FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-2994

GINA DORTCH, BRAD GONZALEZ, SCOTT BURFORD, AMBER BURFORD, NICHOLE CARLISLE, CARRIE GILLESPIE, KIM HICKEY, AMANDA MOORE, MICHAEL TICKEL, AMANDA WEBER, AMANDA DONOHO, DEE BASSO, SHELISA WINGENBACH, KATIE LEWANDOWSKI, GREGORY ADAME, HEATHER WALLACE, GARY DESJARDINS, MICHELLE PETTY, TARAN HELM, JEFF SELLERS, SEAN COLLINS, and TIA BESS,

Petitioners,

v.

ALACHUA COUNTY SCHOOL BOARD, SUPERINTENDENT CARLEE SIMON, DUVAL COUNTY SCHOOL BOARD, SUPERINTENDENT DIANA GREENE,

Respondents.

Emergency Petition for Writ of Mandamus—Original Jurisdiction.

October 29, 2021

LONG, J.

Petitioners, as parents of school children in Alachua and Duval Counties, have petitioned this Court for a writ of mandamus to require the children's respective school boards to comply with section 1000.03(3), Florida Statutes (2021), and Florida Department of Health Emergency Rule 64DER21-15. Respondents argue they need not, and do not intend to, comply with the law.

Society's collective response to the COVID-19 virus has become a cultural and political flash point. But despite its dressing, this case is not a dispute about the wisest public policy response to the virus. Those policy decisions are constitutionally assigned to the legislative and executive branches. *See* Art. II, § 3, Fla. Const.; Art. III, § 1, Fla. Const.; Art. IV, § 1, Fla. Const.; Art. IX, §§ 1, 2, Fla. Const.

This case turns on a question of more enduring substance. The foundational question before us is whether the respondent government actors are required to comply with the laws that govern their authority. We are a constitutional republic sustained through the written law. It is the law's formal application that "makes a government a government of laws and not of men." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 25 (rev. ed. 2018).

I

The Florida Department of Health promulgated Emergency Rule 64DER21-15 pursuant to authority granted by the legislature in section 1003.22(3), Florida Statutes. The rule sets out certain COVID-19 protocols for students in Florida's public schools. Pertinent here, it provides that a parent of a student must be permitted to opt their child out of wearing a face mask at the parent's sole discretion. It reads in relevant part as follows:

> Schools may adopt requirements for students to wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian of the student to opt the student out of wearing a face covering or mask *at the parent or legal guardian's sole discretion*.

Fla. Admin. Code R. 64DER21-15(1)(d) (2021) (emphasis added).

The rule also permits children that have had contact with a COVID-19 positive individual to attend school if the child remains asymptomatic. It reads in relevant part as follows:

> PROTOCOLS FOR STUDENTS WITH EXPOSURE TO COVID-19. Schools shall allow parents or legal guardians the authority to choose how their child receives education after having direct contact with an individual that is positive for COVID-19.
>
> > (a) Parents or legal guardians of students who are known to have been in direct contact with an individual who received a positive diagnostic test for COVID-19 may choose one of the following options:
> >
> > 1. Allow the student to attend school, school-sponsored activities, or be on school property, without restriction or disparate treatment, so long as the student remains asymptomatic; or
> >
> > 2. Quarantine the student for a period of time not to exceed seven days from the date of the last direct contact with an individual that is positive for COVID-19.

Fla. Admin. Code R. 64DER21-15(3).

Respondents have refused to comply with this rule. The Duval County School Board has adopted mandatory masking requirements and *prohibited* parents from opting their children

out of masking or from sending their asymptomatic children to school. The Alachua County School Board has permitted the parents of high school students to opt out of the mask mandate but *refused* to provide an opt-out option to the parents of young children in elementary and middle school.

Section 1003.22(3) requires "[t]he Department of Health, after consultation with the Department of Education," to "adopt rules governing . . . the control of preventable communicable diseases." State law requires local school boards to follow these rules. § 1000.03(3), Fla. Stat. (2021) ("Local educational authorities have a duty to fully and faithfully comply with state laws, standards, and rules.").

Respondents concede their policies do not comply with the rule. They do not argue the rule is unclear. They do not argue that the rule does not apply to them. They do not argue they are confused by the rule. They do not argue they have attempted to comply with the rule. Instead, they assert that they are challenging the rule in an administrative proceeding. And they explain that, rather than follow Florida law, they are following their preferred policy recommendations.

Respondents have been remarkably open in their defiance. They argue they should be permitted to "challenge the rules" and "fail to comply" without being subjected to mandamus. One respondent, Alachua County Superintendent Carlee Simon, wrote a particularly candid editorial. Carlee Simon, *Opinion: Why our school district is defying Florida's ban on mask mandates - even if it means we lose funding*, WASH. POST (Aug. 9, 2021), www.washingtonpost.com/opinions/2021/08/09/floridaschools-mask-mandate-ban-desantis-alachua. In short, they acknowledge they are defying the law, but argue that the courts should refuse to compel their compliance.

II

Both this Court and circuit courts have concurrent original jurisdiction to issue writs of mandamus. Art. V, § 4(b)(3), § 5(b), Fla. Const.; Fla. R. App. P. 9.030(b)(3). A writ of mandamus is the proper remedy to compel a public official's performance of a

ministerial duty that is clearly required by law when there is no other adequate legal remedy. *Volusia Cty. v. Eubank*, 151 So. 2d 37, 49 (Fla. 1st DCA 1963); *Pace v. Singletary*, 633 So. 2d 516, 517 (Fla. 1st DCA 1994); *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000).

A ministerial duty is one that does not involve the exercise of discretion. *See Solomon v. Sanitarians' Registration Bd.*, 155 So. 2d 353, 356 (Fla. 1963) (holding mandamus was appropriate where the ministerial duty was one positively imposed by law and contained no authorization of discretion). While there are discretionary aspects to a school board's adoption of a policy, that discretion is cabined by the permissive scope of state law.

Respondents are challenging the rule through an administrative process. But until the rule is successfully challenged, the respondents are not free to ignore the law. *State ex rel. Atl. Coast Line R. Co. v. State Bd. of Equalizers*, 94 So. 681, 685 (Fla. 1922) ("Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as, constitutional and legal, until their unconstitutionality or illegality has been judicially established; for in a well-regulated government obedience to its laws by executive officers is absolutely essential and of paramount importance."); *State v. Jenkins*, 469 So. 2d 733, 734 (Fla. 1985) ("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law.").

Mandamus "is said to be a writ of discretion. But the discretion of a court always means a found, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the courts are bound to grant it. They can refuse justice to no man." *Marbury v. Madison,* 5 U.S. 137, 153 (1803). Yet "[a]s a general rule, unless there is a compelling reason for invoking the original jurisdiction of a higher court," writ proceedings should be commenced in a circuit court. *Whiley v. Scott*, 79 So. 3d 702, 707 (Fla. 2011). And we echo the supreme court's commitment to "decline jurisdiction and transfer or dismiss writ petitions which . . . raise substantial issues of fact or present individualized issues that do not require immediate resolution by *this* Court, or are not the type of case in which an opinion from this Court would provide important guiding

principles" for the other courts of this district. *Harvard v. Singletary*, 733 So. 2d 1020, 1021-22 (Fla. 1999).

The supreme court made clear that where the resolution of a case may involve fact-finding, those "cases should be handled by the circuit courts because they . . . concern issues specifically related to matters occurring in the circuit and the circuit court [is] in the best position to quickly and efficiently resolve such problems." *Id*. at 1022. Petitioners allege that they are parents of children directly affected by Respondents' non-compliant policies. Respondents have disputed this and created a question of fact that must first be resolved by the circuit court.

The courts will not wade into the policy battles underway. But neither will we refuse to exercise our constitutional authority to compel compliance with the law. Respondents cannot stand between parents and their lawful right to make decisions on behalf of their children.

We exercise our discretion to transfer this petition to the Eighth Judicial Circuit as to the Alachua County petitioners, and to transfer this petition to the Fourth Judicial Circuit as to the Duval County petitioners.

We direct the Chief Judge of each circuit to assign the petition to a circuit judge and that the assigned circuit judges ensure an immediate hearing and a prompt decision on the merits of the petition.

B.L. THOMAS and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Seldon J. Childers of Childers Law, LLC, Gainesville; and Nicholas P. Whitney of AndersonGlenn LLP, Jacksonville, for Petitioners.

David Delaney and Natasha S. Mickens of Dell Graham, PA, Gainesville, for Respondents Alachua County School Board and Superintendent Carlee Simon.

Rita Mairs, Chief Legal Counsel for the Duval County School Board; and Jon R. Phillips, Deputy General Counsel, Craig D. Feiser, Assistant General Counsel, and James E. Millard, Assistant General Counsel for the City of Jacksonville, Jacksonville, for Respondents Duval County School Board and Superintendent Diana Greene.

Mark W. Moseley, Chief Judge, Eighth Judicial Circuit.

Mark H. Mahon, Chief Judge, Fourth Judicial Circuit.