IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

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

Appellants,

vs.

FLORIDA EDUCATION ASSOCIATION, et al.,

Appellees,

and

MONIQUE BELLEFLEUR, et al.,

Appellees.
_____/

Consolidated DCA Case Nos. 1D20-2470 and 1D20-2472
L.T. Case No.: 2020-CA-001450

APPELLEES' MOTION FOR REHEARING *EN BANC*

Appellees Florida Education Association, Stefanie Beth Miller, Ladara Royal, Mindy Festge, Victoria Dublino-Henjes, Andres Henjes, National Association for the Advancement of Colored People, Inc., NAACP Florida State Conference, Monique Bellefleur, *et al.* move for rehearing *en banc* of this Court's opinion issued on October 9, 2020.[1]

[1] References to the Appellants are to the "State." References to the Appellees are to the "Plaintiffs." References to the October 9, 2020 opinion are to "Panel Opinion" or "PO." References to the initial brief's appendix are to "A" (*e.g.* [A 1] references initial brief appendix page 1) and to the answer brief's appendix are to "AB" (*e.g.* [AB 1] references answer brief appendix page 1).

—INTRODUCTION—

The Panel Opinion reaches erroneous conclusions as to critical legal and constitutional questions that will have far-reaching ramifications on future cases.

First, the panel makes the extraordinary and incorrect ruling 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 during the COVID-19 pandemic. If this holding is allowed to stand, it will be used in the future to deny similar plaintiffs standing in challenges to the executive branch, most of which are brought in trial courts falling under the First DCA's jurisdiction. This Court should review the Panel Opinion *en banc* to correct this overbroad holding.

Second, the panel held that the State's obligation under article IX, section 1(a), of the Florida Constitution to provide for "safe" public schools is not subject to judicially-manageable standards. It did so despite the fact the trial court found, based on extensive testimony, that straightforward safety standards exist to determine when it is safe to reopen a school for in-person learning. The panel ignored this factual finding and the fact that courts regularly opine on matters of school safety. The panel also ignored that the Florida Supreme Court has refused to promulgate a blanket rule that article IX, section 1(a), has no judicially-manageable standards and made clear that the existence of judicially-manageable standards must be addressed case by case. This critical issue warrants *en banc*

review given its significant impact on other cases and the fact that safety standards are readily ascertainable.

Third, the panel held that the Plaintiffs did not have a likelihood of success on the merits because, "under Florida's strict requirement for the separation of powers, the trial court cannot intrude on the State's discretionary decisions in these policy areas [of education, emergency management, and public health]—particularly where the executive exercises its authority to address a public health emergency." [PO 18.] This statement directly contradicts this Court's precedent and, if permitted to stand, will leave actions of the executive branch that violate the Florida Constitution wholly unchecked.

Fourth, the panel completely substituted its own fact findings for those of the trial court to bolster the above conclusions. In this case, the trial court held a two-day evidentiary hearing on a motion for temporary injunction regarding Emergency Order 2020-EO-06 (the "Emergency Order") issued by the Department of Education ("DOE"), after which the trial court made the following findings of fact: (**1**) school boards had no choice but to reopen schools for in-person learning under the Emergency Order even in those areas where health experts stated it was unsafe to do so—or else the school districts would lose funding for all students; (**2**) the only way school boards could close a school for in-person learning under the Emergency Order was if Florida Department of Health officials opined that it was

unsafe to reopen a school for in-person learning—but those officials were instructed not to opine on whether it was safe to reopen the schools despite the Emergency Order's requirements; (**3**) some teachers and staff are being forced back into unsafe classrooms and working conditions; (**4**) the "standard for determining when the virus is under control and it is safe to reopen schools is a 5% [or less] positivity rate in the affected area"; and (**5**) the remedies available through the Plaintiffs' collective bargaining agreements and elsewhere were inadequate.

In reaching its conclusions in this case, the Panel Opinion improperly found the opposite: (**1**) school boards had a choice as to whether to reopen schools; (**2**) guidance from public health officials was available to school boards; (**3**) teachers and staff were not being forced back into classrooms; (**4**) there are no judicially-manageable standards to determine school safety; and (**5**) the Plaintiffs' available remedies were adequate. The panel also found that school districts would still receive some funding for On-Line Learning students even if a school was closed for in-person learning. However, the funding analysis the panel outlined is for a totally different virtual learning program and is inapplicable to funding for students learning On-Line due to COVID-19 under the terms of the Emergency Order. An appellate court may not ignore a trial court's findings of fact made after an evidentiary hearing and instead reweigh the evidence. The trial court's specific findings of fact were supported by competent substantial evidence and properly

supported issuance of the temporary injunction and the trial court's ruling that the Emergency Order is unconstitutional.

Rehearing *en banc* is warranted because this case is of exceptional importance. The outcome of the case affects a large portion of the citizens of Florida, and the Panel Opinion interprets a paramount constitutional right.

—BACKGROUND—

The proceeding below was a challenge to DOE's arbitrary and capricious administration of the Emergency Order. [A 132-39.] That Emergency Order provided for funding to school districts for students opting to attend school via On-Line Learning. [A 137 (providing funding for "innovative learning environments").] But, to obtain the funding, school districts had to submit plans for reopening schools for "in-person" learning as well, which had to begin by August 31, 2020. [A 133-39.]

The Emergency Order states that local school districts will make decisions as to reopening for in-person learning, "subject to advice and orders of the Florida Department of Health [("DOH")] [and] local health departments."[2] [A 133 (emphasis added).] Absent such "advice" from DOH or its local departments that it is unsafe to physically open a school, local school districts had to reopen schools

[2] The local health departments constitute arms of DOH. [A 1052 ("So all the county health departments around the state, the 67, are just an extension of the State health department. They are not independent departments.").]

for in-person learning or receive no funding whatsoever for the millions of students who opted for On-Line Learning rather than risk attending schools for in-person learning during the COVID-19 pandemic. [*See* A 132-39.]

A. The Evidence.

At the August 19-21, 2020, temporary injunction evidentiary hearing, the court heard from more than a dozen witnesses and considered volumes of lengthy and detailed exhibits related to the extent to which schools could—or could not—"safely" reopen for in-person learning. [A 1540.] The mountain of evidence considered by the trial court included:

(**1**) testimony from a practicing physician, a senior faculty member at the Harvard Medical School and Harvard School of Public Health and frequent consultant to various government and non-governmental entities on safety issues surrounding the COVID-19 pandemic, that there "[a]bsolutely" is no plan or situation in which it would be safe for students, teachers, or the public to return to brick-and-mortar schools if the COVID-19 positivity rate for infection does not remain below five percent for 14 days or longer [A 1131-32];

(**2**) testimony from a Hillsborough County School Board member that six of seven medical professionals advised during an August 6 board meeting that Hillsborough County schools were not safe to reopen at that time (with five of the seven stating that reopening still would not be safe by August 31) and that the

seventh medical professional—a representative from DOH—refused to opine on the issue at all [A 953-54];

(**3**) a letter signed by Education Commissioner Richard Corcoran in which he rejected the Hillsborough County School Board's reopening plan merely because it purported to delay brick and mortar reopening until September pursuant to the health experts' consensus [AB 1097-99];

(**4**) testimony from FEA's president who stated that FEA's members from across the state feared for their lives if they were forced to return to schools brick and mortar and were effectively being forced to choose between quitting/early retirement or placing themselves and their loved ones at risk [A 977-78]; and

(**5**) testimony from various individuals who explained the difficulties with social distancing and other safety precautions in a brick and mortar school setting at many schools. [A 970, 1178.]

The evidence reflected that, in the months after DOE issued the Emergency Order, the dangers of COVID-19 in Florida grew exponentially—Florida became the "epicenter of the coronavirus" nationwide, with infection numbers growing from 50 to 600,000 in less than six months. [*See* A 975-77.] As of October 26, 2020, that number has increased to over 778,000 infections.[3] However, despite COVID-19 posing a substantially greater risk to students, teachers, and staff in the

[3] *Florida COVID Map and Case Count*, October 26, 2020, available at https://www.nytimes.com/interactive/2020/us/florida-coronavirus-cases.html.

summer than it did when schools were closed in the spring, Commissioner Corcoran issued the Emergency Order on July 6, 2020, for the express purpose of "reopening brick and mortar schools with the full panoply of services for the benefit of Florida students and families." [A 132-39.]

Both before and after the issuance of the Emergency Order, Governor DeSantis and Commissioner Corcoran repeatedly announced publicly that decisions on whether to open schools would be made at the local school district level—and that neither students nor teachers would be forced to attend school in person when schools reopened while COVID-19 was still a threat. [A 984-85.] These turned out to be empty promises.

Although the Emergency Order allowed schools to offer On-Line Learning options, it required each school district in the state to submit a reopening plan offering in-person school learning five days per week in order to obtain full, guaranteed funding for the school year. [A 132-39.] Otherwise, school districts would receive funding subject to their "traditional compliance with statutory requirements for instructional days and hours." [A 137.] The "traditional" funding structure bases district funding on the in-person attendance of students for each day of the school year. *See* § 1003.23(1), Fla. Stat.

The only guidance in the Emergency Order as to the plans school districts had to submit for approval stated that the Emergency Order's in-person reopening

requirement was "subject to advice and orders of the Florida Department of Health" and "local health departments." [A 133.] Unfortunately, a number of school districts quickly learned that, by design, no such "advice" or "orders" regarding whether it was safe to reopen in-person would be forthcoming. [*See* A 954, 1050-51.]

When school district representatives asked DOH employees whether it was safe to reopen schools for in-person instruction, the DOH employees refused to answer. [*See* A 954 (DOH representative in Hillsborough County refused to answer); A 1050 (DOH representative in Volusia County refused to answer); A 1051 (DOH representative advising Brevard County School Board stating that "we can't give a recommendation" as to whether it is safe to reopen schools).] The trial court found that "Plaintiffs presented convincing evidence that State health officials were instructed not to provide an opinion on the reopening of schools." [A 1546 (emphasis added).]

While some DOH employees offered guidance on how schools could attempt to operate in the event those schools reopened brick and mortar, they steadfastly refused to express any opinion as to whether it was safe or not for schools to reopen. [A 1050 (DOH official advising Volusia County School Board that she would not opine on the safety of reopening schools for in-person learning because "we've been advised that our role here is to just advise as to . . . what can

we do to make the environment in schools as safe as possible with COVID-19. It is not to make a decision on whether or not to open up the school.").]

DOH's refusal to give a recommendation was in contrast to the nearly unanimous responses from other public health experts that reopening brick and mortar schools in some areas would not be safe at this time. [*See, e.g.*, A 953, 1057, 1131-32.] For instance, after unsuccessful attempts to consult with DOH as the Emergency Order directed, the Hillsborough County School Board obtained advice from six different health experts, five of whom said it was not yet safe to open schools in Hillsborough County. [A 953-54.] Thus, Hillsborough County submitted a revised reopening plan that delayed in-person instruction until September based on the advice of these experts when DOH refused to provide any recommendation. [A 955, 1545.]

Commissioner Corcoran quickly rejected Hillsborough's plan, stating it was "inconsistent with the framework of the Emergency Order." [AB 1097-99.] Despite public health experts unequivocally stating that reopening brick and mortar would be unsafe in any capacity in Hillsborough County, Commissioner Corcoran directed that Hillsborough would need to "roll up their sleeves and go school-by-school, grade-by-grade, and classroom-by-classroom" to determine whether any portion of any individual school could be reopened brick and mortar. [*Id.*] Otherwise, Hillsborough had to either abide by a previous plan developed without

the current advice from health care experts that contemplated brick and mortar reopening in August, or "proceed under the existing statutory framework," which awarded funding based on an in-school student head count. [*Id.*]

Given the tremendous number of schools in Hillsborough County[4] as well as the fact COVID-19 statistics were not broken down on a school-by-school basis, Commissioner Corcoran's directive to conduct such an analysis was an impossible task. [A 956.] Thus, Hillsborough was placed in the untenable position of choosing either an unsafe brick and mortar reopening or losing its funding for the tremendous number of students who had opted for On-Line Learning. [*Id.*] Hillsborough County School Board Member Tamara Shamburger testified that Hillsborough's school district alone faced a loss of as much as $23 million in state funding if it failed to open brick and mortar schools by August 31 as directed by the Emergency Order. [A 957.]

Despite rejecting Hillsborough's plan to delay brick and mortar reopening following its determination that doing so would be unsafe, Commissioner Corcoran approved similar plans from three other counties—Miami-Dade, Broward, and Palm Beach. [A 1548.] Commissioner Corcoran did not require any of those three counties to provide the detail demanded of Hillsborough County, claiming that delaying brick and mortar reopening in those counties necessarily would be

[4] Testimony presented at the evidentiary hearing established there are over 200 public school "campuses" in Hillsborough County. [A 1392.]

appropriate since they remain in "Phase 1" of Governor DeSantis's "Safe. Smart. Step-by-Step." plan for "reopening" the state generally. [*See id.*] Commissioner Corcoran made this determination despite the fact that public health criteria, or any other criteria for that matter, were not in the Emergency Order. [*See id.*]

B. The Findings of Fact.

After weighing all of the evidence, the trial court ultimately found as a matter of fact that:

(**1**) "school boards have no choice" but to reopen schools brick and mortar by August 31 under the Emergency Order, as doing so is the only way the school districts may ensure adequate funding for the school year [A 1544];

(**2**) despite the Emergency Order's contention that school reopening decisions should be subject to local and State health officials' opinions, the health officials were instructed not to opine on the topic of school reopening [A 1546];

(**3**) the State had allowed three South Florida counties to delay school reopening "until September 30 or beyond" without financial penalty despite rejecting similar proposals from Hillsborough and Monroe Counties [A 1548];

(**4**) "opening schools [brick and mortar] will most likely increase COVID-19 cases in Florida" [A 1549];

(**5**) "there is no evidence in the record that in order to provide flexibility in funding or waivers of certain statutes, [the State] must require school districts to provide a brick and mortar option no later than August 31, 2020" [*Id.*];

(**6**) teachers and staff are being forced back into some classrooms with "extremely unsafe conditions" in which there is no room for social distancing and without adequate protective equipment [A 1550];

(**7**) the "standard for determining when the virus is under control and it is safe to reopen schools is a 5% [or less] positivity rate in the affected area"; and

(**8**) the remedies available through Plaintiffs' collective bargaining agreements and elsewhere were inadequate because those remedies were not available for the types of problems at issue. [A 1551-52.]

The way the State implemented the Emergency Order presented local school districts with a "Hobson's Choice" to essentially "take it or leave it." School districts had to reopen for in-person learning or not receive any funding for the vast number of students who opted for On-Line Learning—even when non-DOH health experts said it was unsafe to physically reopen some schools. [A 1544.]

C. The Trial Court's Ruling.

Based upon these factual findings, the court deemed the Emergency Order unconstitutional "to the extent it arbitrarily disregards safety, denies local school boards decision making with respect to reopening brick and mortar schools, and

conditions funding on an approved reopening plan with a start date in August." [A 1554.] The court struck the Emergency Order's language requiring brick and mortar reopening and deleted the requirement that reopening plans be submitted in order for school districts to receive adequate funding. [A 1554-55.]

D. The Appeal.

The State appealed. As shown in Plaintiffs' answer brief, the trial court rightly found the State's behavior was arbitrary and capricious, which rose to the level of a constitutional violation. The State granted funding to school districts premised on the requirement that schools had to open for in-person learning. The only exception was if, per DOH, COVID-19 made it unsafe to reopen a school for in-person learning. Then the State muzzled DOH from providing any advice on whether it was safe to reopen so as to force schools to reopen for in-person learning even if it was unsafe to do so or else school districts would lose funding for all students opting for On-Line Learning. This is the height of abusing state authority through despotic manipulation.

In light of this emergency situation and the State's clear abuse of authority, the trial court properly used its equitable powers to fashion a remedy that did what the Emergency Order said it would do—allow local school districts to make the decision as to whether they could safely open schools for in-person learning based on recommendations from health experts. The court simply deleted the

requirement for plan submission and approval as a condition of obtaining enhanced funding. Otherwise, teachers, staff, and students would unwittingly be attending some schools where in-person learning was unsafe due to either COVID-19 incidence or where individual school conditions presented an unsafe environment because masks, social distancing, and other COVID-19 protection methods could not be effectively implemented. [A 1550.]

E. The Panel Opinion.

The Panel Opinion reverses the injunction order, accepting all of the State's arguments—despite the trial court's factual findings, supported by clear evidence, establishing that the State had abused its powers in a way that was harmful to Floridians. The Panel Opinion barely mentions the trial court's findings of fact on which it based the injunction let alone consider whether those factual findings were supported by competent substantial evidence.

Instead, the Panel Opinion finds that: **(1)** school boards made the decision to reopen schools; **(2)** guidance from public health authorities was available to schools; **(3)** teachers were not being forced back into classrooms; **(4)** there were no judicially-manageable standards to determine school safety; and **(5)** Plaintiffs' available remedies were adequate.

The panel also made findings that were supported by no evidence at all. The panel found that "per student funding for online instruction is about twenty-five

percent less than funding for in-person classes" [PO 6], implying school districts would receive 75 percent of funding anyway even if they did not submit a reopening plan. This is incorrect. If the school districts chose not to reopen for in-person learning for health and safety reasons, a school district would receive no funding for On-Line Learning students, as opposed to virtual learning students (which is a distinct program not applicable here).[5] That is why the trial court found that the administration of the Emergency Order by the State forced the school districts to open brick and mortar schools despite health and safety concerns.

—ARGUMENT—

A. Substantial Likelihood Of Success On the Merits.

The trial court determined the Plaintiffs had a substantial likelihood of success on the merits on each of the prongs necessary to support a temporary injunction. The panel improperly reviewed the record *de novo* to cultivate facts supporting its holding that the Plaintiffs did not have a substantial likelihood of success on the merits[6]—and its holdings are incorrect as a matter of law.

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[5] See Appellees' Answer Brief at 5 n. 4 , for a full explanation on the funding at issue here.

[6] While review of a temporary injunction "considers" the merits, it does not "decide" the merits absent circumstances not present here—a decision on the merits is issued at the end of the case. *See, e.g., Silver Rose Entm't, Inc. v. Clay Cty.,* 646 So. 2d 246 (Fla. 1st DCA 1994) (denial of a preliminary injunction or reversal of an order granting same does not preclude the granting of a permanent injunction at the conclusion of case).

1. Standing.

The panel makes the extraordinary ruling 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.

To establish standing, a party has to establish that it will be affected by the outcome of the litigation, either directly or indirectly. *Johnson v. State*, 78 So. 3d 1305, 1314 (Fla. 2012). The panel states the Plaintiffs "cannot meet their burden because the State's conduct caused them no injury. Their alleged injury being forced to return to the classroom—stems from decisions made by school districts." [PO 12.] But, the trial court, based on competent substantial evidence, found that school districts had "no choice" but to reopen in-person pursuant to the Emergency Order—which directly impacted teachers, staff, parents, and students alike.

Allowing school districts to choose between the Emergency Order or the default funding structure subjects them to a Hobson's choice—either: (**a**) reopen their brick and mortar schools even if unsafe to do so and receive guaranteed funding (under the Emergency Order); or (**b**) not reopen their brick and mortar schools if unsafe to do so without any funding guarantee (under the default statutory structure). This is because both funding options the State provided require schools to operate without regard to a local determination that it is safe to

open a particular school for in-person learning and because the Emergency Order option was the only one that any school district realistically could choose.

The Panel Opinion finds no standing because "[t]he Emergency Order does not require any teacher, staff member, or student to return to the classroom." [PO 11.] But, the trial court found that the Emergency Order is forcing teachers and staff back into classrooms in extremely unsafe conditions—and that the State muzzled DOH from stating to the contrary. This finding, which also was supported by competent substantial evidence, should not have been disturbed on appeal. *City of Gainesville v. Watson Const. Co., Inc*., 815 So. 2d 785, 785 (Fla. 1st DCA 2002) (trial court applied the law correctly based on the factual findings arising from conflicting evidence); *Poteat v. Guardianship of Poteat*, 771 So. 2d 569, 571 (Fla. 4th DCA 2000) (recognizing that "the trial court resolves conflicts in the evidence"); *Old Equity Life Ins. Co. v. Levenson*, 177 So. 2d 50, 50-51 (Fla. 3d DCA 1965) (indicating where trial court's findings of fact are reasonably supported by competent substantial evidence in the record, as they are here, appellate court cannot reweigh the evidence or substitute its judgment).

As to parents, the panel's finding that they can choose whether to send their children to in-person school ignores that parents are substantially affected by the Emergency Order even when they choose On-Line Learning for their children. The teachers (and staff) who carry out that On-Line Learning are directly impacted

by unsafe conditions at schools, and On-Line Learning students will not be "counted" for funding unless the Emergency Order is implemented in a constitutional manner—thus directly impacting the funds available to teach On-Line Learning students.

The Panel Opinion's holding that the Plaintiffs did not have a substantial likelihood of success on the issue of their standing, despite the breadth and flexibility of the standard, defies logic. Of course teachers, staff, and parents of students will be affected by the outcome of the litigation. The COVID-19 pandemic is unprecedented—how can there be no standing in this extreme situation?

If this holding is allowed to stand, it will be used have a far-reaching and detrimental impact on teachers, staff, and parents. This Court should grant rehearing *en banc* to correct this overbroad holding.

2. Political Question.

If there is ever a case where the State's obligation under article IX, section 1(a) to provide for safe public schools is subject to judicially-manageable standards, this one is it. Multiple witnesses testified to the straightforward safety standards at issue, stating that schools can safely reopen for in-person learning when the local area's COVID-19 positivity rate remains below five percent for 14

days or longer.[7] The trial court relied on this standard in the temporary injunction. [A 1551 (injunction order discussing the five percent positivity rate standard used by "the World Health Organization and the Florida Chapter of the American Academy of Pediatrics").] In fact, this test is so obviously the "gold standard" for determining school safety that the State "did not present an alternative standard." [*Id.* (emphasis added).]

Based on this evidence, the court found that the "standard for determining when the virus is under control and it is safe to reopen schools is a 5% [or less] positivity rate in the affected area." [A 1550.] The panel ignored this factual finding—and that courts regularly opine on matters of school safety [*see* Ans. Br. 38-39]–in order to hold that the terms "safe" and "secure" as used in article IX, section 1(a), lack judicially discoverable or manageable standards. [PO 15.]

In doing so, the panel ignored that the Florida Supreme Court has refused to promulgate a blanket rule that article IX, section 1(a), has no judicially-manageable standards. The Court instead stopped "short of saying 'never,'" *Citizens for Strong Schools, Inc. v. Florida State Board of Education, Inc.* 262 So.

[7] [A 1061 (pediatrician testifying that the positivity rate should be less than five percent); A 1123, 1128 (Dr. Thomas Burke testifying that there must be "at least two weeks of a downward trend" in community spread, "and then certainly less than 5 percent positive rate, that's – that's clear. That's become fairly standard." further describing the WHO's five percent positivity standard as "the gold standard"); A 954 (Hillsborough County School Board member testifying that the public health officials she consulted advised that "the positivity rate needed to be south of 5 percent" for school buildings to be reopened for in-person learning).]

3d 127, 137 (Fla. 2019) (*quoting Coalition for Adequacy & Fairness in School Funding, Inc. v Chiles*, 680 So. 2d 400, 408 (Fla. 1996)), and made clear that the existence of judicially-manageable standards must be addressed case by case.

It is hard to imagine that there would ever be a more manageable and discoverable standard for determining school safety than the COVID-19 positivity rate remaining below five percent for 14 days or longer. If the testimony in this case did not establish safety measurement standards, then there will never be judicially-manageable standards for measuring safety in any case ever. The Panel Opinion, if allowed to stand, will completely curtail challenges to any action of the executive or legislative branch related to school safety—and eviscerate the Florida Supreme Court's mandate that judicially-manageable standards be reviewed on a case by case basis.

3. Separation of Powers.

The panel also held that the Plaintiffs did not have a likelihood of success on the merits because, "under Florida's strict requirement for the separation of powers, the trial court cannot intrude on the State's discretionary decisions in these policy areas [of education, emergency management, and public health]—particularly where the executive exercises its authority to address a public health emergency." [PO 18.] This statement directly contradicts this Court's precedent

and, if permitted to stand, will have a chilling effect on challenges to actions of the executive branch that violate the Florida Constitution.

Under this Court's precedent, "[t]he judicial branch 'must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights.'" *Daly v. Marion Cty.*, 265 So. 3d 644, 649 (Fla. 1st DCA 2019) (emphasis added) (quoting *Florida Dep't of Children & Families v. J.B.*, 154 So. 3d 479, 481 (Fla. 3d DCA 2015)); *see also City of Freeport v. Beach Cmty. Bank*, 108 So. 3d 684, 687 (Fla. 1st DCA 2013) (same in the sovereign immunity context).

The panel's statement that "the trial court cannot intrude on the State's discretionary decisions in these policy areas" means that the judiciary may never review the actions of the executive branch in the areas of education, emergency management, and public health. This statement gives the executive branch carte blanche to do whatever it wishes in these policy areas—even where the executive branch actions are contrary to the Florida Constitution—with little fear of challenge by affected Florida citizens.

4. Arbitrary and Capricious.

The panel held that the Plaintiffs were not likely to succeed on their argument that the State applied the Emergency Order in an arbitrary and capricious manner. The panel gave no import to the findings of fact in reaching this

conclusion—most notably the finding that health officials were instructed not to opine on whether it is safe to reopen schools for in-person learning. Those instructions were the basis of the trial court's arbitrary and capricious determination.

The panel interpreted the Emergency Order to state that reopening plans must provide for opening brick and mortar schools by August 31 or the school district does not get full funding. In doing so, the panel ignored what the Emergency Order says—that the reopening requirement was "subject to advice and orders of the [DOH]" and "local health departments." [A 133.] In other words, the school district would not lose funding if DOH and local health departments advised a school board it was not safe to reopen brick and mortar on August 31.

The panel downplays the "subject to advice and orders of" language to the point where it has no meaning, stating reopening plans were "only 'subject to' advice from those entities." [PO 21 (emphasis added).] The panel then found that the school districts had that guidance because "[a] member of the Manatee County School Board testified that his school board was able 'to work with the health department to figure out what worked best for the community.'" [PO 22.] In selectively citing to this testimony from the record, the panel ignores that the evidence clearly showed the Manatee County School Board member was an epidemiologist who had "significant connections" and was "able to access people

in Tallahassee" [A 1374]—and that DOH health officials refused to provide any guidance whatsoever to numerous other school districts because they were instructed not to do so [A 954, 1050-51].

When school district representatives asked DOH employees whether it was safe to reopen schools for in-person instruction, the DOH employees refused to answer. [*See* A 954 (DOH representative in Hillsborough County refused to answer); A 1050 (DOH representative in Volusia County refused to answer); A 1051 (DOH representative advising Brevard County School Board stated that "we can't give a recommendation" as to whether it is safe to reopen schools); A 1546 (trial court finding "Plaintiffs presented convincing evidence that State health officials were instructed not to provide an opinion on the reopening of schools.").]

Instead of recognizing that the trial court found, based on competent substantial evidence, that that health officials were instructed not to opine on the topic of school reopening, the panel refers to the factual finding as simply an allegation of the Plaintiffs. [PO 21 ("Appellees contend that the State applied this provision in an arbitrary and capricious manner, alleging that the State advised public health officials not to weigh in on whether schools should reopen.").]

But, the trial court heard the testimony of the Manatee County School Board member and the other evidence cited in the Panel Opinion [PO 22], weighed it against evidence related to the interaction of health officials with other school

boards in the state, and found that health officials were instructed not to opine on the topic of school reopening. The fact that one school board, or even a few, were able to receive advice from DOH is irrelevant where the evidence established that DOH was muzzled when it came to giving advice to many other districts. The panel again selectively chose from the evidence and improperly reweighed it in order to come to the opposite conclusion.

B. Irreparable Harm.

As with standing, the panel held that the Plaintiffs showed no irreparable injury because "nothing in the Emergency Order forces school districts to reopen schools for in-person instruction[,] [n]othing in the order requires a student to choose in-person instruction[,] [a]nd nothing in the order forces a teacher to return to the classroom." [PO 25.] While true that the Emergency Order does not expressly say these things, the trial court found that, under the Emergency Order as administered, school districts were forced to open and teachers and staff were forced to return to brick and mortar schools, which were findings of fact the panel should not have disturbed. Again, the panel reviewed the record *de novo* where that is not the standard of review.

Even though in-person school opened in almost all Florida counties by August 31, the irreparable harm is continuing because teachers and staff who were forced to report to schools are becoming infected with COVID-19, have become

sick, and even died after returning to in-person school.[8] As an example, two "lab", Pre-K-12 schools in Tallahassee—Florida State University Schools (at the secondary level) and FAMU Development Research School—closed brick and mortar schools down for two or more weeks.[9]

It is indisputable that the United States is experiencing another surge in COVID-19 infections. The two highest single days of new cases were October 23 and October 24, with more than 83,000 new cases added each day.[10] School boards, however, have no guidance from public health officials whether or when

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[8] *Coronavirus in schools: Florida releases latest COVID-19 cases among students, staff*, October 14, 2020, available at https://www.local10.com/news/local/2020/10/14/coronavirus-in-schools-florida-releases-latest-covid-19-cases-among-students-staff; *Coronavirus kills teacher's aide, 41, and her paramedic brother 1 day apart*, September 23, 2020, available at https://www.nbcnews.com/news/obituaries/Corona-virus-kills-teacher-s-aide-41-her-paramedic-brother-1-n1240831.

[9] *COVID challenge leads Florida State University Schools to shift secondary-instruction online*, September 22, 2020, available at https://www.tallahassee.com/get-cess/?return=https%3A%2F%2Fwww.tallahassee.com%2Fstory%2Fnews%2F2020%2F09%2F22%2Fcovid-challenge-leads-florida-state-university-schools-shift-secondary-instruction-online%2F5861861002%2F *FAMU DRS closing campus reverting to online instruction folling positive COVID-19 tests*, September 20, 2020, available at https://www.tallahassee.com/get-access/?return=https%3A%2F%2Fwww.tallahassee.com%2Fstory%2Fnews%2F2020%2F09%2F20%2Ffamudrs-closing-campus-reverting-online-instruction-following-positive-covid-19-tests%2F5846997002%2F.

[10] *US hits highest 7-day average of coronavirus cases since the pandemic began*, October 26, 2020, available at https://www.cnn.com/2020/10/26/health/us-coronavirus-monday/index.html.

they can shut down one or more schools due to a COVID-19 outbreak and surely fear that, if they made a decision to close a school, they would lose funding.

C. Adequate Remedy at Law.

The trial court found there was no adequate remedy at law because the remedies through Plaintiffs' collective bargaining agreements and elsewhere were inadequate. [A 1551-52.] Instead of determining whether this finding was supported by competent substantial evidence, the panel found that "multiple remedies are available to Appellees" and these remedies were adequate. [PO 25-26.]

The trial court, however, expressly found that these remedies were not available because the grievance process though the union's collective bargaining agreements only affords a teacher relief when there is a breach of the collective bargaining agreement. Collective bargaining arbitrators do not have jurisdiction or authority to decide constitutional questions like those pending before this Court. There is simply no adequate remedy at law available to Plaintiffs under these circumstances. [A1551-1552.]

D. Public Interest.

After a full evidentiary hearing, the trial court weighed the benefits and the potential harm of in-person instruction and concluded that "[r]easoned and data-driven decisions based on local conditions will minimize further community spread

of COVID-19, severe illness, and possible death of children, teachers and school staff, their families, and the community at large. Such local decisions unequivocally serve the public interest." [A 1552.]

That these health and safety concerns outweigh the benefits of in-person instruction is amply supported by the evidence. [*See, e.g.*, A 1139-42 (Dr. Burke explaining that "[e]ven given all of those other associated concerns [including increased risk of domestic violence for remote students, concerns of children receiving an inferior education when learning remotely, etc.], it does not make sense to open brick-and-mortar schools [until it is safe to do so].").]

The panel instead determined public interest weighed in favor of the State because:

> students who preferred to return to the classroom would once again need to shift to online classes—even if online instruction did not serve their mental, physical, or emotional needs. Parents who chose to send their children back to the classroom would lose the right to choose the best education setting for their children. And many parents would be left scrambling to find adequate daycare for their children.

[PO 26.] Once again the panel improperly reweighed the evidence.

E. Severability.

The Emergency Order expressly provides that the reopening requirement was "subject to advice and orders of the Florida Department of Health" and "local health departments." [A 133.] In other words, a school district would not lose

funding if public health officials advised the school board that it was not safe to reopen brick and mortar on August 31.

The panel excises the "subject to advice and orders of" language from the Emergency Order by giving the language no effect but then holds it was improper for the trial court to excise other language from the Emergency Order. However, the trial court simply deleted portions of the Emergency Order so that the Order would operate in a manner consistent with its plain language. Based on the finding that public health officials were told not to provide advice on reopening of schools and schools were forced to reopen, the Emergency Order, as revised by the trial court, provides funding to school districts whose school boards make the decision not to reopen based on health advice of others.

This decision by the trial court to excise the portions of the Emergency Order leading to DOE's arbitrary and capricious actions was within its judicial powers. By severing the Emergency Order's unconstitutional provisions while leaving the remainder of the order intact, the court fashioned a remedy that was as deferential as possible to the separation of powers. *See Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999) (the doctrine of severability "is derived from the respect of the judiciary for the separation of powers"). The court severed the Emergency Order's unconstitutional portions while allowing its remaining portions to stand.

The fact that the trial court substituted—"may" for "must"—was necessary to make the revised Emergency Order internally consistent and to avoid striking the entire paragraph. Any error flowing from these *de minimis* edits is harmless and, in any event, can easily be remedied by making severance adjustments on remand while leaving the thrust of the severed Emergency Order intact.

F. Exceptional Importance.

En banc review is warranted because this appeal presents issues of exceptional importance. Any argument to the contrary by the State would be disingenuous—the State has already argued to this Court that the appeal presented an issue of great public importance in its previously filed Suggestion that Order be Certified as Requiring Immediate Resolution by the Florida Supreme Court.

"Great public importance" and "exceptional importance" are virtually indistinguishable standards. As to "great public importance", the State argued that the injunction order "impacts Florida's public school students on a statewide basis" and "an issue of great public importance here is whether Emergency Order 2020-EO-06, issued by the Department of Education in response to the COVID-19 pandemic to address school-reopening plans for Florida's 2.8 million public-school students ("the Emergency Order"), complies with the Florida Constitution."

In fact, all Floridians are constitutionally entitled to "safe" and "secure" public schools, and it is a "paramount duty of the state" to provide for safe and

secure schools for its citizens. Art. IX, § 1(a), Fla. Const. This entitlement was enshrined within our constitution precisely because it is a "fundamental value of the people of the State of Florida." *Bush v. Holmes*, 919 So. 2d 392, 403 (Fla. 2006). While the Florida Constitution stops short of describing article IX, section 1, as establishing a "fundamental right," it nonetheless establishes "a paramount duty" and ensures constitutionally protected "rights." *See id.* at 404 (discussing the history of article IX, section 1, and proposals to describe education rights as "fundamental rights"); *Scavella v. Sch. Bd. of Dade Cty.*, 363 So. 2d 1095, 1098 (Fla. 1978) (describing the prior version of article IX—which required only "adequate provision . . . for a uniform system of free public schools"—as establishing a "right to a free education"; "That such a right exists cannot be disputed even though there are no Florida cases holding such.").

While this Court has not expressly articulated standards for determining whether a case is exceptionally important, it has reviewed panel opinions *en banc* in similar appeals involving constitutional challenges related to education. *See Haridopolos v. Citizens for Strong Schools, Inc.,* 81 So. 3d 465 (Fla. 1st DCA 2011) (discussing a constitutional challenge to the adequacy of the educational system); *Bush v. Holmes,* 886 So. 2d 340 (Fla. 1st DCA 2004) (discussing whether the Florida Opportunity Scholarship Program violated the state constitution).

This appeal provides an even stronger reason for *en banc* review. As explained above, even if this Court believes that the panel did not err in reversing the injunction order, in doing so, the Panel Opinion's over-broad language as to standing, safe and secure schools, and separation of powers will have a chilling effect on future challenges to acts of the executive branch that violate the Florida Constitution. At minimum, this Court should accept *en banc* review to address these portions of the Panel Opinion.

—CONCLUSION—

For the reasons stated above, the Plaintiffs respectfully ask this Court to grant this motion, review the Panel Opinion *en banc*, vacate the Panel Opinion, and issue an opinion that affirms the trial court's injunction order. In the alternative, the Plaintiffs respectfully ask this Court to address the overbroad holdings of the Panel Opinion.

Rule 9.331(d)(2) Statement. I express a belief, based on a reasoned and studied professional judgment, that the case or issue is of exceptional importance.

Respectfully submitted,

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