

plan to use public-private partnerships (P3) to repair or reconstruct major bridges in the Commonwealth, which was approved by the Pennsylvania Public-Private Transportation Partnership Board (Board) pursuant to Act 88 of 2012, 74 Pa. C.S. §§ 9101-9124 (Act 88 or the Act).¹ Petitioners also challenge a subsidiary P3 project to rebuild and impose tolling on the I-83 Bridge. Pending disposition of their PFR, Petitioners ask this Court to preliminarily enjoin the Pennsylvania Department of Transportation (DOT) and the Board from proceeding with either the Major Bridge P3 Initiative or the I-83 Bridge project, including tolling and rebuilding of the I-83 Bridge. For the reasons that follow, the Court grants Petitioners' Application for Preliminary Injunction.

I. Background

A. The Act

Act 88 was enacted July 5, 2012 and relates to public-private transportation partnerships. 74 Pa. C.S. § 9101. It permits governmental entities (like DOT) to make agreements with the private sector to design, build, finance, operate, or maintain transportation projects, which they would not otherwise be legally permitted to do under traditional public development laws, such as through the Commonwealth Procurement Code.² *See id.* §§ 9107, 9108(b). The Act established the Board, which consists of the following seven members:

- (1) The Secretary of Transportation, who shall be the chairperson of the [B]oard, or a designee who shall be an employee of [DOT].

¹ A group of three municipalities in Allegheny County filed a separate petition for review asserting similar claims against Respondents. *See S. Fayette Twp. v. Pa. Dep't of Transp.*, docketed at No. 404 M.D. 2021. By April 18, 2022 order docketed at No. 404 M.D. 2021, this Court denied Respondents' application to consolidate these two matters. The Court heard *en banc* oral argument in the *South Fayette Township* matter on May 18, 2022.

² Act of May 15, 1998, P.L. 358, No. 57, *as amended*, 62 Pa. C.S. §§ 101-2311.

- (2) The Secretary of the Budget or a designee who shall be an employee of the Office of the Budget.
- (3) Four members appointed by the General Assembly. . . .
- (4) One member appointed by the Governor. . . .

Id. § 9103. Members appointed by the General Assembly under subsection (3) are selected by Pennsylvania House and Senate majority and minority leaders. *Id.* § 9103(c). They must have experience with transportation, finance, law, or land use and planning, as must the member appointed by the Governor under subsection (4). *Id.* § 9103(c)-(d). Board members receive no compensation, and apart from a professional salary, may not have any significant financial interest in a public or private entity that comes before the Board under Act 88. *Id.* § 9103(f), (h).

Section 4 of Act 88 sets out the Board's duties and provides, in part:

(a) Duties.—The [B]oard shall do all of the following:

- (1) Meet as often as necessary but at least annually.
- (2) Adopt guidelines establishing the procedure by which a public entity may submit a request for a transportation project or a private entity may submit an unsolicited plan for a transportation project to the [B]oard.
- (3) *Consult with persons affected by proposed transportation projects.*
- (4) Evaluate and, *where the [B]oard finds that the requests or plans for transportation projects are in the best interests of the Commonwealth and a public entity,* approve the requests or plans for transportation projects. The [B]oard shall approve a proposed transportation project by adopting a resolution.

(5) Submit an annual report to the General Assembly detailing all transportation projects evaluated and resolutions adopted.

(b) Actions.—Actions by the [B]oard are a determination of public policy and public interest and shall not be considered adjudications under 2 Pa. C.S. Chs. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) and 7 Subch. A (relating to judicial review of Commonwealth agency action) and shall not be appealable to [DOT] or a court of law.

74 Pa. C.S. § 9104 (emphasis added). Per this Section, the Board approves proposed “transportation project[s].” Act 88 defines that term, and the related term “transportation facility,” as follows:

“Transportation facility.” A proposed or existing road, bridge, tunnel, overpass, ferry, busway, guideway, public transportation facility, vehicle parking facility, port facility, multimodal transportation facility, airport, station, hub, terminal or similar facility used or to be used for the transportation of persons, animals or goods, together with any buildings, structures, parking areas, appurtenances, intelligent transportation systems and other property needed to operate or related to the operation of the transportation facility. The term includes any improvements or substantial enhancements or modifications to an existing transportation facility.

“Transportation Project.” An undertaking by a private entity or a public entity, other than the public entity providing or improving its own transportation facilities, to provide or improve a transportation facility or transportation-related service which is totally or partially located within this Commonwealth.

74 Pa. C.S. § 9102 (definitions). Section 4(c) permits the General Assembly to rescind the Board’s approval of a transportation project:

(c) General Assembly.—The following shall apply:

(1) The General Assembly may, within 20 calendar days or nine legislative days, whichever is longer, of the adoption of the resolution under subsection (a)(4), pass a concurrent resolution rescinding the approval of a transportation project if the transportation facility which is the subject of the transportation project is owned by the Commonwealth.

(2) If the General Assembly adopts the concurrent resolution within the time period under paragraph (1) by majority vote in both the Senate and the House of Representatives, the transportation project shall be deemed disapproved.

(3) If the General Assembly fails to adopt the concurrent resolution by majority vote in both the Senate and the House of Representatives within the time period under paragraph (1), the transportation project shall be deemed approved.

74 Pa. C.S. § 9104(c).

DOT is required to supply technical, legal, and financial assistance to the Board and to develop a detailed analysis of a request or recommendation **prior** to the Board's approval. *Id.* § 9105. Proposed projects come before the Board in several ways. A "request" is a plan for a transportation project submitted to the Board by a public entity. *Id.* § 9102. Public entities may obtain such plans through a solicitation process under Section 6 of the Act, requiring public notice and an assessment of whether the proposals are in the public entity's best interest. *Id.* § 9106. Public entities may also accept unsolicited plans from private entities. *Id.* § 9108. Finally, private parties may submit unsolicited plans directly to the Board. *Id.* § 9104(a)(2). Act 88 encompasses a broad scope of different "delivery methods" regarding what development services a private partner will provide, including any nontraditional delivery method that will serve the public interest. *Id.* § 9108. The

Act specifically authorizes the Board to approve “[p]redevelopment agreements leading to other implementing agreements.” *Id.*

Once a transportation project is approved by the Board, the relevant public entity enters into a contract for the project with a private partner through a competitive bidding process. *Id.* § 9109. This process requires public notice of the bid opportunity, submission of sealed proposals, a selection process by the public entity, and a protest process for aggrieved bidders. *Id.* The Act lists provisions that must be included in any P3 agreement. *Id.* § 9110.

Section 24 of the Act authorizes DOT to promulgate regulations or issue guidelines to facilitate the Act’s implementation. *Id.* § 9124. DOT has not promulgated any Act 88 regulations, but it has published an “Implementation Manual and Guidelines” for Act 88 (P3 Manual).³ The P3 Manual identifies two offices internal to DOT that are relevant to the instant matter: the PennDOT Office of Private Public Partnerships (P3 Office) and the P3 Steering Committee. The P3 Office, which reports to DOT’s Deputy Secretary for Planning, the Secretary of Transportation, and the Board, oversees and administers “all aspects of the [P3] program, from identifying, screening and prioritizing candidate P3 Projects for approval by the . . . Board to development, procurement, and contract management.” PFR Ex. B at 11. The P3 Steering Committee is chaired by the Secretary of Transportation and consists of DOT officials, DOT’s Chief Counsel, the Secretary of Budget, the Secretary of Policy and Planning, and the Governor. *Id.* at 13-14.

³ See PFR Ex. B (COMMONWEALTH OF PA., ACT 88 OF 2012, PROVIDING FOR PUBLIC PRIVATE TRANSPORTATION PARTNERSHIPS, IMPLEMENTATION MANUAL AND GUIDELINES (Dec. 4, 2019), <https://www.penndot.pa.gov/ProjectAndPrograms/p3forpa/Documents/P3-Implementation-Manual.pdf>).

The P3 Manual describes the project screening process, which consists of two phases. The first, high-level review is based on information submitted by the public entity using DOT’s “Candidate Project Form” which requires information about the proposed project’s schedule and lifecycle, costs and benefits, and “impacted jurisdictions.” *Id.* at 16; PFR Ex. C (Sample Candidate Project Form). In the case of unsolicited projects submitted directly to the Board (where a public entity is not involved at the application stage), the high-level screening is based on the proposal submitted by the private entity. *Id.* at 20. If the project passes the first tier, a second review occurs involving detailed quantitative and technical analysis. *Id.* at 21.

The P3 Manual expressly acknowledges the Board’s statutory duties, stating:

Part and parcel of the evaluation process is *a requirement that there be consultation with persons affected by a proposed project*. Proposed projects found by the . . . Board to be in the best interest of the Commonwealth and a [p]ublic e]ntity are to be approved by resolution.

. . . .

The . . . Board will adopt guidelines establishing the procedures by which a Public Entity may submit a Request for a Transportation Project or a Private Entity may submit an Unsolicited Proposal for a Transportation Project to the . . . Board; *consult with public and private parties affected by proposed Transportation Projects*; and submit an annual report to the General Assembly detailing all the Transportation Projects evaluated and approved.

Id. at 14 (emphasis added). The Manual summarizes the following “Key Action Items” for project screening and approval, which appear to be set forth in sequential order:

- P3 Office develops high-level screening report
- P3 Office presents project to Steering Committee for review
- Steering Committee makes a recommendation based on policy analysis and feasibility
- If recommended by the Steering Committee the P3 Office conducts a detail-level screening
- If a project is not recommended, the [p]ublic [e]ntity can decide to accept the Steering Committee recommendation or proceed directly to the Board to request a detailed analysis be performed
- P3 Office performs detail-level analysis and presents it to the Steering Committee
- Steering Committee makes [r]ecommendation to the . . . Board whether to approve the project
- . . . *Board consults with affected persons and [a]pproves or [d]isapproves*
- If approved by . . . Board, the General Assembly will be notified and Transportation Project approval may be rescinded by concurrent resolution within the longer of 20 calendar days or nine legislative days of approval if the subject transportation facility is owned by the Commonwealth
- P3 Office notifies relevant [p]ublic [e]ntity
- If approved, [p]ublic [e]ntity begins procurement process

Id. at 26-27. There are similar steps for unsolicited projects, including that the “Board consults with affected persons and [a]pproves or [d]isapproves.” *Id.* at 27-28.

B. Factual Background

At its public meeting on November 12, 2020, the Board unanimously adopted a resolution (Resolution) approving the Major Bridge P3 Initiative pursuant to its authority under Act 88. The Initiative would allow DOT to repair or replace

“interstate or expressway” bridges across the Commonwealth using public-private partnerships. PFR Ex. A (Resolution). The Resolution did not identify any specific candidate bridges. On February 18, 2021, DOT announced, for the first time, nine specific bridges being considered for reconstruction and tolling through the Major Bridge P3 Initiative, including the I-83 Bridge. PFR Ex. F (2/18/21 DOT press release). On March 9, 2022, DOT stated in a press release that it has selected Bridging Pennsylvania Partners (BPP) as the private entity to administer the Major Bridge P3 Initiative. PFR Ex. J (3/19/22 DOT press release).

C. The Present Action

On March 21, 2022, Petitioners filed the PFR. They allege that neither DOT nor the Board identified any specific bridge in connection with approval of the Initiative. PFR ¶¶ 56-58. No specific bridge was publicly announced until DOT identified nine candidate bridges in its February 18, 2021 press release, well after the Board approved the Initiative. *Id.* ¶¶ 66-68. The Board has never separately reviewed or approved the I-83 Bridge project under Act 88. *Id.* ¶ 69, 71-72.

Petitioners allege that, to fund the I-83 Bridge project, DOT would implement electronic tolling on the bridge (in both directions) for at least the next 30 years. *Id.* ¶¶ 76-77. DOT’s own traffic diversion study predicts that, if tolling is implemented, 22% of daily traffic will divert to other bridges and local roadways that are already congested and experience high rates of accidents. *Id.* ¶¶ 80-85, 87. Petitioners assert that the I-83 Bridge project will directly harm them through various impacts, including: increased traffic congestion; damage to existing roads; negative impact on businesses due to discouraged driving and reduced street parking; required costly improvements to existing infrastructure; reduced traffic and pedestrian safety;

environmental injustice to low- and moderate-income drivers who must pay the toll; and impaired emergency services. *Id.* ¶ 92.

Count I of the PFR requests a declaratory judgment that the Resolution (approving the Initiative) and the I-83 Bridge project violate Act 88. PFR ¶¶ 139-46. First, Petitioners assert that the Initiative is not itself a “transportation project.” Act 88 defines “transportation project” as relating to a “transportation facility,”⁴ which includes “a proposed or existing . . . bridge.” 74 Pa. C.S. § 9102 (definitions). Petitioners argue that, because the Initiative does not relate to any specific bridge, and thus to no “transportation facility,” it is not a “transportation project” as defined in Act 88. They also claim that the I-83 Bridge Project, which they concede is a “transportation project,” was never specifically approved by the Board. Thus, no “transportation project” was actually approved, which is the only permissible action under Act 88, and Petitioners argue this amounts to an unlawful authorization. PFR ¶¶ 116-25. Petitioners also allege more specific failings under Act 88. The Board apparently did not consider, and made no finding regarding, whether the Initiative is in the best interest of the Commonwealth. *Id.* ¶¶ 126-27, 132. The Board did not consult with Petitioners or any other affected municipalities, despite that they qualify as “persons” under Act 88 who must be consulted before approval. *Id.* ¶ 128. In support, Petitioners point out that the Statutory Construction Act of 1972 defines “person” as including “a . . . government entity (other than the Commonwealth).” 1 Pa. C.S. § 1991. Petitioners also allege the Board failed to give proper notice and opportunity to the General Assembly to rescind approval of the Resolution, because the resolution did not identify any specific bridges, so meaningful legislative review

⁴ Under the Act, a “transportation project” can also pertain to a “transportation-related service,” but Respondents take the position that the Initiative relates to a “transportation facility.” *See* Respondents’ Brief in Support of Answer to Application for Preliminary Injunction at 24.

was impossible. *Id.* ¶ 131. Petitioners argue these failures violate the letter and spirit of Act 88, making the Initiative unlawful. They also ask the Court to declare that the I-83 Bridge project, though it is a “transportation project,” was never approved by the Board, and is thus also unlawful. *Id.* at 44-46 (Wherefore Clause).

Count II requests a declaratory judgment that approval of the Initiative and commencement of the I-83 Bridge project, without notice to Petitioners in either case, deprived them of their federal and state due process rights. PFR ¶¶ 147-59 and at 48-49 (Wherefore Clause). They claim the approval affects their property interests in existing infrastructure, and that they had no notice or opportunity to be heard in the approval proceeding (despite that Act 88 required the Board to “consult” with them). *Id.* ¶¶ 137-38.

Count III requests a declaratory judgment that Act 88 is an unconstitutional delegation of legislative power. PFR ¶¶ 160-69; *id.* at 51 (Wherefore Clause). Act 88 delegates to the Board the power to determine whether a transportation project is “in the best interests of the Commonwealth and the public entity,” and provides no standards to guide or restrain such determinations by the Board. *Id.* ¶¶ 164-65. Additionally, Act 88 essentially delegates to the Board the power to levy taxes, in violation of Article III, Section 31 of the Pennsylvania Constitution,⁵ because the tolls imposed under the Initiative are equivalent to taxes on transportation facilities. PFR ¶¶ 166-69.

⁵ It provides, in relevant part:

“The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.”

PA. CONST., art. III, §31.

Count IV requests a permanent injunction against both the Major Bridge P3 Initiative and the I-83 Bridge project, based on the foregoing allegations.

In the Application for Preliminary Injunction, Petitioners ask the Court to enjoin Respondents from taking any further action with respect to the Major Bridge P3 Initiative or the I-83 Bridge project, including execution of any predevelopment agreement or other contracts, conducting studies, hearings, or meetings, design, acquiring rights-of-way, construction, expending funds, or tolling.

Respondents filed preliminary objections to the PFR. They first object that the PFR fails to state a claim upon which relief can be granted due to the Commonwealth's sovereign immunity and high official immunity on behalf of the Secretary. They also object that Petitioners lack standing to sue, that Petitioners' claims are not ripe because any impacts from the Initiative are remote and speculative, and that the claims are nonjusticiable political questions. Respondents object to Petitioners' due process claims based on the principal that municipalities generally have no inherent right of self-government that is beyond control by the legislature, and therefore cannot assert due process claims against a statute. Finally, Respondents argue Petitioners' claims for injunctive relief are legally insufficient because Act 88's legislative review process affords an adequate remedy at law.

D. Hearing Testimony & Evidence

At the April 25, 2022 hearing on the Application for Preliminary Injunction, Petitioners presented the testimony of three witnesses. They first called, as on cross examination, Michael Bonini, who has served as Director of DOT's P3 Office since 2014 and is familiar with the Board's activities. Mr. Bonini explained that the P3 Office assists the Board by identifying potential P3 projects and providing information for the Board to consider, but that it is the Board that

determines whether a project is in the best interest of the Commonwealth, as required by Act 88. Notes of Testimony (N.T.), 4/25/2022, at 21-24. Mr. Bonini was present at the November 12, 2020 public Board meeting and during preparations for the meeting. *Id.* at 28, 40. Petitioners introduced the summary minutes from the public meeting (Ex. P-1),⁶ which focused on the Major Bridge P3 Initiative. After summarizing some discussion about the Initiative, the minutes state:

The request to approve the PennDOT Pathways Major Bridge P3 Initiative was approved to proceed on a motion by Mr. James Kunz seconded by Mr. Howard A. Cohen and unanimously approved.

Ex. P-1 at 4 (pagination supplied). Mr. Bonini confirmed that this reflects the Board's unanimous vote to approve the Initiative pursuant to Act 88. N.T. at 33. This vote occurred before the public comment period held later at the meeting. Neither DOT nor the Board held any other public meeting or hearing regarding the Initiative or the I-83 Bridge project before the November 12, 2020 meeting. *Id.* at 38.

Mr. Bonini confirmed that no particular candidate bridges were discussed or identified at the Steering Committee meeting, the informational session held with the Board prior to the public meeting, or the November 12, 2020 Board meeting itself. *Id.* at 38-41, 53. He spoke directly with one Board member prior to the public meeting, explaining that the Initiative would ultimately entail a number of candidate bridges, but no specific brides were identified during that discussion. *Id.* at 41-43. The Board did not engage in any debate about the Initiative at the informational session. *Id.* at 51.

⁶ All exhibits introduced at the hearing were moved into the record without objection.

Petitioners introduced the “Major Bridge P3 Initiative Project White Paper” (Ex. P-2) that the P3 Office provided to the Board about one week before the public meeting. N.T. at 56. The paper, which is just over four pages long, summarizes DOT’s background research into the Initiative and recommends that the Board approve the Initiative. *Id.* at 57-58. The white paper does not identify any specific bridge; it states that the Initiative will pertain to “major bridges” but does not define that term. *Id.* at 58. Petitioners also introduced copies of visual slides that Mr. Bonini and Kenneth McClain, DOT’s Director of Alternative Funding, presented at the public meeting (Ex. P-3), which also do not identify any specific bridge or define “major bridges.” Mr. Bonini testified that he understood “major bridge” to refer to any interstate highway bridge greater than 100 feet in length, but when asked, he could not identify how many of DOT’s approximately 25,000 bridges statewide would be considered “major.” N.T. at 58, 63-65. He stated that “we always thought the [I]nitiative could entail approximately 5 to 10 bridges,” but gave no basis for that belief. *Id.* at 64. He acknowledged that no definition of “major bridge” was provided to the public or the Board. *Id.* at 65. None of DOT’s background research materials were provided to the Board. *Id.* at 59-60. He also conceded:

At the time the presentation was made to the Board [at the public meeting], we hadn’t fully gone through the analysis as to which bridges would be included. Once we had Board approval, we knew we were going to continue with that analysis, and then ultimately the environmental analysis that’s associated with each and everyone [sic] of those projects.

Id. at 67.

Petitioners introduced a copy of the written Resolution reflecting the Board’s approval of the Initiative (Ex. P-4), which was signed after the vote at the

meeting. The Resolution broadly approves the Initiative, noting that it will “proceed using the appropriate contracting P3 delivery model for each interstate or expressway bridge.” Ex. P-4. Mr. Bonini explained that the “delivery model” refers to which specific aspects of a project—design, building, financing, operation, or maintenance—the private party will provide. N.T. at 70-71. He conceded that the P3 Office was “asking the Board to approve a concept,” and that the P3 Office “just w[asn’t] sure” about which delivery model to use “because we didn’t know which bridges would be included. And that would ultimately help us determine the appropriate delivery tool.” *Id.* at 71-72. Mr. Bonini agreed that, like previous documents, the Resolution neither identified any specific bridge nor defined what a “major bridge” is. *Id.* at 73. He confirmed that neither the Resolution, nor any document that he can recall, contains a finding by the Board that the Initiative is in the best interest of the Commonwealth. *Id.* at 73-74.

DOT’s February 18, 2021 press release, which Petitioners introduced (Ex. P-5), was the first document to identify specific bridges to the public or to Mr. Bonini; it identified nine “candidate bridges,” including the I-83 Bridge. N.T. at 74-75. Mr. Bonini stated that DOT staff chose the candidate bridges only after the November 12, 2020 meeting, with no involvement or input by the P3 Office or the Board. *Id.* at 75-77. He again confirmed the Board had “no role” in selecting the candidate bridges and was not aware of them before the November 2020 meeting. *Id.* at 77. Petitioners introduced an April 15, 2021 letter from Mr. Bonini to four Pennsylvania Representatives (Ex. P-6), explaining that no specific bridges were identified before Board approval of the Initiative, that the Board has approved other projects in a similar way, and that any candidate bridges would become final only

after “significant public comment” and environmental impact assessments. Ex. P-6 at 1.

Mr. Bonini described DOT’s procurement approach under the Initiative as the “progressive model.” N.T. at 85. It differs from the “traditional” or “conventional” P3 model because a private entity is involved not only in the delivery of the end project, but first enters a predevelopment agreement with DOT where the private entity assists with overall project design and creates “packages” of subsidiary projects, some of which the initial private entity may then subcontract to other contractors. N.T. at 85-93; *see* Ex. P-6 at 2 (pagination supplied). DOT has already selected Bridging Pennsylvania Partners (BPP) as the predevelopment contractor pursuant to a request for qualifications (RFQ) process, which created a shortlist of three contractors, and a request for proposals (RFP), from which DOT selected BPP’s proposal. N.T. at 94, 99-103. BPP will assist in identifying final candidate bridges from among the nine announced and will prepare subsidiary contracts for individual projects. *Id.* at 95-98. BPP may perform 35% of the sub-projects itself, subcontracting the rest to other developers. *Id.* at 97-98. The contracts under the Initiative will have a combined value of about **\$2.4 billion**. *Id.* at 103. Petitioners introduced a copy of the request for proposals (RFP) issued by DOT (Ex. P-7), which provides for, *inter alia*, up to \$300,000 in reimbursement to disappointed bidders. *See* Ex. P-7 at 47. One bidder was disappointed at the RFP stage and requested the maximum reimbursement amount; DOT is currently processing that request. N.T. at 106.

The RFP process culminated in a Predevelopment Agreement (PDA) between DOT and BPP (Ex. P-8), which Petitioners introduced. Mr. Bonini testified that, at the time of the hearing, the PDA was being executed, with BPP and DOT

having already signed, and was awaiting required approval by the Office of Attorney General and Comptroller Operations. N.T. at 113, 117-18; *See* Ex. P-8 at 26, 77. Upon full execution, BPP will begin the work required by the PDA, without any additional supervision or input from the Board. N.T. at 121, 131-32. The PDA will remain in force until execution of all subsidiary contracts for candidate bridges, unless DOT first terminates it. *Id.* at 124-25, 129. There will be no further RFPs for the particular project contracts; it is up to BPP to chose subcontractors. *Id.* at 131-34. Under the RFP and the PDA, contractors for the first “package” of bridge projects are expected to close on project financing by December 2022. *Id.* at 139. The PDA also provides for contractors to recover “allowed costs” expended on candidate projects that are not ultimately selected. *See* Ex. P-8 at 56. If a bridge is selected as a final candidate, the contractor implements tolling and performs the required construction, and then future toll revenue from the bridge will be used to fund “availability payments” as compensation to the contractor. N.T. at 150. The PDA requires DOT to make up any difference between toll revenue and the contract price for availability payments under the PDA. *Id.* at 151. DOT has conducted cost-benefit analysis and traffic diversion analysis on various candidate bridges, including the I-83 Bridge, but these were not provided to the Board or the General Assembly. N.T. at 144-47, 160. Petitioners introduced the traffic diversion study for the I-83 Bridge (Ex. P-9), which predicts that, if the bridge is tolled, about 22% of daily traffic will divert to other routes, including four area bridges: the I-81 Bridge, the I-76 Bridge, the Harvey Taylor Bridge, and the Market Street Bridge. Ex. P-9 at 1.

On direct/redirect examination by Respondents, Mr. Bonini stated that the I-83 bridge is a candidate within the second “package” of bridges under the PDA,

but is still under evaluation, including an outstanding environmental assessment under the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321 *et seq.* N.T. at 169-70, 172. That evaluation will take at least another year, and the second package of projects, including I-83, will not reach financial close before mid-2023 at the earliest and will not be tolled before that point. *Id.* at 171. Mr. Bonini clarified his earlier testimony regarding notice to the General Assembly. The Secretary and staff from DOT's Office of Legislative Affairs briefed legislative leaders prior to the November 2020 public meeting. *Id.* at 152-55. The same day the Board approved the Initiative, DOT sent notice to the General Assembly by email, including the Board's Resolution and the white paper and slide presentation. *Id.* at 196-97, 201-02. Respondents introduced a copy of a November 12, 2020 email from DOT's Director of Legislative Affairs to Pennsylvania legislators (Ex. R-1) explaining that the Board had approved the Initiative and attaching a November 12, 2020 press release to that effect. *See* Ex. R-1. Finally, Mr. Bonini explained that DOT held several virtual public meetings regarding the Initiative after the Board approved it, all of which were publicly noticed. N.T. at 210-12. Several of these meetings occurred in late 2020 or early 2021, before DOT identified the nine candidate bridges. *Id.* at 212. Finally, Mr. Bonini stated his belief that no penalties would accrue to DOT or the Commonwealth if it is not allowed to proceed under the PDA. *Id.* at 217.

Petitioners next presented the testimony of Kirk Stoner, Director of Planning for Cumberland County. He represents Cumberland County in the Harrisburg Area Transportation Study (HATS), a metropolitan planning organization for Cumberland, Dauphin, and Perry Counties. *Id.* at 253. HATS and Cumberland County oppose tolling the bridge due to the impacts of traffic diversion.

Id. at 331. Traffic in the area around the I-83 Bridge, including the likely diversionary routes, is already the most congested in Cumberland County, and many of those roads are older and constrained in width by existing development. *Id.* at 333-37. Mr. Stoner stated that, since much of the bridge's traffic originates near the bridge, drivers are very likely to divert to avoid tolls. *Id.* at 351; *see* Ex. P-9 at 1 (73% of the trips on the I-83 Bridge have an origin within 10 miles of the bridge). Apart from tolls, the construction work itself will also disrupt local traffic, but Mr. Stoner stated that the County is more concerned about the much longer-term impacts of tolling. *Id.* at 349. The local roads use a grid street network, and according to Mr. Stoner, DOT's diversion study considered only state-owned roads, not local roads that will also suffer from diversion, and no further diversion analysis has been announced by DOT. *Id.* at 357-59. Diverted traffic will cause increased wear, increased rates of accidents for drivers and pedestrians, and decreased emergency response times. *Id.* at 361-62, 368.

Mr. Stoner testified that, in order to address these impacts, local municipalities must know what the impacts are and must plan now for the required infrastructure improvements to local roads. *Id.* at 373. The improvements cannot prevent negative impacts unless they are completed before construction and/or tolling, which Mr. Stoner believes could begin in 2024, up to one year before construction is scheduled to begin. *Id.* at 380-81. Thus, the municipalities are already significantly behind schedule in being able to address the impacts of diversion. *Id.* at 381. Finally, regarding alternative funding options, Mr. Stoner explained that the County owns 29 bridges, and it recently imposed a vehicle registration fee to pay for their maintenance. *Id.* at 364, 366. He stated that DOT

has similarly identified 18 other funding mechanisms (other than tolling) for the I-83 Bridge project, but has not pursued them. *Id.* at 344, 348-49.

On cross-examination, Mr. Stoner acknowledged that harmful impacts will not begin until construction and/or tolling occurs, which is not imminent and will not occur until 2024 at the earliest. *Id.* at 393-94. But he emphasized the municipalities need time to plan for diversions, and there has been no diversion analysis for local roads. *Id.* In response, counsel for Respondent represented that, pursuant to earlier testimony by DOT's Deputy Secretary, DOT will conduct exactly that type of analysis before the project begins. *Id.* at 397-99.

Finally, Petitioners presented the testimony of Alissa Packer, President of the Camp Hill Borough Council. Ms. Packer stated that traffic in the Borough has worsened over the last 10 years, and that any diversions to the Borough's roads will be harmful. *Id.* at 416-19. She explained that, because of the way local roads are configured, through traffic would likely divert into residential neighborhoods, which would increase pedestrian accident risk. *Id.* at 416-22. Though engineers could make some improvements to mitigate this, they would be prohibitively expensive for the Borough. *Id.*

At the conclusion of Ms. Packer's testimony, Respondents stipulated that Petitioners' proffered expert witness, Darren S. Myer, P.E., PTOE, would offer similar testimony about the negative traffic impacts of tolling on Respondents. *Id.* at 447-48. Petitioners introduced Mr. Myer's curriculum vitae (Ex. P-10) and expert report (Ex. P-11). *Id.* at 346. The parties also stipulated that other municipal officials, if called by Petitioners, would offer similar testimony.⁷ *Id.* at 448, 457-60.

⁷ The officials were: Joe Deklinski, Borough of Wormleysburg Council President; Gale Gallo, Borough of Lemoyne Council President and West Shore Regional Police Commission President; Thomas G. Vernau, Jr., Lower Allen Township Manager; George A. Tyson, East Pennsboro Township Board of Commissioners Chair; Michael Gossert, West Hanover Township Manager;

Respondents presented the testimony of Melissa Batula, DOT's Acting Executive Deputy Secretary. Ms. Batula stated that DOT has identified several bridges needing repair or replacement, including the I-83 Bridge, which has significant fatigue cracking. N.T. at 237-40. The I-83 Bridge is "fracture critical," meaning that it has only two load-bearing beams, and a failure in one beam compromises the integrity of the entire structure. *Id.* Ms. Batula testified that if the I-83 Bridge is not reconstructed, fracturing will continue, eventually requiring load limits for the bridge and, ultimately, closure. *Id.* The I-83 Bridge will remain safe, however, for several more years, and DOT will inspect it regularly and conduct minor repairs to ensure safety. *Id.* at 241-43.

Ms. Batula generally described how DOT funds transportation infrastructure. There is not sufficient money in DOT's budget to maintain the interstate system, even accounting for annual federal funds and recent federal appropriations for infrastructure. *Id.* at 252-53, 261-62. DOT conducted a user-fee analysis to study various funding options, including tolling. *Id.* at 263-66. Respondents introduced the user-fee study (Ex. R-2) and a statewide driver survey conducted in October 2020 (Ex. R-3).

Ms. Batula testified that a "major bridge" is a bridge that is "significant" in the area, and tends to refer to large bridges. *Id.* at 283-85. In her view, all bridges across the Susquehanna River in the Harrisburg area are major bridges. *Id.* On cross examination, she stated that there may be roughly 90-100 "major" interstate bridges in Pennsylvania. *Id.* at 320-21. She conceded that DOT is not aware of any other state that has implemented a statewide, all-traffic tolling regime for major bridges. *Id.* at 289-91. The I-83 Bridge project still lacks many final clearances, including

and Robert P. Kline, New Cumberland Borough Council President. *See* N.T. at 457-59; Petitioners' Amended Witness List at 2-3.

environmental assessments, cost feasibility studies, and further traffic studies, and financial close for the second bridge package, including the I-83 Bridge, will not occur until mid-2024. *Id.* at 293-303. Respondents introduced a summary of the February 2020 meeting (Ex. R-4) at which DOT discussed the maintenance status of the I-83 Bridge with KCI Technologies, a private consultant.

Finally, Respondents presented the testimony of Kenneth McClain, DOT's Director of Alternative Funding. He testified that staff from his office met with leaders of the General Assembly to discuss the Initiative before the Board's November 2020 meeting. N.T. at 472-74. He explained that a "candidate" bridge under the Initiative requires further study and approval, and that the I-83 Bridge is a "good candidate," but is not certain to be approved for a project contract. *Id.* at 493-95. Mr. McClain described public meetings, both virtual and in-person, that DOT held after the Board approved the Initiative. *Id.* at 478-83. Some of these meetings involved local officials and emergency medical personnel. *Id.* at 484. He confirmed that the I-83 Bridge is in the second "package" of bridges under the PDA, and will not be tolled before its anticipated financial close in June 2024. *Id.* at 487-88. He conceded that, depending on results of outstanding analyses, the I-83 Bridge may be dropped from the Initiative altogether. *Id.* at 493-95.

On cross-examination, Mr. McClain explained that the statewide driver survey DOT conducted (Ex. R-3) produced about 4,200 responses statewide, including 107 responses from residents of Cumberland County. *Id.* at 497-98. But he conceded that the driver survey addressed tolling in general, not the Initiative or P3 projects specifically. *Id.* at 498. He also clarified that DOT did discuss specific candidate bridges at a meeting with members of the General Assembly in February

2021, immediately before the press release announcing the nine candidate bridges.
Id. at 499-502.

II. Discussion

It is well established that a party seeking a preliminary injunction bears a heavy burden of proof, as the applicant must meet all of the following criteria:

(1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest.

SEIU Healthcare Pa. v. Commonwealth, 104 A.3d 495, 502 (Pa. 2014). Notably, “**every one** of these prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others.” *Lee Pub’n, Inc. v. Dickinson Sch. of Law*, 848 A.2d 178, 189 (Pa. Cmwlth. 2004) (en banc) (emphasis in original) (quoting *City of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988)). Petitioner “must show the need for immediate relief, and the preliminary injunction, if issued, should be no broader than is necessary for the petitioner’s interim protection.” *Three Cnty. Servs., Inc. v. Phila. Inquirer*, 486 A.2d 997, 1000 (Pa. Super. 1985).

Further, in a preliminary injunction case, if the respondent “interposes preliminary objections raising a question of jurisdiction, the chancellor must make a threshold inquiry into whether . . . the court has jurisdiction over the cause of action

asserted.” *Aitkenhead v. Borough of W. View*, 397 A.2d 878, 880 (Pa. Cmwlth. 1979) (citing *W. Penn Power Co. v. Goddard*, 333 A.2d 909 (Pa. 1975)). Accordingly, the Court will first address sovereign immunity, which may present a jurisdictional question. *See Sci.Games Int’l, Inc. v. Commonwealth*, 66 A.3d 740, 758 (Pa. 2013) (discussed *infra*). The other defenses and justiciability doctrines Respondents raise in their preliminary objections—official immunity, standing, ripeness, and the political question doctrine—are not jurisdictional⁸ and will be addressed when determining if Petitioners have shown a clear right to relief.

Respondents argue the PFR is barred by sovereign immunity. They cite Article I, Section 11 of the Pennsylvania Constitution⁹ and Section 17 of Act 88, which expressly reaffirms sovereign immunity subject to limited exceptions.¹⁰

⁸ *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 919 n.10 (Pa. 2013) (“[S]tanding and ripeness are prudential rather than jurisdictional concerns for this Court.”); *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 461 n.67 (Pa. 2017) (explaining that in Pennsylvania courts, unlike in federal courts, the political question doctrine relates to justiciability, not jurisdiction); *Madden v. Jeffes*, 482 A.2d 1162, 1164 n.2 (Pa. Cmwlth. 1984) (“[A] claim of official immunity . . . presents n[o] jurisdictional question.”).

⁹ It provides that “[s]uits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.” Pa. Const. Art. I, §11.

¹⁰ Section 17 of the Act, 74 Pa. C.S. § 9117, provides:

Under [S]ection 11 of Article I of the Constitution of Pennsylvania, it is declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees, and a municipal authority, and its officials and employees, acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as provided in section 9118 (relating to specific performance). A claim against the Commonwealth and its officials and employees or municipal authority and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provision of section 9110(e) (relating to Public-Private transportation partnership agreement), 42 Pa. C.S. Ch. 85 (relating to matters affecting government units), 62 Pa. C.S. Ch. 17 (relating to legal and contractual remedies) or any procurement law applicable to a municipal authority.

Preliminary Objections ¶¶ 18-31. They also cite *Scientific Games*, where our Supreme Court held that sovereign immunity barred a suit for declaratory and permanent injunctive relief in the context of the Procurement Code. Petitioners argue that, since they request prohibitory injunctive relief rather than money damages or specific performance, sovereign immunity does not apply. They contend that *Scientific Games* is distinguishable and limited to the Procurement Code context.

“Suits which seek to compel affirmative action on the part of state officials or to obtain money damages or to recover property from the Commonwealth are within the rule of immunity; suits which simply seek to restrain state officials from performing affirmative acts are not within the rule of immunity.” *Phila. Life Ins. Co. v. Commonwealth*, 190 A.2d 111, 114 (Pa. 1963); accord *Finn v. Rendell*, 990 A.2d 100, 105 (Pa. Cmwlth. 2010) (“[S]overeign immunity does not bar a declaratory judgment action or injunction seeking to prohibit state parties, *i.e.*, state agencies or employees, from acting.”). “[I]t is the substance of the relief requested and not the form or phrasing of the requests which guides [the] inquiry.” *Stackhouse v. Pennsylvania State Police*, 892 A.2d 54, 61 (Pa. Cmwlth. 2006). Thus, a suit that fundamentally seeks to restrain state action, and seeks declaratory relief that is prohibitory rather than mandatory in nature, is within this Court’s jurisdiction. See *Fawber v. Cohen*, 532 A.2d 429, 433-34 (Pa. 1987).

Scientific Games represents a limited exception to the general rule that sovereign immunity does not bar prohibitory relief. There, the Department of Revenue issued an RFP related to a technology project under the Procurement Code. 66 A.3d at 744. The petitioner submitted a proposal in response and was selected to proceed with negotiations. *Id.* The parties completed the contract package which

was circulated for signatures, but the Department of Revenue then cancelled the RFP and, by extension, the awarded contract. *Id.* at 744-46. The petitioner filed an action for declaratory and injunctive relief against the Department of Revenue invoking this Court’s original jurisdiction and requesting that the Court enter an order requiring the Department of Revenue to honor the negotiated contract. *Id.* at 746. The Department of Revenue claimed sovereign immunity in its preliminary objections. This Court denied petitioner’s request for preliminary injunction, which our Supreme Court affirmed, and certified the sovereign immunity issue for interlocutory appeal. *Id.* at 748 n.12. Before the Supreme Court, the petitioner specifically argued that sovereign immunity does not bar prohibitory injunctive relief. *See id.* at 752.

The Supreme Court emphasized that the Procurement Code provides “a scheme for resolution of disputes arising in connection with the solicitation or award of a contract,” and vests exclusive jurisdiction over such disputes in the Board of Claims, which was created by the Procurement Code. *Id.* at 743 (citing 62 Pa. C.S. § 1711.1). The Court held that, because of this detailed remedial scheme, “the Board of Claims retains exclusive jurisdiction [over contract disputes,] which is not to be supplanted by a court of law through an exercise of original jurisdiction.” *Id.* at 760. The Court reasoned:

While more general clarification of the relationship between sovereign immunity and jurisdiction may be appropriate in the arena at large, for present purposes, we regard sovereign immunity as a jurisdictional concern *vis-à-vis the Procurement Code*. Our understanding, in this regard, is premised on the enactment’s self-contained reaffirmation of sovereign immunity, and its explicit, limited waiver of such immunity (among other specified and limited waivers) *in connection with a coordinate allocation of “exclusive jurisdiction” to the Board of*

Claims over claims arising from certain contracts entered into by a Commonwealth agency. In this respect, we agree with Appellants that—as a matter of jurisdiction—if the General Assembly has not specifically provided by statute for such nonmonetary relief in a claim arising from a contract entered into by a Commonwealth agency *under the Procurement Code*, then either the claim is within the exclusive jurisdiction of the Board of Claims or it is barred by sovereign immunity.

....

[I]n designing *a particularized dispute-resolution scheme in the procurement arena* overlaid with a reaffirmation of sovereign immunity and an allocation of exclusive jurisdiction to the Board of Claims to resolve contract controversies—the Legislature did not intend to leave the Commonwealth Court with residual jurisdiction to entertain requests for declaratory relief and/or prohibitive or mandatory injunctions against Commonwealth agencies attending the cancellation of solicitations.

Scientific Games, 66 A.3d at 756, 758 (emphasis added) (citations and footnotes omitted).

The Court finds *Scientific Games* distinguishable for two reasons. First, the underlying relief in that case “in effect . . . sought specific performance of the asserted contract with the Commonwealth.” *Scientific Games*, 66 A.3d at 749. Regardless of how it was styled, that is precisely the sort of claim that sovereign immunity typically bars. Although the relief was nominally declaratory and injunctive, the suit was tantamount to a contract dispute under the Procurement Code. Here, by contrast, the underlying claims are in the nature of permanent prohibitory injunctive relief regarding an alleged violation of Act 88 by the Board. Although the claims here incidentally involve a contract (the PDA), they are not brought by a disappointed bidder or other party with a contractual claim. Rather,

they seek to restrain allegedly unlawful activity by Respondents, regardless of any contractual rights. Such claims are generally not barred by sovereign immunity.

Second, our Supreme Court’s reasoning in *Scientific Games* hinged on the Procurement Code’s unique remedial scheme, which differs markedly from Act 88. Though both statutes expressly reaffirm sovereign immunity, Act 88 does not create any administrative remedial process whatsoever. Unlike in *Scientific Games*, there is no administrative body akin to the Procurement Code’s Board of Claims with jurisdiction to adjudicate Petitioners’ claims. Absent such a particularized remedial scheme, it appears the General Assembly *did* “intend to leave the Commonwealth Court with residual jurisdiction to entertain requests for declaratory relief and/or prohibitive . . . injunctions,” as is the norm for such claims against the Commonwealth. *Id.* at 758. Thus, preliminarily, the Court concludes that sovereign immunity does not bar this action.

A. Clear Right to Relief

The Court will begin with the fourth prong of the preliminary injunction standard—whether Petitioners’ right to relief is clear—because the legal claims in this matter will bear on our analysis of the other criteria. For a right of relief to be clear, “it must be ‘more than merely viable or plausible.’” *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 611 (Pa. Cmwlth. 2020) (quoting *Ambrogi v. Reber*, 932 A.2d 969, 980 (Pa. Super. 2007)). The moving party “need not prove the merits of the underlying claim, but need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties.” *SEIU Healthcare*, 104 A.3d at 506; *accord Marcellus Shale Coal. v. Dep’t of Env’t Prot.*, 185 A.3d 985, 995 (Pa. 2018) (“In the context of a motion for a preliminary injunction, only a substantial legal issue need be apparent for the moving party to prevail on the clear-right-to-

relief prong.”). The Court is satisfied that Petitioners’ PFR raises, at a minimum, substantial legal questions that this Court must resolve.

i. Justiciability

At this preliminary stage, the Court will not dispose of the non-jurisdictional preliminary objections Respondents raise. *See City of Philadelphia v. Commonwealth*, 922 A.2d 1, 9 (Pa. Cmwlth. 2003) (addressing only jurisdictional preliminary objections during preliminary injunction proceeding). However, to the extent that these justiciability issues bear on Petitioners’ clear right to relief, the Court is satisfied that they likely do not foreclose Petitioners’ claims.

First, high-official immunity does not apply here. Even though the Secretary is “a high public official” and acted “in the scope of [her] authority,” thus triggering official immunity from suit in general, *See Yakowicz v. McDermott*, 548 A.2d 1330, 1332 (Pa. Cmwlth. 1988), the doctrine applies only to “civil suits *for damages*,” *id.* (emphasis added). As discussed earlier, officials may not invoke immunity in actions for declaratory or injunctive relief that seek to restrain their allegedly unlawful conduct. *Fawber*, 532 A.2d at 434. Even if official immunity were to apply, it protects only the Secretary, and Petitioners could still prevail against the Board and DOT.

Standing and ripeness “considerabl[y] overlap, . . . especially where the contentions regarding lack of justiciability are focused on arguments that the interest asserted by the petitioner is speculative, not concrete, or would require the [C]ourt to offer an advisory opinion.” *Robinson Twp.*, 83 A.3d at 917. For standing, a party must have

a substantial, direct and immediate interest in the outcome of the litigation. A party has a substantial interest in the outcome of litigation if his interest exceeds that of all

citizens in procuring obedience to the law. The interest is direct if there is a causal connection between the asserted violation and the harm complained of; it is immediate if that causal connection is not remote or speculative.

City of Philadelphia v. Commonwealth, 838 A.2d 566, 577 (Pa. 2003) (citations omitted). Where, as here, a municipality is specially affected by application of a statute, its interest surpasses that of the general public, such that its interest is both substantial and direct. *Id.* at 577-78. As to immediacy, factual claims about present uncertainty due to future harm are remote and speculative and do not confer standing. *Id.* at 578. Here, Petitioners' claims related to traffic impacts that will result from eventual tolling, and the present uncertainty this creates, are admittedly speculative: there will be no traffic impacts until tolling is imposed, which will not occur until more than two years from now, at the very earliest.

However, Petitioners argue that the General Assembly functionally conferred standing on them when it guaranteed them the opportunity to be "consult[ed]" as persons affected by a proposed transportation project under Act 88. The Board allegedly denied Petitioners this procedural guarantee when it approved the Initiative without conducting such a consultation and without following the Act's other mandates. *See Answer to Preliminary Objections* ¶ 47. The alleged deprivation of Petitioners' procedural interests under Act 88 is not speculative—it has already occurred and is continuing. This alleged deprivation, effected through Respondents' conduct, appears sufficiently immediate to confer standing. *See City of Philadelphia*, 838 A.2d at 578. "[I]nsofar as ripeness . . . reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute," *Robinson Twp.*, 83 A.3d at 917, that concern is not present here. Petitioners allege a violation of Act 88, which principally presents a legal question,

and no additional factual development in another proceeding is forthcoming. *See id.* This matter thus appears ripe.

Finally, The Pennsylvania Supreme Court “ha[s] been circumspect in [its] application of the political question doctrine.” *William Penn Sch. Dist.*, 170 A.3d at 439. Courts “will not refrain from resolving a dispute which involves only an interpretation of the laws of the Commonwealth, for the resolution of such disputes is our constitutional duty.” *Robinson Twp.*, 83 A.3d at 928. Respondents emphasize Act 88’s legislative oversight process, which involves the General Assembly, but they do not address any of the formal criteria that a court must find to apply the political question doctrine. The doctrine applies only if:

there is a textually demonstrable *constitutional* commitment of the disputed issue to a coordinate political department; there is a lack of judicially discoverable and manageable standards for resolving the disputed issue; the issue cannot be decided without an initial policy determination of a kind clearly for non[-]judicial discretion; a court cannot undertake independent resolution without expressing lack of the respect due coordinate branches of government; there is an unusual need for unquestioning adherence to a political decision already made; [or] there is potential for embarrassment from multifarious pronouncements by various departments on one question.

Id. at 928 (emphasis added) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The legal questions here involve statutory construction, not constitutional commitments. Statutory construction is this Court’s constitutional duty, and, given Respondents’ failure to invoke any of the *Baker* factors, the political question doctrine appears inapposite.

ii. Merits

Petitioners' merits arguments focus on three distinct ways in which the Board failed to comply with Act 88 when it approved the Major Bridge P3 Initiative. First, the Initiative did not identify any specific "proposed or existing . . . bridge," so it does not relate to a "transportation facility," and is thus not a "transportation project" that the Board is authorized to approve. The Board is not authorized to approve a generic statewide "Initiative" or concept as it has done here. The failure to identify specific bridges in the Initiative produced two further violations of Act 88: the Board could not meaningfully consult with persons affected by the Initiative (since it essentially affected all persons statewide), and it could not determine whether the Initiative is in the best interest of the Commonwealth, since it did not understand the scope or content of the Initiative. Even if it could have done either of these things, Petitioners allege that, in fact, the Board did neither. These arguments raise serious questions about whether the Board complied with Act 88's procedural mandates when it approved the Initiative.

Moreover, evidence in the record supports Petitioners' claims. It is clear that the Board had no specific bridges in mind when it approved the Initiative in November 2020: none were identified in the background materials the P3 Office provided to the Board or in the Board's meeting minutes or Resolution. *See* Exs. P-1 to P-4. Mr. Bonini's testimony about the process DOT and the Board followed is credible and highly persuasive. He testified that no specific bridge was identified to the Board or the public until the February 2021 press release, and that the Board played "no role" in selecting candidate bridges after the Initiative was approved. He admitted that the concept of a "major bridge" was not defined for the Board, and even Mr. Bonini, who chairs DOT's P3 efforts, could not explain how many of the

Commonwealth's bridges that might apply to. Ms. Batula, whose testimony the Court also credits, testified that this could include 90-100 interstate bridges across the Commonwealth, but that what constitutes a major bridge is essentially a subjective determination. The Board was not involved at all in choosing the nine "candidate" bridges later presented to the public—which represent less than 10% of bridges in the Commonwealth that might, or might not, constitute "major bridges."

It appears that the Board did not engage in any meaningful consultation with "persons affected" by the Initiative, as Act 88 requires. Act 88 plainly requires this consultation to precede approval: the Board's duty is to consult with those affected by "*proposed*" transportation projects, not projects already approved. 74 Pa. C.S. § 9105. DOT's P3 Manual reaffirms that the consultation is part of the approval process, not an afterthought. Thus, Respondents' claims about public meetings held after approval of the Initiative are not relevant to the Board's duty to consult affected persons. Tellingly, DOT's form for initiating project screening requires the public entity to provide information on "impacted jurisdictions." *See* P3 Manual at 16; PFR Ex. C. It is not clear how DOT could have provided this information—given the Initiative's astounding breadth, DOT would need to list either all municipalities in the Commonwealth or none of them. Neither approach allows for meaningful consultation with affected persons before approval, which, as DOT recognizes, is what Act 88 intends. Because Act 88 does not define "persons," the definition from the Statutory Construction Act controls, and this includes Petitioners as government entities. 1 Pa. C.S. § 1991. And there is no factual dispute that the I-83 Bridge project, which was identified as being part of the Initiative only after approval, will affect Petitioners. Though Mr. McClain testified about DOT's driver survey and meetings with the General Assembly, both conducted before the

Board approved the Initiative, these were not the required consultation. The driver survey was not specific to the Initiative, and the meeting with the General Assembly did not include any other affected parties, such as Petitioners. All evidence in the record points to the conclusion that the Board did not consult with affected persons before approving the Initiative; instead, it (or, more accurately, DOT) purported to do so afterward, once specific bridges were announced. This is inconsistent with Act 88's procedural framework, both as shown by the statute's text and as understood by DOT in its P3 Manual.

The record also shows that the Board never documented any finding that the Initiative is in the best interest of the Commonwealth as Act 88 requires. The Board's meeting minutes and resolution contain no such finding. *See* Exs. P-1 & P-4. Mr. Bonini testified there was no debate at the Board's informational session, and that he does not recall seeing a conclusion as to the Commonwealth's best interest in any document related to the Initiative. At best, the Board's interest determination is implicit; at worst, the Board failed to make any finding at all. The absence of such a conclusion is especially alarming given that BPP has autonomy under the PDA to select subcontractors without any oversight by the Board.

In disposing of the PFR, this Court will construe Act 88 as to how specifically the scope of a "transportation project" must be defined; when, how, and with whom consultation of "affected persons" must occur; and how, if at all, the Board must document its finding that a project is in the Commonwealth's best interest. Even though Act 88 authorizes predevelopment agreements that will result in subsequent implementing agreements, this does not allow the Board to proceed at a level of generality so great that it cannot comply with its other duties under the Act. To be meaningful, these duties require a modicum of specificity in a proposed

project. Petitioners have credibly shown that the Major Bridge P3 Initiative lacks sufficient specificity, such that the Board cannot have performed, and indeed did not perform, all of its essential duties in approving the Initiative.

Petitioners also raise a constitutional issue—that Act 88 violates the constitutional prohibition on delegation of legislative authority. If Petitioners do not prevail on their claims discussed earlier, the Court will address their nondelegation claim. *Cf. Corman v. Acting Sec’y of Pa. Dep’t of Health*, 266 A.3d 452, 467 (Pa. 2021) (avoiding constitutional delegation claim when resolving case on statutory grounds). This claim, in Count III of the PFR, alleges that Act 88 provides none of the essential, legislatively defined standards to guide the Board’s determination of whether a proposed project is in the best interest of the Commonwealth. In support, Petitioners cite *Protz v. Workers’ Compensation Appeal Board (Derry Area School District)*, 161 A.3d 827 (Pa. 2017). *See* Petitioners’ Memorandum of Law in Support of Application for Preliminary Injunction at 20-21. Respondents argue Act 88 is a lawful delegation for two reasons: the General Assembly retains the power to rescind the Board’s actions, and Section 10 of the Act, which specifies required terms of P3 agreements, supplies standards regarding “user fees,” or tolls, which limits the Board’s discretion. *See* Respondents’ Brief in Support of Answer to Application for Preliminary Injunction at 25.

In *Protz*, our Supreme Court observed:

At the heart of the non-delegation doctrine, which we have described as a natural corollary to the text of Article II, Section 1[of the Pennsylvania Constitution], is the tenet that the General Assembly cannot delegate to any other branch of government or to any other body or authority the power to make law. Or, as John Locke put it, legislative power consists of the power to make laws, and not to make legislators. Indeed, the rule is essential to

the American tripartite system of representative government. The framers of the Constitution believed that the integrity of the legislative function was vital to the preservation of liberty.

Although our Constitution generally forbids the delegation of legislative power, it nonetheless permits the General Assembly, in some instances, to assign the authority and discretion to execute or administer a law. When the General Assembly does so, the Constitution imposes two fundamental limitations. First, as mentioned, the General Assembly must make the basic policy choices, and second, the legislation must include adequate standards which will guide and restrain the exercise of the delegated administrative functions. This means, to borrow Chief Justice Taft's oft-quoted expression, that the law must contain some intelligible principle to which the person or body authorized to act is directed to conform.

Protz, 161 A.3d at 833-34 (internal quotation marks and citations omitted). The requisite “basic policy choices” must be set forth in the statute, and the agency must apply them—the agency head’s “own personal preferences are not valid considerations regarding good . . . policy.” *In re Formation of Indep. Sch. Dist. Consisting of Borough of Highspire, Dauphin Cnty.*, 260 A.3d 925, 939 (Pa. 2021) (*Indep. Sch. Dist.*). The necessary “intelligible principle[s]” include “concrete measures to channel the [agency’s] discretion to wield its . . . power, . . . [and] safeguards to protect against arbitrary, ad hoc decision making, such as a requirement [to] hold hearings, allow for public notice and comment, [and] explain the grounds for its [actions] in a reasoned opinion subject to judicial review.” *Protz*, 161 A.3d at 835 (discussing *W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist. of Phila.*, 132 A.3d 957, 966 (Pa. 2016)).

Here, Act 88 is clear—the General Assembly has delegated policymaking authority to the Board. The Act tasks the Board, not the legislature, with determining whether a project is in the “best interests of the Commonwealth,”

74 Pa. C.S. §9104(a), and states that “[a]ctions by the [B]oard are a determination of public policy,” *Id.* § 9104(b). This delegation may be permissible, but it must place the necessary guardrails around the Board’s discretion. In evaluating other delegating statutes, our courts have looked to legislative findings or policy statements in the statute to form such limits, but Act 88 appears to contain no such statements. *Cf. Indep. Sch. Dist.*, 260 A.3d at 939 (holding the statute “comprehensively sets forth the General Assembly’s policy decisions”). Despite Respondents’ argument, Section 10 of the Act¹¹ does not meaningfully restrain the policy decisions of the Board—it provides required contractual terms *if* the Board

¹¹ It provides, in pertinent part:

(f) User fees.--A provision establishing whether user fees will be imposed for use of the Public-Private transportation project and the basis by which any user fees will be imposed and collected shall be determined in the Public-Private transportation partnership agreement. If a user fee is proposed as part of the Public-Private transportation project, a proprietary public entity shall include provisions in the agreement that authorize the collection of user fees, tolls, fares or similar charges, including provisions that:

- (1) Specify technology to be used in the Public-Private transportation project.
- (2) Establish circumstances under which the proprietary public entity may receive a share of revenues from the charges.
- (3) Govern the enforcement of electronic tolls, including provisions for use of available technology.
- (4) Establish payment collection standards, including provisions for enforcement of nonpayment and penalties.
- (5) In the event an operator of a vehicle fails to pay the prescribed toll or user fee at any location on a Public-Private transportation project where tolls or user fees are collected by means of an electronic or other automated or remote form of collection, the collection provisions of section 8117 (relating to electronic toll collection) shall apply except that the development entity shall possess all of the rights, roles, limitations and responsibilities of the Pennsylvania Turnpike Commission.

74 Pa. C.S. § 9110.

chooses to impose a toll, but gives no guidance on *whether* the Board should do so. To the extent the General Assembly made any “basic policy choice,” it is not clear where that choice is embodied in the Act, and thus it is not clear how the Board can apply it. Finally, contrary to sound delegation principles recognized by our courts, Act 88 expressly insulates the Board’s decisions from judicial review. *See* 74 Pa. C.S. § 9104(b).

In addition to these serious questions of law, which Petitioners present as a facial challenge, the factual record greatly heightens the Court’s delegation concerns. The Board essentially approved a **massive** multi-billion dollar infrastructure initiative on an admittedly meager record, consisting of a 4-page recommendation from DOT, a presentation, and minimal discussion, and without understanding which, or how many, pieces of public infrastructure the Initiative would affect. DOT’s chosen “progressive model” allows BPP, a private party, wide discretion over the selection of projects and the terms, and recipients, of subcontracts. Given these apparent concerns, Petitioners have raised a substantial legal question and may prevail on their claim under *Protz*.

Thus, without finally determining these substantial legal questions at the preliminary injunction stage, the Court concludes Petitioners have made a sufficient merits showing for purposes of preliminary injunctive relief.¹² Finally, the Court notes that these are all issues of first impression. Only two reported court decisions discuss Act 88 at all, and neither addressed the statutory construction or constitutional issues raised here. *See Clearwater Constr., Inc. v. Northampton Cnty. Gen. Purpose Auth.*, 166 A.3d 513, 521 (Pa. Cmlwth. 2017) (addressing standing of

¹² Given that Petitioners are likely to prevail on at least some of their claims, we need not analyze Petitioners’ remaining claims, including those based on constitutional due process rights.

disappointed bidder to sue); *Dep't of Transp. v. Walsh/Granite JV*, 149 A.3d 425, 430 (Pa. Cmwlth. 2016) (addressing confidentiality under Act 88 for purpose of Right-to-Know Law¹³).

B. Immediate and Irreparable Harm

Petitioners first claim that, pursuant to decisions of Pennsylvania courts, they have established immediate and irreparable harm per se based on the Board's alleged violations of Act 88. They also assert that the impending impacts of tolling on the I-83 Bridge constitute immediate & irreparable harm. Respondents deny any violation of Act 88, and claim that caselaw providing for per se harm is distinguishable and had not been applied to statewide projects at the predevelopment stage. They also assert that any impacts of tolling are remote and speculative, given that no tolling will occur until 2024 at the earliest.

Courts have long held that, for preliminary injunctions, “where the offending conduct sought to be restrained . . . violates a statutory mandate, irreparable injury will have been established.” *SEIU Healthcare*, 104 A.3d at 508-09 (citing *Pa. Pub. Utility Comm'n v. Israel*, 52 A.2d 317 (Pa. 1947)). In *Israel*, our Supreme Court affirmed a preliminary injunction prohibiting a company from operating taxicabs without certificates in violation of a statutory mandate. The Court reasoned:

At the hearing the Commonwealth has made a prima facie showing that the defendants are operating taxicabs in violation of law. The argument that a violation of law can be a benefit to the public is without merit. When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.

¹³ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101–67.3104.

Israel, 52 A.2d at 321. This rule applies to injunctions sought against state agencies as well. In *SEIU Healthcare*, our Supreme Court applied the same rationale to reverse this Court's denial of a preliminary injunction. There, a statute prohibited closure of state healthcare centers, and the Court held that the Department of Health's plan to close 26 centers violated the statute and constituted irreparable harm per se. 104 A.3d at 508-09.

The statutory mandates at issue here are the Board's duties under Act 88: to approve "transportation projects" as defined in the statute, to consult with affected persons, and to determine that a project is in the best interest of the Commonwealth before approving it. As we have discussed, though Respondents deny any violation, it appears on the record that the Board failed to comply with some or all of these mandates. Moreover, Respondents' attempt to distinguish the per se harm caselaw is unpersuasive. This Court is unaware of any decision in which a court declined to find per se immediate and irreparable harm merely because a statutory violation occurred at an early, predevelopment stage. Courts do sometimes decline to apply the per se irreparable harm doctrine, but only when there is no clear statutory mandate, when there is no credible evidence the mandate was violated, or when the violation has been cured. *See, e.g., Kiddo v. Am. Fed'n of State*, 239 A.3d 1141 (Pa. Cmwlth. 2020) (no statutory mandate); *W. Pittsburgh P'ship ex rel. WEHAV Governing Comm'n v. McNeilly*, 840 A.2d 498, 506 (Pa. Cmwlth. 2004) (no credible evidence of violation); *Commonwealth v. Nat'l Fed'n of the Blind*, 370 A.2d 732, 737-38 (Pa. 1977) (violation ceased). Those reasons are not present here. Act 88's procedural mandates are clear; the evidence, as credited by this Court, shows likely statutory violations; and the violations are ongoing and continue to

affect Petitioners, since DOT is proceeding with the Initiative and the I-83 Bridge project.

Thus, the Court concludes that Petitioner has shown an injunction is necessary to redress immediate and irreparable injury in the form of the likely violation of Act 88. This is sufficient immediate and irreparable injury for injunctive relief, and obviates the need to consider the actual impacts of future tolling on Respondents.¹⁴

C. Balancing of Harms & Public Interest

Petitioners must also show that greater injury would result from refusing the injunction than granting it, and that issuing an injunction would not substantially harm other interested parties, such as DOT. *SEIU Healthcare*, 104 A.3d at 502. Relatedly, Petitioners must demonstrate that a preliminary injunction will not adversely affect the public interest. *Id.* Because DOT's interests as a government agency overlap with those of the public, the Court will address these criteria together.

First, a statutory violation greatly relaxes the standard of proof for these factors. This is because “the argument that a violation of law can be a benefit to the public is without merit,” and once the General Assembly has prohibited conduct, “it is tantamount in law to calling it injurious to the public.” *Israel*, 52 A.2d at 321. Thus, a statutory violation, in addition to showing irreparable harm, “relieve[s] the trial court of undertaking the balance of the harm inquiry.” *Wolk*, 228 A.3d at 611.

¹⁴ The Court notes in passing that Petitioners' municipal and expert witnesses credibly testified that the actual imposition of tolling will cause irreparable injury to them through traffic diversion. But the testimony also established that these impacts are speculative because the I-83 Bridge is still being evaluated for the Initiative, and are not immediate because no tolling will occur for years.

To the extent any further analysis of these factors is necessary, the Court credits Mr. Bonini’s testimony that DOT will not be subject to any contractual penalties if it must cease performing under the PDA, but will simply be “starting from square one.” N.T. at 86. This is consistent with the law: sovereign immunity bars an action for monetary damages against the Commonwealth or its agencies. *Finn*, 990 A.2d at 105. Section 18 of Act 88 allows specific performance, 74 Pa. C.S. § 9118, and the PDA provides for that remedy, Ex. P-8 at 68, but such a proceeding would not seriously harm DOT or the public, particularly when any such claims must first surmount a preliminary injunction entered by this Court. The Court further relies on testimony by Ms. Batula that, for at least the next several years, the I-83 Bridge will remain safe and serviceable. Although Ms. Batula did not address the status of bridges elsewhere in the Commonwealth, and though she acknowledged that delays in repairs may require load restrictions or, in extreme cases, bridge closures, these harms are outweighed by the harms that would result from refusing relief. These include the continued pursuit of the arguably unlawful Initiative in derogation of Act 88, and DOT and other entities continuing to incur substantial public costs that may prove wasted if the Initiative is declared unlawful. The Court also believes that BPP’s authority under the PDA to enter subcontracts without Board oversight, combined with the less-than-transparent manner in which the Initiative was approved, seriously undermines public confidence in the P3 process and in public procurement. When balanced, these harms weigh in favor of granting injunctive relief.

D. Status Quo

For preliminary injunction purposes, the status quo is “the last peaceable *and lawful* uncontested status preceding the underlying controversy.”

Hatfield Township v. Lexon Ins. Co., 15 A.3d 547, 556 (Pa. Cmwlth. 2011) (emphasis added) (quoting *In re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Cmwlth. 2002)). Here, that would be the parties’ status prior to the Board’s arguably unlawful approval of the Initiative. Petitioners request injunctive relief against both the broad Initiative and the more specific I-83 Bridge project, but only the former will preserve the *lawful* status quo. To enjoin only the I-83 Bridge project would leave DOT free to pursue the Initiative everywhere else in the Commonwealth, despite Petitioners’ compelling claims that this would violate Act 88. Moreover, the lawful status quo assumes that Respondents have not expended taxpayer funds on an arguably unlawful project. They have already expended such funds. For example, Mr. Bonini testified that DOT is currently processing payment to a disappointed bidder on the RFP for its contractually guaranteed \$300,000 reimbursement of costs. Though some such costs have already been, or are being, paid, Petitioners’ requested injunctive relief will prevent future accrual of such costs. This works, albeit partially, to restore the status quo to a point before the Initiative was approved and costs incurred therefor. Such an injunction would do “no more than to restore the status quo as it existed before the challenged act,” *i.e.*, before the Board approved the Initiative without following Act 88’s procedures. *Fischer v. Dep’t of Pub. Welfare*, 439 A.2d 1172, 1174 (Pa. 1982). Thus, Petitioners’ requested relief will restore the status quo.

E. Reasonably Suited to Abate the Offending Activity

“Even where the essential prerequisites of an injunction are satisfied, the court must narrowly tailor its remedy to abate the injury.” *Big Bass Lake Cmty. Ass’n v. Warren*, 950 A.2d 1137, 1144-45 (Pa. Cmwlth. 2008). Respondents claim that Petitioners’ relief is not narrowly tailored because they assert harms only related

to the I-83 Bridge project, yet they seek to enjoin the entire Initiative. The Court disagrees. As discussed above, the harm that entitles Petitioners to injunctive relief is a statutory violation, which occurs at the level of the Initiative, not its subsidiary projects.

Petitioners limit their requested relief to enjoining “any further action with respect to the Major Bridge P3 Initiative and the I-83 South Bridge [p]roject.” Application for Preliminary Injunction at 17. However, the Court notes from the Record that DOT performs vast amounts of work—including, for example, feasibility studies, design projects, NEPA assessments, engineering inspections, public outreach, and traditional public procurement—much of which may be authorized by DOT’s other enabling legislation apart from Act 88. Thus, the Court will clarify that it is granting relief against only activities that are taken “with respect to” the Initiative, rather than pursuant to other, independent sources of authority. In other words, the injunction will not restrain activities that are merely incidental to or useful for the Initiative, but which Respondents could lawfully undertake even if the Board had never approved the Initiative. Given this clarification, this criterion will be satisfied.

III. Conclusion

The Court concludes that Petitioners have satisfied each prerequisite for preliminary injunctive relief, and the Court will grant the requested relief as qualified above and in the attached Order.



Ellen Ceisler, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cumberland County, The Borough	:	
of Camp Hill, The Borough of	:	
Wormleysburg, The Borough of	:	
Lemoyne, The Borough of New	:	
Cumberland, Lower Allen Township,	:	
East Pennsboro Township and	:	
West Hanover Township,	:	
Petitioners	:	
	:	
v.	:	
	:	
The Pennsylvania Department of	:	
Transportation, The Public-Private	:	
Transportation Partnership Board and	:	
Yassmin Gramian, P.E. in her	:	
official capacity as Secretary of	:	
the Pennsylvania Department of	:	
Transportation and Chair of the	:	
Pennsylvania Public-Private	:	
Transportation Partnership Board,	:	
Respondents	:	No. 109 M.D. 2022

ORDER

NOW, May 18, 2022, upon consideration of Petitioners’ Application for Relief in the Nature of a Preliminary Injunction (Application for Preliminary Injunction) and Respondents’ Answer thereto, the Application for Preliminary Injunction is **GRANTED**, and Respondents are hereby **ENJOINED** from taking any further action with respect to the Major Bridge P3 Initiative (Initiative) or the I-83 Bridge project, as defined in the accompanying Opinion, including any of the following actions:

1. Further executing or performing under a predevelopment agreement or other contracts;
2. Conducting studies;

3. Conducting hearings or meetings;
4. Design development;
5. Right-of-way acquisition;
6. Tolling;
7. Construction; and
8. Expenditure of any funds

Notwithstanding the foregoing, Respondents may continue to 1) take any action which they could lawfully have taken if the Public-Private Transportation Partnership Board had not approved the Initiative, and 2) expend funds and engage in other activities incident to litigation involving the Initiative.



Ellen Ceisler, Judge