

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

Case No. \_\_\_\_\_

FLORIDA STATE CONFERENCE OF NAACP; FLORIDA STUDENT POWER NETWORK; J.W. by and through her next friend John Walsh; S.W. by and through her next friend John Walsh; JOHN WALSH in his individual capacity; Z.L. by and through his next friend Tera Thaddies; TERA THADDIES in her individual capacity; P.A.B. by and through her next friends Alexia Anastasia and Daniel Brown; ALEXIA ANASTASIA in her individual capacity; DANIEL BROWN in his individual capacity; A.A.1. by and through his next friend Nyesha Anderson; NYESHA ANDERSON in her individual capacity; J.K. by and through his next friend Maya King Wilson; and, MAYA KING WILSON, in her individual capacity,

Petitioners

vs.

STATE OF FLORIDA DEPARTMENT OF HEALTH,

Respondent.

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**PETITION TO DETERMINE INVALIDITY  
OF EXISTING EMERGENCY RULE 64DER21-12**

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Pursuant to Sections 120.56(1), (3), and (5) and 120.569, Florida Statutes, and Rule 28-106.201, Florida Administrative Code, Petitioners seek an administrative determination that Sections (1)(d) and (6)(a)-(c) of existing Emergency Rule 64DER21-12 (“Emergency Rule”), Florida Administrative Code, adopted by the Florida

Department of Health (“DOH”) and published on August 9, 2021 in the Florida Administrative Register, constitutes an invalid exercise of delegated legislative authority. In support of this petition, Petitioners state as follows:

## **I. OVERVIEW**

1. In following Governor Ron DeSantis’ Executive Order 21-175, DOH has exceeded its authority and violated the purpose of its existence. In an attempt to validate its illegal Emergency Rule, DOH invoked Section 1003.22(3), Fla. Stat., which grants DOH rulemaking authority to “adopt rules governing the immunization of children against, the testing for, and the control of preventable communicable diseases.” By its own admission, DOH promulgated the Emergency Rule “to encourage a safe and effective in-person learning environment for Florida’s schoolchildren during the upcoming school year; to prevent the unnecessary removal of students from school; and to safeguard the rights of parents and their children” – none of which are within the delegated legislative authority granted by Section 1003.22(3), or arguably within DOH’s scope of authority at all. Even worse, the sole mandate of the Emergency Rule – i.e., requiring schools to “allow for a parent or legal guardian of the

student to opt-out the student from wearing a face covering or mask” – does the exact opposite of what DOH purports to do and what it is required by statute to do, which is to “implement interventions that prevent or limit the impact or spread of diseases and health conditions.” Section 20.43(1)(b), Fla. Stat.

2. Rather, the Emergency Rule is *facilitating* the spread of COVID-19 by banning masks in public schools. And, predictably, this ban has led to dozens of full or partial school shutdowns, hundreds of thousands of sick and quarantined students being unnecessarily removed from school, and, most tragically, the unnecessary and preventable deaths of children and educators.

3. DOH also cannot justify its illegal rulemaking based on the newly minted Parents’ Bill of Rights. The Parents’ Bill of Rights grants DOH no rulemaking authority and, moreover, it never mentions masks. Even assuming *arguendo* that it did both, which it does not, the Parents’ Bill of Rights grants exceptions where “such action is reasonable and necessary to achieve a compelling state interest and . . . is narrowly tailored and is not otherwise served by a less restrictive means.” Section 1014.03, Fla. Stat. An extension of prior mask mandates during a surge in the pandemic is certainly

reasonable, necessary, narrowly tailored, and not served by less restrictive means.

4. Meanwhile, publicly-funded private schools are free to implement mask mandates in line with widely accepted guidelines from the Centers for Disease Control and Prevention and the American Academy of Pediatrics. This arbitrary difference in treatment of public schools and private schools exacerbates the disparate impact of the pandemic on children of color, children with disabilities and children from low-income families, who comprise a greater percentage of the student population in public schools than in private schools.

5. For these reasons and as explained more fully below, the Emergency Rule is an invalid exercise of delegated legislative authority and must be invalidated because: DOH exceeded its grant of rulemaking authority; it enlarges, modifies, or contravenes the specific provisions of Sections 1003.22(3) and Chapter 1014, Fla. Stats.; it is arbitrary and capricious; it did not publish specific facts and reasons for finding an immediate danger to the public health, safety, or welfare” that are supported by competent substantial

evidence; and, DOH failed to demonstrate that the Emergency Rule was necessary to justify the emergency rulemaking process.

## **II. THE PARTIES**

### **A. Respondent: Florida Department of Health**

6. The agency affected by the petition is the State of Florida Department of Health (“DOH”). DOH maintains offices at: 4052 Bald Cypress Way, Tallahassee, FL 32399. DOH’s file or identification number for this proceeding, if any, is unknown.

### **B. Petitioner: Florida State Conference of NAACP**

7. Petitioner Florida State Conference of the NAACP (“FL NAACP”) is the state affiliate of the national NAACP, the nation’s oldest and largest civil rights organization. FL NAACP is a membership organization dedicated to securing political, educational, social, and economic equality rights in order to eliminate race-based discrimination and its adverse effects and to ensure the health and well-being of all persons. As part of this mission, FL NAACP is committed to eliminating discrimination on the basis of race in healthcare and public education. FL NAACP has standing to bring this action on behalf of its individual members in families and households with children attending public schools in Florida, in

addition to individual members who are teachers. Protecting and enhancing public schools, which are attended disproportionately by children of color, is one of the FL NAACP's core missions. It also has advocated to protect communities of color, who have suffered disproportionately from the ravages of COVID-19, through comprehensive public health policies.

8. FL NAACP is a collective of all the local NAACP branches throughout Florida. FL NAACP business may be conducted at any of the FL NAACP branch offices. Because the Broward branch is currently the largest and most active branch in Florida, much of the FL NAACP business is conducted there. The Broward branch is located at 1100 Sistrunk Boulevard, Ft. Lauderdale, FL 33311. However, for purposes of this petition, the FL NAACP may be contacted through undersigned counsel.

9. Petitioner FL NAACP has standing where “a substantial number of its members, although not necessarily a majority, are ‘substantially affected’ by the challenged rule ... [T]he subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.” *NAACP*,

*Inc. v. Fla. Bd. of Regents*, 863 So. 2d 294, 298 (Fla. 2003) (quoting *Florida Home Builders Ass’n v. Department of Labor & Employment Security*, 412 So.2d 351, 353-54 (Fla. 1982)). Here, a substantial number of the FL NAACP’s members are families with children in public schools. A core part of the NAACP’s mission is protecting the rights of children in public schools and eliminating the adverse effects of race-discrimination in healthcare and public education, and vacatur of an Emergency Rule is a remedy of the kind appropriate for an association to receive.

10. According to the Centers for Disease Control and Prevention (“CDC”), “COVID-19 has unequally affected many racial and ethnic minority groups, putting them more at risk of getting sick and dying from COVID-19.”<sup>1</sup> This trend has been observed in Florida

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<sup>1</sup> Centers for Disease Control and Prevention, “Health Equity Considerations and Racial and Ethnic Minority Groups,” (Apr. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

as well.<sup>2</sup> The FL NAACP has consistently fought to protect communities of color from this disproportionate impact of COVID.<sup>3</sup>

11. Moreover, NAACP supports accessible, quality education for students. That includes building a stronger, more diverse pipeline of teachers; increasing mentoring and coaching to reduce turnover and improve the classroom experience; and, supporting more teachers in acquiring advanced certifications.<sup>4</sup> In order to do that, teachers need to be healthy. Not having mask mandates for students exposes teachers, some of whom are FL NAACP members, and their households to increased risk of contracting COVID-19 and suffering

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<sup>2</sup> Shenae Samuels-Staple, “The State of COVID-19 in Florida and South Florida: An Early Look at Disparities in Outcomes,” Florida Health Justice Project (May 2020), <https://www.floridahealthjustice.org/the-state-of-covid-19-in-florida-and-south-florida.html>.

<sup>3</sup> NAACP FL et. al., “Re: Recommendations for Conducting a Safe General Election During the COVID-19 Pandemic,” Letter (Sept. 3, 2020), <https://www.naacpldf.org/wp-content/uploads/2020.09.03-Recommendations-for-Conducting-a-Safe-Election.pdf>.

<sup>4</sup> NAACP, “Accessible, Quality Education” <https://naacp.org/know-issues/education-innovation/accessible-quality-education> (last accessed Aug. 27, 2021).



adverse consequences. Since the July 2021 reopening order, 53 Florida educators have died from COVID-19. Since August 1, 2021, at least 70,606 Florida PreK-12 students and staff have tested positive for Covid-19, requiring not only those students and staff, but also all of the students and staff who were in close contact with them, to miss work and school while sick, in quarantine and, for some, while hospitalized.<sup>5</sup>

**C. Petitioner: Florida Student Power Network**

12. Petitioner Florida Student Power Network (“FLSPN”) is a membership organization of youth student organizers across Florida dedicated to creating tangible change through issue-driven campaigns, voter mobilization and other creative tactics that engage the young generation to use its collective power for justice. As part of this mission, FLSPN strives to ignite change in several areas including racial justice and economic justice, both of which depend

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<sup>5</sup> Florida Education Association, “FEA’s Safe Schools Report: 2021-22 school year,” <https://feaweb.org/covid19/2021safe-schools-report/> (last accessed Sept. 2, 2021).

on equitable access to safe free high-quality public education for all students and particularly for students of color and students living in or near poverty. So, protecting and enhancing public schools, is one of FLSPN's core missions. For example, FLSPN has advocated for schools that are safe for all children and not subject to the overpolicing and militarization that criminalizes Black and Brown and immigrant youth, that causes them physical and mental harm and that pushes them out of school and into the school-to-prison, school-to-institutionalization, and school-to-deportation pipelines. It also has recently sued to protect its right to engage in such public school advocacy in public meetings of the Marjorie Stoneman Douglass High School Safety Commission. In addition, FLSPN has advocated to protect communities of color, who have suffered disproportionately from the ravages of COVID-19, through comprehensive public health policies. FLSPN has standing to bring this action on behalf of its individual student members and members in families and households with children attending public schools in Florida.

13. FLSPN's main statewide office is located at 10800 Biscayne Boulevard, Suite 1050, Miami, FL 33161. However, for purposes of this petition, FLSPN may be contacted through undersigned counsel.

14. Petitioner FLSPN has standing where "a substantial number of its members, although not necessarily a majority, are 'substantially affected' by the challenged rule ... [T]he subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members." *NAACP, Inc. v. Fla. Bd. of Regents*, 863 So. 2d 294, 298 (Fla. 2003) (quoting *Florida Home Builders Ass'n v. Department of Labor & Employment Security*, 412 So.2d 351, 353-54 (Fla.1982)). Here, a substantial number of FLSPN's members are students in public schools and/or are members in families with children in public schools. A core part of the FLSPN's mission is protecting the rights of children in public schools and eliminating the adverse effects of economic and race discrimination in public education, and vacatur of an Emergency Rule is a remedy of the kind appropriate for an association to receive.

**D. Petitioners: The Walsh Family**

15. Petitioner John Walsh is J.W.'s father and guardian. He brings this suit as next friend to J.W. and S.W. and on his own behalf. Petitioner J.W. is a nine-year-old student enrolled in the School District of Palm Beach County. She is a student with disabilities and qualifies for Exceptional Student Education ("ESE") under the exceptionalities of language impairment, occupational therapy, speech impairment, and other health impairment. J.W. is a child with Down syndrome and is under the care of multiple physicians: her pediatrician, cardiologist, hematologist, endocrinologist, ENT, and neurologist. According to J.W.'s pediatrician, due to J.W.'s "high risk medical condition, she cannot be in a situation with other unvaccinated and unmasked persons, because contracting COVID would be potentially deadly to her." The pandemic comes on the heels of J.W. recovering from double pneumonia in late 2019, where she was hospitalized in the PICU for twelve days and barely managed to avoid being put on a ventilator. Throughout the pandemic in the 2020-21 school year, J.W. attended synchronous remote classes and received speech therapy, language therapy, and occupational therapy on Google Meet. In the 2021-22 school year that just started, J.W. is unable to return to school because of her complex medical conditions

and the steady rise of COVID-19 cases in Palm Beach County,<sup>6</sup> yet she is unable to participate in synchronous remote learning because it is no longer available. J.W. is only receiving one to two hours of services each week. While J.W. has already requested Hospital Homebound services for this school year, that has not yet started.

16. Petitioner John Walsh's older daughter and J.W.'s sister, Petitioner S.W., is 17 years old and enrolled in the School District of Palm Beach County. For the 2021-22 school year, S.W. is attending high school, in-person, where she wears her mask. Even though S.W. diligently wears her mask and is fully vaccinated, there are times where she removes it to have lunch and to drink water. S.W. is also concerned about the number of students who did not wear masks while the Emergency Rule was being followed. Due to the number of students in her school, it is impossible to practice proper social distancing. While S.W. does not have complex medical complications,

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<sup>6</sup> Sonja Isgar, "As PBC COVID cases rise, county's top health official says spread not in classrooms — yet," Palm Beach Post (Aug. 16, 2021), <https://www.palmbeachpost.com/story/news/education/2021/08>

if S.W. contracts COVID-19 and infects her little sister, Petitioner J.W., it could be deadly.

17. Until August 19, 2021, the Palm Beach School Board complied with the DOH order and allowed children to attend school unmasked with parental consent. While its school board has now changed course and voted<sup>7</sup> to require masks for all students except those with medical reasons that prevent them from wearing masks, there is a reasonable probability that, if the rule remains in effect, the District will be compelled to comply with it. Governor DeSantis has described the school board as “violating the law” and warned of “consequences” for the Board’s actions.<sup>8</sup> The State Board of Education is investigating other school districts that have taken the

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<sup>7</sup> Andrew Marra, “Palm Beach County schools cancel mask opt-out for students, defying Gov. DeSantis,” (Aug. 18, 2021), <https://www.palmbeachpost.com/story/news/education/2021/08/18/palm-beach-county-public-schools-cancel-mask-opt-out-students/8190024002/>.

<sup>8</sup> Sooji Nam, “Disappointing’: Governor's office responds to Palm Beach County School Board’s mandatory mask mandate,” wpbf.com (Aug. 19, 2021), <https://www.wpbfc.com/article/florida-governor-desantis-palm-beach-county-school-mask-mandate/37347679>.

same position, threatening financial sanctions and even the removal from office of school board members who vote for mask mandates.<sup>9</sup>

18. While masks were not required, in the first five days of school, 1,412 students in Palm Beach County Schools were ordered to quarantine at home because they had been in close proximity to someone diagnosed with COVID-19.<sup>10</sup> Dr. Alina Alonso, Palm Beach County's top health official, has warned that the risk of in-school transmissions could drastically increase due to "unvaccinated children, fuller classrooms, and wiggle room in the mandate to wear masks."<sup>11</sup> As of August 18, 2021, the number of students in quarantine skyrocketed to about 3,000, and more than 11,000

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<sup>9</sup> Andrew Atterbury, "Florida threatens to remove school officials who disobey DeSantis," Politico (Aug. 17, 2021), <https://www.politico.com/states/florida/story/2021/08/17/florida-threatens-to-remove-school-officials-who-disobey-desantis-1390160>.

<sup>10</sup> Sonja Isgar, "As PBC COVID cases rise, county's top health official says spread not in classrooms — yet," Palm Beach Post (Aug. 16, 2021), <https://www.palmbeachpost.com/story/news/education/2021/08/16/palm-beach-county-covid-cases-rise-top-health-official-says-spread-not-classrooms-yet/8128061002/>

<sup>11</sup> *Id.*

students, or 6.6% of the school district's students, had already opted out of wearing masks.<sup>12</sup> The sheer number of people who attended school unmasked and who were exposed to unmasked people while the District followed the Emergency Rule significantly increased the level of danger for J.W. and S.W.

19. Currently, in S.W.'s high school, there is a chronic shortage of substitute teachers. In the afternoons when a teacher is absent and there is no coverage for a class, S.W.'s school sends the students to the indoor theater until they go home. So far, S.W. has had to do this twice. When that happens, Petitioner John Walsh picks up S.W. from school early to avoid additional, unnecessary exposure. Moreover, in between classes, when students move between classrooms, S.W. reports that most students remove their masks, that she is shoulder-to-shoulder with her classmates, and that it is impossible to practice social distancing. Even though some hallways

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<sup>12</sup> Luli Ortiz, "We'll never comply: Tensions rise during Palm Beach County School Board Meeting," CBS12 News (Aug. 18, 2021), <https://cbs12.com/news/local/well-never-comply-tensions-rise-during-palm-beach-county-school-board-meeting>.



are outside, the CDC is still recommending masks outside for unvaccinated individuals in areas of high transmission, like Florida, in crowded settings, or during activities that involve sustained closed contact with other people.<sup>13</sup> It is impossible to know who is vaccinated in a crowded hallway. Even if vaccinated, people can still catch and transmit the Delta variant, which S.W. desperately wants to avoid so that she does not infect her medically fragile sister, J.W. Also of concern is that at least one of the teachers at S.W.'s school refuses to wear a mask properly—putting it under their chin during class. Even though the District implemented a mask mandate with medical opt-outs, schools are not enforcing it. This risk is reflected in the numbers: S.W.'s school has the second-highest count of

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<sup>13</sup> Centers for Disease Control and Prevention (“CDC”), “Guidance for COVID-19 Prevention in K-12,” Aug. 5, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> (last accessed Aug. 31, 2021).

COVID-19 cases in the county.<sup>14</sup> Since the beginning of the school year, 85 cases have been confirmed among students and teachers at S.W.’s school.<sup>15</sup>

20. Petitioner John Walsh has an interest in his right to make health and education decisions for his children, including the decision to send his children to free and safe public schools as guaranteed by the Florida Constitution, which has been infringed upon by the Emergency Rule.

21. Petitioners John Walsh, J.W., and S.W. reside in Palm Beach County, Florida. However, for purposes of this petition, they may be contacted through undersigned counsel.

**E. Petitioners: The Thaddies Family**

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<sup>14</sup> The School District of Palm Beach County, “COVID-19 Dashboard,” [https://www.palmbeachschools.org/students\\_parents/health\\_services/coronavirus\\_disease\\_2019\\_\\_covid\\_19/covid-19\\_dashboard](https://www.palmbeachschools.org/students_parents/health_services/coronavirus_disease_2019__covid_19/covid-19_dashboard) (last accessed Aug. 31, 2021).

<sup>15</sup> The School District of Palm Beach County, “COVID-19 Dashboard,” [https://www.palmbeachschools.org/students\\_parents/health\\_services/coronavirus\\_disease\\_2019\\_\\_covid\\_19/covid-19\\_dashboard](https://www.palmbeachschools.org/students_parents/health_services/coronavirus_disease_2019__covid_19/covid-19_dashboard) (last accessed Aug. 31, 2021).

22. Petitioner Tera Thaddies is Z.L.'s mother and guardian. She brings this suit as next friend to Z.L., her son, and on her own behalf. Petitioner Z.L. is 11 years old and enrolled in the School District of Palm Beach County. From August 12, 2021, until August 23, 2021, Z.L. was at home because of the increased number of students who have returned to school without masks, the sharp rise in COVID-19 cases across the state, and the need to keep their family safe. As of August 27, 2021, there were 20 confirmed COVID-19 cases in Z.L.'s middle school.<sup>16</sup> Z.L. was diagnosed with autism when he was four years old, and is in an ASD cluster program at school where he receives various support services. Last year, that included behavioral support for children with autism to ensure proper mask wearing. This year, those support services are not being provided. If Z.L. were to contract COVID-19, not only would it be of great concern

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<sup>16</sup> The School District of Palm Beach County, "COVID-19 Dashboard," [https://www.palmbeachschools.org/students\\_parents/health\\_services/coronavirus\\_disease\\_2019\\_\\_covid\\_19/covid-19\\_dashboard](https://www.palmbeachschools.org/students_parents/health_services/coronavirus_disease_2019__covid_19/covid-19_dashboard), (last accessed Aug. 27, 2021).

for his health and safety, but also for Petitioner Tera Thaddies' health.

23. In the past year, Petitioner Tera Thaddies lost her partner of 20 years, and Z.L.'s father, to COVID-19 complications. She was also diagnosed with lupus and rheumatoid arthritis, which is an autoimmune and inflammatory disease, both of which she is struggling to manage. While Petitioner Tera Thaddies is vaccinated, it is unclear how effective the vaccine would be if she were to contract COVID-19 due to her underlying health conditions. She is the sole caregiver and parent for Z.L. and cannot afford to risk even more serious health conditions or death from contracting COVID-19.

24. Like Petitioners John Walsh, J.W., and S.W., the sheer number of people who attended school unmasked in Palm Beach County, and who were exposed to unmasked people while the Emergency Rule was followed, significantly increased the level of danger for Petitioners Tera Thaddies and Z.L.

25. Petitioner Tera Thaddies has an interest in her right to make health and education decisions for her child, including the decision to send Z.L. to free and safe public schools as guaranteed

by the Florida Constitution, which has been infringed upon by the Emergency Rule.

26. Petitioners Tera Thaddies and Z.L. reside in Palm Beach County, Florida. However, for purposes of this petition, they may be contacted through undersigned counsel.

**F. Petitioners: The Anastasia-Brown Family**

27. Petitioners Alexia Anastasia and Daniel Brown are P.A.B.'s parents and guardians. They bring this suit as next friend to P.A.B. and on their own behalf. Petitioner P.A.B. is an eleven-year-old student enrolled in Collier County Public Schools. This is her first year of middle school. P.A.B. has an IEP that lists her primary exceptionality as hospital homebound. P.A.B. has ulcerative colitis, for which she needs monthly infusions of immunosuppressant drugs. From time to time, she has flare ups; the most recent one was this summer. P.A.B. is under the care of multiple physicians: her pediatrician, gastroenterologist, and neurologist.

28. On June 10, 2021, during a telehealth visit, P.A.B.'s gastroenterologist said that she could return to school in the 2021-22 school year, part-time, and in-person, as long as a mask mandate

was in place. Otherwise, if she were to contract COVID-19, P.A.B. is at high risk of complications, including severe illness or death.

29. On June 21, 2021, the Collier County School Board dropped its mask mandate and made face coverings optional.<sup>17</sup>

30. On July 27, 2021, during a telehealth visit with P.A.B.'s doctor, Petitioner Alexia Anastasia informed the doctor that the District would not have a mask mandate. At that point, the doctor told the Anastasia-Brown family that P.A.B. could not return to school in-person.

31. Collier County schools started the 2021-22 school year on August 10. "Ten days into the school year, Collier County surpassed 600 confirmed COVID-19 cases in its public school system," whereas last school year, it took four months to reach that same number of cases.

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<sup>17</sup> Rachel Fradette and Dan DeLuca, "Collier County schools drop mask mandate; face coverings optional starting June 21" Naples Daily News (June 8, 2021), <https://www.naplesnews.com/story/news/education/2021/06/08/collier-county-school-district-ending-mask-mandate/7544690002/>.

32. On the morning of August 27, 2021, Leon County Circuit Judge John C. Cooper issued a ruling that “agreed with a group of parents who claimed in a lawsuit that DeSantis’ order is unconstitutional and cannot be enforced.”<sup>18</sup> Judge Cooper concluded Governor DeSantis’ Executive Order 21-175 “is without legal authority.”<sup>19</sup>

33. Just hours after Judge Cooper’s ruling, at 4:47 p.m., Collier County Schools sent an e-mail to parents stating, “We continue to consult with the Florida Department of Health-Collier (DOH-Collier) and our local medical professionals about the current

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<sup>18</sup> Terry Spencer and Curt Anderson, “Judge blocks Florida governor’s order banning mask mandates,” The Washington Post (Aug. 27, 2021), [https://www.washingtonpost.com/politics/judge-blocks-florida-governors-order-banning-mask-mandates/2021/08/27/effe9fd4-0752-11ec-b3c4-c462b1edcfc8\\_story.html](https://www.washingtonpost.com/politics/judge-blocks-florida-governors-order-banning-mask-mandates/2021/08/27/effe9fd4-0752-11ec-b3c4-c462b1edcfc8_story.html).

<sup>19</sup> Terry Spencer and Curt Anderson, “Judge blocks Florida governor’s order banning mask mandates,” The Washington Post (Aug. 27, 2021), [https://www.washingtonpost.com/politics/judge-blocks-florida-governors-order-banning-mask-mandates/2021/08/27/effe9fd4-0752-11ec-b3c4-c462b1edcfc8\\_story.html](https://www.washingtonpost.com/politics/judge-blocks-florida-governors-order-banning-mask-mandates/2021/08/27/effe9fd4-0752-11ec-b3c4-c462b1edcfc8_story.html).

conditions in Collier County. They **HIGHLY RECOMMEND** the use of masks by District staff and students.”

34. Despite cries from community to institute mask mandates,<sup>20</sup> and despite Judge Cooper’s ruling, Collier County Schools has refused to deviate from the DOH directives.

35. Unfortunately, with COVID-19 raging again throughout Florida, and the surge of the Delta variant, P.A.B.’s doctors have continued to advise that she should not attend school in person at this time.

36. Given the advice of her doctors, her complex medical conditions and the surge of COVID-19 cases in Collier County specifically, P.A.B. has not returned to school in the 2021-22 school

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<sup>20</sup> Gage Goulding, “Parents start petition asking for mandate in Lee, Collier schools,” NBC2 (Aug. 26, 2021), <https://nbc-2.com/news/local/2021/08/24/parents-start-petition-asking-for-mask-mandate-in-lee-collier-schools/>.



year, which started last month,<sup>21</sup> yet she is unable to participate in synchronous remote learning because it is no longer available.

37. P.A.B. is enrolled in virtual school. It has been fraught with disorganization due to the overwhelming demand for a virtual option. For the first six days of school, P.A.B. only received about 30 minutes of programming each day. It was not until the seventh day of school that her classes began. P.A.B. is missing out on educational content as well as the benefit of in-person learning, which her medical providers are willing to recommend if masks were required. P.A.B. has already been subjected to a loss of normalcy due to her medical conditions, and now she is facing another blow to normalcy as she is in her third school year interrupted by COVID-19.

38. Petitioners Alexia Anastasia and Daniel Brown have an interest in their right to make health and education decisions for

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<sup>21</sup> Rachel Fradette and Dan DeLuca, “Collier schools report more than 600 COVID-19 cases. It took four months to get there last year,” Naples Daily News (Aug. 26, 2021), <https://www.naplesnews.com/story/news/coronavirus/2021/08/26/covid-19-collier-schools-report-more-than-500-cases-first-2-weeks/5599169001/>.

their child, including the decision to send P.A.B. to free and safe public schools as guaranteed by the Florida Constitution, which has been infringed upon by the Emergency Rule.

39. Petitioners Alexia Anastasia, Daniel Brown, and P.A.B. reside in Collier County, Florida. However, for purposes of this petition, they may be contacted through undersigned counsel.

**G. Petitioners: The Anderson Family**

40. Petitioner Nyesha Anderson is A.A.1.'s parent and guardian. She brings this suit as next friend to A.A.1. and on her own behalf. Petitioner A.A.1. is an eight-year-old student enrolled in Duval County Public Schools. He is in third grade. A.A.1. has an IEP. Because A.A.1. was diagnosed with autism, he is in a small classroom setting that focuses on his learning needs. While wearing masks is the norm in his classroom, it is not perfect. The same goes for A.A.1.'s siblings: D.N., who is four-years-old; A.A.2., who is ten years old and has an IEP; and, A.A.3., who is twelve-years-old. With four children in schools, Petitioner Nyesha Anderson and her family are at high risk of contracting COVID-19—again.

41. Last year, Petitioner Nyesha Anderson and her four children contracted COVID-19. Petitioner Nyesha Anderson was

severely ill with COVID-19 from the beginning of July 2020 through September 2020. Because she had COVID-19 for over 40 days, Petitioner Nyesha Anderson was admitted to the hospital. She has chronic lingering symptoms and it triggered a flareup of her autoimmune disorder. While Petitioner Nyesha Anderson is fully vaccinated now, she cannot afford to contract the Delta variants due to her medical conditions. Although her children recovered from COVID-19 last year, she worries what would happen to them and to her if they were to be infected with the Delta variant.

42. Besides concerns for her own health and well-being and the fate of her four children should she contract the COVID-19 Delta variant, she is also concerned about the racial inequities in healthcare. Petitioner Nyesha Anderson is a Black woman who is a mother to four Black children. Dr. Rochelle Walensky, director of the

CDC, “declared racism a serious public health threat.”<sup>22</sup> Social determinants of health—where one lives, learns, works, worships, and plays—“are key drivers of health inequities within communities of color, placing those within these populations at greater risk of poor outcomes.”<sup>23</sup> Well before the COVID-19 crisis, communities of color in the United States “experience[d] higher rates of illness and death across a wide range of health conditions, including diabetes, hypertension, obesity, asthma, and heart disease” and have shorter life expectancies.<sup>24</sup>

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<sup>22</sup> Centers for Disease Control and Prevention, “Media Statement from CDC Director Rochelle P. Walensky, MD, MPH, on Racism and Health,” April 8, 2021, <https://www.cdc.gov/media/releases/2021/s0408-racism-health.html> (last accessed Aug. 29, 2021).

<sup>23</sup> Centers for Disease Control and Prevention, “Racism and Health,” <https://www.cdc.gov/healthequity/racism-disparities/index.html> (last accessed Aug. 29, 2021).

<sup>24</sup> Centers for Disease Control and Prevention, “Racism and Health,” <https://www.cdc.gov/healthequity/racism-disparities/index.html> (last accessed Aug. 29, 2021).

43. Fueled by these health disparities, COVID-19 has had a disproportionate impact on communities of color.<sup>25</sup> While, in the U.S., the greatest number of COVID-19 cases are among non-Latinx white people, “racial and ethnic minority groups are disproportionately represented among COVID-19 cases.”<sup>26</sup> In addition, according to the CDC, adults of any age with certain underlying medical conditions can be more likely to get severely ill, need hospitalization, intensive care, a ventilator, or they may die.<sup>27</sup> Long-standing systemic health and social inequities put communities of color and people with disabilities at greater risk of

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<sup>25</sup> Centers for Disease Control and Prevention, “COVID-19 Racial and Ethnic Health Disparities,” (Dec. 10, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/index.html> (last accessed Aug. 29, 2021).

<sup>26</sup> Centers for Disease Control and Prevention, “Cases by race and ethnicity,” (Aug. 29, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/increased-risk-illness.html>.

<sup>27</sup> Centers for Disease Control and Prevention, “People with Certain Medical Conditions,” (Aug. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last accessed Aug. 29, 2021).

getting sick and dying from COVID-19.<sup>28</sup> People of color tend to be younger when they develop chronic medical conditions and may be more likely to have more than one condition.<sup>29</sup> And, studies “have shown people from racial and ethnic minority groups are...dying from COVID-19 at younger ages.”<sup>30</sup>

44. Moreover, recent research verifies that Black patients hospitalized with COVID-19 are more likely to die or be discharged to hospice than white patients.<sup>31</sup> In sum, Petitioner Nyesha Anderson, as a Black mother with underlying health conditions and a greater

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<sup>28</sup> Centers for Disease Control and Prevention, “People with Certain Medical Conditions,” (Aug. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last accessed Aug. 29, 2021).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> David A. Asch, M.D., et al, “Patient and Hospital Factors Associated With Differences in Mortality Rates Among Black and White US Medicare Beneficiaries Hospitalized With COVID-19 Infection,” JAMA Network, (June 17, 2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2781182> (explaining this difference is likely due to the fact that “Black patients disproportionately receive care at hospitals delivering worse care for all.”).

risk of needing hospitalization if she contracts COVID-19, fears being added to the statistics.

45. On August 23, 2021, facing mounting cases, Duval County Public Schools held an emergency School Board meeting and voted to impose a 90-day face mask mandate for all students, except for those with documented medical conditions.<sup>32</sup> But, the mask mandate does not start until September 7, 2021.<sup>33</sup> Meanwhile, students may

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<sup>32</sup> Joe McLean, “What to know about the Duval County Public Schools mask mandate,” Aug. 24, 2021, <https://www.news4jax.com/news/local/2021/08/24/what-to-know-about-duval-county-public-schools-mask-mandate/#:~:text=%E2%80%93%20In%20an%20emergency%20meeting%20Monday,from%20wearing%20a%20face%20covering> (last accessed Aug. 29, 2021).

<sup>33</sup> Joe McLean, “What to know about the Duval County Public Schools mask mandate,” Aug. 24, 2021, <https://www.news4jax.com/news/local/2021/08/24/what-to-know-about-duval-county-public-schools-mask-mandate/#:~:text=%E2%80%93%20In%20an%20emergency%20meeting%20Monday,from%20wearing%20a%20face%20covering> (last accessed Aug. 29, 2021).

opt out for any reason, and the case counts are up to a total of 1,285 in the three weeks since school started.<sup>34</sup>

46. DOH informed Duval County Public Schools “that it has assigned additional personnel to school cases, but the rapid spreading nature of the COVID-19 Delta variant currently exceeds the department’s capability to respond to all school cases within a meaningful timeframe.”<sup>35</sup> Because DOH cannot keep up with the swell of COVID-19 cases in public schools in Duval County, let alone statewide, Duval County Public Schools has had to take matters into

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<sup>34</sup> Duval County Public Schools, “Reported COVID-19 Case Dashboard 2021-22 School Year,” <https://c19sitdash.azurewebsites.net/> (last accessed Aug. 29, 2021).

<sup>35</sup> Duval County Public Schools, “District pivots based on case counts and lack of contact tracing,” Aug. 20, 2021, <https://www.teamduval.org/2021/08/20/district-pivots-based-on-case-counts-and-lack-of-contact-tracing/> (last accessed Aug. 29, 2021).



its own hands, although temporarily, to stop the spread of COVID-19 in its classrooms.<sup>36</sup>

47. Petitioner Nyeshia Anderson's four children are attending school in-person at three different Duval County Public Schools where the DOH is not capable of contact tracing at a pace that will keep up with the COVID-19 cases. This poses increased exposure to COVID-19, and thus increases the chances that Petitioner Nyeshia Anderson and her children will not only fall ill, but suffer grave health outcomes if they contract the COVID-19 Delta variant.

48. Petitioner Nyeshia Anderson has an interest in her right to make health and education decisions for her children, including the decision to send A.A.1., A.A.2., A.A.3., and D.N. to free and safe public schools as guaranteed by the Florida Constitution, which has been infringed upon by the Emergency Rule.

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<sup>36</sup> Duval County Public Schools, "District pivots based on case counts and lack of contact tracing," Aug. 20, 2021, <https://www.teamduval.org/2021/08/20/district-pivots-based-on-case-counts-and-lack-of-contact-tracing/> (last accessed Aug. 29, 2021).

49. Petitioner Nyeshia Anderson and her children. reside in Duval County, Florida. However, for purposes of this petition, they may be contacted through undersigned counsel.

#### **H. Petitioners: The King Family**

50. Petitioner Maya King Wilson is J.K.'s parent and guardian. In the same household are B.K.H and A.K.W., Maya King Wilson's other two minor children. Petitioner Maya King Wilson brings this suit as next of friend to Petitioner J.K. and on her own behalf. Petitioner J.K. is an eleven-year-old student enrolled in Pasco County Schools. He is in fifth grade.

51. J.K. is medically fragile. He was born premature, weighing 1 lb. 5 oz., and required the use of an oxygen tank around the clock for two years. Because J.K. had to use so much pure oxygen to breathe as a baby, his lungs were permanently scarred, and he has asthma. Doctors tell Petitioner Maya King Wilson that x-rays of J.K.'s lungs look as if he were a smoker. As a result, he is extremely vulnerable to respiratory illnesses, such as COVID-19.

52. J.K. also has an IEP that states his primary exceptionality is a specific learning disability, with an additional program and service area of language impairment. Last school year, due to COVID-

19, J.K. participated in online learning. However, because of the virtual setting, the school could not provide certain services to J.K. as required by his IEP. Petitioner Maya King Wilson had to spend approximately \$1,000 out-of-pocket in private tutors to compensate for what the school was unwilling or unable to provide to J.K. This year, Petitioner Maya King Wilson wanted J.K. to continue online learning due to the lack of mask mandates in Pasco County Schools, and because of his medical conditions. Because of the high demand, J.K. is waitlisted for virtual school. Until then, Pasco County Schools requires J.K. to attend school in-person. Otherwise, if he is not actively enrolled, J.K. will not be eligible for online school, once he is pulled from the waitlist.

53. If Petitioner J.K. contracts COVID-19, it not only puts him at risk of severe illness or death, but it also puts his entire family at risk. J.K. has two siblings, B.K.H., who is seven-years-old, and A.K.W., who is two-years-old. Petitioner Maya King Wilson is also under the care of multiple doctors, as she was diagnosed with mixed connective tissue disorder, an autoimmune disorder, about a decade ago. In addition, she manages lupus, rheumatoid arthritis, scleroderma, asthma, and Factor V Leiden thrombophilia. As a

result, if Petitioner Maya King Wilson’s children, including Petitioner J.K., were to contract COVID-19 at school, it puts the entire family, especially Maya King Wilson, at high risk of severe illness or death. While Petitioner Maya King Wilson is vaccinated, it is unclear how effective the vaccine will be against the Delta variant due to her compromised immune system.

54. Last school year, in 2020-21, the School Board passed an emergency rule to “minimize the spread of COVID-19, to reduce the risk of exposure, and to protect the health, safety, and welfare of students, staff, and the community.”<sup>37</sup> It was a comprehensive, nine-page policy that layered mitigation practices.<sup>38</sup> On the first page, the

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<sup>37</sup> Pasco County Schools, “Procedures and Guidance Regarding: Face Coverings, Personal Protective Equipment (PPE), and Application of Code of Conduct Necessitated by COVID-19,” <https://www.pasco.k12.fl.us/library/reopening/Face-Covering-Exhibit-B-072820.pdf> (updated Aug. 6, 2021; last accessed Aug. 29, 2021).

<sup>38</sup> Pasco County Schools, “Procedures and Guidance Regarding: Face Coverings, Personal Protective Equipment (PPE), and Application of Code of Conduct Necessitated by COVID-19,” (updated Aug. 6, 2021) <https://www.pasco.k12.fl.us/library/reopening/Face-Covering-Exhibit-B-072820.pdf> (last accessed Aug. 29, 2021).

District emphasized that “[a]ll employees, contractors, visitors, and students MUST wear a mask or other face covering while on school property and/or engaged in school activities,” but for a documented medical condition.<sup>39</sup>

55. Ahead of the 2021-22 school year, Pasco County Schools updated its COVID-19 protocols and dropped its mask mandates, despite the raging Delta variant.<sup>40</sup> The District now states, in part, that “Masks are optional in Pasco County Schools. However, the CDC continues to recommend the use of masks.”<sup>41</sup> The other health and wellness protocols in place last school year—social distancing, arranging the classroom with adequate distance between students, limiting large gatherings at the school, and limiting school-related

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<sup>39</sup> Pasco County Schools, “Procedures and Guidance Regarding: Face Coverings, Personal Protective Equipment (PPE), and Application of Code of Conduct Necessitated by COVID-19,” (Aug. 6, 2021), <https://www.pasco.k12.fl.us/library/reopening/Face-Covering-Exhibit-B-072820.pdf> (last accessed Aug. 29, 2021).

<sup>40</sup> Pasco County Schools, “COVID-19 Protocols 2021-22,” (Sep. 2, 2021), <https://www.pasco.k12.fl.us/coronavirus/protocols> (last accessed Sep. 3, 2021).

<sup>41</sup> *Id.*

activities—are now just suggestions. This year, with a more deadly COVID-19 variant, the District does not require any of these practices, which, when layered would mitigate the risk of spreading COVID-19.<sup>42</sup>

56. Instead, Pasco County Schools decided to invest in a “COVID Command Center” ahead of the school year, where eleven members of the county health department would work out of the District offices.<sup>43</sup> “We’re doing something kind of novel,” said Assistant Superintendent Ray Gadd.<sup>44</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> Beau Zimmer, “Pasco schools, health department create first of its kind ‘COVID Command Center,’” WTSP Tampa Bay 10 (Aug. 18, 2021)  
<https://www.wtsp.com/article/news/health/coronavirus/pasco-schools-and-health-department-create-first-of-its-kind-covid-command-center/67-7aef740c-6456-4bf9-b9f2-f950523b9746> (last accessed Aug. 29, 2021).

<sup>44</sup> *Id.*

57. The District’s defiance of CDC<sup>45</sup> and American Academy of Pediatrics (“AAP”)<sup>46</sup> guidelines, which recommend universal masking, is reflected in its case counts: as of August 27, 2021, there have been 2,350 student cases reported and 491 staff cases. Numbers are likely much higher, and do not account for spread beyond the classrooms. Pasco County Schools Superintendent Kurt Browning said it is problematic that there will be asymptomatic cases in classrooms, and District spokesperson Stephen Hegarty even conceded that the District has fallen behind in reporting numbers.<sup>47</sup>

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<sup>45</sup> CDC, “Guidance for COVID-19 Prevention in K-12 Schools,” (Aug. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>, (last accessed Aug. 29, 2021).

<sup>46</sup> American Academy of Pediatrics, “COVID-19 Guidance for Safe Schools,” (July 18, 2021), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>, (last accessed Aug. 29, 2021).

<sup>47</sup> Laura Cassels, Florida Phoenix, “School closures reported in five FL counties; districts ‘drowning’ in COVID,” Aug. 20, 2021, <https://floridaphoenix.com/2021/08/20/school-closures-reported-in-five-fl-counties-districts-drowning-in-covid/> (last accessed Aug. 29, 2021).

58. The “novel” COVID Command Center that Pasco County Schools touted ahead of the school year has predictably failed. According to Superintendent Browning, “of 1,261 COVID cases detected during Pasco’s first week of classes, fewer than 400 were ‘completed,’ meaning traced to their source with that person and his or her contacts isolated from others. That means nearly 900 cases had not been traced, likely contributing to further spread of the virus.”<sup>48</sup>

59. Now, the District has shifted contact tracing responsibility back to each school.<sup>49</sup> And schools are notifying parents if their

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<sup>48</sup> Beau Zimmer, WTSP Tampa Bay 10, “Pasco schools, health department create first of its kind ‘COVID Command Center,’” Aug. 18, 2021, <https://www.wtsp.com/article/news/health/coronavirus/pasco-schools-and-health-department-create-first-of-its-kind-covid-command-center/67-7aef740c-6456-4bf9-b9f2-f950523b9746> (last accessed Aug. 29, 2021).

<sup>49</sup> Jeff Patterson, “COVID-19 quarantine policy varies for Tampa Bay counties as cases,” WFLA (Aug. 23, 2021), [risehttps://www.wfla.com/community/health/coronavirus/covid-19-quarantine-policy-varies-for-tampa-bay-counties-as-cases-rise/](https://www.wfla.com/community/health/coronavirus/covid-19-quarantine-policy-varies-for-tampa-bay-counties-as-cases-rise/)



children are in a classroom where someone tested positive for COVID-19, but tells them that it is not necessary to quarantine.

60. Superintendent Browning acknowledges that, “I think these number are pretty staggering,” and “We are drowning. We are struggling to stay afloat.”<sup>50</sup> Even so, Pasco County Schools still does not require masks.

61. On August 27, 2021, Leon County Circuit Judge John C. Cooper’s ruling “agreed with a group of parents who claimed in a lawsuit that DeSantis’ order is unconstitutional and cannot be enforced.”<sup>51</sup> Judge Cooper said that Governor DeSantis’ Executive Order 21-175 “is without legal authority.”<sup>52</sup> Even so, Pasco County

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<sup>50</sup> Laura Cassels, “School closures reported in five FL counties; districts ‘drowning’ in COVID,” Florida Phoenix (Aug. 20, 2021), <https://floridaphoenix.com/2021/08/20/school-closures-reported-in-five-fl-counties-districts-drowning-in-covid/>, (last accessed Aug. 29, 2021).

<sup>51</sup> Terry Spencer and Curt Anderson, “Judge blocks Florida governor’s order banning mask mandates,” The Washington Post (Aug. 27, 2021), [https://www.washingtonpost.com/politics/judge-blocks-florida-governors-order-banning-mask-mandates/2021/08/27/effe9fd4-0752-11ec-b3c4-c462b1edcfc8\\_story.html](https://www.washingtonpost.com/politics/judge-blocks-florida-governors-order-banning-mask-mandates/2021/08/27/effe9fd4-0752-11ec-b3c4-c462b1edcfc8_story.html).

<sup>52</sup> *Id.*

Schools continue to defy the CDC<sup>53</sup> and AAP,<sup>54</sup> and continues to adhere to the DOH Emergency Rule to the detriment of its students, teachers, and community.

62. Petitioner Maya King Wilson has an interest in her right to make health and education decisions for her children, including the decision to send J.K. to free and safe public schools as guaranteed by the Florida Constitution, which has been infringed upon by the Emergency Rule.

63. Petitioners Maya King Wilson and J.K. reside in Pasco County, Florida. However, for purposes of this petition, they may be contacted through undersigned counsel.

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<sup>53</sup> CDC, “Guidance for COVID-19 Prevention in K-12 Schools,” (Aug. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>, (last accessed Aug. 29, 2021).

<sup>54</sup> American Academy of Pediatrics, “COVID-19 Guidance for Safe Schools,” (Jul. 18, 2021), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>, (last accessed Aug. 29, 2021).

## **I. Substantial Interests Affected**

64. At all times relevant to these proceedings, the individual Petitioners John Walsh, Tera Thaddies, Alexia Anastasia, Daniel Brown, Maya King Wilson, and Nyesha Anderson are parents of medically fragile children who are not eligible for the COVID-19 vaccination, or are their children's primary caregivers and have complex medical conditions that increase their own risk of experiencing severe illness and possibly death if they contract COVID-19, even if they are vaccinated. Because of their medical conditions, the individual children Petitioners, J.W., P.A.B., J.K., and A.A.1., are also at increased risk of contracting COVID-19, and of experiencing severe illness and possibly even death.

65. As such, the individual Petitioners, J.W., S.W., John Walsh, Z.L., Tera Thaddies, P.A.B., Alexia Anastasia, Daniel Brown, J.K., Maya King Wilson, A.A.1., and Nyesha Anderson, all have standing under Florida's Administrative Procedure Act because each of them is a "party who is adversely affected by final agency action [and] is entitled to judicial review." § 120.68(1)(a), Fla. Stat. Here, the Emergency Rule gives the individual children Petitioners, J.W., S.W., Z.L., P.A.B., J.K., and A.A.1., a "choice" between being held out of

school with inadequate educational services or seeking a quality education in-person at school and risk being infected with COVID-19 or infecting members of their families. which could cause severe illness or death in addition to resulting in numerous quarantines that will also leave them with significant periods of inadequate or no educational instruction.

66. The fact that some school districts have temporarily chosen to defy the Emergency Rule is immaterial. Petitioners are still adversely affected because they are at serious risk of being forced to attend or be exposed to family members who attend public schools where students and teachers are partially unmasked, where mask mandates are not enforced, where mask mandates are temporary and may expire, or where current mask mandates are at risk of being overturned or banned if the Florida Department of Education is successful in its unrelenting efforts to compel school districts to comply with the DOH Emergency Rule. And, DOH should not be able to abuse its power to pass an emergency rule so unjust that it is widely defied, and then use that defiance to escape challenges to the legality of that rule.

67. Judge Cooper’s decision does not negate standing. He has not enjoined the DOH rule. Moreover, the decision has now been appealed by the state and Attorney General Ashley Moody has advised state agencies and local governments that the Emergency Rule remains in effect and must be followed.<sup>55</sup>

68. Public school on-site instruction and operations must be conducted safely; the Florida Constitution mandates that “[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high-quality system of free public schools.” Art. IX, § 1(a), Fla. Const. The Emergency Rule prevents safety in public schools. The effect of the “opt out” provision of the Emergency Rule is to allow carriers of the COVID-19 virus to attend classes without wearing a face covering and spread the virus to the Petitioners’ children, their respective households and communities, other students, teachers, and staff.

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<sup>55</sup> Attorney General Advisory Legal Opinion - AGO 2021-01, (Sept. 1, 2021), <http://www.myfloridalegal.com/ago.nsf/Opinions/5316DCB70166B4F68525874300645E53>.

## **J. Venue**

69. Petitioners, who are the non-governmental parties affected by DOH's action, respectfully request that all proceedings, including the final hearing, be held via video conference (Zoom). See 28-106.207(1), DOAH Uniform Rules of Procedure.

## **III. IDENTIFICATION OF THE CHALLENGED EMERGENCY RULE**

70. Petitioners are challenging Sections (1)(d) and (6)(a)-(c) of Emergency Rule 64DER21-12 Florida Administrative Code, adopted by the DOH on August 6, 2021. The Emergency Rule became effective August 6, 2021<sup>56</sup> and was published in the Florida Administrative Register on August 9, 2021. Sections (1)(d) and (6)(a)-(c) of the Emergency Rule provide:

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<sup>56</sup> On August 23, 2021, undersigned counsel submitted a public records request pursuant to Chapter 119, Fla. Stats., to the DOH for a single item: the recording of the DOH meeting on August 6, 2021, where Emergency Rule 64DER21-12 (Protocols for Controlling COVID-19 in School Settings) was discussed and adopted. To date, DOH has not provided the recording.

## **64DER21-12 Protocols for Controlling Covid -19 in School Settings**

- (1) GENERAL PROTOCOLS AND DEFINITION. The following procedures should be instituted to govern the control of COVID-19 in public schools:
  - (d) Students may wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask.
  
- (6) NON-DISCRIMINATION. Students whose parents or legal guardian have opted them out of a mask or face covering requirement shall not be subject to any harassment or discriminatory treatment. including but not limited to:
  - (a) Relegation to certain Physical locations;
  - (b) Isolation during school activities; or
  - (c) Exclusion from any school-sponsored events or activities.

A copy of Emergency Rule 64DER21-12 Florida Administrative Code, is attached as **Exhibit “A.”**

#### **IV. ASSERTED RULEMAKING AUTHORITY**

71. On July 30, 2021, Governor Ron DeSantis promulgated Executive Order 21-175, directing the DOH and the Florida Department of Education to work together to:

[I]mmediately execute rules pursuant to section 120.54, Florida Statutes, and to take any additional action necessary, using all legal means available, to ensure safety protocols for controlling the spread of COVID-19 in schools that:

- A. Do not violate Floridian's constitutional freedoms;
- B. Do not violate parents' right 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.

A copy of Executive Order No. 21-175 is attached as **Exhibit "B."**

72. In response, on August 6, 2021, DOH met and adopted Emergency Rule 64DER21-12, "Protocols for Controlling COVID-19 in School Settings."

73. Emergency Rule 64DER21-12 cites as rulemaking authority Section 1003.22(3), Florida Statutes, which provides as follows:



The Department of Health may adopt rules necessary to administer and enforce this section.<sup>57</sup> **The Department of Health, after consultation with the Department of Education, shall adopt rules governing the immunization of children against, the testing for, and the control of preventable communicable diseases. The rules must include procedures for exempting a child from immunization requirements.** Immunizations shall be required for poliomyelitis, diphtheria, rubeola, rubella, pertussis, mumps, tetanus, and other communicable diseases as determined by rules of the Department of Health. The manner and frequency of administration of the immunization or testing shall conform to recognized standards of medical practice. The Department of Health shall supervise and secure the enforcement of the required immunization. Immunizations required by this section shall be available at no cost from the county health departments.

Section 1003.22(3), Fla. Stat. (emphasis added).

74. Section 1003.22(5), Florida Statutes, sets forth the grounds for an exemption from immunizations:

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<sup>57</sup> Section 1003.22, Fla. Stat. (concerns school-entry health examinations and immunization against communicable diseases).

- (5) The provisions of this section shall not apply if:
- (a) The parent of the child objects in writing that the administration of immunizing agents conflicts with his or her religious tenets or practices;
  - (b) A physician licensed under the provisions of chapter 458 or chapter 459 certifies in writing, on a form approved and provided by the Department of Health, that the child should be permanently exempt from the required immunization for medical reasons stated in writing, based upon valid clinical reasoning or evidence, demonstrating the need for the permanent exemption;
  - (c) A physician licensed under the provisions of chapter 458, chapter 459, or chapter 460 certifies in writing, on a form approved and provided by the Department of Health, that the child has received as many immunizations as are medically indicated at the time and is in the process of completing necessary immunizations;
  - (d) The Department of Health determines that, according to recognized standards of medical practice, any required immunization is unnecessary or hazardous; or
  - (e) An authorized school official issues a temporary exemption, for up to 30 school days, to permit a student who transfers into a new county to attend class until his or her records can be obtained. Children and youths who are experiencing

homelessness and children who are known to the department, as defined in s. 39.0016, shall be given a temporary exemption for 30 school days. The public-school health nurse or authorized private school official is responsible for follow up of each such student until proper documentation or immunizations are obtained. An exemption for 30 days may be issued for a student who enters a juvenile justice program to permit the student to attend class until his or her records can be obtained or until the immunizations can be obtained. An authorized juvenile justice official is responsible for follow up of each student who enters a juvenile justice program until proper documentation or immunizations are obtained.

## **V. BACKGROUND FACTS**

75. Florida finds itself as the nation's hotspot for the present wave of the COVID-19 Delta variant.

76. Present positive COVID-19 tests, hospitalizations, and deaths are at the highest point in the history of this pandemic in the State of Florida.<sup>58</sup>

77. Medicine and science tell us that the Delta variant is vastly different from the original COVID-19 strain including transmissibility that mirrors chicken pox,<sup>59</sup> more serious illnesses,<sup>60</sup> and an all-time pandemic high of childhood hospitalizations.<sup>61</sup>

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<sup>58</sup> Centers for Disease Control and Prevention, “COVID Data Tracker,” (Aug. 31, 2021), [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailycases](https://covid.cdc.gov/covid-data-tracker/#trends_dailycases); Sarah Blaskey, Ana Claudia Chacin, and Devoun Cetoute, “Florida changed its COVID-19 data, creating an ‘artificial decline’ in recent deaths,” Miami Herald (Aug. 31, 2021), <https://www.miamiherald.com/news/coronavirus/article253796898.html>

<sup>59</sup> “U.S. CDC internal report says Delta variant as contagious as chickenpox - report,” Reuters (Jul. 30, 2021), <https://www.reuters.com/business/healthcare-pharmaceuticals/us-cdc-internal-report-calls-delta-variant-contagious-chickenpox-nyt-2021-07-30/>.

<sup>60</sup> Centers for Disease Control and Prevention, “Delta Variant: What We Know About the Science,” (Aug. 26, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>

<sup>61</sup> Centers for Disease Control and Prevention, “COVID Data Tracker,” (Aug. 31, 2021), <https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions>.

78. Hospitals and intensive care units throughout the state are nearing capacity for COVID-19 patients.<sup>62</sup>

79. Vaccinated individuals are more resistant to the Delta variant, but they are not immune.<sup>63</sup>

80. Both the CDC and the American Academy of Pediatrics recommend mandatory masking in schools to arrest the spread of COVID-19.<sup>64</sup>

81. On August 27, 2021, Leon County Circuit Judge John Cooper ruled against Florida's blanket ban on school mask mandates, enjoining the mask bans. Final Judgment (Sept. 2, 2021),

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<sup>62</sup> *Id.*; U.S. Dep't Health and Human Services, "Hospital Utilization," (Aug. 30, 2021), <https://protect-public.hhs.gov/pages/hospital-utilization>.

<sup>63</sup> Centers for Disease Control and Prevention, "Delta Variant: What We Know About the Science," (Aug. 26, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>.

<sup>64</sup> *Id.*; American Academy of Pediatrics, "American Academy of Pediatrics Updates Recommendations for Opening Schools in Fall 2021," (Jul. 19, 2021), <https://www.aap.org/en/news-room/news-releases/aap/2021/american-academy-of-pediatrics-updates-recommendations-for-opening-schools-in-fall-2021/>.

*McCarthy v. DeSantis*, Case No.: 2021-CA-001382, (Fla. 2nd Cir. Ct. 2021). The Final Judgment is attached as **Exhibit “C.”**

82. Of note, Judge Cooper ruled as follows:

A. The Parents’ Bill of Rights “does not support a state-wide order or action interfering with the constitutionally provided authority of local school districts to provide for the safety and health of the children based on the unique facts on the ground in a particular county.” See **Exhibit “C,”** Final Judgment at 18.

B. The Parents’ Bill of Rights “...does not ban school board face mask mandates. The statute expressly permits school boards to adopt policies regarding the healthcare of students (such as a face mask mandate) even if a parent disagrees with the policy.” See **Exhibit “C,”** Final Judgment at 21.

C. An “executive order and/or action or agency action which bans under all circumstances a face mask mandate for school children does not meet constitutional muster because such action exceeds the authority given to the Governor and the other Defendants [the Commissioner, Florida Department of Education, and the State Board] under the Parents’ Bill of Rights. Seeking to enforce a policy through the Executive Order and through actions that violate the

provisions of the Parents’ Bill of Rights is arbitrary and capricious because there is no reasonable or rational justification for a violation of this statute. A policy or action which violates the Parents’ Bill of Rights cannot be lawfully enforced by the Defendants.” See **Exhibit “C,”** Final Judgment at 22.

83. However, Judge Cooper’s ruling was automatically stayed pending appeal.<sup>65</sup>

84. Petitioners were forced to retain the services of the undersigned counsel for this challenge to the Emergency Rule.

## **VI. LEGAL ISSUES**

### **A. THE DOH EMERGENCY RULE IS AN INVALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY**

85. DOH is only empowered to adopt “rules that implement or interpret the specific powers and duties granted by the enabling statute.” Section 120.52(8), Fla. Stat. DOH does not have the power

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<sup>65</sup> Curt Anderson, “Florida school mask debate headed for appeals court battle,” The Washington Post (Sept. 3, 2021), [https://www.washingtonpost.com/national/florida-school-mask-debate-headed-for-appeals-court-battle/2021/09/03/9a25c3f8-0ccf-11ec-a7c8-61bb7b3bf628\\_story.html](https://www.washingtonpost.com/national/florida-school-mask-debate-headed-for-appeals-court-battle/2021/09/03/9a25c3f8-0ccf-11ec-a7c8-61bb7b3bf628_story.html)

to adopt a rule simply “because it is reasonably related to the purpose of the enabling legislation.” *Id.* DOH can only adopt rules pursuant to the specific directions of the enabling statute. Otherwise, it is an invalid exercise of delegated legislative authority. Section 120.52(8), Fla. Stat.

86. Section 120.52(8), Fla. Stat., defines “invalid exercise of delegated legislative authority” as an “action which goes beyond the powers, functions, and duties delegated by the Legislature.” A rule is invalid if: the agency “has exceed[ed] its grant of rulemaking authority” (Section 120.52(8)(b), Fla. Stat.); “[t]he rule enlarges, modifies, or contravenes the specific provisions of the law implemented” (Section 120.52(8)(c), Fla. Stat.); the rule is arbitrary or capricious (Section 120.52(8)(e), Fla. Stat.); if the emergency rule did not publish “specific facts and reasons for finding an immediate danger to the public health, safety, or welfare” that are supported by competent substantial evidence (Section 120.54(4)(a)3., Fla. Stat.); or, if the agency failed to demonstrate that the emergency rule was necessary (Section 120.54(4)(a)2., Fla. Stat.).



**B. THE EMERGENCY RULE IS AN INVALID EXERCISE OF LEGISLATIVE AUTHORITY BECAUSE IT ENLARGES, MODIFIES, OR CONTRAVENES ITS ALLEGED ENABLING STATUTES**

87. The Emergency Rule is an invalid exercise of legislative authority in violation of Section 120.52(8)(e), Fla. Stat., as it enlarges, modifies, or contravenes its alleged enabling statutes: Sections 1003.22(3) and Chapter 1014, Fla. Stat.

**i. The Emergency Rule enlarges, modifies, or contravenes the specific provisions of Section 1003.22(3), Fla. Stat.**

88. The Emergency Rule does nothing to “control communicable diseases.” It promotes the spread of them. As such, DOH has enlarged or modified Section 1003.22(3), Fla. Stat., rendering the Emergency rule an invalid exercise of delegated legislative authority.

89. Section 1003.22(3), Fla. Stat. allows DOH to “adopt rules governing the immunization of children.” DOH Emergency Rule 64DER21-12 has nothing to do with immunizations—which fortify the immune systems of children against infectious agents thereby protect their health. Bizarrely, DOH still relies on the immunization authority from Section 1003.22(3), Fla. Stat. to justify its Emergency

Rule, which, unlike immunizations, actually puts children’s health at risk by banning one of the most effective mitigation tools to protect the unvaccinated from COVID-19 – mask requirements. As the DOH should know, immunizations are different than a ban on mask mandates.

90. DOH attempts to ignore the entire immunization focus of the immunization rule by cherry-picking the line that DOH “shall adopt rules governing the immunization of children against, the testing for, and *the control of preventable communicable diseases.*” Section 1003.22(3), Fla. Stat. (emphasis added). Even if one were to ignore the title, purpose and construction of the statute and just accept DOH’s interpretation that Section 1003.22(3) grants it authority to adopt rules generally, and unrelated to vaccinations, governing the “control of preventable diseases” which it does not, there is no empowering statute that gives DOH the authority to limit the ability of others to control communicable diseases and certainly no authority for DOH to adopt rules to hasten the spread of communicable diseases.

91. To be clear, the offending portion of the Emergency Rule does nothing to “control communicable diseases.” On the contrary, it

*promotes* the spread of communicable disease. Thus, the DOH's Emergency Rule harms the interests it is obliged to protect as set forth in Section 1003.22(3), Fla. Stat.

92. As such, DOH has exceeded its grant of rulemaking authority under Section 1003.22(3), Fla. Stat., rendering the Emergency Rule an invalid exercise of rulemaking authority.

**ii. DOH does not have delegated legislative authority from the Parents' Bill of Rights to enact the Emergency Rule, but relies on it anyway**

93. The Parents' Bill of Rights, Section 1014.04, Fla. Stat., provides, in relevant part:

(1) All parental rights are reserved to the parent of a minor child in this state without obstruction or interference from the state, any of its political subdivisions, any other governmental entity, or **any other institution**, including, but not limited to, all of the following rights of a parent of a minor child in this state: . . . (e) The right to make **health care** decisions for **his or her** minor child, unless otherwise prohibited by law.

(Emphasis added).

94. Neither Section 1014.04, Fla. Stat., the Parents' Bill of Rights, nor anything else in Chapter 1014, Fla. Stats., grants rulemaking authority to DOH. While the Parents' Bill of Rights does include a list of rights that *parents* have when making healthcare and

education decisions for their children, those alleged *parental* rights do not give *DOH* regulatory authority over those parents' children. Rather, *DOH* has chosen to use the Parents' Bill of Rights as justification—wrongly so—for passing this Emergency Rule.

95. Moreover, the Parents' Bill of Rights does not purport to create or establish any new parental rights. Instead, Section 1014.02(1), Fla. Stat. explains that such rights existed before passage of the legislation. The statute merely articulates pre-existing rights. The only thing the legislature found that it was necessary to establish was “a consistent mechanism for parents to be notified of information relating to the health and well-being of their minor children.” None of that is at issue in this case.

96. Prior to enactment of the Parents' Bill of Rights, Florida already was in the midst of the COVID-19 pandemic, the most significant pandemic since the “Spanish flu” worldwide pandemic of 1918.

97. In 2020 and early 2021, as it was during the time of the Spanish flu pandemic, wearing a mask became the recommended norm. During the 2020-21 school year, when in-person lessons resumed, some Florida school districts, *e.g.*, Broward County Public

Schools and Pasco County Schools, required students to wear masks in compliance with guidelines from the CDC. Thus, at the time that the Parents' Bill of Rights was passed by the legislature, that body knew of the COVID-19 pandemic and existing mask-wearing protocol and mandates in schools.

98. With the greatest pandemic in a century raging, the legislature chose not to mention one word about masks in the Parents' Bill of Rights. Masks are not addressed in any way by the text. Thus, there is no indication from the text of the Parents' Bill of Rights that the legislature had any intent to have the statutory scheme apply to wearing masks. In light of the worldwide circumstances, the reasonable conclusion is that the choice not to mention masks was deliberate, not an oversight.

99. Next, when used in the Parents' Bill of Rights, "health care" refers exclusively to services provided by "health care practitioners" or at "health care facilities." See Section 1014.06, Fla. Stat., "Parental consent for health care services." The preamble to the Parents' Bill of Rights provides that, with regard to health care, the legislation "prohibit[s] certain health care practitioners and their employees from taking specified actions without a parent's written permission

... provid[es] that certain violations relating to parental consent are grounds for administrative fines for health care facilities ... [and] provid[es] that failure to comply with certain parental consent requirements is grounds for disciplinary action for health care practitioners...”

100. Importantly, school districts are not health care practitioners and do not provide health care services. Thus, decisions by school districts are not covered by the “right to make health care decisions” language of the Parents’ Bill of Rights.

101. According to the CDC, “[m]asks are primarily intended to reduce the emission of virus-laden droplets (“source control”), which is especially relevant for asymptomatic or presymptomatic infected wearers who feel well and may be unaware of their infectiousness to others, and who are estimated to account for more than 50% of

transmissions.”<sup>66</sup> Primarily, “[c]loth face coverings or masks are intended to protect other people—**not the wearer**—by helping to keep the wearer’s respiratory droplets from reaching others.”<sup>67</sup> In addition, masks “help reduce inhalation of these droplets by the wearer (‘filtration for wearer protection’).”<sup>68</sup> But it is the combination of these two that is most effective: “The community benefit of masking for SARS-CoV-2 control is due to the combination of these effects; individual prevention benefit increases with increasing numbers of people using masks consistently and correctly.”<sup>69</sup> As the Fourth District Court of Appeal recently put it, “requiring individuals to cover

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<sup>66</sup> Centers for Disease Control and Prevention, “Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2,” (May 7, 2021), [https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fmore%2Fmasking-science-sars-cov2.html](https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fmore%2Fmasking-science-sars-cov2.html).

<sup>67</sup> Centers for Disease Control and Prevention, “COVID-19 Employer Information for Bus Transit Operators,” (May 7, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/bus-transit-operator.html>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

their nose and mouth while out in public is intended to prevent the transmission from the wearer of the facial covering to others (with a secondary benefit being protection of the mask wearer).” *Machovec v. Palm Beach Cty.*, 310 So. 3d 941, 946 (Fla. 4th DCA 2021). That is, mask wearing is primarily for the protection of others and the *promotion of* public health, safety, and welfare. By comparison, in polite society, we cover our mouths when we sneeze or cough, not to protect ourselves, but to help prevent us from infecting others.

102. With regard to health care, the Parents’ Bill of Rights only addresses a parent’s “right to make health care decisions for his or her minor child.” The legislation does not even purport to articulate rights a parent has to make health care decisions for someone else’s child, as no such right exists. Thus, the “health care decisions” language does not apply to the issues here.

103. Even if the “health care decisions” language could somehow be deemed to apply here, school boards would be well within their rights to “infringe” on some parents’ rights if it demonstrated “that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly



tailored and is not otherwise served by a less restrictive means.”  
Section 1014.03, Fla. Stat.

104. Because the Parents’ Bill of Rights did not grant DOH any rulemaking authority, DOH has exceeded its grant of rulemaking authority in adopting the Emergency Rule. And even if it did grant DOH rulemaking authority, the Emergency Rule would still be invalid because DOH has unlawfully enlarged, modified, or contravened the specific language of Chapter 1404, Fla. Stats.

**C. THE EMERGENCY RULE IS ARBITRARY AND CAPRICIOUS**

105. The Emergency Rule adopted by DOH is both arbitrary and capricious. A rule is arbitrary if it is not supported by the necessary facts or logic. § 120.52(8)(e), Fla. Stat. A rule is capricious when it is adopted without thought or reason or is irrational. *Id.* Here, the Emergency Rule is both arbitrary and capricious.

**i. DOH’s recommendations fail to explain why schools should be treated differently than other locations**

106. DOH and other state agencies have repeatedly recommended the use of masks and facial coverings in a variety of

settings.<sup>70</sup> As early as June 2020, even before the full benefits of masks were known, Surgeon General Rivkes issued a public health advisory recommending that “[a]ll individuals in Florida should wear face coverings in any setting where social distancing is not possible” unless specific exceptions, like disabilities, prevented that from being possible.<sup>71</sup> Governor Ron DeSantis’ “Re-Open Florida Task Force” report, for example, recommended “statewide mitigation efforts” including “wearing a face mask or cloth face cover when entering a business, or within close proximity to members of the public.” DOH also has endorsed the accuracy of CDC guidance recommending the use of facemasks when social distancing is not possible.<sup>72</sup>

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<sup>70</sup> Re-Open Florida Task Force, “Plan for Florida’s Recovery,” at 2, 12 (Sept. 2020), <https://www.flgov.com/wp-content/uploads/covid19/Taskforce%20Report.pdf>.

<sup>71</sup> Scott Rivkes, “State of Florida Department of Health Public Health Advisory,” Florida Department of Health (June 22, 2020), <https://floridahealthcovid19.gov/wp-content/uploads/2020/06/20200622-SOF-DOH-Public-Health-Advisory.pdf>.

<sup>72</sup> Florida Department of Health, “Wear a Mask. Protect Others,” (Sept. 23, 2020), <http://indianriver.floridahealth.gov/newsroom/2020/09/mask.html>.

107. Plainly, DOH believes and admits that the benefits of masks outweigh the costs in a wide variety of settings. Yet DOH has given no explanation for why schools are different, other than its citation to the Parents’ Bill of Rights and reference to “Floridians’ constitutional freedoms” (without specifying if the reference was to the Florida or U.S. Constitution), which as a matter of law do not affect mask mandates, as set forth below. It is not rational to rely on a legal principle to justify a rule when that principle does not support creation of the rule.

**ii. DOH’s Rule is reducing in-person learning, not increase it, irrationally harming its stated goal**

108. The DOH rule states as one justification that “students benefit from in-person learning” and that “[r]emoving children from school poses a threat to developmental upbringing and should not occur absent a heightened showing of illness or risk of illness to other students.” Petitioners agree that these are important goals. Yet DOH irrationally considered removing only one potential form of protection from in-person instruction—face masks. And, it did not make any factual findings or even attempt to determine how many children would be prevented from attending in-person school as a result.

109. On the other hand, DOH did not consider the substantial number of students who would be prevented from attending in-person instruction by the ban imposed by the Emergency Rule. Many children, including some of the Petitioners, cannot safely attend public schools where masks are not required. And public schools which do not require masks will have higher rates of COVID-19, as set out above. That means more children will be out of school quarantining as long as they are infected or are suspected of being infected because of close contacts with people who are infected, and will be prevented from receiving in-person instruction during their quarantines under the terms of the Emergency Rule itself. Since August 1, 2021, 31 school districts have had to fully or partially close temporarily due to uncontrolled surges of COVID-19, over 140,000 students have had to miss school due to positive COVID-19 tests, and there have been over 134,000 confirmed quarantines.<sup>73</sup>

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<sup>73</sup> Florida Education Association, “FEA’s Safe Schools Report: 2021-22 school year,” <https://feaweb.org/covid19/2021safe-schools-report/> (last accessed Sept. 7, 2021).

110. Considering only the costs, and not the benefits of mask mandates in this context is like banning bicycle helmet laws because they might dissuade some children from riding bikes and getting exercise. It is a conceivable cost, but failing to consider the other side of the equation—the injuries helmets prevent—is irrational.

**iii. The Emergency Rule is arbitrary and capricious in light of the federal mask mandate that applies to school buses**

111. It is indisputable that a high percentage of Florida public school students ride school buses to and from school. For example: “[e]ach year, [Pinellas County Schools] school bus drivers travel 9.1 million miles and transport approximately 33,000 students to and from school.”<sup>74</sup> Earlier this month, it was reported that “50,000 Palm Beach County students are registered to ride on school buses . . . .”<sup>75</sup>

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<sup>74</sup> Pinellas County Schools, “Transportation,” <https://www.pcsb.org/transportation>.

<sup>75</sup> Stephanie Susskind, “School bus driver shortage leads to overcrowding, major delays for Palm Beach County students,” WPTV (Aug. 26, 2021), <https://www.wptv.com/rebound/state-of-education/school-bus-driver-shortage-leads-to-overcrowding-major-delays-for-palm-beach-county-students>.

All told, according to the Florida School District 2018-19 Transportation Profiles, the last full school year before the pandemic, 1,043,449 Florida students, representing approximately 45% of all Florida students, were transported by school bus.<sup>76</sup>

112. On January 29, 2021, the Director of the Division of Global Migration and Quarantine at the CDC issued an Order, pursuant to 42 U.S.C. 264(a) and 42 CFR 70.2, 71.31(b), and 71.32(b). The Order provides in relevant part: “Persons must wear masks over the mouth and nose when traveling on conveyances into and within the United States.” The Order became effective on February 1, 2021.<sup>77</sup>

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<sup>76</sup> Florida Department of Education, “Florida School District 2018-19 Transportation Profiles,” <https://www.fldoe.org/core/fileparse.php/7585/urlt/schtrandist1819.pdf>

<sup>77</sup> Centers for Disease Control and Prevention Department of Health and Human Services, Order under Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 Code of Federal Regulations 70.2, 71.31(b), 71.32(b), “Requirement for Persons to Wear Masks while on Conveyances and at Transportation Hubs,” [https://www.cdc.gov/quarantine/pdf/Mask-Order-CDC\\_GMTF\\_01-29-21-p.pdf](https://www.cdc.gov/quarantine/pdf/Mask-Order-CDC_GMTF_01-29-21-p.pdf) (last accessed Sept. 4, 2021).

113. The CDC’s guidance also incorporates this Order. It states, “During school transportation: CDC’s Order applies to all public transportation conveyances including school buses. Passengers and drivers must wear a mask on school buses, including on buses operated by public and private school systems, regardless of vaccination status, subject to the exclusions and exemptions in CDC’s Order.”<sup>78</sup>

114. Thereafter, the CDC posted “Frequent Asked Questions”<sup>79</sup> on its website, including:

**Which public transportation conveyances does the order apply to, and in which areas?**

The Order applies to all public transportation conveyances traveling into the United States (i.e., arriving from a foreign country) or within the United States (including within states or territories or

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<sup>78</sup> Centers for Disease Control and Prevention, “Guidance for COVID-19 Prevention in K-12 Schools,” (Aug. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

<sup>79</sup> Centers for Disease Control and Prevention, “Requirement for Face Masks on Public Transportation Conveyances and at Transportation Hubs,” (Aug. 27, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html>.

traveling between states or territories). ***This includes school buses.***

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**Are masks required on school buses?**

**Yes**, passengers 2 years of age and older and drivers must wear a mask on buses or vans operated by public or private school systems including early care and education/child care programs . . . .

(Emphasis added.)

115. Presumably, DOH was aware of the Order from January 29, 2021, when it issued its Emergency Order. Thus, knowing for several months that more than one million Florida students were mandated by federal regulations to wear masks to and from school while riding on buses or vans operated by public or private school systems, DOH issued the Emergency Order dictating that the rules for mask-wearing abruptly changed for 45% of Florida students the moment they stepped off the bus at school, then changed back the moment they stepped back on the bus to return home.

116. DOH offers no medical-based explanation for this sudden change in rules that apply to students during the school day. Nor has it done any study showing any adverse effect on the 45% of students who are mandated to wear masks to and from school. The abrupt



change in mandates and lack of medically rational explanation further evidence that the Emergency Rule is arbitrary and capricious.

117. Also, to the extent DOH was concerned that some students would not attend school if required to wear a mask, those students would still presumably be dissuaded from attending by having to wear a mask on the way to and from school. Hence, even one of the partially-coherent justifications for the Emergency Rule is rendered unsound and incoherent by an existing federal order.

**iv. The Emergency Rule does not distinguish mask requirements from other school uniform requirements**

118. For as long as can be remembered, dress codes have been a part of school life. The Parents' Bill of Rights does not create any new rights. Parents have never had the right to allow their children to refuse to comply with school dress codes. By example, Okaloosa County's Dress Code mandates:

Appropriate clothing and footwear must be worn at all times... Minimum length of clothing should be approximately five (5) inches above the top of the kneecap... Midriff cannot be exposed... Skin tight clothing, swimwear, low cut blouses or tops, clothing with cutouts, (including pants with holes above the 5 inch rule), or any other revealing garments are inappropriate for school. Leggings/jeggings/yoga pants are permitted as long as the upper garment

meets the 5 inch rule or no curvature of the lower body is exposed when the arms are held straight out to the side... Tops or T-shirts with low cut underarms (not to exceed 3 inches from the armpit area) are not allowed this applies to male and female students... Shoes or sandals must be worn at all times. Due to safety concerns rubber/plastic flip flops and shower shoes are not permitted... For the safety and protection of our students, body-piercing jewelry which includes nose rings and studs, with the exception of earrings worn in the ears, will not be allowed at school or while participating in any school activity.<sup>80</sup>

119. The notion that a school district is permitted to mandate that students cover their feet, thighs, curvature of the lower body, midriff, sides below the armpits, and sternum/upper chest, but is forbidden from mandating that students cover their mouths and noses defies logic and is arbitrary and capricious. That a school district is permitted to preclude flip flops and body-piercing jewelry based on “safety concerns” and for “the safety and protection of our students,” but prohibited from requiring masks during a deadly

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<sup>80</sup> School District of Okaloosa County, “Dress Code,” *available at* <https://www.okaloosaschools.com/baker/sites/okaloosaschools.com.baker/files/users/springlen/Dress%20Code%202015-16.pdf>.

pandemic defies logic and is arbitrary and capricious. In short, the position advocated by DOH leads to an absurd interpretation of the Parents' Bill of Rights, which would violate basic rules of statutory construction.

120. DOE also had no difficulty requiring students to cover parts of their face, head, or teeth for the health and safety of the students. For example, "A Summary of Safety Statutes, Rules and Recommendations for Science" published by DOE provides, in relevant part: "Eye-protective devices **shall be worn** by students, teachers and visitors in courses including, but not limited to, chemistry, physics or chemical-physical laboratories, at any time at which the individual is engaged in or observing an activity or the use of hazardous substances likely to cause injury to the eyes."<sup>81</sup> (Emphasis added.) This mandate, put in place solely for the protection of the wearer of the protective equipment, certainly does

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<sup>81</sup> Florida Department of Education, "A Summary of Safety Statutes, Rules and Recommendations for Science," (Apr. 7, 2015), <https://www.fldoe.org/core/fileparse.php/9958/urlt/2015-safety-in-science.pdf>.

not violate the Parents’ Bill of Rights. Neither does the requirement to wear a mask to protect others against the spread of COVID-19.

121. It is no secret that student athletes in particular sports must wear helmets and/or mouthguards. In fact, the Florida High School Athletic Association “adopt[ed] a first-in-the-nation requirement for female high school lacrosse players to wear helmets . . . .”<sup>82</sup> A helmet requirement for Florida student football players is a staple. Just as there is no reasonable argument that these equipment mandates violate the Parents’ Bill of Rights, the same is true for mask mandates.

122. Without violating the Parents’ Bill of Rights, a Florida school district also may require that student athletes, *e.g.*, soccer

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<sup>82</sup> “FHSAA Girls Lacrosse Helmet Requirement Will Improve Student-Athlete Safety.” Sachs Media (Jun. 25, 2021), <https://sachsmedia.com/fhsaa-girls-lacrosse-helmet-requirement-will-improve-student-athlete-safety/>.

players, wear protective mouthpieces.<sup>83</sup> There is no rational argument why a school district can mandate what students must put in their mouths but not over their mouths.

**v. The Emergency Rule imposes regulatory costs on the regulated person which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives**

123. Governor DeSantis, the Florida Department of Education, and DOH's objective has been to reopen schools for in-person learning. Executive Order 21-175 references Governor Ron DeSantis' directive for "schools to be open for in-person instruction for five days per week to ensure the continued well-being of students and families." See **Exhibit "B."** The Emergency Rule claims to "encourage a safe and effective in-person learning environment for Florida's

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<sup>83</sup> Hillsborough County Public Schools, "Athletics Guidebook of Procedures," [https://www.hillsboroughschools.org/cms/lib/FL50000635/Centri-city/domain/2455/pdf/res\\_ahleticguidebook.pdf](https://www.hillsboroughschools.org/cms/lib/FL50000635/Centri-city/domain/2455/pdf/res_ahleticguidebook.pdf) ("For failure to wear a protective mouthpiece in the sports of football, basketball, soccer, baseball, softball, lacrosse and girls flag football, the student-athlete will be required to leave the contest until the rules permits.")

schoolchildren during the upcoming school year” as well as preventing “the unnecessary removal of students from school.” See **Exhibit “A.”** It emphasized that “removing healthy students from the classroom for lengthy quarantines should be limited at all costs.” *Id.*

124. In reopening schools for in-person learning in the 2021-22 school year, Executive Order 21-175 and the Emergency Rule have banned mask mandates in public schools.

125. But, banning mask mandates did lead to thousands of students in quarantine, parents being forced to take time off work, the closure of two school districts,<sup>84</sup> children who are sick with COVID-19 and who are incurring medical costs, and a loss of learning when students are not present in schools, especially since remote synchronous learning is not an option this year. Failing to require masks could also cost school districts millions, as insurance carriers

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<sup>84</sup> “Two Florida districts close schools until after Labor Day due to COVID-19,” Miami Herald, (Sep. 1, 2021), <https://www.miamiherald.com/news/coronavirus/article253921593.html>.

are warning that they may not cover pandemic-related lawsuits if school districts fail to follow public health mandates.<sup>85</sup>

126. In banning mask mandates, the DOH’s Emergency Rule imposes regulatory costs on the Petitioners, and those who are similarly situated, including school districts themselves, which could have been “reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.” Section 120.52(8)(f), Fla. Stat.

127. Here, that less costly alternative could have been masks, which are already required by federal law on school buses.

128. As such, the Emergency Rule, which is an existing rule currently in effect, is an invalid exercise of delegated legislative authority. Section 120.52(8)(f), Fla. Stat.

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<sup>85</sup> Mark Lieberman, “Why Failing to Require Masks Could Cost Districts Millions Later,” Education Week (Aug. 20, 2021), <https://www.edweek.org/leadership/why-failing-to-require-masks-could-cost-districts-millions-later/2021/08>.

**vi. The Emergency Rule is impermissibly vague**

129. An existing rule is arbitrary and capricious, and thus an invalid exercise of delegated legislative authority, if it is impermissibly vague. Section 120.52(8)(d), Fla. Stat.

130. Section (1)(d) of the Emergency Rule states that “[s]tudents may wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian to opt-out the student from wearing a face covering or mask.” See **Exhibit “A.”**

131. Broward County Public Schools,<sup>86</sup> Alachua County Public Schools,<sup>87</sup> and several other school districts have interpreted the “opt-out” to be a medical opt-out. However, during the Florida Department of Education (“DOE”) emergency hearing on August 6,

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<sup>86</sup> Broward County Public Schools, “Broward County School Board Upholds Mask Mandate in Schools and District Facilities,” [https://www.browardschools.com/site/default.aspx?PageType=3&DomainID=20645&ModuleInstanceID=150127&ViewID=6446EE88-D30C-497E-9316-](https://www.browardschools.com/site/default.aspx?PageType=3&DomainID=20645&ModuleInstanceID=150127&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=234685&PageID=62583)

[3F8874B3E108&RenderLoc=0&FlexDataID=234685&PageID=62583](https://www.browardschools.com/site/default.aspx?PageType=3&DomainID=20645&ModuleInstanceID=150127&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=234685&PageID=62583)

<sup>87</sup> Alachua County Public Schools, “Parental Choice and Mask Opt-Out Options,” <https://www.sbac.edu/Page/30474>.



2021, at which the Broward County Public Schools and Alachua County Public Schools superintendents were summoned to testify ahead of punishing them for allegedly not adhering to the DOH’s Emergency Rule, the DOE interpreted the DOH’s Emergency Rule to not include medical opt-outs.<sup>88</sup>

132. To the extent that medical op-outs could be construed as complying with the Emergency Rule on its face, which does not define which sort of opt-outs to masking are required or prohibited, the Emergency Rule is impermissibly vague, arbitrary, and capricious, since there is disagreement among the DOE, DOH, and numerous school districts across Florida about the definition of “opt-out.”

**vii. The Emergency Rule arbitrarily and without rational basis holds public schools to a different standard from publicly-funded private schools**

133. All of the justifications in the Emergency Rule would seem, on their face, to apply equally to both public and private schools. To

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<sup>88</sup> “8/17/21 State Board of Education Emergency Conference Call,” The Florida Channel, (Aug. 17, 2021), *video available at* <https://thefloridachannel.org/videos/8-17-21-state-board-of-education-emergency-conference-call/>

the extent mask mandates infringe on parents' interest in making decisions about masks, this would be true for public and private schools alike. And to the extent mask mandates deter students from attending school, they do so in public and private schools alike. Section 1003.22(3), Fla. Stat., on which the DOH relies for authority, allows the DOH to regulate both public and private schools. Yet the rule, without explanation, applies only to public schools.

134. To the extent DOH claims the Parents' Bill of Rights or the constitution justify this disparate treatment, those arguments fail because neither has any impact on mask mandates, as explained elsewhere in this Petition. Nor, if parents would be deterred from attending private schools with mask mandates, can they easily switch to another school or a public school—both of those choices would create precisely the kind of in-person educational disruption that the DOH claims to want to avoid.

135. Furthermore, the Parents' Bill of Rights does not claim that it applies only in government settings, rather it extends to "any other institution." This language is as broad as possible. Accordingly, the Parents' Bill of Rights is applicable in private schools as well as

in public schools. Many private schools in Florida, however, expressly require that students wear masks.

136. For example, the Diocese of Venice mandated masks indoors in all Catholic schools in counties with a high positivity rate, which includes Southwest Florida.<sup>89</sup> The Episcopal School of Jacksonville announced: “Masks will be required for everyone age three and above in our community when in classrooms or smaller indoor settings.”<sup>90</sup> The Benjamin School, located in North Palm Beach and Palm Beach Gardens, announced: “All students (grades PK3-12), faculty, staff, visitors, and guests are required to wear face coverings while indoors.”<sup>91</sup>

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<sup>89</sup> Jackie Winchester, “SWFL’s private Catholic schools to require masks,” WINK News (Aug. 6, 2021), <https://www.winknews.com/2021/08/06/swfls-private-catholic-schools-to-require-masks/>.

<sup>90</sup> Episcopal School of Jacksonville, “COVID-19 HEALTH AND SAFETY UPDATE,” (Aug. 31, 2021), <https://www.esj.org/covid/>

<sup>91</sup> The Benjamin School, “COVID-19 UPDATES,” (Aug. 11, 2021), <https://www.thebenjaminschool.org/news--events/covid-19-updates>.

137. Such private schools are not being threatened with defunding by the Florida Department of Education (“DOE”). Instead, DOE is offering parents school vouchers to attend private schools if the relevant public school district has a mask mandate. There is no requirement that the private school receiving the voucher money not have a similar or stricter mask mandate than the mandate in the public school district. Thus, DOE apparently does not recognize any violation of the Parents’ Bill of Rights by using public funds to pay for students to attend a private school requiring masks. There is no logical basis for this distinction.

138. Importantly, public schools, which are deeply underfunded in Florida (ranking 45th in the nation in per pupil funding) represent a disproportionate share of students of color and students who are from low-income families. Moreover, as of 2018, there were approximately 2,869 private schools in Florida, which are largely segregated by race with the vast majority of those schools being 75% or more either predominantly white or predominantly Black and Latinx.

139. Thus, interpretation of the Parents’ Bill of Rights in the manner DOH does is arbitrary and capricious, encourages greater

school segregation, and runs counter to the guarantee of equal protection under the law.

**D. DOH’S “SPECIFIC FACTS AND REASON FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY, OR WELFARE” USED TO JUSTIFY THE EMERGENCY RULE ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE**

140. In order to utilize the emergency rulemaking process of Section 120.54(4), Fla. Stat., DOH had to publish the “specific facts and reasons for finding an immediate danger to the public health, safety, or welfare.” Section 120.54(4)(a)3., Fla. Stat.

141. Sections (1)(d) and (6)(a)-(c) of the Emergency Rule state that school districts must allow students to opt out of masking as a matter of parent choice. However, DOH’s specific facts and reasons to justify the Emergency Rule are not supported by competent substantial evidence or common sense.

142. The Emergency Rule is contrary to the Center for Disease Control and Prevention’s (“CDC”)<sup>92</sup> and the American Academy of Pediatrics<sup>93</sup> standards of uniform masking as part of layering measures to mitigate the spread of COVID-19. It does not create a safe school environment in the present COVID-19 pandemic with the uncontrolled spread of the Delta variant in Florida.

143. There is a plethora of evidence that supports controlling the transmission of COVID-19 through masking, physical distancing, testing, and increasing air ventilation. A CDC study that analyzed COVID-19 in public schools from August through December of 2020, concluded that successful prevention of the introduction of COVID-19 “into schools depends upon controlling community transmission and adhering to mitigation measures in schools, particularly

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<sup>92</sup> Centers for Disease Control and Prevention, “Guidance for COVID-19 Prevention in K-12 Schools,” (Aug. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

<sup>93</sup> American Academy of Pediatrics, “COVID-19 Guidance for Safe Schools,” (Jul. 18, 2021), <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>

masking, physical distancing, testing, and increasing room air ventilation” in addition to supporting “family choice for remote versus in-person learning” to reduce in-school crowding.”<sup>94</sup> Even though this CDC study was conducted before the presence of the Delta variant in Florida, it offers highly relevant findings, including that the number of school-related COVID-19 cases was correlated with cases in the community, and “was highest in smaller counties, districts without mask requirements, and those that reopened earliest after closure in March 2020.”<sup>95</sup>

144. A more recent CDC study that took the Delta variant into consideration analyzed an outbreak of COVID-19 amongst elementary school students and their contacts following exposure to an unvaccinated, infected teacher who did not adhere to masking

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<sup>94</sup> Centers for Disease Control and Prevention, “COVID-19 in Primary and Secondary School Settings During the First Semester of School Reopening — Florida, August–December 2020,” (Mar. 26, 2021),

<https://www.cdc.gov/mmwr/volumes/70/wr/mm7012e2.htm>

<sup>95</sup> *Id.*

guidelines.<sup>96</sup> The study found that, “in addition to vaccination, strict adherence to multiple nonpharmaceutical prevention strategies, including masking, are important to ensure safe school instruction.”<sup>97</sup>

145. However, the State of Florida continues to rely on opinions from the likes of Dr. Mark McDonald, a clinical psychiatrist who testified in the *McCarthy v. DeSantis* matter that, “masking children is abuse” and that masks are “bringing harm to every child in the country.”<sup>98</sup> Judge Cooper noted that some of the other statements that Dr. McDonald made were not supported by science, including

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<sup>96</sup> Centers for Disease Control and Prevention, “Outbreak Associated with SARS-CoV-2 B.1.617.2 (Delta) Variant in an Elementary School — Marin County, California, May–June 2021,” (Sep. 3, 2021), [https://www.cdc.gov/mmwr/volumes/70/wr/mm7035e2.htm?s\\_cid=mm7035e2\\_w](https://www.cdc.gov/mmwr/volumes/70/wr/mm7035e2.htm?s_cid=mm7035e2_w)

<sup>97</sup> *Id.*

<sup>98</sup> Transcript of Record (“Transcript”) at 23-24, *McCarthy v. DeSantis*, Case No.: 2021-CA-001382, (Fla. 2nd Cir. Ct. 2021). The Transcript is attached as **Exhibit “D”**; Jeffrey S. Solocheck and Ana Ceballos, “Judge rules for parents in Florida school mask case, a blow to DeSantis,” Tampa Bay Times (Aug. 28, 2021), <https://www.tampabay.com/news/education/2021/08/27/judge-rules-for-parents-in-florida-school-mask-case-a-blow-to-desantis/>



that “children cannot transfer COVID to adults.”<sup>99</sup> Dr. Cody Meissner testified that “harm is done to children with masks.”<sup>100</sup> The judge found that these opinions are disputed by the science. However, these are the fringe opinions that the State of Florida is using to make policy decisions about masks.

146. As such, the findings of fact in the Emergency Rule were not based upon competent substantial evidence. See **Exhibit “A.”**

**E. THE DOH HAS FAILED TO DEMONSTRATE THAT THE EMERGENCY RULE WAS NECESSARY AS REQUIRED BY SECTION 120.54(4)(A)2., FLA. STAT.**

147. In adopting the Emergency Rule, DOH was only allowed to take “that action necessary to protect the public interest.” Section 120.54(4)(a)2., Fla. Stat.

148. Section (1)(d) of the Emergency Rule bars public schools from mandating masks. It states, “Students may wear masks or facial coverings as a mitigation measure; however, the school must allow

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<sup>99</sup> Transcript of Record (“Transcript”) at 23, *McCarthy v. DeSantis*, Case No.: 2021-CA-001382, (Fla. 2nd Cir. Ct. 2021). The Transcript is attached as **Exhibit “D.”**

<sup>100</sup> *Id.*

for a parent or legal guardian to opt-out the student from wearing a face covering or mask.” Sections (6)(a)-(c) of the Emergency Rule purport to address “non-discrimination” and “harassment” against “students whose parents have opted them out of a mask or face covering requirement.”

149. DOH’s stated justification for issuing the Emergency Rule and “for finding an immediate danger to the public health, safety, or welfare” is that “a recent increase in COVID-19 infections, largely due to the spread of the COVID-19 delta variant, coincides with the imminent start of the school year” and concludes that “it is imperative that state health and education authorities provide emergency guidance to school districts concerning the governance of COVID-19 protocols in schools.” See **Exhibit “A.”** It then addresses Executive Order 21-175 and incorporates it by reference. *Id.*

150. DOH’s purported “reason for concluding that the procedure is fair under the circumstances” is that the “emergency rule is necessary in light of the recent rise in COVID-19 cases in Florida and the urgent need to provide COVID-19 guidance to school districts before the upcoming school year commences.” *Id.* DOH also claimed “insufficient time to adopt the rule through non-emergency

process” because the Emergency Rule was not issued until August 6, 2021. *Id.*

151. In fact, however, the “immediate” circumstances to which the DOH claims the Emergency Rule responds have long been foreseeable. In total, from the start of the pandemic in early 2020 through August 12, 2021, Florida has logged 2,877,214 COVID-19 cases, of which 476,101 have been people under 20-years-old.<sup>101</sup> Indeed, Florida currently accounts for one-fifth of the nation’s new COVID-19 cases.<sup>102</sup> Tragically, 40,766 Floridians had died as of August 5, 2021, the day before the DOH adopted the Emergency Rule. *Id.* While public schools initially closed in March 2020 to control the spread of the pandemic, they re-opened and, during the 2020-21 school year, provided in person instruction. The start of the

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<sup>101</sup> Florida Department of Health, “COVID-19 Weekly Situation Report,” at 7 (Aug. 13, 2021), [ww11.doh.state.fl.us/comm/\\_partners/covid19\\_report\\_archive/covid19-data/covid19\\_data\\_latest.pdf](http://ww11.doh.state.fl.us/comm/_partners/covid19_report_archive/covid19-data/covid19_data_latest.pdf).

<sup>102</sup> Bob Curley, “Why Florida Is the Hardest Hit State During This COVID-19 Surge,” Healthline (Aug. 5, 2021), <https://www.healthline.com/health-news/why-florida-is-the-hardest-hit-state-during-this-covid-19-surge>.

2021-22 school year followed a full year of a raging pandemic and in-person schooling.

152. As such, the DOH has failed to demonstrate that Sections (1)(d) and (6)(a)-(c) of the Emergency Rule, which prevent mandatory masks in public schools, were necessary to address the surge in COVID-19 cases due to the Delta variant.

## **VII. STATEMENT OF WHEN AND HOW THE PETITIONERS RECEIVED NOTICE OF THE AGENCY DECISION**

153. Petitioners became aware of the Emergency Rule as school districts started to plan for the 2021-22 school year. See Rule 28-106.201(2)(c), DOAH Uniform Rules of Procedure.

## **VIII. DISPUTED ISSUES OF MATERIAL FACT**

154. As required by Rule 28-106.201(2)(d), DOAH Uniform Rules of Procedure, the disputed issues of material fact include, but are not limited to:

a. Whether the Centers for Disease Control and Prevention (“CDC”) guidance recommending universal masking for K-12 students as a measure to mitigate the risk of spreading COVID-19 is well-grounded in scientific justification;

b. Whether the Brown University study<sup>103</sup> about COVID-19 data for schools in Florida cited in Executive Order 21-175 is a credible, peer-reviewed article that takes into account the Delta variant;

c. Whether Executive Order 21-175's assertion that "masking children may lead to negative health and societal ramifications" is supported by substantial competent evidence;

d. Whether Executive Order 21-175's assertion that "studies have shown that children are at a low risk of contracting a serious illness due to COVID-19" is supported by substantial competent evidence;

e. Whether Executive Order 21-175's assertion that children "do not play a significant role in the spread of the virus" is supported by substantial competent evidence;

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<sup>103</sup> Emily Oster, *et al.*, "COVID-19 Mitigation Practices and COVID-19 Rates in Schools: Report on Data from Florida, New York and Massachusetts," medRxiv (May 21, 2021), <https://www.medrxiv.org/content/10.1101/2021.05.19.21257467v1>.

f. Whether Executive Order 21-175's assertion that "forcing children to wear masks could inhibit breathing, lead to the collection of dangerous impurities including bacteria, parasites, fungi, and other contaminants" is supported by substantial competent evidence;

g. Whether Executive Order 21-175's assertion that "forcing children to wear masks could...adversely affect communications in the classroom and student performance" is not supported by substantial competent evidence;

h. Whether Executive Order 21-175's assertion that "there is no statistically-significant evidence to suggest that counties with mask requirements have fared any better than those without mask requirements during the 2020-21 school year" is supported by substantial competent evidence;

i. Whether Florida Surgeon General Dr. Scott Rivkees' Public Health Advisory dated April 29, 2021, "stating that continuing COVID-19 restrictions on individuals, including long-term use of face coverings, pose a risk of adverse and unintended consequences," is supported by substantial competent evidence;

j. Whether there are hundreds of thousands of children, educators and school staff in public schools across the State of Florida who have had to quarantine or who are currently quarantining due to exposure to COVID-19;

k. Whether there are tens of thousands of children, educators and school staff in public schools across the State of Florida who have contracted COVID-19;

l. Whether there are public school districts in Florida that have had to temporarily close schools in the 2021-22 school year to in-person learning due to COVID-19;

m. Whether the DOH has the capacity to provide, and whether it is providing, sufficient contact tracing to meet the needs of school districts across Florida who are experiencing a surge in COVID-19 cases due to the Delta variant;

n. Whether Sections (1)(d) and (6)(a)-(c) of the Emergency Rule banning masks in public schools are controlling COVID-19 in school settings;

o. Whether Sections (1)(d) and (6)(a)-(c) of the Emergency Rule, which ban mask mandates in public schools by requiring opt-outs for parental choice, have jeopardized and continue

to jeopardize the health, safety, and welfare of students, teachers, and staff in public schools, as well as their respective households;

p. Whether Sections (1)(d) and (6)(a)-(c) of the Emergency Rule, which ban mask mandates in public schools by requiring opt-outs protects children with disabilities and medically fragile children;

q. Whether mask mandates with medical opt-outs in public schools during a surge of the COVID-19 Delta variant violates the Parents' Bill of Rights;

r. Whether mask mandates with medical opt-outs in public schools during a surge of the COVID-19 Delta variant violate parents' constitutional rights;

s. Whether mask mandates with medical opt-outs enacted by local school districts in public schools are reasonable and necessary to achieve a compelling state interest and are narrowly tailored and not otherwise served by less restrictive means;

t. Whether Sections (1)(d) and (6)(a)-(c) of the Emergency Rule takes only the action necessary to protect the public interest under the emergency procedure;



u. Whether the Emergency Rule published “specific facts and reasons for finding an immediate danger to the public health, safety, or welfare” that are supported by competent substantial evidence;

v. Whether the Emergency Rule is vague about the meaning of opt-outs from the mask mandates;

w. Whether the Emergency Rule is arbitrary and capricious;

x. Whether the Emergency Rule’s ban on mask mandates imposed regulatory costs that could have been reduced by the adoption of less costly alternatives that substantially accomplished the statutory objective of returning students to in-person classroom settings;

y. Whether DOH published an adequate statement of facts and reasons for finding an immediate danger to public health, safety, and welfare; and,

z. Whether prompt implementation of the Emergency Rule was necessary to assure the health, safety, and welfare of students in public schools, teachers, district staff, and their respective households.

## **IX. SPECIFIC LAWS AND RULES THAT WARRANT INVALIDATION OF THE EMERGENCY RULE**

155. As required by Rule 28-106.201(2)(f), DOAH Uniform Rules of Procedure, the specific laws and rules that warrant invalidating Sections (1)(d) and (6)(a)-(d) of DOH Emergency Rule 64DER21-12 are stated below.

### **A. Executive Order 21-175**

156. An executive order directing a cabinet-level agency to create an emergency rule, does not warrant the validity of the emergency rule. In the instant case, the cabinet-level agency—DOH—is only empowered to adopt “rules that implement or interpret the specific powers and duties granted by the enabling statute,” Section 120.52(8), Fla. Stat. Governor DeSantis’s Executive Order 21-175 is not an enabling statute. Therefore, Executive Order 21-175 cannot be justification to render Sections (1)(d) and (6)(a)-(d) of DOH Emergency Rule 64DER21-12 as valid.

### **B. Section 1003.22(3), Fla. Stat.**

157. As explained in the “Legal Issues” section herein, DOH has exceeded its grant of rulemaking authority by relying on Section

1003.22(3), Fla. Stat., rendering the Emergency Rule an invalid exercise of rulemaking authority.

**C. Parents’ Bill of Rights, Chapter 1014, Fla. Stats.**

158. As explained in the “Legal Issues” section herein, Chapter 1014, Fla. Stats., the Parents’ Bill of Rights, does not grant rulemaking authority to DOH. While the Parents’ Bill of Rights does include a list of rights that *parents* have when making healthcare and education decisions for their children, those alleged *parental* rights do not give *DOH* regulatory authority over those parents’ children. Rather, DOH has chosen to use the Parents’ Bill of Rights as justification—wrongly so—for passing this Emergency Rule.

**D. Florida Constitution**

159. The education article of Florida’s Constitution requires a “safe, secure, and high quality system of free public schools.” Fla. Const. Art. 9, § 1(a). Sections (1)(d) and (6)(a)-(d) of DOH Emergency Rule 64DER21-12 undermine the safe operation of schools. Florida students are entitled to safe schools under the law. But, under the outlandish guise of declaring a ban on mask mandates as an immunization, amid the pandemic, the DOH has created an

imminent and actual threat to the public health, safety, and welfare of Florida's students.

160. The Florida Constitution requires "safe" public schools. Fla. Const. Art. 9, § 1(a). The Florida Constitution necessitates that state entities and public officials, who are charged with overseeing the funding and operations of public education, ensure that Florida's schools operate safely. DOH cannot legally deny students, public school staff, their family members, and the public with whom they come in contact within the public school system their basic human needs for health and safety.

161. The DOH's actions unreasonably interfere with Floridians' right to public health and safety as the DOH endangers children and their families by directly exposing them to the COVID-19 virus on a daily basis by running brick and mortar schools with a ban on mask mandates. The Florida Constitution guarantees the safety of students and condemns the needless harm of injury and death directly attributed to the emergency rule promulgated by the DOH.

**E. The Centers for Disease Control and Prevention (“CDC”) Guidelines**

162. The CDC expressly states: “Due to the circulating and highly contagious Delta variant, CDC recommends universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.”<sup>104</sup> The CDC has also issued other guidance and published other studies which are referenced throughout this Petition, but which the DOH did not rely on when adopting the Emergency Rule.

**F. The American Academy of Pediatrics (“AAP”) Guidelines**

163. AAP’s guidelines hinder the spread of COVID-19.<sup>105</sup> They state that all students older than 2 years and all school staff should

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<sup>104</sup> Centers for Disease Control and Prevention (“CDC”), “Guidance for COVID-19 Prevention in K-12,” Aug. 5, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> (last accessed Aug. 31, 2021).

<sup>105</sup> American Academy of Pediatrics, “American Academy of Pediatrics Updates Recommendations for Opening Schools in Fall 2021,” (Jul. 19, 2021), <https://www.aap.org/en/news-room/news-releases/aap/2021/american-academy-of-pediatrics-updates-recommendations-for-opening-schools-in-fall-2021/>.

wear face masks at school. The AAP reasons that “a significant portion of the student population is not eligible for vaccination[,]” masking reduces transmission, there is no system to monitor vaccine status, it is too difficult to monitor and enforce who is vaccinated, there is a possibility of low vaccination uptake within the surrounding school community, and the continued concern for variants that are more easily spread among children, adolescents, and adults.<sup>106</sup> However, the Emergency Rule does not contemplate the AAP guidelines.

#### **G. Emergency Rule Challenges**

164. Lastly, this proceeding also involves the application of Section 120.54(4), Fla. Stat., which provides the procedures applicable to any attempt to adopt emergency rules:

##### (4) EMERGENCY RULES.—

(a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger. The agency

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<sup>106</sup> *Id.*

may adopt a rule by any procedure which is fair under the circumstances if:

1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.

2. The agency takes only that action necessary to protect the public interest under the emergency procedure.

3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one or a part of one county, including the full text of the rules, shall be published in the first available issue of the Florida Administrative Register and provided to the committee along with any material incorporated by reference in the rules. The agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

165. Petitioners respectfully suggest that the Emergency Rule violates Section 120.54(4)(a)(1) and (2), Fla. Stat. by providing inadequate procedural protections. The Emergency Rule imposes nonsensical, harmful standards and then punish school districts for protecting students, teachers, staff, households pursuant to their

duties under state law, federal law, and the Florida Constitution when those nonsensical standards are not met.

166. The Emergency Rule also takes action beyond which is necessary to protect the public interest.

167. The DOH's explanation of the "emergency" which led to the publication of the Emergency Rule is inadequate to demonstrate an immediate threat to the public health, safety, and welfare.

168. Finally, this rule challenge involves Sections 120.56(1) and (5), Fla. Stat., which set forth the requirements for challenges to emergency rules, including that this Petition be assigned to an administrative law judge within seven days and that a final hearing be conducted within 14 days of that assignment, and that a decision will be rendered by the judge 14 days after the final hearing.

**X. STATEMENT OF ULTIMATE FACTS THAT WARRANT A DECLARATION THAT THE EMERGENCY RULE IS INVALID**

169. There is no emergency that required the DOH's imposition of Sections (1)(d) and (6)(a)-(d) of DOH Emergency Rule 64DER21-12. Instead, the Emergency Rule exacerbates the real emergency in Florida—the surge of the COVID-19 Delta variant—rather than solving it. The DOH Emergency Rule is an invalid exercise of



delegated legislative authority because: it enlarges, modifies, or contravenes its alleged enabling statutes (Sections 1003.22(3) and Chapter 1014, Fla. Stats.); it is arbitrary and capricious; DOH's "specific facts and reasons for finding an immediate danger to the public health, safety, or welfare" used to justify the Emergency Rule are not supported by competent substantial evidence; and, the DOH has failed to demonstrate that the Emergency Rule was necessary. As such, Sections (1)(d) and (6)(a)-(d) of DOH Emergency Rule 64DER21-12 are invalid.

## **XI. RELIEF SOUGHT**

170. Pursuant to DOAH Uniform Rule 28-106.201(2)(g), Petitioners respectfully request that:

- A. This matter be assigned to an Administrative Law Judge to conduct a formal administrative hearing in accordance with the provisions of Chapter 120, Florida Statutes;
- B. Sections (1)(d) and (6)(a)-(d) of DOH Emergency Rule 64DER21-12, are declared an invalid exercise of delegated legislative authority;
- C. Sections (1)(d) and (6)(a)-(d) of DOH Emergency Rule 64DER21-12 are declared to lack a documented,

immediate threat to the health, safety, or welfare required to justify the use of emergency rulemaking;

D. Petitioners be awarded costs and reasonable attorneys' fees pursuant to Section 120.595(3), Fla. Stat.; and,

E. Petitioners be granted all other and further relief as is deemed necessary or appropriate under the circumstances.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of September, 2021, a true and correct copy of the foregoing was served as follows:

VIA ELECTRONIC FILING

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VIA FACSIMILE (850.413.8743)

Florida Department of Health  
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BY: /s/ Evian White De Leon  
Evian White De Leon, Esq.  
Florida Bar No. 84790

# EXHIBIT "A"

## Notice of Emergency Rule

### DEPARTMENT OF HEALTH

#### Division of Disease Control

RULE NO.:       RULE TITLE:

64DER21-12      Protocols for Controlling COVID-19 in School Settings

**SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE:** Because a recent increase in COVID-19 infections, largely due to the spread of the COVID-19 delta variant, coincides with the imminent start of the school year, it is imperative that state health and education authorities provide emergency guidance to school districts concerning the governance of COVID-19 protocols in schools. Accordingly, pursuant to its authority to adopt rules governing the control of preventable communicable diseases in public schools, *see* section 1003.22(3), Florida Statutes, the Florida Department of Health, after consultation with the Department of Education, hereby promulgates an emergency rule regarding COVID-19 protocols in public schools to encourage a safe and effective in-person learning environment for Florida's schoolchildren during the upcoming school year; to prevent the unnecessary removal of students from school; and to safeguard the rights of parents and their children.

This emergency rule conforms to Executive Order Number 21-175, which ordered the Florida Department of Health and the Florida Department of Education to ensure safety protocols for controlling the spread of COVID-19 in schools that (1) do not violate Floridians' constitutional freedoms; (2) do not violate parents' rights under Florida law to make health care decisions for their minor children; and (3) protect children with disabilities or health conditions who would be harmed by certain protocols, such as face masking requirements. The order, which is incorporated by reference, directs that any COVID-19 mitigation actions taken by school districts comply with the Parents' Bill of Rights, and "protect parents' right to make decisions regarding masking of their children in relation to COVID-19."

Because of the importance of in-person learning to educational, social, emotional and mental well-being, removing healthy students from the classroom for lengthy quarantines should be limited at all costs. Under Florida law, parents have a fundamental right to direct the upbringing, education, health care, and mental health of their minor children and have the right to make health care decisions for their minor children. HB 241, Ch. 2021-199, Laws of Fla. In furtherance of the Florida Department of Health's authority to adopt rules governing the control of preventable communicable diseases—and because students benefit from in-person learning—it is necessary to immediately promulgate a rule regarding COVID-19 safety protocols that protects parents' rights and to allow for in-person education for their children. Removing children from school poses a threat to developmental upbringing and should not occur absent a heightened showing of illness or risk of illness to other students.

**REASON FOR CONCLUDING THAT THE PROCEDURE IS FAIR UNDER THE CIRCUMSTANCES:** This emergency rule is necessary in light of the recent rise in COVID-19 cases in Florida and the urgent need to provide COVID-19 guidance to school districts before the upcoming school year commences. Given that a majority of schools will resume in-person learning for the 2021-2022 school year within the next four weeks, there is insufficient time to adopt the rule through non-emergency process.

**SUMMARY:** Emergency rule 64DER21-12 sets forth the procedures for controlling COVID-19 in school settings. **THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS:** Carina Blackmore, Florida Department of Health, 4052 Bald Cypress Way, Tallahassee, Florida 32399-1703, (850)245-4732.

THE FULL TEXT OF THE EMERGENCY RULE IS:

64DER21-12 Protocols for Controlling COVID-19 in School Settings

(1) GENERAL PROTOCOLS AND DEFINITION. The following procedures should be instituted to govern the control of COVID-19 in public schools:

(a) Schools should encourage routine cleaning of classrooms and high-traffic areas.

(b) Students should be encouraged to practice routine handwashing throughout the day.

(c) Students should stay home if they are sick.

(d) Students may wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask.

(e) For purposes of this rule, "direct contact" means cumulative exposure for at least 15 minutes, within six feet.

(2) PROTOCOLS FOR SYMPTOMATIC OR COVID-19 POSITIVE STUDENTS. Students experiencing any symptoms consistent with COVID-19 or who have received a positive diagnostic test for COVID-19 should not attend school, school-sponsored activities, or be on school property until:

(a) The student receives a negative diagnostic COVID-19 test and is asymptomatic; or

(b) Ten days have passed since the onset of symptoms or positive test result, the student has had no fever for 24 hours and the student's other symptoms are improving; or

(c) The student receives written permission to return to school from a medical doctor licensed under chapter 458, an osteopathic physician licensed under chapter 459, or an advanced registered nurse practitioner licensed under chapter 464.

(3) PROTOCOLS FOR STUDENTS WITH EXPOSURE TO COVID-19. Students who are known to have been in direct contact with an individual who received a positive diagnostic test for COVID-19 should not attend school, school-sponsored activities, or be on school property until:

(a) The student is asymptomatic and receives a negative diagnostic COVID-19 test after four days from the date of last exposure to the COVID-19 positive individual; or

(b) The student is asymptomatic and seven days have passed since the date of last exposure to the COVID-19 positive individual.

(c) If a student becomes symptomatic following exposure to an individual that has tested positive for COVID-19, the student should follow the procedures set forth in subsection (2), above.

(4) PROTOCOL FOR STUDENTS WITH PRIOR COVID-19 INFECTION. A student who has received a positive diagnostic test for COVID-19 in the previous 90 days and who is known to have been in direct contact with an individual who has received a positive diagnostic test for COVID-19 is not subject to the protocols set forth in subsection (3), so long as the student remains asymptomatic. If a student with a previous COVID-19 infection becomes symptomatic, the student should follow the procedures set forth in subsection (2), above. This subsection applies equally to students that are fully vaccinated for COVID-19.

(5) TESTING. Any COVID-19 testing of minors at school requires informed written consent from a parent or legal guardian.

(6) NON-DISCRIMINATION. Students whose parents or legal guardian have opted them out of a mask or face covering requirement shall not be subject to any harassment or discriminatory treatment, including but not limited to:

(a) Relegation to certain physical locations;

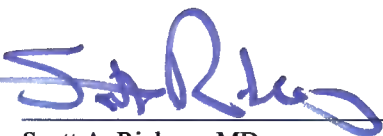
(b) Isolation during school activities; or

(c) Exclusion from any school-sponsored events or activities.

Rulemaking Authority 1003.22(3) FS. Law Implemented 1003.22(3) FS. History—New.

**THIS RULE TAKES EFFECT UPON BEING FILED WITH THE DEPARTMENT OF STATE UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE.**

**EFFECTIVE DATE:**



Scott A. Rivkees, MD  
State Surgeon General



Date

# EXHIBIT "B"

# STATE OF FLORIDA

## OFFICE OF THE GOVERNOR EXECUTIVE ORDER NUMBER 21-175 (Ensuring Parents' Freedom to Choose – Masks in Schools)

**WHEREAS**, a right to normal education is imperative to the growth and development of our children and adolescents; and

**WHEREAS**, last summer, at my direction, Florida's Department of Education ordered schools to be open for in-person instruction for five days per week to ensure the continued well-being of students and families; and

**WHEREAS**, schools – including those that did not require students to be masked – did not drive community transmission of COVID-19; and

**WHEREAS**, despite recent Centers for Disease Control and Prevention (CDC) "guidance," forcing students to wear masks lacks a well-grounded scientific justification; indeed, a Brown University study analyzed COVID-19 data for schools in Florida and found no correlation with mask mandates; and

**WHEREAS**, masking children may lead to negative health and societal ramifications; and

**WHEREAS**, studies have shown that children are at a low risk of contracting a serious illness due to COVID-19 and do not play a significant role in the spread of the virus; and

**WHEREAS**, forcing children to wear masks could 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; and

**WHEREAS**, there is no statistically-significant evidence to suggest that counties with mask requirements have fared any better than those without mask requirements during the 2020-2021 school year; and

**WHEREAS**, on April 29, 2021, Florida Surgeon General Dr. Scott Rivkees issued a Public Health Advisory stating that continuing COVID-19 restrictions on individuals, including long-term use of face coverings, pose a risk of adverse and unintended consequences; and

**WHEREAS**, on June 29, 2021, I signed into law H.B. 241, the Parents' Bill of Rights, which prevents the state, its subdivisions, or any governmental institution, from infringing on the fundamental rights of a parent to direct the upbringing, education, health care, or mental health of a minor child without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and is not otherwise served by less restrictive means; and

**WHEREAS**, pursuant to Florida law, all parents have the right to make health care decisions for their minor children; and

**WHEREAS**, many school districts are scheduled to begin classes on August 10, 2021, which is less than two weeks away, and within four weeks virtually all public schools across Florida will be underway; therefore immediate action is needed to protect the fundamental right of parents to make health and educational decisions for their children; and

**WHEREAS**, Section 1003.22(3), Florida Statutes, mandates the Florida Department of Health to adopt rules, in consultation with the Florida Department of Education, governing the control of preventable communicable diseases, including procedures for exempting children from immunization requirements; and

**WHEREAS**, Florida's State Board of Education, the chief implementing and coordinating body of public education in Florida, has the authority to adopt rules pursuant to Sections



120.536(1), 120.54, and 1001.02, Florida Statutes, and may delegate its general powers to the Commissioner of Education; and

**WHEREAS**, pursuant to Section 1008.32(4), Florida Statutes, if the State Board of Education determines that a district school board is unwilling or unable to comply with the law, the State Board shall have the authority to, among other things, withhold the transfer of state funds, discretionary grant funds, discretionary lottery funds, or any other funds specified as eligible for this purpose by the Legislature until the school district complies with the law or state board rule and declare the school district ineligible for competitive grants; and

**WHEREAS**, given the historical data on COVID-19 and the ongoing debate over whether masks are more harmful than beneficial to children and to school environments in general, we should protect the freedoms and statutory rights of students and parents by resting with the parents the decision whether their children should wear masks in school; and

**WHEREAS**, we should equally and uniformly protect the freedoms and rights of students and parents across the state.

**NOW, THEREFORE, I, RON DESANTIS**, as Governor of Florida, by virtue of the authority vested in me by Article IV, Section 1(a) of the Florida Constitution, and all other applicable laws, promulgate the following Executive Order, to take immediate effect:

Section 1. I hereby direct the Florida Department of Health and the Florida Department of Education, working together, to immediately execute rules pursuant to section 120.54, Florida Statutes, and take any additional agency action necessary, using all legal means available, to 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' right 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.

Section 3. The Florida Commissioner of Education shall pursue all legal means available to ensure school districts adhere to Florida law, including but not limited to withholding state funds from noncompliant school boards violating any rules or agency action taken pursuant to Section 1 above.

Section 4. This does not prohibit the Florida Legislature from exploring legislation to further protect the fundamental rights of students and parents to be free from excessive, harmful regulation in schools.

Section 5. This Executive Order is effective immediately.



IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed, at Tallahassee, this 30th day of July, 2021.

  
\_\_\_\_\_  
RON DESANTIS, GOVERNOR

ATTEST:

  
\_\_\_\_\_  
SECRETARY OF STATE

DEPARTMENT OF STATE  
TALLAHASSEE, FL

2021 JUL 30 PM 3:45

FILED

Filing # 133961523 E-Filed 09/02/2021 03:49:20 PM

## EXHIBIT "C"

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

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 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,

Case No.: 2021-CA-001382

Plaintiffs,

v.

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.

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**FINAL JUDGMENT**

This case came before this Court for a non-jury trial from August 23 -26, 2021. A verbal ruling was announced on August 27, 2021.

“Under the American System of laws and government every one is required to so use and enjoy his own rights as not to injure others in their rights or to violate any law in force for the preservation of the general welfare.” State ex rel. Hosack v. Yocum, 186 So. 448,451(Fla. 1939)(citing from Dutton Phosphate Co. v. Priest, 65 So. 282, 284-85 (Fla. 1914)(emphasis supplied). “The wisdom and necessity, as well as the policy, of a statute are authoritatively determined by the Legislature. Courts may inquire only into the **power** of the Legislature to lawfully enact a particular statute.” Id.

These two quotes from the Florida Supreme Court over 100 years ago describe the balancing of ones own rights with the rights of others, and that, when considering separation of powers, courts may properly consider whether a law (and as a logical extension of this quote an executive action) was lawfully enacted or exercised. A governor’s executive order and an agency’s actions must be based on authority granted to them by the Constitution or the Legislature. Executive power exercised without authority is illegal, null and void, and unenforceable.

### **Incorporation of Verbal Order**

This Court's findings and conclusions of law are listed verbatim in the attached transcript of the Court's verbal ruling on August 27, 2021, as Exhibit "A", which is incorporated by reference in this Final Judgment.<sup>1</sup>

### **Issues and Background**

The issues in this case are formed by the pleadings, the evidence presented, the statements and contentions of the parties in the pleadings and at trial.

Before this Court, is a dispute between the Governor, the Florida Commissioner of Education, the Florida Department of Education, and the Florida Board of Education (the Defendants) and parents and students in the Florida public school system (the Plaintiffs).<sup>2</sup> The dispute is whether state law permits local school districts in Florida to adopt and enforce a face mask mandate for students, teachers, and staff. This dispute arises out of the

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<sup>1</sup>As indicated at the hearing on August 27, 2021, this Court's verbal order would be close to a final order that could be used by the parties preparing the order as a guideline. This Court has received a proposed Final Judgment from the Plaintiffs and comments by the Defendants. After reviewing these, this Court will write its own order and will take into account any portions of the proposal/comments that are applicable. The verbal order was lengthy. Because of the pressing need to reduce the verbal ruling to a written order, this Court will do its best to include all the rulings. However, the complete transcript attached hereto is a more complete recitation of the ruling.

<sup>2</sup>The trial transcript will list the Plaintiffs dismissed by the Court who failed to put on any evidence to support their standing. As to the Plaintiffs not dismissed during the trial, this Court found that they had standing and reaffirms that finding here.

opening of public schools for the new school year and the increasing COVID crisis in Florida. This has resulted from the less than complete vaccination of the population in Florida and the dominance of a COVID virus variant referred to as the Delta variant. The Delta variant has a higher viral load and is more contagious than the form of COVID present in Florida in 2020. Also, the Delta variant presents a higher risk of infection to children than did the previous form of COVID. The combination of lack of vaccination, decreasing social distancing, and the Delta variant has resulted in dramatically increased COVID infections in Florida over the past several months. Although vaccinated persons have significant protection against the Delta variant, they can still become infected with it. As a result, the CDC (Centers for Disease Control), the American Academy of Pediatrics, and the wide majority of the medical and scientific community in this country recommend universal indoor masking for all school students, staff, teachers, and visitors to K-12 schools regardless of vaccination status and social distancing.

On April 14, 2021, Commissioner Corcoran sent a memorandum (Defendants' Exhibit 45) to School Superintendents requesting that they not implement a mandated mask policy. He said, "we ask that districts, which currently are implementing a mandated face covering policy, revise their

policy to be voluntary for the 2021-2022 school year.” Based on this memorandum, this Court concludes that the issue of voluntary versus mandated face mask policies was being considered at least as early as April of 2021. At that time, the Delta variant of COVID had not hit in Florida with full force. It seems that the policy mentioned in the April 14, 2021, memorandum was focusing on the former less infectious form of COVID.

In late June 2021, the Governor declared there was no longer a state of emergency in Florida. He did this by allowing the time-limited declaration of state of emergency order to lapse without renewal. Consequently, his emergency powers under Chapter 252, Florida Statutes expired at that time.

On July 27, 2021, the Governor held a Round Table Meeting on face mask policy in schools. The video of that meeting was introduced into evidence and published at the trial. It was noted at the August 27, 2021, verbal ruling according to this Court’s notes and memory, that the participants at this meeting were the Governor, two charter school representatives, a high school student, and some doctors. One of the doctors present was Jayanta Bhattacharya, M.D., Ph.D., who also testified at trial. No Round Table participant proposed a face mask mandate with no parental opt-out. All participants present proposed or suggested a parental opt-out policy. No one

advocated for any CDC recommended policy or guideline. In its verbal ruling, this Court provided additional detail of statements and positions taken at the Round Table meeting.

On July 30, 2021, the Governor issued Executive Order 21-175, which continued the formulation of a policy and the enforcement of that policy by the Defendants that local school districts in Florida could not adopt a face mask mandate unless it allowed a parental opt-out.<sup>3</sup> The Parents' Bill of Rights was the keystone of this policy and its enforcement.

The Executive Order went on to direct certain actions (which were premised on enforcing the Parents' Bill of Rights) which would result in a blanket banning - in advance of all school board mask mandates with no parental opt-out. The apparent way to accomplish this was to institute a policy that would likely result in a violation of the Parents' Bill of Rights.<sup>4</sup>

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<sup>3</sup>This is reflected in the Defendants' Seventh Affirmative Defense which said, "the Parents' Bill of Rights precludes school boards from implementing categorical mask mandates that do not allow parents to opt their children out of the requirement."

<sup>4</sup>The Defendants contended that "[t]he Executive Order requires that any rules adopted by either agency be in accordance with the Parents' Bill of Rights and tasks the Commissioner of Education with ensuring school districts adhere to Florida law." Defendants' Motion to Dismiss, p. 8. In their Motion to Dismiss, p.14, the Defendants contended that "the State Board can \*\*\* enforce the Rule and the Parents' Bill of Rights through its discretionary application of its statutory enforcement powers under Section 1008.32, Florida Statutes." Finally, the Defendants contended in their Motion to Dismiss, p. 31, that under the Bill of Rights "parents - not school - boards have the discretion to choose whether their children will wear masks in school."



The Executive Order specifically directed the Florida Department of Health and the Florida Department of Education to work together to immediately adopt rules and take any additional agency action necessary to ensure safety protocols for controlling the spread of COVID. This direction was interpreted by the agencies as a direction to pass a rule to put into effect Executive Order 21-175, which they did. The Florida Department of Health, after consultation with the Florida Department of Education, passed an emergency rule (64DER21-12) which said that "[t]his emergency rule conforms to Executive Order Number 21-175", and incorporated the Executive Order by reference. The Department of Health rule directs "that any COVID-19 mitigation actions taken by school districts comply with the Parents' Bill of Rights, and 'protect parents' right to make decisions regarding masking of their children in relation to Covid-19." The record in this case demonstrates that the Executive Order had two functions : (1) prohibit mask mandates by public schools that do not have a parent opt-out, and (2) enforce this policy by using the Parents' Bill of Rights.

Among its general protocols for controlling COVID spread, the emergency rule states that "the school must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering

or mask.”<sup>5</sup> This accurately reflects the Defendants’ position and actions, and is the direct result of the Executive Order.

In addition, the Defendants have acted to threaten and impose sanctions on school districts if they do not comply with the Defendants’ directions.<sup>6</sup> “The Executive Order tasks agencies to draft rules and the State Board to enforce the laws and rules.” (Defendants’ Motion to Dismiss, p. 31).

Thus, the Governor, the Commissioner, the Florida Department of Education, and the Florida Board of Education (by seeking to threaten enforcement of the Executive Order) have directed that school boards may not under any circumstances enact a face mask mandate unless it includes an opt-out provision for the parents pursuant, they say, to the Parents’ Bill of Rights.<sup>7</sup> The Executive Order was issued for the purpose of using the Parents’ Bill of Rights to block all no parent opt-out face mask mandates, and

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<sup>5</sup>The Defendants’ Motion to Dismiss, at p. 33, said, “[n]either the Executive Order nor the Rule require that unvaccinated or non-masked students attend school. Rather, they seek to ensure that school boards are complying with the Parents’ Bill of Rights - leaving the decision of masking of children to the children’s parents.”

<sup>6</sup>The Defendants confirmed by stating at p. 31 of their Motion to Dismiss, “school boards still have the option - albeit with consequences - to categorically mandate masking without exception.”

<sup>7</sup>The Department of Health issued its rule after consulting with the Department of Education. The rule confirms this consultation and the Defendant accept this by stating in their Motion to Dismiss, at p.9, “[i]n accordance with the Executive Order, the Department of Health, after consultation with the Department of Education, promulgated the Rule.”

to put into effect the policies raised in the April 14, 2021, memorandum and the July 27, 2021, Round Table meeting.

The Plaintiffs contend, for various reasons set forth in the pleadings, the evidence, the attorneys' presentations in the motion to dismiss hearing, and at trial, that the Executive Order, which directed and became incorporated into the expressed per se no exceptions anti-mask mandate with no parental-opt out, is unconstitutional, illegal, without authority, and unenforceable. The enforcement action of the Defendants (per the August 20, 2021, press release from the Department of Education) noted both the executive order and the Department of Health rule it directed. It said each order (Executive Order and Department of Health rule) requires school districts to document compliance with the Parents' Bill of Rights and the Department of Health rule. Even after the Department of Health rule was adopted, the Department of Education and the State Board of Education are using the Executive Order and the Parents' Bill of Rights to enforce the no mask mandate without a parent opt-out policy.

The parties have called on this Court for a resolution to their dispute.

### **Count I - Safe Schools**

This Court does not grant relief pursuant to Count I because the proof does not rise to the level required by the decision in DeSantis v. FEA, 306

So.3d 1202 (Fla. 1<sup>st</sup> DCA 2020), and other cases discussing the burden of proof for claims in such cases. There is at least some dispute in the medical community on the issue of masking, therefore, the decision in DeSantis v. FEA mandates a finding by this Court that the burden of proof has not been met for relief.<sup>8</sup>

## **Count II - Home Rule**

### **School Board Control And The Constitution**

There has been discussion for many years in many cases regarding the sometimes competing roles of the local school board and the State of Florida in operating public schools.

For example, Article IX, Section 4(b) of the Florida Constitution says in pertinent part: "The school board shall operate, control and supervise all free public schools within the school district."

Yet the Florida Supreme Court in Citizens for Strong Schools v. Florida State Board of Education, 262 So.3d 127, 137 (Fla. 2019) quoted from an earlier decision in Coalition v. Chiles, 680 So.2d 400, 408 (Fla. 1996), "[w]e

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<sup>8</sup>In this case, the evidence clearly demonstrated that the recommendation of the CDC for universal masking of students, teachers, and staff represents the overwhelming consensus of scientists, medical doctors, and medical organizations. However, the Plaintiffs failed to disprove that there is at least some dispute within the medical community on the issue of masking.

hold that the legislature has been vested with enormous discretion by the Florida Constitution to determine what provision to make for an adequate and uniform system of free public schools." In Coalition and Citizens, the Court dealt with a claim that the Legislature had failed to sufficiently fund the public schools. In general, funding decisions by the Legislature have been granted substantial deference by the appellate courts of Florida. However, the issue here is not whether the State has adequately funded the school system.

Last year the First District Court of Appeal said: "whatever the outcome of Appellees' lawsuit, the choice of how to deliver education to students remains with Florida's school boards". DeSantis v. FEA, 306 So.3d 1202, 1214 (Fla. 1<sup>st</sup> DCA 2020). Although the State retains responsibility for establishing a system of public education through laws, standards, and rules to assure efficient operation of a system of public education, the state constitution states that each county constitutes a school district. Responsibility for the actual operation and administration of all schools within the districts are delegated by law to the school boards of the respective districts. In this regard, all public schools conducted within the district are under the direction and control of the district school board. 46 Fla. Jur. 2d Schools, Universities, and Colleges §19. Although subject to the Parents' Bill

of Rights, the setting of local policies for health and safety of students substantially remains a local function. Florida is a large state including small rural counties to large densely populated counties. What is appropriate in one county may not be appropriate in another county. Thus, 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. However, the passing of the Parents' Bill of Rights and other case law in Florida does not make it sufficiently clear that the issue presented in this case is not clearly, strictly, and solely a local issue with no right of the State to intervene. There exist cases which seem to validate State imposed laws regulating teachers and imposing certain obligations on local school boards regarding charter schools.

Therefore, I cannot find that the law of Florida clearly sets forth the issues in this case as solely local. Thus, this Court finds and **DENIES** relief to the Plaintiffs on Count II of the Complaint.

### **Counts III and IV**

This Court grants relief with respect to Counts III and IV for the reasons announced at the August 27, 2021, hearing and this Final Judgment.

### **Separation of Powers**

The Defendants argue that the Plaintiffs seek relief that would violate the doctrine of separation of powers. This doctrine is set forth at Article II, Section 3 of the Florida Constitution. It provides that the powers of government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided. As it relates to the powers of the judiciary, the separation of powers concept stands for the proposition that the judicial branch must not interfere with the authorized discretionary functions of the legislative or executive branches of government absent violation of constitutional or statutory rights. 10 Fla. Jur. 2d Constitutional Law §158; and Florida Department of Children and Families v. J.B., 154 So.3d 479, 481 (Fla. 3d DCA 2015)(finding that "the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights"); see also Forney v. Crews, 112 So.3d 741, 743 (Fla. 1<sup>st</sup> DCA 2013) (finding that the court cannot dictate the operation of the state prison system "so long as no statute or constitutional requirement is violated."). The courts will not substitute their judgment with reference to matters properly within the domain of the legislative and executive branches of government.

Likewise, neither the Governor nor the executive agencies are permitted to substitute their judgment for the legislature nor can they perform the function of the legislature. By the assertion of separation of powers as an affirmative defense in this case, the Defendants must 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 the Defendants as provided by the Constitution or by the Legislature.

Here, the Defendants argue that they are entitled to deference provided by the separation of powers doctrine because they were exercising their authority to act. This is something they must prove. If their actions are not authorized by the Constitution or the Legislature, then they have no authority to take that action, they are not protected by the separation of powers doctrine, and their actions are invalid as being taken without authority. In DeSantis v. FEA, 306 So.3d 1202 (Fla. 1<sup>st</sup> DCA 2020), the First District Court of Appeal held that the Governor was acting in accordance with his emergency powers pursuant to Fla. Stat. §252.36(1)(b) because he declared a state of emergency to address the COVID pandemic. Thus, the



Governor had authority under the declared state of emergency to "issue executive orders to address a pandemic in accordance with the Act."

In this case, however, the state of emergency lapsed in June 2021, before Executive Order 21-175 was issued. Thus, the Governor did not have emergency powers pursuant to Chapter 252, Florida Statutes. Because the Governor had no emergency powers, he and the other Defendants must look to some other authorization in statute or the Constitution to provide them authority to enforce a blanket ban of mask mandates without a parental opt-out. The Defendants have not shown any convincing authority in the Constitution or any statute. However, they cite the Parents' Bill of Rights as their authority. If Defendants do not show that they had authority to issue the Executive Order, take the actions it called for, and all the things that it led to, the Defendants do not have a separation of powers defense. Thus, the Executive Order and the actions taken as a result are without authority and are null and void.

### **Political Question**

The political question affirmative defense is a form of separation of powers, therefore, the above analysis applies here. As the First District noted in DeSantis, 306 So.3d at 1214, "the nonjusticiability of a political

question is primarily a function of the separation of powers.” The political question doctrine must be cautiously invoked, and the mere fact that a case touches on the political process does not necessarily create a political question beyond the Court’s jurisdiction. 10 Fla. Jur. 2d Constitutional Law §157. If the Defendants’ Executive Order and related actions are ultra vires (i.e., without authority in law) they are without legal basis and therefore null and void. Thus, the defenses of separation of powers or political question are not available. As will be further discussed in this Final Judgment and noted herein, I find that the Defendants have not proven sufficient authority for the Executive Order, their anti-mask mandate policy, and the enforcement actions for them to be entitled to the defenses of Separation of Powers and Political Question.

### **Parents’ Bill of Rights And Additional Rulings**

As the case has proceeded, the Parents’ Bill of Rights and its use to effect the Defendants’ anti-mask mandate has become a focal point.

The Parents’ Bill of Rights (Fla. Stat. §§ 1014.01-06) (2021) was passed by the Legislature and signed by the Governor. It took effect July 1, 2021. No party has challenged the constitutionality of this statute. This Court has found no appellate opinion that discusses this new law.

The provision of the law that is most relevant to this case is: Fl. St. §1014.03, which says in pertinent part, no "governmental entity ... may... infringe on the fundamental rights of a parent to direct the upbringing, education, health care, and mental health of his or her minor child without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and is not otherwise served by a less restrictive means." (emphasis supplied).

It seems that the Defendants are relying only on the first portion of Fla. Stat. §1014.03 that prohibits infringement on parents rights, but ignoring the remaining portion of the section which provides that infringement may occur if the action is reasonable and necessary to achieve a compelling state interest and that the action is narrowly tailored and is not otherwise served by a less restrictive means. In plain English, this law says that the government cannot interfere with parental rights regarding education and health care unless there is a reasonable basis to do so and that the remaining elements of Fla. Stat. §1014.03 are met.

This law does not make invalid various laws in Florida that do affect parents rights to direct health care of children. Examples are Fl. Stat. §1003.22(3) which mandates vaccines for specific diseases prior to school

admittance, and Chapter 39 of the Florida Statutes which sets forth procedures in Child Dependency cases to provide for the care, safety, and protection of children.

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. However, the statute requires the governmental agency to show that the policy is reasonable and necessary to achieve a compelling state interest, and that the policy is narrowly tailored and not otherwise served by a less restrictive means.

There is no prohibition in the Parents' Bill of Rights against schools adopting mandatory face mask policies without a parental opt-out so long as the policy is reasonable and otherwise complies with the provisions of the law. The Defendants do not have authority under this law to enforce a before the fact of policy adoption blanket mandate against a mandatory face mask policy by a local school board. This statute does not support a state-wide order or action interfering with the constitutionally provided authority of local school districts to provide for the safety and health of the children based on the unique facts on the ground in a particular county. As stated in this Final

Judgment the Parents' Bill of Rights statute does allow a challenge of a policy and a requirement that the school demonstrate the reasonableness requirements of the statute.

The law of Florida does not permit the Defendants to punish school boards, its members, or officials for adopting face mask mandates with no parental opt-outs if the school boards have been denied their due process rights under the Parents' Bill of Rights to show that this policy is reasonable and meets the requirements of the statute. If the Defendants act to deny the school districts their due process rights provided by the statute, as is the case if the Defendants strictly enforce the Executive Order, the Department of Health rule, or any other policy prohibiting mask mandates without a parental opt-out, then they are acting without authority and are refusing to comply with all provisions of the law.

Therefore, the Parents' Bill of Rights permits local school boards to enact policies relating to health care and education, including mask mandates. The school boards are not required to secure permission in advance to adopt a policy. To do otherwise would submit local schools to endless court suits and/or administrative hearings on innumerable local policy decisions. If there is an objection to a school board adopted policy by a

parent or the Department of Education, those objecting must initiate an authorized proceeding at which it may be demonstrated that the policy is reasonable and necessary to achieve a compelling state interest, that it is narrowly tailored, and is not otherwise served by a less restrictive means.

By passing the Parents' Bill of Rights, the Florida Legislature necessarily recognized the importance of parental rights. But it also recognized that parents' rights are not immune to some reasonable limitation depending upon safety and reasonableness and compelling state need regarding health care or condition of the child.

The standard of proof a school board must meet is reasonableness. The school board is not required to establish that its policy is the best or only policy available or that the policy might be disagreed with by others.

A school district which adopts a policy (such as a mask mandate) is acting within the discretion given to it by the Legislature in the Parents' Bill of Rights. So long as the requirements provided for in the Parents' Bill of Rights are met, the doctrine of separation of powers requires that the discretionary power exercised by the school board cannot be interfered with by the judiciary or executive branch of government, and neither the judiciary nor the executive can substitute their judgment for that of the school board.

The purpose of the Executive Order and the actions it set in motion were to prohibit local school boards from adopting face mask mandates that did not include a parental opt-out provision. The Defendants have contended by their actions and positions in this case that the Parents' Bill of Rights authorizes them to enforce a blanket prohibition against mask mandates. The Defendants have additionally used threats of enforcement and have engaged in enforcement actions generated as a result of the Executive Order to enforce this blanket prohibition. The Defendants contend that the Parents' Bill of Rights as referenced in the Executive Order authorized the enforcement actions against school boards that adopted face mask mandates with no parent opt-out provision.

The Defendants' assertion in this regard is incorrect because the Parents' Bill of Rights does not ban school board face mask mandates. The statute expressly permits school boards to adopt policies regarding the healthcare of students (such as a face mask mandate) even if a parent disagrees with the policy. The statute requires only that the policy be reasonable, is necessary to achieve a compelling state interest, and be narrowly tailored and not otherwise served by a less restrictive means. The actions of the Defendants do not pass constitutional muster because they

seek to deprive the school boards in advance and without their right to show reasonableness of such a policy. The statute does not require that the school board secure permission for adopting a policy in advance. It only requires in the instance of a policy challenge, that the school board, has a burden to prove its policy's validity under the guidelines of the statute.

Therefore, an executive order and/or action or agency action which bans under all circumstances a face mask mandate for school children does not meet constitutional muster because such action exceeds the authority given to the Governor and the other Defendants under the Parents' Bill of Rights. Seeking to enforce a policy through the Executive Order and through actions that violate the provisions of the Parents Bill of Rights is arbitrary and capricious because there is no reasonable or rational justification for a violation of this statute. A policy or action which violates the Parents' Bill of Rights cannot be lawfully enforced by the Defendants.

Further, an Executive Order and/or agency action, such as a blanket ban of a face mask policy, denies school boards their right to show reasonableness, which violates the Parents' Bill of Rights, exceeds any authority to issue the order or take the action to the extent it sets in motion or causes a violation of the Parents' Bill of Rights and exceeds the authority of



the Defendants granted to them by the Parents' Bill of Rights. Such action is arbitrary, unreasonable, and violates the separation of powers doctrine because it would exceed the powers granted by the Legislature in the Parents' Bill of Rights as discussed in this Final Judgment.

#### **Count V - Department of Health Rule**

The Defendants' Motion for Involuntary Dismissal as to Count V is granted because the Plaintiffs did not sue the Department of Health and it is an indispensable party to that count. The Court cannot take any action that affects the Department of Health because it is not a party to this suit. Therefore, this Court cannot issue an order to the Department of Health ordering it to strike its rule. However, this ruling does not limit the Court from enjoining or otherwise prohibiting the Defendants from engaging in actions that violate the Parents' Bill of Rights.

#### **Count VI - Injunctive Relief**

As stated at the August 27<sup>th</sup> hearing, this Court declines to grant an injunction against the Governor. This Court is not granting an injunction against the Governor because the other Defendants are primarily involved in the enforcement actions on a day-to-day basis against local school boards. However, this Court does issue a permanent injunction and enjoins the

remaining Defendants ("Enjoined Defendants") from violating the Parent's Bill of Rights.

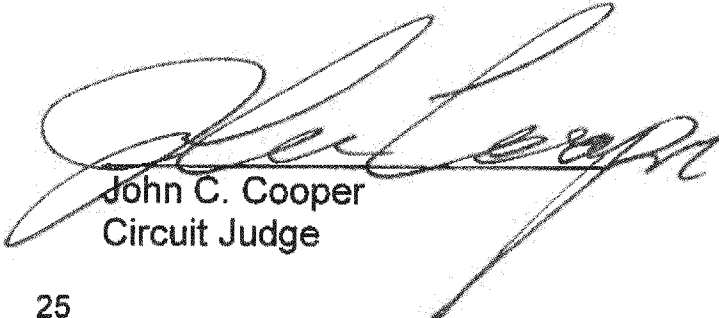
The "Enjoined Defendants" are ordered not to violate the Parents' Bill of Rights by taking action to effect a blanket ban on face mask mandates by local school boards and by denying the school boards their due process rights granted by the statute which permits them to demonstrate the reasonableness of the mandate and the other factors stated in the law. I also enjoin the "Enjoined 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. In granting this injunction I find that the act or conduct to be enjoined (violation of the Parents' Bill of Rights) is a clear legal right, there is no adequate remedy at law, and relief is necessary to prevent an irreparable injury. In this case irreparable injury is demonstrated by the increased risk of Delta variant infection (as demonstrated by CDC guidance and medical evidence in the record) if universal face mask mandates are blocked in violation of the Parents' Bill of Rights. A continuing constitutional violation is in and of itself irreparable harm. Board of County Commissioners v. Home

Builders Association of West Florida, 2021 WL 3177293, at \*3 (Fla. 1<sup>st</sup> DCA July 28, 2021).

This Court notes that it is not enjoining the enforcement of the Parents' Bill of Rights, so long as the complete statute is enforced without omitting portions of it. Defendants can enforce the Parents' Bill of Rights but must do so in accordance with the terms of the law and allow a due process proceeding to permit the local school boards to meet their burden under the statute.

Local school boards can adopt policies dealing with the health and education of school children, and to the extent that those policies may affect parents' rights to control their children's education or health, then, it is incumbent on the school board, if challenged to demonstrate its policy's reasonableness along with the other factors required by the Parents' Bill of Rights.

**Done and Ordered** in Tallahassee, Leon County, Florida this 2<sup>nd</sup> day of September 2021.

  
John C. Cooper  
Circuit Judge

Copies to:

All Counsel of Record

1 IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT  
 2 OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY  
 3 CIVIL DIVISION  
 Case No.: 2021-CA-001382

4 ROBIN MCCARTHY and JOHN MCCARTHY,  
 5 individually and on behalf of L.M., a minor;  
 6 ALLISON SCOTT, individually and on behalf of  
 7 W.S., a minor; LESLEY ABRAVANEL and  
 8 MAGNUS ANDERSSON, individually and on  
 9 behalf of S.A. and A.A., minors; KRISTEN  
 10 THOMPSON, individually and on behalf of P.T.,  
 11 a minor; AMY NELL, individually and on behalf  
 12 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,

vs.

13 GOVERNOR RON DESANTIS, in his official  
 14 capacity as Governor of the State of Florida;  
 15 RICHARD CORCORAN, in his official capacity  
 as Florida Commissioner of Education; FLORIDA  
 DEPARTMENT OF EDUCATION; and  
 16 FLORIDA BOARD OF EDUCATION,  
 17 Defendants.

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18 E X C E R P T

19 TRIAL BEFORE THE HONORABLE JOHN C. COOPER  
 20 (Conducted via Videoconference)

21 DATE: August 27, 2021  
 22 TIME: 10:22 a.m. to 12:34 p.m.  
 23 REPORTED BY: Deborah W. Gonyea, RMR, CRR  
 24 Notary Public, State of  
 25 Florida at Large  
 Pages 1 to 86

Page 2

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 Attorneys for Plaintiffs  
 22  
 23  
 24  
 25

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1 (The following is an excerpted portion of the  
 2 trial proceedings.)  
 3 PROCEEDINGS  
 4 THE COURT: Okay. Good morning.  
 5 Okay. I'm late because I just finished  
 6 putting in my notes from my last night's writings  
 7 on this case, and then for some reason I was  
 8 unable to get on Zoom. But I managed to negotiate  
 9 that.  
 10 So give me one more minute and I'll be right  
 11 back.  
 12 (Brief recess taken.)  
 13 THE COURT: All right. This is actually the  
 14 ruling I just pulled out of the printer. So these  
 15 are my notes.  
 16 So, again, good morning everyone. These  
 17 are -- these are my notes. This is not something  
 18 that I could send and sign, but this is pretty  
 19 close to what could be a final written order. And  
 20 I would expect the parties writing the order to  
 21 take this as their guideline.  
 22 It may be that there will need to be  
 23 grammatical changes or rearranging of various  
 24 sections to make them flow better in a written  
 25 order. But I would expect to be able to receive a

Page 3

1 APPEARANCES CONTINUED:  
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 6  
 7  
 8 INDEX  
 9  
 10 Description Page  
 11 PROCEEDINGS 4  
 12 REPORTER'S CERTIFICATE 86  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

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1 proposed order by Monday. And I would give the  
 2 other side another day after that to make a  
 3 copy -- I'm sorry -- to make comments. And then I  
 4 would like to -- I would like to enter the written  
 5 order Tuesday, if at all possible.  
 6 Excuse me if I take a little while to get  
 7 started, but I was up at 2:00 a.m. this morning  
 8 ruling, working, rereading, making notes, et  
 9 cetera. So this is where I am.  
 10 Before I forget, I'm officially finding that  
 11 the plaintiffs who I left in the case, who we  
 12 identified at the motion for -- I'm calling it a  
 13 motion for directed verdict; I know there's a more  
 14 correct name for it. Motion for order of judgment  
 15 of dismissal, I think. They have -- I'm finding  
 16 that they have standing. So I didn't want to  
 17 forget that before I get into the order.  
 18 All right. I'm going to read this order and  
 19 probably from time to time make comments that are  
 20 not scripted or in my notes. And we'll see how  
 21 that goes. I will try to be articulate and  
 22 relatively slow for the purposes of our court  
 23 reporter.  
 24 And as in a written order you have various  
 25 citations and things of that nature, I'm going to

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1 read those. So it may not sound very flowing when  
 2 I read it, but in part it's because I'm  
 3 referencing citations and grammatical marks, et  
 4 cetera. Also, some of the citations into the  
 5 record and to other parts of the case might be  
 6 more appropriately included in footnotes. But I  
 7 wasn't sure that reading a proposed order and then  
 8 identifying footnotes would be all that helpful.  
 9 So, again, that would be left up to the drafters'  
 10 discretion.  
 11 Even -- who's some great writer, which I'm  
 12 not. Even Ernest Hemingway had an editor. So --  
 13 Maxwell Perkins was his editor, by the way. So I  
 14 have no problem with edits, so long as the essence  
 15 of the order and most of the details are in the  
 16 order.  
 17 Let me start with you a quote which I think  
 18 we should all think about, including those of us  
 19 who are on the Zoom, those of us who are online,  
 20 on YouTube, those who may read about this case in  
 21 the news media. I find that in any intense public  
 22 debate there are often emotions and concepts which  
 23 show a failure to completely understand the  
 24 complete scenario of what we're dealing with.  
 25 In particular, I find in the last 50, 60

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1 years or so, our country has felt that every  
 2 problem could be served -- could be solved in a  
 3 courtroom. Every problem cannot be solved in a  
 4 courtroom. Some problems are solved at the ballot  
 5 box. Some are solved in the courtroom. Some are  
 6 solved by individual action. But before people  
 7 start deciding how they believe about something or  
 8 how it's going to affect them, let me tell you --  
 9 give you an idea of one of the foundations of our  
 10 law as I think it relates to this situation.  
 11 So here's the quote: Quote, Under the  
 12 American system of laws and government, everyone  
 13 is required to use and enjoy his own rights as not  
 14 to injure others in their rights or to violate any  
 15 law in force for the preservation of the general  
 16 welfare.  
 17 That quote comes from a 1914 Florida Supreme  
 18 Court opinion called Dutton, D-u-t-t-o-n,  
 19 Phosphate Company vs. Priest, 65 So. 282, Florida  
 20 1914.  
 21 It was again restated in a 1939 Florida  
 22 Supreme Court, State ex rel. Hosack, H-o-s-a-c-k,  
 23 v. Yocum, just like the country singer, Y-o-c-u-m,  
 24 136 Fla. 246, Florida 1939.  
 25 The second quote, coming from the same

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1 decisions, 1914 decision originally and repeated  
 2 in 1939: The wisdom and necessity, as well as the  
 3 policy, of a statute are authoritatively  
 4 determined by the legislature. Courts may inquire  
 5 only into the power of the legislature to lawfully  
 6 enact a particular statute.  
 7 These two quotes from the Florida Supreme  
 8 Court over 100 years ago describe two things: the  
 9 balancing of one's own rights with the rights of  
 10 others and that, when considering the separation  
 11 of powers, court may properly consider whether a  
 12 law and, as a logical extension of this quote, an  
 13 executive action, was lawfully enacted or  
 14 exercised.  
 15 A governor's executive order and an agency's  
 16 actions must be based on authority granted to them  
 17 by the constitution or the legislature. Executive  
 18 power is exercised -- if executive power -- fifth  
 19 edit; I still missed words. If executive power is  
 20 exercised without authority, the executive action  
 21 is illegal, null and void, and unenforceable.  
 22 So let me go back and comment this concept of  
 23 personal rights. We all have personal rights. We  
 24 all enjoy our personal rights. We all zealously  
 25 protect our personal rights.

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1 We have a personal right, if we so choose --  
 2 not my choice, but many do -- to drink alcoholic  
 3 beverages in their home if they're over 21 years  
 4 of age. We can drink until we're intoxicated.  
 5 But we can't get in a -- it's our right to drink  
 6 alcoholic beverages if we're over 21, but we  
 7 cannot get in our car and start driving around  
 8 while we've had alcoholic beverages that impair  
 9 our ability to drive. And the reason is not  
 10 because of whether the driver's going to hurt him  
 11 or herself or not. The reason is the driver  
 12 exercising his or her rights to drink is now  
 13 putting at risk other people.  
 14 So that driver's right to drive intoxicated  
 15 is limited by the government in various criminal  
 16 laws that prohibit driving while under the  
 17 influence of alcohol.  
 18 We all have a right to speak our mind, First  
 19 Amendment rights. You've all heard this quote.  
 20 We don't have a right to tell lies about people.  
 21 If we do, then we'll have to respond to that in  
 22 some sort of court action. We don't have the  
 23 right to harass and intimidate people verbally  
 24 because that violates the law. That limits our  
 25 rights. And we don't have a right, to the extent

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1 there are crowded theaters anymore -- this in a  
 2 few years may be an anecdote that younger people  
 3 won't even understand what I'm saying. We don't  
 4 have a right to go into a crowded theater and yell  
 5 "fire" because we've decided it's our right to do  
 6 that. We don't have that right because exercising  
 7 the right in that way is harmful or potentially  
 8 harmful to other people.  
 9 Our law and our history as a country going  
 10 back 200-plus years is full of examples of rights  
 11 that are remedied by the good of others that would  
 12 be adversely affected by those rights.  
 13 So when we talk about absolute and  
 14 fundamental rights, there's always a footnote that  
 15 is something like, well, let's see if exercising  
 16 these rights harms other people. If it does, then  
 17 we have to have a discussion.  
 18 That's what we're having here this week, a  
 19 discussion, in part, as to whether people's rights  
 20 to not want their children to wear a face mask for  
 21 30 or 60 days -- which is what most of these  
 22 policies we've been talking about are for --  
 23 whether those rights outweigh the risk not wearing  
 24 a mask places other children in to catching a  
 25 highly contagious and sometimes deadly disease,

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1 even for children.  
 2 So this is not something that I made up.  
 3 This has been the law of Florida I know since  
 4 1914. It's been the law of Florida for probably a  
 5 hundred years before that. These concepts are  
 6 contained in the fundamental writings that support  
 7 our country. They are contained in the -- all the  
 8 founding documents in the country are these  
 9 concepts, including separation of powers and use  
 10 of rights in such a way as not to harm others.  
 11 So I say that to the lawyers, to the parties,  
 12 and to whoever may be listening to this case. We  
 13 will not solve any issue if we can't sit down and  
 14 work together and take positions recognizing that  
 15 what's going on is not some recent imposition on  
 16 someone or some attack on the country. It's what  
 17 has gone on at least during my lifetime on many  
 18 occasions about many issues. So that's all the  
 19 preaching you'll hear from me.  
 20 So let's go on to the issues before the  
 21 Court. The issues in this case are formed by the  
 22 pleadings, the evidence presented, contentions of  
 23 the parties in the pleadings, and statements and  
 24 contentions made by the parties and witnesses and  
 25 evidence at trial. Those all come together at the

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1 end of a trial and formulate essentially the  
 2 issues for the finder of fact -- which is in this  
 3 case me; in a jury trial, it's the jury -- to try  
 4 to determine.  
 5 This is not an easy task because I constantly  
 6 have to remind myself what my role is. My role is  
 7 to primarily try to figure out what the law says  
 8 and then enforce it. My role is rarely to decide  
 9 what policy should be. However, in our system,  
 10 sometimes when a judge has to enforce a rule or a  
 11 regulation or a statute for the constitution,  
 12 there are policy implications. So they're not as  
 13 separate and as cleanly different as one might  
 14 think.  
 15 Before this Court is a dispute between the  
 16 governor of Florida, the Florida commissioner of  
 17 education, the Florida Department of Education,  
 18 and the Florida Board of Education. And I'll call  
 19 those the defendants. When I say defendants, I'm  
 20 referring to all of those people.  
 21 Also are involved parents and students in the  
 22 Florida public school system, which I'll call the  
 23 plaintiffs.  
 24 The dispute is whether state law permits  
 25 local school districts in Florida to adopt and

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1 enforce a face mask mandate for students and  
 2 staff, staff being teachers and other employees in  
 3 the school system.  
 4 There have been a lot of descriptions for  
 5 this. What I think we're talking about is  
 6 essentially the contention of the plaintiffs that  
 7 the school system should be free to pass a face  
 8 mask mandate -- generally this has been considered  
 9 in this trial a face mask mandate -- with a  
 10 medical opt-out only.  
 11 The governor and the defendants believe the  
 12 correct policy is face mask mandate if you want  
 13 to; but if you pass that, there must be a parental  
 14 opt-out.  
 15 So those of you who are drafting this order,  
 16 that's what I mean. I might not be that specific  
 17 as to each one, but that's where I am.  
 18 One sidenote that's not in my notes, many of  
 19 the witnesses -- there were many very fine -- in  
 20 fact, all the witnesses seemed like fine people  
 21 and serious. Many of the witnesses who are  
 22 parents who testified on behalf of the defendants  
 23 had, you know, serious concerns for their  
 24 children, children with serious medical issues,  
 25 and they were scared about the mask mandate. Most



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1 of what I heard, those children would not be  
 2 required to wear a mask in school under any  
 3 version of the mandate we've been talking about.  
 4 Doctors have a responsibility for patients.  
 5 If, in fact, they have a patient with a legitimate  
 6 medical reason not to wear a mask, they should  
 7 step up and sign the opt-out paper for those  
 8 patients. That's the role -- one of the many  
 9 roles our medical community has. You can't just  
 10 say, no, I don't want to get involved.  
 11 Doctors, if you have a patient such as those  
 12 I heard described here, you need to do the correct  
 13 thing and sign a medical opt-out if that is what  
 14 is necessary. Some of these people -- I'm not a  
 15 doctor. But they seem to me to be clear medical  
 16 opt-out circumstances.  
 17 But let me now go back on to my notes.  
 18 Picking up, the dispute is whether state law  
 19 permits local school districts in Florida to adopt  
 20 and enforce a face mask mandate for students and  
 21 staff. This dispute arises out of the opening of  
 22 public schools for the new year and increasing --  
 23 and increasing COVID crisis in Florida.  
 24 This is -- by the way, for those of you, I'm  
 25 drawing on my legal rulings and my findings from

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1 the facts. I am a factfinder. I am required and  
 2 permitted to take the evidence I've heard, draw  
 3 inferences from that evidence, and make findings  
 4 based upon what I think is the more persuasive and  
 5 most credible evidence. So when I give these  
 6 statements such as I am, these aren't things I  
 7 just dreamed up either. These are things that --  
 8 findings I'm making based on the evidence I've  
 9 heard, the legal discussions based upon the law as  
 10 I interpret it.  
 11 So the increasing COVID crisis in Florida has  
 12 resulted from less than complete vaccination of  
 13 the population of Florida and the dominance of a  
 14 COVID virus variant referred to as the Delta  
 15 variant.  
 16 The Delta variant has a much higher viral  
 17 load and is more contagious than the form of COVID  
 18 present in Florida from 2020 until about May or so  
 19 of this year. COVID variant became increasingly  
 20 dominant in Florida starting around May or so, and  
 21 to the present time it is the dominant -- by far  
 22 the dominant virus that's being spread in the  
 23 state of Florida.  
 24 Also, the Delta variant presents a higher  
 25 risk of infection to children than did the

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1 previous form of COVID. This fact places at issue  
 2 all medical studies and anecdotal evidence that  
 3 says, well, we had no problems last year; we  
 4 should have no problems this year. There's a  
 5 difference. We had a different, less infectious,  
 6 less dangerous form of virus last year than we  
 7 have this year.  
 8 And as the facts change on the ground, the  
 9 need, or failure to need, for various measures  
 10 will also change. I'm talking about facts on the  
 11 ground now as I understand it from the evidence.  
 12 The combination of lack of vaccination,  
 13 decreasing social distancing, and the Delta  
 14 variant has resulted in dramatically increased  
 15 COVID infections in Florida over the past several  
 16 months. Although vaccinated persons do have  
 17 significant protection against the COVID variant,  
 18 they can still become infected by the COVID  
 19 variant. They can also transmit that infection to  
 20 children and other people.  
 21 As a result, the CDC, Centers for Disease  
 22 Control, the American Academy of Pediatrics, and  
 23 the wide majority of the medical and scientific  
 24 community in this country recommend universal  
 25 indoor masking for all school students, staff,

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1 teachers, and visitors to K through 12 schools  
 2 regardless of vaccination status and social  
 3 distancing.  
 4 On April 20 -- April 14, 2021, Commissioner  
 5 Corcoran, who's the commissioner of the Florida  
 6 Department of Education and, in his official  
 7 capacity, the defendant -- and for those who  
 8 aren't lawyers, when you sue someone from an  
 9 agency in official capacity, that's just another  
 10 way of suing the agency.  
 11 But Commissioner Corcoran on April 14, 2021,  
 12 sent a memorandum to all school district  
 13 superintendents. The superintendent of a school  
 14 district is sort of like the principal of the high  
 15 school. They're the in-charge executive officer  
 16 of that district. Many are appointed; some are  
 17 elected.  
 18 In that order or memorandum, Defendants'  
 19 Exhibit 45, as I read it, he's requesting that the  
 20 school superintendents do not implement a mandated  
 21 masking policy. He said, With this return -- I'll  
 22 read it -- we ask that districts, which currently  
 23 are implementing a mandated face covering policy,  
 24 revise their policy to be voluntary for the  
 25 '21-'22 school year.

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1 It's clear to this Court that the issue of  
 2 voluntary versus mandated, opt-out versus no  
 3 opt-out, masking policies in Florida school --  
 4 schools was being considered and studied at least  
 5 as early as April of 2021. Remember, at the time  
 6 of that memorandum, COVID virus or variant had not  
 7 really hit the scene hard. So this was a policy  
 8 perhaps dealing primarily with what was viewed as  
 9 the former form of the virus. In any event, the  
 10 policy consideration was ongoing by that time. I  
 11 can't tell you if it started then or not, but it  
 12 was ongoing.

13 In late June 2021, the governor of Florida  
 14 declared that there was no longer a state of  
 15 emergency based on COVID in Florida. You may  
 16 recall we had been in that state of emergency from  
 17 about March or so 2020 until end of June 2021.  
 18 That date was agreed to earlier in this case by  
 19 all parties. The governor did this by allowing  
 20 the time-limited declaration of emergency order to  
 21 lapse without renewal.

22 Under Florida law -- again, I'm speaking off  
 23 memory; I stand to be corrected -- the ability to  
 24 declare a state of emergency usually lasts for 60  
 25 days and then it has to be re-upped in a

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1 supplemental order. If you don't re-up it, it  
 2 will expire, which is -- my understanding that's  
 3 what happened here. Therefore, the governor's  
 4 emergency powers under Florida Statute 252 expired  
 5 at that point, by the end of June.

6 On July 27th, the governor held a roundtable  
 7 meeting on face mask policy. That meeting -- the  
 8 video of that meeting was admitted into evidence.

9 At that meeting -- this is my recollection  
 10 and notes -- no participant in the meeting --  
 11 there were some doctors there. The governor was  
 12 there. There was a charter school -- I think he  
 13 was a principal, but a higher-up charter school  
 14 official from a local charter school. There was  
 15 another mother and also charter school employee  
 16 there. And there was a high school student who  
 17 indicated he and his friends preferred to hang  
 18 around without wearing face masks. There may have  
 19 been others, but that's my member -- memory of who  
 20 was there.

21 No participant at that meeting, this  
 22 factfinding meeting, proposed a mandate -- a  
 23 mandated face mask policy with no parental  
 24 opt-out, such as that being proposed by a  
 25 number -- or being implemented by a number of

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1 school districts in Florida. No one proposed  
 2 that. All proposed a parental opt-out policy. No  
 3 one advocated for any CDC recommended policy.

4 In fact, the governor stated, gave his  
 5 opinion, that his confidence -- hold on a  
 6 second -- that his confidence in some medical  
 7 leadership had been shattered. He said they  
 8 appear to be, quote, delighted to impose  
 9 unspeakable burdens on children. Other than the  
 10 fact that it was said in that conference, no  
 11 evidence has been produced to support that  
 12 statement.

13 Also in the governor's executive order that  
 14 was issued a few days later, the governor  
 15 expressed doubt about the validity of the CDC  
 16 guidance.

17 Remember, the CDC by the overwhelming weight  
 18 of evidence is considered the preeminent medical  
 19 authority in this country about infectious  
 20 diseases. It's the gold standard.

21 The State of Florida has in the past on many  
 22 occasions adopted and incorporated CDC guidelines  
 23 and recommendations into the state statutes. Here  
 24 is an example of just a few. It's not exhaustive.  
 25 Florida Statute 465.189, topic is administration

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1 of vaccines and epinephrine autoinjection; Florida  
 2 Statute 384.23, regarding sexually transmitted  
 3 diseases; Florida Statute 381.0031, regarding  
 4 epidemiological research, report of diseases of  
 5 public health significance to department; Florida  
 6 Statute 1002.23, a statute that's been mentioned  
 7 quite a bit in this case dealing with student and  
 8 parental rights and educational choices. They say  
 9 there, that statute, a recommended immunization  
 10 schedule in accordance with the United States  
 11 Center for Disease Control and recommendations  
 12 is -- is referenced and apparently assumed to be  
 13 worth including in the statute. Florida Statute  
 14 381.005, primary and preventive health services;  
 15 Florida Statute 381.0056, school health services:  
 16 Each school health advisory committee must, at a  
 17 minimum, include members who represent the  
 18 right -- the eight component areas of the  
 19 Coordinated School Health model as defined by the  
 20 Centers for Disease Control; Florida Statute  
 21 381.985, screening program, a requirement that  
 22 there be adoptive rules to follow established  
 23 national guidelines or recommendations such as  
 24 those used by the Council of State and Territorial  
 25 Epidemiologists and the Centers for Disease

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1 Control; Florida Statute 400.141, administration  
 2 and management of nursing home facilities,  
 3 requiring providing for immunizations against flu  
 4 viruses in accordance with the recommendations of  
 5 the Centers for Disease Control; Florida Statute  
 6 112.181, firefighters, paramedics, EMTs, law  
 7 enforcement officers, et cetera, reference to the  
 8 Centers for Disease Control; 381.9315, gynecologic  
 9 and ovarian cancer education and awareness: State  
 10 Surgeon General shall make publicly available, by  
 11 posting on the Internet website of the Department  
 12 of Health, resources and an Internet website link  
 13 to the federal Centers for Disease Control for  
 14 gynecologic cancer information; and, finally --  
 15 but this is not an exhaustive list; this is just  
 16 some of what I found -- Florida Statute 951.27,  
 17 blood tests of inmates, requiring a procedure  
 18 consistent with the guidelines of the Centers for  
 19 Disease Control.

20 So not only do the doctors who testified here  
 21 recognize the Centers for Disease Control as the  
 22 legitimate reputable source of information, it  
 23 appears that over many years so has the Florida  
 24 legislature.

25 So let's go back. At that July 27th

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1 meeting -- I made some notes -- there was one  
 2 presenter there, I believe his name was Meissner,  
 3 who stated that masks were not worn to protect  
 4 wearers of the mask. This is clearly contrary to  
 5 evidence presented at the trial here. He said  
 6 that harm is done to children with masks.

7 A psychiatrist, I think his last name was  
 8 McDonald, said masking is child abuse. He said  
 9 there is no evidence that masking protects against  
 10 COVID.

11 There's a lot of evidence that was presented  
 12 here, including CDC studies, including the April  
 13 21st, two thousand -- April -- the May 21st, 2021,  
 14 CDC study that's Exhibit 48. I'll get back to  
 15 that in a minute.

16 Dr. McDonald also said not a single child has  
 17 benefited from wearing a mask. All children have  
 18 been hurt. He is appalled, he said. Every  
 19 thoughtful, rational adult knows children  
 20 shouldn't be masked. He said children cannot  
 21 transfer COVID to adults. Again, another fact  
 22 that's disputed by the science. Masks do nothing  
 23 to help medically, and they destroy the country.

24 So that's not everything that was said there.  
 25 I thought the governor's remarks were much more

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1 temperate than some of the other participants',  
 2 but that's what was said there.

3 One study -- I'm not going through every  
 4 piece of evidence. I'm highlighting some issues.  
 5 One study, Exhibit -- Defendants' Exhibit 48,  
 6 which was a study in -- I think it was a CDC study  
 7 involving Georgia. What was read to a couple of  
 8 the plaintiffs' witnesses and they were asked for  
 9 this comment, I think it was this sentence:  
 10 quote, The 21 percent lower incidence in schools  
 11 that recommend mask use among students was not  
 12 statistically significant compared to the schools  
 13 where mask use was optional. And the witnesses  
 14 recall -- comment on that.

15 The clear implication made in that  
 16 cross-examination was, here's a CDC study that  
 17 doesn't even recognize that masks work. What was  
 18 not read was the rest of the study.

19 Directly following that sentence -- it's a  
 20 little bit lengthy, but I'm going to read it. It  
 21 says, This finding might be attributed to higher  
 22 effectiveness of masks among adults, who are at a  
 23 higher risk for SARS-CoV-2 infection, but might  
 24 also result from differences in mask-wearing  
 25 behavior among students in schools with optional

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1 requirements. Mask use requirements were limited  
 2 in this sample; 65.1 percent of schools required  
 3 teacher and staff member mask use and  
 4 approximately one-half, 51.5 percent, required  
 5 student mask use. Because universal and correct  
 6 use of masks can reduce COVID -- I'm substituting  
 7 "COVID" for the technical science term "SARS."  
 8 Let me repeat this. Because universal and correct  
 9 use of masks can reduce COVID transmission and is  
 10 a relatively low-cost and easily implemented  
 11 strategy, findings in this report suggest  
 12 universal and correct mask use is an important  
 13 COVID-19 prevention strategy in schools as part of  
 14 the multicomponent approach.

15 This is not a plaintiffs' exhibit. This is a  
 16 defendants' exhibit.

17 Also, one last thing this report said in its  
 18 summary, they noted that COVID infection was 37  
 19 percent lower in schools that required teachers  
 20 and staff members to use masks.

21 So this study, which was presented by the  
 22 defendants to me, wasn't presented to the governor  
 23 at that meeting in which they were stating they  
 24 were trying to decide what to do. But the  
 25 governor was told that use of masks is child abuse

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1 and bringing harm to every child in the country.  
 2 I've seen no scientific evidence of that to  
 3 support that statement in this case.  
 4 So after the meeting, the governor three days  
 5 later issued Executive Order 21-175. This order  
 6 began the formulation of a policy, and enforcement  
 7 by the defendants, that local school districts in  
 8 Florida could not adopt a face mask mandate unless  
 9 it provided for a parental opt-out.  
 10 This is also reflected in the defendants'  
 11 seventh affirmative defense filed in this case  
 12 which says, quote, The Parents' Bill of Rights  
 13 precludes school boards from implementing  
 14 categorical mask mandates that do not allow  
 15 parents to opt their children out of the  
 16 requirement, end quote. We're going to get to the  
 17 Parents' Bill of Rights. But this seventh  
 18 affirmative defense does a good job of stating  
 19 exactly one of the big disputed issues in this  
 20 case. I'll get to that later.  
 21 Continuing, the executive order, based on the  
 22 evidence and inferences from the evidence  
 23 presented to me, was a continuation into a policy  
 24 disfavoring the no opt-out mask mandates and the  
 25 means to accomplish this was going to be through

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1 the Parents' Bill of Rights, which is clearly  
 2 evident from the executive order and confirmed by  
 3 the affirmative defense.  
 4 Under other provisions of the executive  
 5 order, it cited to a study which it said found no  
 6 correlation with face masks. This study is known  
 7 and called in the order the Brown University  
 8 study. It was not peer-reviewed and its own --  
 9 its own authors have expressed doubts as to its  
 10 use. That study's in evidence. All I have to do  
 11 is find it. It's Exhibit -- I believe it is  
 12 Exhibit 19 and -- yes. Exhibit 19.  
 13 Here's a quote from the people that wrote the  
 14 study: Quote, We caution that our analysis  
 15 focuses only on correlations, and it is  
 16 challenging to make causal statements. In the  
 17 case of masking in particular, we focus on  
 18 mandates and not on actual behavior. Masking is  
 19 likely correlated with mask mandates, but it is  
 20 also likely that some individuals mask even in the  
 21 absence of a mandate and that there is imperfect  
 22 compliance even with a mandate. In addition,  
 23 while we control for community rates, we do not  
 24 control for community mitigation practices, which  
 25 would also impact behavior and rates in schools.

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1 This paper adds to our understanding of the  
 2 relationship between COVID mitigation and school  
 3 safety in the U.S., and they cite about four  
 4 different studies. We would emphasize that in  
 5 general this literature suggests in-person school  
 6 can be operated safely with appropriate  
 7 mitigation, which typically includes universal  
 8 masking. It would be premature to draw any  
 9 alternative conclusions about this question based  
 10 on this preliminary data.  
 11 This study doesn't say masking is not  
 12 effective. In fact, it recommends universal  
 13 masking. And it says that it's premature to state  
 14 anything otherwise.  
 15 Also, they say in the study right above the  
 16 section called discussion, It is important to note  
 17 that this -- this is the long discussion in the  
 18 paper -- does not imply masks are ineffective, as  
 19 these results focus only on masking in schools and  
 20 do not take community behavior into consideration.  
 21 Additionally, as noted above, we focus only on  
 22 mask mandates and not actual masking behavior.  
 23 So the Brown report said that it had analyzed  
 24 COVID data and found no correlation with mask  
 25 mandates. If that's true, why did the Brown

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1 report recommend that universal masking was still  
 2 the way to go?  
 3 Now, I don't say that the governor has time  
 4 enough to read a report that's that thick. But  
 5 his advisors do. So the statement in the  
 6 executive order is just incorrect. That study  
 7 does not find no correlation with mask mandates.  
 8 What I read to you is a defense exhibit, not  
 9 a plaintiffs' exhibit.  
 10 So, going back to the executive order, the  
 11 order showed lack of support for CDC guidance on  
 12 face masks -- I don't think there's any dispute  
 13 about that -- and stated that face masks may have  
 14 negative health and societal ramifications. Most  
 15 importantly, the order noted the applicability of  
 16 a new statute called the Parents' Bill of Rights.  
 17 The order -- we'll talk about that more in detail.  
 18 The order directed certain actions which were  
 19 premised on enforcing the Parents' Bill of Rights,  
 20 which would result in a blanket banning in advance  
 21 of all school board mask mandates if there was no  
 22 parental opt-out. The most likely way to  
 23 accomplish this was to institute a policy that  
 24 would likely result in a violation of the Parents'  
 25 Bill of Rights. Parents' Bill of Rights is a law

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# EXHIBIT "D"

Page 1

1 IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT  
2 OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY  
3 CIVIL DIVISION  
4 Case No.: 2021-CA-001382

5 ROBIN MCCARTHY and JOHN MCCARTHY,  
6 individually and on behalf of L.M., a minor;  
7 ALLISON SCOTT, individually and on behalf of  
8 W.S., a minor; LESLEY ABRAVANEL and  
9 MAGNUS ANDERSSON, individually and on  
10 behalf of S.A. and A.A., minors; KRISTEN  
11 THOMPSON, individually and on behalf of P.T.,  
12 a minor; AMY NELL, individually and on behalf  
13 of O.S., a minor; EREN DOOLEY, individually  
14 and on behalf of G.D., D.D., and F.D., minors;  
15 DAMARIS ALLEN, individually and on behalf of  
16 E.A., a minor; PATIENCE BURKE, individually  
17 and on behalf of C.B., a minor; and PEYTON  
18 DONALD and TRACY DONALD, individually  
19 and on behalf of A.D., M.D., J.D., and L.D.,  
20 minors,  
21  
22 Plaintiffs,  
23  
24 vs.

25 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.

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E X C E R P T

TRIAL BEFORE THE HONORABLE JOHN C. COOPER  
(Conducted via Videoconference)

DATE: August 27, 2021  
TIME: 10:22 a.m. to 12:34 p.m.  
REPORTED BY: Deborah W. Gonyea, RMR, CRR  
Notary Public, State of  
Florida at Large  
Pages 1 to 86



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1 (The following is an excerpted portion of the  
2 trial proceedings.)

3 P R O C E E D I N G S

4 THE COURT: Okay. Good morning.

5 Okay. I'm late because I just finished  
6 putting in my notes from my last night's writings  
7 on this case, and then for some reason I was  
8 unable to get on Zoom. But I managed to negotiate  
9 that.

10 So give me one more minute and I'll be right  
11 back.

12 (Brief recess taken.)

13 THE COURT: All right. This is actually the  
14 ruling I just pulled out of the printer. So these  
15 are my notes.

16 So, again, good morning everyone. These  
17 are -- these are my notes. This is not something  
18 that I could send and sign, but this is pretty  
19 close to what could be a final written order. And  
20 I would expect the parties writing the order to  
21 take this as their guideline.

22 It may be that there will need to be  
23 grammatical changes or rearranging of various  
24 sections to make them flow better in a written  
25 order. But I would expect to be able to receive a

1 proposed order by Monday. And I would give the  
2 other side another day after that to make a  
3 copy -- I'm sorry -- to make comments. And then I  
4 would like to -- I would like to enter the written  
5 order Tuesday, if at all possible.

6 Excuse me if I take a little while to get  
7 started, but I was up at 2:00 a.m. this morning  
8 ruling, working, rereading, making notes, et  
9 cetera. So this is where I am.

10 Before I forget, I'm officially finding that  
11 the plaintiffs who I left in the case, who we  
12 identified at the motion for -- I'm calling it a  
13 motion for directed verdict; I know there's a more  
14 correct name for it. Motion for order of judgment  
15 of dismissal, I think. They have -- I'm finding  
16 that they have standing. So I didn't want to  
17 forget that before I get into the order.

18 All right. I'm going to read this order and  
19 probably from time to time make comments that are  
20 not scripted or in my notes. And we'll see how  
21 that goes. I will try to be articulate and  
22 relatively slow for the purposes of our court  
23 reporter.

24 And as in a written order you have various  
25 citations and things of that nature, I'm going to

1 read those. So it may not sound very flowing when  
2 I read it, but in part it's because I'm  
3 referencing citations and grammatical marks, et  
4 cetera. Also, some of the citations into the  
5 record and to other parts of the case might be  
6 more appropriately included in footnotes. But I  
7 wasn't sure that reading a proposed order and then  
8 identifying footnotes would be all that helpful.  
9 So, again, that would be left up to the drafters'  
10 discretion.

11 Even -- who's some great writer, which I'm  
12 not. Even Ernest Hemingway had an editor. So --  
13 Maxwell Perkins was his editor, by the way. So I  
14 have no problem with edits, so long as the essence  
15 of the order and most of the details are in the  
16 order.

17 Let me start with you a quote which I think  
18 we should all think about, including those of us  
19 who are on the Zoom, those of us who are online,  
20 on YouTube, those who may read about this case in  
21 the news media. I find that in any intense public  
22 debate there are often emotions and concepts which  
23 show a failure to completely understand the  
24 complete scenario of what we're dealing with.

25 In particular, I find in the last 50, 60

1 years or so, our country has felt that every  
2 problem could be served -- could be solved in a  
3 courtroom. Every problem cannot be solved in a  
4 courtroom. Some problems are solved at the ballot  
5 box. Some are solved in the courtroom. Some are  
6 solved by individual action. But before people  
7 start deciding how they believe about something or  
8 how it's going to affect them, let me tell you --  
9 give you an idea of one of the foundations of our  
10 law as I think it relates to this situation.

11 So here's the quote: Quote, Under the  
12 American system of laws and government, everyone  
13 is required to use and enjoy his own rights as not  
14 to injure others in their rights or to violate any  
15 law in force for the preservation of the general  
16 welfare.

17 That quote comes from a 1914 Florida Supreme  
18 Court opinion called Dutton, D-u-t-t-o-n,  
19 Phosphate Company vs. Priest, 65 So. 282, Florida  
20 1914.

21 It was again restated in a 1939 Florida  
22 Supreme Court, State ex rel. Hosack, H-o-s-a-c-k,  
23 v. Yocum, just like the country singer, Y-o-c-u-m,  
24 136 Fla. 246, Florida 1939.

25 The second quote, coming from the same

1 decisions, 1914 decision originally and repeated  
2 in 1939: The wisdom and necessity, as well as the  
3 policy, of a statute are authoritatively  
4 determined by the legislature. Courts may inquire  
5 only into the power of the legislature to lawfully  
6 enact a particular statute.

7 These two quotes from the Florida Supreme  
8 Court over 100 years ago describe two things: the  
9 balancing of one's own rights with the rights of  
10 others and that, when considering the separation  
11 of powers, court may properly consider whether a  
12 law and, as a logical extension of this quote, an  
13 executive action, was lawfully enacted or  
14 exercised.

15 A governor's executive order and an agency's  
16 actions must be based on authority granted to them  
17 by the constitution or the legislature. Executive  
18 power is exercised -- if executive power -- fifth  
19 edit; I still missed words. If executive power is  
20 exercised without authority, the executive action  
21 is illegal, null and void, and unenforceable.

22 So let me go back and comment this concept of  
23 personal rights. We all have personal rights. We  
24 all enjoy our personal rights. We all zealously  
25 protect our personal rights.

1           We have a personal right, if we so choose --  
2           not my choice, but many do -- to drink alcoholic  
3           beverages in their home if they're over 21 years  
4           of age. We can drink until we're intoxicated.  
5           But we can't get in a -- it's our right to drink  
6           alcoholic beverages if we're over 21, but we  
7           cannot get in our car and start driving around  
8           while we've had alcoholic beverages that impair  
9           our ability to drive. And the reason is not  
10          because of whether the driver's going to hurt him  
11          or herself or not. The reason is the driver  
12          exercising his or her rights to drink is now  
13          putting at risk other people.

14                 So that driver's right to drive intoxicated  
15                 is limited by the government in various criminal  
16                 laws that prohibit driving while under the  
17                 influence of alcohol.

18                 We all have a right to speak our mind, First  
19                 Amendment rights. You've all heard this quote.  
20                 We don't have a right to tell lies about people.  
21                 If we do, then we'll have to respond to that in  
22                 some sort of court action. We don't have the  
23                 right to harass and intimidate people verbally  
24                 because that violates the law. That limits our  
25                 rights. And we don't have a right, to the extent



1       there are crowded theaters anymore -- this in a  
2       few years may be an anecdote that younger people  
3       won't even understand what I'm saying. We don't  
4       have a right to go into a crowded theater and yell  
5       "fire" because we've decided it's our right to do  
6       that. We don't have that right because exercising  
7       the right in that way is harmful or potentially  
8       harmful to other people.

9               Our law and our history as a country going  
10       back 200-plus years is full of examples of rights  
11       that are remedied by the good of others that would  
12       be adversely affected by those rights.

13              So when we talk about absolute and  
14       fundamental rights, there's always a footnote that  
15       is something like, well, let's see if exercising  
16       these rights harms other people. If it does, then  
17       we have to have a discussion.

18              That's what we're having here this week, a  
19       discussion, in part, as to whether people's rights  
20       to not want their children to wear a face mask for  
21       30 or 60 days -- which is what most of these  
22       policies we've been talking about are for --  
23       whether those rights outweigh the risk not wearing  
24       a mask places other children in to catching a  
25       highly contagious and sometimes deadly disease,

1 even for children.

2 So this is not something that I made up.  
3 This has been the law of Florida I know since  
4 1914. It's been the law of Florida for probably a  
5 hundred years before that. These concepts are  
6 contained in the fundamental writings that support  
7 our country. They are contained in the -- all the  
8 founding documents in the country are these  
9 concepts, including separation of powers and use  
10 of rights in such a way as not to harm others.

11 So I say that to the lawyers, to the parties,  
12 and to whoever may be listening to this case. We  
13 will not solve any issue if we can't sit down and  
14 work together and take positions recognizing that  
15 what's going on is not some recent imposition on  
16 someone or some attack on the country. It's what  
17 has gone on at least during my lifetime on many  
18 occasions about many issues. So that's all the  
19 preaching you'll hear from me.

20 So let's go on to the issues before the  
21 Court. The issues in this case are formed by the  
22 pleadings, the evidence presented, contentions of  
23 the parties in the pleadings, and statements and  
24 contentions made by the parties and witnesses and  
25 evidence at trial. Those all come together at the

1 end of a trial and formulate essentially the  
2 issues for the finder of fact -- which is in this  
3 case me; in a jury trial, it's the jury -- to try  
4 to determine.

5 This is not an easy task because I constantly  
6 have to remind myself what my role is. My role is  
7 to primarily try to figure out what the law says  
8 and then enforce it. My role is rarely to decide  
9 what policy should be. However, in our system,  
10 sometimes when a judge has to enforce a rule or a  
11 regulation or a statute for the constitution,  
12 there are policy implications. So they're not as  
13 separate and as cleanly different as one might  
14 think.

15 Before this Court is a dispute between the  
16 governor of Florida, the Florida commissioner of  
17 education, the Florida Department of Education,  
18 and the Florida Board of Education. And I'll call  
19 those the defendants. When I say defendants, I'm  
20 referring to all of those people.

21 Also are involved parents and students in the  
22 Florida public school system, which I'll call the  
23 plaintiffs.

24 The dispute is whether state law permits  
25 local school districts in Florida to adopt and

1 enforce a face mask mandate for students and  
2 staff, staff being teachers and other employees in  
3 the school system.

4 There have been a lot of descriptions for  
5 this. What I think we're talking about is  
6 essentially the contention of the plaintiffs that  
7 the school system should be free to pass a face  
8 mask mandate -- generally this has been considered  
9 in this trial a face mask mandate -- with a  
10 medical opt-out only.

11 The governor and the defendants believe the  
12 correct policy is face mask mandate if you want  
13 to; but if you pass that, there must be a parental  
14 opt-out.

15 So those of you who are drafting this order,  
16 that's what I mean. I might not be that specific  
17 as to each one, but that's where I am.

18 One sidenote that's not in my notes, many of  
19 the witnesses -- there were many very fine -- in  
20 fact, all the witnesses seemed like fine people  
21 and serious. Many of the witnesses who are  
22 parents who testified on behalf of the defendants  
23 had, you know, serious concerns for their  
24 children, children with serious medical issues,  
25 and they were scared about the mask mandate. Most

1 of what I heard, those children would not be  
2 required to wear a mask in school under any  
3 version of the mandate we've been talking about.

4 Doctors have a responsibility for patients.  
5 If, in fact, they have a patient with a legitimate  
6 medical reason not to wear a mask, they should  
7 step up and sign the opt-out paper for those  
8 patients. That's the role -- one of the many  
9 roles our medical community has. You can't just  
10 say, no, I don't want to get involved.

11 Doctors, if you have a patient such as those  
12 I heard described here, you need to do the correct  
13 thing and sign a medical opt-out if that is what  
14 is necessary. Some of these people -- I'm not a  
15 doctor. But they seem to me to be clear medical  
16 opt-out circumstances.

17 But let me now go back on to my notes.  
18 Picking up, the dispute is whether state law  
19 permits local school districts in Florida to adopt  
20 and enforce a face mask mandate for students and  
21 staff. This dispute arises out of the opening of  
22 public schools for the new year and increasing --  
23 and increasing COVID crisis in Florida.

24 This is -- by the way, for those of you, I'm  
25 drawing on my legal rulings and my findings from

1 the facts. I am a factfinder. I am required and  
2 permitted to take the evidence I've heard, draw  
3 inferences from that evidence, and make findings  
4 based upon what I think is the more persuasive and  
5 most credible evidence. So when I give these  
6 statements such as I am, these aren't things I  
7 just dreamed up either. These are things that --  
8 findings I'm making based on the evidence I've  
9 heard, the legal discussions based upon the law as  
10 I interpret it.

11 So the increasing COVID crisis in Florida has  
12 resulted from less than complete vaccination of  
13 the population of Florida and the dominance of a  
14 COVID virus variant referred to as the Delta  
15 variant.

16 The Delta variant has a much higher viral  
17 load and is more contagious than the form of COVID  
18 present in Florida from 2020 until about May or so  
19 of this year. COVID variant became increasingly  
20 dominant in Florida starting around May or so, and  
21 to the present time it is the dominant -- by far  
22 the dominant virus that's being spread in the  
23 state of Florida.

24 Also, the Delta variant presents a higher  
25 risk of infection to children than did the

1 previous form of COVID. This fact places at issue  
2 all medical studies and anecdotal evidence that  
3 says, well, we had no problems last year; we  
4 should have no problems this year. There's a  
5 difference. We had a different, less infectious,  
6 less dangerous form of virus last year than we  
7 have this year.

8 And as the facts change on the ground, the  
9 need, or failure to need, for various measures  
10 will also change. I'm talking about facts on the  
11 ground now as I understand it from the evidence.

12 The combination of lack of vaccination,  
13 decreasing social distancing, and the Delta  
14 variant has resulted in dramatically increased  
15 COVID infections in Florida over the past several  
16 months. Although vaccinated persons do have  
17 significant protection against the COVID variant,  
18 they can still become infected by the COVID  
19 variant. They can also transmit that infection to  
20 children and other people.

21 As a result, the CDC, Centers for Disease  
22 Control, the American Academy of Pediatrics, and  
23 the wide majority of the medical and scientific  
24 community in this country recommend universal  
25 indoor masking for all school students, staff,

1 teachers, and visitors to K through 12 schools  
2 regardless of vaccination status and social  
3 distancing.

4 On April 20 -- April 14, 2021, Commissioner  
5 Corcoran, who's the commissioner of the Florida  
6 Department of Education and, in his official  
7 capacity, the defendant -- and for those who  
8 aren't lawyers, when you sue someone from an  
9 agency in official capacity, that's just another  
10 way of suing the agency.

11 But Commissioner Corcoran on April 14, 2021,  
12 sent a memorandum to all school district  
13 superintendents. The superintendent of a school  
14 district is sort of like the principal of the high  
15 school. They're the in-charge executive officer  
16 of that district. Many are appointed; some are  
17 elected.

18 In that order or memorandum, Defendants'  
19 Exhibit 45, as I read it, he's requesting that the  
20 school superintendents do not implement a mandated  
21 masking policy. He said, With this return -- I'll  
22 read it -- we ask that districts, which currently  
23 are implementing a mandated face covering policy,  
24 revise their policy to be voluntary for the  
25 '21-'22 school year.



1           It's clear to this Court that the issue of  
2           voluntary versus mandated, opt-out versus no  
3           opt-out, masking policies in Florida school --  
4           schools was being considered and studied at least  
5           as early as April of 2021. Remember, at the time  
6           of that memorandum, COVID virus or variant had not  
7           really hit the scene hard. So this was a policy  
8           perhaps dealing primarily with what was viewed as  
9           the former form of the virus. In any event, the  
10          policy consideration was ongoing by that time. I  
11          can't tell you if it started then or not, but it  
12          was ongoing.

13          In late June 2021, the governor of Florida  
14          declared that there was no longer a state of  
15          emergency based on COVID in Florida. You may  
16          recall we had been in that state of emergency from  
17          about March or so 2020 until end of June 2021.  
18          That date was agreed to earlier in this case by  
19          all parties. The governor did this by allowing  
20          the time-limited declaration of emergency order to  
21          lapse without renewal.

22          Under Florida law -- again, I'm speaking off  
23          memory; I stand to be corrected -- the ability to  
24          declare a state of emergency usually lasts for 60  
25          days and then it has to be re-upped in a

1 supplemental order. If you don't re-up it, it  
2 will expire, which is -- my understanding that's  
3 what happened here. Therefore, the governor's  
4 emergency powers under Florida Statute 252 expired  
5 at that point, by the end of June.

6 On July 27th, the governor held a roundtable  
7 meeting on face mask policy. That meeting -- the  
8 video of that meeting was admitted into evidence.

9 At that meeting -- this is my recollection  
10 and notes -- no participant in the meeting --  
11 there were some doctors there. The governor was  
12 there. There was a charter school -- I think he  
13 was a principal, but a higher-up charter school  
14 official from a local charter school. There was  
15 another mother and also charter school employee  
16 there. And there was a high school student who  
17 indicated he and his friends preferred to hang  
18 around without wearing face masks. There may have  
19 been others, but that's my member -- memory of who  
20 was there.

21 No participant at that meeting, this  
22 factfinding meeting, proposed a mandate -- a  
23 mandated face mask policy with no parental  
24 opt-out, such as that being proposed by a  
25 number -- or being implemented by a number of

1 school districts in Florida. No one proposed  
2 that. All proposed a parental opt-out policy. No  
3 one advocated for any CDC recommended policy.

4 In fact, the governor stated, gave his  
5 opinion, that his confidence -- hold on a  
6 second -- that his confidence in some medical  
7 leadership had been shattered. He said they  
8 appear to be, quote, delighted to impose  
9 unspeakable burdens on children. Other than the  
10 fact that it was said in that conference, no  
11 evidence has been produced to support that  
12 statement.

13 Also in the governor's executive order that  
14 was issued a few days later, the governor  
15 expressed doubt about the validity of the CDC  
16 guidance.

17 Remember, the CDC by the overwhelming weight  
18 of evidence is considered the preeminent medical  
19 authority in this country about infectious  
20 diseases. It's the gold standard.

21 The State of Florida has in the past on many  
22 occasions adopted and incorporated CDC guidelines  
23 and recommendations into the state statutes. Here  
24 is an example of just a few. It's not exhaustive.  
25 Florida Statute 465.189, topic is administration

1 of vaccines and epinephrine autoinjection; Florida  
2 Statute 384.23, regarding sexually transmitted  
3 diseases; Florida Statute 381.0031, regarding  
4 epidemiological research, report of diseases of  
5 public health significance to department; Florida  
6 Statute 1002.23, a statute that's been mentioned  
7 quite a bit in this case dealing with student and  
8 parental rights and educational choices. They say  
9 there, that statute, a recommended immunization  
10 schedule in accordance with the United States  
11 Center for Disease Control and recommendations  
12 is -- is referenced and apparently assumed to be  
13 worth including in the statute. Florida Statute  
14 381.005, primary and preventive health services;  
15 Florida Statute 381.0056, school health services:  
16 Each school health advisory committee must, at a  
17 minimum, include members who represent the  
18 right -- the eight component areas of the  
19 Coordinated School Health model as defined by the  
20 Centers for Disease Control; Florida Statute  
21 381.985, screening program, a requirement that  
22 there be adoptive rules to follow established  
23 national guidelines or recommendations such as  
24 those used by the Council of State and Territorial  
25 Epidemiologists and the Centers for Disease

1 Control; Florida Statute 400.141, administration  
2 and management of nursing home facilities,  
3 requiring providing for immunizations against flu  
4 viruses in accordance with the recommendations of  
5 the Centers for Disease Control; Florida Statute  
6 112.181, firefighters, paramedics, EMTs, law  
7 enforcement officers, et cetera, reference to the  
8 Centers for Disease Control; 381.9315, gynecologic  
9 and ovarian cancer education and awareness: State  
10 Surgeon General shall make publicly available, by  
11 posting on the Internet website of the Department  
12 of Health, resources and an Internet website link  
13 to the federal Centers for Disease Control for  
14 gynecologic cancer information; and, finally --  
15 but this is not an exhaustive list; this is just  
16 some of what I found -- Florida Statute 951.27,  
17 blood tests of inmates, requiring a procedure  
18 consistent with the guidelines of the Centers for  
19 Disease Control.

20 So not only do the doctors who testified here  
21 recognize the Centers for Disease Control as the  
22 legitimate reputable source of information, it  
23 appears that over many years so has the Florida  
24 legislature.

25 So let's go back. At that July 27th

1 meeting -- I made some notes -- there was one  
2 presenter there, I believe his name was Meissner,  
3 who stated that masks were not worn to protect  
4 wearers of the mask. This is clearly contrary to  
5 evidence presented at the trial here. He said  
6 that harm is done to children with masks.

7 A psychiatrist, I think his last name was  
8 McDonald, said masking is child abuse. He said  
9 there is no evidence that masking protects against  
10 COVID.

11 There's a lot of evidence that was presented  
12 here, including CDC studies, including the April  
13 21st, two thousand -- April -- the May 21st, 2021,  
14 CDC study that's Exhibit 48. I'll get back to  
15 that in a minute.

16 Dr. McDonald also said not a single child has  
17 benefited from wearing a mask. All children have  
18 been hurt. He is appalled, he said. Every  
19 thoughtful, rational adult knows children  
20 shouldn't be masked. He said children cannot  
21 transfer COVID to adults. Again, another fact  
22 that's disputed by the science. Masks do nothing  
23 to help medically, and they destroy the country.

24 So that's not everything that was said there.  
25 I thought the governor's remarks were much more

1 temperate than some of the other participants',  
2 but that's what was said there.

3 One study -- I'm not going through every  
4 piece of evidence. I'm highlighting some issues.  
5 One study, Exhibit -- Defendants' Exhibit 48,  
6 which was a study in -- I think it was a CDC study  
7 involving Georgia. What was read to a couple of  
8 the plaintiffs' witnesses and they were asked for  
9 this comment, I think it was this sentence:

10 quote, The 21 percent lower incidence in schools  
11 that recommend mask use among students was not  
12 statistically significant compared to the schools  
13 where mask use was optional. And the witnesses  
14 recall -- comment on that.

15 The clear implication made in that  
16 cross-examination was, here's a CDC study that  
17 doesn't even recognize that masks work. What was  
18 not read was the rest of the study.

19 Directly following that sentence -- it's a  
20 little bit lengthy, but I'm going to read it. It  
21 says, This finding might be attributed to higher  
22 effectiveness of masks among adults, who are at a  
23 higher risk for SARS-CoV-2 infection, but might  
24 also result from differences in mask-wearing  
25 behavior among students in schools with optional

1 requirements. Mask use requirements were limited  
2 in this sample; 65.1 percent of schools required  
3 teacher and staff member mask use and  
4 approximately one-half, 51.5 percent, required  
5 student mask use. Because universal and correct  
6 use of masks can reduce COVID -- I'm substituting  
7 "COVID" for the technical science term "SARS."  
8 Let me repeat this. Because universal and correct  
9 use of masks can reduce COVID transmission and is  
10 a relatively low-cost and easily implemented  
11 strategy, findings in this report suggest  
12 universal and correct mask use is an important  
13 COVID-19 prevention strategy in schools as part of  
14 the multicomponent approach.

15 This is not a plaintiffs' exhibit. This is a  
16 defendants' exhibit.

17 Also, one last thing this report said in its  
18 summary, they noted that COVID infection was 37  
19 percent lower in schools that required teachers  
20 and staff members to use masks.

21 So this study, which was presented by the  
22 defendants to me, wasn't presented to the governor  
23 at that meeting in which they were stating they  
24 were trying to decide what to do. But the  
25 governor was told that use of masks is child abuse



1 and bringing harm to every child in the country.

2 I've seen no scientific evidence of that to  
3 support that statement in this case.

4 So after the meeting, the governor three days  
5 later issued Executive Order 21-175. This order  
6 began the formulation of a policy, and enforcement  
7 by the defendants, that local school districts in  
8 Florida could not adopt a face mask mandate unless  
9 it provided for a parental opt-out.

10 This is also reflected in the defendants'  
11 seventh affirmative defense filed in this case  
12 which says, quote, The Parents' Bill of Rights  
13 precludes school boards from implementing  
14 categorical mask mandates that do not allow  
15 parents to opt their children out of the  
16 requirement, end quote. We're going to get to the  
17 Parents' Bill of Rights. But this seventh  
18 affirmative defense does a good job of stating  
19 exactly one of the big disputed issues in this  
20 case. I'll get to that later.

21 Continuing, the executive order, based on the  
22 evidence and inferences from the evidence  
23 presented to me, was a continuation into a policy  
24 disfavoring the no opt-out mask mandates and the  
25 means to accomplish this was going to be through

1 the Parents' Bill of Rights, which is clearly  
2 evident from the executive order and confirmed by  
3 the affirmative defense.

4 Under other provisions of the executive  
5 order, it cited to a study which it said found no  
6 correlation with face masks. This study is known  
7 and called in the order the Brown University  
8 study. It was not peer-reviewed and its own --  
9 its own authors have expressed doubts as to its  
10 use. That study's in evidence. All I have to do  
11 is find it. It's Exhibit -- I believe it is  
12 Exhibit 19 and -- yes. Exhibit 19.

13 Here's a quote from the people that wrote the  
14 study: Quote, We caution that our analysis  
15 focuses only on correlations, and it is  
16 challenging to make causal statements. In the  
17 case of masking in particular, we focus on  
18 mandates and not on actual behavior. Masking is  
19 likely correlated with mask mandates, but it is  
20 also likely that some individuals mask even in the  
21 absence of a mandate and that there is imperfect  
22 compliance even with a mandate. In addition,  
23 while we control for community rates, we do not  
24 control for community mitigation practices, which  
25 would also impact behavior and rates in schools.

1           This paper adds to our understanding of the  
2 relationship between COVID mitigation and school  
3 safety in the U.S., and they cite about four  
4 different studies. We would emphasize that in  
5 general this literature suggests in-person school  
6 can be operated safely with appropriate  
7 mitigation, which typically includes universal  
8 masking. It would be premature to draw any  
9 alternative conclusions about this question based  
10 on this preliminary data.

11           This study doesn't say masking is not  
12 effective. In fact, it recommends universal  
13 masking. And it says that it's premature to state  
14 anything otherwise.

15           Also, they say in the study right above the  
16 section called discussion, It is important to note  
17 that this -- this is the long discussion in the  
18 paper -- does not imply masks are ineffective, as  
19 these results focus only on masking in schools and  
20 do not take community behavior into consideration.  
21 Additionally, as noted above, we focus only on  
22 mask mandates and not actual masking behavior.

23           So the Brown report said that it had analyzed  
24 COVID data and found no correlation with mask  
25 mandates. If that's true, why did the Brown

1 report recommend that universal masking was still  
2 the way to go?

3 Now, I don't say that the governor has time  
4 enough to read a report that's that thick. But  
5 his advisors do. So the statement in the  
6 executive order is just incorrect. That study  
7 does not find no correlation with mask mandates.

8 What I read to you is a defense exhibit, not  
9 a plaintiffs' exhibit.

10 So, going back to the executive order, the  
11 order showed lack of support for CDC guidance on  
12 face masks -- I don't think there's any dispute  
13 about that -- and stated that face masks may have  
14 negative health and societal ramifications. Most  
15 importantly, the order noted the applicability of  
16 a new statute called the Parents' Bill of Rights.  
17 The order -- we'll talk about that more in detail.

18 The order directed certain actions which were  
19 premised on enforcing the Parents' Bill of Rights,  
20 which would result in a blanket banning in advance  
21 of all school board mask mandates if there was no  
22 parental opt-out. The most likely way to  
23 accomplish this was to institute a policy that  
24 would likely result in a violation of the Parents'  
25 Bill of Rights. Parents' Bill of Rights is a law

1 that was passed by the legislature this year.

2 The defendants contend that the executive  
3 order -- this is what the defendants have stated  
4 in their motion to dismiss. They stated this:  
5 Quote, The executive order requires that any rules  
6 adopted by either agency be in accordance with the  
7 Parents' Bill of Rights and task the commissioner  
8 of education with ensuring school districts adhere  
9 to the Florida law.

10 This is significant only in that when you're  
11 trying to interpret a statement made by a  
12 defendant, that when the defendants tell you what  
13 they think it means, it's a relative -- it's a  
14 relevant consideration. It doesn't mean it's  
15 be-all-end-all. But it's relev- -- rel- --  
16 relevant to consider.

17 Let me ask the court reporter, how are we  
18 doing?

19 THE REPORTER: (Indicating.)

20 THE COURT: You tell me when you need a  
21 break. Sound off because I might not look up  
22 enough.

23 The defendants also contend that the state  
24 Board of -- state Board of Education can, quote,  
25 be consistent with its supervisory -- let me see.

1 This is one I did at 2:00 in the morning. Let me  
2 see if this makes any sense. Quote, The state  
3 Board of Education can -- I think I meant to put  
4 be consistent with its supervisory powers under  
5 Article IX, Section 2 of the Florida Constitution,  
6 can enforce the rule and the Parents' Bill of  
7 Rights through its discretionary application of  
8 its statutory enforcement powers under Section  
9 1008.32 Florida Statutes. That's apparently  
10 what's being done from -- we know in the Alachua  
11 County and the Broward County case.

12 Defendants also have contended at page 31 in  
13 their motion to dismiss that under the Bill of  
14 Rights, quote, Parents, not school boards, have  
15 the discretion to choose whether their children  
16 will wear a mask in school, end quote.

17 I don't think this is a surprise. I think  
18 that's been the consistent position from the April  
19 14th letter to the school superintendents, through  
20 the roundtable meeting, through the order, and  
21 into this case.

22 As I will discuss later, this statement is  
23 actually a misstatement of the provisions of the  
24 Florida Statute.

25 The executive order directed the Florida

1 Department of Health and Florida Department of  
2 Education to work together to immediately execute  
3 rules to take any additional agency action  
4 necessary to ensure safety protocols for  
5 controlling the spread of COVID.

6 Now, one might argue that there was no need  
7 for an emergency action, but that issue hasn't  
8 really been raised or focused on enough for me to  
9 make any findings regarding that. So I will not  
10 make findings on whether it was properly an  
11 emergency rule or not. I just -- that's not been  
12 briefed and it was not on my scope of things to  
13 review.

14 This direction from the executive order was  
15 interpreted by the agencies as a direction to pass  
16 a regulation that put into effect the executive  
17 order, which they did. Florida Department of  
18 Health, after consultation with the Department of  
19 Education, passed an emergency rule, 64DER21-12,  
20 which said, quote, This emergency rule conforms to  
21 Executive Order 21-175. It incorporated the  
22 executive order by reference into the regulation.  
23 The regulation itself stated, quote, that any  
24 COVID-19 mitigation actions taken by school  
25 districts comply with the Parents' Bill of Rights

1 and protect parents' rights to make decisions  
2 regarding masking of their children in relation to  
3 COVID-19.

4 There's really no doubt that the executive  
5 order had two functions: prohibit parent  
6 opt-out -- I mean, sorry -- prohibit -- or  
7 encourage parent opt-out or require parent opt-out  
8 and do it by enforcing the Parents' Bill of  
9 Rights. Again, a consistent theme we've heard  
10 throughout the case and in the record.

11 Among other provisions, the emergency rule  
12 said, quote, The school must allow for a parent or  
13 legal guardian of the student to opt-out the  
14 student from wearing a face covering or mask, end  
15 quote.

16 Defendants' motion to dismiss at page 33  
17 said, quote, Neither the executive order nor the  
18 rule require that unvaccinated or non-masked  
19 students attend school. Rather, they seek to  
20 ensure that school boards are complying with the  
21 Parents' Bill of Rights, leaving the decision of  
22 masking of children to the children's parents, end  
23 quote. Consistency all the way through.

24 The regulation of the Department of Health  
25 accurately reflects the defendants' position as



1 just stated, and actions of the defendants so  
2 taken is reflected in the evidence and is a direct  
3 result of the executive order.

4 In addition, the defendants have acted to  
5 threaten and impose sanctions on school districts  
6 if they do not comply with the defendants'  
7 directions. Defendants confirmed this in their  
8 motion to dismiss at page 31 when they said,  
9 quote, School boards still have the option, albeit  
10 with consequences, to categorically mandate  
11 without exception. The executive order tasked  
12 agencies to draft rules and the school board to  
13 enforce the laws and rules, end quote.

14 When you say you can do whatever you want but  
15 there's going to be consequences if you do, that's  
16 a threatened enforcement action.

17 Thus, the governor, the commissioner, the  
18 Florida Department of Education and the Florida  
19 School Board of Education, by seeking to threaten  
20 enforcement of the executive order, have directed  
21 that school boards may not under any circumstance  
22 enact a face mask mandate unless it includes an  
23 opt-out provision for the parents -- again,  
24 there's no doubt about that -- pursuant to, they  
25 say, the Parents' Bill of Rights.

1           Again, seventh affirmative defense by the  
2 defendants, quote, The Parents' Bill of Rights  
3 precludes school boards from implementing  
4 categorical mask mandates that do not allow  
5 parents to opt their children out of the  
6 requirement. The executive order, it's required  
7 the application of the Parents' Bill of Rights to  
8 the mandate issue and that that has been  
9 interpreted by the defendants in this case, both  
10 in their actions and by their explicit statement  
11 in an affirmative defense, that that means there's  
12 a categorical ban on mask mandates that do not  
13 allow a parent opt-out.

14           Department of Health issued its rule after  
15 consulting with the Department of Education. The  
16 rule confirms this consultation and the defendants  
17 accept this by stating in their motion to dismiss  
18 at page 9, quote, In accordance with the executive  
19 order, the Department of Health, after  
20 consultation with the Department of Education,  
21 promulgated the rule, end quote. The executive  
22 order was for the purpose of using the Parents'  
23 Bill of Rights to block all or no parent opt-out  
24 face mask mandates. That was the purpose of the  
25 executive order, and it did it by referencing the

1 Bill of Rights and the sequence of events it set  
2 into effect, as raised in the April 14th  
3 memorandum and the July 27th, '21, roundtable.

4 The plaintiffs contend, for various reasons  
5 set forth in the pleadings, the evidence, and  
6 attorneys' presentations in their motion to  
7 dismiss hearing and trial, that the executive  
8 order, which directed and became incorporated into  
9 the express per se no exceptions anti-mask mandate  
10 with no parental opt-out, is unconstitutional,  
11 illegal, without authority and unenforceable.

12 The enforcement action of the defendants, as  
13 noted in the August 20, '21, press release from  
14 the Department of Education, interestingly noted  
15 that both the executive order and the Department  
16 of Health rule directed this enforcement. It said  
17 each order -- again, these are 2:00 in the morning  
18 notes, so I'll defer to the actual exhibits. It  
19 said each order, executive order and Department of  
20 Health rule, requires school -- school district to  
21 document compliance with the Parents' Bill of  
22 Rights and the DOH rule. Even after the DOH rule  
23 was adopted, the department is still using the  
24 executive order as a means of enforcement of its  
25 no mandate without a parent opt-out policy.

1           So that's the background.

2           The parties have asked me, however, to come  
3 up with some resolution to this dispute.

4           Court reporter, you still okay?

5           THE REPORTER: (Indicates affirmatively.)

6           THE COURT: Am I talking too fast for you?

7           THE REPORTER: (Indicates negatively.)

8           THE COURT: Okay.

9           I'm going to go into some discussion of what  
10 I have referred to as some fairly sophisticated  
11 legal issues.

12           One is called the separation of powers. The  
13 defendants have raised the separation of powers as  
14 a defense in this case, stating that the actions  
15 of the defendants were within their authorized  
16 discretionary authority. So I'm going to analyze  
17 what that is and how that applies to this case.

18           I would note that there are a number of cases  
19 in which I have enforced the separation of powers,  
20 as argued by the State in those cases, to bar  
21 recovery from -- sought by the plaintiffs in those  
22 cases.

23           The defendants argue that the plaintiffs seek  
24 relief, they would violate the separation of  
25 powers. The doctrine of separation of powers is

1 set forth in Article II, Section 3 of the  
2 constitution, Florida Constitution. It's also  
3 stated in one of the papers that Hamilton and  
4 Madison wrote, the Federalist Papers, it's in  
5 there. I think there was a writer -- I may get --  
6 I may butcher his name, Montesquieu -- from  
7 England who talked about separation of powers  
8 before the Madison -- the Federalist Papers talked  
9 about separation of powers.

10 This is a longstanding governmental concept  
11 both in the United States and in the state of  
12 Florida. This is not new. I didn't invent it.  
13 And it's been discussed a lot in -- by the  
14 appellate courts and the Florida Supreme Court.

15 The separation of powers provides that the  
16 powers of government shall be divided into  
17 legislative, executive, and judicial branches. No  
18 one belonging to one branch shall exercise any  
19 powers appertaining to either of the other  
20 branches unless expressly provided herein. As it  
21 relates to the judiciary, the separation of powers  
22 concept stands for the proposition that the  
23 judicial branch must not interfere with the -- and  
24 I underlined this word -- authorized discretionary  
25 functions of the legislative or executive branches

1 of government absent violation of constitutional  
2 or statutory rights.

3 Now, those of you who are Law Review people  
4 are going to hate I'm citing Florida Jur, but I'm  
5 going to cite Florida Jur for this. That is 10  
6 Fla. Jur. 2d Constitutional Law Section 158.  
7 That's also referenced in Florida Department of  
8 Children and Families vs. J.B., 154 So.3d 479 at  
9 481, Florida Third District Court of Appeal 2015,  
10 wherein they said, among other things, the  
11 judicial branch must not interfere with  
12 discretionary functions of the legislative or  
13 executive branches of government absent a  
14 violation of constitutional or statutory rights.

15 Let me rephrase that in plain English. A  
16 court can't interfere with the functions of the  
17 legislative or the executive unless there's been a  
18 violation of the law. That's what that means.

19 Also Forney, F-o-r-n-e-y, v. Crews, 112 So.3d  
20 741 at 743, Florida First District Court of Appeal  
21 2013 -- that's the district that we're in and the  
22 one that I'm required by law to look to first to  
23 see if there's any law on issue -- says that a  
24 court cannot dictate the operation -- in this case  
25 it was the state prison system -- so long as no

1 law was violated.

2 In other words, the courts will not  
3 substitute their judgment with reference to  
4 matters properly within the domain of the  
5 legislative and executive branches of government.

6 However, the separation of powers just  
7 doesn't flow one way. It flows three different  
8 ways at the same time. The governor nor the  
9 executive agencies are permitted to substitute  
10 their judgment for the legislature or for any  
11 other governmental agency that has been given  
12 discretionary power, nor can they perform the  
13 function of the legislature.

14 By the assertion of the separation of powers  
15 as an affirmative defense in this case, the  
16 defense is now required to show that the action  
17 challenged -- here the executive order and the  
18 blanket prohibition of mask mandates with only a  
19 medical opt-out by school boards -- and related  
20 enforcement actions is within the powers of the  
21 defendants as provided by the constitution or by  
22 the legislature by the statute.

23 Here the defendants argue that they are  
24 entitled to deference provided by the separation  
25 of powers doctrine because they are exercising

1 their authority, their authority to act. This is  
2 something they must prove. If their actions are  
3 not authorized by the constitution or the  
4 legislature, then they have no authority to take  
5 that action and they are not protected by the  
6 separation of powers doctrine and their actions  
7 are invalid as being taken without authority.

8 The First District Court of Appeal in  
9 DeSantis vs. FEA -- let's see if I have this. The  
10 cite is 306 So.3d 1202, Florida First District  
11 Court of Appeal 2020.

12 For those of you who aren't lawyers, that's  
13 the case we've been talking about as the case from  
14 last year.

15 In that case they held that the governor was  
16 acting in accordance with his emergency powers  
17 pursuant to Florida Statute 252.36(1)(b) because  
18 he had declared a state of emergency to address  
19 the COVID pandemic. Thus, the governor in that  
20 case had authority, according to that court, to --  
21 under the declared state of emergency to issue  
22 executive orders to address the pandemic in  
23 accordance with the Emergency Procedures Act.

24 Further, the court in DeSantis held that by  
25 using the authority, the governor could delegate



1 powers to the education commissioner to develop a  
2 safety plan to safely open the schools.

3 This was a -- the contention was that the  
4 State said that they would pay more for an  
5 out-of-school student than normally the rules  
6 required so as not to result in a financial hit to  
7 the school boards around the state because a lot  
8 of the students were staying home and being  
9 educated by the computer. And in return for that,  
10 the State says, you don't have to do it; but if  
11 you want this program, you have to open a  
12 brick-and-mortar school in your district.

13 That was contested by the First District, and  
14 the First District says that was not a requirement  
15 that the schools do anything. It wasn't -- also  
16 it was not a ban or an order that the schools not  
17 do a particular thing. And the First District  
18 said that was within the separation of powers  
19 doctrine, and the governor had powers to do that  
20 because, because we were in a state of emergency.

21 In this case now, the state of emergency has  
22 lapsed in June of 2021 before this executive order  
23 was issued. Thus, the governor did not have  
24 emergency powers pursuant to Chapter 252, which  
25 the First District found were the basis for the

1 order at issue in the DeSantis case last year.  
2 Because the governor had no emergency powers, then  
3 the other defendants must look to some other  
4 authorization in statute or the constitution to  
5 provide authority to defendants to act, to enforce  
6 a blanket ban on a mask mandate.

7 They've not shown me any convincing authority  
8 in the constitution or any other statute, except  
9 the authority they consistently point to is the  
10 Florida Parents' Bill of Rights law. We'll talk  
11 about that in amendment -- in a minute.

12 If they do not show that they had authority  
13 to take these actions, executive orders and all  
14 the things that it ordered and led to, they don't  
15 have -- a separation of power defense is not  
16 available to them, and the order and actions taken  
17 are without authority and null and void.

18 A subset of that, which is another defense  
19 raised by the defendants in affirmative defense,  
20 is called the political question defense. The  
21 political question defense is a form of separation  
22 of powers. I'm not going to repeat all the  
23 analysis I just stated above, but that applies to  
24 the political question defense.

25 The First District Court of Appeal in

1 DeSantis noted that the nonjusticiability of a  
2 political question is primarily a function of the  
3 separation of powers. The political question  
4 doctrine, however, must be cautiously invoked, and  
5 the mere fact that a case touches on the political  
6 process does not necessarily create a political  
7 question beyond the court's jurisdiction. The  
8 judiciary can review a question even though  
9 questions of policy are involved. This situation  
10 may just affect the scope of the review, but it's  
11 still appropriate to do.

12 Again, 10 Fla. Jur. 2d Constitutional Law  
13 Section 157, the defendants are authorized --  
14 sorry. Bad edits. If the defendants' executive  
15 order and related actions are ultra vires,  
16 u-l-t-r-a v-i-r-e-s -- that's a fancy legal term  
17 that means without authority and law. An ultra  
18 vires act and law is an act that's without  
19 authority to do and therefore not authorized. If  
20 they -- if their actions are ultra vires, they are  
21 without legal basis and therefore null and void.

22 This isn't new. I didn't invent this. This  
23 was old law when I was in law school, and that was  
24 45 years ago. So this isn't something that I came  
25 up with.

1           Thus, the defenses of separation of powers  
2           and political question are not available if there  
3           is no authorized statutory basis for these powers.

4           Going back, then, to the Florida Bill --  
5           Parents' Bill of Rights.

6           Before I get to that, let me make some notes.  
7           I'm not going to grant relief under the count  
8           relating to what's called the home rule doctrine.  
9           I'm going to give you some broad-stroke points on  
10          local control. But this is -- this is intertwined  
11          [sic] and in between -- between cases, statutes,  
12          and court decisions that -- and decisions,  
13          multiple decisions of the First District that I  
14          don't feel comfortable granting relief based on  
15          that. But I'm going to give you a brief page or  
16          so of comments on that.

17          There has been discussion for many years in  
18          many cases regarding the sometimes competing roles  
19          of the local school board and the State of Florida  
20          in operating public schools. For example, Article  
21          IX, Section (b) -- that's little B in  
22          parentheses -- of the Florida Constitution says,  
23          in pertinent part, quote, The school board shall  
24          operate, control, and supervise all free public  
25          schools within the school district, end quote.

1            Yet the Florida Supreme Court in *Citizens v.*  
2            Florida State Board of Regents [sic], 262 So.3d  
3            127 at 137 (Florida 2019) quoted from an earlier  
4            decision in *Coalition vs. Chiles*, 680 So.2d 400,  
5            408 (Florida 1996) -- so that's 25 years ago --  
6            quote, We hold that the legislature has been  
7            vested with enormous discretion by the Florida  
8            Constitution to determine what provision to make  
9            for an adequate and uniform system of free public  
10           schools, end quote.

11           In both those cases, the court, the way I  
12           read them, was dealing with a claim that the  
13           legislature had failed to sufficiently fund the  
14           public schools. In general, funding decisions by  
15           the legislature have been granted substantial, as  
16           you can tell from these two cites, substantial  
17           deference by the appellate courts in Florida.

18           However, the issue here is not whether the  
19           state has adequately funded the school system.

20           Last year, the First District Court of Appeal  
21           said in the *DeSantis vs. FEA* case, quote, Whatever  
22           the outcome of appellees' lawsuit, the choice of  
23           how to deliver education to students remains with  
24           Florida's school boards, end quote, 306 So.3d  
25           1202, 1214 (Florida First DCA 2020).

1           Although the State retains responsibility for  
2           establishing a system of public education through  
3           laws, standards, and rules to assure efficient  
4           operation of a system of public education, the  
5           school -- the state constitution states that each  
6           county constitutes a school district.

7           Responsibility for the actual operation and  
8           administration of all schools within the districts  
9           appears to be delegated by law to the school of  
10          the respective districts. In this regard, all  
11          public schools conducted within the district are  
12          under the direction and control of the district's  
13          school board, 46 Fla. Jur. 2d, schools,  
14          universities, and colleges, Section 19.

15          Here's a little bit of the rub here in my  
16          case. Although subject to the Parents' Bill of  
17          Rights, the setting of local policies for health  
18          and safety of students substantially remains a  
19          local function, I think. And I add "I think"  
20          because the case law to my mind is still all over  
21          the place on this.

22          Florida is a large state, including small,  
23          rural communities to large, densely populated  
24          counties. What is appropriate in one county may  
25          not be appropriate in another county. Thus, a

1 one-size-fits-all policy for student health and  
2 safety as dictated by Tallahassee, in other words,  
3 by the State, runs contrary to Article IX, Section  
4 4(b) of the Florida Constitution.

5 If that were literally true, then somebody  
6 would have challenged the constitutionality of the  
7 Florida Bill of Rights, which I'll talk about in a  
8 minute. But no one has.

9 I have ruled in cases, and been affirmed by  
10 the First District, that various levels of school  
11 reform relating to how teachers are paid, all  
12 sorts of things, extensive school reform, was --  
13 did not violate Article IX, Section 4(b).

14 I ruled a year or two ago that the  
15 legislature's bills regarding charter schools  
16 didn't violate Section IX 4(b). They agreed with  
17 me on that. But they didn't agree with me that  
18 the school boards had standing to file suit to  
19 contest the constitutionality of those bills. So  
20 I was reversed on the standing question and  
21 affirmed on the -- what I call the separation of  
22 powers local control question.

23 I just have to say that the law is not clear  
24 and certain enough for me to rule to grant relief  
25 under -- hold on -- Count -- just a second. I

1 think it's Count I. Let me see. No. Under Count  
2 II. I am going to decline the invitation to grant  
3 relief pursuant to Count II of the complaint.

4 Again, this may be something the parties want  
5 to appeal and maybe the law can be clarified on  
6 this point. But I don't feel it's certain enough  
7 from my standpoint to grant relief.

8 Anyway, analysis --

9 Still okay, court reporter?

10 THE REPORTER: (Indicates affirmatively.)

11 THE COURT: Okay.

12 Anybody need a break?

13 Okay. Analysis of Florida's -- Florida  
14 Parents' Bill of Rights. I'm sure I eventually  
15 will butcher this name. I may call it the police  
16 bill of rights. No telling what I'm going to call  
17 it. But I'm referring to the Florida Bill of  
18 Rights.

19 As this case has proceeded, the Florida Bill  
20 of Rights -- I'm sorry. The Florida Parents' Bill  
21 of Rights and its use to effect the anti-mask  
22 policy has become the focal point. In this case,  
23 a new law called the Parents' Bill of Rights,  
24 which is now known as Florida Statute Sections  
25 1014.01-.016 (2021) -- it's so new that it's not



1 even on my statutory statute cite online of  
2 Florida laws. And it is also described as -- it's  
3 in my notebook here. Hold on. Here we go. It's  
4 described as Chapter 21-199, House Bill Number  
5 241.

6 This bill was passed this year by the Florida  
7 legislature. I believe I recall I saw that the  
8 governor, in fact, did sign it. I believe the  
9 governor did sign the bill. And it took effect  
10 July 1, 2021, about 26 days before the roundtable  
11 and about 29 days before the executive order.

12 Yes.

13 This is a brand-new law. There is no  
14 appellate decision, when I last checked, which was  
15 a couple days ago, interpreting this law. It's  
16 now about seven weeks old. There's one lawsuit in  
17 Jacksonville, a circuit lawsuit, brought pursuant  
18 to this law against the school over there. But as  
19 far as I know, there's been no court rulings which  
20 give interpretation on that case. That's all I've  
21 been able to find.

22 So it's up to me. It's my job, not the job  
23 of any witness in this case, it's my job to  
24 interpret the Florida Bill of Rights. Then at  
25 some point it may be up to the appellate court to

1       decide if they agree or disagree with my  
2       interpretation.

3               So it's important to note that the Florida  
4       Bill of Rights was not in effect when the First  
5       District Court of Appeal decided the DeSantis vs.  
6       FEA case. So that's one point of distinction  
7       between the cases.

8               Another point of distinction between the  
9       cases is that there is no -- there was no state of  
10      emergency in effect when the executive order was  
11      issued as there was in the DeSantis case.

12              A third point of distinction is the DeSantis  
13      case said that the order in that case did not  
14      require the school districts to do anything. In  
15      this case, the order and the consequences it set  
16      up and directed resulted in ordering the school  
17      districts to not pass a mandate with no parental  
18      opt-out. If you do do that, as was stated, there  
19      will be consequences. And we've already seen that  
20      that's happening now.

21              So here's the issue. What does the Bill of  
22      Rights say and what does it authorize people to  
23      do? Well, I read the Bill of Rights. I think I'm  
24      on my seventh or eighth reading. I read it again  
25      last night, at about 1:15 this morning. I've read

1 the legislative history. It seems to be  
2 consistent with my reading of the statute. Now,  
3 granted, if the plain reading of the statute is  
4 clear and you can interpret it, it's really  
5 improper to try to rely on outside legislative  
6 history because that's written by one or two  
7 people that may or may not be valid. I'm just  
8 saying it seems to agree with what -- how I read  
9 it.

10 So the provision of the law that is most  
11 relevant here is Florida Statute 1014.03. And  
12 it's called -- the title of it is infringement on  
13 parental rights. It says, The state or any of its  
14 political subdivision or any governmental unit --  
15 that would cover school boards; that is any  
16 governmental unit -- or any other institution may  
17 not infringe on the fundamental rights of a parent  
18 to direct the upbringing, education, health care,  
19 and mental health of his or her minor child.

20 Now, what I've heard in this case, that's  
21 where the reading has been stopped by the  
22 defendants in this case. Here's what the rest of  
23 it says: cannot infringe on fundamental rights on  
24 education and health care without demonstrating  
25 that such action is reasonable and necessary to

1       achieve a compelling state interest and that such  
2       action is narrowly tailored and is not otherwise  
3       served by a less restrictive means.

4               So what that law says -- this is how I  
5       interpret it -- is normally you can't interfere  
6       with the rights of parents to direct schooling and  
7       education unless there's a reasonable basis to do  
8       so, that your action is reasonable and it's a  
9       legitimate reason to do so that's of interest  
10      throughout the state, that you narrowly tailor it  
11      so you don't get excessive on what you're doing,  
12      and there's no other less restrictive means to  
13      accomplish that.

14              So what does that mean here? It doesn't ban  
15      mask mandates at all. It doesn't require that a  
16      mask mandate must exclude a parental opt-out at  
17      all. What it does do is say, if someone disagrees  
18      with a policy that's been adopted, then they can  
19      bring an authorized proceeding or review, whatever  
20      is required by the Florida law, to say to the  
21      school board, say, okay, show me how this is  
22      reasonable, show me how this is necessary to  
23      achieve a compelling state interest, and show me  
24      that it's narrowly tailored.

25              For example, if you have a mask mandate, if

1 it said the mask mandate applies to all school  
2 students and all alumni, eh, that might be not  
3 narrowly tailored. If it says it shall apply for  
4 the next three years, that would probably be not  
5 otherwise served by less restrictive means.

6 There's any number of examples you can come to.

7 But that's what the Bill of Rights means. It  
8 does not authorize the governor or the Department  
9 of Education, state Board of Education to say to  
10 schools: You cannot adopt a blanket face mask  
11 policy unless it has a parental opt-out. It does  
12 not say that.

13 What it does say is that if you do that, it  
14 has to be reasonable, support a state purpose, has  
15 to be narrowly drawn and not otherwise  
16 accomplished by some other means.

17 So let me go -- pick back up on my notes. I  
18 was freewheeling then, as you can tell. So let me  
19 go back to my notes.

20 For example, this law doesn't violate -- or  
21 doesn't make illegal other laws in Florida  
22 relating to mandatory vaccines. There are some  
23 opt-outs for religious reasons or medical reasons  
24 for mandatory vaccines by the statute. But  
25 Florida -- the Florida legislature -- this is one

1 of the reasons it gave me pause on the remedy  
2 under Count II. Florida legislature passed 100 --  
3 this is from memory -- 2 or 3 point something,  
4 that says you have to take six or seven different  
5 vaccines for polio and all these mumps, measles,  
6 et cetera. You have to take those vaccines before  
7 you even get in the front door of a school in  
8 Florida.

9 Now, there are -- as I understand, there are  
10 some religious opt-outs, and I would not be  
11 surprised if there are not some sort of health  
12 opt-outs. There probably are people that have  
13 deep allergic reactions to certain things and they  
14 shouldn't be taking them.

15 But in general, that law is much more an  
16 infringement on parents' rights to control the  
17 health of their children than a face mask policy.  
18 That's sticking a needle in their arm and putting  
19 a vaccine in there that's going to, you know, for  
20 example, polio, mumps, and measles, going to  
21 affect them the rest of their life. There's no  
22 undoing those vaccines once they go in.

23 So I will tell you anecdotally, when I came  
24 to FSU in 1968, for some reason I had escaped  
25 having a smallpox vaccination. I had to go to

1 Dr. Simmons' office in Auburndale, Florida, and  
2 get a smallpox vaccination because it was required  
3 that I get that before I got into FSU.

4 So that's one example of how you weigh these  
5 competing interests and the reasonableness of the  
6 law that does actually infringe, at least in part,  
7 on parental rights.

8 Here's another example. There's a chapter of  
9 law in Florida called Chapter 39. Chapter 39 sets  
10 forth procedures in cases which we call child  
11 dependency cases. And the purpose of that law is  
12 to provide for care, safety and protection of  
13 children, to ensure secure and safe custody of  
14 children, and to prevent child abuse, neglect and  
15 abandonment. This statute passed by the Florida  
16 legislature states that, quote, The health and  
17 safety of children served shall be of paramount  
18 concern, end quote. That law permits under court  
19 supervision children to be removed from their  
20 parents temporarily and in some cases permanently.  
21 It requires -- it allows the court to order  
22 medical care, psychiatric treatments. It requires  
23 the court to have the child go through various  
24 programs and counseling, requires the parents to  
25 go through programs and counseling, all of which

1 violates the parents' right to control their  
2 child. But they don't have the right to harm  
3 their child, which is the, you know, underpinning  
4 of Chapter 39. There are dependency court  
5 proceedings going on right now in every county of  
6 the state of Florida.

7 So, therefore, another example of how, yes,  
8 parents' rights are very important. I'm a parent.  
9 Parents' rights are very important. But they're  
10 not without some reasonable limitation depending  
11 upon safety and reasonableness and compelling  
12 state need usually regarding health care or  
13 condition of the child.

14 The Parents' Bill of Rights expressly gives  
15 governmental entities -- school board's a  
16 governmental entity -- to adopt policies  
17 concerning health care and education of children  
18 in school, that expressly they have the right to  
19 do that, even if those policies affect the  
20 parents' rights to make decisions in those areas.  
21 This statute allows governmental agencies such as  
22 a school board to adopt health care policies if  
23 the policy is reasonable and necessary to achieve  
24 a compelling state interest, narrowly tailored,  
25 and not otherwise served by a less restrictive



1 means.

2 As it relates to school boards adopting  
3 mandatory face mask policies with no parental  
4 opt-out provision, there's no prohibition in the  
5 Parents' Bill of Rights to adopting such a policy,  
6 none, as long as that policy is reasonable and  
7 otherwise complies with the provisions I've just  
8 outlined in the Parents' Bill of Rights.

9 The defendants do not have authority under  
10 this law to a blanket mandatory ban against a face  
11 mask policy that it -- that does not provide a  
12 parental opt-out. They simply do not have that  
13 authority, unless they give the school boards  
14 their due process rights granted by the Florida  
15 legislature to make a showing of reasonableness,  
16 support a state policy, narrowly tailored, no  
17 lesser means you can achieve the same thing.

18 This statute does not support a statewide  
19 order or any action interfering with a  
20 constitutionally provided authority of local  
21 school districts to provide for the safety and  
22 health of children based on the unique facts on  
23 the ground in a particular county.

24 The law of Florida does not permit the  
25 defendants to punish school boards for adopting a

1 face mask mandate if the school boards have been  
2 denied their due process rights under the Parents'  
3 Bill of Rights to show that their policy is  
4 reasonable and meets the requirements of the law.

5 If the defendants act to deny the school  
6 districts due process rights provided by the law,  
7 as appears to be the case here in at least the  
8 Broward and Alachua County case, and if they  
9 enforce, strictly enforce any other rule,  
10 regulation, policy, executive order, whatever  
11 basis you want to call it, then they are acting  
12 without authority and they are refusing to comply  
13 with the provisions, laws set forth by the  
14 legislature.

15 Remember, the legislature has its own  
16 protection by the separation of powers. They pass  
17 laws. Unless that law is unconstitutional -- it  
18 has not been challenged by either side -- I can't  
19 tell the legislature I'm just not going to -- I'm  
20 not going to follow that law; I don't agree with  
21 it. I can't do that. Governor can't do that.  
22 Department of Education, state Board of Education,  
23 they can't do that.

24 If I go to Quincy and I take the 90 exit off  
25 I-10 where there's about three or four different

1 speed limits, when it goes down to 35, I have to  
2 drive 35, even if I don't think -- even if I might  
3 think that that's not high enough. When it goes  
4 up to 40, I can drive up to 40. When it goes back  
5 down to 35, I can drive 35. I don't have  
6 authority to not obey laws and regulations that  
7 are lawfully passed simply because I don't agree  
8 with them. That's the underpinning of our entire  
9 judicial system.

10 And in a minute I'm going to show you one  
11 reason why I'm not giving you relief, plaintiffs,  
12 in another complaint -- portion of your complaint  
13 because I feel like the First District has  
14 essentially instructed me inferentially to not  
15 grant that relief. I'll get to that in a minute.

16 So with regard to the Parents' Bill of  
17 Rights, the school districts -- the Bill of Rights  
18 permits school districts to enact, including, but  
19 not limited to, mask mandates, no parent opt-out,  
20 policies that relate to health education -- health  
21 care and education. The school districts are not  
22 required to give permission in advance to pass  
23 these policies. To do otherwise would submit  
24 local schools to endless court suits and/or  
25 administrative proceed- -- hearings on innumerable

1 local policy decisions that would just make  
2 practically running a school impossible.

3 For example, if a school board decided they  
4 were going to ban high school students from  
5 leaving campus during the school hours, like to go  
6 get lunch or something, they're not required to  
7 prove that that's reasonable before they do it.  
8 If someone challenges it, they can. They'll say,  
9 all right, this is just during school. The  
10 purpose of this is to keep them at school so they  
11 won't get in trouble, so they'll probably eat  
12 better, they will not have their attention  
13 diverted by being away from school and they won't  
14 do things they normally wouldn't do in school.

15 I don't know about now, but that was the  
16 policy when I was in high school, which was  
17 strictly enforced. That's just one minor policy.  
18 And it was the safety of the students and ability  
19 to keep the students out of trouble, keep them at  
20 school so they don't go off in a car, have an  
21 accident or otherwise get into serious trouble.

22 That actually impairs a parent's rights to  
23 say -- say the parent wants the child to come home  
24 every day to the house and eat lunch with him or  
25 her. Such a policy would impair that right. The

1 school board, if it's challenged on that, would  
2 then have to show the rational basis for it, why  
3 they're doing it, how it's narrowly drawn, et  
4 cetera.

5 That's one of many things that go along.  
6 Dress codes, not having a knife in your  
7 backpack -- that might be a state criminal law --  
8 and any number of things, no fighting on campus,  
9 all those things are day-to-day decisions schools  
10 and school boards make all the time. I don't  
11 think the Department of Education has any real  
12 interest in getting involved in those sorts of  
13 things.

14 However, the face mask issue has -- a lot of  
15 people have a lot of opinions on that. It doesn't  
16 mean that they can't raise those opinions. It  
17 just means that the school board, after they pass  
18 the policy, they must demonstrate, when  
19 challenged, that it meets the requirements of the  
20 state Parents' Bill of Rights.

21 If it doesn't meet those challenges, then  
22 they can't do it. And it's because of the fact  
23 that the legislature passed that bill and it's not  
24 been challenged as unconstitutional I feel  
25 constrained to say the state can take action

1 regarding face masks under the home rule section.  
2 The legislature -- not as to face masks, but the  
3 legislature has passed a policy which affects  
4 rights -- school boards' rights to enact policies,  
5 but it hasn't tied their hands. It's just said  
6 you have to make it reasonable and you have to be  
7 ready to show that.

8 So the standard of proof -- let me go back  
9 here. If there's an objection by a parent or the  
10 department to a policy, whether it's school mask  
11 or not -- face mask or not, there has to be some  
12 sort of authorized proceeding that's authorized by  
13 law, a due process proceeding, that allows the  
14 school board to show why its policy is acceptable  
15 under the school board -- I'm sorry, the school  
16 board -- the Parent -- Florida Parents' Bill of  
17 Rights.

18 The standard of proof a school board must  
19 meet in showing this reasonableness is not beyond  
20 a reasonable doubt, is not reasonable and there's  
21 no rational basis that can be stated against it.  
22 That's not the standard. The standard is, is it  
23 reasonable. It's a reasonableness standard.  
24 That's a much lower standard than you would have  
25 if you're trying to disallow a policy of the

1 legislature or the governor because you say it is  
2 not rational. There you have to show there's --  
3 either he has no authority or there's no rational  
4 basis whatever to support that policy. That's not  
5 the standard when a school board has to justify  
6 policies it passes pursuant to the Parents' Bill  
7 of Rights. Their standard is reasonableness.

8 Here I think I'm required to make some  
9 comments on the evidence. The evidence clearly  
10 demonstrates that the recommendation of the CDC  
11 for universal masking of students, teachers, and  
12 staff represents the overwhelming consensus of  
13 scientists, medical doctors, and medical  
14 organizations. The evidence submitted by the  
15 defendant I think reflects a minority, perhaps  
16 even a small minority, of medical and scientific  
17 opinion. That's the reason I can't say there's no  
18 rational basis for the governor's policy under a  
19 different legal theory in a different county.

20 You can agree or disagree. Both sides may  
21 end up appealing this order.

22 So although no individual school system's  
23 policy is in front of me, I have heard significant  
24 evidence concerning the medical and scientific  
25 basis for face mask policies, and I conclude that

1       this evidence demonstrates that face mask policies  
2       that follow CDC guidance are at this point in time  
3       reasonable and consistent with the best scientific  
4       and medical opinion and guidance in the country at  
5       this time. That's not to say that they might be  
6       in force for too long, they might be not narrowly  
7       structured, or for some other reason.

8               But the evidence presented in this trial --  
9       part of the issues in this trial is, are the CDC  
10       guidelines, are those -- is that a rational basis  
11       for masking? They are. However, that could  
12       change very shortly. Their guidance could change.  
13       Conditions on the ground could change. Conditions  
14       from county to county could change. A very  
15       small -- small-populated rural county might have a  
16       different analysis or needs and requirements than  
17       Miami-Dade County does.

18               I also find -- this finding is not intended  
19       to be binding on any party, the defendants in this  
20       case or any school, because the policies have not  
21       been litigated and each school district has unique  
22       circumstances and conditions. This is just my  
23       analysis as a factfinder of the evidence. And it  
24       also is relevant as to another ruling I'm going to  
25       make at the end.



1           The school district which adopts a policy,  
2           such as a mask mandate, is acting within  
3           discretion given to it by the legislature in the  
4           Florida Parents' Bill of Rights. So long as the  
5           requirements of the policy provided for in the  
6           Parents' Bill of Rights are met, the doctrine of  
7           separation of powers requires that the  
8           discretionary power exercised by the school board  
9           cannot be interfered with by the judiciary or  
10          executive branch of government and neither the  
11          judiciary nor executive can substitute their  
12          judgment for that of the school board.

13           Remember, I'm not -- this is not something I  
14          made up. This power has been given to the school  
15          boards very recently by a bill that the governor  
16          signed.

17           My ruling in this case, if you want to put it  
18          in one sentence, is I am enforcing the bill passed  
19          by the legislature in requiring that anyone who  
20          uses that bill has to follow all provisions, not  
21          part of the provisions.

22           So let me move on real quickly here. I'm  
23          about finished. So these are some nature of some  
24          additional findings and rulings. They might  
25          duplicate things I've already said. Again, this

1 is where editorial discretion is acceptable. I'll  
2 tell you where -- in some areas where it's not.  
3 These are findings. And I think they're  
4 consistent with what I've said already. And I'm  
5 about to finish.

6 The purpose of the executive order and the  
7 actions it set in motion were to prohibit local  
8 school boards from adopting face mask mandates  
9 that did not include a parental opt-out provision.

10 The defendants have contended by their  
11 actions and positions in this case that the  
12 Florida Parents' Bill of Rights authorizes them to  
13 enforce this blanket prohibition.

14 The defendants have additionally used threats  
15 of enforcement and enforced actions generated as a  
16 result of the executive order to enforce this  
17 blanket prohibition.

18 The defendants contend that the Parents' Bill  
19 of Rights as referenced in the executive order  
20 authorized actions of the defendants seeking to  
21 enforce the blanket prohibition on school boards  
22 adopting face mask mandates which did not include  
23 a parental opt-out provision.

24 The defendants' assertion in this regard is  
25 incorrect because the Parents' Bill of Rights does

1 not ban school board face mask mandates. The  
2 law -- the law expressly permits school boards to  
3 adopt policies regarding the health care of  
4 students, such as a face mask mandate, even if a  
5 parent disagrees with that policy. The law  
6 requires only that the policy be reasonable, is  
7 necessary to achieve a compelling state interest,  
8 and be narrowly tailored and not otherwise served  
9 by a less restrictive means.

10 As I've said before, if the Department of  
11 Education or some other interested person  
12 challenges that, then that might have to be proven  
13 by the school board in some -- or demonstrated in  
14 some due process proceeding of some sort which  
15 would also allow an entry into the appellate  
16 system.

17 The actions of the defendants do not pass  
18 constitutional muster because they seek to  
19 deprive -- excuse me -- they seek to deprive the  
20 school boards in advance and without the school  
21 boards' right to show the reasonableness of the  
22 policy. The law does not require that the school  
23 board get permission for a policy in advance. It  
24 requires only that if a policy is challenged, it  
25 has the burden to prove its validity under the

1 guidelines of the statute.

2 Therefore, an executive order and/or an  
3 agency action or an executive action which bans  
4 under all circumstances a face mask mandate for  
5 schoolchildren without a parental opt-out does not  
6 meet constitutional muster because such action  
7 exceeds the authority given to the defendants  
8 under the Parents' Bill of Rights law passed by  
9 the Florida legislature.

10 Seeking to enforce a policy through the  
11 executive order and through actions that violate  
12 the provisions of the Parents' Bill of Rights is,  
13 by definition, arbitrary and capricious because  
14 there is no reasonable or rational justification  
15 for not following -- excuse me -- no reasonable or  
16 rational justification for not following all of  
17 the provisions of a duly enacted and authorized  
18 Florida law.

19 A policy or action which violates the  
20 Parents' Bill of Rights cannot be lawfully  
21 enforced by the defendants.

22 The executive order and/or agency action as  
23 described above and heard in this case which  
24 violates the Parents' Bill of Rights exceeds any  
25 authority to issue the executive order to the

1 extent it sets in motion or causes a violation of  
2 the Parents' Bill of Rights and exceeds the  
3 authority of the defendants that was granted to  
4 them by the legislature in the Parents' Bill of  
5 Rights.

6 An executive order ordering or setting in  
7 motion a violation of the Parents' Bill of Rights  
8 is without legal authority.

9 Further, such action, in other words,  
10 ordering something which -- or taking an action  
11 which is a violation of a Florida Statute, is, by  
12 definition, arbitrary, unreasonable, and violates  
13 the separation of powers doctrine because it would  
14 exceed the powers granted by the legislature in  
15 the Parents' Bill of Rights because such action  
16 would not permit the school board authority which  
17 has adopted a mask mandate to demonstrate the  
18 reasonableness of it, whether it was necessary to  
19 achieve a compelling state interest, is narrowly  
20 tailored, and not otherwise served by a less  
21 restrictive means, all of which is expressly  
22 permitted by the legislature in the Florida Bill  
23 of Rights.

24 As previously stated earlier in this order, a  
25 school district adopting a policy such as a mask

1 mandate is acting within its discretion. It has  
2 been given this discretion by the Florida  
3 legislature in the Parents' Bill of Rights, so  
4 long as the requirements for the policy provided  
5 for in the Parents' Bill of Rights are met -- I'm  
6 not saying the legislature has unbridled  
7 discretion. They can't just do -- I'm sorry, the  
8 school boards. They can't just do whatever they  
9 want to. They can't do that. They have to meet  
10 the requirements the legislature has set forth to  
11 authorize them to take certain acts involving  
12 education and health.

13 But so long as they do that, the doctrine of  
14 separation of powers requires that the  
15 discretionary power exercised by the school board  
16 cannot be interfered by the judiciary or by the  
17 executive branch of government, and neither the  
18 judiciary nor the executive can substitute their  
19 judgment for the school board's power.

20 I do not grant relief pursuant to Counts I  
21 and II. I think I is safe schools, II is local  
22 rule. This I want in the order. So this is not  
23 something you can leave on the editing floor.

24 I do not grant relief pursuant to those  
25 counts because, especially as to Count I, which is

1 the safe schools, I do not believe the proof rises  
2 to the level required by the decision in DeSantis  
3 vs. FEA, 306 So.3d 1202, First District 2020, and  
4 other cases discussing the burden of proof for  
5 claims such as those brought in Counts I and also  
6 on the Article IX, Section 4(b), local rule basis  
7 for school boards.

8 This doesn't mean that I think the policy is  
9 right or that I've made any value judgment about  
10 it one way or the other. It simply means -- I  
11 have to say this plain, as your own expert said  
12 this; I don't accept the argument that  
13 circumstances dispute it -- that there is at least  
14 some dispute in the medical community on this  
15 issue. And it doesn't have to be a lot of dispute  
16 to make this something I can't grant relief on.

17 I think this is mandated by the First  
18 District in that decision. Again, you're not  
19 going to offend me if you disagree. You're  
20 totally not going to offend me if you appeal.  
21 Neither the other side either. But it's the way I  
22 see it. And I think I'm required to follow the  
23 First District's directions in that regard.

24 The DeSantis case doesn't deal with the  
25 legislative bill of rights. It didn't deal with a

1 direct violation of a law passed by the  
2 legislature. It didn't deal with the aspect of  
3 the legislature where there's no authority to --  
4 there's no authority to violate a Florida law. It  
5 doesn't exist. The legislature didn't deal with  
6 that in the DeSantis vs. FEA case.

7 So I'm not granting relief on Counts I and  
8 II.

9 I am granting relief, as I stated it, it fits  
10 in both the other counts, as I stated.

11 Also, I grant the motion to dismiss Count V.  
12 For whatever reason, the plaintiffs did not sue an  
13 indispensable party, which was the Department of  
14 Health.

15 And let me make one other comment on that.  
16 Count V requested that I declare that rule  
17 unconstitutional. I cannot order anything -- I  
18 cannot issue an order to the Department of Health  
19 to say you have to strike your rule. I can't  
20 order to the Department of Health you can't do  
21 something with this rule.

22 We do know that emergency rules run out in 60  
23 days unless reestablished. So this rule is what?  
24 It's probably almost 30 days in.

25 But I'm not saying that I'm limited in my



1 ability to enjoin or otherwise prohibit the  
2 defendants in this case from violating the  
3 Parents' Bill of Rights. I'm simply saying I  
4 can't do anything that affects the Department of  
5 Health because they're not a party to this suit.

6 So I am granting the motion to dismiss Count  
7 V on that basis. However, I do -- I interpret my  
8 ruling and it is based upon my continued ability  
9 to enjoin or otherwise prohibit defendants from  
10 engaging in certain actions that violate the  
11 Parents' Bill of Rights.

12 Now, let me go back. Injunction. I had not  
13 originally intended early in the case to grant an  
14 injunction. I do now. I want to say this. I am  
15 not granting an injunction against the governor of  
16 Florida. I am granting an injunction against the  
17 other defendants who are the ones who are  
18 primarily involved in enforcement actions. I  
19 believe that -- and the governor himself, to the  
20 extent that the other defendants are, isn't  
21 involved in enforcement, as far as I know, on a  
22 day-to-day basis because the Department of  
23 Education, state board of health [sic], they're  
24 set up to do enforcement of rules.

25 I grant a permanent injunction and enjoin the

1 defendants, except for the governor, from  
2 violating the Florida Parents' Bill of Rights by  
3 taking any action on whatever basis they take it,  
4 by taking any action to effect a blanket ban on  
5 face mask mandates with no parent opt-out by local  
6 school boards. And I grant an injunction against  
7 denying the school boards their due process rights  
8 granted by the statute to permit them to  
9 demonstrate the reasonableness of the mandate and  
10 other factors stated in law.

11 I am not enjoining the defendants from  
12 enforcing the Florida Bill of Rights, so long as  
13 they enforce the complete statute and don't omit  
14 portions of it. I'm just banning them from  
15 violating the Florida Bill of Rights. So they  
16 still have full powers. It's a law of Florida.  
17 It's in force. It's passed by the legislature,  
18 signed by the governor. Defendants can enforce  
19 the law, but they have to do so in accordance with  
20 the terms of the law. And at least until someone  
21 rules otherwise, this has -- in the means that  
22 I've set out, they must allow a due process  
23 proceeding of some sort to allow for a showing of  
24 the reasonableness, et cetera.

25 I also enjoin the defendants, but not the

1       governor, from -- I'm not saying the governor can  
2       go -- go out and start doing these things. I'm  
3       just saying I don't think his role is in the same  
4       scope of enforcement as these other agencies are.  
5       I also enforce the defendants as named -- enjoin  
6       the defendants as named from enforcing the  
7       executive order and the policies it caused to be  
8       generated and any resulting policy or action which  
9       violates the Parents' Bill of Rights.

10       In granting this injunction, I find that the  
11       act or conduct to be enjoined violating the Bill  
12       of Rights is a clear legal right. There's no  
13       adequate money at law. In other words, a legal  
14       remedy, a money judgment or some other remedy at  
15       law, doesn't remedy the peril, damage and danger  
16       caused by unlawful failure to follow this statute.  
17       Also a case I'll cite for you on that is Oxford,  
18       O-x-f-o-r-d, International Bank vs. Merrill Lynch,  
19       374 So.2d 54, Florida DCA 1979.

20       In this case, an irreparable injury that's  
21       demonstrated by the increased risk of the Delta  
22       variant infection is demonstrated by CDC guidance  
23       and the overwhelming medical evidence that's in  
24       this record if universal face masks are blocked,  
25       in violation, in violation of the Parents' Bill of

1 Rights. The continuing constitutional violation  
2 is in and of itself irreparable harm, according to  
3 the law, Board of County Commissioners vs. Home  
4 Builders Association of West Florida, 2021 WL,  
5 Westlaw, 3177293, First District of Florida, July  
6 28th, 2021.

7 Again, I think I've done the other rulings.  
8 But what I want to say is I'm requiring that the  
9 parties follow the statute called the Parents'  
10 Bill of Rights. I'm enjoining the parties from  
11 violating the statute. I've set forth a means of  
12 it. I'm not saying that any particular part of  
13 school policy can't be reviewed under that  
14 statute. I'm not saying yes or no to any  
15 particular policy. I'm simply saying schools can  
16 adopt policies dealing with health and education.  
17 And to the extent they may affect a parent's right  
18 to control their children's education or health,  
19 then it's incumbent on the school board, if  
20 challenged in that policy, to demonstrate its  
21 reasonableness and the other factors in the law.

22 This ruling was not contained in the DeSantis  
23 vs. FEA case. And the reason it wasn't contained  
24 is that these issues were not before the First  
25 District Court of Appeal. It doesn't mean that

1 they're bound to agree or whatever with me.

2 That -- they have a complete, full right, which I  
3 appreciate and I honor their right to do this, to  
4 review this and agree or disagree.

5 But I want to make it clear to you lawyers,  
6 to the public, perhaps even to the First District,  
7 I read that DeSantis decision multiple times. My  
8 intent was to follow it where I felt it applied to  
9 this case, which is the reason I ruled as I did on  
10 the safe schools provision of your complaint.

11 I interpreted the statutes as I believe the  
12 plain -- I read the statute as written. I read it  
13 as written and interpreted it as written. I think  
14 that's my job. Defense counsel admitted it was my  
15 job to enforce the statute.

16 So that's where we are. I don't know if I've  
17 brought any light to this conversation or not. I  
18 understand that it's possible all of you disagree  
19 with me on some portion of my ruling. I  
20 understand that. And I don't take any offense at  
21 disagreement by anyone. You all are very good  
22 lawyers. I respect you. I respect your clients.

23 But the one thing I have done, which is the  
24 only thing I promised you in this case, I worked  
25 till there was no time left to work on this. I

1 mean, at ten o'clock this morning, I was typing in  
2 edits on my notes. That's why I was late. I also  
3 was trying to decipher some of my 2:00 a.m.  
4 handwriting, which was not the easiest in the  
5 world.

6 I have considered everything I can possibly  
7 consider. I've listened to great arguments on  
8 both sides. I've tried to make some sense out of  
9 this law. And to me, it all comes down to the  
10 issues that I've laid out here. That's where I  
11 am. That's my ruling.

12 I'm going to ask the plaintiffs to draft an  
13 order. I'm going to ask that you get it to me by  
14 Monday. I expect you to continue spending the  
15 same effort in this case that I spent in this  
16 case. And there's plenty of you to sit around and  
17 draft an order out with this sort of verbal detail  
18 in two days -- in three days. Monday's three.

19 Then when you do it, I want you to send it to  
20 plaintiffs' [sic] counsel. I don't expect that  
21 they'll agree with the order. But I want them to  
22 be able to give me a comment within a day of what  
23 areas they think are wrong or don't reflect my  
24 ruling, those sorts of things.

25 So I would just ask you, counsel, send it to

1 plaintiffs' -- I'm sorry -- send it to defense  
2 lawyer. Go ahead and email me the order. That  
3 way if you email it to me, I will be able to edit  
4 it.

5 But I will not sign anything until I hear  
6 from the plaintiffs the next day their comments on  
7 the order. And email that to me also. It will  
8 give me the ability to review those comments.

9 And then I will -- I don't know what my  
10 schedule is next week. I have an emergency  
11 hearing in another case at three o'clock today.  
12 So I think next week is a hearing week for me.  
13 But I'll take the time that it takes to review the  
14 order and get it where I think it accurately  
15 reflects the ruling.

16 But most of what I told you I read. Not all.  
17 And I think it's probably, if you listen to the --  
18 if you have an audio, if you listen to that, I  
19 think you can tell where I added some additional  
20 comments that are not in writing.

21 I do recognize that some of my findings at  
22 the end duplicate the findings I said before. But  
23 I reached the point where my ability to edit and  
24 say things only once in every topic was -- had  
25 expired. So that's why I say I understand

1 editing -- sometimes I said it twice because I  
2 wanted to make sure that I got it said. And  
3 that's a common trait we all lawyers do.

4 So I do recognize, for example, the  
5 separation of powers finding with regard to school  
6 boards, I know I said it twice. And it might  
7 actually be almost exactly the same. I'm not  
8 saying you have to put it in there twice. I'm  
9 just saying I was writing this late at night and I  
10 just wanted to make sure that I had it in there.  
11 And I changed it two or three times from the way I  
12 originally wrote it.

13 So, anyway, I don't know that we'll see each  
14 other again. We may. But thank you very much to  
15 everyone in the case.

16 I have always enjoyed working with  
17 Jacksonville lawyers. I've always felt  
18 Jacksonville lawyers practiced law very similar to  
19 the way Tallahassee lawyers do. They're very  
20 professional. They still can make verbal  
21 commitments with each other. So, Mr. Abel and  
22 your firm, and Mr. Bean and Mr. Burns, I have  
23 enjoyed working with you.

24 And all the other lawyers too. And I expect  
25 the plaintiffs' lawyers to be working this



1 weekend, as I will be, but on something else.

2 And Mr. Abel will -- if you get it before  
3 Monday, send it to Mr. Abel and his firm as soon  
4 as you get it -- your order done. I know it's not  
5 easy to draft an order on these cases in such a  
6 short timeframe, but I kind of feel like I've done  
7 a big part of the work, given you the bones of the  
8 order at least and you can go from there.

9 MR. ABEL: Your Honor, may I direct a  
10 question to the Court? This is Mike Abel.

11 THE COURT: Yes, sir.

12 MR. ABEL: Your Honor's laid out a schedule  
13 for presenting a final order to Your Honor, and  
14 Your Honor has also done a very good job of  
15 apprising observers of this process of issues that  
16 lawyers may know, but it's helpful to the  
17 observers of the process to also learn.

18 And so can we -- I want to clarify, Your  
19 Honor, that your ruling that you've announced from  
20 the bench today will not become effective until a  
21 final order is entered and signed and docketed by  
22 the Court.

23 THE COURT: See, Mr. Abel, this is why I  
24 respect you so much, because you have articulated  
25 something which I kicked back and forth in my

1 head.

2 I'm going to make my ruling effective as of  
3 the date of the written order. And this is why:  
4 I don't want confusion out there. I think we need  
5 to have a written order -- we have a verbal order.  
6 You know that it will probably be reported. The  
7 press is usually accurate. But any human person  
8 can misinterpret something.

9 And it seems to me, Mr. Abel, that unless you  
10 disagree, it makes more sense to make it effective  
11 when the written order is signed.

12 MR. ABEL: I believe that's the most  
13 beneficial to the process, and appreciate the  
14 Court's comments.

15 THE COURT: All right. All right. Thank you  
16 so much.

17 MR. GALLAGHER: One comment, if I could.

18 THE COURT: As y'all know, I don't like to  
19 miss lunch, so I'm going to leave and go get  
20 lunch.

21 MR. GALLAGHER: One brief question, Your  
22 Honor, if I could.

23 THE COURT: Yes, Mr. Gallagher.

24 MR. GALLAGHER: You were referencing the  
25 different numerical counts in the -- your ruling.

1 I just want to confirm that Counts III and IV you  
2 decided to grant relief in favor of plaintiff. I  
3 think that's the case, but I didn't hear you say  
4 that exactly.

5 THE COURT: I granted relief within the  
6 context of my ruling. I and II, I did not grant  
7 relief on. V, I dismissed. VI is the injunctive  
8 relief. But no relief against the governor in VI.  
9 I just don't think with the way the structure of  
10 government works -- that's the injunction count --  
11 I don't think it's necessary to enter an  
12 injunction against the governor. And I just -- I  
13 decided not to do that.

14 MR. GALLAGHER: Thank you, Your Honor.

15 THE COURT: I think the governor will follow  
16 the law that's decided by the courts, one. And  
17 the school board people are enjoined, so there's  
18 just really no reason to enjoin the governor.

19 And so if you do appeal, appeal fast. That's  
20 why I want the order out fast. So I recognize we  
21 may have one or two hearings that will be  
22 necessary after I enter the order, but we'll cross  
23 that bridge when we get to it.

24 MR. GALLAGHER: Thank you, Your Honor.

25 THE COURT: All right. Thanks a lot. We're

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adjourned. Thank you.

Thank you, madam court reporter.

(Proceedings concluded at 12:34 p.m.)

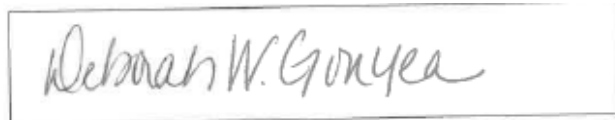
REPORTER'S CERTIFICATE

STATE OF FLORIDA  
COUNTY OF HILLSBOROUGH

I, Deborah W. Gonyea, Registered Merit Reporter, Certified Realtime Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings via Zoom and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 30th day of August, 2021.



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Deborah W. Gonyea, RMR, CRR

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