**IN THE DISTRICT COURT OF APPEAL**
**FIRST DISTRICT OF FLORIDA**

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

Defendant–Appellants,

v.

FLORIDA EDUCATION ASSOCIATION, et al.,

Plaintiff–Appellees,

and

MONIQUE BELLEFLEUR, et al.,

Plaintiff–Appellees.

Case Nos. 1D20-2470
(Consolidated) 1D20-2472

L.T. Case Nos. 2020-CA-001450
(Consolidated) 2020-CA-001467

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

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# INITIAL BRIEF OF DEFENDANT–APPELLANTS

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# I. INTRODUCTION

This case arises from the State of Florida's efforts, through the Governor's emergency powers, to provide additional state funding and flexibility to local school districts as they plan to educate their students during the COVID-19 pandemic. The Plaintiff–Appellees (the "Plaintiffs"), led by representatives of Florida's teachers unions, sued the Defendant–Appellees (the "State Defendants")[1] in an effort to prevent public schools from reopening for in-person instruction in the fall. Although the circuit court refused to issue a statewide injunction closing Florida's public schools, it erred by purporting to revise an emergency order issued by the Florida Commissioner and Department of Education, stripping out the order's requirement to submit local plans with an option for in-person instruction as a condition to receive additional state funding, subject to the advice and orders of state and local public-health officials.

This Court should vacate the circuit court's improper preliminary injunction, which fails to protect the Plaintiffs from irreparable (or indeed *any*) injury, violates Florida's strict constitutional separation of powers, purports to answer non-justiciable political questions, and rests on the erroneous conclusion that the State Defendants' preference for optional in-person instruction when and where safe is

[1] The State Defendants are Governor Ron DeSantis, the State Board of Education (along with state-board chair Andy Tuck), Commissioner of Education Richard Corcoran, the Florida Department of Education (the "DOE"), and Jacob Oliva (Chancellor of the DOE's Division of Public Schools).

arbitrary and capricious. The circuit court made errors of law and abused its discretion, and its order should promptly be set aside.

## II. STATEMENT OF THE CASE AND FACTS

### A. Statement of the Case

#### 1. Nature of the Case

The Plaintiffs in these consolidated cases challenge the Governor's authority to respond to a statewide public-health emergency, on the theory that the Department of Education (as his delegate) "arbitrarily" conditioned the receipt of additional state funding (beyond the funds generated under current state law) on the development of local plans to reopen public schools safely. The Plaintiffs challenge the exercise of this authority by the Florida Department of Education and Commissioner of Education under the state constitution's due-process and education clauses:

> No person shall be deprived of life, liberty or property without due process of law . . . .

Art. I, § 9, Fla. Const.

> Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education . . . .

Art. IX, § 1(a), Fla. Const.

The context for the Plaintiffs' claims is the COVID-19 pandemic, which emerged earlier this year and continues to disrupt life for millions of Floridians. Many schools closed for in-person instruction and businesses shuttered while government officials raced to develop strategies and balance competing policy priorities in response to the unprecedented crisis. The Florida Department of Education recommended in March that local school districts close their facilities to students and deliver instructional services remotely. (DOE Emergency Order 2020-EO-01 [A. 33-42]).

But in July, after months of planning and stakeholder input, including requests for relief from school-district finance officers (Defs.' Ex. 12, [A. 106-8]), the DOE issued Emergency Order No. 2020-EO-06 (the "Emergency Order"). [A. 132-9]. That order offered school districts additional state funding and flexibility if they developed plans to provide a mix of in-person and remote instruction in the fall—all expressly "subject to advice and orders of the Florida Department of Health[] [and] local departments of health." (Emergency Order § I.a, [A. 133-4]). Districts that submitted approved plans, instead of being funded under Florida statutes and rules that tie state funding to actual enrollment and reimburse districts at a discounted rate for virtual classes, would effectively receive additional state funding—*despite* falling enrollment and increased participation in distance learning during the pandemic. (*Id.* § III, [A. 138-9]). But "[n]othing [in the

Emergency Order] requires a district . . . to submit a plan if the district . . . wishes to open in traditional compliance with statutory requirements for instructional days and hours." (*Id.* § II.a).

As school districts were submitting and receiving state approval for their local plans to reopen, the Plaintiffs sued to challenge the Emergency Order, alleging that the State Defendants (as opposed to the local school districts) were unconstitutionally "forcing" students and employees to report to local brick-and-mortar schools before it was safe to do so, and seeking an injunction. Although the circuit court acknowledged that it did not have the authority to order statewide school closures, it nevertheless issued a preliminary injunction that excised the Emergency Order's requirement for local school districts to submit plans before obtaining additional funding and flexibility. On the same day that the court issued its injunction, however, dozens of school districts and hundreds of thousands of Florida students had already returned to schools for in-person instruction under the districts' previously approved reopening plans. This is the State Defendants' appeal from the circuit court's injunction.

**2. Course of Proceedings**

The Emergency Order was issued on July 6, 2020, and the Plaintiffs filed suit in two separate actions on July 19 and 20, 2020.

One group of Plaintiffs, a parent and a teacher, filed suit in Orange County, *Bellefleur v. DeSantis*, No. 2020-CA-001467 (Fla. 9th Cir. Ct. filed July 19, 2020), seeking an injunction partly to prohibit the State Defendants "from opening public schools in Orange County until such time as the defendants can demonstrate to the Court that the Government . . . is compliant with Article IX, § 1(a) of the Constitution" and to prevent the State "from restricting funds to [the Orange County public schools] should they refuse to permit face-to-face education when [the] 2020–2021 School year commences." (*Bellefleur* Am. Compl. Prayer for Relief ¶¶ (1), (3), [A. 467]). In their original and amended complaints,[2] the *Bellefleur* Plaintiffs explained that they sought "specifically to prevent [the State] Defendants from requiring in-person attendance at the start of the 2020–2021 School Year." (*Bellefleur* Am. Compl. at 2, [A. 445]).

The other group of Plaintiffs, several Miami-area parents, teachers, and other school-district employees led by union advocates at the Florida Education Association, filed suit in Miami–Dade County, *Fla. Educ. Ass'n* (*FEA*) *v. DeSantis*, No. 2020-CA-001450 (Fla. 11th Cir. Ct. filed July 20, 2020), seeking an injunction partly to prevent the State Defendants "from unnecessarily and unconstitutionally forcing millions of public-school students to report to unsafe brick and mortar

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[2] The *Bellefleur* Plaintiffs amended their complaint on August 13 and added two more Orange County teachers as plaintiffs. (*Bellefleur* Am. Compl. ¶¶ 9, 12, [A. 450-1]).

schools that should remain physically closed during the resurgence of COVID-19 in Florida." (*FEA* Compl. Prayer for Relief ¶ (a), [A. 252-3]).[3]

The *FEA* Plaintiffs also sued the mayor of Miami–Dade County, who moved to dismiss on the grounds that the local school board (instead of the mayor) was an indispensable party, which had already decided to provide exclusively remote schooling through at least September 30, 2020, and that "the proper way to open public schools in the face of COVID-19 is a political, nonjusticiable question[] that is beyond the courts' jurisdiction." (Def. Mayor C. Gimenez' Mot. Dismiss Compl. 3, [A. 371]; *see also id.* ("A court attempting to solve political disputes would violate the separation of powers and entangle courts in decisions that they are ill-suited to make. The decision as to whether it is better for students to attend classes in person versus virtually are questions of policy trade-offs and value judgments. Because this Court cannot answer those questions or render those judgments, this case must be dismissed.")). The *FEA* Plaintiffs voluntarily dismissed their claims against the mayor on August 7, 2020. (Notice of Voluntary Dismissal Without Prejudice of Def. C. Gimenez, [A. 432-4]).

Both cases were transferred to Leon County,[4] where the circuit court consolidated the actions *sua sponte* and denied the State Defendants' motions to

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[3] The *FEA* Plaintiffs later added the National Association for the Advancement of Colored People, Inc. and the NAACP Florida State Conference as additional plaintiffs.

dismiss. (Order Consolidating Cases [A. 441-3]; Order Den. Mot. Dismiss [A. 537-8]).[5] The State Defendants filed a response opposing the Plaintiffs' requests for a preliminary injunction (Defs.' Resp. Opp'n to Pls.' Expedited Mots. Temporary Inj. [A. 705-933]), and an evidentiary hearing, at which the parties offered approximately 100 exhibits and 14 witnesses, was held August 19 through 21, 2020 (*see generally* Hr'g Tr. [A. 940-1538]). Along with other evidence presented at the hearing, the State Defendants offered extensive public-health guidance, declarations, and witness testimony about the importance of in-person instruction, particularly for Florida's most vulnerable students, such as students of migrant workers, students who are homeless, students who are in foster care, students with disabilities, students who are English language learners, and students who are economically disadvantaged. (*E.g.*, Defs.' Exs. 5 [A. 934-39], 11–18 [A. 106-108, 438-40, 544-8, 613-20, 623-704]).

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[4] In transferring the *Bellefleur* case, the Orange County circuit court severed the *Bellefleur* Plaintiffs' claims against the Orange County school board and local superintendent and stayed those proceedings pending further order of the court. (Agreed Order Severing & Transferring Claims & Staying Case [A. 383-5]).

[5] The State Defendants had moved to dismiss both cases on several grounds, including that the Plaintiffs' complaints (1) "fail[ed] to allege any specific, concrete injury suffered by any of the Plaintiffs at the hands of the State Defendants, (2) there is no justiciable case or controversy, (3) it improperly asks the Court to entangle itself in a political question, and because (4) Plaintiffs seek relief which affects the interests of non-parties." (*FEA* Mot. Dismiss 1 [A. 1614]; *accord Bellefleur* Mot. Dismiss 1–2 [A. 308-9]; *see also* Defs.' Reply Supp. Mot. Dismiss [A. 515-36]).

### 3. Disposition in the Lower Tribunal

The circuit court ultimately granted the Plaintiffs' motions for a preliminary injunction—albeit not in the form requested in their complaints or in their motions seeking temporary injunctive relief. (Order Granting Mot. Temporary Inj. [A. 1533-1555). Despite the fact that "no official representative of any school district testified regarding any coercion to reopen its schools," the court concluded that the Emergency Order gave local school boards "no choice" but to reopen brick-and-mortar schools because they would "have no meaningful alternative" to avoid the "risk[ of] losing state funding." (*Id.* at 5, [A. 1544]). Quoting *Lebron v. Secretary, Florida Department of Children and Families*, 710 F.3d 1202, 1217 (11th Cir. 2013), the circuit court further concluded that the State Defendants had imposed "unconstitutional conditions" on the additional funding and flexibility provided for in the Emergency Order. (Order Granting Mot. Temporary Inj. 6, [A. 1545]). And citing anecdotal evidence from Broward, Miami–Dade, and Palm Beach counties, as well as Hillsborough County (home to none of the Plaintiffs), the court determined that the Emergency Order's language to the effect that "the day-to-day decision to open or close a school rests locally with the school boards, subject to the advice of local health officials," was "essentially meaningless." (*Id.* at 7, [A. 1546]).

The circuit court thus concluded (erroneously, as discussed below) that the State Defendants had "ignored the requirement of school safety by requiring the statewide opening of brick-and-mortar schools to receive already allocated funding," supposedly in violation of the state constitution's education clause, Art. IX, § 1(a), Fla. Const. (Order Granting Mot. Temporary Inj. 5 [A. 1544]). The court acknowledged that the Plaintiffs had "to prove beyond a reasonable doubt that the State's education policies . . . were not rationally related to the provision 'by law' for a 'uniform, efficient, safe, secure, and high-quality system of free public schools that allows students to obtain a high-quality education," under *Citizens for Strong Schools, Inc. v. Florida State Board of Education*, 232 So. 3d 1163, 1172 (Fla. 1st DCA 2017), *approved*, 262 So. 3d 127 (Fla. 2019). (Order Granting Mot. Temporary Inj. 7 [A. 1546]). But the court nevertheless found that the Plaintiffs had satisfied that "very high burden" by showing that the Emergency Order was "arbitrary and capricious," or "being applied arbitrarily across Florida," in violation of the due-process clause, Art. I, § 9, Fla. Const. (*Id.* at 7, 10 [A. 1546, 1549]).

After determining that the teacher Plaintiffs faced a threat of irreparable injury if "forced to return to school," the circuit court undertook a severability analysis in an effort to separate "the good and bad features of the [Emergency] Order." (Order Granting Mot. Temporary Inj. 12, 13 [A. 1551, 1552]). The court

then purported to strike the "unconstitutional portions" of the Emergency Order, even though none of the Plaintiffs had requested that sort of severance as a remedy in their complaints or motions for injunctive relief. (*Id.* at 15 [A. 1554]). In particular, the Court struck language about reopening brick-and-mortar schools "subject to advice and orders of" state and local health officials, and deleted entirely the requirement for school districts to submit a local plan before they could take advantage of the Emergency Order's additional funding and flexibility. (*Id.* at 15–16 [A. 1554-5]).[6]

**B. Statement of the Facts**

Since well before the COVID-19 pandemic, Florida's funding system for K–12 public schools has long been built on the premises that local school districts earn state funding based on their actual student enrollment and that most of their students will receive in-person classroom instruction. Virtual classes are permitted, but school districts are reimbursed for those classes only if successfully completed, and at a lower rate (because the costs of virtual instruction are lower than the costs of in-person instruction). The Emergency Order reflected an effort to provide *additional* funding and *more* flexibility than school districts would have otherwise

[6] On the Plaintiffs' motion, which the State Defendants opposed, the circuit court also lifted the automatic stay pending review under Florida Rule of Appellate Procedure 9.310(b)(2). This Court reinstated that stay in its orders dated August 28 and 31, 2020.

received under state law, contingent on the development of local reopening plans that are subject to the advice and orders of state and local health officials.

### 1. Florida's Longstanding Education-Funding System Generally Allocates Funds to County School Districts Based on Actual Attendance for In-Person Instruction.

As summarized in the declaration of Suzanne Pridgeon, who oversees the DOE's Division of Finance and Operations, most state funding for Florida's public schools is provided through the Florida Education Finance Program ("FEFP"). That program—which the Florida Supreme Court recently upheld under article IX, section 1(a) of the Florida Constitution, *Citizens for Strong Sch.*, 262 So. 3d 127—generally allocates funding to school districts based on the number of individual students participating in a particular course or program.

Students typically generate FEFP funding for a school district (on a full-time equivalent or "FTE" basis) when they are participating in an educational program at a brick-and-mortar school. Thus, a student must be (1) physically present in school during an attendance survey period and (2) a member of a class or course that is eligible for funding. *See* § 1011.62, Fla. Stat.; Fla. Admin. Code R. 6A-1.0451; Full-Time Equivalent (FTE) General Instructions 2019-20, at 8–9.[7] A student satisfies the attendance requirement by being physically present in school

[7] The FTE General Instructions are incorporated by reference into State Board Rule 6A-1.0451 and are at https://www.flrules.org/Gateway/reference.asp?No=Ref-11320.

"at least one day of survey week or on one of the six scheduled school days preceding the survey week when the school was in session." Full-Time Equivalent (FTE) General Instructions 2019-20, at 9. From July until the middle of January, school districts receive FEFP funding for in-person instruction based on the previous year's enrollment forecast. But after each year's October attendance survey, FEFP funding is adjusted beginning in January to account for actual student attendance and membership. (Defs.' Ex. 19 (Decl. of Suzanne Pridgeon) ¶¶ 12, 14 [A. 551]).

School districts can also earn FEFP funding for virtual course offerings. *See* § 1011.61(1)(c)b.(III)–(VI), Fla. Stat. Courses delivered through district virtual programs and virtual charter schools are funded if students "successfully complete the virtual instruction program," regardless of the student's location or in-person attendance. Full-Time Equivalent (FTE) General Instructions 2019-20, at 40.

But districts generally earn less FEFP funding for virtual programs (on an FTE basis) than they do for in-person instruction. For example, virtual students do not need the same bus services, and districts do not receive funds to meet class-size limits for students who attend a district virtual school. And because virtual courses are funded based on successful completion, virtual students who fail a course do not generate any funding for that course for their school districts. (Pridgeon Decl. ¶¶ 5–7 [A. 550]).

Hence, under Florida's education-funding system, districts would ordinarily experience significant funding losses if previously in-person students switched to a virtual instruction model or if enrollment declined. (Pridgeon Decl. ¶¶ 4–18 [A. 550, 551-52]). And when the COVID-19 pandemic hit Florida, state officials anticipated that more students than previously forecast would withdraw from school in their local district (perhaps for homeschooling or to enroll in the Florida Virtual School), miss the October survey's attendance requirements to be counted for in-person FTE funding, or participate in a district's virtual offerings—all of which would have resulted in less FEFP funding for the district. (*See, e.g.*, Defs.' Ex. 12 [A. 106-08]).

**2. In the Wake of the Pandemic, the Governor's Executive Orders and the DOE's Emergency Order Provide a Means for Districts to Secure Additional Funding Despite Falling Demand for In-Person Instruction.**

When the COVID-19 public-health crisis arrived in Florida, Governor DeSantis declared a statewide emergency pursuant to his constitutional and statutory authority on March 9, 2020. Executive Order 20-52 [A. 11-17]. *See generally* Art. IV, § 1(a), Fla. Const.; ch. 252, Fla. Stat. Among the Governor's emergency powers is the authority to suspend the provisions of any regulatory statute, order, or rule, "if strict compliance with the provisions of any such statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency." § 252.36(5)(a), Fla. Stat. And as permitted by state

law, *id.* § 252.36(1)(a), the Governor delegated this power to each state agency, including the Department of Education. (*See* Executive Order 20-52, § 4.B [A. 14]; Div. Emergency Mgmt. Emergency Order No. 20-004.[8]

Pursuant to the Governor's delegation of authority, the Commissioner of Education suspended and waived certain provisions of the Florida K–20 Education Code in response to the COVID-19 emergency on March 23, 2020. DOE Emergency Order 2020-EO-01. At that time, the Commissioner recommended that school districts close their physical facilities, except to teachers and staff, and enabled them to do so without running afoul of state law or losing state funding for the remainder of the 2019–2020 school year. *See id.* §§ 1, 3.

Several months later—after most Florida counties had entered "Phase 2" of the state's COVID-19 recovery plan[9]—the Commissioner determined that because

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[8] Available at https://www.flgov.com/wp-content/uploads/covid19/DEM%20ORDER%20NO.%2020-004.pdf. The Governor has extended this state of emergency and its accompanying delegation of authority to suspend or waive state laws twice, in Executive Order 20-114 (May 8, 2020) [A. 25-6], and Executive Order 20-166 (July 7, 2020) [A. 31-32].

[9] In Executive Order 20-112 (Apr. 29, 2020) [A. 18-24], the Governor noted that he had convened a "Task Force to Re-Open Florida to evaluate how to safely and strategically re-open the State" and adopted a series of recommendations for Florida's "Phase 1 Recovery" in concert with the efforts of the "the White House Coronavirus Task Force, and based on guidance provided by the White House and the Centers for Disease Control and Prevention (CDC), the Occupational Safety and Health Administration (OSHA), and the Florida Surgeon General and State Health Officer." (*Id.* at 1, §1 [A. 19]). The Governor further implemented the state's recovery plan in Executive Order 20-139 (June 3, 2020) [A. 27-28], in

"extended school closures can impede educational success of students, impact families' well-being, and limit many parents and guardians from returning to work," there was a need to open schools "consistent with safety precautions." (Emergency Order 1). That determination led to the Emergency Order at issue in this appeal, which was intended to accomplish the goal of "reopening brick and mortar schools with the full panoply of services for the benefit of Florida students and families," in conjunction with the guidance of state and local health officials. *Id.*

In keeping with that goal, while allowing for potential safety concerns, Section I of the Emergency Order provided in part as follows:

> Upon reopening in August, all school boards and charter school governing boards must open brick and mortar schools at least five days per week for all students, *subject to advice and orders of the Florida Department of Health, local departments of health, Executive Order 20-149 and subsequent executive orders.* Absent these directives, *the day-to-day decision to open or close a school must always rest locally with the board* or executive most closely associated with a school . . . .

(Emergency Order § I.a (emphasis added) [A. 133-34]).[10] The same paragraph of the Emergency Order also waived the requirement for "a uniform and fixed date

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which he determined that most Florida counties—with the exceptions of Miami–Dade, Broward, and Palm Beach—had entered "Phase 2 Recovery." (*Id.* § 1.B [A. 27]).

[10] At the circuit court's injunction hearing, Dr. Scott Hopes, an epidemiologist and member of Manatee County School Board, testified that the Emergency Order thus allowed his school board "to work with the health department to figure what

for the opening and closing of schools" and the requirement "to operate public schools for a minimum of 180 days or an hourly equivalent." (*Id.*). Nothing in the Emergency Order required students to attend school in person, but districts taking advantage of the Emergency Order's flexibility and funding provisions (discussed below) were required to "provide the full array of services that are required by law so that families who wish to educate their children in a brick and mortar school full time have the opportunity to do so." (*Id.* § I.b [A. 134-5]).

Section II of the Emergency Order further emphasized local planning by requiring school districts that wished "to receive the flexibility and continuity provided for in this Order" to "submit to the Department [of Education] a reopening plan that satisfies the requirements of this Order." (Emergency Order § II.a [A. 136-7]). But "[n]othing herein requires a district or charter school to submit a plan if the district or charter school wishes to open in traditional compliance with statutory requirements for instructional days and hours"—i.e., the default statutory and regulatory provisions for school funding based on attendance and normal virtual coursework. (*Id.*).

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worked best for the community." (Hr'g Tr. 647:20–647:21 [A. 1367]; Defs.' Ex. 24 [A. 43-55]). The Florida Department of Health's chief of staff similarly testified that its "local county health departments would work with any school district on what the best practices are to mitigate the risk of spread and how—best practices how to prevent that, to include social distancing." (*Id.* at 214:20–214:24 [A. 1048]).

Section III of the Emergency Order described the additional funding and flexibility that districts could receive if they did submit local plans with an option for in-person instruction. First, districts with approved plans would receive full state "funding based on pre-COVID-19 FTE student membership forecasts"—without any reduction in "the distribution of funds based on the July and October 2020 student surveys" of actual attendance. (Emergency Order § III.a [A. 137]). Second, the Emergency Order recognized that not all "students will return to full-time brick and mortar schools," because "some parents will continue their child's education through innovative learning environments, often due to the medical vulnerability of the child or another family member who resides in the same household." (*Id.* § III.b [A. 137-8]). To account for those parent-driven safety concerns, the Emergency Order provided that districts "with an approved reopening plan are authorized to report approved innovative [distance] learning students for full FTE credit." (*Id.*).[11]

In reliance on the Emergency Order, 66 of Florida's 67 local school districts have submitted and received approval for their plans to reopen for fall instruction. (Decl. of J. Oliva (Aug. 26, 2020) ¶ 12 [A. 1558]). A handful of districts—in Broward, Miami–Dade, and Palm Beach counties—have approved plans that call

[11] Students receiving traditional virtual education (for example, in a dedicated district virtual school) would continue to be funded under preexisting state law.

for exclusively remote instruction at the beginning of the school year, due to local conditions that have prevented those counties from graduating from "Phase 1" to "Phase 2" of the state's COVID-19 recovery plan. (Hr'g Tr. 742:22–744:9 [A. 1391]).[12] But as of August 24, 2020—the date of the circuit court's injunction order—45 of the state's county school districts had already opened schools for in-person instruction, delivering those services to approximately 711,000 students. (Oliva Decl. ¶ 6 [A. 1557]).

## III. SUMMARY OF ARGUMENT

The circuit court's preliminary injunction should be vacated because the Plaintiffs have failed to satisfy *any* of the prerequisites for that extraordinary relief under Florida law. First, the Plaintiffs have suffered no threat of irreparable injury, and the speculative harms that they contend *might* be caused by non-parties do not allow them to pursue claims against the State Defendants. Second, the Plaintiffs lack standing and are unlikely to succeed on the merits of their constitutional claims, which are barred by Florida's strict separation of powers, raise non-justiciable political questions, and cannot succeed in the face of the sound, rational policy concerns that justify the Emergency Order. And third, the preliminary

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[12] An example of an approved "Optional Innovative Reopening Plan" (for the School District of Manatee County) was introduced as Defendants' Exhibit 7g at the injunction hearing [A. 255-307]. All of the official approved district reopening plans, including those for Broward, Miami–Dade, and Palm Beach counties, are available on the DOE's COVID-19 website: http://www.fldoe.org/em-response/.

injunction is contrary to the public interest, which favors giving Florida's students and their families local options for in-person instruction when and where safe, based on the advice and orders of public-health officials.

## IV. ARGUMENT

Standard of Review: "An appellate court's review of a ruling on a temporary injunction is hybrid in nature in that legal conclusions are reviewed de novo while factual findings implicate the abuse of discretion standard." *SunTrust Banks, Inc. v. Cauthon & McGuigan, PLC*, 78 So. 3d 709, 711 (Fla. 1st DCA 2012). However, "[w]here a trial court fails to include specific reasons for issuing an injunction, the reviewing court must reverse." *Kirkland v. PeoplesSouth Bank*, 70 So. 3d 662, 664 (Fla. 1st DCA 2011) (citing Fla. R. Civ. P. 1.610(c)).

"[T]he issuance of a preliminary injunction is an extraordinary remedy which should be granted sparingly, [and] which must be based upon a showing of the following criteria: (1) The likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) consideration of public interest." *Hadi v. Liberty Behavioral Health Corp.*, 927 So. 2d 34, 38 (Fla. 1st DCA 2006) (quoting *Shands at Lake Shore, Inc. v. Ferrero*, 898 So. 2d 1037, 1038–39 (Fla. 1st DCA 2005); *City of Jacksonville v. Naegele Outdoor Advert. Co.*, 634 So. 2d 750 (Fla. 1st DCA 1994) (alteration in original), *approved*, 659 So. 2d 1046 (Fla. 1995)). "The petitioner has the burden

of providing competent, substantial evidence satisfying each of these elements." *SunTrust*, 78 So. 3d at 711. A court entering a temporary injunction must also "do more than parrot each tine of the four-prong test. Facts must be found." *City of Jacksonville*, 634 So. 2d at 754. "Clear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a preliminary injunction." *Id.*

### A. The Preliminary Injunction Does Not Prevent Any Irreparable Injury, and the Plaintiffs Have Other Adequate Remedies Against Non-Parties.

The circuit court's preliminary injunction was based on the flawed premise that the Emergency Order unconstitutionally requires local school districts to reopen all public schools for in-person instruction regardless of public-health guidance or conditions on the ground. This Court has already correctly held (in reinstating the automatic stay) that the circuit court's preliminary injunction does not prevent any irreparable injury because "nothing in the Emergency Order requires *any* teacher or *any* student to return for in-person instruction at a brick-and-mortar school":

> As to teachers, whether a school district assigns them to in-person instruction or virtual instruction is a matter between those teachers and their employing school districts. Governor DeSantis, Commissioner Corcoran, and the other appellants have no say in the matter. And the school districts that *do* have a say are notably absent from this lawsuit.
>
> As to students, the Emergency Order does not compel any student to choose in-person instruction or attend a brick-and-

> mortar school. Rather, students and parents are free to choose a brick-and-mortar school for in-person instruction, virtual instruction from their local school district, Florida Virtual School, private school, or homeschooling. While many students and their families chose virtual instruction, parents of over 1.6 million students have decided that the benefits of students returning to school for in-person instruction outweigh any risks posed by COVID-19.
>
> As to school districts, none have been "forced" under the Emergency Order to offer in-person instruction for students. It is left to the individual school districts to determine whether offering in-person instruction poses risks to the welfare and safety of their students, teachers, and school personnel. Nothing in the Emergency Order disturbs the discretion of a school district to determine when to reopen schools and whether to offer in-person instruction. And nothing in the Executive Order limits a school district's ability to reopen schools under the funding formulae approved by the Legislature and administered by DOE.
>
> . . . .
>
> In sum, nothing in the Emergency Order forces school districts to reopen brick-and-mortar schools. Nothing in the order requires a student to attend a brick-and-mortar school. And nothing in the order forces a teacher to return to the classroom. For these reasons, the circuit court abused its discretion in concluding that reinstatement of the automatic stay would cause irreparable harm.

Order (Aug. 31, 2020) 7–8. The Court's conclusions in this regard are legally correct and amply supported by the record. There is no need to reconsider them in this appeal, and the preliminary injunction should be vacated for that reason alone.

Although the circuit court cited *Lebron v. Secretary, Florida Department of Children and Families*, 710 F.3d 1202, 1217 (11th Cir. 2013), for the proposition

that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests" (Cir. Ct. Order (Aug. 24, 2020) 5–6 [A. 1544-5] (internal quotation marks omitted)), *Lebron* is a readily distinguishable Fourth Amendment case involving mandatory state drug testing as a precondition for the receipt of federal welfare benefits. Unlike the welfare recipients in that case, who had a protected interest in avoiding unlawful searches and seizures, the Plaintiffs here have no "constitutionally protected interests" in preventing *school districts* from preparing reopening plans—or any claim to the conditional funding and flexibility that the Emergency Order makes available to districts with plans that are approved. Nor, as this Court concluded, does the Emergency Order "force" the school districts (which are not parties) to do anything at all. All the assurances requested by the Emergency Order directly relate to educational duties and obligations that local school districts have under state and federal law. Efforts to ensure that school districts meet the needs of vulnerable students unquestionably fall within the supervisory authority of the State Board of Education.

Furthermore, the circuit court's injunction does not give the Plaintiffs the relief that they sought in the first place. The Plaintiffs' complaints prayed for an injunction (in part)[13] to prevent the State "Defendants from requiring in-person

[13] The *FEA* Plaintiffs also requested "[a]n order requiring Defendants to develop and implement an online instruction plan . . . to make internet connectivity and

attendance at the start of the 2020–2021 School Year" and from "forcing millions of public-school students to report to unsafe brick and mortar schools that should remain physically closed." (*FEA* Compl. Prayer for Relief ¶ (a) [A. 252]; *accord* *Bellefleur* Am. Compl. at 2 [A. 445]). But even the circuit court correctly held (albeit in its order improperly lifting the automatic stay) that it lacked "authority to enter such an order." (Cir. Ct. Order (Aug. 27, 2020) 2 [A. 1633]).

At any rate, because the Emergency Order does not require the Plaintiff parents to send their children to a brick-and-mortar school for in-person instruction, this case essentially boils down to an employment dispute about working conditions at public schools operated by Florida's 67 local county school districts. Yet none of those school districts or the local boards that oversee them are parties to this case. Nothing in the circuit court's injunction requires any school district to operate their schools any differently, to change their teachers' classroom assignments, or to alter the working conditions for any of their employees.

Instead of suing the State Defendants, the non-parent Plaintiffs should take these matters up (if at all) with their individual school-board employers. For

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computer devices available to all students" and to require that each school "have adequate personal protective equipment and other necessary supplies for all employees and students; reduce class sizes to comply with physical distancing requirements; install sufficient hand-sanitizing stations; add plexiglass shields where necessary; increase staffing; increase school clinic capabilities; and take all necessary measures to protect students and staff and minimize COVID-19 transmission." (*FEA* Compl. Prayer for Relief ¶¶ (b),(c) [A. 252-3]).

example, one of the teacher Plaintiffs, Kathryn Hammond, provided a sworn declaration admitting that her employer, the Orange County School Board, had given her an accommodation to teach remotely. (Pls.' Ex. 33 (Decl. of K. Hammond) ¶¶ 12–13 [A. 621-2]). Her alleged uncertainty "as to how long [her] accommodation to teach remotely will last" (*id.* ¶ 13 [A. 622]) is neither an irreparable injury nor attributable to the State Defendants. If she and the other Plaintiffs have concerns about their conditions of employment or risk of exposure to COVID-19 in the workplace, they should work with their employers and seek relief from their respective local boards of education.

"Injunctions must be specifically tailored to each case and they must not infringe upon conduct that does not produce the harm sought to be avoided." *See Angelino v. Santa Barbara Enters., LLC*, 2 So. 3d 1100, 1104 (Fla. 3d DCA 2009), *quoted with approval in Eadgear, Inc. v. Baca*, 93 So. 3d 1246, 1247 (Fla. 1st DCA 2012)). The circuit court erred when it issued an injunction that could not satisfy that fundamental requirement.

**B. The Plaintiffs Are Not Likely to Succeed on the Merits.**

To prevail on the merits, the Plaintiffs would have to show that the Emergency Order is unconstitutional and would somehow injure them because of the conditions that it placed on the *additional* funding afforded to school districts willing to submit a local reopening plan. Settled Florida law precludes them from

carrying that heavy burden. First, because they face no threat of concrete injury attributable to the State Defendants, they lack standing to pursue their claims. Second, the separation-of-powers doctrine prevents the courts from interfering with the Governor's emergency powers or the DOE's supervision of Florida's public school system here. Third, the Plaintiffs' allegations about the "safety" and "security" of their local public schools raise political questions about policy judgments that are non-justiciable under Florida law. And fourth, the Plaintiffs cannot show that the Emergency Order is arbitrary and capricious in violation of the state due-process clause. Accordingly, the Plaintiffs' unlikelihood of success on the merits is yet another reason to vacate the circuit court's preliminary injunction.

**1. The Plaintiffs have no standing to sue the State Defendants.**

The Plaintiffs' lack of any injury caused by the State Defendants means that they could not possibly prevail, because they lack standing to assert their claims.

> For a court of law operating as one of the three branches of government under the doctrine of the separation of powers, standing is a threshold issue which must be resolved before reaching the merits of a case. Before a court can consider whether an action is illegal, the court must be presented with a justiciable case or controversy between parties who have standing.

*Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015). To have standing, a party must have sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the

litigation. *Nedeau v. Gallagher*, 851 So. 2d 214, 215–16 (Fla. 1st DCA 2003) (citing *Peregood v. Cosmides*, 663 So. 2d 665 (Fla. 5th DCA 1995), and *Equity Res., Inc. v. Cty. of Leon,* 643 So. 2d 1112 (Fla. 1st DCA 1994)). The alleged interest cannot be conjectural or merely hypothetical. *Id*.

It bears repeating that the Emergency Order does not require *a single student* to report for in-person instruction, and any concerns about workplace assignments are between district teachers or staff and the local school boards that employ them. The mere possibility that local school boards, as non-party employers, may or may not take action that may or may not address the Plaintiffs' hypothetical risk of injury does not meet the requirements for standing under Florida law.

The standing barrier is even higher for the teacher and other employee Plaintiffs, including the FEA. The education clause in article IX, section 1(a) of the Florida Constitution expressly concerns "the education of *children*" and "students" within a broader statewide "*system* of free public schools" (emphasis added)." No Florida court has ever held that a county school district's *employees* have standing to assert claims under that provision to challenge classroom assignments or working conditions in specific districts or individual schools. *Cf. Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 403 n.4 (Fla. 1996) ("question[ing] the standing" of an incorporated "coalition," as opposed to students or parents, to assert claims under article IX, section 1(a)).

### 2. The preliminary injunction violates Florida's strict separation of powers by intruding on the State Defendants' executive and supervisory authority in a public-health emergency.

The circuit court's injunction impermissibly interferes with the State Defendants' broad executive authority and discretion to respond to emergencies and supervise Florida's system of free public schools. "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided" in the state constitution. Art. 2, § 3, Fla. Const. "[T]he Florida Constitution [thus] imposes a 'strict' separation of powers requirement that applies just as vigorously to the judicial branch as it does to the other two branches of government." *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1170 (Fla. 1st DCA 2017) (quoting *State v. Cotton*, 769 So. 2d 345 (Fla. 2000)), *approved*, 262 So. 3d 127 (Fla. 2019). And "no branch may encroach upon the powers of another." *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991). Yet by striking selected language from some parts of the Emergency Order and deleting other provisions altogether—effectively blue-penciling the Emergency Order as if it were an ordinary employment contract with a restrictive covenant[14]—the circuit court usurped the

[14] *Cf. White v. Mederi Caretenders Visiting Servs. of Se. Fla., LLC*, 226 So. 3d 774, 785 (Fla. 2017) ("Section 542.335 commands courts to modify, or blue pencil, a non-competition agreement that is 'overbroad, overlong, or otherwise not

State Defendants' executive authority to respond to public emergencies and supervise Florida's public schools to address the unique circumstances of the COVID-19 pandemic.

The "supreme executive power" in Florida is vested in the Governor, who must "take care that the laws are faithfully executed." Art. IV, § 1(a), Fla. Const. And as noted in the executive order delegating authority to suspend regulatory statutes to state agencies during the COVID-19 pandemic, the Governor—not the judiciary—"is responsible for meeting the dangers presented to this state and its people by emergencies" and may "issue executive orders, proclamations and rules . . . [that] shall have the force and effect of law." § 252.36(1)(a), (b), Fla. Stat.; (*see also* Executive Order 20-52, at 2 [A. 12]).

Similarly, article IX, section 2 of the Florida Constitution gives the State Board of Education—again, not the judiciary—"such supervision of the system of free public education as is provided by law." Art. IX, § 2, Fla. Const. Even with respect to local boards of education, which *do* have constitutional authority to operate local public schools, Florida courts have recognized that "[t]he Florida Constitution . . . creates a hierarchy under which a school board has local control, but the State Board supervises the system as a whole. This broader supervisory

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reasonably necessary to protect the legitimate business interest,' instructing courts to 'grant only the relief reasonably necessary to protect such interest.'" (quoting § 542.335(1)(c), Fla. Stat.)).

authority may at times infringe on a school board's local powers, but such infringement is expressly contemplated—and in fact encouraged by the very nature of supervision—by the Florida Constitution." *Sch. Bd. of Collier Cty. v. Fla. Dep't of Educ.*, 279 So. 3d 281, 292 (Fla. 1st DCA 2019) (quoting *Sch. Bd. of Palm Beach Cty. v. Fla. Charter Educ. Found. Inc.*, 213 So. 3d 356, 360 (Fla. 4th DCA 2017)), *review denied*, No. SC19-1649, 2020 WL 1685138 (Fla. Apr. 7, 2020).

The Plaintiffs do not contend that the State Defendants exceeded their constitutional authority in the Emergency Order by suspending state laws to provide school districts with additional state funding that (as this Court observed) "*would have been unavailable absent a waiver of applicable statutes and rules*." Order (Aug. 31, 2020) 8. Quite the contrary: the Plaintiffs urged the circuit court to *preserve* the additional funding and flexibility made available under the Emergency Order while eviscerating the accompanying requirement to develop a local plan with an option for in-person instruction, subject to the advice of state and local health authorities. By issuing an injunction that rewrote the Emergency Order to reflect the circuit court's assessment of the order's "good and bad features" under the guise of a severability analysis, (Cir. Ct. Order (Aug. 24, 2020) 14 [A. 1553]), the court improperly intruded on the State Defendants' executive authority to impose conditions on the additional funding and flexibility that they deemed appropriate for local school districts during a public-health emergency.

The circuit court's severability analysis was also deeply flawed. As an initial matter, that court impermissibly *added* language to the Emergency Order. (Cir. Ct. Order (Aug. 24, 2020) 15 [A. 1554]) (striking the word "must" and replacing it with "may"; striking the word "districts" and replacing it with "boards"). "The severability doctrine has only been used to strike objectionable language. It is not a vehicle for the wholesale substitution of other language for language that is stricken." *Fla. Dep't of State v. Mangat*, 43 So. 3d 642, 650 (Fla. 2010).

Moreover, even if "the severability standard for statutes—whether the legislature would not have taken the valid action independently of the invalid action—also applies to Executive Orders," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 173 (1999), the circuit court ignored the plain intent of the Emergency Order. That order states on its face that "there is a need to open schools fully" and describes one of its central "goals" as "reopening brick and mortar schools with the full panoply of services for the benefit of Florida students and families." (Emergency Order at 2 [A. 133]). Divining "legislative intent" from the pronouncements of an executive official is a dubious exercise to begin with. But the circuit court's conclusion that the Emergency Order's *other* "goals can be accomplished independently," (Cir. Ct. Order (Aug. 24, 2020) 15 [A. 1554]), improperly disregards critical parts of the order as issued by the Commissioner and the DOE.

In addition, despite the Plaintiffs' suggestion that the State Defendants cannot use additional funding as an incentive for local school districts to provide an option for in-person instruction—even in the *absence* of a public emergency—Florida law clearly permits the State to impose constraints on the manner, extent, and use of funds for public education under article IX of the state constitution. *See, e.g.*, *Sch. Bd. of Collier Cty.*, 279 So. 3d at 291 ("[T]he trial court reasoned in part that the school boards failed to explain how the Florida Constitution could preclude the State from imposing conditions on . . . [funds raised with state] authorization. The school boards have failed to show any error on the trial court's part."). There is nothing unconstitutionally "coercive" about requiring local planning or imposing other conditions on the receipt or use of state funds by a local school district. The circuit court's concern that the Emergency Order "denies local school boards decision making with respect to reopening brick and mortar schools," by "condition[ing] funding on an approved reopening plan with a start date in August" (Cir. Ct. Order (Aug. 24, 2020) 15 [A. 1554]), ignores the fundamental structure of the State's authority to supervise Florida's statewide system of public schools.

The U.S. Supreme Court has similarly recognized that states have inherent police powers to protect the public health and welfare, as well as the discretion to prescribe the "mode or manner in which those results are to be accomplished."

*Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (upholding state law requiring smallpox vaccination); *see also id.* at 31 (permitting courts to review an emergency action on constitutional grounds only when (1) there is "no real or substantial relation" between the action and the crisis; or (2) the action is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law"). Although courts may consider whether the State's actions are "arbitrary or oppressive," they should not "second-guess the wisdom or efficacy of the measures" themselves. *In re Abbott*, 954 F.3d 772, 785 (5th Cir. 2020). After all, the State's discretion is "especially broad" in emergencies "fraught with medical and scientific uncertainties." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in the denial of injunctive relief involving state COVID-19 restrictions) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)).

In sum, the Florida Supreme Court has "described the separation of powers as the 'cornerstone of American democracy.'" *Corcoran v. Geffin*, 250 So. 3d 779, 783–84 (Fla. 1st DCA 2018) (quoting *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004)). That principle has even more significance during an emergency like the COVID-19 pandemic. "Courts should be loath to intrude on the powers and prerogatives of the other branches of government," *Orr v. Trask*, 464 So. 2d 131, 135 (Fla. 1985), and should not overturn—or blue-pencil—emergency executive

orders except upon a showing of the most compelling circumstances. The circuit court's preliminary injunction exceeded the bounds of its judicial authority and encroached on the powers of the executive. The injunction thus violated the separation of powers under the Florida Constitution and should be vacated on that ground as well.

### 3. The circuit court's purported assessment of the constitutional "safety" or "security" of Florida's public schools improperly addressed a non-justiciable political question.

Regardless of whether the Plaintiffs' claims technically arise under the Florida Constitution's education clause or due-process clause, they necessarily turn on the meaning of the State Defendants' alleged obligation to "ensure that our schools operate safely." (*FEA* Compl. ¶ 80 [A. 245]; *see also Bellefleur* Am. Compl. ¶ 73 [A. 464] ("Since schools cannot open safely and be secure, no reasonable person could state that live and in person classrooms in the near term would be providing anything resembling high quality education as demanded by Florida's Constitution.")). But "safety" and "security" in the context of an evolving pandemic are elusive and debatable concepts that depend on many variables and competing policy priorities. In other words, those concepts lack "judicially discoverable and manageable standards for resolving" the non-justiciable political questions raised by the Plaintiffs' claims. *Coalition*, 680 So. 2d at 408.

First, the constitutional requirement that "[a]dequate provision shall be made *by law* for a . . . safe, secure, and high quality system of free public schools," Art. IX, § 1(a), Fla. Const. (emphasis added), shows "that the constitution has committed the determination of 'adequacy'" and concepts like safety and security "to the legislature." *Coalition*, 680 So. 2d at 408. The use of the phrase "by law" "demonstrates that the constitution continues to commit education policy determinations to the legislative and executive branches." *Citizens for Strong Sch.*, 232 So. 3d at 1171 (Fla. 1st DCA 2017). "[T]he courts possess no special competence or specific constitutional authority" to wade into "the details and execution of educational policies and related appropriations, involving millions of students and [potentially] billions of dollars." *Id.* And as the Florida Supreme Court concluded in *Citizens for Strong Schools*, the Plaintiffs here have "fail[ed] to present the courts with any roadmap by which to avoid intruding into the powers of the other branches of government" as they ask the judiciary to define safety during the COVID-19 pandemic. 262 So. 3d at 135 (Fla. 2019).

The evidence presented at the injunction hearing only confirmed that "the lack of any definitive consensus regarding education policies and programs" to reopen schools safely during the pandemic "demonstrates the political nature of [the Plaintiffs'] assertions." *Citizens for Strong Sch.*, 232 So. 3d at 1171 (Fla. 1st DCA 2017). The evidence in the record demonstrates there is no obvious litmus

test for how or when to reopen schools in these unprecedented circumstances, regardless of what the Plaintiffs or the circuit court might have believed.[15] Indeed, a bright-line approach is inconsistent with virtually all available guidance regarding the reopening of schools from the Centers for Disease Control and Prevention, the American Academy of Pediatrics, and the Governor's phased COVID-19 recovery plan (under which several school districts in Broward, Miami–Dade, and Palm Beach counties have further delayed in-person instruction).[16] Even the two Emergency Orders issued by the DOE in this case—one in March 2020, and the subsequent order at issue from July—reflect evolving

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[15] (*See, e.g.*, Hr'g Tr. 559:6–559:18 [A. 1295] (Test. of Dr. Jay Battacharya, M.D., Ph.D., Stanford University School of Medicine: "[P]ercent positivity does not actually reflect community risk. It's not a random sample. . . . [U]nder no setting would I say that this number by itself is definitive in deciding whether to open or close a school [or] it's safe to open or close a school district, as far as disease is concerned."); *id.* at 608:7–608:9 [A. 1357] ("You have to look at a much broader set of facts before you decide something like that. You can't just look at one number."); *id.* at 685:1–685:8 [A. 1376] (testimony of Manatee school-board member and epidemiologist Dr. Scott Hopes that COVID-19 positivity rates are not meaningful or relevant as a "single measurement")).

[16] Dr. Bhattacharya, a Professor of Medicine at Stanford University and widely published public-health researcher (Defs.' Ex. 8 [A. 110-131]), testified that schools around the world are reopening for in-person instruction based partly on research showing that children with COVID-19 have lower mortality rates than children with the flu. (Hr'g Tr. 538:22–543:22 [A. 1290-1291]). Dr. Bhattacharya explained several studies from countries where closing and opening schools had no appreciable effect on the community spread of COVID-19. (*Id.*; Defs.' Exs. 26–28 [A. 56-105, 435-437]). And Dr. Bhattacharya further testified that the CDC and World Health Organization have both issued guidance emphasizing the importance of reopening schools for in-person instruction. (Hr'g Tr. 628:17–629:9 [A. 1362]).

perspectives on the risks, policy judgments, and competing priorities to be balanced during the ongoing pandemic. As the circuit court put it, "The medical literature is clearly still in flux and difficult to parse." (Cir. Ct. Order (Aug. 24, 2020) 9 [A. 1548]).[17]

The circuit court's reliance on dicta from another circuit judge to the effect that "Florida's trial courts deal with issues relating to safety and security all day long," (Cir. Ct. Order (Aug. 24, 2020) 8 [A. 1547]), was thus misplaced. For one thing, that court's passing gloss on the terms "safe" and "secure" was not adopted by either of the appellate courts that subsequently affirmed and approved its judgment. *See Citizens for Strong Sch.*, 232 So. 3d at 1167 n.3 (Fla. 1st DCA 2017) ("As to 'safe' and 'secure,' the trial court ruled that these terms are subject to judicially manageable standards, but that Appellants had withdrawn any challenge to the safety or security of the public school system before trial. . . . As we hold that the overarching question of adequacy is not justiciable, we do not opine on the trial court's conclusion in this regard."). But even if those terms were somehow justiciable in the relatively simple context of, say, building codes or fire safety, Chief Justice Roberts of the U.S. Supreme Court has correctly explained that

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[17] (*Cf.* Hr'g Tr. 632:8–632:12 [A. 1363] (Test. of Dr. Bhattacharya: "It's a risk-based decision. There's no other choice. There's no safe option. Keeping the schools closed is not safe. Keeping the schools open poses risks that we can mitigate.")).

questions about "'[t]he safety and the health of the people'" during the COVID-19 pandemic "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *S. Bay United Pentecostal*, 140 S. Ct. at 1613 (Roberts, C.J.) (quoting *Jacobson*, 197 U.S. at 38; *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)).

Just as the terms "adequate," "efficient," and "high quality" were held to be non-justiciable in *Citizens for Strong Schools*, 262 So. 3d 127, the relative meanings of the words "safe" and "secure" in *this* context are not "'susceptible [of] judicial interpretation,'" *id.* at 134 (quoting First DCA's opinion, 232 So. 3d at 1170). In the words of the circuit court, "What has been clearly established is there is no easy decision . . . ." (Cir. Ct. Order (Aug. 24, 2020) 10 [A. 1549]). The Plaintiffs cannot succeed on the merits of claims that are non-justiciable, and the circuit court therefore erred in issuing the preliminary injunction.

#### 4. The Plaintiffs cannot show that the Emergency Order is arbitrary and capricious because it is supported by a conceivable rational basis.

The circuit court also erroneously concluded that the Emergency Order was "arbitrary and capricious" in violation of Florida's due-process clause. The court correctly recognized that the Plaintiffs would have "to prove beyond a reasonable doubt that the State's education policies . . . were not rationally related to the

provision 'by law' for a 'uniform, efficient, safe, secure, and high-quality system of free public schools that allows students to obtain a high-quality education," under *Citizens for Strong Schools*, 232 So. 3d at 1172 n.5 (Fla. 1st DCA 2017). (Cir. Ct. Order (Aug. 24, 2020) 7 [A. 1546]). But the court incorrectly found that the Emergency Order was unsupported by any rational basis. *See Agency for Health Care Admin. v. Hameroff*, 816 So. 2d 1145, 1149 (Fla. 1st DCA 2002) ("[T]he state is not obligated to demonstrate the constitutionality of the legislation. The burden is instead upon the party challenging the legislation to negate *every conceivable rational basis* which might support it." (emphasis added) (citing *Coy v. Fla. Birth-Related Neurological Injury Compensation Plan*, 595 So. 2d 943, 945 (Fla. 1992)).

None of the examples in the circuit court's order show that the Emergency Order is arbitrary or irrational. For example, with respect to the "evidence . . . that the Department of Education allowed Miami-Dade County, Broward County, and Palm Beach County to begin the school year with distance learning" (Cir. Ct. Order (Aug. 24, 2020) 9 [A. 1548]), that decision was rationally supported by the fact that those three counties had not progressed to Phase 2 of Florida's COVID-19 recovery plan. Although the Emergency Order itself does not explicitly mention "phases" (*id.*), it *does* state that the decision to reopen brick-and-mortar schools is "subject to advice and orders of the Florida Department of Health, local departments of health, Executive Order 20-149 *and subsequent executive orders*."

(Emergency Order § I.a [A. 133-4] (emphasis added)). As noted above in Part I.B. (and footnotes 9 and 10), the Governor explained the phases of Florida's recovery plan in Executive Orders 20-112 and 20-139, which were issued pursuant to Executive Order 20-52—the source of the DOE's delegated authority for the Emergency Order—as extended by Executive Orders 20-114 and 20-166. The Emergency Order is expressly "subject to" these other executive orders, which provide a rational basis for the decision to postpone in-person instruction in Miami-Dade, Broward, and Palm Beach counties.

The Plaintiffs' emphasis on Hillsborough County is no more convincing as supposed "evidence" of the State Defendants' "arbitrarily prioritiz[ing] reopening schools statewide in August over safety." (Cir. Ct. Order (Aug. 24 2020) 7 [A. 1546]). None of the Plaintiffs are from Hillsborough County, and neither complaint contains allegations about problems specific to that county. But in any event, the State Defendants presented undisputed evidence that many groups of students can suffer physiologically, emotionally, and educationally when they are unable to attend school in-person. (*See, e.g.*, Defs.' Exs. 5 [A. 934-39], 14 [A. 544-8], 15 [A. 623-8], 16 [A. 613-20], 17 [A. 699-704], 18 [A. 629-676]). At the same time, *no* student is forced to return to school for in-person instruction under any plan submitted and approved under the Emergency Order. Even if the circuit court did

not *personally* agree with the balance struck by the Emergency Order, the Plaintiffs cannot show that it lacked any *conceivable* rational basis.

In fact, the Emergency Order's preference for in-person instruction (when and where safe) is consistent not only with Florida's FEFP funding formula but also with a specific statute on reopening public schools in the context of an emergency:

> In the event of an emergency situation, the commissioner may coordinate through the most appropriate means of communication with local school districts, Florida College System institutions, and satellite offices of the Division of Blind Services and the Division of Vocational Rehabilitation to assess the need for resources and assistance to enable each school, institution, or satellite office the ability to *reopen as soon as possible after considering the health, safety, and welfare of students and clients*.

§ 1001.10(8), Fla. Stat. (emphasis added). Like this preexisting statute (which took effect in 2018), the Emergency Order reflects a policy preference for reopening schools for in-person instruction after considering health and safety issues. The Plaintiffs have not challenged this presumptively constitutional statute,[18] nor could they show that it lacks a conceivable rational basis if they tried. The circuit court

[18] "Should any doubt exist that an act is in violation of any constitutional provision, the presumption is in favor of constitutionality. To overcome the presumption, the invalidity must appear *beyond reasonable doubt . . . .*" *Pub. Def., 11th Jud. Cir. of Fla. v. State*, 115 So. 3d 261, 280 (Fla. 2013) (emphasis added) (internal alterations, citation, and quotation marks omitted).

should have reached the same conclusion with respect to the Emergency Order and denied the Plaintiffs' request for a preliminary injunction.

### C. The Preliminary Injunction Does Not Serve the Public Interest.

As this Court concluded when it reinstated the automatic stay pending review, the circuit court's "injunction order caused confusion and uncertainty for students, parents, and teachers." (Order (Aug. 31, 2020) 7). If permitted to take effect after this appeal, that injunction would threaten to undermine the planning completed by nearly all of Florida's public school districts in reliance on the additional funding and flexibility available under the Emergency Order. The hundreds of thousands of students and their families who have opted for in-person classroom instruction would be thrown into a state of uncertainty. And allowing local school districts to abandon classroom instruction altogether—though the circuit court conceded that it lacked the authority to issue an order to that effect—would threaten to deprive schoolchildren of the myriad benefits of in-person instruction described by the CDC, (Defs.' Ex. 5 [A. 934-9]), and by numerous witnesses who provided declarations or testimony for the preliminary injunction hearing. The advantages of in-person instruction for English Language Learners, (Defs.' Ex. 14 [A. 544-8]), children living in potentially abusive homes, (Defs.' Ex. 15 [A. 623-8]), students with disabilities, (Defs.' Ex. 16 [A. 613-20]), students

struggling with mental health, (Defs.' Ex. 17 [A. 699-704]), and overall student achievement and attainment, (Defs.' Ex. 18 [A. 629-676]), are beyond dispute.

Insofar as the Plaintiffs raise hypothetical concerns about in-school exposure to COVID-19, the Emergency Order reflects a considered policy judgment to consider those concerns and defer to the advice and expertise of state and local public-health authorities. In addition to the absence of irreparable injury and the State Defendants' likelihood of success on the merits, the public interest also weighs in favor of vacating the circuit court's improper preliminary injunction.

## V. CONCLUSION

The circuit court erroneously issued a preliminary injunction to address a hypothetical risk of injury, for Plaintiffs who are unlikely to prevail on the merits, and all to the detriment of the broader public interests of Florida's public-school students and their families, who stand to benefit from safe options for in-person classroom instruction. To preserve the separation of powers, to keep the courts from wading into non-justiciable political questions, and for all of the other reasons set forth above, the preliminary injunction should be vacated, and the case should be remanded with instructions for an appropriate disposition below.

Respectfully submitted September 2, 2020.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing is being served on September 2, 2020, by email through the Florida Courts E-Filing Portal addressed to the following counsel of record:

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

s/ *David M. Wells*
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