[J-86-2021]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BAER, C.J., SAYLOR, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

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 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 AMANDA PALMER, INDIVIDUALLY AND AS PARENTS OF TWO MINOR SCHOOL CHILDREN; PENNCREST SCHOOL DISTRICT; CHESTNUT RIDGE SCHOOL DISTRICT AND WEST YORK AREA SCHOOL DISTRICT, Appellees v. ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH, Appellant	:	No. 83 MAP 2021 Appeal from the Commonwealth Court Order dated November 10, 2021 at No. 294 MD 2021. ARGUED: December 8, 2021

OPINION

OPINION FILED: December 23, 2021

JUSTICE WECHT **DECIDED: December 10, 2021**

We granted expedited review of this direct appeal to decide whether the Commonwealth Court erred in concluding that Acting Secretary of Health Alison Beam ("the Secretary") lacked the power under existing law and Department of Health regulations to require individuals to wear facial coverings while inside Pennsylvania's schools as a means of controlling the spread of COVID-19. Having determined that the Secretary exceeded her authority in issuing that directive, by *per curiam* order on December 10, 2021, we affirmed the lower court's decision nullifying the mandate, with this opinion to follow.[1]

I.

To set the stage for the instant appeal, we begin with a brief recitation of the pertinent legal developments that have transpired since the novel coronavirus disease was first detected in Pennsylvania nearly two years ago. On March 6, 2020, in response to the emerging COVID-19 pandemic, Governor Tom Wolf issued a Proclamation of Disaster Emergency ("Disaster Proclamation")[2] pursuant to Section 7301(c) of the Emergency Management Services Code ("Emergency Code").[3] Relevant here, upon declaring a disaster emergency, the Governor is empowered to

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[1] *Corman v. Acting Sec'y of the Pa. Dep't of Health*, 83 MAP 2021, --- A.3d ----, 2021 WL 5860589 (Pa. Dec. 10, 2021) (*per curiam*).

[2] *See* Disaster Proclamation, available at https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf.

[3] Act of Nov. 26, 1978, P.L. 1332, No. 323, *codified as amended at* 35 Pa.C.S. §§ 7101, *et seq.*

> [s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency.

35 P.S. § 7301(f)(1). Relying upon that statutory provision in his Disaster Proclamation, Governor Wolf expressly authorized then-Secretary of Health Rachel L. Levine, "in her sole discretion, to suspend or waive any provision of law or regulation which the Pennsylvania Department of Health is authorized by law to administer or enforce, for such length of time as may be necessary to respond to this emergency."[4]

Thereafter, in an effort to mitigate the spread of COVID-19—and thereby forestall the anticipated strain the virus would cause Pennsylvania's community health and hospital systems—Governor Wolf and Secretary Levine issued a series of directives designed to reduce the frequency of person-to-person contact throughout the Commonwealth. Among other things, those orders temporarily suspended in-person dining at restaurants and bars, restricted the physical operations of "non-life-sustaining" businesses, limited the size of in-person gatherings, and directed residents to stay at home except when engaged in certain activities or when visiting places where social-distancing could be practiced.[5] Exercising our King's Bench authority, we upheld the Governor's business-closure order as a permissible exercise of the Commonwealth's general police power under the Emergency Code. *See Friends of Danny DeVito v. Wolf*,

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[4] *See* Disaster Proclamation, *supra* n.2.

[5] *See* Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses that are not Life Sustaining, 3/19/2020, available at https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf.

227 A.3d 872, 890-92 (Pa. 2020) ("The protection of the lives and health of millions of Pennsylvania residents is the *sine qua non* of a proper exercise of police power.").

For businesses that were permitted to maintain in-person operations, Secretary Levine directed the implementation of stringent COVID-19 mitigation protocols, including a requirement that employees and patrons alike wear face coverings while on business premises.[6] This mandate later was expanded to require all individuals to wear masks while "outdoors and unable to consistently maintain a distance of six feet from individuals who are not members of their household"; "in any indoor location where members of the public are generally permitted"; when utilizing public transportation; when "obtaining services from the healthcare sector in" various settings and facilities; and generally while

> engaged in work, whether at the workplace or performing work off-site, when interacting in-person with any member of the public, working in any space visited by members of the public, working in any space where food is prepared or packaged for sale or distribution to others, working in or walking through common areas, or in any room or enclosed area where other people, except for members of the person's own household or residence, are present when unable to physically distance.[7]

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[6] *See* Order of the Secretary of the Pa. Dep't of Health Directing Public Health Safety Measures for Businesses Permitted to Maintain In-Person Operations, 4/15/2020, available at https://www.governor.pa.gov/wp-content/uploads/2020/04/20200415-SOH-worker-safety-order.pdf.

[7] *See* Order of the Secretary of the Pa. Dep't of Health Requiring Universal Face Coverings, 7/1/2020, available at https://www.governor.pa.gov/wp-content/uploads/2020/07/20200701-SOH-Universal-Face-Coverings-Order.pdf; *see also* Updated Order of the Secretary of Health Requiring Universal Face Coverings, 11/17/2020, available at https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Updated%20Order%20of%20the%20Secretary%20Requiring%20Universal%20Face%20Coverings.pdf. The universal masking order was lifted June 28, 2021. *See* Press Release, "Department of Health Lifting Universal Masking Order on June 28, Urging Pennsylvanians to Follow Mask-Wearing Guidance Where Required," 6/25/2021, available at https://www.media.pa.gov/pages/health-details.aspx?newsid=1505.

When these orders took effect, Section 7301(c) of the Emergency Code permitted the Governor in his discretion to issue disaster emergency declarations for renewable periods of ninety days, terminable by concurrent resolution of the General Assembly. In *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020), we construed that statutory mechanism so as to require the General Assembly to present such a concurrent resolution to the Governor to sign or veto in accordance with the presentment clause of Article III, Section 9 of the Pennsylvania Constitution. *Id.* at 696-97. We also rejected a constitutional challenge to the General Assembly's delegation of power to the Governor, via the Emergency Code, to suspend certain laws pursuant to a disaster emergency declaration. *Id.* at 704-07. Governor Wolf then renewed his Disaster Proclamation, with amendments, on June 3, August 31, November 24, 2020, and February 19, 2021.[8]

At the municipal primary on May 18, 2021, Pennsylvania's electorate ratified two proposed amendments to our Constitution. The first of these amendments modified Article III, Section 9 to empower the General Assembly to extend or terminate a gubernatorial disaster emergency declaration, or any portion thereof, by a simple majority vote, without the need for presentment to the Governor, thereby abrogating our decision

[8] Secretary Levine resigned January 23, 2021, following her nomination by President Joseph R. Biden, Jr., to serve as the Assistant Secretary for Health within the United States Department of Health and Human Services. Governor Wolf named Ms. Beam, his Deputy Chief of Staff, to the role of Acting Secretary effective that day. *See* Press Release, *Gov. Wolf to Nominate Alison Beam as Secretary of Health, Names Dr. Wendy Braund as Interim Acting Physician General*, 1/22/2021, available at https://www.governor.pa.gov/newsroom/gov-wolf-to-nominate-alison-beam-as-secretary-of-health-names-dr-wendy-braund-as-interim-acting-physician-general/.

in *Scarnati*.[9] The second added a new Section 20 to Article IV, which now limits the duration of a gubernatorial disaster emergency declaration to twenty-one days absent an affirmative extension by concurrent resolution of the General Assembly.[10]

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[9] Article III, Section 9 ("Action on concurrent orders and resolutions.") now reads:

> Every order, resolution or vote, to which the concurrence of both Houses may be necessary, except on the questions of adjournment or termination or extension of a disaster emergency declaration as declared by an executive order or proclamation, or portion of a disaster emergency declaration as declared by an executive order or proclamation, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.

PA. CONST. art. III, § 9.

[10] Article IV, Section 20 ("Disaster emergency declaration and management.") provides:

> (a) A disaster emergency declaration may be declared by executive order or proclamation of the Governor upon finding that a disaster has occurred or that the occurrence or threat of a disaster is imminent that threatens the health, safety or welfare of this Commonwealth.
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> (b) Each disaster emergency declaration issued by the Governor under subsection (a) shall indicate the nature, each area threatened and the conditions of the disaster, including whether the disaster is a natural disaster, military emergency, public health emergency, technological disaster or other general emergency, as defined by statute. The General Assembly shall, by statute, provide for the manner in which each type of disaster enumerated under this subsection shall be managed.
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> (c) A disaster emergency declaration under subsection (a) shall be in effect for no more than twenty-one (21) days, unless otherwise extended in whole or part by concurrent resolution of the General Assembly.
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> (d) Upon the expiration of a disaster emergency declaration under subsection (a), the Governor may not issue a new disaster emergency declaration based upon the same or substantially similar facts and circumstances without the passage of a concurrent resolution of the

On May 20, two days after the statewide referendum, Governor Wolf issued his fifth amended Disaster Proclamation, which the General Assembly terminated on June 10 by concurrent resolution under the newly-amended Article III, Section 9. Governor Wolf has not issued a new proclamation of disaster emergency since then.

On August 31, in anticipation of the statewide return to in-person learning for the 2021-2022 school year, Secretary Beam issued an order titled "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities" ("Mask Mandate" or "Order").[11] Effective September 7, the Order directed "[e]ach teacher, child/student, staff, or visitor working, attending, or visiting a School Entity"[12] in Pennsylvania to abide by a "General Masking Requirement" while indoors, "regardless of vaccination status." Order at 4, § 2. The Order specifically mandated that those individuals wear a "face covering," which meant the

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> General Assembly expressly approving the new disaster emergency declaration.

PA. CONST. art. IV, § 20.

[11] Available at https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Order%20of%20the%20Acting%20Secretary%20Directing%20Face%20Coverings%20in%20Schools.pdf.

[12] The Order defined "School Entity" (hereinafter, "school") as 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 or 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; [and] (8) a child care provider licensed by the Department of Human Services of the Commonwealth.

Order at 3-4, § 1 (capitalization and punctuation modified).

> 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.

Id. at 3, § 1.[13]

Although generally applicable to every individual who entered a school, the Mask Mandate included eight enumerated exceptions. Individuals were not required to wear a face covering while inside a school under the following circumstances:

> 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.
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> 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.
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> 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.
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> 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.
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> F. When the individual is under two (2) years of age.
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> G. When an individual is:
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> (1) Engaged in an activity that cannot be performed while wearing a mask, such as eating and drinking, or playing

[13] The Order permitted individuals to utilize an "alternative to a face covering," including "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." Order at 3, § 1.

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.

Order at 4-5, § 3; *see id.* (cautioning that "[a]ll alternatives to a face covering, including the use of a face shield, should be exhausted before an individual is excepted from this Order").

As for her legal authority to impose the Mask Mandate, the Secretary stated:

> 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 [ ] 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.

See id. at 3. By its own terms, the Order was to "remain in effect until otherwise terminated." *Id.* at 6, § 6.

On September 3, Petitioner-Appellees[14] filed a petition for review in the Commonwealth Court's original jurisdiction challenging the Mask Mandate, alleging that

[14] Petitioners include Jacob D. Corman, III, President *pro tempore* of the Pennsylvania Senate, in his individual capacity; Jesse Wills Topper; Calvary Academy; Hillcrest Christian Academy; James and Michelle Reich; Adam and Chelsea McClure; Victoria T. Baptiste; Jennifer D. Baldacci; Klint Neiman; and Amanda Palmer. On September 24, Petitioners filed an amended petition adding Penncrest School District, Chestnut Ridge School District, and West York Area School District as petitioners.

the Secretary failed to adhere to statutory rulemaking requirements before issuing the Order. They also filed an application for special relief in the form of an emergency preliminary injunction to prevent the Secretary from enforcing the Order. Following a pre-hearing conference, the Commonwealth Court stayed a scheduled hearing by agreement of the parties and directed them to file briefs addressing whether the Order constituted a rule or regulation subject to the provisions of the Regulatory Review Act and whether it violated the non-delegation doctrine.[15]

Thereafter, Petitioners withdrew their application for special relief, and the parties filed their respective applications for summary relief and responses thereto.[16] Petitioners argued that the Mask Mandate lacked independent statutory support and that it was not issued during a period when agency rulemaking procedures were suspended pursuant to a gubernatorial disaster emergency declaration. In their view, the Order constituted a

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[15] "The non-delegation doctrine" is a constitutional principle, predicated upon the separation of powers, that "forbids entities other than the legislative branch from exercising 'legislative power,' as those entities do not have 'the power to make law.'" *Scarnati*, 233 A.3d at 704 (quoting *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 833 (Pa. 2017)).

[16] On September 14, the Pennsylvania House of Representatives' Health Committee concluded that the Mask Mandate is a rule or regulation requiring compliance with the Regulatory Review Act. The committee presented its determination by letter to the Joint Committee on Documents, an inter-branch body charged with reviewing claims that agency documents should be published or promulgated as regulations. *See* 45 Pa.C.S. § 502(a). By a vote of 7-4, the Joint Committee came to the contrary conclusion. *See* Order in Favor of Respondent Department of Health, 10/21/2021 ("Joint Committee Order"). On October 27, the Secretary moved to supplement the record with the Joint Committee Order, which the Commonwealth Court construed as an application for post-submission communication pursuant to Pa.R.A.P. 2501(a) and granted. The Health Committee appealed the Joint Committee's ruling to the Commonwealth Court, which has not yet issued a decision. *See The Honorable Kathy L. Rapp, Chair, on behalf of the House of Representatives Health Comm. v. Dep't of Health*, 1184 C.D. 2021 (Pa. Cmwlth.).

rule or regulation, the issuance of which did not comply with established regulatory requirements set forth in the Regulatory Review Act,[17] the Commonwealth Documents Law,[18] and the Commonwealth Attorneys Act.[19] Conversely, the Secretary contended that the Order was not a rule or regulation subject to the procedures set forth in those statutes, but instead was promulgated pursuant to existing statutory and regulatory authority.

Following argument on October 20, the Commonwealth Court, by a vote of 4-1, granted the Petitioners' application and denied the Secretary's application. *Corman v. Acting Sec'y of the Pa. Dep't of Health*, 294 M.D. 2021, --- A.3d ----, 2021 WL 5227124 (Pa. Cmwlth. Nov. 10, 2021) (*en banc*).[20]

The court began by reviewing the legal requirements for promulgating agency regulations:

> An 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. . . . [W]hen promulgating a regulation, an agency must comply with the requirements set forth in the Commonwealth Documents

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[17] Act of June 25, 1982, P.L. 633, No. 181, *codified as amended at* 71 P.S. §§ 745.1, *et seq.*

[18] Act of July 31, 1968, P.L. 769, No. 240, *codified as amended at* 45 P.S. §§ 1102, *et seq.*, and 45 Pa.C.S. §§ 501, *et seq.*

[19] Act of Oct. 15, 1980, P.L. 950, No. 164, *codified as amended at* 71 P.S. §§ 732-101, *et seq.*

[20] Notably, two days before the Commonwealth Court issued its decision, Governor Wolf announced that the statewide school Mask Mandate would expire January 17, 2022, thus leaving the decision whether to implement masking requirements to local school leaders. *See* Press Release, "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/.

> Law, the Commonwealth Attorneys Act, 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.
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> 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. 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*.

Id. at *6-7 (quoting *Germantown Cab Co. v. Phila. Parking Auth.*, 993 A.2d 933, 937-38 (Pa. Cmwlth. 2010)) (cleaned up). "Additionally, the Regulatory Review Act establishes a 'mandatory formal rulemaking procedure that is, with rare exceptions, required for the promulgation of [agency] regulations.'" *Id.* at *7 (quoting *Naylor v. Dep't of Pub. Welfare*, 54 A.3d 429, 433 (Pa. Cmwlth. 2012)). Thus, "in the absence of a gubernatorial proclamation of disaster emergency or a statute or regulation that authorizes or requires a new agency rule or requirement," all agencies must follow the statutory procedures governing rulemaking. *Id.* (citing 71 P.S. § 745.5).

The court then identified two ways in which the rulemaking process can be expedited or circumvented, if necessary, under existing law. First, "Section 6(d) of the Regulatory Review Act authorizes the Governor to certify the immediate adoption of regulations 'to meet an emergency which includes conditions which may threaten the public health, safety or welfare.'" *Id.* at *7 n.20 (quoting 71 P.S. § 745.6(d)). When a proposed rule is so certified pursuant to Section 6(d), the Independent Regulatory Review Commission is barred from issuing an order blocking an agency from "promulgating a final-form or final omitted regulation," and the proposed regulation is allowed to "take effect on the date of publication" while its review by the Commission and House and

Senate committees takes place over a 120-day period. 71 P.S. § 745.6(d). The emergency regulation "shall be rescinded after 120 days or upon final disapproval, whichever occurs later." *Id.* If no action is taken on the regulation by the expiration of the review period, the regulation shall continue in full force and effect until otherwise suspended or repealed. *Id.*

Second, the court acknowledged that the Governor may suspend the Regulatory Review Act's otherwise mandatory rulemaking procedures upon the declaration or proclamation of a disaster emergency in accordance with the Emergency Code, which this Court has recognized as a valid exercise of the police power. *Id.* at *7 (citing *Scarnati*, 233 A.3d at 705; *DeVito*, 227 at 887-88, 892-93). Here, however, no disaster proclamation was in place when the Secretary promulgated the Mask Mandate. Accordingly, the Commonwealth Court identified the "pertinent question" as whether the Order "represents a rule or regulation subject to the formal requirements for regulatory rulemaking and, if so, whether the Secretary was authorized by statute or regulation to promulgate the [ ] Order without complying with" the aforementioned statutes. *Id.* at *8.

The court explained that an agency may formulate policy that has the force of law in one of two ways: by promulgating substantive rules, or via binding, precedential adjudications. Because general policy statements are a product of neither approach, they do not require adherence to the Regulatory Review Act's procedural requirements.

> 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.
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> 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.

Id. (quoting *Pa. Human Rels. Comm'n v. Norristown Area Sch. Dist.*, 374 A.2d 671, 679 (Pa. 1977)).

Reasoning that the Secretary "intended to, and actually [did], dictate citizens' standards of conduct within Pennsylvania's schools" by "requir[ing] all persons physically within a School Entity . . . to wear a face covering regardless of COVID-19 infection or vaccination status," the Commonwealth Court rejected the notion that the Mask Mandate was "mere guidance" in pursuit of statutory interpretation, rather than a substantive rule with "the force and effect of law." *Id.* at *8-10. As such, for the Order to survive, it had to be authorized by statute or regulation. To that end, the Secretary relied upon the statutory provisions cited in her Order—namely, the Disease Prevention and Control Law of 1955,[21] the Administrative Code of 1929,[22] and the Department of Health Act[23]—in addition to a departmental regulation,[24] which she asserted empowered the Department to implement *any* disease control measure necessary to protect the public from the spread of infectious disease. The Commonwealth Court disagreed.

Before addressing each of those provisions, the court offered the following observation regarding "the principle of administrative agency deference":

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[21] Act of Apr. 23, 1956, P.L. (1955) 1510, *codified as amended at* 35 P.S. §§ 521.1, *et seq.*

[22] Act of Apr. 9, 1929, P.L. 177, No. 175, *codified as amended at* 71 P.S. §§ 51, *et seq.*

[23] Act of Apr. 27, 1905, P.L. 312, *codified as amended at* 71 P.S. §§ 1401, *et seq.*

[24] *See* 28 Pa. Code § 27.60.

> Courts give substantial deference to an agency's interpretation of a statute the agency is charged with implementing and enforcing. An administrative agency's interpretation of the statute it is charged to administer is entitled to deference on appellate review absent fraud, bad faith, abuse of discretion or clearly arbitrary action. Interpretations of an ordinance that are entitled to deference become of controlling weight unless they are plainly erroneous or inconsistent with the ordinance. However, when an administrative agency's interpretation is inconsistent with the statute itself, or when the statute is unambiguous, such administrative interpretation carries little weight.

Id. at *10 (quoting *Azoulay v. Phila. Zoning Bd. of Adjustment*, 194 A.3d 241, 249 (Pa. Cmwlth. 2018)) (cleaned up). Finding the text of the asserted authorities to be unambiguous, the court determined that the Secretary's interpretation was owed no deference. *Id.* The court addressed each in turn.

The court began with Section 5 of the Disease Prevention and Control Law, entitled "Control measures," which provides:

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

35 P.S. § 521.5 (emphasis added). The court construed this provision as requiring that a "control measure" be "limited to one as provided by an existing rule or regulation." *Corman*, 2021 WL 5227124, at *10. In the court's view, because the Mask Mandate "require[d] neither isolation nor quarantines . . . the Acting Secretary by necessity relie[d] on the 'any other control measure' portion" of the statute for support. *Id.* (footnotes omitted). However, the court found that the provision's language "contemplates existing control measures for diseases already subject to those existing control measures." *Id.* Additionally, the court noted that the Secretary's proposed construction did not account for the portion of the provision italicized above, which the court considered to be an

"express limitation" that cabins the Department's authority to "carry out appropriate control measures." *Id.* (observing that "it does not provide the Acting Secretary with the blanket authority to create new rules and regulations out of whole cloth"). With that in mind, the court concluded that Section 5 "does not, on its own, provide the Acting Secretary with the authority to impose the Masking Order's non-isolation, non-quarantine control measure of requiring all individuals to wear masks or face coverings inside Pennsylvania's School Entities to combat reports of COVID-19." Rather, it "limits the 'other control measures' available to [the Secretary] to those permitted under existing rules and regulations." *Id.*

With regard to Section 2102(a) of the Administrative Code and Section 8 of the Department of Health Act—which collectively refer to the Department's "duty" and "power" to "determine and employ the most efficient and practical means for the prevention and suppression of disease," 71 P.S. §§ 532(a), 1403(a)—the court acknowledged that, while these provisions empower the Department to promulgate rules and regulations in furtherance of its general duty to protect Pennsylvanians' health, they "do not authorize specific means by which the Department [ ] may accomplish the duties, nor do they provide specific authority for the [Mask Mandate]." *Corman*, 2021 WL 5227124, at *11. Because those statutes "make no reference whatsoever to disease control measures of any kind," the court found that they did not sanction non-compliance with established rulemaking protocols. *Id.* ("It 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.").

The court then turned to the Secretary's reliance upon Section 27.60 of the Department's regulations, which provides:

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

28 Pa. Code § 27.60(a) (emphasis added). The court observed that the regulation "speaks in terms of isolating and/or surveilling animals or individuals with a communicable disease or infection," as well as surveilling, segregating, and quarantining "contacts" of those persons or animals. *Corman*, 2021 WL 5227124, at *11 (footnotes omitted). Because the Mask Mandate required everyone within a school to wear a mask regardless of their infection or exposure status, the court concluded that the Order "cannot be said to be in furtherance of" those specific disease control measures. *Id.* To the extent that the Secretary relied upon the portion of the regulation that permits the Department to implement "any other disease control measure the Department . . . considers to be appropriate," the court noted that this clause "does not provide blanket authority to create new rules and regulations out of whole cloth," but rather is qualified by language that limits such measures to those that are "appropriate for the surveillance of disease." *Id.* at *12. And since "[m]ask wearing is not disease surveillance," in the court's view, that portion of the regulation also provided no support for the Mask Mandate. *Id.*

Nor would the court consider compulsory mask-wearing to be a form of "modified quarantine," which the Department's regulations define as

> [a] selected, partial limitation of freedom of movement determined on the basis of differences in susceptibility or danger of disease transmission which is designated to meet particular situations. The term includes the exclusion of children from school and the prohibition, or the restriction, of those exposed to a communicable disease from engaging in particular activities.

28 Pa. Code § 27.1. Emphasizing that this definition "contemplates the limitation of *movement* of individuals who *have already been exposed* to a communicable disease," the court declined to equate a "partial limitation of freedom of movement" applicable to those exposed to disease with a blanket masking requirement applicable to everyone regardless of their exposure statue. *Corman*, 2021 WL 5227124, at *12 (emphasis in original). To do so "would improperly ignore the plain language of the definitions contained in the Department['s] own regulations." *Id.*

The court also noted that Section 27.60(b) requires the Department to "determine the appropriate disease control measure based upon the disease or infection, the patient's circumstances, the type of facility available and any other available information relating to the patient and the disease or infection." *Id.* (quoting 28 Pa. Code § 27.60(b)). In referring to "the patient's circumstances," the court found that this language "specifically limits the authority and possible actions of the Department [ ] to those individuals who have already contracted specific diseases, not the general, uninfected population as a whole." *Id.* Likewise, the court reasoned that the subsection's reference to available facilities indicates a focus upon facilities for surveilling, segregating, or quarantining individuals already known to have been exposed to a disease or infection. *Id.* Accordingly, the court concluded that this subsection could not provide the broad authority

asserted by the Secretary in support of ordering "otherwise healthy Pennsylvanians attending, working in, or otherwise visiting Pennsylvania's" schools to wear masks. *Id.*

Finally, the court reiterated that the Emergency Code grants the governor the power to issue "executive orders, proclamations and regulations which shall have the effect of law," and observed that this Court recognized in *Scarnati* and *DeVito* that the General Assembly granted the governor the power to "[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance . . . would in any way prevent, hinder or delay necessary action in coping with the emergency" declared pursuant to Section 7301(f)(1) of that Code. *Corman*, 2021 WL 5227124, at *12 (quoting 35 P.S. §§ 7301(b), (f)(1)). As there was no such emergency declaration in place when the Secretary issued the Mask Mandate, the court concluded that she was required to follow the prescribed procedures for rulemaking set forth in the Regulatory Review Act and related statutes. Because she did not, the court held that her Order was void *ab initio*. *Id.* at *13.[25]

Judge Wojcik dissented. Characterizing the Mask Mandate as "a valid interpretive rule that track[ed] the statutory and regulatory authority conferred upon" the Secretary of Health, the dissent concluded that it was not a rule or regulation that must be formally promulgated. *Id.* (Wojcik, J., dissenting). Relying upon the authority cited by the Secretary, the dissent opined that:

> the increase in COVID-19 cases caused by the Delta variant of the SARS-CoV-2 virus at the time of [the Order's] issuance, in combination with the concern of the quick and dangerous spread among unvaccinated children,

[25] Having invalidated the Mask Mandate on statutory grounds, the court declined to address the Petitioners' constitutional claim. *Corman*, 2021 WL 5227124, at *13 n.33.

> while considering the mental health needs of students to return to in-person instruction in schools, compelled the Secretary to follow the advice of the [Centers for Disease Control and Prevention] and [the American Academy of Pediatrics] to temporarily impose the least restrictive and "most efficient and practical means" of ensuring the safety of the vulnerable student population. In the absence of universal testing of all individuals who may come into contact with a student while in a "School Entity," the use of masks by all individuals in this setting during the life of the COVID-19 pandemic is an appropriate and limited "isolation" or "segregation" measure to prevent the spread of an airborne virus causing, in some cases, an asymptomatic disease. This temporary measure is "the most efficient and practical means for the prevention and suppression of [this] disease," as mandated by Section 2102(a) of the Administrative Code and Section 8(a) of the [Department of Health] Act, and is a specifically authorized mode of prevention provided by Section 5 of the Disease Control Law and Section 27.60(a) of [the Department's] regulations.

Id. at *17 (footnotes omitted).

The dissent stressed that the Secretary's interpretation of the foregoing statutes and Department regulations should be afforded "great deference," and that a reviewing court should not disturb it "absent fraud, bad faith, abuse of discretion or clearly arbitrary action." *Id.* at *19 (quoting *Winslow-Quattlebaum v. Md. Ins. Grp.*, 752 A.2d 878, 881 (Pa. 2000)); *see id.* at *17 n.12 (quoting *Blumenschein v. Pittsburgh Hous. Auth.*, 109 A.2d 331, 334-35 (Pa. 1954) ("That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion.") (emphasis in original)).[26] Finding no such abuse in the Secretary's conduct, Judge Wojcik would have upheld the Mask Mandate as a valid exercise of her administrative power. *Id.* at *20. He also would

[26] Judge Wojcik also opined that the court "should defer to the Joint Committee's expertise and determination that the Secretary's Order does not constitute a rule or regulation" requiring adherence to formal rulemaking procedures. *Corman*, 2021 WL 5227124, at *19. The majority found the Joint Committee Order to be unpersuasive, remarking that it "was issued absent analysis or rationale and, in any case, has no precedential or binding effect on the judiciary." *Id.* at *9 n.23.

have reached the non-delegation question and answered it in the Department's favor. *Id.* at *20-21.

The Secretary immediately appealed the Commonwealth Court's decision to this Court, triggering an automatic stay. *See* Pa.R.A.P. 1736(b) ("Unless otherwise ordered pursuant to this chapter the taking of an appeal by any party specified in Subdivision (a) of this rule," including the Commonwealth or any officer thereof acting in his or her official capacity, "shall operate as a *supersedeas* in favor of such party, which *supersedeas* shall continue through any proceedings in the United States Supreme Court."). We granted her request for expedited review on November 16, 2021. That same day, Judge Fizzano Cannon, on Petitioners' (now Appellees') motion, lifted the automatic stay in a single-judge order, effective December 4, 2021, four days before the matter was scheduled to be argued before this Court. We granted the Secretary's emergency application to reinstate the *supersedeas* pending further consideration following argument.[27]

II.

> The Secretary presents the following questions for our review:
>
> I. Did the General Assembly empower the Department of Health to issue an order requiring masking in school buildings, as the most efficient and practical means to suppress the transmission of COVID-19 among unvaccinated school children, without having to engage in the lengthy process of promulgating a new regulation?
>
> II. Did the General Assembly violate the Non-Delegation Doctrine in granting the Department of Health authority and discretion to quickly suppress novel diseases afflicting the Commonwealth?

Secretary's Br. at 4. The validity of an administrative agency's orders under its enabling statutes, and the constitutionality of the authority delegated to an agency therein, are pure

[27] The stay was lifted by *per curiam* order on December 10, 2021. *See supra* n.1.

questions of law, as to which our standard of review is *de novo*, and our scope of review is plenary. *Crown Castle NG East LLC v. Pa. Pub. Util. Comm'n*, 234 A.3d 665, 674 (Pa. 2020); *Protz*, 161 A.3d at 833.[28]

The Secretary contends that the Commonwealth Court misapprehended the Department's statutory and regulatory authority. She asserts that the pertinent question is whether the General Assembly granted the Department the "discretion to quickly issue orders tailored to employ the most efficient and practical methods for fighting a new disease, or must the Department promulgate new regulations every time a novel health crisis arises?" Secretary's Br. at 19. Highlighting the conclusions of the Joint Committee on Documents, the Secretary echoes the dissenting view of Judge Wojcik that the Mask Mandate is authorized by the Disease Prevention and Control Law, the Administrative Code, and the Department's existing regulations. *Id.* at 20-21.

As the Secretary notes, the Department's duty "to protect the health of the people of the State, and to determine and employ the most efficient and practical means for the prevention and suppression of disease," has not changed since its inception in 1905. *Id.* at 23 (quoting 71 P.S. § 1403(a)). Indeed, she observes that when the General Assembly enacted the Administrative Code in 1929, it reiterated the Department of Health Act's "broad empowering language" in declaring that the Department "'shall have the power, and its duty shall be . . . [t]o protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and

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[28] Because we resolve this appeal on statutory grounds, we do not consider whether the General Assembly violated the non-delegation doctrine by empowering the Department to promulgate disease control measures by rule or regulation. To the extent the parties' arguments address that constitutional issue, we omit them from the following summary.

suppression of disease.'" *Id.* (quoting 71 P.S. § 532(a)). The Mask Mandate falls within this statutory authority, she claims, because it is "the most efficient and practical means for the prevention and suppression" of COVID-19 among school children. *Id.*

The Secretary avers that the Commonwealth Court erred in determining that these statutes authorized no specific disease control measures at all for a number of reasons. *Id.* at 24-25 ("Respectfully, to require the General Assembly to specify what means the Department must employ to combat future unknowable diseases is an impossible task. That was the entire reason behind creating a Department of Health with broad authority and discretion—to allow the medical and health *experts* discretion to quickly and nimbly respond to ongoing public health emergencies." (emphasis in original)). In the Secretary's view, the court improperly read words into the statute that do not exist—namely, that the Department is only permitted to employ disease control measures that are specifically authorized elsewhere—before erroneously reducing the authorizing language to mere surplusage simply because the General Assembly did not define what "efficient and practical means" were available to the Department. *Id.* at 25. She further objects to the court's reasoning as "ahistorical," noting that the Department of Health Act's robust grant of authority predated the Disease Prevention and Control Law by half-a-century. Thus, she asserts, the court's "conclusion that the 1905 grant of authority was somehow dependent upon the passage of future laws before it became effective leads to an absurd result." *Id.* at 26 ("If the General Assembly intended the broad 'efficient and practical means' language to be limited or cabined by more specific language, it would have stated this.").

The Secretary further opines that the Legislature's decision to leave the available means of controlling the spread of disease to the Department in its expertise "is both logical and prudent." *Id.* Since the vast majority of legislators are not doctors or medical experts, and because no one can predict the future, she posits that necessity compels a broad interpretation of the Department's authority to act when a health crisis arises in order to quickly combat communicable disease. *Id.* Lastly, she asserts that the court incorrectly characterized the discretion granted to the Department as "*carte blanche*." To the contrary, she says, the Department cannot issue orders that have no connection to the prevention and suppression of the disease at issue, or that employ inefficient or impractical means. *Id.* at 27-28. Ultimately, she asserts that neither the Commonwealth Court nor Appellees questioned the "limiting principle in this case"—that "universal masking prevents the transmission of COVID-19 among students, reducing the number of children who are hospitalized." *Id.* at 28 ("This concession to medical reality is dispositive.").

Invoking the Disease Prevention and Control Law, the Secretary asserts that the Department is empowered to carry out appropriate control measures for the suppression of disease: "Under this law, upon 'a report of a disease which is subject to isolation, quarantine, or any other control measure, the . . . department shall carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation.'" *Id.* (quoting 35 P.S. § 521.5 ("Control measures")). Pursuant to that statute, in 2000, the Department promulgated Section 27.60 of its regulations, which authorizes the Department to order a "'modified quarantine of contacts of a person . . . with a communicable disease or infection.'" *Id.* at 30 (quoting 28 Pa. Code § 27.60(a)).

Because the Mask Mandate is a "partial limitation of freedom of movement" applied to those "engaging in particular activities"—*e.g.*, individuals who enter a school—it falls within the definition of a modified quarantine. *Id.* at 31 (quoting 28 Pa. Code § 27.1).

The Secretary claims that the Commonwealth Court mistakenly concluded that a modified quarantine only applies to the "*limitation of movement* of individuals who *have already been exposed* to a communicable disease," *id.* (quoting *Corman*, 2021 WL 5227124, at *12 (emphasis in original)), for three reasons. First, the court's determination that the Order does not fall within this definition because it applies to all individuals entering a school without knowledge of whether they have been exposed to COVID-19 "ignores the nature of this virus and the manner in which it is transmitted." *Id.* at 32 (quoting *DeVito*, 227 A.3d at 889-90).

> Given the prolific nature of this virus, the manner in which it is transmitted by asymptomatic and pre-symptomatic individuals, and the large number of infected individuals in society, the possibility of exposure to an infected person at any given time is high. This is precisely why, despite high levels of vaccinations and after nearly two years of fighting this pandemic, thousands of new cases are reported in Pennsylvania every day. We are, therefore, all "contacts" as defined by the regulation. And any unmasked indoor activity among a large population of unvaccinated children presents an opportunity for acquiring the infection.

Id. at 32-33 (footnote omitted). Second, contrary to the court's suggestion, modified quarantines are not cabined to only the limitation of movement, as the definition explicitly permits restricting individuals from engaging in particular activities—which naturally includes limiting individuals from entering a school building without a mask. *Id.* at 33. Indeed, the definition's use of the phrase "to include" demonstrates that it is introducing examples, not an exhaustive list. *Id.* at 33-34. Third, principles of statutory construction require that a statute be read in the manner which will effectuate its purpose. The

Department's statutory duty to protect public health "cannot be served if it is powerless to protect students from a global pandemic." *Id.* at 35.

Even if the Mask Mandate was not a modified quarantine, the Secretary argues in the alternative that it was authorized by the last provision of Section 27.60(a), which permits the Department to use "any *other* disease control measure the Department . . . 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." *Id.* at 35-36 (quoting 28 Pa. Code. § 27.60(a) (emphasis in original)). While the regulations do not define "disease control measure," the adjective "other" reveals that the measures contemplated are those other than isolation, quarantine, or modified quarantine. The Mask Mandate clearly is a "disease control measure," the Secretary maintains, because it suppresses the transmission of COVID-19. The Commonwealth Court erroneously concluded that the Order did not fit this definition because it "focuse[d] myopically" on the surveillance-of-disease language, rather than viewing the provision holistically. *Id.* at 36-37. In doing so, the court overlooked the fact that surveillance is a passive activity, and that one "cannot control a disease merely by studying it." *Id.* at 37. That is why "active control measures" are necessary: "The two go hand-in-hand." *Id.* In sum, the Secretary contends that "permitting the Department to isolate and quarantine," while barring it from "employ[ing] lesser methods to address the problem of transmission by asymptomatic and pre-symptomatic carriers, is neither efficient nor practical." *Id.* at 37-38.

While the Secretary believes that the regulation clearly provides authority for the Mask Mandate, she avers that, "at worst, the regulation is ambiguous, as reasonable minds arrived at multiple interpretations of the same regulatory language." *Id.* at 39.

Consequently, she asserts that the lower court erred when it declined to defer to the Department's interpretation of its own regulations. *Id.*

Lastly, the Secretary suggests that the Commonwealth Court "demonstrate[d] a fundamental misunderstanding of the process for promulgating an emergency [ ] regulation" when it indicated that the Department could pass an emergency regulation in as little as five days. *Id.* at 40. "While an emergency-certified regulation takes effect upon publication in the Pennsylvania Bulletin," *id.* (citing 1 Pa. Code § 313.2), the Secretary submits that, in order to get to that stage, the Department "is still subject to various statutory and regulatory document and transmission requirements," including, *inter alia*, completion of a twelve-page regulatory analysis form and a fiscal note. In her estimation, the information that must accompany a proposed regulation—including a cost-benefit analysis, supportive data, and a small business analysis—"is significant." *Id.* at 41 ("Completing this type of analysis and providing the data and relevant peer-reviewed articles to support the regulation requires time."). The Department denies the lower court's suggestion that it can "timely promulgate new regulations every time it is confronted with a novel health crisis." *Id.* Simply put, "[d]ays of delay are counted in lives lost." *Id.* "The Commonwealth Court's attempt to limit the authority and discretion of the Department [] during such emergencies is unsupported by statutory language, contrary to principles of statutory construction . . ., and dangerous to public health." *Id.* at 42.[29]

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[29] The Pennsylvania Chapter of the American Academy of Pediatrics ("PA AAP") submitted an *amicus curiae* brief, along with its national organization, in support of the Mask Mandate, which notes that Pennsylvania has reported nearly 290,000 cases of COVID-19 among children, the fifth-most in the nation, and that at least nineteen children have died from the disease in the Commonwealth. PA AAP's Br. at 4. *Amici* describe some of the severe symptoms experienced by children, as well as many secondary and

For their part, Appellees' argument largely tracks the Commonwealth Court's analysis. They assert that the control measures available to the Department under the Disease Prevention and Control Law are limited to those permitted under existing rules and regulation. Appellees' Br. at 6. As far as the "any other disease control measure" clause of Section 27.60(a) of the Department's regulations is concerned, Appellees submit that the lower court correctly held that the available measures must relate to surveilling a disease. Appellees fear that if the Secretary is correct that the regulation provides her with the authority to issue the Order, then she "has limitless authority to create and implement other disease control measures at her sole discretion." *Id.* at 7.

> The alleged authority . . . 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.

Id. at 8; *see id.* ("If there are limitations to the [Secretary's] asserted authority," she has articulated none.).

While Appellees acknowledge that the Department has authority to isolate, segregate, quarantine, and surveil persons or animals with communicable diseases and those persons or animals who come into contact with the infected, they contend that there

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long-term conditions attributable to the disease. *Id.* at 4-5. They cite various research studies and literature indicating that universal masking in schools is an "effective and safe" way to reduce the likelihood and rate of infections. *Id.* at 10-14. Notably, *amici* cite several federal cases in which courts have found that universal mask policies are *required* in order to comply with the Americans with Disabilities Act and the federal Rehabilitation Act of 1973, due to the heightened risks of severe complications that children with certain preexisting medical conditions face if they contract COVID-19. *Id.* at 14 & n.37 (citing federal district court decisions from Iowa, South Carolina, Tennessee, and Texas granting permanent or preliminary injunctions or temporary restraining orders).

is no existing rule that vests the Department with the authority to issue a mask order. *Id.* at 17. The Administrative Code and Department of Health Act provide "general policy statement[s] regarding the general duties of the Department," but they do not authorize the Order absent a rule or regulation to that effect. *Id.* at 16. Because the relevant statutes are clear and unambiguous in Appellees' view, the Secretary's interpretation is not entitled to deference. *Id.* at 18. As she failed to comply with Pennsylvania's formal rule-making procedures in promulgating the Order, it is void *ab initio*. *Id.* at 19-25; *see id.* at 22-24 (likening the Mask Mandate to the CDC's extension of the nationwide eviction moratorium, which the Supreme Court struck down in *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S.Ct. 2485, 2489 (2021) (*per curiam*) (explaining that "the Government's read of § 361(a) [of the Public Health Service Act for authority to promulgate and extend the eviction moratorium] would give the CDC a breathtaking amount of authority")).[30]

III.

The issues raised in this case require us to construe the terms of several statutes and administrative rules. For this, we look to the Statutory Construction Act. *See*

[30] The Honorable Kathy L. Rapp, Chair of the Pennsylvania House of Representatives' Health Committee, filed an *amicus* brief in favor of Appellees. Chair Rapp's Committee is responsible for reviewing the applicable regulations promulgated by the Department "to, *inter alia*, ensure conformity with legislative intent." Chair Rapp's Br. at 2. By promulgating the Order without undergoing formal rulemaking, Chair Rapp asserts that the Secretary stripped the Health Committee of its statutory authority to review the agency's action in contravention of the separation of powers. *Id.* at 3. She suggests that the Department "could (and should) have availed itself of the emergency certified 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." *Id.* at 7-8.

1 Pa.C.S. §§ 1901, *et seq.*[31] Our duty is "to ascertain and effectuate the intention of the General Assembly." *Id.* § 1921(a). "Every statute shall be construed, if possible, to give effect to all its provisions." *Id.* "The best indication of legislative intent is the plain language of the statute." *Crown Castle*, 234 A.3d at 674. In ascertaining its meaning, "we consider the statutory language in context and give words and phrases their 'common and approved usage.'" *Id.* (quoting *Commonwealth by Shapiro v. Golden Gate Nat'l Senior Care LLC*, 194 A.3d 1010, 1027-28 (Pa. 2018)). "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). But when the words are not explicit, we may glean the Legislature's intent by considering, among other things, "the occasion and necessity for the statute"; "the circumstances under which it was enacted"; "the mischief to be remedied"; "the object to be obtained"; "the former law, if any, including other statutes upon the same or similar subjects"; and "the consequences of a particular interpretation." *Id.* § 1921(c) (capitalization and punctuation altered). With these principles in mind, we turn to the origins of the Department of Health.

A.

The United States' struggle against communicable disease is as old as the nation itself, and Pennsylvania is no stranger to that effort. Indeed, the founding generation was intimately aware of the devastation that contagions had wrought throughout the world and close to home. The scourge of smallpox was so common in 17th- and 18th-century

[31] *Id.* § 1901 ("In the construction of the statutes of this Commonwealth, the rules set forth in this chapter shall be observed, unless the application of such rules would result in a construction inconsistent with the manifest intent of the General Assembly.").

America that nearly every colony had laws in place to deal with outbreaks by the time of the Revolution, with severe enforcement penalties for those who broke quarantine.[32]

Pennsylvania was the rare exception. The Commonwealth "was without authority for local quarantine until well after the War for Independence."[33] As a consequence of government officials' "cavalier" attitude toward public health, Philadelphia was perhaps the only city where smallpox was endemic during the Revolution, which coincided with a historic epidemic that lasted from 1775 to 1782.[34] With rumors circulating that the British might employ "germ warfare" against the military and civilian populations alike, George Washington, then-Commander in Chief of the Continental Army and himself a smallpox survivor, resolved to preempt a biological attack.[35] Fearing the repercussions that an outbreak would have upon the war effort, Washington carried out the first mass-smallpox

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[32] The word "quarantine" is derived from the Italian *quaranta giorni*—"forty days"—and can be traced to 14th-century Venice's practice of detaining ships arriving in port for that length of time to stop the spread of bubonic plague during the Black Death. *See* Philip A. Mackowiak & Paul S. Sehdev, *The Origin of Quarantine*, 35 CLINICAL INFECTIOUS DISEASES 1071, 1071-72 (2002).

[33] Elizabeth C. Tandy, *Local Quarantine and Inoculation for Smallpox in the American Colonies (1620-1775)*, 13 AM. J. PUB. HEALTH 203, 205 (1923) ("Indeed, in the colonial statutes of Pennsylvania smallpox was not a disease for which even seaboard quarantine might be established.").

[34] ELIZABETH FENN, POX AMERICANA: THE GREAT SMALLPOX EPIDEMIC OF 1775-82, 82-85 (2001) ("Nowhere in North America was smallpox more persistent than in the city of Philadelphia. By the time of the Revolutionary War, Pennsylvania's thriving commercial hub may well have been the only place on the continent where *Variola* had become endemic. . . . [T]he persistent contagion established Philadelphia as a sort of distribution center from which the pox could spread far and wide.").

[35] *Id.* at 15, 88-92.

inoculation in military history while the Continental Army was encamped in and around Philadelphia in February 1777, repeating the endeavor the next winter at Valley Forge.[36]

Yellow fever, too, was endemic to Philadelphia, which was ravaged by recurring outbreaks of the mosquito-borne disease throughout the 18th century. Most notably, between August and November 1793, a yellow fever epidemic killed more than 5,000 of the city's inhabitants—one-tenth of its population—prompting a mass exodus from the fledgling nation's capital.[37] In its wake, Congress adopted the first federal quarantine law, authorizing

> the President of the United States . . . to direct the revenue-officers and the officers commanding forts and revenue-cutters, to aid in the execution of quarantine, and also in the execution of the health-laws of the states, respectively, in such manner as may to him appear necessary.[38]

But the frequency of epidemics in the United States would not soon abate.

By the 19th century, tuberculosis, or "consumption," was estimated to have killed one-in-seven people *who had ever lived*, earning the ancient disease the grim nickname "Captain of Death."[39] In the United States, where tuberculosis was "by far the leading cause of death," the sanatorium movement spawned one of the first truly "public" health responses when it took root in the early 1880s with "the construction of dedicated care

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36 *Id.* at 92-101.

37 STEPHEN FRIED, RUSH: REVOLUTION, MADNESS & THE VISIONARY DOCTOR WHO BECAME A FOUNDING FATHER 364, 367-68 (2018)

38 Act of May 27, 1796, 1 Stat. 474 ("An Act Relative to Quarantine").

39 *See generally* THOMAS M. DANIEL, CAPTAIN OF DEATH: THE STORY OF TUBERCULOSIS (1997).

facilities target[ing]" the disease.[40] That century also witnessed no fewer than five cholera pandemics, three of which struck the United States, in 1832, 1849, and 1866, killing more than 200,000 Americans.[41] Typhus (a highly lethal bacterial infection spread by body lice), and typhoid (a food-borne illness that produced similar feverish symptoms), afflicted Philadelphia as well, with major outbreaks of one or the other in 1836, 1876, 1888-89, 1899, and 1906.[42] And the influenza pandemic of 1889-1890—"with the exception of 1918-19, the most severe influenza pandemic in the last three centuries"—killed more than one million people worldwide, including many Americans.[43]

It was against *this* backdrop that the General Assembly adopted the Department of Health Act in April 1905, unmistakably signaling its belief that the swift prevention and control of communicable disease was of paramount importance to public health and safety throughout the Commonwealth.[44] The Legislature made it "the duty of the

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[40] Annika Neklason, *A Historical Lesson in Disease Containment*, THE ATLANTIC (Mar. 21, 2020), available at https://www.theatlantic.com/health/archive/2020/03/tuberculosis-sanatoriums-were-quarantine-experiment/608335/.

[41] G.F. Pyle, *The Diffusion of Cholera in the United States in the Nineteenth Century*, 1 GEOGRAPHICAL ANALYSIS 59, 64 (1969) (observing that Philadelphia was "hard hit by the epidemic" of 1832).

[42] Timothy K. Holliday, *What an 1836 Typhus Outbreak Taught the Medical World About Epidemics*, SMITHSONIAN MAGAZINE (Apr. 21, 2020), https://www.smithsonianmag.com/history/what-1836-typhus-outbreak-taught-medical-world-about-epidemics-180974707/. Scarlet fever also afflicted Philadelphia throughout the 1800s, but accurate statistics of that disease were not kept until the turn of the 20th century. Maurice Ostheimer, *Scarlet Fever During 1915 in Philadelphia*, 6 AM. J. PUB. HEALTH 1104, 1104 (1916).

[43] JOHN M. BARRY, THE GREAT INFLUENZA: THE STORY OF THE DEADLIEST PANDEMIC IN HISTORY 261 (2004).

[44] In the context of early 20th-century America public health jurisprudence, the Act was adopted just two months after the United States Supreme Court upheld

Department of Health to protect the health of the people of the State, and to determine and employ the most efficient and practical means for the prevention and suppression of disease." 71 P.S. § 1403(a). To ensure that this power would be exercised with great care and expert judgment, the General Assembly required that the Department consist of a Commissioner (now Secretary) of Health, "appointed by the Governor, with the advice and consent of the Senate," who was "either a graduate of an accredited medical or osteopathic medical school who is a practicing physician licensed by the Commonwealth or an individual with professional experience in the field of public health, health services delivery or education or training of health service professionals"; an advisory board of physicians and public health experts; and a Physician General. *Id.* § 1401.

The Act expressly empowered the Commissioner of Health "to order nuisances, detrimental to the public health, or the causes of disease and mortality, to be abated and removed," including by such coercive tactics as mandatory quarantines. *Id.* § 1404. In furtherance of that mandate, the Commissioner was authorized to "revoke or modify any order, regulation, by-law, or ordinance of a local board of health, concerning a matter which, in his judgment, affects the public health beyond the territory over which such local board has jurisdiction." *Id.* § 1406 ("Orders of local boards may be revoked"). The Act also authorized the Commissioner to "enter upon" any "premises" (except coal mines and

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Massachusetts' compulsory smallpox vaccination law, which made non-compliance punishable by fines and imprisonment, as a valid exercise of the general police power. *See Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) ("Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."); *cf. Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 471-72 (1877) ("[T]he police powers of a State justifies the adoption of precautionary measures against social evils. . . . [A] State . . . may prevent persons and animals suffering under contagious or infectious diseases . . . from entering the State; [and] for the purpose of self-protection it may establish quarantine . . . .").

tanneries) without the owner or occupant's permission in order to "abate or remove" disease, *id.* § 1404; to "employ competent persons to render sanitary service and make or supervise practical and scientific investigations and examinations requiring expert skill, and prepare plans and reports relative thereto"; to "issue subpoenas to secure the attendance of witnesses, and compel them to testify in any matter or proceeding before him or his authorized agent"; and to "issue warrants to any sheriff, constable, or policeman to apprehend and arrest such persons who disobey the quarantine orders or regulations of the department of health." *Id.* § 1402 ("Employment of investigators; subpoenas; warrants").

While the 1905 Act did not expressly require that disease control measures be promulgated by any formal mechanism, it contemplated that the Commissioner would have the power "to enforce quarantine *regulations*," *id.* § 1404 (emphasis added), and prescribed penalties for non-compliance with those regulations. In fact, the Act made the "violat[ion of] any order or regulation of the Department," or the "resist[ance] or interfere[nce] with any officer or agent thereof in the performance of his duties in accordance with the regulations and orders of the Department," a summary offense punishable by "a fine of not less than ten ($10.00) dollars and costs nor more than fifty ($50.00) dollars and costs," the default of which was further punishable by imprisonment in the "county jail for a period of thirty days." *Id.* § 1409 ("Fine and penalty for violations of orders").

In furnishing the newly-established Department with the authority to develop and implement efficient and practical means to suppress the incidence and spread of disease—which had theretofore been exercised inconsistently, and with sometimes tragic

effect, by a patchwork of various local health bureaus, independent boards, charities, and commissions—the Act embodied the basic truth that the Legislature could not possibly predict all the ways in which public health might be threatened.[45] Hence the creation of a body of medical experts with the flexibility to act as the need arose. The General Assembly's worries proved prescient. Barely a decade later, during "the hot summer of 1916," a polio epidemic spread throughout the northeastern United States, killing or paralyzing thousands of children and prompting Pennsylvania's Health Commissioner to close the schools until the first week of October.[46]

When another influenza pandemic gripped the United States in the fall of 1918, the Commissioner directed local boards of health "to close all public places of entertainment, including theatres, moving picture establishments, saloons and dance halls, and to prohibit all meetings of every description until further notice." *Commonwealth v. Keeper of Lycoming Cty. Prison*, 1918 WL 3227, *1 (Com. Pl. Lycoming Cty. Nov. 6, 1918) (quoting October 3, 1918 Order of Commissioner of Health Edward Martin).[47] Alas, the

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[45] Indeed, the field of virology, the scientific study of viruses, wouldn't be established until 1926, when Dr. Thomas M. Rivers "defined the difference between viruses and bacteria." BARRY *supra* n.43, at 417.

[46] Daniel J. Wilson, *Polio in Pennsylvania*, 19 PENN. LEGACIES 24 (2019), available at https://hsp.org/blogs/fondly-pennsylvania/polio-pennsylvania; *see also* Keith Meyers & Melissa A. Thomasson, *Can pandemics affect educational attainment? Evidence from the polio epidemic of 1916*, 15 CLIOMETRICA 231, 235 (2021) ("The extent and nature of these [school] closures varied across political and geographic divisions of the USA due to the decentralized structure of the nation's public health system. For example, Pennsylvania and Vermont postponed the start of the school year across the entire state, while states such as Connecticut and New Jersey left the decision up to local public health authorities or local school boards.").

[47] While past practice may be indicative of present authority, apart from the Commissioner's statewide business-closure order, our research has not definitively resolved whether mask mandates were employed in Pennsylvania during that time

Commissioner's order would not be enough to stem the tide. By the pandemic's end, no two American cities had been hit harder by "*la grippe*" than Pittsburgh and Philadelphia.[48]

In hindsight, though some might consider the Commissioner's robust exercise of the authority delegated to him to be "breathtaking," *see* Appellees' Br. at 22-24 (quoting *Ala. Assoc. of Realtors*, 141 S.Ct. at 2489), the General Assembly took the lesson of 1918 and repeatedly refined and constrained the Department's discretion to respond to public health threats, first with the adoption of the Administrative Code of 1929—which reiterated the Department's "power" and "duty" to protect public health by suppressing disease through "efficient and practical means," *see* 71 P.S. §§ 532(a), 536—and then with the promulgation of the Disease Prevention and Control Law of 1955, which imposed a

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period. *See* Christine Hauser, *The Mask Slackers of 1918*, N.Y. TIMES, Aug. 3, 2020 (updated Dec. 10, 2020) (noting that, "[b]y the fall of 1918, seven cities—San Francisco, Seattle, Oakland, Sacramento, Denver, Indianapolis, and Pasadena, Calif.—had put in effect mandatory face mask laws," and recounting anecdotal reports of anti-mask protests in Illinois and California, including, notably, the Anti-Mask League of San Francisco), https://www.nytimes.com/2020/08/03/us/mask-protests-1918.html.

[48] Estimates place the number of H1N1 influenza A infections at half-a-billion people worldwide between 1918 and 1920, with upwards of 100 million dead. In the United States, "epidemiologists have settled on 675,000 [deaths] out of a population of 105 million" as the "official" mortality rate. BARRY *supra* n.43, at 396-97. For an authoritative account of Philadelphia's experience during the pandemic, including the aftermath of its ill-fated Liberty Loan Parade, *see id.* at 197-227, 321-44.

> Overall, Pittsburgh experienced the worst epidemic of any major city in the United States. The average death rate for Eastern cities was 555 per 100,000 [people]. By contrast, Pittsburgh's excess death rate was a whopping 807 per 100,000 people. The Steel City's ordeal with influenza was even deadlier than that of Philadelphia (748) or Boston (710), two communities where influenza ran rampant in the fall of 1918.

U. MICH. CTR. FOR THE HISTORY OF MED. & U. MICH. LIBRARY, *Influenza Encyclopedia – The American Influenza Epidemic of 1918-1919: A Digital Encyclopedia*, available at https://www.influenzaarchive.org/cities/city-pittsburgh.html#.

number of prerequisites before the Department could do much of anything in the way of disease control. The evolution of that comprehensive statutory framework dictates the resolution of this matter.

B.

Among its various reforms, the Disease Prevention and Control Law expressly cabined the Department's power to carry out disease control by restricting the available measures to those promulgated by formal rule or regulation. *See* 35 P.S. § 521.5 ("the department *shall carry out the appropriate control measures in such manner and in such place* ***as is provided by rule or regulation***") (emphasis added).[49] This mid-century mandate tracks the Administrative Code's treatment of the Department's powers under the Department of Health Act decades earlier. To illustrate the point: although the Code expressly reauthorized the Department "[t]o establish and enforce quarantines," the Department was constrained to act "in such manner, for such period, and with such powers, as may now or hereafter be provided by law." 71 P.S. § 536(b); *accord id.*

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[49] *Cf.* 71 P.S. § 532(g) ("The Department [ ] shall have the power . . . [t]o promulgate its rules and regulations . . . ."); *id.* § 536(a) ("The Department [ ] shall have the power . . . to establish such regulations for the prevention of the spread of diseases as the department and the Advisory Health Board shall deem necessary and appropriate . . . ."); *id.* § 541(b) ("The Advisory Health Board shall have the power . . . [t]o make such reasonable rules and regulations, not contrary to law, as may be deemed by the board necessary for the prevention of disease, and for the protection of the lives and health of the people of the Commonwealth, and for the proper performance of the work of the Department of Health, and such rules and regulations, when made by the board, shall become the rules and regulations of the department . . . ."); 35 P.S. § 521.16(a) ("The Board [of Health] may issue rules and regulations with regard to," *inter alia*, "(3) the communicable diseases which are to be subject to isolation, quarantine, or other control measures; (4) the duration of the periods of isolation and quarantine; (5) the enforcement of isolation, quarantine and other control measures; (6) the immunization and vaccination of persons and animals; [and] (7) the prevention and control of disease in public and private schools . . . .").

§ 532(b) (empowering the Department "to enforce quarantine regulations"); *id.* § 1404 (same). While the Disease Prevention and Control Law filled in some of the apparent gaps in that authority (twenty-six years later)—in part by defining what it means to "quarantine" or "isolate" a person, and the temporal limitations thereof, 35 P.S. § 521.2—the General Assembly left it to the Department to promulgate regulations further detailing how isolation and quarantine would be effectuated, their duration, and the means available to the Department to enforce them. *See* 28 Pa. Code § 27.65 ("Quarantine"), *id.* § 27.67 ("Movement of persons . . . subject to isolation or quarantine by action of . . . the Department."); *id.* § 27.68 ("Release from isolation or quarantine.").

Thus, notwithstanding that the Department of Health Act and the Administrative Code granted the Department broad authority "[t]o protect the health of the people of [Pennsylvania], and to determine and employ the most efficient and practical means for the prevention and suppression of disease," 71 P.S. §§ 532(a), 1403(a), this general expression of public health policy does not permit the Department or the Secretary of Health to act by whim or fiat in all matters concerning disease. Though it may be more "efficient" to circumvent the regulatory process, we doubt that the General Assembly had that kind of efficiency in mind when it voiced these basic principles in the law. To conclude otherwise, we would have to ignore the numerous regulatory reforms that followed those enactments, which made the *manner* in which the Department exercises its powers and duties critical to that exercise's validity. Accordingly, we hold that the disease control measures available to the Department pursuant to its non-emergency powers are limited to those adopted by formal rule or regulation.

Under the Disease Prevention and Control Law, the triggering event that enables the Department to undertake discrete mitigation efforts is its receipt of "a report of a disease." 35 P.S. § 521.5. Relevant here, a "reportable disease" includes "[a]ny communicable disease declared reportable by regulation," or "any unusual or group expression of illness which, in the opinion of the secretary, may be a public health emergency." *Id.* § 521.2(k)(a)-(b). The law defines "communicable disease" as "[a]n illness due to an infectious agent or its toxic products which is transmitted, directly or indirectly, to a well person from an infected person, animal or arthropod, or through the agency of an intermediate host, vector of the inanimate environment." *Id.* § 521.2(c).

Non-communicable diseases are, by definition, not transmissible from person to person (and most are non-infectious, though parasitic diseases would constitute an exception), so there would be no reason for the Department to subject an individual with a non-communicable disease, like cancer or diabetes, to coercive control measures. For that reason, although some "non-communicable diseases and conditions" are reportable, the Secretary's discretion as to those cases is limited to "authoriz[ing] reporting to provide data and information which, in the opinion of the Advisory Health Board, are needed in order effectively to carry out those programs of the department designed to protect and promote the health of the people of the Commonwealth, or to determine the need for the establishment of such programs." *Id.* § 521.2(k)(c). Therefore, the Department's identification of a reported disease as "communicable" or a threat to public health is a threshold step to further action by control measure.[50]

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[50] The Department has identified COVID-19 as a reportable disease. *See* List of Reportable Diseases, Pa. Dep't of Health ("17. COVID-19"), available at https://www.health.pa.gov/topics/Reporting-Registries/Pages/Reportable-Diseases.aspx.

Next, the Department must determine whether a reported disease "is subject to isolation, quarantine, or any other control measure." *Id.* § 521.5. The Disease Prevention and Control Law authorizes the State Advisory Health Board to identify "the communicable diseases which are to be subject to isolation, quarantine, or other control measures" by rule or regulation. *Id.* § 521.16(a)(3).[51] As noted, if the Department receives a report of a disease that is not capable of suppression via one or more control measures, whether due to its non-communicability or some other factor, the Secretary's power is limited to studying the disease in order to collect additional information about it. However, if the Department concludes that the reported disease "is subject to isolation, quarantine, or any other control measure," it must then identify and "carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation." *Id.* § 521.5.

In 2000, the Department promulgated the regulation upon which the Secretary now relies. That regulation provides:

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

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[51] Secretary Levine identified COVID-19 as a disease subject to various control measures by order dated November 23, 2020. *See* Order of the Secretary of the Pa. Dep't of Health for Mitigation & Enforcement, 11/23/2020, at 1 ("Physical distancing, face coverings, and isolation and quarantine when ill or suspected of being ill or exposed to the virus are the first line of defense against [COVID-19's] spread."), available at https://www.governor.pa.gov/wpcontent/uploads/2020/11/20201123-Order-of-the-Secretary-for-Mitigation-and-Enforcement-SIGNED.pdf.

28 Pa. Code § 27.60(a) ("Disease control measures").

Although neither the statute nor the regulation defines "other disease control measure," the principle of *ejusdem generis* sheds some light on the contours of that catch-all. That canon of construction teaches that, "[w]here general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012); *see Commonwealth v. Klucher*, 193 A. 28, 30 (Pa. 1937) ("[T]he Legislature, in using the words 'or **other** objects' in [a tax and licensing statute applicable to 'any game [ ] played with the use of balls and pins, or other objects'], deliberately selected a word which would give the taxing statute a wide application.") (emphasis in original). As always, we are mindful that "while *ejusdem generis* is a useful tool of statutory construction," it "must yield in any instance in which its effect would be to confine the operation of a statute within narrower limits than those intended by the General Assembly when it was enacted." *DeVito*, 227 A.3d at 889 (citing *Dep't of Assess. & Tax. v. Belcher*, 553 A.2d 691, 696 (Md. 1989)).[52]

Applying that precept to the phrase "other control measure," the means available to the Department include, at the very least, those that are comparable to isolation and quarantine, which the statute defines, respectively, as:

> **(e) Isolation.** The separation for the period of communicability of infected persons or animals from other persons or animals in such places and under such conditions as will prevent the direct or indirect transmission of the

[52] In *Belcher*, the Court identified the limits of the canon's utility, explaining that "the general words will not be restricted in meaning if upon a consideration of the context and the purpose of the particular statutory provisions as a whole it is clear that the general words were not used in a restrictive sense." 553 A.2d at 696.

> infectious agent from infected persons or animals to other persons or animals who are susceptible or who may spread the disease to others. . . .
>
> **(i) Quarantine.** The 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.
>
> > (1) Modified quarantine is a selected, partial limitation of freedom of movement, determined on the basis of differences in susceptibility or danger of disease transmission, which is designed to meet particular situations. Modified quarantine includes, but is not limited to, the exclusion of children from school and the prohibition or the restriction of those exposed to a communicable disease from engaging in particular occupations.
> >
> > (2) Surveillance is the close supervision of persons and animals exposed to a communicable disease without restricting their movement.
> >
> > (3) Segregation is the separation for special control or observation of one or more persons or animals from other persons or animals to facilitate the control of a communicable disease.

35 P.S. § 521.2(e), (i). The Department's regulations provide similar (but not identical) definitions for those terms:

> *Modified quarantine*--A selected, partial limitation of freedom of movement determined on the basis of differences in susceptibility or danger of disease transmission which is designated to meet particular situations. The term includes the exclusion of children from school and the prohibition, or the restriction, of those exposed to a communicable disease from engaging in particular activities.
>
> *Quarantine*--
>
> > (i) The limitation of freedom of movement of a person or an animal that has been exposed to a communicable disease, for a period of time equal to the longest usual incubation period of the disease, or until judged noninfectious by a physician, in a manner designed to prevent the direct or indirect transmission of the infectious agent from the infected person or animal to other persons or animals.

> (ii) The term does not exclude the movement of a person or animal from one location to another when approved by the Department or a local health authority under § 27.67 (relating to the movement of persons and animals subject to isolation or quarantine by action of a local health authority or the Department). . . .

28 Pa. Code § 27.1 ("Definitions").

Generally speaking, isolation and quarantine are measures that separate those infected with a communicable disease, or anyone who comes into contact with the afflicted, from the rest of the population to prevent the transmission of disease. Modified quarantines, by extension, address the need for greater flexibility in "particular situations," in part by taking into account "differences in susceptibility or danger of disease transmission," and they range from categorical exclusion from a certain space to targeted restrictions on engaging in certain professions or activities. *Id.*; 35 P.S. § 521.2(i)(1). Taken together, these measures seek to put distance between healthy individuals and those already sick with, or who have been exposed to, a communicable disease, until the infection, confirmed or suspected, runs its course or may no longer be communicable.

Furthermore, in contemplating the scope of the Department's powers in this regard, we note that the Disease Prevention and Control Law expressly requires the Department to employ disease control measures that are "appropriate" for the reported disease at issue. 35 P.S. § 521.5. The General Assembly has signaled its awareness that some diseases are especially communicable via "aerosolized transmission," which it defined as "[p]erson-to-person transmission of a communicable disease by large or small particles that are able to remain airborne for a duration of time to allow infection." *Id.* § 521.2(a); *cf. id.* § 521.2(c) ("Communicable disease"). Since some of the disease control measures that would be appropriate for non-aerosolized, vector- or water-borne

communicable diseases wouldn't be appropriate for aerosolized ones, and *vice-versa*, it is reasonable to conclude that the law counsels in favor of giving the Department broad latitude to "design" its response based upon the unique characteristics of a given disease.[53] In that vein, because an unduly restrictive construction risks hamstringing the Department's ability to control a pestilence of previously unknown qualities, context and flexibility are critical when assessing the propriety of the "other" disease control measures that might be in the Department's toolkit. *See* 1 Pa.C.S. § 1921(c)(6) ("When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering . . . [t]he consequence of a particular interpretation."); *cf. Belcher*, *supra*.

But such flexibility as we find in the Disease Prevention and Control Law has been limited by both the General Assembly and the Department itself, and it is these limitations with which the Department must contend.

C.

Here, seeking to shoehorn the Mask Mandate into the most plausible category, the Secretary argues that it constitutes a "modified quarantine." Alluding to the statutory definition, she emphasizes that a modified quarantine is one "designed to meet particular

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[53] For instance, while certain disease control measures applicable only to vector- or water-borne illnesses, like mosquito-control or water-purification efforts, bear no resemblance to isolation and quarantine, we have deemed them appropriate nonetheless. *See Lutz v. Dep't of Health*, 156 A. 235, 237 (Pa. 1931) (affirming the Department's authority to subject "plaintiff's piggery . . . to abatement as a public nuisance" where "evidence conclusively show[ed]" that it "pollute[d] a source of public water supply . . . and bre[d] flies and pestilence"); *Commonwealth ex rel. Wood v. Soboleski*, 153 A. 898, 899 (Pa. 1931) (*per curiam*) (same, where "due care was not used by [piggery owner] to prevent the breeding of flies and vermin"); *see also Elias v. Envtl. Hearing Bd.*, 312 A.2d 486, 487-88 (Pa. Cmwlth. 1973) (recognizing overlapping functions of Health and Environmental Resources Departments to, *inter alia*, order removal of mosquito-breeding water).

situations," and "includes, *but is not limited to*, the exclusion of children from school." 35 P.S. § 521.2(i)(1) (emphasis added). In so many words, the Secretary contends that it would be odd—to say nothing of inefficient and impractical—to permit the exclusion of children from school as a means of disease control under the Disease Prevention and Control Law's explicit authority while prohibiting the less drastic measure of a general masking requirement that is "designed to meet" the "particular situation" of maintaining in-person instruction in the midst of a highly transmissible aerosolized disease. Secretary's Br. at 31 (describing masking requirements as "reasonable and medically accepted").

This rationale has some facial appeal. But upon closer inspection, the Secretary's case for characterizing the Mask Mandate as a "modified quarantine" under existing departmental regulations quickly runs headlong into terminological roadblocks. For purposes of this analysis, we assume, *arguendo*, that the Secretary is correct that compulsory masking is a form of restricting "the freedom of movement of a person," 35 P.S. § 521.2(i)(1), or the manner in which a person may "engag[e] in particular activities," 28 Pa. Code § 27.1, including, perhaps, the conditions under which they may enter a school. It makes no difference.

By definition, a quarantine consists of restricting "the freedom of movement of persons . . . *who have been exposed to a communicable disease* . . . in such manner as to prevent effective contact with those not so exposed." 35 P.S. § 521.2(i) (emphasis added); *cf.* 28 Pa. Code § 27.1. A "modified" quarantine suggests something less than a complete restriction on the freedom of movement, but of the two examples given for that control measure, the latter expressly provides for "the prohibition or the restriction *of those*

exposed to a communicable disease from engaging in particular occupations." 35 P.S. § 521.2(i)(1) (emphasis added). The regulation's definition of modified quarantine varies slightly insofar as it applies more broadly to restricting "particular activities," 28 Pa. Code. § 27.1, but the requirement of a known exposure remains.

The other specified example generally contemplates "the exclusion of children from school," which is capable of two meanings. The first suggests that the Department may designate discrete individuals for exclusion from school based upon an identified infection or demonstrable symptoms of communicable disease, or a known exposure thereto. As to this interpretation, we observe that the Department has promulgated several highly detailed regulations delineating its authority to do just that in individual cases, with *specific temporal limitations* on the period of exclusion. *See, e.g.*, 28 Pa. Code §§ 27.71-27.76.[54] This comports with the Disease Prevention and Control Law's

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[54] Among other things, those regulations require "[a] person in charge of a public, private, parochial, Sunday or other school or college" to

> 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 [enumerated herein]. Readmission shall be contingent upon the school nurse or, in the absence of the school nurse, a physician, verifying that the criteria for readmission have been satisfied.

Id. § 27.71 ("Exclusion of children, and staff having contact with children, for specified diseases and infection conditions."). While Section 27.71 enumerates sixteen "diseases, the[ir] periods of exclusion and the criteria for readmission" (not including COVID-19), *id.*, a separate regulation provides for the exclusion of children from school based upon general symptoms of illness, such as:

> (1) mouth sores associated with inability to control saliva; (2) rash with fever or behavioral change; (3) purulent discharge from the eyes; (4) productive cough with fever; (5) oral or axillary temperature equal to or greater than 102° F; (6) unusual lethargy, irritability, persistent crying, difficulty breathing

express limitation on the duration of quarantine to "a period of time equal to the longest usual incubation period of the disease." 35 P.S. § 521.2(i); *cf. id.* § 521.2(e) (limiting the duration of isolation to "the period of communicability").

The second meaning, by contrast, contemplates a much broader power to categorically exclude all children from school in afflicted areas, as occurred during the polio epidemic of 1916. However, in promulgating Section 27.60, the Department expressly adopted a "contact" metric that ties the availability of "surveillance, segregation, quarantine or modified quarantine" to the identification of an individual "*known to have had an association with* an infected person or animal." 28 Pa. Code § 27.1 ("Contact") (emphasis added). The General Assembly's discrete authorization of categorical school exclusions exists in tension with specific temporal limitations, because it is unclear how a single school exposure could be isolated without a consequent series of additional, potentially triggering exposures. Still, the salient point is that the regulation *requires* a triggering contact, and it restricts the duration of the triggered *exclusion* to the longest usual incubation period of the communicable disease in question, here approximately fourteen days. *See DeVito*, 227 A.3d at 889 ("The virus . . . has an incubation period of

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> or other signs of severe illness; (7) persistent vomiting; [and] (8) persistent diarrhea.

Id. § 27.72 ("Exclusion of children, and staff having contact with children, for showing symptoms.") (capitalization and punction altered). When exclusion is predicated upon general symptoms of illness, the excluded individual "may not be readmitted until the school nurse or, in the absence of a school nurse, a physician, is satisfied that the condition for which the person was excluded is not communicable or until the person presents a statement from a physician that the person has recovered or is noninfectious." *Id.* § 27.73(a) ("Readmission of excluded children, and staff having contact with children."). Yet another regulation sets forth detailed "[i]mmunization requirements for children in child care group settings." *Id.* § 27.77.

up to fourteen days . . . ."). So while it is conceivable that a *de facto* indefinite exclusion could result, it would require a triggering event no more than fourteen days after the prior triggering event. The Department's position in this litigation, though, concedes no such predicate to its authority, and its conduct has not embodied such an approach. But the regulation is clear on this point, and pragmatic or *de facto* considerations cannot, without more, change the inexorable result of any fair reading of the text of the rule.

Thus, while a modified quarantine might seem like a natural fit for a mask mandate, in that the concept envisions "selected, partial limitation[s] . . . of movement" based upon "differences in susceptibility or danger of disease transmission" in "particular situations," 28 Pa. Code § 27.1, under the plain terms of the Section 27.60(a), that measure may only be applied in response to "*contacts* of a person or an animal with a communicable disease or infection," *id.* § 27.60(a) (emphasis added), and then only for the length of time necessary for the period of communicability to lapse. The Secretary's Order broadly applied to everyone entering a school, save for those categorically or situationally exempt, regardless of exposure or contact status. And it was to "remain in effect until otherwise terminated." Order at 6, § 6. But without a contact nexus or durational limit compatible with the statute's and the regulation's requirements, the Mask Mandate simply is not, by definition, a "modified quarantine."

The Secretary also argues pragmatically that the nature of this disease should dictate our understanding of the control measures available to combat it. COVID-19 is different, she says, because,

> [g]iven the prolific nature of this virus, the manner in which it is transmitted by asymptomatic and pre-symptomatic individuals, and the large number of infected individuals in society, the possibility of exposure to an infected

> person at any given time is high. . . . *We are, therefore, all 'contacts' as defined by the regulation.*

Secretary's Br. at 32-33 (emphasis added). While we grant that context matters in disease control, we are troubled by the breadth of the Secretary's proposition. It may be the case that COVID-19, like influenza, will always be with us in one form or another—that adapting to each variant is the "new normal." But taken to its logical conclusion, the Department's bald assertion that *we are all* "contacts" would transform emergency disease control measures into enduring, government-mandated fixtures of daily life. With respect to endemic disease, such an approach is susceptible of no limiting principle.[55] We cannot imagine that the General Assembly would have intended such permanency when it wrote temporal limitations into the statutory definitions of isolation and quarantine and then authorized the Department to promulgate regulations relating to those temporary measures. Because the Secretary's open-ended, universal school Mask Mandate differs from the enumerated temporary disease control measures in both kind and quality, we do not agree that it is subsumed within the definition of a "modified quarantine," no matter what other leeway that control measure provides the Department to restrict an individual's "freedom of movement."

Nor could the Mask Mandate be justified under Section 27.60(a)'s "any other disease control measure" catch-all. Preliminarily, to the extent masking inhibits the spread of airborne illnesses by blocking the dispersal of "large or small particles that are

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[55] Perhaps a more persuasive case could be made that we are all "contacts" for purposes of non-individualized, compulsory disease control measures of extended duration based upon some intelligible standard of "uncontrolled" or "community spread" in the rare circumstance of an epidemic, but at present we find no such standard embodied in statute or regulation.

able to remain airborne for a duration of time to allow infection," 35 P.S. § 521.2(a), we do not doubt that it constitutes *another* disease control measure under the broad terms of the Disease Prevention and Control Law, apart from the enumerated (and defined) measures of isolation, surveillance, segregation, quarantine, and modified quarantine. Indeed, as some *amici* have suggested, masking might be particularly "appropriate" for controlling the spread of an aerosolized, communicable disease in spaces where social distancing is difficult to enact and police, such as schools. *See generally* PA AAP's Br. at 10-14.

But as the Commonwealth Court observed, the specific language of the *regulation's* catch-all limits the "other" available control measures to those "appropriate for *the surveillance of disease*." 28 Pa. Code § 27.60(a) (emphasis added). "Surveillance of disease" is a term of art. It means "[t]he continuing scrutiny of all aspects of occurrence and spread of disease that are pertinent to effective control." *Id.* § 27.1. Masks are a general prophylactic measure. They provide no means by which to "scrutin[ize]" or "close[ly] supervis[e]" the "occurrence and spread of" COVID-19 or any other disease. Masks are utilized for indoor activities where social distancing is not possible *because* the disease does not manifest itself in all cases and therefore can be spread by asymptomatic carriers. By its very nature, by the time a COVID-19 infection is amenable to surveillance, odds are the disease also is circulating among the carrier's contacts.[56]

[56] Moreover, modified quarantine and surveillance are mutually exclusive measures. Whereas a modified quarantine limits an individual's freedom to move in certain ways, surveillance includes only "the close supervision of persons and animals exposed to a communicable disease *without restricting their movement*." 35 P.S. § 521.2(i)(2) (emphasis added).

The Secretary criticizes the Commonwealth Court for "focus[ing] myopically on the surveillance of disease language," instead of reading the clause holistically in furtherance of the overarching goal of "controlling" disease. Secretary's Br. at 36-37. To the contrary, that is the most natural construction of the language that the Department chose when it wrote this specific regulation. It is unclear why the Department opted to insert that particular phrase; in fact, it doesn't appear anywhere in the Disease Prevention and Control Law's expansive enabling provision relating to control measures. *Compare* 28 Pa. Code § 27.60(a), *with* 35 P.S. § 521.5.

Of course, the Department has the power to promulgate a different regulation, or to amend this one, to expressly authorize mask mandates or to strip the "any other disease control measure" catch-all of its limiting language.[57] The same goes for the Department's self-imposed "contact" metric, which restricts the class of individuals who can be subjected to a modified quarantine. And nothing we say here today should be construed as limiting the Department's authority to amend or promulgate regulations in accordance with the Disease Prevention and Control Law and any other applicable regulatory statute.[58] As it stands now, though, we are constrained by the terms of the

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[57] *See* 35 P.S. § 521.16(a) ("The Board may issue rules and regulations with regard to . . . (3) the communicable diseases which are to be subject to . . . other control measures;" "(5) the enforcement of . . . other control measures;" and "(7) the prevention and control of disease in public and private schools."); *id.* § 521.5 ("Upon the receipt . . . by the department . . . of a report of a disease which is subject to . . . any other control measure, . . . the department shall carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation."). Unlike the regulation, it appears that nothing in the Disease Prevention and Control Law requires that the "other disease control measures" be limited only to those measures that are "appropriate for the surveillance of disease."

[58] Neither do we intend to call into question the authority local school districts or other governmental bodies may have to implement their own COVID-19 mitigation protocols,

regulation before us, not the regulation that the Secretary might have hoped the Department had written.

Further action by the Department may be necessary to meet the moment, in any event, as it appears Section 27.60(b) of the regulation further cabins the Department's discretion to "determine the *appropriate* disease control measure" in a given situation by requiring that its determination be "based upon the disease or infection, *the patient's* circumstances, the type of facility available and any other available information relating to *the patient* and the disease or infection." 28 Pa. Code § 27.60(b) (emphasis added). In focusing upon the individual "patient," these criteria further suggest that the aim of the regulation as a whole is *targeted* control measures responsive to *discrete* cases of exposure or infection. So while the nature of the disease certainly is relevant when deciding what measures are appropriate to control its spread, this language reinforces the notion that this regulation, as written, was not intended for blanket control measures, but rather case-specific restrictions.

Notably, the Department has not, in the past, relied exclusively upon the regulation's catch-all in developing "other control measures." For instance, the Department has promulgated a distinct regulation for "placarding"—a form of public-warning-*cum*-shaming in which the Department posts signs on the residences of those "case[s], [ ] contact[s] or others" whom "the Department . . . has reason to believe . . . will not fully comply with the isolation or quarantine." 28 Pa. Code § 27.66 ("Placarding"). The Department similarly has provided for the "segregation" of contacts of a person or

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consistently with applicable state and federal laws. That issue is not before us and we offer no opinion on it.

animal with a communicable disease by regulation, which vaguely entails "[t]he separation for special control or observation of one or more persons or animals from other persons or animals to facilitate the control of a communicable disease." *Id.* § 27.1 (defining "segregation"). And as indicated, the Department has crafted a number of regulations dealing with isolation and quarantine generally, as well as measures for controlling the spread of disease in schools and childcare facilities in particular. The Department's ability to develop comprehensive regulations for disease control in schools is apparent. Presently, we see no obvious reason why it cannot formally add masks to that list in due course.

In a final effort, the Secretary suggests that Section 27.60 is, at worst, ambiguous, thus entitling the Department's interpretation of that provision to judicial deference. Specifically, she cites this Court's recitation of "federal and Pennsylvania jurisprudence," under which "properly-enacted legislative rules enjoy a presumption of reasonableness and are accorded a particularly high measure of deference—often denominated *Chevron* deference—by reviewing courts." *Nw. Youth Servs., Inc. v. Dep't of Pub. Welfare*, 66 A.3d 301, 311 (Pa. 2013) (citing *Pa. Human Rels. Comm'n v. Uniontown Area Sch. Dist.,* 313 A.2d 156, 169 (Pa. 1973), and *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844-45 (1984)). Notwithstanding our loose invocation of the phrase "*Chevron* deference" in past administrative law decisions, that regime, if it applies at all, relates to an agency's interpretation of ambiguous provisions of the *statutes* that it is charged with administering. *See Chevron*, 467 U.S. at 843-44 ("If Congress has left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision *of the statute* by regulation. Such legislative regulations are

given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.") (emphasis added). Because the statutes at issue here aren't ambiguous about the Department's obligation to act by formal rule or regulation, this isn't a *Chevron* case.

What the Department actually asks for is *Auer* or *Seminole Rock* deference, under which courts "defer to an agency's interpretation *of its own regulation* . . . unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (quoting *Auer v. Robbin*, 519 U.S. 452, 461 (1997) (emphasis added)); *accord Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).[59] As the foregoing analysis indicates, however, we are not persuaded that the Department's regulation admits of much ambiguity either. That regulation covers predefined control measures that generally are discrete or targeted in nature and limited in duration. The Mask Mandate was neither of those things. To the extent that the Department attempts to extract ambiguity from the regulation's "any other disease control measure" catch-all, that, too, is constrained by the "appropriate for the surveillance of disease" language, which is further limited by the criteria for individualized consideration contained in Section 27.60(b). The Department's view is not persuasive in the face of these difficulties with its position.

To be clear, where an agency is authorized to act, it is entitled to some latitude for discretionary matters committed to its expertise-based judgment by statute, such as the Department of Health's power and duty to "determine and employ the most efficient and practical means for the prevention and suppression of disease." 71 P.S. § 532.

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[59] In *Kisor v. Wilkie*, 139 S.Ct. 2400, 2408 (2019), the High Court further qualified the limits of *Auer* deference, professing that it "is potent in its place, but cabined in its scope."

Questions of efficiency and practicality in "dynamic and fact-intensive" matters of public health and disease control are policy judgments; they should be left to the policymakers and their designees. *See South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613, 1613-14 (2020) (*per curiam*) (Roberts, C.J., concurring in denial of application for injunctive relief) ("Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.' When those officials 'undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." (internal citations omitted)).[60] But that does not mean that the courts must defer to an agency on questions of statutory and regulatory construction for deference's sake. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). By keeping clear the line dividing the judiciary's domain from the executive's, we maintain fidelity to the separation of powers.

In sum, absent a gubernatorial disaster emergency declaration suspending the framework of laws governing agency rulemaking in Pennsylvania, the Department was obligated to follow the procedures set forth in the Regulatory Review Act, the

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[60] *Cf. Jacobson*, 197 U.S. at 28 ("[I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.").

Commonwealth Documents Law, and the Commonwealth Attorneys Act before promulgating a new disease control measure with the force of law.[61] Because the Secretary circumvented that process, her Order was void *ab initio*.

IV.

More than a century has passed since mankind confronted a global pandemic on the scale of the one it faces today, which to-date has claimed the lives of as many as 800,000 Americans. In that time, rapid advancements in medical science and clinical research have revolutionized our ability to test, trace, treat, and vaccinate against communicable disease, with the ultimate goal of reducing human suffering. But the more things change, the more they stay the same. In 1918, as now, well-intentioned disease mitigation efforts stimulated spirited public debate, in Pennsylvania and throughout the nation, about the wisdom of various approaches to disease control and the proper role of government in that process. This pandemic has affected every American—every human being—in some way. In that sense, at least, we are all united. And this Court is mindful that, for far too many, the pain and loss wrought by this dreadful virus is incalculable. We do not intend to diminish the weight of that anguish.

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[61] The Secretary is correct that the Commonwealth Court overstated the speed with which an emergency regulation can be enacted under Section 6 of the Regulatory Review Act. *See* 71 P.S. § 745.6. That provision does not excuse an agency from adhering to any of the standard rulemaking procedures, including public notice and comment, and submission to the Independent Regulatory Review Commission for approval. And an emergency-certified regulation lasts only for 120 days or until the Commission issues a final disapproval, whichever occurs later, *id.* § 745.6(d), so an agency is guaranteed four months of use at best. But that is neither here nor there. The Department does not have the discretion to ignore formal rulemaking procedures simply because the process for emergency certification is not as fast as it might prefer.

Nor do we question the efficacy of masking as a means by which to curb the incidence and spread of aerosolized communicable diseases like COVID-19. But it is not our prerogative to substitute our views for those of the policy-making branches of our Commonwealth's government, especially on an issue as fraught with uncertainty as how best to respond to an evolving public health emergency. We leave that solemn duty to the people's elected representatives and their lawful designees. Our role in this case is limited to deciding whether it was within the Acting Secretary of Health's authority under existing laws and regulations to issue a statewide school mask mandate. Respectfully, we conclude that it was not.

Accordingly, the judgment of the Commonwealth Court is hereby affirmed.

Chief Justice Baer and Justices Todd, Donohue, Dougherty and Mundy join the opinion.

Justice Saylor did not participate in the consideration or decision of this matter.