

TABLE OF CONTENTS

I. Introduction.....1

II. Factual Background and Procedural History.....2

III. Action Sought to be Enjoined.....5

IV. Standard for Preliminary Injunction.....6

V. Argument7

 a. Senate Intervenor Respondents Have a Clear Right to Relief and are Likely to Prevail on the Merits.....7

 b. An Injunction is Necessary to Prevent Immediate and Irreparable Harm17

 c. Greater Harm Would Result from Refusing an Injunction than granting it because the Injunction Would Properly Maintain the Status Quo and Issuance will not Substantially Harm Other Interested Parties18

 d. An Injunction is Reasonably Suited to Abate the Offending Activity.....19

 e. An Injunction is in the Public Interest.....20

VI. Conclusion20

TABLE OF AUTHORITIES

Cases

| | |
|--------------------------------------------------------------------------------------------------------------------------------------|--------------|
| <i>Baker v. Carr</i> , 369 U.S. 186 (1962)..... | 8 |
| <i>Berger By and Through Berger v. W. Jefferson Hill Sch. Dist.</i> , 669 A.2d 1084, 1085 (Pa. Cmwlth. 1995)..... | 6 |
| <i>Collins v. Commonwealth</i> , 106 A. 229, 230 (Pa. 1919) | 11 |
| <i>Com. Ex re. Pappert v. Coy</i> , 860 A.2d 1201, 1204 (Pa. Cmwlth. 2004)..... | 6 |
| <i>Common Cause/Pennsylvania v. Commonwealth</i> , 710 A.2d 108, 117 (Pa. Cmwlth. 1998)..... | 8 |
| <i>Commonwealth v. Sessoms</i> , 532 A.2d 775, 778 (Pa. 1987)..... | 9 |
| <i>Commonwealth v. Sutley</i> , 378 A.2d 780, 782 (Pa. 1977) | 8 |
| <i>Corman v. Acting Sec'y of Pa. Dep't of Health</i> , No. 294 M.D. 2021, 2021 Pa. Commw. LEXIS 574 (Pa. Cmwlth. Nov. 10, 2021)..... | grine 14, 15 |
| <i>Germantown Cab Co. v. Phila. Parking Auth.</i> , 933 A.2d 933, 937-38 (Pa. Cmwlth. 2010)..... | 14 |
| <i>Grine v. County of Centre</i> , 138 A.3d 88, 99, 101, 107 (Pa. Cmwlth. 2016)..... | 9, 17 |
| <i>Israel</i> , 52 A.2d at 406..... | 20 |
| <i>Markham v. Wolf</i> , 190 A.3d 1175, 1183 (Pa. 2018)..... | 9 |
| <i>Mastrangelo v. Buckley</i> , 250 A.2d 447, 452-53 (Pa. 1969)..... | 12 |
| <i>Pa. Public Utility Comm. v. Israel</i> , 52 A.2d 317, 406-07 (Pa. 1947)..... | 18 |
| <i>SEIU Healthcare Pa. v. Commonwealth</i> , 104 A.3d 495, 502, 506, 509 (Pa. 2014)..... | 7, 18 |
| <i>Sweeney v. Tucker</i> , 375 A.2d 698, 705, 706 (Pa. 1977) | 8 |
| <i>Thompson v. City of Altoona Code Appeals Bd.</i> , 934 A.2d 130, 133, 134 (Pa. 2007)..... | 12, 13 |
| <i>Warehime v. Warehime</i> , 860 A.2d 41, 46-47 (Pa. 2004)..... | 7 |
| <i>Whitlatch v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing</i> , 715 A.2d 387, 389-90 (Pa. 1998) | 11 |
| <i>Wolk v. School District of Lower Merion</i> , 228 A.3d 595, 610, 611 (Pa. Cmwlth. 2020)..... | 17, 18 |

Statutes

| | |
|----------------------------|-------|
| 45 Pa.C.S. § 501 | 15 |
| 75 Pa.C.S. § 6146(1) | 12 |
| 35 P.S. § 4004(24)..... | 12 |
| 35 P.S. § 4007(a)(e) | 15 |
| 35 P.S. § 4005(a)(1) | 2, 19 |

| | |
|--------------------------|---------|
| 35 P.S. § 4006.3(a)..... | 19 |
| 45 P.S. § 1102 | 15 |
| 71 P.S. § 745.7(d)..... | 2, 3, 9 |

Other Authorities

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| https://www.indianagazette.com/news/local/generating-station-considers-cutting-operations/article_ea5bf117-fac0-50af-ad27-5cb60c9879d8.html | 16 |
| https://www.patreaury.gov/transparency/budget.php | 13 |
| Pa. Const. art. 2, § 1, 31 | 9, 12 |
| Pa. Const. art. 3, § 9 | 3 |

Rules

| | |
|-------------------------|---|
| Pa.R.A.P. 106..... | 6 |
| Pa.R.A.P. 1532(a) | 6 |
| Pa.R.Civ. P. 1531 | 6 |

I. Introduction

Petitioner brought this action to force the premature publication of Environmental Quality Board ("EQB") Rulemaking #7-559, also referred to as the Regional Greenhouse Gas Initiative ("RGGI") Rulemaking. That rulemaking is currently proceeding through the legislative review process. By attempting to force publication before this process is complete, Petitioner has infringed upon the legislative authority vested in the General Assembly by the Pennsylvania Constitution. In addition, the RGGI Rulemaking itself is an unconstitutional exercise of legislative authority by the Executive Department, and publication in either the near or long term would constitute an unconstitutional infringement upon the General Assembly's exclusive authority to make laws, to join interstate compacts, and to levy taxes. Finally, the RGGI Rulemaking should not be published because it was not developed in accordance with proper rulemaking procedure and is, therefore, void *ab initio*.

Senate Intervenor Respondents have a strong likelihood of success on the merits of these claims as set forth in their Answer with New Matter and Counterclaims. Senate Intervenor Respondents therefore request that this Court preliminarily enjoin publication of the RGGI Rulemaking. The House Intervenor Respondents concur in these requests.

II. Factual Background and Procedural History

On February 3, 2022, Petitioner McDonnell filed a Verified Petition for Review in the Nature of a Complaint for Permanent and Peremptory Mandamus and for Declaratory Judgment (the "Petition").

At the center of Petitioner's action is a CO2 Budget Trading Program rulemaking adopted by the EQB on July 13, 2021, under its purported rulemaking authority pursuant to the Air Pollution Control Act ("APCA"), 35 P.S. § 4005. Pet. at ¶30.

The RGGI Rulemaking was subsequently approved by the Governor's Office of General Counsel on July 26, 2021, the Independent Regulatory Review Commission ("IRRC") on September 1, 2021, and the Pennsylvania Office of Attorney General on or about November 24, 2021. Pet. at ¶¶31-32, 34.

Following IRRC's approval of the RGGI Rulemaking, on September 14, 2021, the Senate ERE Committee voted out of committee to the full Senate chamber Senate Concurrent Regulatory Review Resolution ("S.C.R.R.R. 1") disapproving of the RGGI Rulemaking pursuant to Section 7(d) of the Regulatory Review Act ("RRA"), 71 P.S. § 745.7(d). S.C.R.R.R. 1 was later adopted by the full Senate on October 27, 2021, and the full House of Representatives on December 15, 2021. Pet. at ¶¶77, 83, 89.

S.C.R.R.R. 1 was subsequently presented to, and vetoed by, Governor Tom Wolf on January 10, 2022. Pet. at ¶92 n.5; Ex. I. Under the RRA, the Senate and the

House of Representatives now each have 30 calendar days or ten legislative days, whichever is longer, to override Governor Wolf's veto. 71 P.S. § 745.7(d).

As of the date of this filing, the Senate is considering whether to override the Governor's veto of S.C.R.R.R. 1 in accordance with the RRA. While Senate Intervenor Respondents do not dispute LRB's obligation to publish duly promulgated rulemakings in the Pennsylvania Bulletin, such actions may only be undertaken in accordance with the procedures and timelines prescribed by applicable law, including the RRA and Article III, Section 9 of Pennsylvania's Constitution. Pa. Const. art. 3, § 9.

Petitioner seeks to compel Respondents to publish the RGGI Rulemaking in the Pennsylvania Bulletin, and to obtain from this Court a declaration that "Respondents may not continue to disregard their duties . . . based upon Respondents' incorrect interpretation and application of law." Pet. at ¶2.

Count One of the Petition seeks an immediate peremptory and permanent writ of mandamus against Respondents, requiring them to publish the RGGI Rulemaking in the Pennsylvania Bulletin. Pet. at ¶69. In Count Two of the Petition, Petitioner seeks a declaratory judgment that the RGGI Rulemaking, among other things, "has been deemed approved by the General Assembly." Pet. at ¶71.

Petitioner, in relevant part, requests the following relief from this Court:

- (1) enter judgment declaring that, under Section 7(d) of the [RRA] (71 P.S. § 745.7(d)), the House of Representatives was

permitted to adopt [S.C.R.R.R. 1] only through October 14, 2021;

(2) enter judgment declaring that, under Section 7(d) of the RRA (71 P.S. § 745.7(d)), the House's adoption of S.C.R.R.R. 1 on December 15, 2021, was a nullity, ineffective and contrary to Section 7(d);

(3) enter judgment declaring that, under Section 7(d) of the RRA (71 P.S. § 745.7(d)), the Trading Program Regulation was deemed approved by the General Assembly on October 15, 2021;

Pet. at p. 24, Omnibus Prayer for Relief.

Along with his Petition, Petitioner included an Application for Expedited Special and Summary Relief. On February 23, 2022, Petitioner filed an Application for Expedited Briefing Schedule and Oral Argument on his Verified Application for Expedited Special and Summary Relief.

On February 24, 2022, leaders from Pennsylvania's House of Representatives Republican Caucus¹ ("House Intervenor Respondents") sought leave from this Court to intervene in the matter and attached proposed preliminary objections, asking the Court to accept the preliminary objections upon grant of intervention.

Also on February 24, 2022, Respondents filed preliminary objections to the Petition, arguing Petitioner is misinterpreting the RRA and also failed to join members of the General Assembly, who are indispensable parties in this matter.

¹ The House Intervenors include Speaker Bryan D. Cutler, Majority Leader Kerry Benninghoff, and Chair of the House ERE Committee Daryl Metcalfe.

On February 25, 2022, the Court denied Petitioner's application for Expedited Briefing Schedule and Oral Argument on his Verified Application for Expedited Special and Summary Relief.

Also on February 25, 2022, Senate Intervenor Respondents sought leave to intervene in this matter and attached a proposed Answer with New Matter and Counterclaims, asking the Court to accept their proposed filing upon grant of intervention.

On March 2, 2022, Petitioner consented to the intervention of the House Intervenor Respondents and Senate Intervenor Respondents.

On March 3, 2022, the Court granted the applications for intervention of both the House and Senate Intervenor Respondents and ordered the Prothonotary to accept for filing each party's proposed filings.

On March 8, 2022, Respondents withdrew their Preliminary Objection relating to the failure to join an indispensable party.

III. Action Sought to be Enjoined

Senate Intervenor Respondents respectfully request this Court preliminarily enjoin all government officials employed by PADEP, the LRB, and the Pennsylvania Code and Bulletin from taking further steps to promulgate, publish, or otherwise codify the RGGI Rulemaking.

IV. Standard for Preliminary Injunction

The purpose of a preliminary injunction is "to preserve the status quo and prevent imminent and irreparable harm which might occur before the merits of the case can be heard and determined." *Berger By and Through Berger v. W. Jefferson Hill Sch. Dist.*, 669 A.2d 1084, 1085 (Pa. Cmwlth. 1995). Pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), this Court, upon application, may issue a preliminary injunction "in the interest of justice and consistent with the usages and principles of law." Pa.R.A.P. 1532(a).

The requirements for obtaining a preliminary injunction under Pennsylvania Rule of Appellate Procedure 1532(a) are the same as those for obtaining a preliminary injunction under Pennsylvania Rule of Civil Procedure 1531, Pa.R.Civ.P. 1531. *Com. Ex re. Pappert v. Coy*, 860 A.2d 1201, 1204 (Pa. Cmwlth. 2004); *see also* Pa.R.A.P. 106. Pennsylvania Rule of Civil Procedure 1531 sets forth the procedural steps for obtaining a preliminary injunction. Rule 1531 provides that, generally, a preliminary injunction will not be issued until after notice and a hearing, "*unless* it appears to the satisfaction of the court that immediate and irreparable injury will be sustained before notice can be given or a hearing held." Pa.R.Civ.P. 1531 (emphasis added).

In addition to the procedural requirements, the Pennsylvania Supreme Court has made clear that a moving party must demonstrate six prerequisites to obtain a preliminary injunction, which are as follows:

- (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). A preliminary injunction will not issue if the moving party does not establish each prerequisite. *See Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004).

V. Argument

a. Senate Intervenor Respondents Have a Clear Right to Relief and are Likely to Prevail on the Merits

Senate Intervenor Respondents have a clear right to relief. To establish a clear right to relief, the party seeking an injunction need not fully prove the merits of the underlying claim or claims, but need only demonstrate that a substantial legal question must be resolved to determine the rights of the parties. *SEIU Healthcare Pa.*, 104 A.3d 506. This matter invokes substantial legal questions regarding statutory interpretation of the Regulatory Review Act and Commonwealth

Documents Law, as well as questions regarding legislative procedure and the separation of powers between the General Assembly and the Executive Department under Pennsylvania's Constitution. These Constitutional questions involve the scope of authority granted to the Executive Department by the General Assembly under the APCA and the Executive Department's encroachment upon the General Assembly's power to levy a tax and enter into interstate compacts.

Pennsylvania's Constitution clearly, unambiguously, and exclusively vests the General Assembly with legislative authority, and Pennsylvania Courts have consistently held that under the principle of separation of powers, no branch of government should exercise the functions exclusively committed to another branch by the Constitution. *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977); *see also Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 117 (Pa. Cmwlth. 1998).

This doctrine of the separation of powers has been "inherent in the structure of this Commonwealth's government since its inception." *Commonwealth v. Sutley*, 378 A.2d 780, 782 (Pa. 1977). Further, the Supreme Court of Pennsylvania has recognized that it is the responsibility of Pennsylvania courts, as the ultimate interpreter of the Commonwealth's Constitution, to carefully consider and determine whether the actions of one branch encroach upon the authority of another. *Sweeney*, 375 A.2d at 706 (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

This Court has recognized that a clear right to relief exists, and a preliminary injunction is appropriate, when such action is necessary to avoid a potential separation of powers violation. *See Grine v. County of Centre*, 138 A.3d 88, 99 (Pa. Cmwlth. 2016) (enjoining Office of Open Records from directing agency to disclose records showing activities of judicial agency).

Article II, Section 1 of Pennsylvania's Constitution vests legislative power exclusively in the General Assembly. Pa. Const. art. 2, § 1; *see Commonwealth v. Sessoms*, 532 A.2d 775, 778 (Pa. 1987). Article III, part A of Pennsylvania's Constitution "sets out the procedure by which laws are to be passed in the exercise of this legislative power." *Sessoms*, 532 A.2d at 778; *see also Markham v. Wolf*, 190 A.3d 1175, 1183 (Pa. 2018) ("[I]t is for the legislature to create the law . . . and this is an exclusive power. . . . It is equally clear, as a corollary, that another branch cannot usurp the power of the legislature to create the law.").

As described in Senate Intervenor Respondents' Answer with New Matter and Counterclaims, pursuant to Section 7(d) of the RRA, S.C.R.R.R. 1 was properly adopted by both chambers of the General Assembly, consistent with the legislative process outlined in Article III, part A. *See Senate Intervenor Respondents' Answer with New Matter and Counterclaims ¶¶105-115.*

Under the RRA, Petitioner remains barred from promulgating the RGGI Rulemaking while the General Assembly exercises its constitutional and statutory right to override Governor Wolf's veto. *See 71 P.S. § 745.7(d)* ("If the Governor

vetoed the concurrent resolution, the General Assembly may override that veto by a two-thirds vote in each house. The Senate and the House of Representatives shall *each* have 30 calendar days or ten legislative days, whichever is longer, to override the veto." (emphasis added)). *See* Senate Intervenor Respondents' Answer with New Matter and Counterclaims, ¶¶116-142 (New Matter).

In seeking to publish the RGGI Rulemaking prematurely, Petitioner seeks to violate the plain language of the RRA and, at the same time, abruptly terminate the legislative process outlined under Article III, Section 9 of the Constitution. Pa. Const. art. 3, § 9. Interruption of this process usurps the General Assembly's procedural legislative authority under the Constitution. *See* Senate Intervenor Respondents' Answer with New Matter and Counterclaims, ¶¶153-175 (Counterclaim I).

In addition, by attempting to promulgate the RGGI Rulemaking now or in the future, the Executive Department encroaches upon the General Assembly's substantive legislative authority in several ways.

First, the RGGI Rulemaking is as an unconstitutional *ultra vires* action because it goes beyond the authority granted by the General Assembly to the Executive Department via the APCA. Through the rulemaking, the Executive Branch is attempting to enact broad, foundational, and basic policy when the Constitution mandates that such action be reserved to the General Assembly, thus constituting a violation of the separation of powers doctrine. *See* Senate Intervenor

Respondents' Answer with New Matter and Counterclaims, ¶¶176-187 (Counterclaim II).

Second, the RGGI Rulemaking is an unconstitutional encroachment upon the General Assembly's authority to enter the Commonwealth into interstate compacts. The General Assembly retains authority over, and may take legislative action regarding, any subject not specifically addressed in the Constitution. *See Collins v. Commonwealth*, 106 A. 229, 230 (Pa. 1919). Article IV of the Pennsylvania Constitution vests the Executive Department with its powers, and those enumerated powers do not include the authority to join interstate compacts or agreements, Pa. Const. art. IV., nor is the power to do so addressed elsewhere in the Constitution.

Thus, the General Assembly retains the authority to enter into binding interstate compacts, and the Executive Department cannot enter into binding interstate compacts without express authority from the General Assembly to do so.

The express authority from the General Assembly must also limit an agency's discretion with adequate standards to guide and restrain the exercise of the delegated administrative function. *See, e.g., Whitlatch v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing*, 715 A.2d 387, 389-90 (Pa. 1998) (determining Secretary of Transportation's action to enter interstate speeding enforcement agreement appropriate where statutory authorization from General Assembly "specifically enumerated the types of agreements that the Secretary of

Transportation [] is authorized to enter into, e.g. 'agreements to notify any state of violations incurred by residents of that state.'" (quoting 75 Pa.C.S. § 6146(1)).

This division of power between the Executive Department and the General Assembly is acknowledged in the language of the APCA, the very statute under which Petitioner claims to have authority to issue the RGGI Rulemaking. Specifically, Section 4(24) of the APCA provides that PADEP may, "where appropriate formulate interstate air pollution control compacts or agreements *for the submission thereof to the General Assembly.*" 35 P.S. § 4004(24) (emphasis added).

Petitioner's attempt to enter Pennsylvania into RGGI, an interstate compact, without legislative approval is a violation of the separation of powers and the plain language of the APCA. *See* Senate Intervenor Respondents Answer with New Matter and Counterclaims, ¶¶188-200 (Counterclaim III).

Next, the RGGI Rulemaking is unconstitutional because it usurps Senate Intervenor Respondents' legislative authority to levy taxes, an authority vested exclusively in the General Assembly. *See* Pa. Const. art. 2, § 1; *see also* Pa. Const. art. 3, § 31 (placing restrictions on General Assembly's right to delegate its taxing authority). "It is well-settled that '[t]he power of taxation ... lies solely in the General Assembly of the Commonwealth acting under the aegis of the Constitution.'" *See Thompson v. City of Altoona Code Appeals Bd.*, 934 A.2d 130, 133 (Pa. 2007) (quoting *Mastrangelo v. Buckley*, 250 A.2d 447, 452-53 (Pa. 1969)).

While Petitioner claims the charges for the allowances would be a permissible "fee" under the APCA, Pennsylvania courts have been skeptical of such claims where the amount of revenue generated by the fee outweighs the cost of operating the regulatory program the fee is purported to support. *See, e.g., Thompson v. City of Altoona Code Appeals Bd.*, 934 A.2d 130, 134 (Pa. 2007) (determining annual \$40 residential unit licensing fee was reasonable where the \$516,137 total fees generated over three-year period was "reasonably commensurate" with the trial court's estimate for the costs to administer the licensing program over that same period of \$500,000). Where the fees established by a governmental entity go beyond that reasonably necessary to operate the regulatory program, and therefore create revenue, the fee is deemed a tax. *Id.* at 133.

According to PADEP, during just one year of participation in RGGI, PADEP would collect "fees" from a single regulatory program that amount to almost \$650 million. For context, the total funds appropriated to PADEP from the General Fund for the 2021-22 fiscal year was just over \$169 million.² It would be disingenuous to argue the funds expected from the RGGI Rulemaking are "reasonably commensurate" with the cost of administering even the entire air program under the APCA, which is just one of PADEP's many regulatory programs.

² *See* Pennsylvania Treasury, General Fund Current Fiscal Year Enacted Budget: Appropriated Departments, <https://www.patreasury.gov/transparency/budget.php> (last visited February 19, 2022).

If published, the RGGI Rulemaking would implement this tax upon energy generators in Pennsylvania due to the requirement that they purchase allowances for CO2 emissions. This tax would also be passed through to energy customers, who would see an increase in the rate they pay for electricity.³

The RGGI Rulemaking constitutes an unconstitutional tax, and publication of the regulations would cause harm by further usurping Senate Intervenor Respondents' exclusive constitutional authority to levy taxes. *See* Senate Intervenor Respondents' Answer with New Matter and Counterclaims, ¶¶201-218 (Counterclaim IV).

Finally, the RGGI Rulemaking should not be published because it is void *ab initio* for failure to provide sufficient opportunity for public comment. The rulemaking is therefore invalid because it was not issued pursuant to proper procedure. *Corman v. Acting Sec'y of Pa. Dep't of Health*, No. 294 M.D. 2021, 2021 Pa. Commw. LEXIS 574, at *13-14 (Pa. Cmwlt. Nov. 10, 2021) (*en banc*), *aff'd*, 266 A.3d 452 (Pa. 2021) (quoting *Germantown Cab Co. v. Phila. Parking Auth.*, 933 A.2d 933, 937-38 (Pa. Cmwlt. 2010)) (emphasis added).⁴

³ The Commonwealth of Virginia joined RGGI in July 2020. A March 2022 report found most costs were passed on to customers and as a result, "participation in RGGI is in effect a direct carbon tax on all households and businesses." Virginia Carbon Trading Rule and Regional Greenhouse Gas Initiation (RGGI) Participation Costs and Benefits "A Report to the Honorable Glenn Youngkin, Governor Commonwealth of Virginia, March 11, 2022 at 3 available at <https://www.deq.virginia.gov/home/showpublisheddocument/13813/637829669069026180> (last visited March 18, 2022).

⁴ A copy of *Corman v. Acting Sec'y of Pa. Dep't of Health*, No. 294 M.D. 2021, 2021 Pa. Commw. LEXIS 574 (Pa. Cmwlt. Nov. 10, 2021) is attached to Senate Intervenor Respondents'

The procedural requirements for promulgating regulations are set forth in the Commonwealth Documents Law, 45 P.S. § 1102 *et seq.*, and 45 Pa.C.S. § 501 *et seq.*, (which collectively are known as the "Commonwealth Documents Law"). 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. *See Corman*, at *13-14.

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." *Id.* The APCA further requires that "[p]ublic hearings shall be held by [EQB] or by [PADEP], acting on behalf and at the direction or request of the board, in any region of the Commonwealth affected before any rules or regulations with regard to the control, abatement, prevention or reduction of air pollution are adopted for that region or subregion." 35 P.S. § 4007(a).

The APCA requires that "[f]ull opportunity to be heard with respect to the subject of the hearing shall be given to all persons *in attendance . . .*" *Id.* at § 4007(e) (emphasis added). PADEP hosted 10 virtual meetings, purportedly accessible by phone or internet connection during five days in December 2020. The APCA

Answer with New Matter and Counterclaim as Attachment C, and a courtesy copy is also provided here as Attachment A.

specifically contemplates in person participation, and requires the hearings be held in the region or regions affected.

Electricity generation is a significant portion of Pennsylvania's economy. According to recent analysis by the Commonwealth's Independent Fiscal Office ("IFO"), Pennsylvania is the largest exporter of electricity in the nation.⁵ Large energy generation facilities have an outsized economic impact on the communities in which they sit, and the RGGI Rulemaking, when combined with other regulatory and market pressures, has the potential to reduce the generation capacity of or even shutter these facilities.⁶ These communities and their residents are exactly the kind of "affected" constituents contemplated by the public hearing requirement in the APCA.

In addition, there are many regions in Pennsylvania that do not have adequate broadband service, making access to a meeting via phone or internet very difficult, if not impossible.⁷

For these reasons, the virtual hearings were insufficient. Implementation of the RGGI Rulemaking would have a significant impact on Pennsylvania's economy,

⁵ See Pennsylvania Electricity Update, Independent Fiscal Office, Research Brief (March 2022). A copy of the research brief is attached hereto as Exhibit A.

⁶ See Patrick Cloonan, Generating station considers cutting operations, INDIANA GAZETTE, February 15, 2022, available at https://www.indianagazette.com/news/local/generating-station-considers-cutting-operations/article_ea5bf117-fac0-50af-ad27-5cb60c9879d8.html (attached hereto as Exhibit B).

⁷ See Press Release, Governor Tom Wolf, Gov. Wolf Celebrates Effort to Close Digital Divide in Pennsylvania through Creation of Pennsylvania Broadband Authority (Feb. 15, 2022) (attached hereto as Exhibit C).

while also more acutely impacting specific communities around the Commonwealth that are home to energy generation facilities. Residents of these communities should have been provided an opportunity to *attend* meetings in person and to provide public comment during a public hearing in their community while the regulations were being developed, as required by the Commonwealth Documents Law and the APCA. PADEP failed to meet this requirement and the regulation is invalid.

b. An Injunction is Necessary to Prevent Immediate and Irreparable Harm

Deprivation of a statutory right constitutes irreparable harm *per se*. *See Grine*, 138 A.3d at 101 (internal citations omitted); *see also Wolk v. School District of Lower Merion*, 228 A.3d 595, 610 (Pa. Cmwlth. 2020). Further, any agency's failure to comply with an open government statute is sufficiently injurious to constitute irreparable harm. *Id.* For the reasons described above, publication of the RGGI Rulemaking would cause irreparable harm because it would violate the RRA, the Commonwealth Documents Law, and the separation of powers. These violations cannot be remedied via monetary damages.

In addition, and as Petitioner explains in his Verified Application for Expedited Special and Summary Relief, if the RGGI Rulemaking is published, the RGGI auction process would soon require Pennsylvania's power generation sector to pay hundreds of millions of dollars in the form of an unconstitutional tax. *See* Petitioner's Verified Application for Expedited Special and Summary Relief at ¶¶3-

12. This tax, and its financial impact on the facilities and their customers, could not be undone at a later date or remedied via damages.

Once enacted, the impact of the required auction payments would quickly permeate Pennsylvania's electricity generation and delivery network. Energy generators would begin seeking rate increases to cover the cost of the allowances, and customers would soon see increases in their energy bills. This comprehensive change to the energy generation grid could not be undone without significant effort and expense, nor can it be remedied via monetary damages.

c. Greater Harm Would Result from Refusing an Injunction than granting it because the Injunction Would Properly Maintain the Status Quo and Issuance will not Substantially Harm Other Interested Parties

Pennsylvania courts have recognized that, in the event of a statutory violation, the harm is irreparable *per se* and therefore a comparison of the relative harm is unnecessary. *See, Wolk*, 228 A.3d at 611 (citing *Pa. Public Utility Comm. v. Israel*, 52 A.2d 317, 406-07 (Pa. 1947)). However, even if it were not the case that the harm is irreparable *per se*, it remains true that greater harm would result from refusing the injunction and allowing the RGGI Rulemaking to be published than if publication is enjoined until this matter can be resolved on the merits. Publication would codify an unconstitutional rulemaking, but an injunction would maintain the status quo. *See SEIU Healthcare Pennsylvania*, 104 A.3d at 509 (aligning analysis with

demonstration of irreparable harm and concluding that maintenance of status quo that had existed for nearly 20 years to be appropriate).

Issuance of the injunction will not substantially harm other interested parties. The APCA was enacted in 1960 and the provisions cited by Petitioner as support for the RGGI Rulemaking, 35 P.S. §§ 4005(a)(1) and 4006.3(a), have not been amended in nearly 30 years. Despite discussing a desire to join RGGI as early as 2014, Governor Wolf did not issue an executive order directing PADEP to develop RGGI regulations until October 2019. *See* Senate Intervenor Respondents' Answer with New Matter and Counterclaims, Exhibit B.

In addition, Petitioner argues the RGGI Rulemaking was deemed approved on October 15, 2021, yet Petitioner waited until February 3, 2022, to file the Petition in this matter. *See* Pet. at ¶88.

Therefore, Petitioner cannot now argue the matter is so urgent that delaying publication of the RGGI Rulemaking until this matter can be decided on its merits would cause substantial harm. Rather, the injunction will properly maintain the parties' respective status by preventing publication and implementation of an unlawful, unconstitutional, and invalid set of regulations until the matter can be resolved on the merits.

d. An Injunction is Reasonably Suited to Abate the Offending Activity

The injunction is reasonably suited to abate the offending activity because the preliminary injunction will prevent publication of the unconstitutional RGGI

Rulemaking and prevent the Executive Department's encroachment upon the General Assembly's legislative authority until this matter can be resolved on the merits.

e. An Injunction is in the Public Interest

The requested preliminary injunction is in the public interest because it will maintain the status quo while the matter can be decided on the merits, and it will prevent statutory and constitutional violations. "The argument that a violation of law can be a benefit to the public is without merit." *Israel*, 52 A.2d at 406. The injunction will serve the public interest because the public has an interest in upholding the laws of this Commonwealth, including the Constitutional principles establishing the distinct roles and rights of the General Assembly and the Executive Branch.

In addition, and as discussed above, the hundreds of millions of dollars energy generators will be required to spend on allowances each year will very likely be passed on to energy consumers, who will see increases in the rates paid for electricity. Enjoining these regulations is in the public interest so as to protect the public from price increases resulting from an unlawful and unconstitutional set of regulations.

VI. Conclusion

For these reasons, Senate Intervenor Respondents respectfully request this Court preliminarily and permanently enjoin all government officials employed by

PADEP, the LRB, and the PCB from taking further steps to promulgate, publish, or otherwise codify the RGGI Rulemaking.

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Dated: March 25, 2022

Attorneys for Intervenor Respondents

CERTIFICATE OF COMPLIANCE

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

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Dated: March 25, 2022

Attorneys for Intervenor Respondents

EXHIBIT A

Pennsylvania Electricity Update



Independent Fiscal Office | Research Brief | March 2022

The Independent Fiscal Office (IFO) publishes this research brief to provide a general overview of the Pennsylvania electricity market. This is an update of a research brief published by the IFO in September 2021 and incorporates the latest data published by the U.S. Energy Information Administration (EIA).

Table 1 - Electricity Exports by State (2021)

| State | Net Generation | | | | Total | Total Consumption | Net Exports |
|----------------|----------------|------|---------|-------|-------|-------------------|--------------|
| | Nat. Gas | Coal | Nuclear | Other | | | |
| Pennsylvania | 127.3 | 29.3 | 75.9 | 9.1 | 241.6 | 156.2 | 85.5 |
| West Virginia | 2.7 | 59.6 | -- | 3.4 | 65.6 | 35.3 | 30.3 |
| Connecticut | 24.5 | 0.2 | 17.2 | 2.1 | 44.1 | 30.0 | 14.1 |
| North Carolina | 47.1 | 20.4 | 43.1 | 20.6 | 131.3 | 145.6 | -14.3 |
| New Jersey | 29.3 | 1.0 | 28.1 | 2.9 | 61.4 | 78.0 | -16.6 |
| Maryland | 14.7 | 5.8 | 15.0 | 4.1 | 39.7 | 63.5 | -23.8 |
| New York | 57.1 | -- | 31.1 | 37.0 | 125.2 | 150.8 | -25.6 |
| Ohio | 54.2 | 45.8 | 17.5 | 5.9 | 123.3 | 157.5 | -34.1 |
| Massachusetts | 14.9 | -- | -- | 4.5 | 19.4 | 54.1 | -34.7 |
| Virginia | 54.1 | 3.1 | 28.6 | 8.5 | 94.3 | 133.2 | -38.8 |

Note: Amounts in millions of megawatt hours. Total consumption includes 2020 amounts for direct use and line losses, which are not yet available for 2021.
Source: U.S. Energy Information Administration.

Table 1 shows net electricity generation by fuel source, total electricity consumption and net exports for Pennsylvania and other regional states. Net generation is broken down into electricity generated from natural gas, coal, nuclear and other sources. Other sources include petroleum, hydroelectric, wind, solar and other renewable sources. Total consumption is the sum of (1) retail sales of electricity to all sectors (residential, commercial, industrial, transportation) within the state, (2) direct use electricity and (3) estimated line losses. Net exports are equal to net generation less total consumption.¹

For 2021, Pennsylvania exported more megawatt hours of electricity than any other state. The state’s net exports were 79.7% higher than Alabama (not shown), the second largest exporter of electricity. Among regional states, Pennsylvania was the largest producer and net exporter of electricity. Nearly all other states shown in Table 1 (except West Virginia and Connecticut) were net importers of electricity. Pennsylvania exported 35.3% of the electricity it generated in 2021, behind only West Virginia (46.1%) among regional states.

Table 2 (next page) shows recent trends in average electricity prices for residential customers in Pennsylvania and regional states. The table shows the average price in 2016, the average price in 2021, and the ratio of other states’ prices to the Pennsylvania price. The residential price in Pennsylvania declined by 0.5% from 2016 to 2021. That trend is due to increasing natural gas production that provided a relatively low-cost input for electricity generators in the state. Moreover, the share of total electricity generation from

¹ This computation generally follows the EIA methodology used to compute net interstate trade.

Table 2 - Residential Electricity Price

| State | 2016 | 2021 | 2016 Ratio | 2021 Ratio |
|----------------|-------|-------|------------|-------------|
| Massachusetts | 19.00 | 22.91 | 1.37 | 1.66 |
| Connecticut | 20.01 | 21.86 | 1.44 | 1.59 |
| New York | 17.58 | 19.44 | 1.27 | 1.41 |
| New Jersey | 15.72 | 16.37 | 1.13 | 1.19 |
| Pennsylvania | 13.86 | 13.79 | -- | -- |
| Maryland | 14.23 | 13.14 | 1.03 | 0.95 |
| Ohio | 12.47 | 12.78 | 0.90 | 0.93 |
| West Virginia | 11.44 | 12.16 | 0.83 | 0.88 |
| Virginia | 11.36 | 12.14 | 0.82 | 0.88 |
| North Carolina | 11.03 | 11.50 | 0.80 | 0.83 |

Note: Cents per kilowatt hour.

Source: U.S. Energy Information Administration.

Pennsylvania plants that use natural gas increased from 28% to 53% during that period. For the New England states, New York and New Jersey, prices were higher than Pennsylvania in 2016, and the differential widened through 2021. The average residential price in states located south or west of Pennsylvania were lower in 2016 (i.e., the price ratio was below 1.0), and the relative price differential narrowed over time. Maryland is the sole exception to these trends.

Table 3 uses net generation and carbon dioxide emissions from electricity generators to calculate carbon emissions per kilowatt hour for the same states for 2007 and 2021. Calendar year 2007 was used because that year marks the recent peak of power sector carbon dioxide emissions for Pennsylvania. During that period, Pennsylvania generation increased by 6.9%, but carbon emissions declined by 37.4%. Among the states shown, the average reduction in emissions per unit from 2007 to 2021 was 32.2%. Pennsylvania's carbon emissions per unit decreased by 41.4%, notably higher than the average. This outcome is due to the significant shift from coal to natural gas in the state's electricity generation mix over that period.

Table 3 - Electricity Generation Carbon Dioxide Emissions

| State | Generation | | Emissions | | Emissions per Unit | |
|----------------|------------|-------|-----------|------|--------------------|-------------|
| | 2007 | 2021 | 2007 | 2021 | 2007 | 2021 |
| New York | 145.9 | 125.2 | 53.7 | 28.7 | 0.37 | 0.23 |
| New Jersey | 62.7 | 61.4 | 20.8 | 14.5 | 0.33 | 0.24 |
| Connecticut | 33.2 | 44.1 | 10.5 | 10.6 | 0.32 | 0.24 |
| Virginia | 78.4 | 94.3 | 47.2 | 27.3 | 0.60 | 0.29 |
| North Carolina | 130.1 | 131.3 | 79.4 | 40.5 | 0.61 | 0.31 |
| Pennsylvania | 226.1 | 241.6 | 129.3 | 81.0 | 0.57 | 0.34 |
| Maryland | 50.2 | 39.7 | 31.5 | 15.2 | 0.63 | 0.38 |
| Massachusetts | 47.1 | 19.4 | 25.8 | 8.4 | 0.55 | 0.43 |
| Ohio | 155.2 | 123.3 | 132.0 | 68.7 | 0.85 | 0.56 |
| West Virginia | 93.9 | 65.6 | 87.3 | 58.4 | 0.93 | 0.89 |

Note: Generation in million megawatt hours. Emissions in million metric tons.

Source: U.S. Energy Information Administration. 2021 Emissions are estimated by the IFO based on 2021 generation and 2020 emissions per unit.

Staff Acknowledgments

This report was produced by Jesse Bushman. Questions regarding this report can be directed to jbushman@ifso.state.pa.us.

EXHIBIT B

https://www.indianagazette.com/news/local/generating-station-considers-cutting-operations/article_ea5bf117-fac0-50af-ad27-5cb60c9879d8.html

FEATURED

Generating station considers cutting operations

By PATRICK CLOONAN pcloonan@indianagazette.net

Feb 15, 2022



A large crow flew from its perch in a tree on Penn View Mountain silhouetted against the massive Homer City Generating Station, several miles away in Center Township.

Gazette file photo

Operators of Pennsylvania's largest coal-fired electric generating complex, the Homer City Generating Station in Center Township, Indiana County, said Monday they may reduce operations by May 2023, due in part to the Regional Greenhouse Gas Initiative.

However, in a news release issued by Homer City Generation LP, the station's ownership group since April 2017, its management said there would be no immediate impact on 129 employees there.

"We're proud of the investments we've made in the Homer City Generating Station and the work of our talented team of employees," said Homer City Generation President and CEO William Wexler.

Specifically, Homer City Generation LP said it may decide by April 4 whether to pull back some operations from a capacity auction PJM Interconnection LLC will conduct.

Homer City Generation LP operates three generating units — two that started in 1969 and a third that was added in 1977 — and produces 1,884 megawatts of power fed into the PJM regional transmission grid.

PJM, which covers Pennsylvania as well as all or part of 12 other states and the District of Columbia, is conducting the auction to procure power supply resources for the 2023-24 delivery year.

Homer City Generation officials said the company requested an exception to the must-offer requirement for some units.

They said any deactivated units would be removed from service in May 2023.

In its release, Homer City Generation LP said any decommissioning decision would be based on a number of factors, including:

- Ongoing operating performance
- The ability to support a one- or two-unit operation
- Ongoing maintenance and operating costs
- Forward power and coal prices
- Availability of coal supply
- Regulatory uncertainties

The latter include “those arising from the Commonwealth of Pennsylvania’s prospective entry into” RGGI, a regional compact seeking to cap and reduce carbon dioxide emissions from the power sector.

“The current ownership group at Homer City obtained the facility out of its second bankruptcy reorganization in 2017, but even prior to that time — and long before RGGI was proposed — there were discussions regarding its financial capacity to continue operations as the market forces for coal-fired electric generating units are challenging,” said Gov. Tom Wolf’s Press Secretary Elizabeth Rementer.

“That said,” Rementer continued, “the governor’s plan to participate in RGGI, as laid out in two pieces of identical legislation, House Bill 1565 and Senate Bill 15, would support workers impacted by closing facilities — facilities that have been closing without RGGI in place.”

HB 1565, sponsored by Rep. Dianne Herrin, and SB 15, sponsored by Carolyn T. Comitta, both D-Chester, would amend the state’s Air Pollution Control Act of 1960 to provide for “disposition of auction proceeds from (the) CO2 Budget Trading Program, for clean air fund accounts, for the Energy Communities Trust Fund and for Environmental Justice Communities Trust Fund.”

Herrin’s bill has 23 co-sponsors, Comitta’s 12, all Democrats. Both remain in the Environmental Resources and Energy committees of the respective legislative chambers.

On the other hand, Wolf has repeatedly vetoed Republican legislation that either would restrict or reject RGGI. Most recently, in January, it was a joint legislative resolution that turned thumbs down on a regulation by the state Environmental Quality Board to have Pennsylvania join RGGI.

Rementer also called attention to a petition filed Feb. 3 in Commonwealth Court by state Department of Environmental Protection Secretary Patrick J. McDonnell, in that role and his position as EQB chairperson, calling on officials of the Pennsylvania Legislative Reference Bureau and Pennsylvania Code and Bulletin to “discharge their mandatory, nondiscretionary duty to publish EQB’s duly-promulgated final-form rulemaking” that would implement Pennsylvania’s entry into RGGI.

RGGI now includes Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont and Virginia.

Virginia Gov. Glenn Youngkin has signed an executive order to start the process of withdrawing that commonwealth from RGGI, while in North Carolina the process is under way that could bring that state into the compact.

“We look forward to engaging with the local community on alternative uses, including but not limited to the installation of renewable generating capacity, given the significant amount of infrastructure located on the site,” Wexler said. “Our community has benefited from the economic engine that is the Homer City Generating Station for over 50 years,” said state Sen. Joe Pittman, R-Indiana.

“The operations of the facility have evolved over time and I fully believe there is an opportunity for continued productive economic use of the site beyond May of 2023.”

Pittman acknowledged that what that use may be is an open question, but also said regulatory hurdles and taxes as proposed by RGGI make future use opportunities very difficult to explore. A spokesman for Citizens for Pennsylvania’s Future, or PennFuture, said Homer City had been the only large coal-fired power plant in Pennsylvania that hadn’t announced plans to retire or convert to fracked-gas. “This change has been driven by a highly competitive energy market where dirty coal-fired units built in the 1960s just can’t compete,” said Rob Altenburg, PennFuture’s senior director for Energy and Climate. “This shift in the industry has been underway since well before Pennsylvania contemplated joining the Regional Greenhouse Gas Initiative, but RGGI is part of the solution. Not only does it require polluters to pay towards the damage they are causing, it also generates proceeds that can be invested to help workers and communities impacted by the failure of fossil fuel industries.” Rep. Jim Struzzi, R-Indiana, whose legislative district includes the Homer City station, called this development unfortunate news.

“It highlights why we have been fighting to stop Pennsylvania’s entry in (to RGGI),” Struzzi said.

“We will work with the power plant to minimize the impacts and hope for the best outcome for our county.” Equally, Pittman said, “I remain committed to working with my elected colleagues, the current ownership team of the plant and all potentially affected employees in figuring out the highest and best economic use of the Homer City Generating Station beyond May of 2023.”

Homer City’s announcement follows a more stringent set of wastewater guidelines issued last fall by the U.S. Environmental Protection Agency.

It requires power plants to clean coal ash and toxic heavy metals such as mercury, arsenic and selenium from plant wastewater before it is dumped into streams and rivers.

In west-central Pennsylvania, the Keystone Generating Station in Plumcreek Township, Armstrong County, and the Conemaugh Generating Station in West Wheatfield Township, said they will stop using coal and retire all of their generating units by Dec. 31, 2028, according to regulatory notices obtained separately by The Associated Press.

However, Homer City Generation LP told state regulators it plans to keep operating and abide by the new wastewater limits.

PAT CLOONAN

EXHIBIT C

Gov. Wolf Celebrates Effort to Close Digital Divide in Pennsylvania through Creation of Pennsylvania Broadband Authority

February 15, 2022

Economy, Efficiency, Equality, Infrastructure, Press Release

Acknowledging that broadband is essential to success in the commonwealth, Governor Tom Wolf today celebrated the creation of Pennsylvania's Broadband Development Authority, which will manage at least \$100 million in federal aid to coordinate the rollout of broadband across Pennsylvania.

"Broadband is as essential today as electricity and water. But there is a digital divide in Pennsylvania," said Gov. Wolf. "This Broadband Authority will close the divide and ensure consistent, affordable, quality statewide broadband to keep children learning, businesses growing, and opportunities abounding for all Pennsylvanians."

In December, Gov. Wolf signed House Bill 2071 to create the Pennsylvania Broadband Authority to serve as a one stop shop for all things broadband in Pennsylvania.

"Without reliable high-speed internet, kids can't do their homework and local businesses can't compete," said U.S. Senator Bob Casey. "We passed the Infrastructure Investment and Jobs Act to help solve this very problem. The formation of the Pennsylvania Broadband Development Authority, enacted into law by Gov. Wolf, is a critical step in Pennsylvania using the hundreds of millions of dollars coming to the commonwealth for broadband thanks to the infrastructure law. With access to high-speed internet, kids can keep up in school, small businesses can reach more customers and families can stay connected. This is an investment in our communities, our children and their future."

Pain from lack of reliable broadband is found statewide and was exacerbated over the past two years as Pennsylvanians relied on virtual means of communication, work, and learning. While rural counties are especially vulnerable, communities outside of Pennsylvania's biggest cities are also left behind because of inaccessibility or affordability. At least 500,000 Pennsylvanians are without broadband, this lack of access slows economic growth and limits opportunity.

"It is alarming that still today, I hear the troubling stories of rural communities where internet access remains unavailable. The fact that this is still an issue plaguing rural communities in our commonwealth is simply unacceptable," said Superintendent of Wyalusing Area School District Dr. Jason Bottiglieri, representing the Pennsylvania Association of Rural and Small Schools. "While nearly every Pennsylvanian has likely experienced a dropped cell phone call or experienced frustration with an internet outage, our rural communities deal with this every day. Imagine learning in that environment, imagine working or running a business in that environment, imagine not having access to conduct medical research, or being denied equal access to quality doctors and mental health services that can be delivered via telemedicine. We cannot allow a child's zip code to dictate their success."

HB2071 was championed by a bipartisan workgroup that included members of the Administration and the General Assembly. Representatives Pam Snyder and Martin Causer, and Senator John Kane joined today's celebration.

"The creation of the Pennsylvania Broadband Development Authority is just the beginning step to connect millions of Pennsylvanians to high-speed internet," Rep. Snyder said. "Now the commonwealth has a single entity that can solely focus on making sure that every resident has equal and affordable access to broadband, no matter where they live."

"The bipartisan broadband legislation I sponsored is a game changer for our state. With the Authority in place, we will have the kind of comprehensive plan and coordinated effort we need to maximize broadband funding to rollout high-speed connectivity in every part of our state," said Rep. Causer. "Thank you to my colleagues in the Legislature and Gov. Wolf for your support of this important legislation."

The Pennsylvania Broadband Development Authority is made of an 11-member board. The board includes the secretaries of the Pennsylvania Departments of Agriculture, Community and Economic Development, Education, General Services, and Budget; the executive director for the Center for Rural Pennsylvania; chairperson from the Pennsylvania Utilities Commission; and four legislative members.

“Two months ago, we passed a historic bill to establish Pennsylvania’s Broadband Development Authority, the first entity of its kind in the history of the commonwealth. I was honored to be appointed to the board of the Authority, and I’m thrilled about the work we started at today’s meeting,” said Senator Kane. “As a commonwealth, we have the chance to make a major investment in expanding our broadband infrastructure to ensure all Pennsylvanians are covered, while creating good-paying, family-sustaining jobs in the process. I look forward to working with this bipartisan group moving forward to make sure all Pennsylvanians have access to this essential utility.”

Gov. Wolf has worked to improve broadband access throughout his administration. In 2018, the Wolf Administration launched a \$35 million Pennsylvania Broadband Investment Incentive Program to expand broadband in rural areas.

In 2021, the Pennsylvania Department of Community and Economic Development launched the Unserved High-Speed Broadband Funding Program to further support the deployment of high-speed broadband infrastructure to unserved areas with \$10 million in funding.

The creation of the Pennsylvania Broadband Development Authority is a step to provide broadband access to all Pennsylvanians and put the commonwealth on a path to a brighter future.

ATTACHMENT A

Corman v. Acting Sec'y of the Pa. Dep't of Health

Commonwealth Court of Pennsylvania

October 20, 2021, Argued; November 10, 2021, Decided; November 10, 2021, Filed

No. 294 M.D. 2021

Reporter

2021 Pa. Commw. LEXIS 574 *; 2021 WL 5227124

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, Petitioners v. Acting Secretary of the Pennsylvania Department of Health, Respondent

Subsequent History: As Amended November 17, 2021.

Affirmed by, Motion granted by Corman v. Acting Secy. of the Pa. Dep't of Health, 2021 Pa. LEXIS 4199 (Pa., Dec. 10, 2021)

Counsel: [*1] For West York Area School District, Jesse Wills Topper, Michelle Reich, James Reich, Penncrest School District Amanda Palmer, Klint Neiman, Chelsea McClure, Adam McClure, Hillcrest Christian Academy Jacob Doyle Corman, Chestnut Ridge School District Calvary Academy Victoria T. Baptiste, Jennifer D. Baldacci, Petitioner: Thomas E. Breth, Dillon McCandless King Coulter & Graham, LLP, Butler, PA; Elliott, Ronald Troy, Dillon McCandless King Coulter & Graham LLP, Butler, PA; Shuber, Jordan Peter, Dillon, McCandless, King, Coulter & Graham, L.L.P., Butler, PA.

For Penn-Trafford School District, Amicus Curiae: Korns, Michael Thurman, 2nd, Maiello Brungo & Maiello Llp, Pittsburgh, PA.

For Central York School District, Amicus Curiae: Harris, Christopher Lee, Stock and Leader, LLP, York, PA; Pahowka, Gareth David, Stock and Leader, LLP, York, PA.

For Alison Beam, Respondent: Neary, Keli Marie, Romano, Karen Mascio, Pennsylvania Office of Attorney General, 16th Floor, Strawberry Square, Harrisburg, PA, Harrisburg, PA.

Judges: BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge, HONORABLE PATRICIA A. McCULLOUGH, Judge, HONORABLE MICHAEL H. WOJCIK, Judge, HONORABLE CHRISTINE FIZZANO CANNON, Judge, HONORABLE ELLEN [*2] CEISLER, Judge. OPINION BY JUDGE FIZZANO CANNON. President Judge Brobson and Judges Cohn Jubelirer, Covey, and Crompton did not participate in this decision. DISSENTING OPINION BY JUDGE WOJCIK.

Opinion by: CHRISTINE FIZZANO CANNON

Opinion

OPINION BY JUDGE FIZZANO CANNON

This case presents a challenge by Petitioners Jacob Doyle Corman, III, 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, Penncrest School District, Chestnut Ridge School District, and West York Area School District (collectively, Petitioners) to the "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities" (Masking Order) issued on August 31, 2021, by Alison M. Beam, the Acting Secretary of Health¹ (Acting Secretary or Respondent), which imposed an open-ended general masking requirement effective September 7, 2021, on all teachers, students, school staff, and visitors within Pennsylvania's schools, regardless of vaccination status, with certain exceptions. Petitioners' underlying First Amended Petition for Review (Amended Petition)² alleges [*3] the Masking Order is void *ab initio* as a result of the Acting Secretary's failure to comply with the requirements of Pennsylvania law in imposing the Masking Order and seeks an injunction preventing the Acting Secretary from enforcing the Masking Order. The Amended Petition further claims that the Masking Order violates the non-delegation doctrine.

Before the Court currently are Petitioners' Application for Summary Relief and Entry of Judgment Pursuant to Pa.R.A.P. 1532 and In Accordance With the Court's September 27, 2021 Order (Petitioners' Application) and Respondent's Application for Summary Relief (Respondent's Application) filed by the Acting Secretary.

Preliminarily, we note that we express herein no opinion regarding the science or efficacy of mask-wearing or the politics underlying the considerable controversy the subject continues to engender. *See Wolf v. Scarnati*, 233 A.3d 679, 684 (Pa. 2020). Instead, we decide herein only the narrow legal question of whether the Acting Secretary acted properly in issuing the Masking Order in the absence of either legislative oversight or a declaration of disaster emergency by the Governor.³

¹ Although Alison M. Beam is identified in the Masking Order as the "Acting Secretary of the Pennsylvania Department of Health," her actual title is "Acting Secretary of Health." *See* Section 205 of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended* (Administrative Code), 71 P.S. § 66 (stating the heads of the Commonwealth's administrative departments and their respective titles).

² As discussed *infra*, Petitioners originally filed their Petition for Review on September 3, 2021. On September 24, 2021, Petitioners filed Petitioners' Motion for Leave to File Amended Petition for Review (Petition to Amend) seeking to add the Penncrest School District, Chestnut Ridge School District, and West York Area School District as additional petitioners. *See* Petition to Amend. This Court granted the Petition to Amend and docketed the Amended Petition on September 27, 2021, at which time the Amended Petition became the operative filing before this Court. *See* Commonwealth Court Order dated September 27, 2021. We note that, by stipulation filed October 4, 2021, the parties jointly agreed that Respondent would not need to file a responsive pleading to the Amended Petition, if necessary, until 14 days after the Court's resolution of the parties' respective applications for summary relief presently before the Court. *See* Stipulation filed October 4, 2021, at 1-2.

³ The parties stipulated that this matter could be decided on the purely legal issues of (1) whether the Masking Order constitutes a rule or regulation subject to the provisions of the Regulatory Review Act, Act of June 25, 1982, P.L. 633, *as amended*, 71 P.S. §§ 745.1-745.15 (Regulatory Review Act), and (2) whether the Masking Order violates the principles governing the delegation of legislative authority. *See* Commonwealth Court Order dated September 13, 2021 (September 13 Order) at 2. While the Dissenting Opinion raises issues of the substantive merit of the Masking Order, *see* Dissenting Opinion at 11-12, that issue is not before this Court. This Majority Opinion intentionally does not respond to points raised by the Dissenting Opinion, on the merits or otherwise, beyond the scope of those stipulated by the parties for consideration by this Court.

Upon review, we grant Petitioners' Application and deny Respondent's [*4] Application.

I. Background and Procedural Posture

On March 6, 2020, Governor Wolf issued a Proclamation of Disaster Emergency (Disaster Proclamation) pursuant to Section 7301(c) of the Emergency Management Services Code (Emergency Code),⁴ 35 Pa.C.S. § 7301(c),⁵ regarding the novel coronavirus (COVID-19) pandemic.⁶ Thereafter, the Governor implemented numerous orders designed to mitigate and stop the spread of COVID-19, which orders, *inter alia*, closed restaurants and bars in Pennsylvania for in-person dining, closed non-essential businesses, limited the size of in-person gatherings within the Commonwealth, and directed citizens to stay at home. Governor Wolf also issued multiple periodic amendments to the Disaster Proclamation, each of which renewed the Disaster Proclamation for an additional 90 days.⁷

On May 18, 2021, the voters of the Commonwealth approved two amendments to the Pennsylvania Constitution that limit the Governor's power under the Emergency Code (collectively, the Constitutional Amendments).⁸ The first of the Constitutional Amendments amended section 9 of article III of the Constitution to allow the General Assembly, by a simple majority vote, to extend or terminate a gubernatorial disaster emergency declaration, or a portion thereof, as declared by an executive order or proclamation. *See* Pa. Const. art. III, § 9.⁹ The second of the Constitutional Amendments added new

⁴ 35 Pa.C.S. §§ 7101-79A33.

⁵ At the time Governor Wolf issued the Disaster Proclamation, Section 7301 of the Emergency Code allowed for the issuance of disaster emergency declarations that would continue at the discretion of the Governor for renewable 90-day periods terminable by the General Assembly as follows:

Declaration of disaster emergency.--A disaster emergency shall be declared by executive order or proclamation of the Governor upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent. The state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist [*5] and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time.

³⁵ Pa.C.S. § 7301(c). As discussed *infra*, the enactment of two amendments to Pennsylvania's Constitution in May of 2021 limited the duration of a gubernatorial disaster emergency declaration pursuant to this section of the Emergency Code.

⁶ At the time the Governor issued the Disaster Proclamation, the World Health Organization (WHO) characterized the COVID-19 outbreak as a "public health emergency of international concern." *See* Disaster Proclamation at 1 (pagination supplied). The WHO upgraded the COVID-19 outbreak to a global pandemic shortly thereafter on March 11, 2020.

⁷ The Governor issued amendments renewing the Disaster Proclamation on June 3, 2020, August 31, 2020, November 24, 2020, February 19, 2021, and May 20, 2021.

⁸ The Constitutional Amendments followed our Supreme Court's July 1, 2020 decision in *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020), wherein the Supreme Court held that the General Assembly could not unilaterally terminate a Governor's emergency powers by resolution. *See generally Scarnati*.

⁹ Section 9 of article III of the Pennsylvania Constitution now provides as follows:

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 [*6] 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.

section 20 to article IV of the Pennsylvania Constitution, which section limits the duration of a gubernatorial disaster emergency declaration to 21 days absent an extension by concurrent resolution of the General Assembly. *See* Pa. Const. art. IV, § 20.¹⁰

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

However, on August 31, 2021, in anticipation of a Commonwealth-wide return to in-person learning in the 2021-2022 school year, the Acting Secretary issued the Masking Order, effective September 7, 2021. Initially, the Masking Order provides an introductory statement that explains the Acting Secretary imposed the Masking Order to protect the health and safety of Pennsylvania's schoolchildren.¹¹ *See* [*8] Masking Order at 1-3. The introductory statement outlines the Acting Secretary's purported authority to impose the Masking Order as follows:

COVID-19 is a threat to the public's health, for which the Secretary of Health may order general control measures. This authority is granted to the Secretary of Health pursuant to Pennsylvania law. *See* [S]ection 5 of the Disease Prevention and Control Law[, Act of April 23, 1956, P.L. (1955) 1510 (Disease Control Law)], 35 P.S. § 521.5; [S]ection 2102(a) of The Administrative Code of 1929, 71 P.S. § 532(a); and the Department of Health's regulation at 28 Pa. Code § 27.60 (relating to disease control measures). Particularly, the Department of Health [] has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. *See* 35 P.S. §

Pa. Const. art. III, § 9.

¹⁰Section 20 of article IV of the Pennsylvania Constitution provides:

§ 20. Disaster emergency declaration and management

(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.

(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.

(c) A disaster emergency declaration [*7] 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.

(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 General Assembly expressly approving the new disaster emergency declaration.

Pa. Const. art. IV, § 20.

¹¹The Masking Order breaks this generalized reason into multiple sub-reasons: (1) the rising risk of COVID-19 to unvaccinated individuals based on the increased transmissibility and severity of the Delta variant of the SARS-CoV-2 virus; (2) the current unavailability of an approved vaccine for many school-aged children; (3) the desire to maintain in-person instruction and socialization, which are necessary for the health and wellbeing of children; (4) the strong recommendation issued by the Centers for Disease Control and Prevention for masking of all persons within the nation's schools regardless of vaccination status; (5) the recommendation of the American Academy of Pediatrics that masks be worn in schools; (6) studies indicating that mask-wearing in schools contributes to lower levels of COVID-19 transmission among students and staff; and (7) rising COVID-19 case counts and hospitalizations. *See* Masking Order at 1-3.

521.5; 71 P.S. §§ 532(a), and [Section 8 of the Act of April 27, 1905, P.L. 312, *as amended*, 71 P.S. §] 1403(a); 28 Pa. Code § 27.60.

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

Each teacher, child/student, staff, or visitor working, attending, or visiting a School Entity¹² shall wear a face covering indoors, regardless of vaccination status, except as set forth in Section 3.¹³

Masking Order at 4. Regarding the duration of the Masking Order, Section 6 indicates that, once effective, the Masking Order "shall remain in effect until otherwise terminated." [*9] Masking Order at 6.

On September 3, 2021, Petitioners filed a Petition for Review, in which Petitioners allege the Acting Secretary failed to comply with the requirements of the Disease Control Law in issuing the Masking Order, and "Petitioners' Application for Special Relief in the Form of an Emergency Preliminary

¹²The Masking Order defines a "School Entity" 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 and 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.
- (8) A childcare provider licensed by the Department of Human Services of the Commonwealth.

Masking Order at 3-4.

¹³Section 3 of the Masking Order enumerates the exceptions to the masking requirement and provides:

The following are exceptions to the face covering requirements in Section 2. All alternatives to a face covering, including the use of a face shield, should be exhausted before an individual is excepted from this Order.

- 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.
- 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.
- C. When necessary to confirm the individual's identity.
- D. When working alone and isolated from interaction [*10] with other people with little or no expectation of in-person interaction.
- 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.
- F. When the individual is under two (2) years of age.
- G. When an individual is:
 - 1) Engaged in an activity that cannot be performed while wearing a mask, such as eating and drinking, or playing 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.

Masking Order at 4-5.

Injunction Under Pa.R.A.P. 1532" (Application for Special Relief), [*11] which sought an injunction to prevent the Acting Secretary from enforcing the Masking Order. The Acting Secretary filed Respondent's Answer to Petitioners' Application for Special Relief in the Form of an Emergency Preliminary Injunction on September 8, 2021, and the matter was scheduled for a hearing on September 16, 2021.

Following a pre-hearing conference conducted on September 13, 2021, on agreement of the parties, the Court stayed the hearing on the Application for Special Relief¹⁴ and directed the parties to file briefs addressing the limited legal issues of (1) whether the Masking Order constitutes a rule or regulation subject to the provisions of the Regulatory Review Act, Act of June 25, 1982, P.L. 633, *as amended*, 71 P.S. §§ 745.1-745.15 (Regulatory Review Act), and (2) whether the Masking Order violates the principles governing the delegation of legislative authority. *See* Commonwealth Court Order dated September 13, 2021 (September 13 Order) at 2. Thereafter, Petitioners and Respondent each timely filed a brief pursuant to the September 13 Order on September 16, 2021, and September 23, 2021, respectively. Following a status conference conducted on September 27, 2021, Petitioners withdrew the Application [*12] for Special Relief and the parties filed their respective applications for summary relief and responses thereto. This Court conducted *en banc* argument on October 20, 2021. The parties' applications for summary relief are now ripe for determination by the Court.^{15,16}

II. Discussion

The applications for summary relief¹⁷ currently before the Court argue diametrically opposed views of the same undisputed facts, stated *supra*, regarding the imposition of the Masking Order, with each party claiming that these undisputed facts entitle them to summary relief. Petitioners argue that, because the Acting Secretary imposed the Masking Order without statutory authority, the Masking Order, which does

¹⁴ The Court also held in abeyance Respondent's "Application for Relief in the Nature of a Motion to Quash Notice to Attend and Subpoena *Ad Testificandum* Directed to Alison M. Beam, Acting Secretary of Health," which sought to quash the subpoena issued to compel the testimony of the Acting Secretary at the scheduled hearing on the Application for Special Relief. *See* Commonwealth Court Order dated September 13, 2021, at 2.

¹⁵ Amicus Curiae briefs were filed by the Spring Grove Area School District, Central York School District and Penn-Trafford School District.

¹⁶ On October 27, 2021, the Acting Secretary also filed "Respondents' [sic] Application for Relief in the Nature of a Motion for Leave to Supplement the Record" in this matter (Application to Supplement Record), seeking to add the Joint Committee on Documents' October 21, 2021, Order in Favor of Respondent Department of Health (Joint Committee Order) to the record of this matter. *See* Application to Supplement Record. This Application to Supplement the Record was treated as an application pursuant to Rule of Appellate Procedure 2501(a) and was granted on October 29, 2021, as a post-submission communication to the Court advising the Court of the Joint Committee Order. *See* Pa.R.A.P. 2501(a).

¹⁷ Pennsylvania Rule of Appellate Procedure 1532(b) provides that "[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear." Pa.R.A.P. 1532(b); *see also Summit Sch., Inc. v. Commonwealth*, 108 A.3d 192, 195 (Pa. Cmwlth. 2015). In deciding a request for summary relief, "this [C]ourt must determine whether it is clear from the undisputed facts that either party has a clear right to the relief requested." *Bell Atl.-Pa., Inc. v. Tpk. Comm'n*, 703 A.2d 589, 590 (Pa. Cmwlth. 1997), *aff'd*, 552 Pa. 41, 713 A.2d 96 (Pa. 1998). "The record, for purposes of the motion for summary relief, is the same as a record for purposes of a motion for summary judgment." *Summit*, 108 A.3d at 195-96. Pursuant to Pennsylvania Rule of Civil Procedure 1035.1, the record in a motion for summary judgment includes any: "(1) pleadings, (2) depositions, answers to interrogatories, admissions and affidavits, and (3) reports signed by an expert witness that would, if filed, comply with [Pa.R.Civ.P. 4003.5(a)(1)], whether or not the reports have been produced in response to interrogatories." Pa.R.Civ.P. 1035.1. "In ruling on applications for summary relief, [this Court] must view the evidence of record in the light most favorable to the non-moving party and enter judgment only if there is no genuine issue as to any material facts and the right to judgment is clear as a matter of law." *Eleven Eleven Pa., LLC v. Commonwealth*, 169 A.3d 141, 145 (Pa. Cmwlth. 2017) (internal brackets omitted).

not rely on a gubernatorial declaration of disaster emergency, represents a rule or regulation issued without compliance with established, statutory rulemaking requirements and is accordingly void *ab initio*. See generally Petitioners' Application; Petitioners' Br. Respondent, on the other hand, argues that the Masking Order is not a rule or regulation subject to regulatory rulemaking procedures, but instead was promulgated pursuant to existing statutory and [*13] regulatory authority. See generally Respondent's Application; Respondent's Br.

Initially, we begin by reviewing the established law governing the process for the promulgation of regulations by Commonwealth agencies. As this Court has explained:

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 Law[, Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §§ 1102-1602, and 45 Pa.C.S. §§ 501-907, which, collectively, are known as the "Commonwealth Documents Law"], the Commonwealth Attorneys Act[, Act of October 15, 1980, P.L. 950, *as amended*, 71 P.S. §§ 732-101-732-506,] and the Regulatory Review Act. Regulations promulgated in accordance with these requirements have the force and effect of law. A regulation not promulgated in accordance with the statutory requirements will be declared a nullity.

In general, the purpose of the Commonwealth Documents Law is to promote public participation in the promulgation of a regulation. To [*14] 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. [Section 202 of the Commonwealth Documents Law,] 45 P.S. § 1202. After an agency obtains the Attorney General's approval of the form and legality of the proposed regulation, the agency must deposit the text of the regulation with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*. Section 205, 207 of the Commonwealth Documents Law, 45 P.S. §§ 1205, 1207.

The legislature has identified what is meant by an "agency" for purposes of the Commonwealth Documents Law. It has defined an "agency" as:

the Governor or any department, departmental administrative board or commission, officer, independent board or commission, authority or other agency of this Commonwealth now in existence or hereafter created. . . .

Section 102(3) of the Commonwealth Documents Law, 45 P.S. § 1102(3) []. Thus, any "independent commission" or any "other agency of this Commonwealth," including one not in existence at the time of the enactment of the Commonwealth Documents Law, is subject to its terms.

Germantown Cab Co. v. Phila. Parking Auth., 993 A.2d 933, 937-38 (Pa. Cmwlth. 2010), *aff'd*, 614 Pa. 133, 36 A.3d 105 (Pa. 2012) (footnotes, internal quotations, emphasis, and some internal citations omitted).

Additionally, the Regulatory [*15] Review Act establishes a "mandatory, formal rulemaking procedure"¹⁸ that is, with rare exceptions, required for the promulgation of [agency] regulations." See *Naylor v.*

¹⁸In promulgating regulations, the Regulatory Review Act requires that Commonwealth agencies "submit [] proposed regulation[s] to [the Independent Regulatory Review Commission (IRRC)] for public comment, recommendation from [the] IRRC, and, ultimately, [the] IRRC's

Commonwealth, 54 A.3d 429, 433 (Pa. Cmwlth. 2012), *aff'd*, 621 Pa. 190, 76 A.3d 536 (Pa. 2013); *see also* Section 5 of the Regulatory Review Act, 71 P.S. § 745.5. The General Assembly enacted the Regulatory Review Act with the express purpose of establishing procedures "for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate[.]" 71 P.S. § 745.5.¹⁹ Accordingly, 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, the enactment of new rules and regulations proposed by Commonwealth agencies must be accomplished in compliance with the mandatory procedures for review set forth in the Regulatory Review Act.²⁰ *See* 71 P.S. § 745.5. Our

approval or denial of a final-form regulation. [Section 5 of the Regulatory Review Act,] 71 P.S. § 745.5." *Naylor v. Commonwealth*, 54 A.3d 429, 434 (Pa. Cmwlth. 2012), *aff'd*, 621 Pa. 190, 76 A.3d 536 (Pa. 2013).

For thirty [*16] days thereafter, interested members of the public or relevant legislative committees may submit public comments. At the close of the public comment period, [the] IRRC may offer recommendations on the proposed regulation. The agency then reviews and considers the comments and delivers final-form regulations to [the] IRRC.

[The] IRRC may then approve or disapprove the regulations within thirty (30) days. In making a decision, [the] IRRC considers, in part, whether the agency has the statutory authority to promulgate the legislation.

Naylor, 54 A.3d at 434 n.10 (internal citations omitted).

¹⁹ The General Assembly explained its intent in enacting the Regulatory Review Act in depth as follows:

The General Assembly has enacted a large number of statutes and has conferred on boards, commissions, departments and agencies within the executive branch of government the authority to adopt rules and regulations to implement those statutes. The General Assembly has found that this delegation of its authority has resulted in regulations being promulgated without undergoing effective review concerning cost benefits, duplication, inflationary impact and conformity to legislative intent. The General Assembly finds that it must establish a procedure for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail [*17] excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania. It is the intent of this act to establish a method for ongoing and effective legislative review and oversight in order to foster executive branch accountability; to provide for primary review by a commission with sufficient authority, expertise, independence and time to perform that function; to provide ultimate review of regulations by the General Assembly; and to assist the Governor, the Attorney General and the General Assembly in their supervisory and oversight functions. To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency.

Section 2(a) of the Regulatory Review Act, 71 P.S. § 745.2(a).

²⁰ We note that procedures exist to expedite the administrative rulemaking process, if necessary. 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[.]" 71 P.S. § 745.6(d). This certification bars the IRRC from issuing an order barring an agency from "promulgating a final-form or final omitted regulation" and allows the regulation to "take effect on the date of publication," while its review by the IRRC and the House and Senate Committees takes place over a 120-day period. *Id.* The emergency regulation "shall be rescinded after 120 days or upon final disapproval, whichever occurs later." *Id.* If no action is taken by the expiration of the review period, the regulation shall continue in full force and effect until otherwise suspended or repealed. *See id.*

Although the Regulatory Review Act has been amended numerous times since its enactment in 1982, the mechanism for the emergency certification of agency regulations has remained intact. Under this mechanism, a regulation can be promulgated expeditiously. For example, on March 17, 1986, in the wake of "substantial increase in the number of mid-term cancellations and nonrenewal of commercial property and casualty insurance policies," Governor Dick Thornburgh certified that emergency rulemaking was required to address that "emergency situation." 16 PA. B. 953 (Mar. 22, 1986) (citations omitted). On March 22, 1986, the Insurance Department published its "emergency amendments" to its regulations "to provide commercial property and casualty insurance policyholders within 60 days' advance notice of nonrenewal or midterm cancellation of their coverage and to limit the reasons for which an insurer may cancel commercial property and casualty insurance policies in midterm." 16 PA. B. 951-52 (Mar. 22, 1986). The regulation was deemed approved by the IRRC on April 16, 1986. *See* 16 PA. B. 4167 (Oct. 25, 1986). From the certification of the emergency to the promulgation of the emergency regulation, a total of five days elapsed. In the instant matter, the Acting Secretary did not employ such measures in the implementation of the Masking Order.

Supreme Court, however, has recognized that the Governor may, as a valid use of police power, suspend the otherwise mandatory rulemaking procedures of the Regulatory Review Act upon the declaration or proclamation of a disaster emergency pursuant to the Emergency Code, 35 Pa.C.S. § 7301(c). *See Scarnati*, 233 A.3d at 705; *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 887-88, 892-93 (Pa.), *cert. denied*, 141 S. Ct. 239, 208 L. Ed. 2d 17 (2020).²¹

In the instant matter, it is undisputed that the Governor did not issue a new declaration of disaster emergency following the termination of the Disaster Proclamation by the General Assembly's June 10, 2021 Concurrent Resolution. It is likewise beyond dispute that the Acting Secretary did not comply with [*18] the formal requirements of the Commonwealth Documents Law and the Regulatory Review Act in promulgating the Masking Order. As a result, the pertinent question herein is whether the Masking Order represents a rule or regulation subject to the formal requirements for regulatory rulemaking and, if so, whether the Acting Secretary was authorized by statute or regulation to promulgate the Masking Order without complying with the formal requirements of the Commonwealth Documents Law and the Regulatory Review Act.

As our Supreme Court has observed:

An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which [*19] the agency intends to follow in future adjudications.

Pa. Hum. Rels. Comm'n v. Norristown Area Sch. Dist., 473 Pa. 334, 374 A.2d 671, 679 (Pa. 1977). Therefore, as opposed to regulations that establish substantive rules, the promulgation of simple statements of policy does not require adherence to the procedural requirements of the Regulatory Review Act. *See id.* On the distinction between these concepts, our Supreme Court has noted:

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

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

Id.

²¹The Acting Secretary notes that this Court followed these Supreme Court holdings in its unpublished opinion *County of Allegheny v. Cracked Egg, LLC* (Pa. Cmwlth., No. 101 C.D. 2021, filed July 23, 2021), slip op. at 30-33.

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²¹The Acting Secretary notes that this Court followed these Supreme Court holdings in its unpublished opinion *County of Allegheny v. Cracked Egg, LLC* (Pa. Cmwlth., No. 101 C.D. 2021, filed July 23, 2021), slip op. at 30-33.

Because the Masking Order herein is intended to, and actually does, dictate citizens' standards of conduct within [*20] Pennsylvania's schools, we need not belabor an analysis of whether the Masking Order represents simply a general statement of policy as opposed to a regulation. The language of the Masking Order clearly mandates that those inside School Entities must wear masks and binds those School Entities and those attending or visiting. The Order does not guide or provide an interpretation of a statute, but rather, requires that "[e]ach teacher, child/student, staff, or visitor working, attending, or visiting a School Entity shall wear a face covering indoors, regardless of vaccination status[.]" Masking Order at 4. There is no palatable argument that this Order is mere guidance.²²

The Regulatory Review Act defines a "regulation," in relevant part, as:

[a]ny rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency or amending, revising or otherwise altering the terms and provisions of an existing regulation, or prescribing the practice or procedure before such agency. . . . The term shall not include a proclamation, executive order, directive [*21] or similar document issued by the Governor, but shall include a regulation which may be promulgated by an agency, only with the approval of the Governor.

Section 3 of the Regulatory Review Act, 71 P.S. § 745.3. Our Supreme Court has adopted the three-part "binding norm" test articulated by the Court of Appeals for the District of Columbia to determine whether an order issued by an agency amounts to a regulation requiring adherence to formal rulemaking processes. *See Pa. Hum. Rels. Comm'n*, 374 A.2d at 679. Pursuant to this test,

[i]n ascertaining whether an agency has established a binding norm, the reviewing court must consider: (1) the plain language of the provision; (2) the manner in which the agency has implemented the provision; and, (3) whether the agency's discretion is restricted by the provision.

Eastwood Nursing & Rehab. Ctr. v. Dep't of Pub. Welfare, 910 A.2d 134, 144 (Pa. Cmwlth. 2006).

Here, with certain exceptions, the plain language of the Masking Order requires all persons physically within a School Entity as a student, teacher, staff, or visitor, to wear a face covering regardless of COVID-19 infection or vaccination status. This plain language clearly indicates that the Masking Order is an order of general application that creates a binding norm for all persons physically within School Entities. Further, the Acting Secretary [*22] intended the Masking Order to be implemented not by future rulemaking, but immediately upon the effective date and under the authority of statute and regulation as

²² We acknowledge the Dissenting Opinion's citation of dicta in *Northwestern Youth Servs. v. Commonwealth, Dep't of Pub. Welfare*, 620 Pa. 140, 66 A.3d 301 (Pa. 2013), in an attempt to classify the Masking Order as an "interpretative" rule. *See Corman v. Acting Sec'y of the Pa. Dep't of Health*, __ A.3d __, 2021 Pa. Commw. LEXIS 574 (Pa. Cmwlth. 2021) (Wojcik, J., dissenting). There are two categories of rules: (1) legislative, and (2) non-legislative, sometimes called "guidance documents" or "interpretive rules," that merely explain existing statutes or regulations. *Nw. Youth Servs.*, 66 A.3d at 310-11. The Supreme Court in *Northwestern Youth Services* held that a bulletin intended to be "mandatory and binding" was neither a "guideline" nor a "statement of the Department's future intent," but rather, imposed new and strict changes to an agency's practices and policies and was procedurally invalid where regulatory review procedures were not followed. *Id.* at 307 & 316-17. This holding supports the conclusion that the Masking Order, a mandate, is procedurally invalid as it did not follow regulatory review procedures and does not support the Dissenting Opinion's position that the Masking Order is an interpretive rule not subject to those procedures.

Further, the Dissenting Opinion overlooks the fact that, in the instant matter, the Acting Secretary does not contend that her Masking Order is mere guidance or an interpretation of any rule or regulation. *See* Masking Order at 3; *see also Nw. Youth Servs.*, 66 A.3d at 311-12.

cited in the Masking Order itself. Finally, the Masking Order leaves no room for the Department of Health to exercise any discretion regarding compliance with the Masking Order, once implemented. The Masking Order is a blanket rule that affects all School Entities in the Commonwealth. The Masking Order has the force and effect of law.

In consideration of the above, we have little difficulty agreeing that the Masking Order represents an attempt by the Acting Secretary to impose a new, binding norm. As such, if not already authorized by statute or regulation, and in the absence of a disaster emergency declared by the Governor, the Masking Order represents a regulation subject to the requirements of the Commonwealth Documents Law and the Regulatory Review Act.²³

The Acting Secretary claims that the Masking Order is not a rule or regulation requiring compliance with the requirements of the Commonwealth [*23] Documents Law or the Regulatory Review Act, but instead is an order promulgated pursuant to the authority granted to the Secretary of Health by Pennsylvania law, specifically, Section 5 of the Disease Control Law, 35 P.S. § 521.5, Section 2102(a) of the Administrative Code, 71 P.S. §§ 532(a), Section 8 of the Act of April 27, 1905, P.L. 312, 71 P.S. § 1403(a), and the Department of Health's regulation at 28 Pa. Code § 27.60 (relating to disease control measures). The Masking Order states that these authorities allow the Department to implement *any* disease control measure appropriate to protect the public from the spread of infectious disease. *See* Masking Order at 3. We do not agree.

Before reviewing the authority cited by the Acting Secretary for the implementation of the Masking Order, we observe the following with reference to the principle of administrative agency deference:

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

²³ We note that the Regulatory Review Act contains a document classification procedure whereby a legislative committee may review a document and, if it determines the document should be published as a regulation, the committee may present the matter to the Joint Committee on Documents. *See* Section 7.1 of the Regulatory Review Act, added by the Act of June 30, 1989, P.L. 73, 71 P.S. § 745.7a. The Joint Committee on Documents consists of nine governmental members — the General Counsel, the Attorney General, the Director of the Legislative Reference Bureau, the Director of the Pennsylvania Code, the President Pro Tempore of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, and the Secretary of General Services, or persons designated by each — and two public members appointed by the Governor from among attorneys at law or other members of the public who represent the class of persons who may be expected to be effected by documents published by the Joint Committee on Documents. *See* 45 Pa.C.S. § 502. Pursuant to this procedure, once the legislative committee determines that a document should be published as a regulation and presents it to the Joint Committee on Documents, the Joint Committee then makes its own determination of whether the document should be promulgated as a regulation. *See* Section 7.1 of the Regulatory Review Act, 71 P.S. § 745.7a.

This process occurred in the instant matter. On September 14, 2021, the Pennsylvania House of Representatives Health Committee concluded that the Masking Order is, in fact, a rule or regulation requiring compliance with the Regulatory Review Act and presented this determination, by letter, to the Joint Committee on Documents. *See* Letter to the Commonwealth Joint Committee on Documents from Kathy L. Rapp, Chairperson of the House of Representatives Health Committee, dated September 14, 2021, attached as Exhibit G to Petitioners' Application. Thereafter, on October 21, 2021, the Joint Committee on Documents reviewed the Masking Order and arrived, by a vote of 7 to 4, at the opposite conclusion — that the Masking Order was not a regulation requiring compliance with formal rulemaking procedures. *See* Joint Committee Order. The Joint Committee Order, which has been appealed at Commonwealth Court Docket No. 1184 C.D. 2021, was issued absent analysis or rationale and, in any case, has no precedential or binding effect on the judiciary. *See The Honorable Kathy L. Rapp, Chair, on behalf of the House of Representatives Health Comm. v. Dep't of Health* (Pa. Cmwlth., No. 1184 C.D. 2021).

controlling [*24] 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.

Azoulay v. Phila. Zoning Bd. of Adjustment, 194 A.3d 241, 249 (Pa. Cmwlth. 2018) (internal quotations, citations, and brackets omitted). Initially, and as discussed hereinafter, we find the text of the statutes and regulations cited by the Acting Secretary as authorizing the implementation of the Masking Order to be unambiguous. For this reason, we owe no deference to the Department of Health's interpretation thereof. *Id.* at 249.

Regarding the specific sections of Pennsylvania law upon which the Acting Secretary bases her authority to implement the Masking Order, first, Section 5 of the Disease Control Law, entitled "Control measures," provides that

[u]pon 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* [*25] *as is provided by rule or regulation.*

35 P.S. § 521.5 (emphasis added). A "control measure" is limited to one as provided by an existing rule or regulation. *See id.*

The Masking Order requires neither isolation²⁴ nor quarantines.²⁵ Therefore, the Acting Secretary by necessity relies on the "any other control measure" portion of this section of the Disease Control Law as authority for the Masking Order. However, the language of this section — particularly "a disease which is subject to isolation, quarantine, or any other disease control measure" and "shall carry out the appropriate control measures" — contemplates existing control measures for diseases already subject to those existing control measures. Additionally, the Acting Secretary's reading of Section 5 of the Disease Control Law does not account for the portion of the text that immediately follows the "any control measures" language that requires that any "other control measure" be carried out "in such manner and in such place as is provided by an existing rule or regulation." 35 P.S. § 521.5. As a result of this express limitation, while Section 5 of the Disease Control Law does grant the authority to "carry out the appropriate control measures" to control diseases, [*26] as Respondent suggests,²⁶ it does not provide the Acting Secretary

²⁴ The Disease Control Law defines "isolation" as:

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 infectious agent from infected persons or animals to other persons or animals who are susceptible or who may spread the disease to others.

Section 2 of the Disease Control Law, 35 P.S. § 521.2.

²⁵ The Disease Control Law defines "quarantine" as:

The limitation of freedom of movement of persons or animals who have been exposed to a communicable disease for a [*27] 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.

Section 2 of the Disease Control Law, 35 P.S. § 521.2.

²⁶ *See* Respondent's Brief Addressing Legal Issues Framed In the Court's September 13, 2021 Order at 4.

with the blanket authority to create new rules and regulations out of whole cloth, provided they are related in some way to the control of disease or can otherwise be characterized as disease control measures.²⁷ Instead, Section 5 limits the "other control measures" available to Respondent to those permitted under existing rules and regulations. Accordingly, this section of the Disease Control Law 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.

The Acting Secretary also relies on two provisions from the Administrative Code as further authority for the implementation of the Masking Order. *See* Masking Order at 3. Section 2102(a) of the Administrative Code, entitled "General health administration," enumerates the duties of the Department of Health, among which are the duties

[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 suppression of disease[.]

71 P.S. § 532(a). The Administrative Code further states, in the section entitled "Duty to protect health of the people," that

[i]t shall be the duty of the 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.

Section 8 of the Act of April 27, 1905, P.L. 312, 71 P.S. § 1403(a). These sections are statements of general duties of the Department [*28] of Health. By so listing these duties, these subsections do authorize the Department of Health to promulgate rules and regulations to accomplish these goals and fulfill these duties, but do not authorize specific means by which the Department of Health may accomplish the duties, nor do they provide specific authority for the Masking Order. These Administrative Code subsections make no reference whatsoever to disease control measures of any kind; nothing in these subsections authorizes the promulgation of rules or regulations pursuant to the duties listed therein without compliance with established rulemaking protocols. 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. *See supra* nn.18-20.

The Acting Secretary also cites Section 27.60 of the Department of Health Regulations, 28 Pa. Code § 27.60, as authorizing the requirements of the Masking Order. Section 27.60(a) provides that

[t]he Department [of Health] or local health authority shall direct isolation of a person or an animal *with [*29] 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.

²⁷ Respondent acknowledges that, while the General Assembly may delegate broad powers to the executive branch of government, it may not impart limitless discretion thereon. *See* Respondent's Br. at 20.

28 Pa. Code § 27.60(a)²⁸ (emphasis added).²⁹ This subsection of Department of Health Regulation Section 27.60 speaks in terms of isolating³⁰ and/or surveilling³¹ animals or individuals with a communicable disease or infection, and also in terms of the surveillance, segregation, and quarantine of contacts³² of a person or an animal with a communicable disease or infection. *See id.* The Masking Order requires the wearing of masks and/or face coverings in School Entities regardless of whether individuals are known to be infected with COVID-19 or whether they are a contact of an individual known to be infected with a communicable disease. As such, the Masking Order cannot be said to be in furtherance of the isolation or surveillance of animals or individuals with a communicable disease or [*30] the surveillance, segregation, or quarantine of contacts of a person or an animal with a communicable disease or infection.

To the extent the Acting Secretary relies on the language of Department of Health Regulation Section 27.60(a) that allows the Department to implement "any other disease control measure the Department [of Health] . . . considers to be appropriate[.]" we note, as we did in our discussion of the language of Section 5 of the Disease Control Law, 35 P.S. § 521.5, *supra*, that this language does not provide blanket authority to create new rules and regulations [*31] out of whole cloth. Instead, directly following the "any other disease control measure" language is the qualifying language "for the surveillance of disease." 28 Pa. Code § 27.60(a). This language directly limits the disease control measures the Department of Health may consider "appropriate" to those disease control measures related to the surveillance of disease. Mask wearing is not disease surveillance. Therefore, for this additional reason, the Acting Secretary cannot rely on Department of Health Regulation Section 27.60(a) as authority for the Masking Order.

Likewise, it cannot be said that mask wearing represents a form of "modified quarantine" as contemplated in 28 Pa. Code § 27.60(a). In addition to Section 27.60(a) referring only to infected animals or individuals

²⁸ The directives authorized by Section 27.60 are issued to discrete individuals with a communicable disease and their contacts. In that regard, the directive is a quasi-judicial action governed by the Administrative Agency Law, 2 Pa.C.S. §§ 101-754. An agency action with "general application throughout the Commonwealth is a quasi-legislative function and is not an adjudication." 20 Darlington et al., WEST'S PENNSYLVANIA APPELLATE PRACTICE § 102:6 (2020). Calling a regulation an "order" does not diminish the quasi-legislative character of the agency action. *See Sule v. Phila. Parking Auth.*, 26 A.3d 1240, 1244 (Pa. Cmwlth. 2011).

²⁹ We note that, in reciting the provisions of Section 27.60(a) of the Department of Health Regulations, the Dissenting Opinion omits the portion of text that makes clear that Section 26.70(a) refers to control measures considered "appropriate for the surveillance of disease[.]" *See* 28 Pa. Code § 26.70(a); *see also Corman*, __ A.3d at __, 2021 Pa. Commw. LEXIS 574, *29 (Wojcik, J., dissenting).

³⁰ The Department of Health's regulations define "isolation" to mean:

The separation for the communicable period of an infected person or animal from other persons or animals, in such a manner as to prevent the direct or indirect transmission of the infectious agent from infected persons or animals to other persons or animals who are susceptible or who may spread the disease to others.

28 Pa. Code § 27.1.

³¹ The Department of Health's regulations define "surveillance of disease" to mean:

The continuing scrutiny of all aspects of occurrence and spread of disease that are pertinent to effective control.

28 Pa. Code § 27.1.

³² The Department of Health's regulations define "contact" to mean:

A person or animal known to have had an association with an infected person or animal which presented an opportunity for acquiring the infection.

28 Pa. Code § 27.1.

and the contacts of infected animals or individuals, Section 27.1 of the Department Regulations defines "Modified quarantine" 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 [*32] in particular activities.

28 Pa. Code § 27.1. This definition of "modified quarantine" contemplates the limitation of *movement* of individuals who *have already been exposed* to a communicable disease. To equate a "partial limitation of freedom of movement" in those exposed to a communicable disease with a mask-wearing requirement for all individuals without knowledge of whether they had been exposed to COVID-19 would improperly ignore the plain language of the definitions contained in the Department of Health's own regulations.

Further, subsection (b) of the Department of Health Regulation Section 27.60 permits the Department of Health to "determine the appropriate disease control measure based upon the disease or infection, the patient's circumstance, 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). In referring to "the patient's circumstances," Department of Health Regulation Section 27.60(b) specifically limits the authority and possible actions of the Department of Health to those individuals who have already contracted specific diseases, not the general, uninfected population as a whole. Additionally, the subsection's reference [*33] to "facilities available" indicates facilities for the surveillance, segregation, quarantine, or modified quarantine of individuals already known to have been exposed to a disease or infection. Accordingly, this subsection likewise fails to provide the broad authority claimed by the Acting Secretary to impose the Masking Order on otherwise healthy Pennsylvanians attending, working in, or otherwise visiting Pennsylvania's School Entities.

We further acknowledge that the Emergency Code grants the Governor the power to issue "executive orders, proclamations and regulations which shall have the effect of law." 35 Pa.C.S. § 7301(b). We further acknowledge that our Supreme Court has recognized in *Scarnati*, 233 A.3d at 705, and *DeVito*, 227 A.3d at 885, that the General Assembly has also 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 the Emergency Code. 35 Pa.C.S. § 7301(f)(1). However, as discussed *supra*, in the absence of a declared emergency, and where such orders are not [*34] otherwise authorized by statute or regulation, the Governor and the executive agencies of the Commonwealth must follow the prescribed procedures for rulemaking set forth in the Commonwealth Documents Law and the Regulatory Review Act.

The instant matter presents such a scenario. The Governor did not declare a new disaster emergency following the General Assembly's approval of the Concurrent Resolution that terminated the Disaster Proclamation. Instead, the Acting Secretary issued the Masking Order, which is a regulation, without complying with the mandatory rulemaking requirements of the Commonwealth Documents Law and the Regulatory Review Act. In so doing, the Acting Secretary attempted to issue her own emergency declaration about the dangers of COVID-19 and mutations thereof, including the Delta variant. *See* Masking Order at 1. The purported authority cited by the Acting Secretary in the Masking Order does not

convey the authority required to promulgate a new regulation without compliance with the formal rulemaking requirements of the Commonwealth Documents Law and the Regulatory Review Act. Therefore, because the Acting Secretary did not comply with the requirements of the Commonwealth [*35] Documents Law or the Regulatory Review Act in promulgating the Masking Order, the Masking Order is void *ab initio*. For this Court to rule otherwise would be tantamount to giving the Acting Secretary unbridled authority to issue orders with the effect of regulations in the absence of either a gubernatorial proclamation of disaster emergency or compliance with the Commonwealth Documents Law and the Regulatory Review Act, as passed by the General Assembly. As this would be contrary to Pennsylvania's existing law, we decline to do so.

III. Conclusion

For the foregoing reasons, we find the Masking Order to be void *ab initio*. Accordingly, we grant Petitioners' Application and deny Respondent's Application.³³ Consequently, we declare the Masking Order void *ab initio* and unenforceable.

CHRISTINE FIZZANO CANNON, Judge

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

ORDER

AND NOW, this 10th day of November, 2021, Petitioners' Application for Summary Relief and Entry of Judgment Pursuant to Pa.R.A.P. 1532 and In Accordance with the Court's September 27, 2021 Order is GRANTED, and Respondent's Application for Summary Relief filed by Alison M. Beam, [*36] the Acting Secretary of Health (Acting Secretary), is DENIED.

The "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities," issued by the Acting Secretary on August 31, 2021, is declared void *ab initio*.

Respondent's "Application for Relief in the Nature of a Motion to Quash Notice to Attend and Subpoena *Ad Testificandum* Directed to Alison M. Beam, Acting Secretary of Health" is DISMISSED as moot.

CHRISTINE FIZZANO CANNON, Judge

Dissent by: MICHAEL H. WOJCIK

Dissent

DISSENTING OPINION BY JUDGE WOJCIK

I dissent.

³³ Our determination herein that the Masking Order is void *ab initio* vitiates the need for this Court to determine whether the Acting Secretary's enactment of the Masking Order represents a violation of the non-delegation doctrine.

On August 31, 2021, the Acting Secretary (Secretary) of the Pennsylvania Department of Health (DOH) issued an Order directing that face coverings must be worn by each teacher, child/student, staff, or visitor working, attending, or visiting a school while indoors regardless of his or her 2019 novel coronavirus (COVID-19) vaccination status. *See* Petitioners' Amended Petition for Review (PFR), Exhibit A at 1-6. The Secretary states her reasoning for issuing the Order, in relevant part, as follows:

[COVID-19] is a contagious disease that continues spreading rapidly from person to person in the world, the United States, and this Commonwealth. Despite [*37] periods of time when the virus seemed to wane, it, like all viruses, has continued to mutate, and spread. As of the date of this Order, there have been 1,300,368 cases and 28,235 deaths in this Commonwealth caused by the still present and ongoing pandemic. At this time, the Centers for Disease Control and Prevention (CDC) estimates that the Delta variant is the predominant strain in the Commonwealth. COVID-19 can be transmitted from any person who is infected, even if they [sic] have no symptoms and, with the Delta variant, even if they [sic] have been vaccinated. Symptoms of COVID-19 may include fever or chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea. Older adults and people who have serious chronic medical conditions were considered to be at higher risk for serious illness. Now, because of the rise of the Delta variant, increasing disease and hospitalizations, and the inability to obtain vaccines for a large part of that vulnerable group, children are more and more at risk.

There are several reasons for the increasing risk to children [*38] from COVID-19. The risk overall to the unvaccinated population is rising. Given the rise in hospitalizations and deaths, and despite COVID-19 vaccines being available, the Delta variant of the SARS-CoV-2 virus is causing the rate of cases of COVID-19 to increase. The Delta variant is more infectious, and it is leading to increased transmissibility. Additionally, data [are] suggesting that the Delta variant may cause more severe illness than previous strains of SARS-CoV-2; however, not all of our population is able to get vaccinated. As of yet, no vaccine has been approved for children under the age of 12. As of August 26, 2021, the total number of cumulative cases reported in children in the Commonwealth was 23,974 in the 0-4 years of age cohort, 56,039 in the 5-12 years of age cohort, and 88,205 in the 12-18 years of age cohort.

In addition to the concern that COVID-19 spreads quickly and dangerously among children, there are concerns that school closures create health issues for children too. Maintaining in-person instruction and socialization are necessary for the health and well-being of our children. In view of this serious concern for our nation's children, the CDC has issued [*39] a strong recommendation for masking of all persons, teachers, students, and staff within the nation's schools, regardless of vaccination status, to create a multi-layered approach for fighting COVID-19 and to keep our schools open for in-person education. In addition, the American Academy of Pediatrics (AAP) has also strongly recommended masking in schools. Finally, recent studies have shown that mask-wearing in schools has contributed to lower levels of COVID-19 transmission among students and staff and allowed for the continued in-person attendance. Requiring face coverings in schools, therefore, balances the concerns for the mental health of our children with the need to protect them against a disease that is growing more virulent as we struggle to protect the most vulnerable members of our population. In accordance with the recommendations of the CDC and AAP and based upon the rising case numbers and hospitalizations in general in the Commonwealth, including the number of cases in our children, as

well as the need to protect and maintain in-person education for the health and well-being of those children, I am issuing this Order to protect the ability of our schools to continue [*40] to educate our children, and of our children to receive in-person instruction in the safest environment possible.

COVID-19 is a threat to the public's health for which the [Secretary] may order general control measures. This authority is granted to the [Secretary] pursuant to Pennsylvania law. *See* [Section 5 of the Disease Prevention and Control Law of 1955 (Disease Control Law)];¹ [Section 2102(a) of The Administrative Code of 1929 (Administrative Code)];² and [the DOH] regulation at 28 Pa. Code §27.60 (relating to disease control measures).³ Particularly, [DOH] has the authority to take any

¹ Act of April 23, 1956, P.L. (1955) 1510, *as amended*, 35 P.S. §521.5. Section 5 states, in relevant part: "Upon the receipt by . . . [DOH] . . . of a report of a disease which is subject to isolation, quarantine, or any other control measure, . . . [DOH] shall carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation." In addition, Section 3 of the Disease Control Law states, in relevant part:

(a) Local boards and departments of health shall be primarily responsible for the prevention and control of communicable [*41] and non-communicable disease, including disease control in public and private schools, in accordance with the regulations of the [State Advisory Health Board (Board)] and subject to the supervision and guidance of [DOH].

(b) [DOH] shall be responsible for the prevention and control of communicable and non-communicable disease in any municipality which is not served by a local board or department of health, including disease control in public and private schools.

(c) If the [S]ecretary finds that the disease control program carried out by any local board or department of health is so inadequate that it constitutes a menace to the health of the people within or without the municipalities served by the local board or department of health, he may appoint agents of [DOH] to supervise or to carry out the disease control program of the particular local board or department of health until he determines that the menace to the health of the people no longer exists and that the local board or department of health is able to carry out an adequate disease control program.

35 P.S. §521.3. As the Pennsylvania Supreme Court has explained:

We find in the [Disease Control Law] a holistic scheme that, for purposes of disease prevention and control, favors local regulation [*42] as informed by the expertise of a dedicated local board or department of health over state-level regulation, and correspondingly allows local lawmakers to impose more stringent regulations than state law provides. Thus, in priority order, a municipality with a board or department of health may enact ordinances or promulgate rules and regulations in service of disease prevention and control. Where a municipality lacks its own board or department of health, but lies within the jurisdiction of a county department of health, the municipality may enact such ordinances, while the county board or department of health may issue rules and regulations. Absent a municipal or county board or department of health, a municipality falls within the jurisdiction of the [Board].

With this account in mind, viewing [Section 16 of the Disease Control Law, 35 P.S.] §521.16, in its entirety, certain principles are clear. First, state-level regulations must be devised and promulgated by [the Board] with the Secretary[']s oversight. Second, at the local level, municipalities with the benefit of access to similar expertise, whether in the form of a municipal board or department of health or a department or board administered by the county, [*43] enjoy the prerogative of enacting additional laws or regulations, provided they are no *less* strict than state law and regulations on the same subject. *See* [Section 16(c) of the Disease Control Law,] 35 P.S. §521.16(c) (allowing such ordinances that "are not less strict than the provisions of this act or the rules and regulations issued thereunder" by the [B]oard).

Pennsylvania Restaurant and Lodging Association v. City of Pittsburgh, 653 Pa. 596, 211 A.3d 810, 828 (Pa. 2019) (emphasis in original).

² Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §532(a). Section 2102(a) states: "[DOH] 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 suppression of disease[.]" *See also* Section 2111(a) and (b) of the Administrative Code, 71 P.S. §541(a) and (b) ("The [Board] shall have the power, and its duty shall be . . . [t]o advise the [Secretary] on such matters as he may bring before it . . . [and t]o make such reasonable rules and regulations, not contrary to law, as may be deemed by the [B]oard 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 [DOH], and such rules and regulations, when made by the [B]oard, shall become the rules and regulations of [DOH].").

³ 28 Pa. Code §27.60. Section 27.60(a) of DOH's regulations states, in pertinent part:

disease control measure appropriate to protect the public from the spread of infectious disease. *See* [Section 5 of the Disease Control Law]; [Section 2102(a) of the Administrative Code and Section 8(a) of the Act of April 27, 1905, P.L. 312, *as amended*, 71 P.S. §1403(a) (DOH Act)];⁴ [and Section 27.60 of DOH's regulations]. With the opening of the 2021 school year at hand, and case counts and hospitalizations continuing to rise, there is a need for additional action to protect our Commonwealth's children.

PFR, Exhibit A at 1-2 (footnotes omitted).

In Section 2 of the Order, the Secretary imposes a "General Masking Requirement" requiring [*44] that "[e]ach teacher, child/student, staff, or visitor working, attending, or visiting a School Entity⁵ shall wear a face covering indoors, regardless of vaccination status, except as set forth in Section 3.⁶" PFR, Exhibit A at 4. The Secretary also stated she issued the Order "in order to prevent and control the spread of disease,"

(a) [DOH] . . . shall direct isolation of a person . . . with a communicable disease or infection; surveillance, segregation, quarantine or modified quarantine of contacts of a person . . . with a communicable disease or infection; and any other disease control measure [DOH] . . . 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).

In turn, Section 27.1 of DOH's regulations defines "isolation," in relevant part, as

[t]he separation for the communicable period of an infected person . . . from other persons . . . in such a manner as to prevent the direct or indirect transmission of the infectious agent from infected persons . . . to other persons . . . who are susceptible or who may spread the disease to others.

28 Pa. Code §27.1. Additionally, Section 27.1 defines "segregation," in pertinent part, as "[t]he separation for special control and observation of one or more persons . . . from other persons . . . to facilitate the control of a communicable disease." *Id.*

⁴Section 8(a) of the DOH Act states: "It shall be the duty of [DOH] 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."

⁵Section 2 of the Order defines "School Entity," in relevant part, as follows:

- (1) A public PreK-12 school.
- (2) A brick and mortar or cyber charter school.
- (3) A private or parochial school.
- (4) A career and 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 local-funded prekindergarten activities.
- (8) A childcare provider licensed by the Department of Human Services of the Commonwealth.

PFR, Exhibit A at 3-4.

⁶Section 3 of the Order lists the following exceptions to its application: (1) if wearing a mask while working would create an unsafe condition in which to operate equipment or execute a task under local, state, or federal regulations or workplace safety guidelines; (2) if wearing a mask would either cause a medical condition, or exacerbate an existing one, including respiratory issues that impede breathing, a mental health condition, or a disability; (3) when necessary to confirm an individual's identity; (4) while working alone and isolated from others with little or no expectation of in-person contact; (5) while communicating with someone who is hearing impaired or has another disability requiring sight of the mouth in order to communicate; (6) when the individual is under two years old; (7) when the individual is engaged in an activity that cannot be performed while wearing a mask, such as eating or drinking, or playing an instrument, or participating in a high intensity aerobic or anaerobic activity, including during physical education class, in a well-ventilated area; and (8) while participating in a sports activity or event either indoors or outdoors. PFR, Exhibit A at 4-5.

and that "[t]his Order shall take effect at 12:01 a.m. on September 7, 2021, and shall remain in effect until otherwise terminated." *Id.* at 3, 6. Petitioners subsequently filed the PFR seeking declaratory and injunctive relief based on the Order's purported invalidity, and Petitioners and the Secretary filed cross-applications for summary relief (ASR).⁷

On September 13, 2021, this Court filed an order framing the issues to be considered in this matter:

[W]hether the August 31, 2021 [Order] constitutes a rule or regulation subject to the provisions of the Regulatory Review Act, Act of June 25, [*46] 1982, P.L. 633, *as amended*, 71 P.S. §§745.1-745.15, and whether said [Order] violates the principles governing the delegation of administrative authority.

I.

With regard to the first issue presented herein, the Pennsylvania Supreme Court has explained:

Commonwealth agencies have no inherent power to make law or otherwise bind the public or regulated entities. Rather, an administrative agency may do so only in the fashion authorized by the General Assembly, which is, as a general rule, by way of recourse to procedures prescribed in the Commonwealth Documents Law,⁸ the Regulatory Review Act, and the Commonwealth Attorneys Act.⁹ When an agency acts under the general rule and promulgates published regulations through the formal notice, comment, and review procedures prescribed in those enactments, its resulting pronouncements are accorded the force of law and are thus denominated "legislative rules." *See Borough of Pottstown v. Pennsylvania Municipal Retirement Board*, 551 Pa. 605, 712 A.2d 741, 743 (Pa. 1998)]. *See generally* Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L.REV. 331, 335 (2011) ("The canonical mode by which agencies define the meaning of statutes and regulations or establish policy is legislative rulemaking.") (footnote omitted).

Non-legislative rules—more recently couched (in decisions [*47] and in the literature) as "guidance documents"—comprise a second category of agency pronouncements recognized in administrative

⁷ As this Court has recently observed:

Applications for summary relief filed in this Court's original [*45] jurisdiction are governed by Pennsylvania Rule of Appellate Procedure 1532(b), Pa. R.A.P. 1532(b), which provides that "[a]t any time after the filing of a petition for review . . . , the court may enter judgment if the right of the applicant thereto is clear." An application for summary relief under Rule 1532(b) is evaluated according to standard for a motion for summary judgment. A motion for summary relief may only be granted when "**the dispute is legal rather than factual**," there is **no genuine issue of material fact**, and the moving party is entitled to judgment as a matter of law. The evidence is to be reviewed in a light most favorable to the non-moving party. "Even if the facts are undisputed, the moving party has the burden of proving that its right to relief is so clear as a matter of law that summary relief is warranted." "Bold unsupported assertions of conclusory accusations cannot create genuine issues of material fact." "Summary [relief] may be entered only in cases that are clear and free from doubt."

Delaware Riverkeeper Network v. Department of Environmental Protection (Pa. Cmwlth., No. 525 M.D. 2017, filed August 3, 2021), 2021 Pa. Commw. Unpub. LEXIS 413 (citations and footnote omitted); *see also* Pa. R.A.P. 126(b) ("As used in this rule, 'non-precedential decision' refers to . . . an unreported memorandum opinion of the Commonwealth Court filed after January 15, 2008. [] Non-precedential decisions . . . may be cited for their persuasive value.").

⁸ Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §§1102-1602, and 45 Pa. C.S. §§501-907.

⁹ Act of October 15, 1980, P.L. 950, *as amended*, 71 P.S. §§732-101-732-506.

law practice. These "come in an abundance of formats with a diversity of names, including guidances, manuals, interpretive memoranda, staff instructions, policy statements, circulars, bulletins, advisories, press releases and others." Robert A. Anthony, Commentary, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L.REV. 1045, 1046 (2000). When such documents fairly may be said to merely explain or offer specific and conforming content to existing statutes or regulations within the agency's purview, they are regarded as "interpretive rules," which generally are exempt from notice-and-comment rulemaking and regulatory-review requirements. *See Borough of Pottstown*, [712 A.2d at 743]; Seidenfeld, *Substituting Substantive for Procedural Review*, 90 TEX. L.REV. at 346 (explaining that an interpretive rule "is meant to explain preexisting legal obligations and relations that are embodied in the agency's authorizing statutes and regulations") (footnote omitted). Additionally, "statements of policy"—or agency pronouncements which are not intended to bind the public and agency personnel, but rather, merely express an agency's tentative, future intentions—also are [*48] not regulations subject to notice-and-comment rulemaking and regulatory-review requirements. *See Borough of Pottstown*, [712 A.2d at 743 n.8].

Northwestern Youth Servs. v. Commonwealth, Dep't of Pub. Welfare, 620 Pa. 140, 66 A.3d 301, 310-11 (Pa. 2013) (citation and footnote omitted).¹⁰

To my mind, the Secretary's Order is a valid interpretive rule that tracks the statutory and regulatory authority conferred upon her, and it is not a rule or regulation that must be promulgated under the Regulatory Review Act. As outlined above, Section 2102(a) of the Administrative Code states: "[DOH] shall have the power, and its duty shall be . . . [t]o protect the health of the people . . . and to determine and employ the most efficient and practical means for the prevention and suppression of disease[.]" 71 P.S. §532(a). Likewise, Section 8(a) of the DOH Act states: "It shall be the duty of [DOH] to protect the health of the people . . . and to determine and employ the most efficient and practical means for the prevention and suppression of disease." 71 P.S. §1403(a). Additionally, Section 5 of the Disease Control

¹⁰With respect to the various species of non-legislative rules, such as the Secretary's Order issued herein, Professor Anthony has further explained:

Documents that are not legislative rules, but that nevertheless fit [Section 551 of Administrative Procedures Act's, 5 U.S.C. §551,] definition of "rule," are called "non[-]legislative rules." They come in an abundance of formats with a diversity of names, including guidances, manuals, interpretive memoranda, staff instructions, policy statements, circulars, bulletins, advisories, press releases and others. Non[-]legislative rules do not carry the force of law. They are potentially exempt from notice[and]comment requirements under the "interpretative rules" exemption (for documents that interpret) or under the "general statements of policy" exemption (for some documents that do not interpret). Whether a document will be exempt in a given case depends upon further analysis.

That analysis is a simple one for non[-]legislative rules that interpret existing legislation. All such documents (more precisely, those portions of the documents that genuinely interpret) fall squarely within the exemption for "interpretative rules," and need not undergo notice[and]comment. [*49] The theory is that the agency is not making new law, but is merely spelling out or explaining positive legal substance that was already inherent in the statute or legislative rule or line of decisional law being interpreted. Thus, the public-participation procedures required by [S]ection 553[, 5 U.S.C. §553,] for making new law are not needed.

In practice, the courts often have quite an uneasy time deciding whether a document does or does not interpret. It is in the application of the interpretative rule exemption, not in its conception, that perplexity intrudes. It is notoriously difficult to say with confidence that a given non[-]legislative document actually interprets a given legislative document, such that the meaning of the former flows fairly from and is justified by the latter. But when the court ultimately concludes that a document does so interpret, the law is utterly clear that notice[and]comment need not have been used in its promulgation. (Good practice may counsel agencies voluntarily to observe notice[and]comment before issuing an interpretation in many situations, such as where the interpretation would extend the practical scope of the agency's jurisdiction, would alter the obligations of [*50] private parties or would modify eligibility for entitlements.)

Law states, in relevant part: "Upon the receipt by . . . [DOH] . . . of a report of a disease which is subject to isolation, quarantine, or any other control measure, . . . [DOH] 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. In turn, as stated above, Section [*51] 27.60(a) of DOH's regulations provides, in relevant part, that "[DOH] . . . shall direct isolation of a person . . . with a communicable disease or infection . . . [or] segregation, quarantine or modified quarantine of contacts of a person . . . with a communicable disease or infection . . ." 28 Pa. Code §27.60(a).

As extensively outlined in the Secretary's Order, the increase in COVID-19 cases caused by the Delta variant of the SARS-CoV-2 virus at the time of its issuance, in combination with the concern of the quick and dangerous spread among unvaccinated children, 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 CDC and AAP to temporarily impose the least restrictive and "most efficient and practical means" of ensuring the safety of the vulnerable student population.¹¹ 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, [*52] 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 DOH Act,¹² and is a specifically authorized mode of prevention provided by Section 5 of the Disease Control Law and Section 27.60(a) of DOH's regulations.¹³

¹¹ In this regard, the Secretary's rulemaking authority under the Administrative Code, the DOH Act, and the Disease Control Law must be distinguished from the Board's authority to promulgate regulations with respect to DOH operations as outlined above in the Disease Control Law. The Pennsylvania Supreme Court has explained this important distinction as follows:

There is a well-recognized distinction in the law of administrative agencies between the authority of a rule adopted by an agency pursuant to what is denominated by the text writers as *legislative* rule-making power and the authority of a rule adopted pursuant to *interpretative* rule-making power. The former type of rule 'is the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the Legislative body,' and 'is valid and is as binding upon a court as a statute if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable.' A court, in reviewing such a regulation, 'is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have [*53] been exceeded in the field of action . . . involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be 'so entirely at odds with fundamental principles . . . as to be the expression of a whim rather than an exercise of judgment.'

An interpretative rule on the other hand depends for its validity not upon a law-making grant of power, but rather upon the willingness of a reviewing court to say that it in fact tracks the meaning of the statute it interprets. While courts traditionally accord the interpretation of the agency charged with administration of the act some deference, the meaning of a statute is essentially a question of law for the court, and, when convinced that the interpretative regulation adopted by an administrative agency is unwise or violative of legislative intent, courts disregard the regulation.

Uniontown Area School District v. Pennsylvania Human Relations Commission, 455 Pa. 52, 313 A.2d 156, 169 (Pa. 1973) (emphasis in original and citations omitted). As outlined above, because the Secretary's Order tracks the statutory and regulatory powers conferred thereunder, it is a valid interpretive rule issued pursuant to her rulemaking authority.

¹² Where, as here, the Secretary has extensively outlined the basis upon which she issued the Order, the Pennsylvania Supreme Court has cautioned:

By a host of authorities in our own and other jurisdictions it has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts [*54] of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of the manner

Moreover, on October 21, 2021, while this matter was pending, the Joint Committee on Documents (Joint Committee) issued the following Order: [*55]

Pursuant to [S]ection 7.1 of the Regulatory Review Act,¹⁴ the [Joint Committee] finds the following:

1. Findings.

The Health Committee of the House of Representatives [(House Committee)] petitioned the [Joint Committee] to determine whether the order of the [Secretary], issued August 31, 2021, should be promulgated as a regulation. A legislative standing committee may challenge an agency's unpromulgated order under [S]ection 7.1 of the Regulatory Review Act[.]

The [O]rder is an instrument issued by [DOH] under the authority of the Commonwealth and is, therefore, a document for purposes of Pennsylvania's laws governing Commonwealth documents. Def[inition] of "document," [S]ection 102 of the Commonwealth Documents Law[, Act of July 9, 1970, P.L. 477, as amended,] 45 P.S. §1102;¹⁵ *see also* [Section 1.4 of the Pennsylvania Code,] 1 Pa. Code §1.4.¹⁶ A regulation is "any rule or regulation, or order in the nature of a rule or regulation,

adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. 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.

Blumenschein v. Pittsburgh Housing Authority, 379 Pa. 566, 109 A.2d 331, 334-35 (Pa. 1954) (footnotes omitted and emphasis in original).

As provided within the text of the Order, the Secretary stated the reasoning underlying the exercise of her statutory and regulatory discretion in formulating the appropriate means for protecting the vulnerable statewide student population in the School Entity setting during the ongoing COVID-19 pandemic. The pleadings in this case simply do not demonstrate the requisite "manifest and flagrant abuse of discretion or a purely arbitrary execution of the [Secretary's] duties or functions" to enable this Court to inquire into the wisdom or details of her actions in this regard. Further, as extensively explained throughout this Dissenting Opinion, the Secretary's Order does not constitute a rule or regulation subject to the notice and comment requirements of either the Regulatory Review Act or the Commonwealth Documents Law, so no extra-agency input was required prior to the Secretary's issuance of the Order pursuant to her statutory and regulatory authority. In sum, although this Court may have reached a different conclusion based on the available information that was relied upon by the Secretary in issuing the Order, it is inappropriate to substitute our judicial discretion for the Secretary's administrative discretion conferred by Section 2102(a) of the Administrative Code and Section 8(a) of the DOH Act to employ "the most efficient and practical means for the prevention and suppression of" COVID-19 in the School Entity setting during the life of this pandemic.

¹³ Likewise, Section 2106(b) of the Administrative Code states:

The [DOH] shall have the power, and its duty shall be:

* * *

(b) to establish and enforce quarantines, in such manner, for such period, and with such powers, as may now or hereafter be provided by law, to prevent the spread of diseases declared by law or by the [DOH] to be communicable diseases.

71 P.S. §536(b) (emphasis added).

¹⁴ Added by the Act of June 30, 1989, P.L. 633, as amended, 71 P.S. §745.7a. Section 7.1 of the Regulatory Review Act states:

If the [Independent Regulatory Review Commission (Commission)] or [a standing committee of the Senate or House of Representatives (committee)] finds that a published or unpublished document should be promulgated as a regulation, the [C]ommission or committee may present the matter to the [Joint [*57] Committee]. The [Joint Committee] shall determine whether the document should be promulgated as a regulation and may order an agency either to promulgate the document as a regulation within 180 days or to desist from the use of the document in the business of the agency.

¹⁵ Section 102 of the Commonwealth Documents Law defines "Document," in pertinent part, as "any . . . order, regulation, rule, statement of policy, adjudication, certificate, license, permit, notice or similar instrument issued, prescribed or promulgated by or under the authority of this Commonwealth."

promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency" Def[inition] of "regulation," [S]ection 3 of the Regulatory Review Act[,] 71 P.S. §745.3[;] 1 Pa. Code §1.4.¹⁷ As a substantive rule issued under an agency's statutory authority, a regulation [*56] must be promulgated in accordance with the Commonwealth Documents Law. Def[inition] of "regulation," [S]ection 3 of the Regulatory Review Act[,] 71 P.S. §745.3[;] *see also* Article II of the Commonwealth Documents Law, [45 P.S. §§1201-1208].

2. Determination.

Based on the record, the [Joint Committee], by a vote of seven to four, finds that the [House Committee] has failed to show that the [Secretary's Order], issued August 31, 2021, should be promulgated as a regulation.

While the [Secretary's Order] imposes a legal requirement to wear face coverings in schools and other locations identified in the [O]rder, [the Secretary] issued the [O]rder under existing statutory and regulatory authority. [DOH's] regulatory authority to bypass the rulemaking process is authorized by [Section 27.60 of its regulations,] 28 Pa. Code §27.60[;] [S]ection 2101(a) of the [Administrative Code], 71 P.S. §532(a)[;] [P.S.71 P.S. §1403(a)[;] and [S]ection 2106(b)] of the [Administrative Code], 71 P.S. §536(b)]. (Footnote Omitted).¹⁸

As the Commonwealth entity empowered to determine whether an administrative agency rule is required to be promulgated as a rule or regulation subject to the provisions of the Regulatory Review Act¹⁹ and the Commonwealth Documents Law,²⁰ this Court should defer to the Joint Committee's expertise and

¹⁶Section 1.4 of the Pennsylvania Code defines "Document," in relevant part, as "an order, regulation, rule, statement of policy, adjudication, certificate, license, permit, notice or similar instrument issued, prescribed or promulgated by or under the authority of the Commonwealth."

¹⁷Section 1.4 of the Pennsylvania Code defines "Regulation" as "[a] rule or regulation or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of a statute administered by or relating to the agency, or prescribing the practice or procedure before the agency."

¹⁸By an October 29, 2021 order, this Court granted the Secretary's Application for Relief in the Nature of a Motion for Leave to Supplement the Record, treating the application as a post-submission communication under Pa. R.A.P. 2501(a), and docketed the Joint Committee's October 21, 2021 Order in this matter as an addendum to the Secretary's ASR. Additionally, the House Committee has petitioned this Court to review the Joint Committee's October 21, 2021 Order. *See The Honorable Kathy L. Rapp v. Department of Health* (Pa. Cmwlth., No. 1184 C.D. 2021).

¹⁹*See* Section 7.1 of the Regulatory Review Act, 71 P.S. §745.7a ("The [Joint Committee] shall determine whether the document should be promulgated as a regulation and may order an agency either to promulgate the document as a regulation within 180 days or to desist from the use of the document in the business of the agency."); *see also* Section 11(a) of the Regulatory Review Act, 71 P.S. §745.11(a) ("For the purposes of reviewing the regulations of the [C]ommission and otherwise satisfying the requirements of this act, the [Joint Committee] shall exercise the rights and perform the functions of the [C]ommission; and the [C]ommission shall exercise the rights and perform the functions of an agency under this act.").

²⁰Section 502(d) of the Commonwealth Documents Law states that "[t]he [Joint Committee] shall exercise the powers and perform the duties vested in and imposed upon it by this part and any other powers or duties vested in and imposed upon the [Joint Committee] by law." 45 Pa. C.S. §502(d). In turn, Section 503 of the Commonwealth Documents Law states:

Subject to the provisions of [S]ection 732 (relating to required contractual arrangements), the manner in which the [Pennsylvania Code], the permanent supplements thereto, and the [Pennsylvania Bulletin], shall be published, and all other matters with respect thereto not otherwise provided for in this part shall be prescribed by regulations promulgated or orders adopted by the [Joint Committee]. The [Joint Committee] shall administer this part and Subchapter A of Chapter 3 of Title 2 (relating to regulations of Commonwealth agencies) with a view toward encouraging the widest possible dissemination of documents among the persons affected thereby which is consistent with the due administration of public affairs.

determination that the Secretary's Order does not constitute a rule or regulation within the requirements of either of these statutes, as well as the Secretary's determination that her Order was properly issued according to her statutory and regulatory authority. As the Pennsylvania Supreme Court has explained:

It is well settled that when the courts of this Commonwealth are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation. . . . Thus, our courts [*58] will not disturb administrative discretion in interpreting legislation within an agency's own sphere of expertise absent fraud, bad faith, abuse of discretion or clearly arbitrary action.

Winslow-Quattlebaum v. Maryland Insurance Group, 561 Pa. 629, 752 A.2d 878, 881 (Pa. 2000) (citations omitted).

Based on the allegations raised in the PFR, it is clear that neither the Secretary nor the Joint Committee acted with fraud or bad faith, or that either committed an abuse of discretion or clearly arbitrary action. As a result, unlike the Majority, I do not conclude [*59] that the Secretary's Order is void *ab initio* as an improperly promulgated rule or regulation subject to the requirements of the Regulatory Review Act, the Commonwealth Documents Law, or in the absence of a gubernatorially-declared disaster emergency issued pursuant to Section 7301(c) of Pennsylvania's Emergency Management Services Code, 35 Pa. C.S. §7301(c). This conclusion is amply supported by the Joint Committee's October 21, 2021 Order. Accordingly, unlike the Majority, I would grant the Secretary's ASR, and deny Petitioners' ASR, with respect to the first issue in this case.

II.

Regarding the second issue presented in this matter, the Pennsylvania Supreme Court has stated:

[T]he separation of powers doctrine divides the functions of government equally between the executive, legislative, and judicial branches. As we recently explained,

Article II, [s]ection 1 of the Pennsylvania Constitution states that "[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." PA. CONST. art. II, §1. That is why, when the General Assembly empowers some other branch or body to act, our jurisprudence requires "that the basic policy choices involved in 'legislative power' actually be made by the [l]egislature as

45 Pa. C.S. §503. *See also* Section 206 of the Commonwealth Documents Law, 45 P.S. §1206 ("The agency text of all regulations and other documents, required or authorized to be deposited with the Legislative Reference Bureau [(Bureau)] by this act shall be prepared in such form and format as may be prescribed by regulations promulgated by the [Joint Committee]."); Section 701 of the Commonwealth Documents Law, 45 Pa. C.S. §701 ("It shall be the duty of the [Bureau], subject to the policy supervision and direction of the [Joint Committee], to compile, edit and supplement . . . an official legal codification, to be divided into titles of convenient size and scope, and to be known as the 'Pennsylvania Code.'"); Section 722(d) of the Commonwealth Documents Law, 45 Pa. C.S. §722(d) ("If an agency and the [B]ureau disagree concerning the form or format of a document required or authorized to be deposited with the [B]ureau, the agency may refer the matter to the [Joint Committee], which shall resolve the conflict pursuant to the standards and procedures provided by [S]ection 723(a) (relating to processing of deposited documents)."); 1 Pa. Code §3.1(a)(2) and (9) ("The following documents shall be codified in the [Pennsylvania] Code: . . . [a]dministrative and gubernatorial regulations [and d]ocuments or classes of documents which the Governor, the Joint Committee or the Bureau finds to be general and permanent in nature."); 1 Pa. Code §17.94 ("Section 502(d) of [the Commonwealth Documents Law] (relating to [the Joint Committee]) provides that the Joint Committee shall exercise the powers and perform the duties vested in and imposed upon it by the act and any powers and duties subsequently vested in and imposed upon the Joint Committee by statute.").

constitutionally [*60] mandated." This constraint serves two purposes. First, it ensures that duly authorized and politically responsible officials make all of the necessary policy decisions, as is their mandate per the electorate. And second, it seeks to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power.

Although the legislature may not delegate legislative power, it may, in some instances, assign the authority and discretion to execute or administer a law, subject to two fundamental limitations: First, the General Assembly must make "the basic policy choices." Once it does so, the General Assembly may "impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions" of the legislation. Second, the legislation must include "adequate standards which will guide and restrain the exercise of the delegated administrative functions." In determining whether the legislature has established adequate standards, "we are not limited to the mere letter of the law, but must look to the underlying purpose of the statute and its reasonable effect." Further, the General Assembly does not delegate legislative powers by delegating mere [*61] details of administration.

Germantown Cab Company v. Philadelphia Parking Authority, 651 Pa. 604, 206 A.3d 1030, 1047 (Pa. 2019) (citations omitted).

The provisions of the Administrative Code and the Disease Control Law provide DOH 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).²¹ However, the Disease Control Law and the associated regulations outline the parameters within which the Secretary and the Board, as well as local boards and departments, may operate with respect to the containment of communicable diseases within public and private schools. *See* Sections 4 and 5 of the Disease Control Law; Section 27.60 of DOH's regulations. Specifically, the Secretary may only "carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation," upon the receipt of "a report of a disease which is subject to isolation, quarantine, or any other control measure." 35 P.S. §521.5. *See also* *Wolf v. Scarnati*, 233 A.3d 679, 705 (Pa. 2020) ("Broad discretion and standardless discretion are not the same thing."); *Gilligan v. Pennsylvania Horse Racing Commission*, 492 Pa. 92, 422 A.2d 487, 490 (Pa. 1980) ("The latitude of the standards controlling exercise of the rulemaking powers expressly conferred on the Commission must be viewed in light of the broad supervisory task necessary [*62] to accomplish the express legislative purpose.").

In this case, the Secretary has acted according to the statutory and regulatory authority conferred upon her to protect the vulnerable student population in "School Entities" by the least restrictive and "the most efficient and practical means" available while the lethal COVID-19 pandemic continues to infect and kill the residents of this Commonwealth. The authority conferred upon her in this regard in no way encroaches upon the legislative power provided in article II, section 1 of the Pennsylvania Constitution.

²¹ In this regard, the Pennsylvania Supreme Court has observed:

In *Archbishop O'Hara's Appeal*, [389 Pa. 35, 131 A.2d 587, 594 (Pa. 1957)], the standard of "the promotion of the health, safety, morals and general welfare * * *" was deemed sufficient to limit the administrative exercise of the zoning power to grant or refuse a special exception. The similarly general standard of "detrimental to welfare, health, peace and morals of the inhabitants of the neighborhood" was held to provide adequate guidance for the administrative refusal of a liquor license in *Tate Liquor License Case*, [196 Pa. Super. 193, 173 A.2d 657 (Pa. Super. 1961)]. *See also* *Dauphin Deposit Trust Co. v. Myers*, [388 Pa. 444, 130 A.2d 686, 689 (Pa. 1957)] (statement that "adequacy or inadequacy of banking facilities" a proper criterion).

DePaul v. Kauffman, 441 Pa. 386, 272 A.2d 500, 503 (Pa. 1971).

Accordingly, unlike the Majority, I would grant the Secretary's ASR and deny Petitioners' ASR, with respect to the second issue as well, and dismiss Petitioners' PFR. [*63]

MICHAEL H. WOJCIK, Judge

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PROOF OF SERVICE

I certify that I have caused a true and correct copy of the foregoing document to be served on this 25th day of March, 2022, upon the persons and at the addresses below via the Court's PACFile System and U.S. Mail, First Class, postage prepaid, as follows, in accordance with Pennsylvania Rules of Appellate Procedure 121 and 1514(c), Pa.R.A.P. §§ 121, 1514(c):

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