduct upon a large portion of the Commonwealth's populace unquestionably establishes a standard of conduct with the force of law.

Accordingly, Appellant's Masking Order, in the absence of existing statutory authority, was required to be subjected to the requirements of Pennsylvania's Regulatory Review Act and Commonwealth Documents Law. 71 P.S. § 745.1, *et al.*, *et seq.*; 45 P.S. § 1102, *et al.*, *et seq.*

2. The authority cited by the Appellant in her Masking Order does not grant Appellant the authority to issue the same.

As purported authority for the Masking Order, the Appellant claims,

... 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...

R. 60a.

Section 521.5 of the Disease Prevention and Control Law simply provides that the Department of Health, upon the report of a disease which is subject to isolation, quarantine, or any other control measure, shall carry out appropriate control measures in such manner and in such place **as is provided by rule or regulation**. 35 P.S. § 521.5 (emphasis added). The Disease Prevention and Control Law defines "isolation" as,

[t]he separation for the period of communicability of infected persons or animals from other person or animals in such places and under such conditions as will 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.

35 P.S. § 521.2.

Pennsylvania's Disease Prevention and Control Law further defines "quarantine" as,

[t]he limitation of freedom of movement of persons or animals who have been exposed to a communicable disease for a period of time equal to the longest usual incubation period of the disease in such manner as to prevent effective contact with those not so exposed. Quarantine may be complete, or, as defined below, it may be modified, or it may consist merely of surveillance or segregation.

Id.

Accordingly, as Appellant's Order clearly does not provide for isolation or quarantine as set forth by Pennsylvania's Disease Prevention and Control Law, Appellant's purported authority for her Masking Order must rest on the section of 35 P.S. § 521.5 providing for, "any other control measure . . . in such manner and in such place ***as is provided by rule or regulation.***" 35 P.S. § 521.5 (emphasis added).

However, as made clear by the emphasized language of Section 521.5, this language contemplates the existence of a rule or regulation already authorizing control measures attempting to be issued by the agency. As there is no currently existing rule or regulation providing for the control measure prescribed by the Appellant in her Masking Order, Section 521.5 of Pennsylvania's Disease Prevention and Control Law does not vest with the Appellant the authority to issue her Masking Order.

Appellant's Order next cites to Section 2102(a) of the Administrative Code, 71 P.S. § 523(a). However, Section 2102(a) only provides a general policy statement regarding the general duties of the Department of Health. Appellant's cited authority from Pennsylvania's Administrative Code only authorized the Department of Health to promulgate rules and regulations in furtherance of the duties cited therein. The Administrative Code does not provide any authority to issue specific disease control measures and further does not permit the Appellant to forego the mandatory procedures of Pennsylvania's formal rule-making process. As noted by the Court below,

[i]t goes without saying that the Department of Health must carry out these duties within the constraints of the law and does not have carte blanche authority to impose whatever disease control measures the Department of Health sees fit to implement without regard for the procedures for promulgating rules and regulations, expedited or otherwise.

R. 24a.

Lastly, Appellant's Masking Order cites to 28 Pa. Code § 27.60(a) – Disease Control Measures, of the Department of Health's regulations. 28 Pa. Code § 27.60(a) states, in relevant part,

(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.

28 Pa. Code § 27.60(a).

28 Pa. Code § 27.60 permits the Secretary of Health to direct isolation of a person or an animal with a communicable disease or surveillance of contacts of a person or animal with a communicable disease or infection. The term “isolation,” as used in Section 27.60, is defined to mean, “[t]he 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 person or animals to other persons or animals who are susceptible or who may spread the disease to others.” 28 Pa Code § 27.1. “Surveillance,” as used in Section 27.60 is defined as, “[t]he continuing scrutiny of all aspects of occurrence and spread of disease that are pertinent to effective control.” *Id.*

However, Section 27.60 only permits the Department of Health to direct isolation, surveillance, segregation, quarantine, or modified quarantine of persons or animals with a communicable disease or infection. This Section is inapplicable to Appellant’s Masking Order, which makes no distinction of infected and non-infected individuals. Indeed, not only does Appellant’s Masking Order not draw a distinction between infected and non-infected persons, but Appellant’s Masking Order also fails to provide a

distinction between vaccinated and unvaccinated individuals subject to the Order.

Appellant also argues that the Department's interpretation of a statute is entitled to deference. As reflected by Justice Wecht's concurring opinion in the case of *Crown Castle NG East, LLC v. PPUC*, 234 A.3d 665 (Pa. 2020), where a statute is clear and unambiguous, the agency's interpretation is afforded no deference. Justice Wecht stated,

[p]ursuant to what sometimes is referred to as "the Chevron Two-Step," federal courts considering agency interpretations of a statute first must ask whether the statute is clear. If so, then no deference need be afforded to the agency's position. . .

It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.

Crown Castle NG East LLC v. PPUC, 234 A.3d 665, 867, 688-689 (Pa. 2020) (Wecht J., concurring); *citing Talk America, Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia J., concurring).

Accordingly, Appellant's purported authority to issue her Masking Order does not actually grant the Appellant the authority claimed.

B. Appellant has failed to comply with Pennsylvania’s formal rule-making procedures in issuing her Masking Order, rendering such Order void *ab initio*.

In the absence of existing statutory authority for the issuance of her Masking Order, Appellant was required to subject her Order to Pennsylvania’s Regulatory Review Act. In passing Pennsylvania’s Regulatory Review Act, the General Assembly set forth its intent as follows:

[t]he 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 cost benefits, duplication, inflationary impact, and 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 regulated before imposing hidden costs upon the economy of Pennsylvania.

71 P.S. § 745.2(a).

Sections 745.5a and 745.5b of Pennsylvania’s Regulatory Review Act set forth the procedures and requirements for the review of proposed regulations necessary before such regulations are codified in The Pennsylvania Bulletin. Section 745.5a of the Act requires the regulation be published, republished, the hearing of public comment, agency responses to the public comments heard, and extensive review and input by the reviewing

Committees and the Independent Regulatory Review Commission. Following compliance with these procedures, the Independent Regulatory Review Commission may approve or disapprove the final-form regulation. 71 P.S. § 745.5a. The Act additionally requires the Regulatory Review Commission to decide as to whether the agency has the statutory authority to promulgate the proposed regulation; determine whether the proposed regulation is consistent with the intent of the General Assembly; and determine whether the proposed regulation is in the public interest. 71 P.S. § 745.5b.

Appellant goes to great lengths to convince the Court of the emergency nature of her Masking Order and the need for expedited action to address the COVID-19 pandemic. While Appellees continue to maintain no position as to the overall efficacy of face coverings to address any alleged emergency, Pennsylvania's Regulatory Review Act provides for an expedited rule making process which could have addressed Appellant's concerns. 71 P.S. § 745.6(d). Section 745.6(d) of Pennsylvania's Regulatory Review Act provides,

[t]he commission may not issue an order barring an agency from promulgating a final-form or final-omitted regulation if the Attorney General certifies that the final-form or final-omitted regulation is required pursuant to the decree of any court or to implement the provisions of a statute of the United States or regulations issued thereunder by a Federal agency or if the

Governor certifies that the final-form or final-omitted regulation is required to meet an emergency which includes conditions which may threaten the public health, safety or welfare; cause a budget deficit; or create the need for supplemental or deficiency appropriations of greater than \$1,000,000. In those cases, the final-form or final-omitted regulation may take effect on the date of publication or on a later date specified in the order adopting the final-form or final-omitted regulation. The commission and the committees shall review the final-form or final-omitted regulation pursuant to the procedures provided for in this act. If the final-form or final-omitted regulation is disapproved pursuant to those procedures, that regulation shall be rescinded after 120 days or upon final disapproval, whichever occurs later.

71 P.S. § 745.6(d).

This emergency procedure, upon certification by Pennsylvania's Governor that a regulation is required to meet an emergency which includes conditions which may threaten the public health, safety, or welfare, would permit the Department of Health to immediately adopt a regulation to meet that specific threat. The emergency regulation will take effect upon publication and will be permitted to remain in effect while the regulation is reviewed by the Independent Regulatory Review Commission and the General Assembly. The Act's emergency certification procedure contained in Section 745.6(d) would permit Appellant to address the emergency that she alleges requires the promulgation of her Masking Order while still permitting the regulation to be reviewed by the General Assembly in accordance with the legislative intent of the Regulatory Review Act.

The procedure contained in Section 745.6 is still available to the Appellant and, in fact, has been brought to her attention on two separate occasions by the Court below. See R. 15a; see *also* Memorandum Opinion and Order dated November 16, 2021, at 8. However, as of the date of the filing of the present brief, Appellant has failed to avail herself to such procedure and has instead elected to proceed without lawful authority.

Indeed, in issuing her Masking Order, the Appellant has failed to subject the same to *any* of the mandatory requirements of Pennsylvania's rule-making process. In so doing, the Appellant has deprived the populace of the Commonwealth in their opportunity to be heard on the Masking Order, granted the General Assembly no opportunity to review the legality and necessity of the Masking Order, and has unilaterally issued a binding rule with the force of law in violation of the laws of the Commonwealth of Pennsylvania.

The US Supreme Court has recently confronted a similar situation involving government overreach in the form of an Executive Agency seeking to grant itself unfettered power in the absence of express authority from the Legislative Branch.

In the recent case of *Ala. Assoc. of Realtors v. Dep't of Health and Hum. Servs.*, -- S.Ct. -- , 2021 WL 3783142 (2021), the United States

Supreme Court struck down the Center for Disease Control’s extension of the nationwide eviction moratorium, stating that the CDC’s interpretation of 42 U.S.C. § 264(a) would grant them, “a breathtaking amount of authority,” and subsequently held that the CDC did not have the authority to issue its moratorium on evictions. *Id.* at 3.

Applying the United States Supreme Court’s legal analysis to the present matter, Appellant’s interpretation of 35 P.S. § 532(a); 28 Pa. Code § 27.60; 35 P.S. § 521.5; and 71 P.S. 1403(a) is limitless. Other than the requirement that the Department deem a measure, “appropriate,” Appellant’s interpretation of the statutes cited in her Masking Order contain virtually no further restrictions. *Compare to Ala. Assoc. of Realtors v. Dep’t of Health and Hum. Servs.*, -- S.Ct. -- , 2021 WL 3783142 at 3* (2021) (Stating: “It is hard to see what measures this interpretation would place outside the CDC’s reach, and the Government has identified no limit in § 361(a) [42 U.S.C. § 264(a)] beyond the requirement that the CDC deem a measure ‘necessary.’)

The principles set forth in the United States Supreme Court case, *Ala. Assoc. of Realtors v. Dep’t of Health and Hum. Servs.*, -- S.Ct. -- , 2021 WL 3783142 (2021), are directly applicable to the present matter. While “[i]t is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant[,] . . . our system does not permit agencies to

act unlawfully even in pursuit of desirable ends.” *Ala. Assoc. of Realtors*, 2021 WL 3783142 at *4; *citing Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Despite the Appellant’s efforts to redefine the issues of the present case, this Court is faced with a narrow issue: “whether Appellant’s August 31, 2021 “Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities” (Masking Order) represents a rule or regulation subject to the formal requirements for regulatory rulemaking, and if so, whether Appellant was authorized by statute or regulation to promulgate the Masking Order without complying with the formal requirements of the Commonwealth Documents Law and the Regulatory Review Act?”

Accordingly, this Court should apply the legal principles set forth in *Ala. Assoc. of Realtors* to the present matter and affirm the Court below.

The Secretary’s interpretation of the statutes cited as purported authority for her Masking Order do not grant the Secretary the power to issue her Order as such interpretation would grant Appellant a, “breathtaking amount of authority,” such that Appellant’s interpretation would violate Pennsylvania’s Non-Delegation Doctrine. Rather, Appellant was required to subject her Masking Order to the requirements and procedures of

Pennsylvania's Regulatory Review Act and the Commonwealth Documents Law. The Appellant's failure to follow these mandatory rule-making processes has subsequently rendered her Masking Order void *ab initio*.

II. The Non-Delegation Doctrine prohibits Pennsylvania's General Assembly from granting Appellant the unilateral authority to issue her Masking Order without making the basic policy choices underlying the Appellant's Order and without providing adequate standards to guide and restrain the exercise of the delegated authority.

In a recent Pennsylvania Supreme Court case, Justice Wecht set forth an explanation of the Non-Delegation Doctrine under Pennsylvania's Constitution, stating,

Article II, Section 1 of the Pennsylvania Constitution states that “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” PA. CONST. art. II, § 1. That is why, when the General Assembly empowers some other branch or body to act, our jurisprudence requires “that the basic policy choices involved in ‘legislative power’ actually be made by the [l]egislature as constitutionally mandated.” *Tosto v. Pa. Nursing Home Loan Agency*, 460 Pa. 1, 331 A.2d 198, 202 (1975). This constraint serves two purposes. First, it ensures that duly authorized and politically responsible officials make all of the necessary policy decisions, as is their mandate per the electorate. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269, 291 (1975) (plurality opinion). And second, it seeks to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power.

Protz v. Workers' Compensation Appeal Bd. (Derry Area School District), 161 A.3d 827, 833-835 (Pa. 2017).

Article II, Section 1 of Pennsylvania's Constitution has been interpreted to require that the General Assembly set forth, "adequate standards which will guide and restrain the exercise of the delegated administrative functions." *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 418 (Pa. 2005); See also *State Bd. of Chiropractic Exam'rs v. Life Fellowship of Pa.*, 272 A.2d 478, 481 (Pa. 1971); quoting *Chartiers Valley Joint Sch. v. Cty. Bd. of Sch. Dirs. of Allegheny Cty.*, 211 A.2d 487, 492-93 (Pa. 1965). This policy, known as the Non-Delegation Doctrine, prohibits the General Assembly from granting, "to any other branch of government or to any other body or authority," the power to make law. *Blackwell v. Com., State Ethics Com'n*, 567 A.2d 630, 636 (Pa. 1989); see also *State Bd. of Chiropractic Exam'rs v. Life Fellowship of Pa.*, 272 A.2d 478, 480 (Pa. 1971).

Pennsylvania's General Assembly has the power to delegate authority, "in connection with the execution and administration of a law to an independent agency or an executive branch agency where the General Assembly first establishes primary standards and imposes upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the enabling legislation." *Blackwell*, 567 A.2d at 637. When delegating authority to an administrative agency, two limitations shall

apply. The first is that “the basic policy choices must be made by the [l]egislature,” and the second is that “the legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions.” *Blackwell*, 567 A.2d at 637; citing *Gilligan v. Pa. Horse Racing Commission*, 422 A.2d 487, 489 (Pa. 1980).

This Court, in the case of *Protz v. Workers’ Compensation Appeal Bd. (Derry Area School District)*, 161 A.3d 827 (Pa. 2017), reviewed Pennsylvania’s Non-Delegation Doctrine in the context of Pennsylvania’s Workers’ Compensation Act. Pennsylvania’s Workers’ Compensation Act provided that when an employer demands that a claimant undergo an “impairment-rating evaluation (IRE)” in which a physician determines the degree and extent of impairment attributable to the claimant’s injury, the physician must apply the methodology set forth in, “the most recent edition” of the American Medical Association *Guides to the Evaluation of Permanent Impairment*. *Id.* at 830.

In cases regarding the delegation of legislative authority, this Court has, “stressed the importance of procedural mechanisms that serve to limit or prevent the arbitrary and capricious exercise of delegated power.” *Id.* at 834; See e.g. *Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198, 203 (Pa. 1975) (“the statute at issue required that the administrative agency

establish neutral operating procedures, develop standardized documents, and give the public notice of proposed agency rules and regulations before promulgating them.”); *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 291 (Pa. 1975) (“a plurality of [this Court] found it significant that the General Assembly had assigned the [power to assess whether certain local taxes were excessive or reasonable] to the courts, rather than to an administrative body, because the very structure of the judiciary serves to protect against the arbitrariness of *ad hoc* decision making.”)

In accordance with the Court’s prior decisions regarding Pennsylvania’s Non-Delegation Doctrine, the *Protz* Court struck down the authority delegated to the American Medical Association as unduly broad and unbridled, stating,

[t]he General Assembly did not favor any particular policies relative to the Guides’ methodology for grading impairments, nor did it prescribe any standards to guide and restrain the AMA’s discretion to create such a methodology.

Protz, 161 A.3d at 835.

Appellees maintain that Appellant did not possess the statutory authority to issue her Masking Order. However, assuming that the provisions cited by the Appellant in her Masking Order do grant her the authority to issue the same, such delegation of authority by Pennsylvania’s General Assembly would violate the non-delegation doctrine.

Appellant's interpretation of the statutory authority cited in her Masking Order would allow the Secretary of Health to unilaterally create, define, and promulgate limitless control measures to prevent and control disease in the general public so long as the Secretary determines that such a measure is, "appropriate." This interpretation would grant Pennsylvania's Secretary of Health with unfettered power, "without any parameters cabining its authority." See *Protz*, 161 A.3d at 835. If Appellant's interpretation of the law is held to be correct, the populace of the Commonwealth of Pennsylvania may then be subjected to Orders, such as the Order at issue here, which have no specific duration, no limitations on its implementation, and no safeguards to protect the Citizens of the Commonwealth from Constitutional violations.

Accordingly, Appellant's Masking Order and the Appellant's interpretation of the authority cited therein violate Pennsylvania's constitutional prohibition on the delegation of legislative, law-making authority to an administrative agency.

CONCLUSION

For the reasons set forth herein, Appellees respectfully request that this Honorable Court affirm the judgment of the Commonwealth Court and hold that Appellant's Masking Order is void *ab initio*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,672 words within the meaning of Pa. R.A.P. Rule 2135. In making this certificate, I have relied on the word count of the word-processing system used to draft the brief.

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

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JACOB DOYLE CORMAN, III

v.

ACTING SECRETARY OF THE PENNSYLVANIA
DEPARTMENT OF HEALTH
-----X

I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

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