

IN THE SUPREME COURT OF PENNSYLVANIA

JACOB DOYLE CORMAN, III, <i>et al.</i> ,	:	
	:	No. 83 MAP 2021
Petitioners-Appellees	:	
	:	
vs.	:	
	:	
ACTING SECRETARY OF THE	:	
PENNSYLVANIA DEPARTMENT OF	:	
HEALTH,	:	
	:	
Respondent-Appellant.	:	

**BRIEF OF AMICUS CURIAE THE HONORABLE KATHY L. RAPP,
CHAIR OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES
HEALTH COMMITTEE, IN SUPPORT OF APPELLEES, JACOB DOYLE
CORMAN, III, *ET AL.***

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

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Honorable Kathy L. Rapp, Chair of the House of Representatives Health Committee (“Chair Rapp”), by and through her undersigned counsel, files this *amicus curiae* brief in support of Appellees Jacob Doyle Corman, III, *et al.*, (collectively “Appellees”).¹

On September 14, 2021, having found that the August 31, 2021 Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities (“Masking Order”) creates binding legal requirements and corresponding penalties beyond the scope of the relevant laws and regulations, the Pennsylvania House of Representatives Health Committee (“Health Committee”) requested a determination from the Joint Committee on Documents that the Masking Order should be promulgated as a regulation pursuant to 71 P.S. § 745.7a. On October 21, 2021, a majority of the members of the Joint Committee on Documents determined that the Masking Order should not be promulgated as a regulation. Four members – the Director of the Legislative Reference Bureau, the Director of the Pennsylvania Code and Bulletin, the designee of the President Pro Tempore of the Senate, and the Speaker

¹ Pursuant to Pa. R.A.P. 531(b)(2), Chair Rapp discloses that no other person or entity other than Chair Rapp or her counsel paid, in whole or in part, for the preparation of this *amicus curiae* brief or authored, in whole or in part, this *amicus curiae* brief.

of the House – voted that the Masking Order should have been promulgated through the rulemaking process.

On October 26, 2021, the Health Committee voted to authorize Chair Rapp to file an appeal from the October 21, 2021 Order of the Joint Committee on Documents “and pursue other judicial remedies available to the [Health] Committee as appropriate.” The appeal was filed with the Commonwealth Court on October 28, 2021, at docket number 1184 CD 2021.

Chair Rapp’s appeal of the Order of the Joint Committee on Documents raises the same fundamental questions of openness and transparency and implicates the same constitutional principles inherent in the separation of powers as *Corman v. Department of Health*. Both concern the Masking Order and whether it should have been promulgated as a regulation.

The difference, however, is in the paths – although both lead to a similar place. The Health Committee is the standing committee which, under the Regulatory Review Act, must review applicable regulations promulgated by the Pennsylvania Department of Health to, *inter alia*, ensure conformity with legislative intent. 71 P.S. § 745.3 (definition of “committee”). The Regulatory Review Act also specifically authorizes the Health Committee to request a determination from the Joint Committee on Documents if it finds that an agency document should have been promulgated as a

regulation. 71 P.S. § 745.7a.² It is the Health Committee, therefore, whose statutory authority to review and comment on regulations on behalf of the Commonwealth’s legislative branch has been thwarted by the manner in which the Masking Order was issued. As the Chair of the Health Committee, Chair Rapp is in a unique position to act as *Amicus Curiae* and offer her perspective regarding the separation of powers concerns implicated in this appeal.

II. ARGUMENT

On August 31, 2021, the Acting Secretary of the Pennsylvania Department of Health (“Department”) made law in violation of the Department’s constitutional and statutory authority.

On November 10, 2021, the Commonwealth Court appropriately held that, by binding all citizens of this Commonwealth and certain entities to its Masking Order, the Secretary issued a regulation. And, in issuing that regulation, the Secretary evaded the mandatory – and necessary – regulatory review process. Simply, in issuing the Masking Order, the Acting Secretary invaded the singular province of the General Assembly, and stripped the Health Committee of its statutory authority, and obligation, to review agency action to ensure fidelity with the intent and scope of the Department’s

² “If ... a committee finds that a published or unpublished document should be promulgated as a regulation, the commission or committee may present the matter to the Joint Committee on Documents. The Joint Committee on Documents shall determine whether the document should be promulgated as a regulation ...” *Id.*

enabling statutes. Accordingly, the Commonwealth Court unequivocally held that the Masking Order is void *ab initio* because it is a regulation that is not authorized by an existing statute, and which the Acting Secretary promulgated in circumvention of the Commonwealth Documents Law and the Regulatory Review Act. Commonwealth Court November 10, 2021 *En Banc* Opinion and Order, pp. 30-31, R. 30a-31a. That Order must be affirmed.

A. The Masking Order Offends the Constitutional Separation of Powers.

“The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, or a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” The Federalist No. 47, p. 301 (James Madison).

The constitutional separation of powers, vesting the legislative, executive, and judicial powers in the three separate branches, is the bedrock of our representative democracy. “This tripartite structure, with its system of checks and balances among these branches, is designed to prevent a concentration of power in any one branch and to prevent one branch from exercising the core functions of another. . . .” *Markham v. Wolf*, 190 A.3d 1175, 1177 (Pa. 2018); *see also Wolf v. Scarnati*, 233 A.3d 679, 705 (Pa. 2020) (“Under the principle of separation of the powers of government, . . . no branch should exercise the functions exclusively committed to another branch.”).

Of course, the Pennsylvania Constitution grants the power to make law exclusively to the General Assembly. PA. CONST. art. II, § 1. “The framers of the Constitution believed that the integrity of the legislative function was vital to the preservation of liberty.” *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 833 (Pa. 2017). Thus, while the separation of power principle is “still to be strictly followed” as to each branch of government, *Lloyd v. Fishinger*, 605 A.2d 1193, 1196 (Pa. 1992), “at its foundation is that final lawmaking authority rests with the General Assembly.” *Markham*, 190 A.3d at 1183.

As this Honorable Court has emphasized, it is “clear” that the executive branch cannot arrogate the General Assembly’s power to make law, and any executive branch order “that, in essence, creates law, is unconstitutional.” *Id.* In *Markham*, the executive action at issue – an executive order that, *inter alia*, spoke to the relationship between direct care workers, participants, and the Department of Human Services – was challenged due to separation of powers concerns. This Court held, in pertinent part, that the Governor did not make law in issuing that executive order because it was “voluntary, non-binding, non-exclusive, and unenforceable[,]” and, importantly, did not “create enforceable rights or duties.” *Id.* at 1184-85. Accordingly, in *Markham*, the Governor did not exceed his authority – and thereby usurp the General Assembly’s authority – in issuing the executive order.

Here, however, unlike the order in *Markham*, “[t]here is no palatable argument that [the Masking Order] is mere guidance.” Commonwealth Court Order, p. 18, R.

18a. Instead, the Masking Order “clearly mandates” that any individual “working, attending or visiting” a school entity **must** wear a mask, subject to limited exceptions. Masking Order, §§ 2, 3, R. 61a. Further, noncompliance with the binding Masking Order subjects individuals to penalties and entities to citations. *See* 35 P.S. § 521.20; 71 P.S. § 1409; 55 Pa. Code §§ 3270.14, 3270.21, 3280.20, and 3290.18. As such, the Commonwealth Court held that the Acting Secretary created a binding norm that applies equally to all citizens and all regulated entities that has the “force and effect of law.” Commonwealth Court Order, at pp. 19-20, R. 19a-20a.

The Masking Order is void *ab initio* because the Department, through its Acting Secretary, invaded the exclusive province of the General Assembly by making law that binds all citizens of the Commonwealth. Accordingly, the Commonwealth Court’s Order should be affirmed.

B. Because the Masking Order Has the Force and Effect of Law, It Must Be Promulgated Through the Regulatory Review Process.

The General Assembly may delegate to administrative agencies limited authority to make law, but “only in the fashion authorized by the General Assembly. . . .” *Nw. Youth Servs. v. Commonwealth, Dep’t of Pub. Welfare*, 66 A.3d 301, 310 (Pa. 2013). Thus, Commonwealth agencies may be empowered to promulgate rules and regulations, but only on the subject matter delegated by the General Assembly in the appropriate enabling statute and, even then, only in the manner prescribed by the

General Assembly – the regulatory review process. Here, the Department, and the Acting Secretary, defied both substance and procedure.

The mandatory rulemaking process under the Commonwealth Documents Law and the Regulatory Review Act is not a mere formality. Rather, the proposed regulation must undergo scrutiny by the General Assembly, and specifically the appropriate standing committees, to ensure that each and every regulation is promulgated consistent with the authority and the legislative intent of the relevant enabling statute, “in order to foster executive branch accountability.” 71 P.S. § 745.2(a); *see also Borough of Bedford v. Commonwealth*, 972 A.2d 53, 62 (Pa. Cmwlth. 2009) (regulations “must also undergo legislative scrutiny in accordance with the Regulatory Review Act.”).

Even in the face of an emergency and absent a Declaration of Disaster Emergency, the General Assembly still provided the executive agencies the ability to act quickly. Specifically, the Regulatory Review Act authorizes the emergency certified regulation process, under which agencies can immediately implement regulations if the Governor certifies that the regulation is necessary to respond to an emergency that may “threaten the public health, safety or welfare.” 71 P.S. § 745.6(d). An emergency certified regulation is effective upon publication in the Pennsylvania Bulletin or the date specified in the agency’s adoption order. 1 Pa. Code § 313.2. Thus, the Department could (and should) have availed itself of the emergency certified regulation procedure for the Masking Order to have immediate effect, while still

appropriately providing for review by the Independent Regulatory Review Commission, the Health Committee, and the People of the Commonwealth.

There is no dispute that the COVID-19 pandemic is an emergency. Even then, however, the Acting Secretary has no authority to create law during that emergency – especially where, as here, there are no temporary powers granted to the executive branch through operation of a declaration of disaster emergency. Indeed, any other outcome “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.” Order, p. 30, R. 30a. “It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends.” *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2490, 210 L. Ed. 2d 856, 862 (2021).

The Department, through the Acting Secretary’s Masking Order, shirked any notion of executive branch accountability. It defied the Constitution and created new law through unchecked order – cutting the People and the Health Committee out of the process so that no scrutiny of the Department’s choices could occur.

III. CONCLUSION

For all of the foregoing reasons, *Amicus Curiae*, the Honorable Kathy L. Rapp, Chair of the Pennsylvania House of Representatives Health Committee, requests that

this Court prevent the continued damage to the constitutional separation of powers and affirm the Order of the Commonwealth Court declaring the Masking Order *void ab initio*.

Respectfully submitted,

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COMBINED CERTIFICATIONS OF COUNSEL

1. I certify that the foregoing brief uses a proportionally spaced, 14-point Times New Roman typeface, and that the text of the brief contains **1,923** words according to the word count provided by Microsoft Word.

2. I certify that his 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.

3. I hereby certify that on November 30, 2021 I caused a true and correct copy of the foregoing Brief of *Amicus Curiae* the Honorable Kathy L. Rapp, Chair of the Pennsylvania House of Representatives Health Committee, to be served via electronic filing upon all counsel of record.

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