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; RICHARD CORCORAN, in his official capacity as Florida Commissioner of Education; FLORIDA DEPARTMENT OF EDUCATION; and FLORIDA BOARD OF EDUCATION,

Defendants/Appellants,

v. Case No. 1D21-2685

ALLISON SCOTT, individually and on behalf of W.S., a minor; LESLEY ABRAVANEL and MAGNUS ANDERSSON, individually and on behalf of S.A. and A.A., minors; KRISTEN THOMPSON, individually and on behalf of P.T., a minor; AMY NELL, individually and on behalf of O.S., a minor; DAMARIS ALLEN, individually and on behalf of E.A., a minor; PATIENCE BURKE, individually and on behalf of C.B., a minor; and PEYTON DONALD and TRACY DONALD, individually and on behalf of A.D., M.D., J.D., and L.D., minors,

Plaintiffs/Appellees,

_____/

APPELLANTS' EMERGENCY MOTION TO REINSTATE THE AUTOMATIC STAY

This emergency motion is necessitated by the circuit court's lifting of the automatic stay after declaring an executive order unconstitutional and enjoining the Commissioner of Education, Florida Board of Education, and Florida Department of Education from enforcing a valid Department of Health Emergency Rule. The trial court's Final Judgment violates the separation of powers principles under the Florida Constitution and the party presentation principle. Further, the Final Judgment ignores long-standing constitutional and statutory authority vested in the Governor, the Board of Education, and the Department of Health. The Final Judgment found that the Defendant-Appellants violated the Florida Parents' Bill of Rights by protecting parents' rights at the expense of implied "due process rights" purportedly granted to local school districts by that law. Because Appellants are likely to succeed on appeal, because Appellees did not make the necessary showing of compelling circumstances, and because reinstatement of the stay is unlikely to cause irreparable harm to Appellees, this Court should reinstate the automatic stay pending appeal.

Appellants Governor Ron DeSantis, in his official capacity as Governor of the State of Florida, Richard Corcoran, in his official

capacity as Florida Commissioner of Education, the Florida Department of Education, and the Florida Board of Education, submit this Emergency Motion to Reinstate the Automatic Stay under Florida Rules of Appellate Procedure 9.300 and 9.310(b)(2).

INTRODUCTION

Appellees have not and cannot show that "the equities are overwhelming[ly] tilted against maintaining the stay." Fla. Dep't of Health v. People United for Med. Marijuana, 250 So. 3d 825, 828 (Fla. 1st DCA 2018). The purpose of an automatic stay under Florida Rule of Appellate Procedure 9.310(b)(2) is to provide deference to the government and its agencies regarding its decision-making process and implementation. Id. Therefore, even if a trial court enjoins a state agency from promulgating, executing, or enforcing its orders, a party must nevertheless demonstrate that the equities overwhelmingly weigh against maintaining a stay such that the trial court is compelled to override the automatic deference provided by Rule 9.310(b)(2). As part of this analysis, Appellees were required to demonstrate that Appellants are not likely to succeed on appeal and that maintaining the automatic stay would result in irreparable harm to Appellees.

Appellees failed to prove both prongs. Appellees are incorrect in their assertions of wide-spread and uncontrollable harm if parent-choice continues in most of Florida's counties, or returns in certain other counties, pending disposition of this case on appeal. Further, Appellants are likely to succeed on appeal. The threshold issues of standing, separation of powers, and the political question doctrine warrant reversal. Moreover, the Final Judgment's unusual interpretation that the Parents' Bill of Rights precludes parental choice when local school districts attempt to govern matters of public health improperly expands local school district powers. The trial court *sua sponte* applied the Parents' Bill of Rights to invalidate the Executive Order for protecting parental rights, even though the Parents' Bill of Rights was neither alleged as a basis for any of the prevailing claims nor ever presented or argued as a basis for relief by Plaintiffs, thus violating the party presentation principle. And by adjudicating an unalleged interpretation of the Parents' Bill of Rights rather than assessing the rational basis of the parental opt-out, the trial court erred in finding a violation of the Due Process Clause. Finally, none of the Appellants can be enjoined from enforcing a Department of Health emergency rule that was not, and could not be,

invalidated by the trial court because Appellees neglected to make the Department of Health a party to this action. To the extent the Final Judgment nevertheless attempts to enjoin the Appellants from enforcing the "policies" the Executive Order "caused to be generated," Final Judgment at 24 (App. at 385), (*i.e.*, the Department of Health Emergency Rule), the Final Judgment exceeds the scope of the case and disregards the autonomy and authority of a separate agency to issue and defend its own rule.

In sum, Appellees did not meet their burden of proving that the automatic stay should be vacated, and this Court should reinstate the stay pending its review.

FACTUAL BACKGROUND

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 . . . ." Exec. Order 21-175 (July 30, 2021), (App. at 52). 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. 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 52–53.

In accordance with the Executive Order, the Department of Health, after consultation with the Department of Education, promulgated Emergency Rule 64DER21-12. 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. Appellants 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. 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.

Plaintiffs consisted of nine sets of parents and their school-aged children.[1] Compl. ¶¶ 3-11, 34-42, (App. at 18–19, 22–23). According to Plaintiffs, unless the Court enjoins the parental opt-out on masks, "Florida's students risk exposure . . . that will certainly lead to

[1] Plaintiffs are acting individually but nevertheless purport to bring this lawsuit "to safeguard the health and welfare of Florida public school students and the general public." App. at 22.

contracting COVID-19 and transmitting it to others." Id. ¶ 45. As a result, "[s]tudents will become sick and potentially die . . . ." Id. ¶ 46. Plaintiffs further alleged that the "presence of non-masked students and unvaccinated students within the school setting is an actual harm" to them supporting their standing in this action. Id. ¶¶ 35-42. In other words, other un-masked children in their schools and classes have become "an actual harm" to Plaintiffs so long as those children are physically present in school. Id.

Based on these highly speculative harms caused by ordinary children whose parents exercise a right to opt-out of mask mandates, Plaintiffs alleged in Count I that the Defendants were not providing safe public schools. Id. ¶¶ 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." Id. 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. Id. ¶¶ 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. Id. ¶¶ 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. Id. ¶¶ 134-39. Each of Counts I through IV challenged the validity and enforcement of the Executive Order. Id. ¶¶ 66, 71, 80, 83, 89, 94, 107-10, 132, 136-37. Only Count V challenged the validity and enforcement of the Emergency Rule. Id. ¶ 155. Plaintiffs alleged that the Emergency Rule, to the extent it precludes mandatory masking, infringes upon their constitutional right to "safe" public schools in violation of Article IX, Section 1(a), similar to what Plaintiffs alleged in Count I. Id. ¶¶ 155-65, 173. Finally, Count VI incorporates all the previous Counts and seeks emergency injunctive relief against the Executive Order. Id. ¶¶ 174-93.

Notably, no Count in the Complaint alleged that the Executive Order violated the Parents' Bill of Rights, codified in Sections 1014.01–.06, Florida Statutes. See Ch. 2021-199, Laws of Fla. Indeed, none of the allegations in the Complaint even referenced the Parents' Bill of Rights.

On August 19, 2021, the trial court denied Defendants' Motion to Dismiss. App. at 105. Then, from August 23 through 26, 2021, the trial court held an evidentiary hearing on Plaintiffs' demand for emergency injunctive relief. The trial court entered its Final Judgment on September 2, 2021, granting declaratory relief under Counts III and IV by ruling that the Executive Order is arbitrary and capricious, but not for the reasons alleged in Counts III and IV. Instead, the Court enjoined Commissioner Corcoran, the Florida Department of Education, and the Florida Board of Education (hereinafter, the "Education Defendants"), from "violat[ing] the Parents' Bill of Rights by 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 granted by the statute which permits them to demonstrate the reasonableness of the mandate and the other factors stated in the law." App. at 385. The trial court further

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." Id.

Appellants immediately filed a Notice of Appeal, which implemented an automatic stay of the injunction pursuant to Florida Rule of Appellate Procedure 9.310(b)(2). On September 2, 2021, Plaintiffs filed an Emergency Motion to Vacate Automatic Stay, arguing that compelling circumstances warrant that the stay be lifted. App. at 7. On September 8, 2021, the trial court held a hearing on the motion to vacate the automatic stay. Despite previously finding that Appellants had not violated Article IX, Section 1(a) to provide for "safe" and "secure" schools, the trial court nonetheless found that irreparable harm would result if the stay was not vacated due to unsafe conditions in schools. Accordingly, Appellants file this motion to reinstate the stay pending this Court's review.

ARGUMENT

Florida Rule of Appellate Procedure 9.310(b)(2) provides, in pertinent part, that "the timely filing of a notice [of appeal] shall automatically operate as a stay pending review . . . when the state,

any public officer in an official capacity, board, commission, or other public body seeks review . . . ." While Rule 9.310(b)(2) permits the trial court "to vacate an automatic stay during the pendency of an appeal, it may only do so 'under the most compelling circumstances.'" Dep't of Env't Prot. v. Pringle, 707 So. 2d 387, 390 (Fla. 1st DCA 1998) (quoting St. Lucie Cnty. v. N. Palm Dev. Corp., 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984)), vacated on other grounds, 743 So. 2d 1189 (Fla. 1999). The rationale for this high burden is clear: "planning-level decisions are made in the public interest and should be accorded a commensurate degree of deference and . . . any adverse consequences realized from proceeding under an erroneous judgment harm the public generally." Id. (quoting N. Palm Dev., 444 So. 2d at 1135). Thus, the party seeking to vacate the automatic stay has the burden of establishing an evidentiary basis for the existence of compelling circumstances. Id.

In furtherance of demonstrating compelling circumstances, a party moving to vacate an automatic stay must demonstrate that "the equities are overwhelming[ly] tilted against maintaining the stay." People United, 250 So. 3d at 828 (quoting Tampa Sports Auth. v. Johnston, 914 So. 2d 1076, 1084 (Fla. 2d DCA 2005)). Additionally,

a decision whether to vacate an automatic stay requires the trial court to consider: (1) the government's likelihood of success on appeal, and (2) the likelihood of irreparable harm if the automatic stay is maintained. Id. (citing Mitchell v. State, 911 So. 2d 1211, 1219 (Fla. 2005)). "A trial court abuses its discretion by vacating an automatic stay when the party seeking to vacate the stay does not make the necessary showing of compelling circumstances, when the government is likely to succeed on appeal, or when reinstatement of the stay is unlikely to cause irreparable harm." Order on Emergency Motion to Reinstate Automatic Stay at 6 DeSantis v. Fla. Educ. Ass'n, No. 1D20-2470 (Fla. 1st DCA Aug. 31, 2020), App. at 562.

1. The equities do not overwhelmingly favor lifting the automatic stay.

The equities in this case are not "overwhelming[ly] tilted against maintaining the stay." Id. (quoting Tampa Sports Auth., 914 So. 2d at 1084). Importantly, the trial court found for Appellants on Counts I and V, which alleged that the ban on exceptionless mask mandates made schools unsafe in violation of the Florida Constitution. Thus, any argument that the automatic stay creates a level of legally cognizable unsafe conditions in schools is belied by the trial court's

express rulings that Appellants did not violate Article IX, Section 1(a). The adequate level of safety in schools and other public settings is a political question reserved entirely for elected representatives who are publicly accountable. DeSantis v. Fla. Educ. Ass'n, 306 So. 3d 1202, 1216–18 (Fla. 1st DCA 2020) ("The terms 'safe' and 'secure' as used in article IX, section 1(a), lack judicially discoverable or manageable standards."). Therefore, in finding irreparable harm, the trial court should not have substituted its own health policy preferences or risk assessments for those of the Governor or, more importantly, the State Health Officer and Surgeon General. § 20.43(2), Fla. Stat.; see id. at 1218. Any suggestion the equities weigh in favor of Appellees' safety concerns would require the improper substitution of risk assessments that would violate the political question doctrine. See Fla. Educ. Ass'n, 306 So. 3d at 1218.[2]

[2] The trial court did not grant Count I because it concluded that "the proof [did] not rise to the level required by the decision in DeSantis v. FEA, 306 So. 3d 1202 (Fla. 1st DCA 2020)." Final Judgment at 9. But Florida Education Association holds that such claims regarding the level of school safety required by the Florida Constitution are non-justiciable—not matters of satisfying a higher burden of proof. 306 So. 3d at 1214-18.

2. Defendants are likely to succeed on appeal.

There are multiple reasons why the Final Judgment should be reversed, thus, demonstrating that Appellants are likely to succeed on appeal.

a. Plaintiffs lacked 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 22, ¶ 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 redressable by the trial court.[3] See Fla. Educ. Ass'n, 306 So. 3d at 1213 (stating that standing requires plaintiffs to demonstrate 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). Specifically as to Counts III and IV, Plaintiffs lacked standing to challenge the alleged "usurpation" of power from local school districts and from the

[3] 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 364 n.2.

Department of Health. Only those local school districts and the Department of Health could assert such claims to defend their institutional rights.

Plaintiffs also lacked standing because the Executive Order takes no state action against them. See Fla. Educ. Ass'n, 306 So. 3d at 1213–14. 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 application to local school districts and never did. Thus, enjoining the Executive Order (without enjoining the operative rule) does not provide Plaintiffs with redress for their alleged grievances because the choice of how to control communicable diseases in schools remains with the Department of Health. See id. at 1214; § 1003.22(3), Fla. Stat.

b. Clear legal authority underlies the Governor's issuance of the Executive Order, the Department of Health's promulgation of the Emergency Rule, and the Department of Education's enforcement of the Emergency Rule.

The trial court improperly placed the burden on Appellants to "show that the actions challenged (here, the Executive Order, the blanket prohibition of mask mandates that do not include a parental opt-out, and related enforcement actions) are within the powers of Defendants as provided by the Constitution or by the Legislature."[4] App. at 375. Ultimately, the trial court ruled that Appellants had not sufficiently proven their authority to act. App. at 375-77.

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[4] The trial court apparently placed this burden on Appellants because it found that Appellants had asserted separation of powers as an affirmative defense. App. at 375. Significantly, however, Appellants only asserted separation of powers as an affirmative defense after the trial court denied Appellants' Motion to Dismiss Counts I, III, IV, V and VI, which pointed out that Appellees were asking the trial court to violate the "foundational principle" of separation of powers by urging the trial court to make policy decisions reserved for the executive branch. See Fla. Educ. Ass'n, 306 So. 3d at 1218. Notably, however, the Florida Supreme Court has sustained the dismissal of claims based on separation of powers at the motion to dismiss stage, and Appellants should not have been required to carry the burden of proof as an affirmative defense. Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 407-08 (Fla. 1996) (affirming state court dismissal of claims that presented a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature, in violation of the separation of powers doctrine.)

Even if Appellants had the burden of proof, they repeatedly presented the legal authorities supporting the Executive Order and Emergency Rule. To be sure, there is no credible basis to question the Governor's general authority to issue an Executive Order to executive agencies. 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.[5] Accordingly, pursuant to his constitutional and statutory authorities, the Governor could issue

[5] 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.

the Executive Order. See id.; see also, e.g., §§ 20.02(3); 20.03(4), (13), Fla. Stat.

Notably, the trial court did not fault the issuance of the Executive Order *per se* but found fault with the policy choice within it. The trial court observed that "the setting of local policies for health and safety of students substantially remains a local function." App. at 373. The Court further opined, "a one-size-fits-all policy for student health and safety as dictated by Tallahassee seems to run contrary to Article IX, Section 4(b) of the Florida Constitution." Id.

Discrediting this ruling, however, is the law giving the Department of Health—not local school districts—the legislatively delegated authority to create rules governing the control of communicable diseases in schools. § 1003.22(3), Fla. Stat. Indeed, the entire thrust of Count IV is Appellees' contention that "public health matters, such as masking in schools, is appropriately within the authority of the Florida Department of Health under section 1003.22(3), Florida Statutes." App. at 33, ¶ 136. Yet, the Final Judgment ignores this statewide, statutory authority vested in the Department of Health.

Section 1003.22(3) delegates to the Department of Health the authority to decide among COVID-19 policy choices, including, for example, that a mask mandate is necessary everywhere to control COVID-19, that no masks should be used at all, or some middle ground to balance competing policy and constitutional interests (*i.e.*, a parental opt-out). Regardless of its own thoughts concerning masking in schools, "the judiciary may not second guess 'the policy decisions of the political branches, no matter how appealing [it] may find contrary rationales.'" Fla. Educ. Ass'n, 306 So. 3d at 1218 (alteration adopted) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 521 (1981)). Accordingly, the Final Judgment's criticism of the one-size-fits-all approach to COVID-19 directly conflicts with the Legislature's specific enactment in Section 1003.22(3), which instills statewide discretion to the Department of Health.

Furthermore, given that Section 1003.22(3) requires the Department of Health to consult with the Department of Education, the policy considerations at issue extend beyond just public health matters and into public education priorities. As a result, a court cannot scrutinize each provision in the policy to assess whether it

maximizes health outcomes alone. There are numerous other factors that policymakers must weigh while governing the control of communicable diseases in schools. Here, one such factor is the adverse consequences of universal masking in schools. This further shows why the issues raised are non-justiciable under any legal theory Appellees (or the trial court) might advance.

Once the Department of Health issued the Emergency Rule, the Education Defendants had clear authority to enforce the Emergency Rule. See § 1008.32, Fla. Stat. Section 1008.32 delineates the roles of the State Board of Education and the Commissioner of Education in ensuring compliance with "law or state board rule." § 1008.32, Fla. Stat. Therefore, any rule promulgated pursuant to the Education Code, including any rule promulgated by the Department of Health governing communicable diseases in schools, falls within the Education Defendants' enforcement authority.

Appellees did not challenge any of the above statutes. Accordingly, the existence and validity of such statutes definitively refute the Final Judgment's conclusion that Appellants were without legal authority to issue and enforce the policies implemented in the Emergency Rule. In other words, the Final Judgment's finding that

Appellants "have not shown any convincing authority in the Constitution or any statute," supporting the issuance of the Executive Order, App. at 376, fails to consider the well-established statutory authority which Appellants repeatedly presented and which Appellees never questioned or challenged. See, e.g., Defs.' Mot. to Dismiss at 8–19 (App. at 63–74); Defs.' Exs. 6–13 (App. at 388–537).

Further, as argued throughout this case, the Florida Constitution delineates a hierarchal structure between the State Board of Education and the local school districts. See Sch. Bd. of Collier Cnty. v. Fla. Dep't of Educ., 279 So. 3d 281, 286–87 (Fla. 1st DCA 2019). It was not improper for the Executive Order to attempt to appropriately leverage the constitutional supervisory authority granted to the State Board of Education to ensure compliance with statewide policy. And, because the Executive Order is a directive from the State's "supreme executive power" to other executive agencies, Art. IV, § 1, Fla. Const., any judicial interference would violate the strict separation of powers, Art. II, § 3, Fla. Const.

c. Plaintiffs never alleged or argued that the Executive Order or its enforcement violates the Parents' Bill of Rights.

In its Final Judgment, the trial court interpreted and purported to enforce the newly enacted Parents' Bill of Rights, § 1014.01 *et seq.*, Fla. Stat. But Appellees never presented this statute as a basis for relief. Nonetheless, the trial 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 376. The trial 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. App. at 377–84.

It was entirely improper for the trial court, wholly on its own initiative, to devise new legal grounds to support its ultimate conclusion.

Writing for a unanimous Supreme Court, Justice Ginsburg restated 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." See United States v. Sineng-Smith, 140 S. Ct. 1575, 1579 (2020) (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 Appellees' claims could not be adjudicated as an alleged violation of that new law. To the extent the Final Judgment invalidated the Executive Order on that basis—which, in Appellants' reading, is the full extent Appellees were awarded any relief—the Final Judgment must be reversed. The Final Judgment'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 Appellees.[6] Because the trial court's application

[6] 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 violates the Parents' Bill of Rights, and, accordingly,

of this newly enacted statute was never raised by Appellees, it should not have been the dispositive issue in the Final Judgment.

d. The Parents' Bill of Rights does not grant new authority to local school districts and cannot serve to invalidate the Executive Order as arbitrary and capricious.

The Final Judgment also holds 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 379, 386. This finding is erroneous. According to its plain terms, the Parents' Bill of Rights *limits governmental authority* and *protects the inherent rights of parents*. See §§ 1014.01–.06, Fla. Stat. Thus, the Governor could not possibly have violated the Parents' Bill of Rights by protecting parents' rights.

Most assuredly, the Parents' Bill of Rights does not grant any authority to local school districts that did not previously exist. The Court's finding that "the Parents' Bill of Rights permits local school

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Defendants were never given the opportunity to show the fault in such argument. This demonstrates why the party presentation principle 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.

boards to enact policies relating to health care and education, including mask mandates," App. at 380, improperly extends authority and power to local school districts. In fact, this holding conflicts with settled law governing the hierarchal structure between the State Board of Education and the local school districts, Sch. Bd. of Collier Cnty., 279 So. 3d at 286–87, as well as the Department of Health's specific authority under Section 1003.22, Florida Statutes, to control communicable diseases in schools. The Parents' Bill of Rights did not alter or supersede these preexisting authorities, nor did it add powers to local school districts that they previously did not have. Thus, to the extent the Final Judgment awards school districts new authority under the Parents' Bill of Rights, it must be overturned.

Further, the Final Judgment also incorrectly found that the Parents' Bill of Rights awarded "due process rights" upon local school districts 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 379. This holding, too, fails to consider the long-standing statutory authority providing the Commissioner of Education with the power to investigate local school districts and the

State Board of Education with the power to determine and impose penalties for local school districts' violations of Florida laws or rules. § 1008.32, Fla. Stat. The Florida Legislature implemented a statutory scheme that provides the State Board with the requirement to enforce compliance with Florida law among the local school districts. Id. This statutory scheme also includes "due process" for the local school districts. § 1008.32(2)-(3) (providing local school districts with the opportunity to document compliance with the law). Despite this specific statutory scheme, the Final Judgment expands the Parents' Bill of Rights to create additional due process protections for local school districts and simultaneously limits the State Board's statutory authority—neither of which are explicit therein.

That said, even if the Final Judgment was correct and the Parents' Bill of Rights protects school districts more than it protects parents, the analysis still fails under the appropriate test for Counts III and IV, which alleged violations of the Florida Constitution Due Process Clause. App. at 30–33.

"When a law challenged on substantive due process grounds does not infringe upon a fundamental right, [a court] must review the law under the rational basis test, which requires that the law bear 'a

reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive.'" Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla., 97 So. 3d 204, 212 (Fla. 2012) (quoting Lasky v. State Farm Ins. Co., 296 So. 2d 9, 15 (Fla. 1974)). The rational basis standard is concerned only with "the existence of a conceivably rational basis," not with whether the basis was actually considered by the lawmaking authority, and it is "highly deferential." Jacques v. Dep't of Bus. & Pro. Regul., Div. of Pari-Mutuel Wagering, 15 So. 3d 793, 797 (Fla. 1st DCA 2009). A court is not concerned with whether the law in question is "the most prudent choice, or is a perfect panacea, to cure the ill or achieve the interest intended." Jackson v. State, 191 So. 3d 423, 428 (Fla. 2016). "If there is a legitimate state interest that the [law] aims to effect, and if the [law] is a reasonably related means to achieve the intended end, it will be upheld." Id. The challenger must prove beyond a reasonable doubt that there is no conceivable basis for upholding the law. McElrath v. Burley, 707 So. 2d 836, 839 (Fla. 1st DCA 1998). "If the question is at least debatable, there is no substantive due process violation." Bennett v. Walton Cnty., 174 So. 3d 386, 388 (Fla. 1st DCA 2015)

(quoting WCI Comtys., Inc. v. City of Coral Springs, 885 So. 2d 912, 914 (Fla. 4th DCA 2004)).

Here, the trial court found that the Executive Order was "arbitrary" and "unreasonable" because it "exceed[ed] the powers granted by the Legislature in the Parents' Bill of Rights . . . ." App. at 384. However, as demonstrated above, the Governor had the authority to issue the Executive Order irrespective of the Parents' Bill of Rights.

Ultimately, the trial court assessed the rational basis question too narrowly. Rather than asking if any rational basis supports the parental opt-out provision as part of the overall approach to controlling COVID-19 in schools, the trial court asked if the Governor's partial reliance on the Parents' Bill of Rights to support the parental opt-out provision was legally correct.

Certainly, the Governor relied in part on the Parents' Bill of Rights to support parent choice respecting mask opt-outs. On its face the Executive Order reads: "Any action taken [by the Florida Department of Health and the Florida Department of Education] 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 53. In striking down the Executive Order, the trial court concluded that any "policy prohibiting mask mandates without a parental opt-out" would "deny the school districts their due process rights," as provided by the Parents' Bill of Rights by precluding local school districts from enacting and defending their own mask mandates; thus, the Executive Order is arbitrary and capricious for *violating* the Parents' Bill of Rights with "no reasonable or rational justification" for doing so. App. at 380-84.

In so ruling, the trial court ignored the substantial justifications for parent opt-outs, explained on the face of the Executive Order and in the evidence before the Court. For example, the Executive Order found that "masking children may lead to negative health and societal ramifications," "inhibit breathing," "lead to the collection of dangerous impurities including bacteria, parasites, fungi, and other contaminants," and "adversely affect communications in the classroom and student performance." App. at 50. This is consistent with record evidence presented during trial. Specifically, Dr. Bhattacharya testified regarding the harms to children from wearing masks. For example, in contrast to the poor-quality evidence that

masking children in schools has any effect whatsoever on COVID-19 disease spread, there is considerable evidence that requiring children to wear masks all day at school correlates with harms to their learning and development, physically and psychologically. Defs.' Ex. 14 ¶ 46 (App. at 553). Mandating children to wear masks causes children to experience immediate physical side effects: speaking difficulties, mood changes, and discomfort breathing. App. at 553, ¶ 48. Additionally, masking reduces the ability to communicate. App. at 553, ¶ 49. As he explained, positive emotions such as laughing and smiling become less recognizable and negative emotions become amplified. Id. This diminishes the level of bonding between students and teachers. Id. Moreover, he explained that masking also exacerbates the chances that a child will experience anxiety and depression. Id.

Given the negative effects from mandatory masking, the Governor referenced the "ongoing debate over whether masks are more harmful than beneficial to children and to school environments in general . . . ." App. at 52. Indeed, even the trial court conceded that "there is at least some dispute within the medical community on the issue of masking." App. at 371 n.8. On this record, therefore, the

Executive Order's parent opt-out policy cannot violate the Due Process Clause because "the question is at least debatable . . . ." Bennett, 174 So. 3d at 388.

Finally, in view of the Legislature's preference via an enacted statute to preserve a parent's right to direct the health care of his or her minor child, the Governor expressed his own belief that "all parents have the right to make health care decisions for their minor children." App. at 51. Favoring parental choice is alone a rational basis for the parental opt-out policy, with or without the Parents' Bill of Rights.

In conclusion, the Final Judgment errs in expanding the Parents' Bill of Rights to create additional "rights" for local school districts not explicit in the statute. Moreover, the Final Judgment's interpretation of the Parents' Bill of Rights conflicts with other statutory provisions that were not expressly limited by the Legislature. See §§ 1003.22(3), 1008.32, Fla. Stat. Even if the Governor cannot rely entirely on the Parents' Bill of Rights to require parental choice for masking, there are ample other rational bases to support parental choice on school masking, many of which the

Governor also expressly relied upon. Because Appellants are likely to succeed on appeal on this basis, the stay should be reinstated.

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

Finally, 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 385.

First, 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 53. 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.

Finally, none of the Appellants can be enjoined from enforcing the subsequent agency "rules or agency action" which followed the Executive Order, because only one of those rules was even challenged in this action and that challenge was unsuccessful. As noted above, the Court correctly determined that the Emergency Rule could not be invalidated under Count V, because the Department of Health was not a party to this action. App. at 384.

The Final Judgment nevertheless attempts to enjoin the Appellants from enforcing the Emergency Rule by enjoining the enforcement of all "policies" the Executive Order "caused to be generated." App. at 385. Oddly, the trial court used its equitable power to enjoin the enforcement of an Emergency Rule that was not and could not be invalidated. The trial court's 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 Defendants' right *and duty* to enforce the Emergency Rule as good law. See §§ 1003.22(3), 1008.32, Fla. Stat.

For the foregoing reasons, the Appellants have a high likelihood of success on appeal. Therefore, the trial court abused its discretion in vacating the automatic stay, and this Court should reinstate the stay pending review. See App. at 565–66.

3. Plaintiffs failed to prove that vacating the automatic stay would result in irreparable harm.

Appellees failed to show that they would suffer irreparable harm if the stay is reinstated. Presently, there are no active policies in any school district that prohibit students from wearing masks. All of Appellees' children remain free to wear masks. Maintaining the automatic stay will not prohibit Appellees from masking their children.

Although Appellees purport to be safeguarding the health and welfare of public-school students and the general public, they nevertheless recognize that that lifting the automatic stay requires proof of irreparable harm to Appellees' specifically. Pls.' Emerg. Mot. to Vacate Auto. Stay at 4 ("[T]here is the very real prospect of

irreparable harm to the individual Plaintiffs."), App. at 10. Here, Appellees claim only one form of "irreparable harm"—the "increased risk of the Delta variant infection . . . if universal face mask mandates are blocked in violation of the Parents' Bill of Rights." Id.

Vague, speculative, and unsupported risks are not "irreparable harm." Appellees simply declared in one sentence that there is a "very real prospect" of becoming infected due to the "increased risk" of the Delta variant if mask mandates are blocked, and they label this "prospect" and "risk" as irreparable harm. Id. But this label utterly failed to satisfy Appellees' burden. See Pringle, 707 So. 2d at 390. Appellees fail to quantify this risk or explain how the "very real prospect" of harm exists for any specific Plaintiff. Indeed, Appellees provided no evidence or argument in support of their claims of individualized increased risks *to their children*, as opposed to the generalized risk the Delta variant may pose to the public at large. Not a single Appellee articulated any "irreparable harm" beyond a generalized concern for sending their children to the same school in which some parents could exercise their fundamental right to not require their own children to wear a mask. Because Appellees failed

to show any irreparable harm, the trial court abused its discretion, and this Court should reinstate the stay.

The trial court also erred in finding that Appellants failed to demonstrate any irreparable harm if the stay was vacated. First, the burden is on the party seeking to vacate the stay to demonstrate irreparable harm to it. See, e.g., People United, 250 So. 3d at 828; Dep't of Agric. & Consumer Servs. v. Henry & Rilla White Found., Inc., 317 So. 3d 1168, 1170 (Fla. 1st DCA 2020) ("The party seeking to vacate an automatic stay has the burden of demonstrating that . . . it will suffer irreparable harm if the automatic stay is maintained . . . .").

Nonetheless, Appellants, and parents who made health and education decisions for their children based on the Executive Order will suffer irreparable harm absent a stay. Appellants will suffer irreparable harm because "planning-level decisions are made in the public interest and should be accorded a commensurate degree of deference and that any adverse consequences realized from proceeding under an erroneous judgment harm the public generally." N. Palm Dev., 444 So. 2d at 1135; see also People United, 250 So. 3d at 828 (citing N. Palm Dev.). And irreparable harm will befall

innumerable parents who will be stripped of the right to make healthcare decisions for their children. Specifically, parents who would not have enrolled their children for in-person classes had they known that categorical mask mandates would ensue will suffer irreparable harm because the status quo is disrupted and those parents cannot go back and change their decision. To the contrary, Appellees knew of the Governor's policy before starting school and could have decided against in-person classes for their children. Similar to this Court's ruling in DeSantis v. Florida Education Association, last year, here, Appellees were "free to choose a brick-and-mortar school for in-person instruction, virtual instruction from their local school district, Florida Virtual School, private school, or homeschooling." App. at 563; see also App. at 574–81 (explaining the various options available to students).

Moreover, Jacob Oliva, the Chancellor of K-12 Public Schools testified that many superintendents and school districts welcomed the consistency that the Executive Order and Emergency Rule provided. App. at 602. This appreciated consistency resulting from the Executive Order and Department of Health Rule will be lost if the stay is vacated. Ultimately, parents and local school districts will

suffer irreparable harm if the stay is not reinstated. As the trial court failed to consider the irreparable harm resulting from vacating the stay, it abused its discretion.

CONCLUSION

Although the trial court enjoined Appellants from taking any action to effect a blanket ban on face mask mandates with no parent opt-out by local school districts, the burden for vacating the automatic stay under Rule 9.310(b)(2) is more stringent. Appellees were required to demonstrate compelling circumstances to override the deference afforded to government entities acting in the public good. Appellees failed to meet this burden and the trial court erred in finding they did. Further, because Appellants are likely to succeed on appeal and irreparable harm will result if the status quo is not maintained, this Court should grant this Emergency Motion and reinstate the stay pending this Court's review.

DATED: September 8, 2021.

Respectfully Submitted,

ABEL BEAN LAW, P.A.

By: /s/ Michael A. Abel
Michael A. Abel, Esq.

Florida Bar No. 0075078
Daniel K. Bean, Esq.
Florida Bar No. 0015539
Jacqueline A. Van Laningham, Esq.
Florida Bar No. 1003168
Jared J. Burns, Esq.
Florida Bar No. 1003415
100 N. Laura St., Ste. 501
Jacksonville, FL 32202
mabel@abelbeanlaw.com
dbean@abelbeanlaw.com
jvanlaningham@abelbeanlaw.com
jburns@abelbeanlaw.com

Attorneys for Appellants, Governor Ron DeSantis, Commissioner Richard Corcoran, Florida Department of Education, and Florida Board of Education

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 September 8, 2021.

Charles R. Gallagher III, Esq.
Gallagher & Assoc. Law Firm, P.A.
5720 Central Avenue
St. Petersburg, FL 33707
crg@attorneyoffices.org
service@attorneyoffices.org
fax@attorneyoffices.org

Charles W. Dodson, Esq.
270 Rosehill Dr. N
Tallahassee, FL 32312
chasdod@aol.com

Co-Counsel for Plaintiffs

Co-Counsel for Plaintiffs

Joshua G. Sheridan, Esq.
Busciglio Sheridan Schoeb, P.A.
3302 N. Tampa Street
Tampa, FL 33603
josh@mytampafirm.com

Co-Counsel for Plaintiffs

Maria G. Pitelis, Esq.
Mary Lou Miller Wagstaff, Esq.
Wagstaff & Pitelis, P.A.
161 14th Street N.W.
Largo, FL 33770
maria@wagstafflawoffice.com
marylou@wagstafflawoffice.com

Co-Counsel for Plaintiffs

Erin E. Woolums, Esq.
Erin K. Barnett, Esq.
Barnett Woolums, P.A
6501 1st Avenue South
St. Petersburg, FL 33707
woolums@barnettwoolums.com
barnett@barnettwoolums.com
service@barnettwoolums.com

Co-Counsel for Plaintiffs

Tracey L. Sticco, Esq.
4202 E. Fowler Avenue,
SOC 107
Tampa, FL 33620
tsticco@yahoo.com

Co-Counsel for Plaintiffs

Natalie L. Paskiewicz, Esq.
Paz Mediation
PO Box 7233
St. Petersburg, FL 33734
natalie@pazmediation.com

Co-Counsel for Plaintiffs

Craig A. Whisenhunt, Esq.
Ripley Whisenhunt, PLLC
8130 66th Street North, Ste. 3
Pinellas Park, FL 33781
craig@rwlawfirm.com

Co-Counsel for Plaintiffs

/s/ Michael A. Abel
Attorney