IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND FOR
LEON COUNTY, FLORIDA

ROBIN MCCARTHY and JOHN MCCARTHY, individually and on behalf of L.M., a minor; 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; EREN DOOLEY, individually and on behalf of G.D., D.D., and F.D., minors; 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,

v. CASE NO.: 2021-CA-1382

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.
_____/

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION TO VACATE THE AUTOMATIC STAY

Defendants 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 response in opposition to Plaintiffs' Emergency Motion to Vacate Automatic Stay ("Motion") imposed by Defendants' appeal of this Court's Final Judgment, dated September 2, 2021.

INTRODUCTION

Plaintiffs 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. Therefore, even if a trial court enjoins a state agency from promulgating, executing, or enforcing its orders, the movant must nevertheless demonstrate that the equities overwhelmingly weigh against maintaining a stay such that the Court is compelled to override the automatic deference provided by Rule 9.310(b)(2). As part of this analysis, Plaintiffs must demonstrate that Defendants are not likely to succeed on appeal and that maintaining the automatic stay would result in irreparable harm.

Plaintiffs fail both prongs. Plaintiffs 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, Defendants 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 violates the party-presentment principle, improperly expands local school district powers, and misconstrues the rational basis test. The 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. Finally, none of the Defendants can be enjoined from enforcing a Department of Health emergency rule that was not, and could not be, invalidated by this Court because Plaintiffs neglected to make the Department of Health a party to this action. To the extent the Final Judgment nevertheless attempts to enjoin the Defendants from enforcing the "policies" the Executive Order "caused to be generated," Final Judgment at 24, (*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, Plaintiffs have not met their burden of proving that the automatic stay should be vacated, and their Motion is due to be denied.

FACTUAL BACKGROUND

On July 30, 2021, the Governor issued the Executive Order, 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), https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-175.pdf. 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.

Exec. Order 21-175 §§ 1–2.

In accordance with the Executive Order, the Department of Health, after consultation with the Department of Education, promulgated the Emergency Rule. See Fla. Admin. Code R. 64DER21-12 (Protocols for Controlling COVID-19 in School Settings), https://www.flrules.org/gateway/ruleNo.asp?id=64DER21-12; Vol. 47, No. 153, Fla. Admin. Reg. (August 9, 2021). The Emergency Rule identifies the specific reasons for finding an immediate danger to the public health, safety, or welfare and the reason for concluding that the procedure is fair under the circumstances. Plaintiffs did not challenge these findings. See generally § 120.54(4), Fla. Stat. (describing requirements for emergency rulemaking). The Emergency Rule also outlines the protocols for controlling COVID-19 in school settings, which include routine cleaning, encouragement of 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 the student out of wearing a mask. The Emergency Rule became effective August 6, 2021.

Plaintiffs consist of nine sets of parents and their school-aged children. Compl. ¶¶ 3-11, 34-42.[1] According to Plaintiffs, unless the Court enjoins the parental opt-out on masks, "Florida's students risk exposure . . . that will certainly lead to 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 allege 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 highly speculative potential harms caused by ordinary children whose parents exercise a choice to opt-out of mask mandates, Plaintiffs alleged in Count I that the Defendants are not providing safe public schools. Id. ¶¶ 17, 30, 57-63, 70-71. This, according to Plaintiffs, violates 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

[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." Compl. ¶ 33.

statewide parental opt-out violates 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. Compl. ¶¶ 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. Compl. ¶¶ 134-39. Each of Counts I through IV challenge the validity and enforcement of the Executive Order. Compl. ¶¶ 66, 71, 80, 83, 89, 94, 107-10, 132, 136-37. Only Count V challenges the validity and enforcement of the Emergency Rule. Compl. ¶ 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. Compl. ¶¶ 155-65, 173. Finally, Count VI incorporates all the previous Counts and seeks emergency injunctive relief against the Executive Order. Compl. ¶¶ 174-93.

Notably, none of the Counts in the Complaint allege that the Executive Order violates the Parents' Bill of Rights, codified in Sections 1014.01–.06, Florida Statutes. See Ch. 2021-199, Laws of Fla., http://laws.flrules.org/2021/199. Indeed, none of the allegations in the Complaint even reference the Parents' Bill of Rights.

On August 19, 2021, the Court denied Defendants' Motion to Dismiss. Then, from August 23 through 26, 2021, the Court held an evidentiary hearing on Plaintiffs' demand for emergency injunctive relief. The 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." Final Judgment at 24. The 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.

Defendants filed a Notice of Appeal immediately thereafter, 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. Motion at 6-7.

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. 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 for Med. Marijuana, 250 So. 3d at 828 (quoting Tampa Sports Auth. v. Johnston, 914 So. 2d 1076, 1084 (Fla. 2d DCA 2005)). Further, a decision whether to vacate an automatic stay also 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)).

1. Plaintiffs are unable to demonstrate that the equities 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 Court found for Defendants 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 Court's express rulings that Defendants did not violate Article IX, Section 1(a). Safety considerations 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, the Court cannot substitute 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 Plaintiffs' safety concerns would require the improper substitution of risk assessments that would violate the political question doctrine.[2] See Fla. Educ. Ass'n, 306 So. 3d at 1218.

2. Defendants are likely to succeed on appeal.

There are multiple reasons why the Final Judgment is subject to reversal.

a. Plaintiffs do not have standing.

Plaintiffs' purpose in bringing this action was "to safeguard the health and welfare of Florida public school students and the general public . . . ." Compl. ¶ 33. But Plaintiffs do not have standing to bring this action for the general welfare, and they cannot demonstrate a non-speculative injury that

[2] The 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.

was caused by the Defendants and is also redressable by the Court.[3] 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 do not have standing to challenge the alleged "usurpation" of power from local school districts and from the Department of Health. Only those local school districts and the Department of Health could assert such claims to defend their institutional rights.[4]

Plaintiffs also lack standing because the Executive Order takes no state action against them. See Fla. Educ. Ass'n, 306 So. 3d at 1213–14. The

[3] The Final Judgment stated, without elaboration or support, that "the Plaintiffs not dismissed during the trial, this Court found that they had standing and reaffirms that finding here." Final Judgment at 3 n.2.

[4] As discussed herein, the Final Judgment frames the dispute in this case as whether "state law permits local school districts in Florida to adopt and enforce a face mask mandate for students, teachers and staff." Final Judgment at 3. The Court then makes repeated references to the "right" of local school districts to adopt such policies regarding health care, id. at 18, and, similarly, how the Parents' Bill of Rights "expressly permits" local school districts to adopt such policies including a mask mandate, id. at 21. These legal conclusions are all incorrect. Nevertheless, the Court then held that the executive actions at issue violated the due process rights of local school districts because these actions supposedly abrogated the authority of local school districts to adopt health care policies. Id. at 19. Importantly, however, not a single school district appeared in this case to raise these issues. Ultimately, the Court made a results-oriented determination rooted in protecting newly discovered due process rights of local school districts, none of which appeared in the case to assert or even claim the existence of any such rights or contend that the executive actions were in any way interfering with their due process rights.

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 rules) cannot provide Plaintiffs with any 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.

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 Court improperly placed the burden on Defendants 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."[5] Final Judgment at 14. Ultimately, the Court ruled

[5] The Court apparently placed this burden on Defendants because the Court found that Defendants had asserted separation of powers as an affirmative defense. Final Judgment at 14. Significantly, however, Defendants only asserted separation of

that Defendants did not sufficiently prove their own authority to act. Final Judgment at 14-16.

Even if Defendants had the burden of proof, Defendants repeatedly presented the correct legal authorities supporting the Executive Order and Emergency Rule (even though the Court only focused on the Parents' Bill of Rights). To be sure, there is no credible basis to question the Governor's general authority to issue an Executive Order to executive agencies.[6] 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

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powers as an affirmative defense after the Court denied Defendants' Motion to Dismiss Counts I, III, IV, V and VI on the basis that Plaintiffs had asked the Court to violate the "foundational principle" of separation of powers by urging the 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 Defendants 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.)

[6] 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.

> 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. 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), (13).

Notably, the Court did not fault the issuance of the Executive Order *per se* but found fault with the policy choice within it. The Court observed that "the setting of local policies for health and safety of students substantially remains a local function." Final Judgment at 12. 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.

Contrary to the Final Judgment's 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 Plaintiffs' contention that "the subject matter of 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." Compl. ¶ 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 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 priorities 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 in reaching their policy determinations. 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 Plaintiffs (or the Court) might advance, exactly as articulated in Defendants' Motion to Dismiss.

Once the Department of Health duly promulgated the Emergency Rule, the Education Defendants have 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.

Plaintiffs have not challenged any of the referenced authorizing statutes. Accordingly, the existence and validity of such statutes definitively refute the Court's conclusion that Defendants were without legal authority to issue and enforce the policies implemented in the Emergency Rule. In other words, the Final Judgment's finding that Defendants "have not shown any convincing authority in the Constitution or any statute," supporting the issuance of the Executive Order, Final Judgment at 15, fails to consider the well-established statutory authority which Defendants repeatedly presented and which Plaintiffs never questioned or challenged. See, e.g., Defs.' Mot. to Dismiss at 8–19; Defs.' Exs. 6–13.

Further, as argued repeatedly 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 is 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, Article IV, Section 1, Florida Constitution, any judicial interference would violate the strict separation of powers, Article II, Section 3, Florida Constitution.

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

In its Final Judgment, the Court interpreted and purported to enforce the newly enacted Parents' Bill of Rights, § 1014.01 *et seq.*, Fla. Stat. But Plaintiffs 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. Final Judgment at 15. 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. Final Judgment at 16–

23. *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).

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." 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 Defendants' reading, is the full extent Plaintiffs were awarded any relief—the Final Judgment must 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, and there is a high probability the appellate court will not uphold that ruling.

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." Final Judgment at 18, 25. 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.

[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 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.

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 boards to enact policies relating to health care and education, including mask mandates," Final Judgment at 19, 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 Defendants "do not have authority under [the Parents' Bill of Rights] to enforce a before the fact" policy requiring a parental opt-out. Final Judgment at 18. This holding, too, fails to consider the long-standing statutory authority providing the State Board of Education with the power to investigate, 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 limit the State Board's statutory authority—neither of which are explicit therein.

That said, even if the Court were 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. Compl. ¶¶ 105-109, 115-116, 134-139.

"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 particular 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. "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 Court found that the Executive Order was "arbitrary" and "unreasonable" because it "exceed[s] the powers granted by the Legislature in the Parents' Bill of Rights . . . ." Final Judgment at 23. However, as demonstrated above, the Governor had the authority to issue the Executive Order irrespective of the Parents' Bill of Rights. Instead, the Court looked at 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 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." Exec Order 21-175. In striking down the Executive Order, the 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. Final Judgment at 19–22. Under the Court's reading of the Parents' Bill of Rights, the Executive Order and related enforcement measures stifle the local school districts' opportunity to enact and defend 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. Id. at 19-23.[8]

[8] Notably, the Executive Order recites the same strict scrutiny standard by which local school districts could overrule parental choice under certain circumstances, so the Court's inference that the Executive Order discards that aspect of the Parents' Bill of Rights is not entirely accurate. Nevertheless, even with the Parents' Bill of Rights, local school districts' policies cannot conflict with the Emergency Rule promulgated under Section 1003.22(3).

In so ruling, the Court ignored the substantial justifications for parent-choice driven opt-outs, evidenced 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." Exec. Order 21-175. This is consistent with record evidence before the Court. 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 at ¶ 46. Mandating children to wear masks causes children to experience immediate physical side effects: speaking difficulties, mood changes, and discomfort breathing. Id. ¶ 48. In addition, masking reduces the ability to communicate. Id. ¶ 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, which are also at pandemic levels. Id.

Given these 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[.]" Exec. Order 21-175. Indeed, even the Court conceded that "there is at least some dispute within the medical community on the issue of masking." Final Judgment at 10 n. 8. On this record, the Executive Order's parent-choice driven 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 and mental health 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." Exec. Order 21-175. Favoring parental choice is alone a rational basis for the parental opt-out policy, with or without the Parents' Bill of Rights.[9]

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

[9] Even the Court assumed that decisions on masking school children are parental health decisions within the scope of the Parents' Bill of Rights, to be infringed only when a school district can satisfy strict scrutiny.

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.

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

Finally, the 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 . . . ." Final Judgment at 24.

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 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. Exec. Order 21-175. 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 order. The Education Defendants are instead directed to enforce "any rules or agency action" that may arise under those agencies' own rulemaking power, *not* the Executive Order.

Finally, none of the Defendants 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. Final Judgment at 23.

The Final Judgment nevertheless attempts to enjoin the Defendants from enforcing the Department of Health rule by enjoining the enforcement of all "policies" the Executive Order "caused to be generated." Final Judgment at 24. Oddly, the Court used its equitable power to enjoin the enforcement of an Emergency Rule that was not and could not be invalidated. The Court's interjection into the carefully balanced health-related "policies" emanating from, or adopted in line with, the Executive Order violates the Department of Health's statutory and due process rights to issue and 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 Defendants have a high likelihood of success on appeal. Therefore, the Motion should be denied, and the automatic stay must remain in effect pending appellate review.

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

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

Although Plaintiffs 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 Plaintiffs' specifically. Motion at 4 ("[T]here is the very real prospect of irreparable harm to the individual Plaintiffs."). Here, Plaintiffs claim only one form of "irreparable harm"—the "increased risk of the Delta variant infection, as shown by CDC recommendations and the overwhelming medical evidence that is in the record of this case, 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." Plaintiffs simply declare 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. But this label utterly fails to satisfy Plaintiffs' burden. See Pringle, 707 So. 2d at 390. Plaintiffs fail to quantify this risk or explain how the "very real prospect" of harm actually exists for any specific Plaintiff. Indeed, Plaintiffs provide 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 Plaintiff has articulated any "irreparable harm" beyond a generalized concern for sending their children to the same school in which some parents have exercised their fundamental right to not require their own children to wear a mask. Plaintiffs have failed to show any irreparable harm if the stay remains in place.

CONCLUSION

Although this Court has enjoined Defendants 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 authorized by Rule 9.310(b)(2) is more stringent. Plaintiffs must demonstrate compelling circumstances to override the deference afforded to Defendants in acting in the public good. They have failed to meet this burden. Further, because

Defendants are likely to succeed on appeal and irreparable harm will result if the status quo is not maintained, this Court should deny the Motion and leave intact the automatic stay of its Order pending appeal.

DATED: September 7, 2021.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 7, 2021, the foregoing was filed with the Clerk of Court by using the e-portal electronic filing system, which will serve via email this filing on all counsel of record named below.

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