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

DEFENDANT–APPELLANTS' RESPONSE IN OPPOSITION TO APPELLEES' MOTION FOR REHEARING EN BANC

This Court's unanimous opinion in these consolidated appeals reflected a careful consideration of the facts and law, which warranted vacating the trial court's preliminary injunction against the State Defendants.[1] The Plaintiffs' motion for rehearing en banc does not show that the original panel erred in its conclusions,

[1] The State Defendants are Governor Ron DeSantis, the State Board of Education (along with State Board of Education 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).

nor does the Plaintiffs' motion show that this case deserves the extraordinary attention of the full Court sitting en banc. The benefits of finality and closure also weigh against reviving the threat of a preliminary injunction in this matter, and the Plaintiffs' motion for rehearing en banc should be denied.

I. BACKGROUND

This litigation arose from a series of emergency executive orders in response to the COVID-19 pandemic, including its impact on Florida's K–12 public schools. Because of concerns about state funding for alternatives to in-person instruction and the harms associated with extended school closures, the state Commissioner of Education issued Florida Department of Education Emergency Order No. 2020-EO-06 (the "Emergency Order").[2]

The Emergency Order offered county school districts additional state funding and flexibility if they developed plans to provide a mix of in-person and "innovative" remote instruction in the fall[3]—all expressly "subject to advice and

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[2] The Commissioner issued the Emergency Order pursuant to the Governor's lawful delegation of authority in Executive Order 20-52, § 4.B [A.14]. *See generally* § 252.36(1)(a), (5)(a), Fla. Stat.; Division of Emergency Management Emergency Order No. 20-004, https://www.flgov.com/wp-content/uploads/covid19/DEM%20ORDER%20NO.%2020-004.pdf.

[3] The Plaintiffs' assertion that this Court "made findings that were supported by no evidence at all" because of the panel's discussion of virtual and online instruction (Mot. Reh'g En Banc 15) ignores the panel's express recognition that the Emergency Order gave "school districts needed authority to continue to offer online classes *outside* the Florida Virtual School program" to mitigate "decreased

orders of the Florida Department of Health[] [and] local departments of health." (Emergency Order § I.a, [A. 133]). If districts submitted approved plans, instead of being funded under existing statutes and rules that tied state funding to actual enrollment and discounted reimbursement for virtual classes, those districts would effectively receive additional state funding—*despite* their falling enrollment and increased participation in distance learning during the pandemic. (*Id.* § III, [A. 137-38]). 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. [A. 137]).

As school districts were already 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.[4] The trial court acknowledged that it did not have the authority to order statewide school closures. But it nevertheless issued a preliminary injunction purporting to excise the condition that for local school districts to receive the optional funding and

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[in-person] student enrollment" (Opinion 6 (emphasis added)).

[4] The Plaintiffs' claims relied on part of the Florida Constitution's education clause: "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. (emphasis added).

flexibility under the Emergency Order, they would need to develop their own approved reopening plans. (Order Granting Mot. Temporary Inj. [A. 1539-55]).

In the State Defendants' appeal from that injunction, this Court first reinstated the automatic stay to which the State Defendants were entitled under Florida Rule of Appellate Procedure 9.310(b)(2)—and declined to certify the trial court's order as one requiring immediate resolution by the Florida Supreme Court. (Order (Aug. 28, 2020)). The Court also issued a 10-page order explaining its decision on the stay, reasoning that "no compelling circumstances warranted vacating the stay," that "the State has a substantial likelihood of succeeding on the merits," and that the Plaintiffs had "failed to show that reinstatement of the automatic stay would cause irreparable harm." (Order (Aug. 31, 2020) 6).

After full briefing, the Court further concluded that the Plaintiffs had not met the requirements for a preliminary injunction and that the trial court had "exceeded the constitutional limits of its authority by rewriting" the Emergency Order. (Opinion (Oct. 9, 2020) 4). In explaining those conclusions, the Court summarized the facts and the record of proceedings (*id*. at 4–9), conducted a detailed analysis of the Plaintiffs' standing (*id.* at 10–12), carefully addressed political-question and separation-of-powers concerns (*id.* at 12–21), and rejected the Plaintiffs' central assertion that the Emergency Order was arbitrary and capricious on its face or as applied (*id.* at 21–24). Having determined that the Plaintiffs were unlikely to

prevail on the merits, the Court also concluded that they did not face a threat of irreparable injury (*id.* at 24–25), that they had failed to show that they lacked an adequate remedy at law (*id.* at 25–26), and that the trial court's preliminary injunction did not serve the public interest (*id.* at 26–27). Finally, the Court concluded that even if the Plaintiffs *had* satisfied the requirements for an injunction in general, the trial court's *specific* injunction granted relief not properly sought and also misapplied Florida's severability doctrine, by rewriting the Emergency Order in a way that defeated one of its central purposes and substituted the trial court's preferred language and policy views for those of the State. (*Id.* at 27–29).

II. ARGUMENT

"En banc hearings and rehearing shall not be ordered unless the case or issue is of exceptional importance or unless necessary to maintain uniformity in the court's decisions." Fla. R. App. P. 9.331(a). Although the State Defendants agree that the concerns raised by the trial court's erroneous injunction were important, "[a] rehearing en banc is an extraordinary proceeding," *id.* 9.331(d)(2), and the Plaintiffs have not shown that the panel opinion vacating that preliminary injunction requires this Court as a whole to reconsider the matter.

The three-judge panel in this case issued a thorough and detailed opinion that correctly rejected the Plaintiffs' arguments[5] in defense of the trial court's

[5] Like the Plaintiffs' motion for rehearing en banc, this opposition focuses

erroneous preliminary injunction. Regardless of the Plaintiffs' disagreement with the panel's unanimous opinion, the Court should deny their motion for rehearing en banc.

A. The Panel Correctly Applied the Law and Reached the Right Result.

1. The Panel Did Not Err by Concluding That the Plaintiffs Lack Standing.

The Plaintiffs first incorrectly challenge the panel's holding that they lacked standing as not only mistaken but also "overbroad" in a manner that would "have a far-reaching and detrimental impact on teachers, staff, and parents." (Mot. Reh'g En Banc 19). But the panel opinion carefully addressed the Plaintiffs' arguments and the evidence on this point before reaching the right conclusion on the *specific* facts of *this* case:

> The Emergency Order does not require any teacher, staff member, or student to return to the classroom. Nor would an order declaring the Emergency Order unconstitutional and enjoining its enforcement force any school district to close schools. Nor would it prevent school districts from requiring teachers and staff to return to the classroom.

(Opinion 11).

The Plaintiffs' misguided assertion that the panel "should not have . . . disturbed" the trial court's supposed factual findings (Mot. Reh'g En Banc 18) is

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primarily on their arguments concerning the likelihood of success on the merits. The State Defendants respectfully submit that the panel's well-reasoned conclusions on the other issues, including (for example) the adequacy of other remedies and severability, speak for themselves.

beside the point. The panel correctly observed that "[s]tanding is a question of law, which an appellate court reviews de novo," and concluded that the Plaintiffs had "simply not demonstrated any concrete, palpable injury sufficient to confer standing." (Opinion 11 (citing *McCall v. Scott*, 199 So. 3d 359, 364 (Fla. 1st DCA 2016)); *id.* at 12). The Plaintiffs' disagreement with that conclusion does not mean that the panel was wrong—much less that the issue warrants en banc review.

The Plaintiffs' motion for rehearing en banc also misapprehends the panel's holding on standing. The panel did not issue a blanket "holding that teachers, staff, and parents of school children do not have standing to challenge actions of the State related to the safety of public schools." (Mot. Reh'g En Banc 17). The panel instead held that on the facts of *this* case, "there is no causal link between the State's conduct in issuing the Emergency Order and Appellees' alleged injuries." (Opinion 12; *see also id.* ("Appellees have not alleged that any student has been denied the option to take classes online. Nor have they alleged that any teacher was forced to return to the classroom, denied a requested accommodation from their employing school district, and then suffered harm.")). There is no need to "correct" the panel's holding on standing (Mot. Reh'g En Banc 19), which was both correct and reasonable.

2. The Panel Did Not Err When It Concluded That the Plaintiffs' Claims Were Nonjusticiable.

The panel carefully analyzed Florida precedent on the justiciability of claims arising under the education clause of the Florida Constitution—including *Coalition of Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996), *Citizens for Strong Schools, Inc. v. Florida State Board of Education* (*Citizens I*), 232 So. 3d 1163 (Fla. 1st DCA 2017), and *Citizens for Strong Schools, Inc. v. Florida State Board of Education*, 262 So. 3d 127 (Fla. 2019) (*Citizens II*)—and applied that law to the facts. The panel also explicitly addressed many of the points raised in the Plaintiffs' motion for rehearing—including the 5% positivity rate that they describe as a "gold standard" for safety. (*Compare* Mot. Reh'g En Banc 20, *with* Opinion 16 n.1 ("Public health authorities disagree on the metrics to be applied and how to interpret those metrics.")). And the panel correctly noted "the perils of judicial decision-making in this policy-laden arena," which would have required the trial court "to consider the myriad concerns the State had to ponder in deciding whether schools should reopen for in-person instruction—the risks associated with the virus if schools reopen and the risks associated with **not** reopening schools—before deciding which risks were tolerable." (Opinion 15, 16). The panel thus correctly held that "[s]uch complex decision-making and policy judgments" involving "education policy, public health

policy, economic policy, and emergency management policy" were "far beyond the authority of the judiciary." (*Id.* at 17).

The Plaintiffs are also wrong to suggest that the panel ignored Florida law by not addressing justiciability concerns on a "case by case" basis (Mot. Reh'g En Banc 21). Although the panel correctly held that "[t]he terms 'safe' and 'secure' as used in article IX, section 1(a), lack judicially discoverable or manageable standards," it further explained that "[t]his is especially true when, *as here*, the State was trying to meet its constitutional obligation to provide for an adequate public school system while also exercising its statutory authority to respond to a natural emergency." (Opinion 15 (emphasis added)). The panel's conclusion that "[c]ourts simply lack the expertise and authority to weigh and balance the many public health, social, and economic factors that inform the policy decision made *here*" with respect to "when and how to reopen Florida's public schools in the wake of a public health emergency" (*id.* at 17 (emphasis added)) shows that the panel considered Florida law and properly applied it to the facts.

3. The Panel Correctly Applied Florida Law in Concluding that the Trial Court's Order Violated Florida's Strict Separation of Powers.

The Plaintiffs' separation-of-powers argument again misapprehends the panel opinion—and does so by raising an issue that they never presented to the panel. The Plaintiffs' merits briefing did not cite *Daly v. Marion County*, 265 So.

3d 644, 649 (Fla. 1st DCA 2019), much less argue that mere allegations of a constitutional violation are sufficient to overcome Florida's strict separation of powers. (*Cf.* Mot. Reh'g En Banc 22 (citing *Daly*)).

At any rate, the panel did not hold, as the Plaintiffs claim, "that the judiciary may *never* review the actions of the executive branch in the areas of education, emergency management, and public health." (Mot. Reh'g En Banc 22). The panel opinion instead focused on the trial court's broad and overreaching injunction, which would have forced the Commissioner of Education to remove discretionary conditions on optional state funding even though he "could have chosen to do *nothing* and declined to exercise the discretionary authority the Governor delegated to him" in the first place. (Opinion 19 (emphasis added)).

4. The Panel Did Not Improperly "Substitute" Its Own Findings for the Trial Court's in Concluding That the Trial Court Had Improperly Enjoined the State.

The Plaintiffs' remaining arguments depend on the assertion that the panel gave insufficient weight to selected evidence or to the trial court's findings on particular issues.[6] For one thing, many of the "findings" that the Plaintiffs cite are at best mixed questions of law and fact on issues such as causation, justiciability,

[6] Insofar as the Plaintiffs cite hearsay from articles and websites outside the record (Mot. Reh'g En Banc 26), those sources should be disregarded. *See Altchiler v. State, Dep't of Prof'l Regulation*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983) ("That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court.").

and the adequacy of the Plaintiffs' other potential remedies. But regardless of whether the Plaintiffs think the panel gave enough "import to the findings of fact," "downplay[ed]" other evidence, or described factual findings as "*allegation*[*s*]" (Mot. Reh'g En Banc 22, 23, 24)—though the panel *did* correctly articulate and apply the appropriate standard of review for appeals from a preliminary injunction (*see* Opinion 9–10)—mere disagreements about the weight of the evidence do not warrant en banc review.

B. The Plaintiffs Have Not Shown That Issues of Exceptional Importance Require Rehearing En Banc.

The Plaintiffs' arguments that this case warrants an extraordinary en banc proceeding because of its "exceptional importance," Fla. R. App. P. 9.331(a), are also misplaced. First, the Plaintiffs' reference to the State Defendants' request for a pass-through appeal (Mot. Reh'g En Banc 30) ignores the fact that this Court denied that request (Order (Aug. 28, 2020)). And more broadly, the only arguably "exceptional" issues raised in the Plaintiffs' motion are this case's connections to the COVID-19 pandemic. The State Defendants sought pass-through jurisdiction in an effort to mitigate the uncertainty and disruption threatened by the trial court's order *before* this Court had stayed the preliminary injunction pending appeal.[7]

[7] Especially before this Court reinstated the automatic stay under Rule 9.310(b)(2)—in the same order denying the request to certify for a pass-through appeal—the trial court's preliminary injunction directly threatened to interfere with the ongoing reopening of public schools by local districts and to disrupt family

Now that the injunction has been vacated and the school year is well underway, considerations of finality weigh strongly against granting a motion that could revive the same uncertainty that the panel considered in concluding that an injunction would not serve the public interest. (*See* Opinion 27 ("[R]ather than maintaining the status quo, an injunction would diminish the funding available to school districts, throw into disarray plans made by every school board in the state, and leave parents and students in doubt about their educational options.")).

III. CONCLUSION

The three-judge panel issued a thorough, well-reasoned, and correct decision in this appeal. The Plaintiffs have not shown that the panel erred or that issues of exceptional importance warrant an extraordinary review by the full Court. The Plaintiffs' motion for rehearing en banc should therefore be denied.

Respectfully submitted November 10, 2020.

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plans for the education of millions of Florida students. Those concerns abated when the panel stayed and then vacated the injunction.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing is being served on November 10, 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).

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