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 PANEL REHEARING

The 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 Plaintiff–Appellees may be disappointed by that result, but simply accusing the Court of

[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).

"misapprehend[ing] and overlook[ing] points of law and fact" (Mot. Panel Reh'g 2) does not make it so. The Plaintiffs' motion for panel rehearing amounts to nothing more than an improper attempt to reargue the case. There is no need to revisit these issues under Florida Rule of Appellate Procedure 9.330, and the Plaintiffs' motion 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 Court's discussion of virtual and online instruction (Mot. Panel Reh'g 15) ignores the Court's express recognition that the Emergency

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

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Order gave "school districts needed authority to continue to offer online classes *outside* the Florida Virtual School program" to mitigate "decreased [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).

the condition that for local school districts to receive the optional funding and 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 detailed 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

A motion for panel rehearing must "state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision." Fla. R. App. P. 9.330(a)(2)(A). Such a motion "shall not present issues not previously raised in the proceeding." *Id.* Moreover, "'[a] motion for rehearing shall not reargue the merits of the court's order.'" *Unifirst Corp. v. City of Jacksonville*, 42 So. 3d 247, 248 (Fla. 1st DCA 2009) (quoting *Jacobs v. Wainwright*, 450 So.2d 200, 202 (Fla. 1984)) (imposing sanctions for filing motion for rehearing that clearly violated Florida Rule of Appellate Procedure 9.330).

> "Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation."

Id. (quoting *State ex rel. Jaytex Realty Co. v. Green*, 105 So.2d 817, 818–19 (Fla. 1st DCA 1958)).

The Plaintiffs have not met the standards to justify a rehearing. In a thorough and detailed opinion, this Court already considered the Plaintiffs' arguments in defense of the trial court's erroneous injunction. Regardless of their disagreement with the Court's unanimous opinion—based on four arguments[5] that were previously presented and necessarily rejected—the Court should deny their motion for panel rehearing.

A. The Court Did Not Overlook or Misapprehend Anything When It Concluded That the Plaintiffs Lack Standing.

The Plaintiffs' first argument for rehearing is that the Court "overlook[ed] that teachers, staff and parents are indeed suffering injury via the Emergency Order at issue—and continue to do so." (Mot. Panel Reh'g 2; *see also id.* at 17–19). But

[5] Like the Plaintiffs' motion for rehearing, this opposition focuses primarily on their arguments concerning the likelihood of success on the merits. The State Defendants respectfully submit that the Court's well-reasoned conclusions on the other issues, including (for example) the adequacy of other remedies and severability, speak for themselves.

the Court's opinion explicitly addressed the Plaintiffs' argument and the evidence on this point, and more. (*See, e.g.*, Opinion 11 ("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.")).

The Plaintiffs' misguided assertion that the Court "should not have . . . disturbed" the trial court's supposed factual findings (Mot. Panel Reh'g 18) does not show that the Court *overlooked* the trial court's findings. Rather, the Court 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 previously made all of the standing arguments in their motion for rehearing to the Court in their briefs on the merits. That the Plaintiffs were unsuccessful does not mean that the Court should now change its mind.

The Plaintiffs' motion for rehearing also misapprehends the Court's holding on standing. This Court 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. Panel Reh'g 17). The Court 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 Court's holding (Mot. Panel Reh'g 19), which was both correct and reasonable.

B. The Court Did Not Err When It Concluded That the Plaintiffs' Claims Were Nonjusticiable.

The Plaintiffs' political-question arguments are similarly inappropriate for panel rehearing. The Court 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 Court 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. Panel Reh'g 20, *with* Opinion 16 n.1 ("Public

health authorities disagree on the metrics to be applied and how to interpret those metrics.")).

The Plaintiffs are wrong to suggest that the Court "overlooked" Florida law by not addressing justiciability concerns on a "case by case" basis (Mot. Panel Reh'g 20, 21). Although the Court 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 Court'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 Court considered Florida law and properly applied it to the facts.

C. 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 Court's opinion—and does so by raising an issue that they never presented in their prior briefing. The Plaintiffs' merits brief 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. Panel Reh'g 22 (citing *Daly*)). *See generally* Fla. R. App. P. 9.330(a)(2)(A) ("The motion [for rehearing] shall not present issues not previously raised in the proceeding.").

At any rate, this Court 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. Panel Reh'g 22). The Court's 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)).

D. The Court Did Not "Overlook" Any Other Evidence When It Concluded That the Trial Court Had Improperly Enjoined the State.

The Plaintiffs' remaining arguments inappropriately depend on the assertion that the Court 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

[6] Insofar as the Plaintiffs cite hearsay from articles and websites outside the record (Mot. Panel Reh'g 26), those sources should be disregarded, both under Rule 9.330(a)(2)(A) and because the principle "[t]hat 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." *Altchiler v. State, Dep't of Prof'l Regulation*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983).

Plaintiffs cite are at best mixed questions of law and fact on issues such as causation, justiciability, and adequacy of remedies. But in any event, the question on a motion for rehearing is not whether the Court gave enough "import to the findings of fact," "downplay[ed]" other evidence, or described factual findings as "*allegation*[*s*]." (Mot. Panel Reh'g 22, 23, 24). The Plaintiffs are again trying to reargue points on which they were unsuccessful.

III. CONCLUSION

The Plaintiffs have not shown that this Court erred and "overlooked or misapprehended" any points of law or fact as contemplated by Rule 9.330(a)(2)(A). Their motion for panel rehearing should therefore be denied.

Respectfully submitted November 10, 2020.

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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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