IN THE FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

GOVERNOR RON DESANTIS, in his Official capacity as Governor of the State of Florida; et al.,

Defendants/Appellants,

v.

Case No. 1D21-2685
L.T. Case No. 2021-CA-1382

ALLISON SCOTT, individually and on behalf of W.S., a minor; et al.,

Plaintiffs/Appellees,
_____/

ON APPEAL FROM THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

I. Introduction

The Florida Legislature enacted the Parents' Bill of Rights in June, 2021, to further protect parents' constitutional rights to make health care and education decisions for their children and to limit government interference with those decisions. Thereafter, Governor Ron DeSantis issued an Executive Order directing the Department of Health and Department of Education to issue rules that would protect parents' rights to make one particular healthcare decision for their children—whether or not to wear masks in schools. This policy decision was rational and legally authorized even if the Legislature had not enacted the Parents' Bill of Rights. And, in recognition of the Governor's and the Legislature's clear preference for parental choice, the Department of Health and Department of Education initiated rulemaking to guarantee parental choice over masks in schools.

This lawsuit immediately followed, presenting a challenge by parents and students ("Plaintiffs" or "Appellees") who believe the Governor and the Department of Health promulgated the wrong policy. Despite Plaintiffs' lack of standing and their request for relief

that violates the separation of powers and political question doctrines, the trial court proceeded to an evidentiary hearing.

Ultimately, the trial court found that the Governor's Executive Order, which sought to expand parental choice, actually *violated* the Parents' Bill of Rights. The trial court determined that the Parents' Bill of Rights provides additional rights to local school boards so that those entities may infringe on parents' rights. While the trial court's determinations were directly contrary to existing law, this outcome was additionally unexpected because the Plaintiffs never raised that argument during the proceedings—that somehow the Parents' Bill of Rights created new rights for local boards and served as a limitation on the rights of parents, so not even the Governor may expand parental choice beyond what the new law protects. Rather, the trial court *sua sponte* raised this legal theory to rule against the Appellants and then enjoined the Commissioner, the State Board of Education, and Department of Education—but not the Governor—from enforcing the Executive Order and "the policies it caused to be generated," thereby implicitly enjoining the Emergency Rule by the Department of Health despite the Department of Health not being a defendant in the case.

For these reasons and others as stated herein, this Court should vacate the Final Judgment and dismiss this case.

II. Statement of the Case

A. Nature of the Case

The evidence in this case and much of Appellees' arguments below focus on the risks associated with COVID-19 and the efficacy of masking. But the resolution of this case does not hinge on scientific evidence. Nor does it hinge on what makes good school policy. This Court can easily resolve this case pursuant to Appellants' clear and unequivocal constitutional and statutory authority.

In this case several parents, individually and on behalf of their school-aged children, challenged an Executive Order and a Department of Health Emergency Rule that reflect policy decisions concerning who decides whether a child wears a mask in school. Plaintiffs challenged the Executive Order and Emergency Rule under the Florida Constitution's due process clause and education article. (Complaint, App. at 32–56).

Specifically, Plaintiffs alleged in Count I that the Defendants were not providing safe public schools. (App. at 35–36, 40–41, ¶¶ 17, 30, 57-63, 70-71). This, according to Plaintiffs, violated Article IX,

Section 1(a) of the Florida Constitution, which directs the state to provide by law a "safe . . . system of free public schools." (App. at 39–41, ¶¶ 47–71). In Count II, Plaintiffs alleged that the statewide parental opt-out violated the home rule powers of local school districts who "operate, control and supervise all free public schools" pursuant to Article IX, Section 4 of the Florida Constitution. (App. at 42–44, ¶¶ 81-86). In Count III, Plaintiffs alleged that the Executive Order is arbitrary and capricious, in violation of the Due Process Clause of the Florida Constitution, for "usurping" the authority of local school districts to make decisions affecting the health and safety of their schools, when such local school districts are best suited to understand local health risks. (App. at 44–46, ¶¶ 105–117). In Count IV, Plaintiffs again alleged that the Executive Order is arbitrary and capricious, in violation of the Due Process Clause, for requiring parental opt-outs on masks and thereby "usurp[ing]" the authority of the Florida Department of Health to govern "public health matters, such as masking in schools," pursuant to Section 1003.22(3), Florida Statutes. (App. at 47–48, ¶¶ 134-39).

Each of Counts I through IV challenged the validity and enforcement of the Executive Order. (App. at 41–45, 47–48, ¶¶ 66,

71, 80, 83, 89, 94, 107-10, 132, 136-37). Only Count V challenged the validity and enforcement of the Emergency Rule. (App. at 49, ¶ 155). Much like the allegations presented in Count I, Plaintiffs alleged that the Emergency Rule, to the extent it precludes universal masking, infringes upon their constitutional right to "safe" public schools in violation of Article IX, Section 1(a). (App. at 49–51, ¶¶ 155-65, 173). Finally, Count VI incorporated all the previous Counts and sought emergency injunctive relief against the Executive Order. (App. at 52–54, ¶¶ 174-93).

Only Counts III, IV, and VI are at issue in this appeal and present challenges to Defendants' authority to issue the Executive Order and enforce the Emergency Rule. (Final Judgment, App. at 14–30). This is the Defendants' appeal of the circuit court's final judgment.

B. Course of the Proceedings

The Governor issued the Executive Order on July 30, 2021, (Executive Order, App. at 65–68), and the state Surgeon General

signed the Emergency Rule on August 5, 2021,[1] (Emergency Rule, App. at 69–70). On August 6, 2021, Plaintiffs, originally consisting of nine sets of parents and their school-aged children, filed the Complaint, and served Appellants on August 11, 2021. On August 13, 2021, the trial court held a case management conference, during which the trial court set an expedited schedule to brief and hear a motion to dismiss, and then for trial.[2]

[1] The Department of Health has since replaced the Emergency Rule challenged by Appellees. See Emergency Rule 64DER21-15, Fla. Admin. Reg., Vo. 47/185 (Sept. 23, 2021), https://www.flrules.org/gateway/ruleNo.asp?id=64DER21-15.

[2] That same day, Appellees filed a "Notice of Dropping Parties" that purportedly attempted to "drop" Robin and John McCarthy, individually and on behalf of L.M. and Eren Dooley, individually and on behalf of G.D., D.D., and F.D. (App. at 2098–2102). Appellees attempted to "drop" the two sets of parents under Florida Rule of Civil Procedure 1.250(b). (App. at 2099). Although they were alerted that this was the incorrect procedural device, see Fla. R. Civ. P. 1.420(a)(1), Appellees refused to file voluntary notices of dismissal. At the close of Plaintiffs' case-in-chief, Defendants moved under Rule 1.420(b) to dismiss the claims of all Plaintiffs who did not testify for lack of standing. (App. at 1263–66). The Court agreed and held that all Plaintiffs who did not testify, except for Magnus Andersson whose wife testified, were dismissed for lack of standing. Appellants contend that this included the Plaintiffs purportedly "dropped." (App. at 1263–66). The Court never entered a written order clarifying this issue after being provided with competing proposed orders.

Pursuant to the trial court's schedule, Appellants filed their motion to dismiss on August 16, 2021. (Defs. Mot. to Dismiss, App. at 71–119). As discussed at the case management conference, the motion to dismiss raised only the threshold issues of standing, separation of powers, and the political question doctrine. Appellees filed their response in opposition on August 17, 2021, (Pls.' Mem of Law in Opp'n, App. at 120–147), and the Court held a hearing on August 19, 2021. Relying on facts outside of the Complaint, (see Mot. to Dismiss Tr., App. at 282–86), and incorrectly determining that standing, separation of powers, and the political question doctrine are affirmative defenses, the trial court denied the motion to dismiss and proceeded to an evidentiary hearing. (App. at 286).

The trial court heard three days of evidence. During the first two days, Appellees presented testimony of four parent plaintiffs (Amy Nell, Kristen Thompson, Damaris Allen, and Lesley Abravanel), one emerging disease researcher, and six physicians, and introduced twenty-seven exhibits. At the close of Plaintiffs' case-in-chief, Appellants moved for involuntary dismissal under Florida Rule of Civil Procedure 1.420(b). Appellants argued that: (1) Plaintiffs still

lacked standing;[3] (2) the separation of powers and political question doctrines precluded Plaintiffs' claims; (3) Plaintiffs failed to join an indispensable party—i.e., the Department of Health; (4) Plaintiffs failed to exhaust their administrative remedies in challenging the Department of Health Rule under both the Florida Administrative Procedure Act and under the Individuals with Disabilities Education Act ("IDEA"); (5) the Governor had the constitutional and statutory authority to direct agencies to make rules; and (6) Plaintiffs failed to negate every conceivable rational basis for the Executive Order and Emergency Rule. (Hr'g Tr., App. at 1262–76). The trial court granted the motion in part—dismissing the Plaintiffs who did not testify—reserved ruling on the indispensable party argument, and denied the remainder of the motion. (App. at 1286–91).

During their case-in-chief, Appellants presented testimony from three parents whose children are adversely affected by mask wearing, a leading expert, researcher, and published scholar in infectious

[3] Appellants argued specifically that all Plaintiffs who did not testify failed to demonstrate their standing. (App. at 1263). And with respect to the Plaintiffs who did testify, their children went to schools that had enacted mandatory mask policies without parental opt-outs—the exact relief those parents were seeking. (App. at 1263–66).

disease epidemiology, and the Florida Chancellor for the Division of Public Schools. Appellants also introduced forty-eight exhibits.

On the fourth day of the evidentiary hearing, the parties presented their closing arguments. (App. at 1729–847). The following day, the trial court orally announced its ruling, which garnered national publicity. On September 2, 2021, the trial court entered its Final Judgment. (App. at 6–31). That same day, Appellants filed their Notice of Appeal, (Defs.' Notice of Appeal, App. at 317–21), and Appellees subsequently filed a motion in the trial court to vacate the automatic stay under Florida Rule of Appellate Procedure 9.310(b)(2), (Pls.' Emerg. Mot. to Vacate Auto. Stay, App. at 619–28). Appellants responded on September 7, 2021, (Defs. Resp. in Opp. to Pls.' Emerg. Mot., App. at 629–61), and the trial court held a hearing on the motion on September 8, 2021. The trial court vacated the stay, (Order Vacating Stay, App. at 662–63), and Appellants immediately filed an Emergency Motion to Reinstate the Stay before this Court, (Emerg. Mot. to Reinstate Auto. Stay, App. at 664–704). After allowing Appellees an opportunity to respond, (Resp. in Opp. to Emerg. Mot to Reinstate Stay, App. at 705–37), this Court granted Appellants' motion and reinstated the stay via an order, advising that this Court

has "serious doubts about standing, jurisdiction, and other threshold matters." (Order Reinstating Stay, App. at 738–39).

Immediately thereafter, Appellees filed a Suggestion that Order be Certified as Requiring Immediate Resolution by the Florida Supreme Court under Appellate Rule 9.125. (App. at 740–50). Appellants responded in opposition, (App. at 751–71), and on September 24, 2021, the Court denied the Suggestion. (App. at 772–73). On September 29, 2021, Appellees filed a Notice of Cross-Appeal. (App. at 774–79).

C. Disposition of the Lower Tribunal

The trial court announced its oral ruling over two hours and then issued a written Final Judgment that incorporated the prior oral ruling. (App. at 1848–933; App. at 6–31). For Count I, the trial court did not grant relief because "the proof d[id] not rise to the level required by the decision in DeSantis v. [Florida Education Association], 306 So. 3d 1202 (Fla. 1st DCA 2020), and other cases discussing the burden of proof for claims in such cases." (App. at 14–15). For Count II, the trial court laid out its case for why local school districts should have control over masking policies, but ultimately denied relief, concluding that it is not "sufficiently clear that the issue

presented in this case is not clearly, strictly, and solely a local issue with no right of the State to intervene." (App. at 17). As stated, the Court also dismissed Count V for failure to join an indispensable party, the Department of Health. (App. at 28).

The trial court granted relief under Counts III and IV. Despite its finding as to Count I, the trial court held that the Executive Order lacked a rational basis because it "and the actions taken as a result are without authority and are null and void." (App. at 20). Relating to Counts III and IV, the trial court found that the Parents' Bill of Rights "expressly gives governmental entities, such as school boards, the right to adopt policies regarding health care and education of children in school . . . ." (App. at 23). The trial court further found that the Executive Order and the Emergency Rule deny local school boards their due process rights. (App. at 24).

The trial court also entered an injunction under Count VI against the Commissioner, State Board, and Department of Education. The trial court enjoined them from "taking action to effect a blanket ban on face mask mandates by local school boards and by denying the school boards their due process rights . . . ." (App. at 29). Moreover, the trial court enjoined the Education Defendants "from

enforcing or attempting to enforce the Executive Order and the policies it caused to be generated and any resulting policy or action which violates the Parents' Bill of Rights as outlined in this Final Judgment." (App. at 29).

III. Statement of the Facts

A. The Executive Order, Department of Health Emergency Rule, and Appellants' Authority.

On July 30, 2021, the Governor issued Executive Order 21-175, which directs the Department of Health and the Department of Education to execute rules that "ensure safety protocols for controlling the spread of COVID-19 in schools . . . ." (App. at 67). The Executive Order directs the Florida Department of Health and the Florida Department of Education, working together, to engage in rulemaking pursuant to Section 120.54, Florida Statutes. (App. at 67). The Department of Health and Department of Education were instructed to promulgate rules:

> [T]o ensure safety protocols for controlling the spread of COVID-19 in schools that:
>
> A. Do not violate Floridians' constitutional freedoms;

> B. Do not violate parents' rights under Florida law to make health care decisions for their minor children; and
>
> C. Protect children with disabilities or health conditions who would be harmed by certain protocols such as face masking requirements.
>
> Section 2. Any action taken pursuant to Section 1 above shall at minimum be in accordance with Florida's "Parents' Bill of Rights" and protect parents' right to make decisions regarding masking of their children in relation to COVID-19.

(App. at 67–68).

Before enacting the Executive Order, the Governor participated in several roundtables with infectious disease experts, psychologists, pediatric physicians, school administrators, teachers, parents, and students to discuss masking in schools. (Defs.' Ex. 24, App. at 2097; see also App. at 1316:17–20; 1368:17–22; 1396:19–97:23). The Governor had also reviewed numerous studies regarding the efficacy of masking in slowing COVID-19 transmission, as well as the potential harms. (App. at 1315:17–16:20; 1394:24–96:3). Additionally, the Executive Order cited an article that found no

correlation between mask mandates and COVID-19 rates among students. (App. at 65; Defs.' Ex. 19, App. at 2083).

Further, before the Governor issued the Executive Order and the Department of Health issued its Emergency Rule, the Commissioner and State Board reviewed data from the 2020-21 school year regarding masking policies and COVID-19 cases in schools. (See App. at 1606; Defs.' Ex. 18, App. at 2081). This data reflected that there was no correlation between mask mandates and COVID-19 rates in schools. (App. at 2081; App. at 1619:5–24).

In accordance with the Executive Order, the Department of Health, after consultation with the Department of Education, promulgated Emergency Rule 64DER21-12. (App. at 69–70). See Fla. Admin. Code R. 64DER21-12 (Protocols for Controlling COVID-19 in School Settings), Vol. 47, No. 153, Fla. Admin. Reg. (August 9, 2021), (App. at 54–55). The Emergency Rule identifies the specific reasons for finding an immediate danger to the public health, safety, or welfare and the reasons for concluding that the procedure is fair under the circumstances. Appellees did not challenge these findings. See generally § 120.54(4), Fla. Stat. (describing requirements for emergency rulemaking). The Emergency Rule also outlines protocols

for controlling COVID-19 in school settings, including routine cleaning, routine hand washing, and a series of protocols for when students are symptomatic, test positive, or are exposed to COVID-19. (App. at 69–70). In furtherance of the Executive Order, the Emergency Rule allows students to wear masks, but also gives parents the choice to opt their child out of wearing a mask. The Emergency Rule became effective August 6, 2021. (App. at 69–70).

Jacob Oliva, the Chancellor of Public Schools for the Department of Education, testified that local school officials appreciated the Department of Health Emergency Rule. (App. at 1628:1–20). Nonetheless, as certain plaintiffs testified, and the trial court judicially noticed, certain local school boards implemented mandatory mask policies that did not provide for a parental opt-out. (App. at 1628:21–1630:16; 1632:13–1643:23; 983:3–8; 1027:23–25; 1107:11–16; 1230:1–6).

SUMMARY OF THE ARGUMENT

The trial court erred in holding that the Parents' Bill of Rights granted local school boards the right to enact policies related to the control of communicable diseases in school. In fact, the trial court improperly interpreted the Parents' Bill of Rights in two material respects. First, it found that the Parents' Bill of Rights "expressly" gives school boards the "right" to adopt policies regarding health care in school. Second, the trial court held that the Parents' Bill of Rights provides governmental entities, such as school boards, with "due process rights" when enacting such policies. But the trial court's reasoning ignores long-standing statutory authority that grants the Department of Health—not local school boards—with the authority to control communicable diseases in schools, and the Commissioner of Education, State Board of Education, and Department of Education to ensure, via enforcement mechanisms, that local school boards comply with Florida laws and rules. The Parents' Bill of Rights did not alter these preexisting statutes and did not confer additional rights on governmental entities.

Not only was the trial court's interpretation of the Parents' Bill of Rights incorrect, Appellees never presented this statute as a basis

for relief. Nevertheless, the Court, *sua sponte*, incorrectly found that the Parents' Bill of Rights was the sole "authority" underlying the Executive Order's parental opt-out policy. The Court then proceeded to explain why the Parents' Bill of Rights is inconsistent with the state-wide opt-out provision, thus making that aspect of the Executive Order arbitrary and capricious. It was improper for the Court, wholly on its own initiative, to devise new legal grounds to support the Court's ultimate conclusion, thus violating the important principle of party presentation.

Second, Appellees lack standing. Appellees' purpose in bringing this action was purportedly to safeguard the health and welfare of Florida public school students and the general public, but Plaintiffs below lacked standing to bring this case for the general public, and they did not demonstrate a non-speculative injury that Appellants caused that is redressable in court. To establish standing to sue, a plaintiff must have a legitimate or sufficient interest at stake in the controversy that will be affected by the outcome of the litigation. Ultimately, Appellees did not show, and cannot show, an injury-in-fact, a causal connection between Appellants' conduct and the complained-of injury, and a substantial likelihood that the requested

relief will remedy the alleged injury-in-fact. At its core, the Executive Order tasks two state agencies—the Department of Education and the Department of Health—to pursue rules controlling the spread of COVID-19, while also maintaining education priorities and protecting constitutional and statutory rights. The Executive Order has no direct application to local school districts, schools, teachers, parents, or students. Thus, the complained of conduct—an executive order that directs rulemaking by two state agencies—cannot cause the complained-of harm.

Third, the relief granted in the Final Judgment is improper because it operates to enjoin enforcement of a valid Department of Health Emergency Rule, and the purported irreparable harm is not alleviated by the injunction.

Finally, this case is non-justiciable because any relief would violate the separation of powers and political question doctrines. The trial court, at the request of Appellees, violated the "foundational principle" of separation of powers by interfering with policy directives and decisions reserved for the executive branch. The trial court also erred in not dismissing the Complaint based on the separation of

powers doctrine and incorrectly construed separation of powers to be an affirmative defense that Appellants were required to prove.

The trial court's Final Judgment also implicates non-justiciable political questions. The Governor's Executive Order and the Department of Health's Emergency Rule involved carefully balanced health and safety policy considerations, and decisions on the safety and the health of the people are entrusted to the politically accountable officials of the State to guard and protect.

ARGUMENT

I. The Trial Court Erred in Holding that the Parents' Bill of Rights Grants Local School Boards the Right to Enact Policies Related to the Control of Communicable Diseases in Schools

A. The Governor had the authority to issue the Executive Order.

The Governor had the authority to issue the Executive Order. See Art. IV, § 1(a), Fla. Const. (Defs.' Ex. 6 , App. at 1891); Ch. 12-119, § 1(12)(a)–(b), (14)(c), Laws of Fla. (Defs.' Ex. 7, App. at 2062); §§ 20.02(3), 20.03(4), (13), Fla. Stat. (Defs.' Ex. 8, App. at 2066, 2067). The Florida Constitution vests the "supreme executive power" in the Governor, who must "take care that the laws [are] faithfully executed." Art. IV, § 1(a), Fla. Const. Additionally, the Governor must "transact all necessary business with the officers of government." Id. The functions of the executive branch are allocated into departments that, except in certain circumstances, are under the direct supervision of the Governor. Art. IV, § 6, Fla. Const. Those departments under the supervision of the Governor—i.e., those that serve at the pleasure of the Governor—are subject to his direction and supervision. §§ 20.03(4), § 20.03(13), Fla. Stat. The Legislature has made clear:

> The exercise of delegated quasi-legislative power within the parameters of Florida's Administrative Procedure Act and related statutes involves certain discretionary policy choices by executive branch officers. In authorizing the exercise of this power, the Legislature has imposed no restriction on the authority of the Governor or any other constitutional officer or collegial body to supervise and direct such policy choices made by subordinate executive branch officials in rulemaking.

Section 1(14)(a), 2012-116, Laws of Fla.[4] Accordingly, pursuant to his constitutional and statutory authorities, the Governor could issue the Executive Order. See id.; see also, e.g., §§ 20.02(3); 20.03(4), § 20.03(13), Fla. Stat.

B. The Department of Health had the authority to issue the Emergency Rule.

Similarly, the Department of Health had the authority to issue the Emergency Rule. See § 1003.22(3), Fla. Stat. (Defs.' Ex. 12, App.

[4] In response to Defendants' Motion to Dismiss, Plaintiffs cited Whiley v. Scott, 79 So. 3d 702 (Fla. 2011) for the proposition that the Governor does not have the authority to direct agencies to make rules. However, in the very next legislative session, the Florida Legislature intentionally and specifically amended Chapter 20, Florida Statutes to ensure the Governor had the power that the legislative and executive branches always believed he had. Importantly, the Florida Legislature directly cited Justice Poltson's and Justice Canady's dissenting opinions from Whiley to support its determination that state agencies are subject to the direction and supervision of the Governor. See Section 1(12)(a)–(b); (14)(c), 2012-116, Laws of Fla.

at 2077); § 20.43(1)–(2), Fla. Stat. (Defs.' Ex. 10, App. at 2073); § 20.02(3), Fla. Stat. (App. at 2066). The Department of Health is under the constitutional authority of the Governor pursuant to Florida law. See § 20.02(3), Fla. Stat. (App. at 2066) ("The administration of any executive branch department or entity placed under the direct supervision of an officer or board appointed by and serving at the pleasure of the Governor shall remain at all times under the constitutional executive authority of the Governor . . . ."); § 20.43(2), Fla. Stat. (App. at 2073) (creating the Department of Health, headed by the State Surgeon General, who is appointed by and serves at the pleasure of the Governor). The Department of Health has its own unique responsibilities, which include adopting rules, after consultation with the Department of Education, governing the control of communicable diseases in public schools. § 1003.22, Fla. Stat. (App. at 2077-79).

C. Florida's Constitution creates a hierarchical system of governance for education in the state.

Article IX of the Florida Constitution implements the parameters for public education in the state. Section One requires the Legislature, by law, to provide for a "uniform, efficient, safe,

secure, and high quality system of free public schools that allows students to obtain a high quality education . . . .” Art. IX, § 1(a), Fla. Const. Section Two creates the State Board of Education, which has “supervision of the system of free public education as is provided by law.” Art. IX, § 2, Fla. Const. Section Four creates school districts which elect local school boards that “shall operate, control and supervise all free public schools within the school district . . . .” Art. IX, § 4(b), Fla. Const. Commissioner Corcoran is the executive director of the Department of Education. See § 20.15(2), Fla. Stat.

The State Board of Education, a constitutional entity, “ha[s] such supervision of the system of free public education as is provided by law.” Art. IX, § 2, Fla. Const. The State Board is the head of the Department of Education under Florida law. § 20.15(1), Fla. Stat. The State Board, which consists of seven members appointed by the Governor and confirmed by the Senate, appoints the commissioner of education. Art. IX, § 2, Fla. Const.

The text and structure of the Florida Constitution demonstrates that the Legislature has both primacy and preemptive authority over the state’s public education system. See DeSantis v. Fla. Educ. Ass’n, 306 So. 3d 1202, 1215–16 (Fla. 1st DCA 2020) (noting the Florida

Supreme Court's prior holding in Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996), that "the use of the phrase 'by law' in the [first section of Article IX] shows that the text of the Florida Constitution commits education policy to the legislative and executive branches"). This is demonstrated by the text of Section One—"[a]dequate provision *shall be made by law* . . . . ," Art. IX, § 1(a), Fla. Const. (emphasis added)—and Section Two—"[t]he state board of education *shall* . . . *have such supervision* of the system of free public education *as is provided by law*," Art. IX, § 2, Fla. Const. (emphasis added). Thus, the Legislature, through law, empowers the State Board to supervise local school boards. This Court has explained:

> The Florida Constitution "creates a hierarchy under which a school board has local control, but the State Board supervises the system as a whole." . . . The State's "broader supervisory authority may at times infringe on a school board's local powers, but such infringement is expressly contemplated—and in fact encouraged by the very nature of supervision—by the Florida Constitution."

Sch. Bd. of Collier Cnty. v. Fla. Dep't of Educ., 279 So. 3d 281, 286–87 (Fla. 1st DCA 2019) (quoting Sch. Bd. of Palm Beach Cnty. v. Fla. Charter Educ. Found. Inc., 213 So. 3d 356, 360 (Fla. 4th DCA 2017)).

Thus, although "[p]ublic education is a cooperative function of

the state and local educational authorities," "[t]he state retains responsibility for establishing a system of public education through laws, standards, and rules" and "[l]ocal educational authorities have a duty to fully and faithfully comply with state laws, standards, and rules . . . ." § 1000.03(3), Fla. Stat. This hierarchical structure comports with the broader framework of the Florida Constitution, which simultaneously promotes and limits the home rule authority of Article VIII counties considering the Article III state Legislature's broad prerogative to decide and preempt matters of public policy. Compare, e.g., Art. II, § 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive and judicial branches."), and Art. III, § 1, Fla. Const. ("The legislative power of the state shall be vested in a legislature of the State of Florida[.]"), with Art. VIII, § 1(f), Fla. Const. ("Counties not operating under county charters shall have such power of self-government *as is provided by general or special law*." (emphasis added)), and Art. VIII, § 1(g), Fla. Const. ("Counties operating under county charters shall have all powers of local self-government *not inconsistent with general law*[.]" (emphasis added)). Moreover, where the Florida Constitution creates constitutional education entities but provides limited guidance on

the division of powers, the Legislature "has broad powers to define the relationship . . . ." McCalister v. Sch. Bd. of Bay Cnty., 971 So. 2d 1020, 1023 (Fla. 1st DCA 2008) (discussing the Legislature's authority under the education article with respect to the division of power between local school boards and superintendents).

Within this constitutional framework, the Legislature has provided the State Board with tools to exercise its constitutional mandate to supervise local school boards and ensure they comply with the laws and rules governing the system of education. The State Board of Education and the Commissioner of Education are tasked with ensuring compliance with "law or state board rule." See § 1008.32, Fla. Stat.; see also § 1000.03(2)(b) ("[T]he State Board of Education shall oversee the enforcement of all laws and rules . . . ."). The Commissioner also has the power to investigate local school districts, and the State Board has the power to determine and impose penalties for local school board's violations of Florida laws or rules. § 1008.32, Fla. Stat.

Similarly, the Legislature has mandated that local school boards "[r]equire that all laws, all rules of the State Board of Education, and all rules of the district school board are properly

enforced." § 1003.02, Fla. Stat. And, significantly, the Legislature granted the Department of Health, within the education code, the statutory authority and obligation to adopt rules governing the control of communicable diseases in schools. § 1003.22(3), Fla. Stat.

D. The Parents' Bill of Rights is a statute limiting government action and does not alter the education hierarchy within Florida.

On June 29, 2021, the Governor signed into law House Bill 241, known as the Parents' Bill of Rights. Practically, the Parents' Bill of Rights is comprised of four substantive sections: Section 1014.03 that restricts government action infringing upon parental rights; Section 1014.04 which outlines and enumerates parents' rights; Section 1014.05 which imposes obligations on local school boards to notify parents about their rights; and Section 1014.06 which imposes requirements on health care practitioners regarding parental consent. The Executive Order, citing House Bill 241, quoted language from Section 1014.03. That section states, in full:

> The state, any of its political subdivisions, any other governmental entity, or any other institution may not infringe on the fundamental rights of a parent to direct the upbringing, education, health care, and mental health of his or her minor child without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and

is not otherwise served by a less restrictive means. § 1014.03, Fla. Stat. Providing context to the Parents' Bill of Rights, the Legislature recited its findings:

> The Legislature finds that it is a fundamental right of parents to direct the upbringing, education, and care of their minor children. The Legislature further finds that important information relating to a minor child should not be withheld, either inadvertently or purposefully, from his or her parent, including information relating to the minor child's health, well-being, and education, while the minor child is in the custody of the school district. The Legislature further finds it is necessary to establish a consistent mechanism for parents to be notified of information relating to the health and well-being of their minor children.

§ 1014.02, Fla. Stat. Thus, as is clear from the legislative findings, the Parents' Bill of Rights is designed to protect parents' rights and to clarify the standard that governmental entities must meet if they infringe upon parents' rights through an exercise of their authority. See id. There is no express nor implied grant of authority or creation of rights on behalf of governmental entities. See id.

E. The trial court erroneously interpreted the Parents' Bill of Rights to grant authority and rights to governmental entities that do not exist on the face of the statute.

The trial court improperly interpreted the Parents' Bill of Rights in two material respects.[5] First, it found that the Parents' Bill of Rights "expressly" gives local school boards the "right" to adopt policies regarding health care in school. (App. at 23). Second, the trial court held that the Parents' Bill of Rights provides governmental entities, such as local school boards, with "due process rights" when enacting such policies. (App. at 24). Both interpretations fail to consider existing statutes and add additional terms to the Parents' Bill of Rights that are not specified within its plain language.

First, the trial court found that the Parents' Bill of Rights "expressly gives governmental entities, such as school boards, the right to adopt policies regarding health care and education of children in school, even if the policies affect a parents' rights to make decisions in these areas." (App. at 23). But the trial court's reasoning ignores long-standing statutory authority that grants the

[5] A trial court's statutory interpretation is reviewed *de novo*. Crapo v. Univ. Cove Partners, Ltd., 298 So. 3d 697, 700 (Fla. 1st DCA 2020).

Department of Health—not local school boards—with the authority to control communicable diseases in schools, § 1003.22(3), Fla. Stat., and the Commissioner of Education, State Board of Education, and Department of Education with the statutory authority to ensure, via enforcement mechanisms, that local school boards comply with Florida laws and rules, § 1008.32, Fla. Stat.; see § 1000.03(2)(b), Fla. Stat. The Parents' Bill of Rights did not alter these preexisting statutes and did not confer additional rights on governmental entities.

"[T]he legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force." Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 249 (Fla. 1987). "Moreover, a statute such as section [1003.22(3)] covering a specific subject, is controlling over a statute such as section [1014.03] that applies to a general class of subjects; in effect, the specific statute operates as an exception to the general." Kelly, 516 So. 2d at 249.

When the Legislature passed the Parents' Bill of Rights, the Department of Health had the authority and obligation to "adopt rules governing the . . . control of preventable communicable

diseases [in public schools]." § 1003.22(3), Fla. Stat. This statute is within the education code and does not authorize local school boards to implement their own contrary rules. The Parents' Bill of Rights does not mention Section 1003.22, the Department of Health, or the control of communicable diseases. Therefore, Section 1003.22(3) is still the sole legislative delegation of authority for controlling communicable diseases in schools and that authority is vested with the Department of Health, in consultation with the Department of Education. See Kelly, 516 So. 2d at 249.

Additionally, when the Legislature passed the Parents' Bill of Rights, the Commissioner of Education had the power to investigate local school boards and the State Board had the power to determine and impose penalties for local school boards' violations of Florida laws or rules. § 1008.32, Fla. Stat. This legislative authority is consistent with the constitutional education hierarchy that provides local school boards with some autonomy, but also provides the State Board with oversight responsibility. See Sch. Bd. of Collier Cnty., 279 So. 3d at 286–87; see also Art. IX, § 2, Fla. Const. The Parents' Bill of Rights does not alter this hierarchy, it does not diminish the Commissioner or State Board's oversight responsibility, and it does

not grant local school boards greater power. Thus, the trial court erred in finding greater power for government in the Parents' Bill of Rights.

Contrary to the trial court's ruling, the second half of Section 1014.03—requiring a governmental entity to meet the strict scrutiny standard before infringing on parents' rights—was included to clarify the standard for determining whether state action that infringes upon parents' rights is permissible. That portion of the statute does not grant additional authority to any state actor. Instead, it limits what state actors can do within their previously granted constitutional or statutory authority. The trial court's finding that the Parents' Bill of Rights "expressly" provides school boards with the right to implement policies regarding the control of communicable diseases directly conflicts with Section 1003.22(3)—providing the Department of Health with the sole authority, in consultation with the Department of Education, to implement rules for the control of communicable diseases in schools—and is, therefore, an incorrect interpretation. See Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 199 (Fla. 2007) (stating that similar statutes should be read in harmony); Kelly, 516 So. 2d at 249 ("[T]he legislature is presumed to

pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force.").

Second, the trial court erred in determining that the Parents' Bill of Rights granted new or additional due process rights to local school boards and that Appellants "do not have authority under [the Parents' Bill of Rights] to enforce a before the fact" policy requiring a parental opt-out. (App. at 23). This holding, too, fails to consider long-standing statutory authority granted to the Education Defendants and misinterprets required due process. Instead, the Final Judgment improperly expands the Parents' Bill of Rights to create due process protections for local school boards and simultaneously limits the State Board's statutory authority—neither of which are explicit therein.

Under Florida law, although "there is no single test to determine whether the requirements of due process have been met, '[t]he fundamental requirements of due process are satisfied by reasonable notice and a reasonable opportunity to be heard.'" Citizens of State v. Fla. Pub. Serv. Comm'n, 146 So. 3d 1143, 1154 (Fla. 2014) (citation omitted) (quoting Fla. Pub. Serv. Comm'n v. Triple "A" Enter., Inc., 387 So. 2d 940, 943 (Fla. 1980)). And the Legislature

has discretion to "determine by what process and procedure legal rights may be asserted and determined provided that the procedure adopted affords reasonable notice and a fair opportunity to be heard before rights are decided." Id. (quoting Peoples Bank of Indian River Cnty. v. State, Dep't of Banking & Fin., 395 So. 2d 521, 524 (Fla. 1981)).

In the education code, the Legislature implemented a statutory scheme that provides the State Board with the requirement to enforce compliance with Florida law among the local school boards. § 1008.32, Fla. Stat. This scheme provides the Commissioner of Education with the power to investigate local school boards and the State Board with the power to determine and impose penalties for local school boards' violations of Florida laws or rules. Id. But this statutory scheme also includes "due process" for local school boards suspected of violating any law or rule. § 1008.32(2)-(4) (requiring local school boards to document compliance with law before the State Board can take any enforcement action). Ultimately, the Commissioner investigates allegations of noncompliance and reports determinations of probable cause to the State Board (notice) and the local school boards are given an opportunity to document compliance

before the State Board takes any enforcement action (opportunity to be heard). This procedure provides due process under Florida law. See Citizens of State, 146 So. 3d at 1154. Thus, to the extent the trial court requires the Education Defendants to provide any additional due process protections to local school boards under the Parents' Bill of Rights, such interpretation is inconsistent with existing law and, thus, incorrect.[6]

F. The Final Judgment should be vacated because the trial court relied on arguments not raised by Appellees.

Not only was the trial court's interpretation of the Parents' Bill of Rights incorrect, it was also developed *sua sponte*; Appellees never alleged or argued that Appellants' actions violated that statute. In other words, Appellees never presented this statute as a basis for relief. Nonetheless, the Court, *sua sponte*, incorrectly found that the Parents' Bill of Rights was the sole "authority" underlying the Executive Order's parental opt-out policy. (App. at 20). The Court then proceeded to explain why the Parents' Bill of Rights is

[6] The evidence in this case—which the Court found on its own and then alerted the parties that it was taking judicial notice of in the middle of the Appellants' direct examination of a Department of Education witness—demonstrates that the Education Defendants employed this exact procedure here. (See App. at 1628:21–31:17).

inconsistent with the state-wide opt-out provision, thus making that aspect of the Executive Order arbitrary and capricious. (App. at 21-28). It was improper for the Court, wholly on its own initiative, to devise new legal grounds to support the Court's ultimate conclusion. See United States v. Sineng-Smith, 140 S. Ct. 1575, 1579 (2020).

A unanimous Supreme Court recently affirmed the important principle of party presentation: that our adversarial system of adjudication "is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." Id. (quoting Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment)). "In short: Courts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties." Id. (internal citation and quotations omitted.)

The Complaint's omission of any reference to the Parents' Bill of Rights makes clear that Plaintiffs' claims could not be adjudicated as an alleged violation of that new law. To the extent the Court

invalidated the Executive Order on that basis—which, in Appellants' reading, is the sole basis on which Plaintiffs were awarded relief—the Final Judgment should be reversed. The Court's reliance on the Parents' Bill of Rights as the foundation for the injunction far exceeds a valid connection to any allegation or argument made by Plaintiffs.[7] Because the Court's application of this newly enacted statute was never raised by the Plaintiffs, it should not have been the dispositive issue in the Court's ruling.

II. Appellees Lack Standing

Appellees' purpose in bringing this action was "to safeguard the health and welfare of Florida public school students and the general public . . . ." (App. at 37, ¶ 33). But Plaintiffs-below lacked standing to bring this case for the general public, and they did not demonstrate a non-speculative injury that was caused by Defendants and is

[7] To be sure, the Executive Order references the Parents' Bill of Rights, and Defendants asserted an affirmative defense relying on the Parents' Bill of Rights. Nonetheless, Plaintiffs never argued that the Executive Order itself violates the Parents' Bill of Rights, and, accordingly, Defendants were never given the opportunity to show the fault in such finding. This demonstrates why the party presentment rule is so important—had this issue been presented to the Court, Defendants would have demonstrated how the Executive Order is in full accord with the Parents' Bill of Rights.

redressable by the trial court.[8] Accordingly, this Court should reverse the trial court's decision and dismiss this action for lack of standing.

"To establish standing to sue, a plaintiff must have a legitimate or sufficient interest at stake in the controversy that will be affected by the outcome of the litigation." Fla. Educ. Ass'n, 306 So. 3d at 1213 (citations and quotations omitted). Standing is a question of law that is reviewed *de novo*. Id. Additionally, standing is a "threshold issue" that must be determined before reaching the merits. See, e.g., Jones v. Dep't of Revenue, 523 So. 2d 1211, 1214 (Fla. 1st DCA 1988) ("Before reaching the merits of appellant's challenge, however, it is first necessary to determine whether appellant had standing to challenge the constitutionality of the statute."); McCarty v. Myers, 125 So. 3d 333, 336 (Fla. 1st DCA 2013) ("Standing presents 'a threshold inquiry' that must be made at the commencement of the case. . . . . It is well-established 'that a party seeking adjudication of the courts on the constitutionality of statutes is required to show that

[8] The Final Judgment stated, without elaboration or support, that for "the Plaintiffs not dismissed during the trial, this Court found that they had standing and reaffirms that finding here." (App. at 8 n.2).

his constitutional rights have been abrogated or threatened by the provisions of the challenged act.'").

Standing is reduced to three requirements: an injury-in-fact, a causal connection between defendants' conduct and the complained-of injury, and a substantial likelihood that the requested relief will remedy the alleged injury-in-fact. Fla. Educ. Ass'n, 306 So. 3d at 1213 (citing State v. J.P., 907 So. 2d 1101, 1113 n.4 (Fla. 2004)). Appellees cannot demonstrate any of the three factors.

First, Appellees cannot demonstrate an injury-in-fact. To satisfy the injury requirement, a plaintiff must show an injury that is actual, imminent, and concrete and neither speculative nor conjectural. See id. Plaintiffs complain that they will be injured if they are forced to return to in-person schools without mask mandates. But their testimony regarding their specific injuries was highly general, conclusory, and hypothetical. For example, the Parent Plaintiffs testified that without an exceptionless school mask mandate, there is a worry of unknown potential long-term complications if a child contracts COVID-19 (App. at 993:3–24), an increased fear of contracting COVID-19, (App. at 1228:1–18), and the potential for a greater chance of contracting COVID-19, (App. at 1109:15–23). But,

worries about the unknown, increased fear of something, and the unsubstantiated potential for a greater chance of something happening are, by definition, speculative and conjectural and not actual, imminent, or concrete. See Fla. Educ. Ass'n, 306 So. 3d at 1213. Ultimately, Appellees' purported injuries fail to satisfy the rigors of the standing analysis.

Further, Count III alleged that the Executive Order wrongfully usurps local school boards' powers, (App. at 45–46, ¶¶ 111–17), and Count IV alleged that the Executive Order usurps the power of the Department of Health, (App. at 48, ¶¶ 136, 139). But these are not injuries specific to Plaintiffs. Similarly, any threat or loss of funding to a local school board that could result from Appellants' enforcement of valid laws and rules is not an injury to Plaintiffs, either. Ultimately, the Executive Order that directs the Department of Health to issue rules regarding the control of communicable diseases in schools does not create an injury to students or parents simply because the students and parents believe that local school districts should make such rules instead.

Second, assuming that "the presence of non-masked students and unvaccinated students within the school setting" could ever be a

sufficient injury-in-fact to confer standing, the Executive Order is not the cause of this supposed harm. The presence of non-masked students is the normal state of affairs, so Plaintiffs' causation element requires some other government intervention to upend normalcy by universally requiring students to cover their noses and mouths—an extreme measure. To be sure, the Executive Order does not direct local school boards or schools to do anything. Nor does it take any state action against the Plaintiffs. So the causal relationship with these Plaintiffs' alleged harm is simply too remote.

At its core, the Executive Order tasks two state agencies—the Department of Education and the Department of Health—to pursue rules controlling the spread of COVID-19, while also maintaining education priorities and protecting constitutional and statutory rights. Both agencies followed the Governor's directive and pursued rules of their own, and those rules are now the operative law for local school districts. The Executive Order, on the other hand, has no direct application to local school boards, schools, teachers, parents, or students. Thus, the complained of conduct—an executive order that directs rulemaking by two state agencies—cannot cause the complained-of harm.

Additionally, Plaintiffs failed to prove that their alleged harm could not have been avoided by the numerous alternative schooling methods. Chancellor Oliva testified at length about the many alternative options for students, to include district-run virtual school, state-run virtual school, the Hope Scholarship, and others. (App. at 1695-98). Although certain Plaintiffs quibble with some of these options, they failed to prove that the Executive Order—the state action at issue—requires them to attend a school without a mask mandate, which results in their so-called harm. The Executive Order does not require any student to attend in-person school. Thus, Plaintiffs failed to prove that the Executive Order caused their purported injuries. See Fla. Educ. Ass'n, 306 So. 3d at 1214 (explaining that the plaintiffs failed to demonstrate an injury-in-fact because there were adequate alternatives to attending in-person school).

Lastly, Plaintiffs fail to allege that there is a "substantial likelihood that the requested relief will remedy the alleged injury-in-fact." Fla. Educ. Ass'n, 306 So. 3d at 1214 (quotation marks omitted). First, every testifying plaintiff admitted that they already have the relief they seek: a school district with an exceptionless mask

mandate. (App. at 983:3–8; 1027:23–25; 1101:11–16; 1230:1–6). Second, the Emergency Rule, which actually governed the issue of masks in schools, was not invalidated by this case. Plaintiffs only sought to invalidate the Governor's Executive Order. But that Executive Order accomplished its purpose – getting the Department of Health to promulgate the Emergency Rule. Enjoining the Governor's Executive Order at this point does absolutely nothing. And although the Final Judgment purportedly enjoins the Education Defendants from enforcing the Emergency Rule, local school boards are still required to abide by valid rules issued by the Department of Health.

Moreover, the trial court's injunction does not mandate universal masking in schools—the remedy required to redress Plaintiffs' speculative harms. Even if the Executive Order and Emergency Rule were declared unconstitutional, local school boards would still be free to choose not to implement mask mandates. And at least a third of local school boards had no mask mandate during the 2020-21 school year. (App. at 2081). Ultimately, Plaintiffs did not demonstrate that they suffered a legally-cognizable injury that was caused by Appellants and could have been redressed by the trial

court. For that reason, the trial court's order should be vacated and this case dismissed.

III. The relief granted in the Final Judgment is improper.

"To obtain a permanent injunction, the [plaintiff] must 'establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief.'" Fla. Dep't of Transp. v. Tropical Trailer Leasing, LLC, 308 So. 3d 242, 246 (Fla. 1st DCA 2020) (quoting Liberty Counsel v. Fla. Bar Bd. of Governors, 12 So. 3d 183, 186 n.7 (Fla. 2009)). The trial court enjoined the Education Defendants "from enforcing or attempting to enforce the Executive Order and the policies it caused to be generated and any resulting policy or action which violates the Parents' Bill of Rights . . . ." (App. at 29). However, the injunction is improper because it operates to enjoin enforcement of a valid Department of Health Rule and the purported irreparable harm is not alleviated by the injunction.[9]

[9] A district court reviews the granting of an injunction under a mixed standard of review, with factual findings reviewed for abuse of discretion and legal determinations reviewed *de novo*. Tropical Trailer, 308 So. 3d at 246.

As a preliminary matter, it is doubtful the Education Defendants could even "enforce" the Executive Order, let alone be enjoined from doing so. The Executive Order was directed *to* the Education Defendants and the Department of Health. It would be highly unusual for the *objects* of a law's directive to also be the entities enforcing compliance with those directives. Unless stated otherwise in the Executive Order itself or in existing law, only the Governor retains the role of enforcing the Governor's orders.

To the extent an enforcement mechanism exists at all in the Executive Order, it states that "[t]he Florida Commissioner of Education shall pursue all legal means" to enforce "any rules or agency action" that are undertaken *following* the Executive Order. (App. at 68). So the idea that the Education Defendants are enforcing the Executive Order *itself* (and therefore should be enjoined from doing so) is inconsistent with the plain terms of the Executive Order. The Education Defendants are instead directed to enforce "any rules or agency action" that may arise following the Executive Order, *not* the Executive Order itself.

What is truly at stake in the trial court's injunction is the Department of Health's Emergency Rule. Although the Emergency

Rule was not and could not be invalidated or enjoined directly, because the Department of Health was not a party in the case, the Final Judgment nevertheless enjoins the Education Appellants from enforcing the Emergency Rule by enjoining the enforcement of all "policies" the Executive Order "caused to be generated." This de facto injunction of the Emergency Rule, by virtue of its policy alignment with the Governor's Executive Order, violates the Department of Health's statutory and due process rights to defend its own rule, as well as the Education Appellants' right *and duty* to enforce the Emergency Rule as good law. See §§ 1003.22(3), 1008.32, Fla. Stat. Because the Final Judgment was improper, it should be vacated.

Second, the stated irreparable harm—"increased risk of Delta variant infection . . . if universal face mask mandates are blocked"—is not remedied by the injunction and is, therefore, an inappropriate basis upon which to issue the injunction. According to the trial court, the irreparable harm is the increased risk of infection from the Delta variant when there is no categorical mask mandate. (App. at 29). Yet, enjoining the enforcement of the Executive Order and the Emergency Rule does not impose universal mask mandates in schools. Thus, the trial court's stated irreparable harm ostensibly exists irrespective of

the injunction. And, "[i]t is standard hornbook law that a[n] . . . injunction will only be issued in situations wherein the plaintiff can clearly demonstrate that irreparable injury would follow the denial of the injunction." Jacksonville Elec. Auth. v. Beemik Builders & Constructors, Inc., 487 So. 2d 372, 373 (Fla. 1st DCA 1986).

Moreover, "[i]rreparable injury will never be found where the injury complained of is doubtful, eventual or contingent." Donoho v. Allen-Rosner, 254 So. 3d 472, 474 (Fla. 4th DCA 2018) (quoting Beemik Builders, 487 So. 2d at 373). Thus, whether schools impose "universal face mask mandates" and, according to the trial court, thus remedy the increased risk of infection, is contingent on local school boards that are not parties to this case. See id. Stated differently, the complained of injury—an increased risk of contracting COVID-19 resulting from an absence of universal masking—remains contingent upon the actions of non-parties. See id. And, Appellants presented evidence that during the 2020-2021 school year, when there was no ban on exceptionless mask mandates, a third of schools chose not to implement such a mandate. (App. at 2081; App. at 1608:13-1609:22). This further demonstrates the doubtfulness that the complained-of-injury can be remedied by the injunction.

Accordingly, because the trial court erred in its finding of irreparable harm, the decision below should be vacated.

IV. This case is non-justiciable because any relief would violate the separation of powers and political question doctrines.

A. Florida's Constitution mandates that the judiciary not take action reserved for the other branches.

The trial court, at the request of Appellees, violated the "foundational principle" of separation of powers by making policy decisions reserved for the executive branch. See Fla. Educ. Ass'n, 306 So. 3d at 1218. The trial court erred in not dismissing the Complaint based on the separation of powers doctrine and incorrectly construed separation of powers to be an affirmative defense that Appellants were required to prove. Separation of powers is a legal issue reviewed *de novo*. Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004).

Article II, Section 3 of the Florida Constitution states: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. Further, the Florida Constitution grants the Governor with the "supreme

executive power" and requires that he "take care that the laws be faithfully executed" and "transact all necessary business with the officers of the government." Art. IV, § 1(a), Fla. Const. "The judiciary violates the doctrine of separation of powers if it directs an administrative agency to perform its duties in a particular manner." Fla. Fish & Wildlife Conservation Comm'n v. Daws, 256 So. 3d 907, 917 (Fla. 1st DCA 2018).

Separation of powers is a jurisdictional issue—not an affirmative defense. See Coal. for Adequacy & Fairness, 680 So. 2d at 407; Corcoran v. Geffin, 250 So. 3d 779, 782 (Fla. 1st DCA 2018). Thus, the Florida Constitution mandates that an action that infringes the separation of powers be dismissed for lack of jurisdiction. See Jackson v. Sch. Bd. of Okaloosa Cnty., No. 1D20-423, 2021 WL 3508361, at *1 (Fla. 1st DCA Aug. 2, 2021) ("Because judicial review of this matter would violate the separation of powers …, we affirm the circuit court's order dismissing her complaint with prejudice."); Moffitt v. Willis, 459 So. 2d 1018, 1022 (Fla. 1984) (determining that the separation of powers doctrine divested circuit court of jurisdiction and failure to dismiss the case was therefore error). "[T]he doctrine of separation of powers has been strictly construed in Florida. 'It would

be hard to compose a more demanding requirement in organic law' than Florida's separation of powers." Id. at 783 (quoting Barati v. State, 198 So. 3d 69, 83 (Fla. 1st DCA 2016)). The separation of powers constitutional principle similarly mandates reversal here.

This Court has repeatedly held that courts lack the power to dictate education policy, which is left to the discretion of the executive and legislative branches. See Fla. Educ. Ass'n, 306 So. 3d at 1219 ("[T]he trial court had no authority to direct the executive to act in a specific manner when the constitution and statutes provide for discretion."); Citizens for Strong Sch., Inc. v. Florida State Bd. of Educ., 232 So. 3d 1163, 1165-66 (Fla. 1st DCA 2017), approved, 262 So. 3d 127 (Fla. 2019) ("[T]he strict separation of powers embedded in Florida's organic law requires judicial deference to the legislative and executive branches to adopt and execute educational policies those branches deem necessary and appropriate . . . . There is no language or authority in Article IX, section 1(a) that would empower judges to order the enactment of educational policies . . . .").

Here, the Governor exercised his discretion and used his executive power to task the Department of Health and Department of Education to develop rules that implement safety policies in school

without encroaching on parents' rights. Further, acting within his lawful authority, the Governor tasked the Commissioner to ensure that the local school districts adhere to the laws and rules. In doing so, the Governor acted within his Constitutional and statutory authority on matters strictly within the executive branch, and all of the Governor's communications occurred within the confines of the executive branch. In turn, the Commissioner and the State Board, through their constitutional and statutory powers, have such authority and discretion to ensure that school districts adhere to the law. See Art. IX, § 2, Fla. Const.; § 1008.32, Fla. Stat.; Sch. Bd. of Collier Cnty., 279 So. 3d at 286–87 (explaining that the Florida Constitution creates an educational hierarchy where the State Board has supervisory powers).

The trial court's injunction prevents the Commissioner, the State Board, and Department of Education from enforcing the Executive Order and "the policies it caused to be generated," and therefore violates the separation of powers doctrine. The trial court essentially intruded on executive decision-making and then directed how the Education Defendants had to exercise their discretion from enforcing a valid Department of Health emergency rule. See Fla.

Educ. Ass'n, 306 So. 3d at 1219 ("the trial court had no authority to direct the executive to act in a specific manner when the constitution and statutes provide for discretion"). Because the injunction violates the separation of powers doctrine, the trial court's final judgment must be vacated and the case dismissed.

B. The trial court's Final Judgment violated the political question doctrine.

The trial court's Final Judgment implicates non-justiciable political questions. The Governor's Executive Order and the Department of Health's Emergency Rule involved carefully balanced health and safety policy considerations, and decisions on the safety and the health of the people are entrusted to the politically accountable officials of the State to guard and protect. Fla. Educ. Ass'n, 306 So. 3d at 1217. Answering such "profound questions" must "necessarily be performed exclusively within the political branches, which by their nature are far more responsive and prompt to address the needs of parents and students than the courts could ever be." Id. (citing Citizens for Strong Sch., 232 So. 3d at 1169). The trial court should have declined the invitation to second guess the executive's discretionary actions.

The political question doctrine is not an evidentiary issue. It is not an affirmative defense. The political question doctrine divests the court of jurisdiction. McPherson v. Flynn, 397 So. 2d 665, 668 (Fla. 1981) (reversing denial of a motion to dismiss because "[t]he litigation in this case unavoidably involves a nonjusticiable political question and is properly left to the prerogative of the legislature."); see also CRSJ, Inc. v. Miami-Dade Cnty., No. 3D20-1693, 2021 WL 3176845, at *3 (Fla. 3d DCA July 28, 2021) (affirming denial of a temporary injunction because the trial court lacked jurisdiction to entertain a political question).

"The nonjusticiability of a political question is primarily a function of the separation of powers." Fla. Educ. Ass'n, 306 So. 3d at 1214 (quoting Baker v. Carr, 369 U.S. 186, 210 (1962)). As the Florida Supreme Court has cautioned, "each branch of government has certain delineated powers that the other branches of government may not intrude upon." Coal. for Adequacy & Fairness, 680 So. 2d at 407. The judiciary's powers extend to legal questions whereas "political questions 'fall within the exclusive domain of the legislative and executive branches under the guidelines established by the Florida Constitution.'" Fla. Educ. Ass'n, 306 So. 3d at 1214–15

(quoting Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995)). "[C]ourts must refrain from answering political questions because it is not the judiciary's role to decide questions that 'revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the legislature] or the confines of the Executive Branch.'" Id. at 1215 (quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)).

The United States Supreme Court has outlined six factors to "gauge" in determining whether a case involves a political question:

> (1) the issue raised has been demonstrably and textually committed to a coordinate political department; (2) judicially discoverable and manageable standards for resolving the question are lacking; (3) the court cannot decide the question "without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) the trial court cannot undertake independent resolution of the issue "without expressing lack of respect due coordinate branches of government"; (5) there is "an unusual need for unquestioning adherence to a political decision already made"; and (6) there is a potential of "embarrassment from multifarious pronouncements by various departments on one question."

Id. (quoting Baker, 369 U.S. at 217); see also Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ. (Citizens II), 262 So. 3d 127, 137 (Fla. 2019) (acknowledging the Florida Supreme Court's usage of the

Baker factors). If a single factor is present, the case presents a non-justiciable political question. Fla. Educ. Ass'n, 306 So. 3d at 1215.

The trial court's Final Judgment predominately implicates the third and fourth Baker factors. The third factor states that "the court cannot decide the question without an initial policy determination of a kind clearly for nonjudicial discretion." Fla. Educ. Ass'n, 306 So. 3d at 1215 (quoting Baker, 369 U.S. at 217). The conflicting views regarding the carefully balanced safety and health policies underlying the Executive Order and Emergency Rules—including the conflicting scientific and medical support for those views—demonstrates that such decisions should be left to the executive branch. This issue is political in nature and subject to differing views. Assessing the best approach requires balancing a multitude of factors—not only for the parties involved but for children, parents, educators, and citizens throughout the State. This is a task for politicians who are accountable to their electorate.

The Final Judgment also implicates the fourth Baker factor because a court "cannot resolve the questions here 'without expressing lack of respect due coordinate branches of government.'" Fla. Educ. Ass'n, 306 So. 3d at 1215 (quoting Baker, 369 U.S. at

217). Policy decisions are left to the executive and legislative branches, and any attempt by any court to weigh-in on those decisions would be improper. The propriety of any of these policies—including whether masks should be mandated in schools—are decisions reserved for the legislative and executive branches.

Ultimately, Appellees did not seek judicial determinations—they sought policy determinations. Appellees do not challenge the Governor's exercise of his authority under the Florida Constitution to direct various state agencies to adopt rules implementing Florida laws in accordance with their respective delegated rulemaking authority. They simply disagree with the policy decisions and balancing of various interests expressed in the Executive Order. If, for example, the Governor had stated that mask mandates were *required*, Appellees would likely not have brought this lawsuit. Appellees also do not challenge the constitutionality of Section 1003.22, Florida Statutes, the statute by which the Department of Health issued the prior Emergency Rule, as unconstitutional on its face. Instead, they again challenge the Agency's *policy determinations* expressed in the Emergency Rule. Appellees invited the trial court to second-guess policy determinations and discretionary executive

actions which entailed lack of respect due coordinate branches of government. The trial should have declined the invitation to do so.

CONCLUSION

For the reasons stated herein, Appellants respectfully submit that this Court should vacate the Final Judgment and dismiss this case.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this filing has been provided to all counsel of record named below by email and via the E-Filing Portal on October 2, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.045, I certify that this document complies with the applicable font and word count limit requirements within Florida Rules of Appellate Procedure 9.045 and 9.210(a)(2)(B).

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