

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

ALLISON SCOTT, individually and on behalf
of W.S., a minor; LESLEY ABRAVANEL and
MAGNUS ANDERSSON, individually and on
behalf of S.A. and A.A., minors; KRISTEN
THOMPSON, individually and on behalf of
P.T., a minor; AMY NELL, individually and
on behalf of O.S., a minor; DAMARIS ALLEN,
individually and on behalf of E.A., a minor;
PATIENCE BURKE, individually and on behalf
of C.B., a minor; and PEYTON DONALD and
TRACY DONALD, individually and on behalf of
A.D., M.D., J.D., and L.D., minors,¹

Plaintiffs,

v.

CASE NO.: 2021-CA-1382

GOVERNOR RON DESANTIS, in his official
capacity as Governor of the State of Florida;
RICHARD CORCORAN, in his official capacity
as Florida Commissioner of Education;
FLORIDA DEPARTMENT OF EDUCATION;
and FLORIDA BOARD OF EDUCATION,

Defendants.

_____ /

NOTICE OF APPEAL

¹The caption as it appears on the Final Judgment contains Plaintiffs who the Court previously dismissed due to lack of standing.

NOTICE IS GIVEN that pursuant to Florida Rules of Appellate Procedure 9.030(b), 9.110(a)(1), and 9.310(b)(2), Defendants Governor Ron DeSantis, in his official capacity as Governor of the State of Florida; Richard Corcoran, in his official capacity as Florida Commissioner of Education; Florida Department Of Education; and Florida Board Of Education, (“Defendants”), hereby appeal to the First District Court of Appeal the Order of this Court rendered September 2, 2021, entering Final Judgment and granting Plaintiffs’ Demand for Emergency Injunctive Relief. A copy of the Order and incorporated transcript of the Court’s ruling delivered from the bench on August 27, 2021, is attached as Exhibit A.

This order is appealable as a final order of the trial court under Florida Rule of Appellate Procedure 9.030(b)(1)(A). Further, the filing in this Notice triggers an automatic stay pending review. Fla. R. App. P. 9.310(b)(2) (“The timely filing of a notice [of appeal] shall automatically operate as a stay pending review . . . when the state, any public officer in an official capacity, board, commission, or other public body seeks review”); see Fla. Dep’t of Health v. People United for Med. Marijuana, 250 So. 3d 825, 827-28 (Fla. 1st DCA 2018) (citing Rule 9.310(b)(2) in acknowledging an automatic stay of

the circuit's final order upon the State's appeal); see also Reform Party of Fla. v. Black, 885 So. 2d 303, 306 (Fla. 2004); DeSantis v. Fla. Educ. Ass'n, 306 So. 3d 1202, 1212 (Fla. 1st DCA 2020).

DATED: September 2, 2021.

Respectfully Submitted,

ABEL BEAN LAW, P.A.

By: /s/ Michael A. Abel
Michael A. Abel, Esq.
Florida Bar No. 0075078
Daniel K. Bean, Esq.
Florida Bar No. 0015539
Jacqueline A. Van Laningham, Esq.
Florida Bar No. 1003168
Jared J. Burns, Esq.
Florida Bar No. 1003415
100 N. Laura St., Ste. 501
Jacksonville, FL 32202
mabel@abelbeanlaw.com
dbean@abelbeanlaw.com
jvanlaningham@abelbeanlaw.com
jburns@abelbeanlaw.com

***Attorneys for Defendants,
Governor Ron DeSantis,
Commissioner Richard Corcoran,
Florida Department of Education,
and Florida Board of Education***

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 2, 2021, the foregoing was filed with the Clerk of Court by using the e-portal electronic filing system, which will serve via email this filing on all counsel of record named below.

Charles R. Gallagher III, Esq.
Gallagher & Assoc. Law Firm, P.A.
5720 Central Avenue
St. Petersburg, FL 33707
crg@attorneyoffices.org
service@attorneyoffices.org
fax@attorneyoffices.org

Co-Counsel for Plaintiffs

Joshua G. Sheridan, Esq.
Busciglio Sheridan Schoeb, P.A.
3302 N. Tampa Street
Tampa, FL 33603
josh@mytampafirm.com

Co-Counsel for Plaintiffs

Erin E. Woolums, Esq.
Erin K. Barnett, Esq.
Barnett Woolums, P.A.
6501 1st Avenue South
St. Petersburg, FL 33707
woolums@barnettwoolums.com
barnett@barnettwoolums.com
service@barnettwoolums.com

Co-Counsel for Plaintiffs

Craig A. Whisenhunt, Esq.
Ripley Whisenhunt, PLLC
8130 66th Street North, Ste. 3
Pinellas Park, FL 33781
craig@rwlawfirm.com

Co-Counsel for Plaintiffs

Maria G. Pitelis, Esq.
Mary Lou Miller Wagstaff, Esq.
Wagstaff & Pitelis, P.A.
161 14th Street N.W.
Largo, FL 33770
maria@wagstafflawoffice.com
marylou@wagstafflawoffice.com

Co-Counsel for Plaintiffs

Tracey L. Sticco, Esq.
4202 E. Fowler Avenue,
SOC 107
Tampa, FL 33620
tsticco@yahoo.com

Co-Counsel for Plaintiffs

Natalie L. Paskiewicz, Esq.
Paz Mediation
PO Box 7233
St. Petersburg, FL 33734
natalie@pazmediation.com

Co-Counsel for Plaintiffs

Charles W. Dodson, Esq.
270 Rosehill Dr. N
Tallahassee, FL 32312
chasdod@aol.com

Co-Counsel for Plaintiffs

/s/ Michael A. Abel
Attorney

Composite

EXHIBIT A

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

ALLISON SCOTT, individually and on behalf of W.S., a minor; LESLEY ABRAVANEL and MAGNUS ANDERSSON, individually and on behalf of S.A. and A.A, minors; KRISTEN THOMPSON, individually and on behalf of P.T., a minor; AMY NELL, individually and on behalf of O.S., a minor; DAMARIS ALLEN, individually and on behalf E.A., a minor; PATIENCE BURKE, individually and on behalf of C.B., a minor; and PEYTON DONALD and TRACY DONALD, individually and on behalf of A.D., M.D., J.D., and L.D., minors,

Case No.: 2021-CA-001382

Plaintiffs,

v.

GOVERNOR RON DESANTIS, in his official capacity as Governor of the State of Florida; RICHARD CORCORAN, in his official capacity as Florida Commissioner of Education; FLORIDA DEPARTMENT OF EDUCATION; and FLORIDA BOARD OF EDUCATION,

Defendants.

FINAL JUDGMENT

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

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

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

Incorporation of Verbal Order

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

Issues and Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Count I - Safe Schools

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

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

Count II - Home Rule

School Board Control And The Constitution

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

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

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

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

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

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

of Rights, the setting of local policies for health and safety of students substantially remains a local function. Florida is a large state including small rural counties to large densely populated counties. What is appropriate in one county may not be appropriate in another county. Thus, a one-size-fits-all policy for student health and safety as dictated by Tallahassee seems to run contrary to Article IX, Section 4(b) of the Florida Constitution. However, the passing of the Parents' Bill of Rights and other case law in Florida does not make it sufficiently clear that the issue presented in this case is not clearly, strictly, and solely a local issue with no right of the State to intervene. There exist cases which seem to validate State imposed laws regulating teachers and imposing certain obligations on local school boards regarding charter schools.

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

Counts III and IV

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

Separation of Powers

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

Likewise, neither the Governor nor the executive agencies are permitted to substitute their judgment for the legislature nor can they perform the function of the legislature. By the assertion of separation of powers as an affirmative defense in this case, the Defendants must show that the actions challenged (here, the Executive Order, the blanket prohibition of mask mandates that do not include a parental opt-out, and related enforcement actions) are within the powers of the Defendants as provided by the Constitution or by the Legislature.

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

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

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

Political Question

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

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

Parents’ Bill of Rights And Additional Rulings

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

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

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

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

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

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

The Parents' Bill of Rights expressly gives governmental entities, such as school boards, the right to adopt policies regarding health care and education of children in school, even if the policies affect a parents' rights to make decisions in these areas. However, the statute requires the governmental agency to show that the policy is reasonable and necessary to achieve a compelling state interest, and that the policy is narrowly tailored and not otherwise served by a less restrictive means.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Count V - Department of Health Rule

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

Count VI - Injunctive Relief

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

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

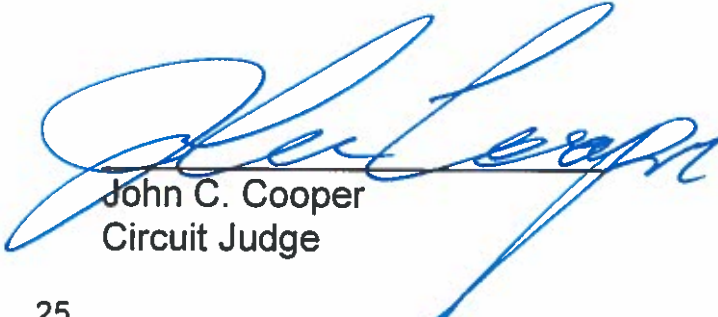
The "Enjoined Defendants" are ordered not to violate the Parents' Bill of Rights by taking action to effect a blanket ban on face mask mandates by local school boards and by denying the school boards their due process rights granted by the statute which permits them to demonstrate the reasonableness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

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

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

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

Done and Ordered in Tallahassee, Leon County, Florida this 2nd day of September 2021.


John C. Cooper
Circuit Judge

Copies to:

All Counsel of Record

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

Case No.: 2021-CA-001382

ROBIN MCCARTHY and JOHN MCCARTHY,
individually and on behalf of L.M., a minor;
ALLISON SCOTT, individually and on behalf of
W.S., a minor; LESLEY ABRAVANEL and
MAGNUS ANDERSSON, individually and on
behalf of S.A. and A.A., minors; KRISTEN
THOMPSON, individually and on behalf of P.T.,
a minor; AMY NELL, individually and on behalf
of O.S., a minor; EREN DOOLEY, individually
and on behalf of G.D., D.D., and F.D., minors;
DAMARIS ALLEN, individually and on behalf of
E.A., a minor; PATIENCE BURKE, individually
and on behalf of C.B., a minor; and PEYTON
DONALD and TRACY DONALD, individually
and on behalf of A.D., M.D., J.D., and L.D.,
minors,

Plaintiffs,

vs.

GOVERNOR RON DESANTIS, in his official
capacity as Governor of the State of Florida;
RICHARD CORCORAN, in his official capacity
as Florida Commissioner of Education; FLORIDA
DEPARTMENT OF EDUCATION; and
FLORIDA BOARD OF EDUCATION,

Defendants.

E X C E R P T

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

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

<p>Page 2</p> <p>1 APPEARANCES: 2 CHARLES R. GALLAGHER III, ESQUIRE ERIK T. MARIZ, ESQUIRE 3 Gallagher & Associates Law Firm, P.A. 5720 Central Avenue 4 St. Petersburg, Florida 33707 - and - 5 JOSHUA G. SHERIDAN, ESQUIRE Busciglio Sheridan Schoeb, P.A. 6 3302 North Tampa Street Tampa, Florida 33603 - and - 7 CRAIG A. WHISENHUNT, ESQUIRE Ripley Whisenhunt, PLLC 8 8130 66th Street North, Suite 3 Pinellas Park, Florida 33781 - and - 9 MARIA G. PITELIS, ESQUIRE Wagstaff & Pitelis, P.A. 11 161 14th Street Northwest Largo, Florida 33770 - and - 12 ERIN K. BARNETT, ESQUIRE ERIN E. WOOLUMS, ESQUIRE Barnett Woolums, P.A. 14 6501 1st Avenue South St. Petersburg, Florida 33707 - and - 15 TRACEY L. STICCO, ESQUIRE 4202 East Fowler Avenue, SOC 107 16 Tampa, Florida 33620 - and - 17 NATALIE L. PASKIEWICZ, ESQUIRE Paz Mediation 18 Post Office Box 7233 St. Petersburg, Florida 33734 - and - 19 CHARLES W. DODSON, ESQUIRE 270 Rosehill Drive North 21 Tallahassee, Florida 32312 Attorneys for Plaintiffs 22 23 24 25</p>	<p>Page 4</p> <p>1 (The following is an excerpted portion of the 2 trial proceedings.) 3 PROCEEDINGS 4 THE COURT: Okay. Good morning. 5 Okay. I'm late because I just finished 6 putting in my notes from my last night's writings 7 on this case, and then for some reason I was 8 unable to get on Zoom. But I managed to negotiate 9 that. 10 So give me one more minute and I'll be right 11 back. 12 (Brief recess taken.) 13 THE COURT: All right. This is actually the 14 ruling I just pulled out of the printer. So these 15 are my notes. 16 So, again, good morning everyone. These 17 are -- these are my notes. This is not something 18 that I could send and sign, but this is pretty 19 close to what could be a final written order. And 20 I would expect the parties writing the order to 21 take this as their guideline. 22 It may be that there will need to be 23 grammatical changes or rearranging of various 24 sections to make them flow better in a written 25 order. But I would expect to be able to receive a</p>
<p>Page 3</p> <p>1 APPEARANCES CONTINUED: 2 MICHAEL A. ABEL, ESQUIRE JARED J. BURNS, ESQUIRE 3 Abel Bean Law, P.A. 100 North Laura Street 4 Suite 501 Jacksonville, Florida 32202 5 Attorneys for Defendants 6 7 8 9 INDEX 10 Description Page 11 PROCEEDINGS 4 12 REPORTER'S CERTIFICATE 86 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>Page 5</p> <p>1 proposed order by Monday. And I would give the 2 other side another day after that to make a 3 copy -- I'm sorry -- to make comments. And then I 4 would like to -- I would like to enter the written 5 order Tuesday, if at all possible. 6 Excuse me if I take a little while to get 7 started, but I was up at 2:00 a.m. this morning 8 ruling, working, rereading, making notes, et 9 cetera. So this is where I am. 10 Before I forget, I'm officially finding that 11 the plaintiffs who I left in the case, who we 12 identified at the motion for -- I'm calling it a 13 motion for directed verdict; I know there's a more 14 correct name for it. Motion for order of judgment 15 of dismissal, I think. They have -- I'm finding 16 that they have standing. So I didn't want to 17 forget that before I get into the order. 18 All right. I'm going to read this order and 19 probably from time to time make comments that are 20 not scripted or in my notes. And we'll see how 21 that goes. I will try to be articulate and 22 relatively slow for the purposes of our court 23 reporter. 24 And as in a written order you have various 25 citations and things of that nature, I'm going to</p>

<p style="text-align: right;">Page 6</p> <p>1 read those. So it may not sound very flowing when 2 I read it, but in part it's because I'm 3 referencing citations and grammatical marks, et 4 cetera. Also, some of the citations into the 5 record and to other parts of the case might be 6 more appropriately included in footnotes. But I 7 wasn't sure that reading a proposed order and then 8 identifying footnotes would be all that helpful. 9 So, again, that would be left up to the drafters' 10 discretion. 11 Even -- who's some great writer, which I'm 12 not. Even Ernest Hemingway had an editor. So -- 13 Maxwell Perkins was his editor, by the way. So I 14 have no problem with edits, so long as the essence 15 of the order and most of the details are in the 16 order. 17 Let me start with you a quote which I think 18 we should all think about, including those of us 19 who are on the Zoom, those of us who are online, 20 on YouTube, those who may read about this case in 21 the news media. I find that in any intense public 22 debate there are often emotions and concepts which 23 show a failure to completely understand the 24 complete scenario of what we're dealing with. 25 In particular, I find in the last 50, 60</p>	<p style="text-align: right;">Page 8</p> <p>1 decisions, 1914 decision originally and repeated 2 in 1939: The wisdom and necessity, as well as the 3 policy, of a statute are authoritatively 4 determined by the legislature. Courts may inquire 5 only into the power of the legislature to lawfully 6 enact a particular statute. 7 These two quotes from the Florida Supreme 8 Court over 100 years ago describe two things: the 9 balancing of one's own rights with the rights of 10 others and that, when considering the separation 11 of powers, court may properly consider whether a 12 law and, as a logical extension of this quote, an 13 executive action, was lawfully enacted or 14 exercised. 15 A governor's executive order and an agency's 16 actions must be based on authority granted to them 17 by the constitution or the legislature. Executive 18 power is exercised -- if executive power -- fifth 19 edit; I still missed words. If executive power is 20 exercised without authority, the executive action 21 is illegal, null and void, and unenforceable. 22 So let me go back and comment this concept of 23 personal rights. We all have personal rights. We 24 all enjoy our personal rights. We all zealously 25 protect our personal rights.</p>
<p style="text-align: right;">Page 7</p> <p>1 years or so, our country has felt that every 2 problem could be served -- could be solved in a 3 courtroom. Every problem cannot be solved in a 4 courtroom. Some problems are solved at the ballot 5 box. Some are solved in the courtroom. Some are 6 solved by individual action. But before people 7 start deciding how they believe about something or 8 how it's going to affect them, let me tell you -- 9 give you an idea of one of the foundations of our 10 law as I think it relates to this situation. 11 So here's the quote: Quote, Under the 12 American system of laws and government, everyone 13 is required to use and enjoy his own rights as not 14 to injure others in their rights or to violate any 15 law in force for the preservation of the general 16 welfare. 17 That quote comes from a 1914 Florida Supreme 18 Court opinion called Dutton, D-u-t-t-o-n, 19 Phosphate Company vs. Priest, 65 So. 282, Florida 20 1914. 21 It was again restated in a 1939 Florida 22 Supreme Court, State ex rel. Hosack, H-o-s-a-c-k, 23 v. Yocum, just like the country singer, Y-o-c-u-m, 24 136 Fla. 246, Florida 1939. 25 The second quote, coming from the same</p>	<p style="text-align: right;">Page 9</p> <p>1 We have a personal right, if we so choose -- 2 not my choice, but many do -- to drink alcoholic 3 beverages in their home if they're over 21 years 4 of age. We can drink until we're intoxicated. 5 But we can't get in a -- it's our right to drink 6 alcoholic beverages if we're over 21, but we 7 cannot get in our car and start driving around 8 while we've had alcoholic beverages that impair 9 our ability to drive. And the reason is not 10 because of whether the driver's going to hurt him 11 or herself or not. The reason is the driver 12 exercising his or her rights to drink is now 13 putting at risk other people. 14 So that driver's right to drive intoxicated 15 is limited by the government in various criminal 16 laws that prohibit driving while under the 17 influence of alcohol. 18 We all have a right to speak our mind, First 19 Amendment rights. You've all heard this quote. 20 We don't have a right to tell lies about people. 21 If we do, then we'll have to respond to that in 22 some sort of court action. We don't have the 23 right to harass and intimidate people verbally 24 because that violates the law. That limits our 25 rights. And we don't have a right, to the extent</p>

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

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

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

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

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1 even for children.

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

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

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

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

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

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

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

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

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

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

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

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

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

<p style="text-align: right;">Page 14</p> <p>1 of what I heard, those children would not be 2 required to wear a mask in school under any 3 version of the mandate we've been talking about. 4 Doctors have a responsibility for patients. 5 If, in fact, they have a patient with a legitimate 6 medical reason not to wear a mask, they should 7 step up and sign the opt-out paper for those 8 patients. That's the role -- one of the many 9 roles our medical community has. You can't just 10 say, no, I don't want to get involved. 11 Doctors, if you have a patient such as those 12 I heard described here, you need to do the correct 13 thing and sign a medical opt-out if that is what 14 is necessary. Some of these people -- I'm not a 15 doctor. But they seem to me to be clear medical 16 opt-out circumstances. 17 But let me now go back on to my notes. 18 Picking up, the dispute is whether state law 19 permits local school districts in Florida to adopt 20 and enforce a face mask mandate for students and 21 staff. This dispute arises out of the opening of 22 public schools for the new year and increasing -- 23 and increasing COVID crisis in Florida. 24 This is -- by the way, for those of you, I'm 25 drawing on my legal rulings and my findings from</p>	<p style="text-align: right;">Page 16</p> <p>1 previous form of COVID. This fact places at issue 2 all medical studies and anecdotal evidence that 3 says, well, we had no problems last year; we 4 should have no problems this year. There's a 5 difference. We had a different, less infectious, 6 less dangerous form of virus last year than we 7 have this year. 8 And as the facts change on the ground, the 9 need, or failure to need, for various measures 10 will also change. I'm talking about facts on the 11 ground now as I understand it from the evidence. 12 The combination of lack of vaccination, 13 decreasing social distancing, and the Delta 14 variant has resulted in dramatically increased 15 COVID infections in Florida over the past several 16 months. Although vaccinated persons do have 17 significant protection against the COVID variant, 18 they can still become infected by the COVID 19 variant. They can also transmit that infection to 20 children and other people. 21 As a result, the CDC, Centers for Disease 22 Control, the American Academy of Pediatrics, and 23 the wide majority of the medical and scientific 24 community in this country recommend universal 25 indoor masking for all school students, staff,</p>
<p style="text-align: right;">Page 15</p> <p>1 the facts. I am a factfinder. I am required and 2 permitted to take the evidence I've heard, draw 3 inferences from that evidence, and make findings 4 based upon what I think is the more persuasive and 5 most credible evidence. So when I give these 6 statements such as I am, these aren't things I 7 just dreamed up either. These are things that -- 8 findings I'm making based on the evidence I've 9 heard, the legal discussions based upon the law as 10 I interpret it. 11 So the increasing COVID crisis in Florida has 12 resulted from less than complete vaccination of 13 the population of Florida and the dominance of a 14 COVID virus variant referred to as the Delta 15 variant. 16 The Delta variant has a much higher viral 17 load and is more contagious than the form of COVID 18 present in Florida from 2020 until about May or so 19 of this year. COVID variant became increasingly 20 dominant in Florida starting around May or so, and 21 to the present time it is the dominant -- by far 22 the dominant virus that's being spread in the 23 state of Florida. 24 Also, the Delta variant presents a higher 25 risk of infection to children than did the</p>	<p style="text-align: right;">Page 17</p> <p>1 teachers, and visitors to K through 12 schools 2 regardless of vaccination status and social 3 distancing. 4 On April 20 -- April 14, 2021, Commissioner 5 Corcoran, who's the commissioner of the Florida 6 Department of Education and, in his official 7 capacity, the defendant -- and for those who 8 aren't lawyers, when you sue someone from an 9 agency in official capacity, that's just another 10 way of suing the agency. 11 But Commissioner Corcoran on April 14, 2021, 12 sent a memorandum to all school district 13 superintendents. The superintendent of a school 14 district is sort of like the principal of the high 15 school. They're the in-charge executive officer 16 of that district. Many are appointed; some are 17 elected. 18 In that order or memorandum, Defendants' 19 Exhibit 45, as I read it, he's requesting that the 20 school superintendents do not implement a mandated 21 masking policy. He said, With this return -- I'll 22 read it -- we ask that districts, which currently 23 are implementing a mandated face covering policy, 24 revise their policy to be voluntary for the 25 '21-'22 school year.</p>

<p style="text-align: right;">Page 18</p> <p>1 It's clear to this Court that the issue of</p> <p>2 voluntary versus mandated, opt-out versus no</p> <p>3 opt-out, masking policies in Florida school --</p> <p>4 schools was being considered and studied at least</p> <p>5 as early as April of 2021. Remember, at the time</p> <p>6 of that memorandum, COVID virus or variant had not</p> <p>7 really hit the scene hard. So this was a policy</p> <p>8 perhaps dealing primarily with what was viewed as</p> <p>9 the former form of the virus. In any event, the</p> <p>10 policy consideration was ongoing by that time. I</p> <p>11 can't tell you if it started then or not, but it</p> <p>12 was ongoing.</p> <p>13 In late June 2021, the governor of Florida</p> <p>14 declared that there was no longer a state of</p> <p>15 emergency based on COVID in Florida. You may</p> <p>16 recall we had been in that state of emergency from</p> <p>17 about March or so 2020 until end of June 2021.</p> <p>18 That date was agreed to earlier in this case by</p> <p>19 all parties. The governor did this by allowing</p> <p>20 the time-limited declaration of emergency order to</p> <p>21 lapse without renewal.</p> <p>22 Under Florida law -- again, I'm speaking off</p> <p>23 memory; I stand to be corrected -- the ability to</p> <p>24 declare a state of emergency usually lasts for 60</p> <p>25 days and then it has to be re-upped in a</p>	<p style="text-align: right;">Page 20</p> <p>1 school districts in Florida. No one proposed</p> <p>2 that. All proposed a parental opt-out policy. No</p> <p>3 one advocated for any CDC recommended policy.</p> <p>4 In fact, the governor stated, gave his</p> <p>5 opinion, that his confidence -- hold on a</p> <p>6 second -- that his confidence in some medical</p> <p>7 leadership had been shattered. He said they</p> <p>8 appear to be, quote, delighted to impose</p> <p>9 unspeakable burdens on children. Other than the</p> <p>10 fact that it was said in that conference, no</p> <p>11 evidence has been produced to support that</p> <p>12 statement.</p> <p>13 Also in the governor's executive order that</p> <p>14 was issued a few days later, the governor</p> <p>15 expressed doubt about the validity of the CDC</p> <p>16 guidance.</p> <p>17 Remember, the CDC by the overwhelming weight</p> <p>18 of evidence is considered the preeminent medical</p> <p>19 authority in this country about infectious</p> <p>20 diseases. It's the gold standard.</p> <p>21 The State of Florida has in the past on many</p> <p>22 occasions adopted and incorporated CDC guidelines</p> <p>23 and recommendations into the state statutes. Here</p> <p>24 is an example of just a few. It's not exhaustive.</p> <p>25 Florida Statute 465.189, topic is administration</p>
<p style="text-align: right;">Page 19</p> <p>1 supplemental order. If you don't re-up it, it</p> <p>2 will expire, which is -- my understanding that's</p> <p>3 what happened here. Therefore, the governor's</p> <p>4 emergency powers under Florida Statute 252 expired</p> <p>5 at that point, by the end of June.</p> <p>6 On July 27th, the governor held a roundtable</p> <p>7 meeting on face mask policy. That meeting -- the</p> <p>8 video of that meeting was admitted into evidence.</p> <p>9 At that meeting -- this is my recollection</p> <p>10 and notes -- no participant in the meeting --</p> <p>11 there were some doctors there. The governor was</p> <p>12 there. There was a charter school -- I think he</p> <p>13 was a principal, but a higher-up charter school</p> <p>14 official from a local charter school. There was</p> <p>15 another mother and also charter school employee</p> <p>16 there. And there was a high school student who</p> <p>17 indicated he and his friends preferred to hang</p> <p>18 around without wearing face masks. There may have</p> <p>19 been others, but that's my member -- memory of who</p> <p>20 was there.</p> <p>21 No participant at that meeting, this</p> <p>22 factfinding meeting, proposed a mandate -- a</p> <p>23 mandated face mask policy with no parental</p> <p>24 opt-out, such as that being proposed by a</p> <p>25 number -- or being implemented by a number of</p>	<p style="text-align: right;">Page 21</p> <p>1 of vaccines and epinephrine autoinjection; Florida</p> <p>2 Statute 384.23, regarding sexually transmitted</p> <p>3 diseases; Florida Statute 381.0031, regarding</p> <p>4 epidemiological research, report of diseases of</p> <p>5 public health significance to department; Florida</p> <p>6 Statute 1002.23, a statute that's been mentioned</p> <p>7 quite a bit in this case dealing with student and</p> <p>8 parental rights and educational choices. They say</p> <p>9 there, that statute, a recommended immunization</p> <p>10 schedule in accordance with the United States</p> <p>11 Center for Disease Control and recommendations</p> <p>12 is -- is referenced and apparently assumed to be</p> <p>13 worth including in the statute. Florida Statute</p> <p>14 381.005, primary and preventive health services;</p> <p>15 Florida Statute 381.0056, school health services:</p> <p>16 Each school health advisory committee must, at a</p> <p>17 minimum, include members who represent the</p> <p>18 right -- the eight component areas of the</p> <p>19 Coordinated School Health model as defined by the</p> <p>20 Centers for Disease Control; Florida Statute</p> <p>21 381.985, screening program, a requirement that</p> <p>22 there be adoptive rules to follow established</p> <p>23 national guidelines or recommendations such as</p> <p>24 those used by the Council of State and Territorial</p> <p>25 Epidemiologists and the Centers for Disease</p>

<p style="text-align: right;">Page 22</p> <p>1 Control; Florida Statute 400.141, administration 2 and management of nursing home facilities, 3 requiring providing for immunizations against flu 4 viruses in accordance with the recommendations of 5 the Centers for Disease Control; Florida Statute 6 112.181, firefighters, paramedics, EMTs, law 7 enforcement officers, et cetera, reference to the 8 Centers for Disease Control; 381.9315, gynecologic 9 and ovarian cancer education and awareness: State 10 Surgeon General shall make publicly available, by 11 posting on the Internet website of the Department 12 of Health, resources and an Internet website link 13 to the federal Centers for Disease Control for 14 gynecologic cancer information; and, finally -- 15 but this is not an exhaustive list; this is just 16 some of what I found -- Florida Statute 951.27, 17 blood tests of inmates, requiring a procedure 18 consistent with the guidelines of the Centers for 19 Disease Control. 20 So not only do the doctors who testified here 21 recognize the Centers for Disease Control as the 22 legitimate reputable source of information, it 23 appears that over many years so has the Florida 24 legislature. 25 So let's go back. At that July 27th</p>	<p style="text-align: right;">Page 24</p> <p>1 temperate than some of the other participants', 2 but that's what was said there. 3 One study -- I'm not going through every 4 piece of evidence. I'm highlighting some issues. 5 One study, Exhibit -- Defendants' Exhibit 48, 6 which was a study in -- I think it was a CDC study 7 involving Georgia. What was read to a couple of 8 the plaintiffs' witnesses and they were asked for 9 this comment, I think it was this sentence: 10 quote, The 21 percent lower incidence in schools 11 that recommend mask use among students was not 12 statistically significant compared to the schools 13 where mask use was optional. And the witnesses 14 recall -- comment on that. 15 The clear implication made in that 16 cross-examination was, here's a CDC study that 17 doesn't even recognize that masks work. What was 18 not read was the rest of the study. 19 Directly following that sentence -- it's a 20 little bit lengthy, but I'm going to read it. It 21 says, This finding might be attributed to higher 22 effectiveness of masks among adults, who are at a 23 higher risk for SARS-CoV-2 infection, but might 24 also result from differences in mask-wearing 25 behavior among students in schools with optional</p>
<p style="text-align: right;">Page 23</p> <p>1 meeting -- I made some notes -- there was one 2 presenter there, I believe his name was Meissner, 3 who stated that masks were not worn to protect 4 wearers of the mask. This is clearly contrary to 5 evidence presented at the trial here. He said 6 that harm is done to children with masks. 7 A psychiatrist, I think his last name was 8 McDonald, said masking is child abuse. He said 9 there is no evidence that masking protects against 10 COVID. 11 There's a lot of evidence that was presented 12 here, including CDC studies, including the April 13 21st, two thousand -- April -- the May 21st, 2021, 14 CDC study that's Exhibit 48. I'll get back to 15 that in a minute. 16 Dr. McDonald also said not a single child has 17 benefited from wearing a mask. All children have 18 been hurt. He is appalled, he said. Every 19 thoughtful, rational adult knows children 20 shouldn't be masked. He said children cannot 21 transfer COVID to adults. Again, another fact 22 that's disputed by the science. Masks do nothing 23 to help medically, and they destroy the country. 24 So that's not everything that was said there. 25 I thought the governor's remarks were much more</p>	<p style="text-align: right;">Page 25</p> <p>1 requirements. Mask use requirements were limited 2 in this sample; 65.1 percent of schools required 3 teacher and staff member mask use and 4 approximately one-half, 51.5 percent, required 5 student mask use. Because universal and correct 6 use of masks can reduce COVID -- I'm substituting 7 "COVID" for the technical science term "SARS." 8 Let me repeat this. Because universal and correct 9 use of masks can reduce COVID transmission and is 10 a relatively low-cost and easily implemented 11 strategy, findings in this report suggest 12 universal and correct mask use is an important 13 COVID-19 prevention strategy in schools as part of 14 the multicomponent approach. 15 This is not a plaintiffs' exhibit. This is a 16 defendants' exhibit. 17 Also, one last thing this report said in its 18 summary, they noted that COVID infection was 37 19 percent lower in schools that required teachers 20 and staff members to use masks. 21 So this study, which was presented by the 22 defendants to me, wasn't presented to the governor 23 at that meeting in which they were stating they 24 were trying to decide what to do. But the 25 governor was told that use of masks is child abuse</p>

<p style="text-align: right;">Page 26</p> <p>1 and bringing harm to every child in the country. 2 I've seen no scientific evidence of that to 3 support that statement in this case. 4 So after the meeting, the governor three days 5 later issued Executive Order 21-175. This order 6 began the formulation of a policy, and enforcement 7 by the defendants, that local school districts in 8 Florida could not adopt a face mask mandate unless 9 it provided for a parental opt-out. 10 This is also reflected in the defendants' 11 seventh affirmative defense filed in this case 12 which says, quote, The Parents' Bill of Rights 13 precludes school boards from implementing 14 categorical mask mandates that do not allow 15 parents to opt their children out of the 16 requirement, end quote. We're going to get to the 17 Parents' Bill of Rights. But this seventh 18 affirmative defense does a good job of stating 19 exactly one of the big disputed issues in this 20 case. I'll get to that later. 21 Continuing, the executive order, based on the 22 evidence and inferences from the evidence 23 presented to me, was a continuation into a policy 24 disfavoring the no opt-out mask mandates and the 25 means to accomplish this was going to be through</p>	<p style="text-align: right;">Page 28</p> <p>1 This paper adds to our understanding of the 2 relationship between COVID mitigation and school 3 safety in the U.S., and they cite about four 4 different studies. We would emphasize that in 5 general this literature suggests in-person school 6 can be operated safely with appropriate 7 mitigation, which typically includes universal 8 masking. It would be premature to draw any 9 alternative conclusions about this question based 10 on this preliminary data. 11 This study doesn't say masking is not 12 effective. In fact, it recommends universal 13 masking. And it says that it's premature to state 14 anything otherwise. 15 Also, they say in the study right above the 16 section called discussion, It is important to note 17 that this -- this is the long discussion in the 18 paper -- does not imply masks are ineffective, as 19 these results focus only on masking in schools and 20 do not take community behavior into consideration. 21 Additionally, as noted above, we focus only on 22 mask mandates and not actual masking behavior. 23 So the Brown report said that it had analyzed 24 COVID data and found no correlation with mask 25 mandates. If that's true, why did the Brown</p>
<p style="text-align: right;">Page 27</p> <p>1 the Parents' Bill of Rights, which is clearly 2 evident from the executive order and confirmed by 3 the affirmative defense. 4 Under other provisions of the executive 5 order, it cited to a study which it said found no 6 correlation with face masks. This study is known 7 and called in the order the Brown University 8 study. It was not peer-reviewed and its own -- 9 its own authors have expressed doubts as to its 10 use. That study's in evidence. All I have to do 11 is find it. It's Exhibit -- I believe it is 12 Exhibit 19 and -- yes. Exhibit 19. 13 Here's a quote from the people that wrote the 14 study: Quote, We caution that our analysis 15 focuses only on correlations, and it is 16 challenging to make causal statements. In the 17 case of masking in particular, we focus on 18 mandates and not on actual behavior. Masking is 19 likely correlated with mask mandates, but it is 20 also likely that some individuals mask even in the 21 absence of a mandate and that there is imperfect 22 compliance even with a mandate. In addition, 23 while we control for community rates, we do not 24 control for community mitigation practices, which 25 would also impact behavior and rates in schools.</p>	<p style="text-align: right;">Page 29</p> <p>1 report recommend that universal masking was still 2 the way to go? 3 Now, I don't say that the governor has time 4 enough to read a report that's that thick. But 5 his advisors do. So the statement in the 6 executive order is just incorrect. That study 7 does not find no correlation with mask mandates. 8 What I read to you is a defense exhibit, not 9 a plaintiffs' exhibit. 10 So, going back to the executive order, the 11 order showed lack of support for CDC guidance on 12 face masks -- I don't think there's any dispute 13 about that -- and stated that face masks may have 14 negative health and societal ramifications. Most 15 importantly, the order noted the applicability of 16 a new statute called the Parents' Bill of Rights. 17 The order -- we'll talk about that more in detail. 18 The order directed certain actions which were 19 premised on enforcing the Parents' Bill of Rights, 20 which would result in a blanket banning in advance 21 of all school board mask mandates if there was no 22 parental opt-out. The most likely way to 23 accomplish this was to institute a policy that 24 would likely result in a violation of the Parents' 25 Bill of Rights. Parents' Bill of Rights is a law</p>

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

CIVIL DIVISION

Case No.: 2021-CA-001382

ROBIN MCCARTHY and JOHN MCCARTHY,
individually and on behalf of L.M., a minor;
ALLISON SCOTT, individually and on behalf of
W.S., a minor; LESLEY ABRAVANEL and
MAGNUS ANDERSSON, individually and on
behalf of S.A. and A.A., minors; KRISTEN
THOMPSON, individually and on behalf of P.T.,
a minor; AMY NELL, individually and on behalf
of O.S., a minor; EREN DOOLEY, individually
and on behalf of G.D., D.D., and F.D., minors;
DAMARIS ALLEN, individually and on behalf of
E.A., a minor; PATIENCE BURKE, individually
and on behalf of C.B., a minor; and PEYTON
DONALD and TRACY DONALD, individually
and on behalf of A.D., M.D., J.D., and L.D.,
minors,

Plaintiffs,

vs.

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

E X C E R P T

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

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

APPEARANCES:

CHARLES R. GALLAGHER III, ESQUIRE
 ERIKA T. MARIZ, ESQUIRE
 Gallagher & Associates Law Firm, P.A.
 5720 Central Avenue
 St. Petersburg, Florida 33707
 - and -

JOSHUA G. SHERIDAN, ESQUIRE
 Busciglio Sheridan Schoeb, P.A.
 3302 North Tampa Street
 Tampa, Florida 33603
 - and -

CRAIG A. WHISENHUNT, ESQUIRE
 Ripley Whisenhunt, PLLC
 8130 66th Street North, Suite 3
 Pinellas Park, Florida 33781
 - and -

MARIA G. PITELIS, ESQUIRE
 Wagstaff & Pitelis, P.A.
 161 14th Street Northwest
 Largo, Florida 33770
 - and -

ERIN K. BARNETT, ESQUIRE
 ERIN E. WOOLUMS, ESQUIRE
 Barnett Woolums, P.A.
 6501 1st Avenue South
 St. Petersburg, Florida 33707
 - and -

TRACEY L. STICCO, ESQUIRE
 4202 East Fowler Avenue, SOC 107
 Tampa, Florida 33620
 - and -

NATALIE L. PASKIEWICZ, ESQUIRE
 Paz Mediation
 Post Office Box 7233
 St. Petersburg, Florida 33734
 - and -

CHARLES W. DODSON, ESQUIRE
 270 Rosehill Drive North
 Tallahassee, Florida 32312
 Attorneys for Plaintiffs

APPEARANCES CONTINUED:

MICHAEL A. ABEL, ESQUIRE

JARED J. BURNS, ESQUIRE

Abel Bean Law, P.A.

100 North Laura Street

Suite 501

Jacksonville, Florida 32202

Attorneys for Defendants

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

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

4 THE COURT: Okay. Good morning.

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

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

12 (Brief recess taken.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 The second quote, coming from the same

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

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

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

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

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

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

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

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

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

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

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

1 even for children.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 and bringing harm to every child in the country.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 that was passed by the legislature this year.

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

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

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

19 THE REPORTER: (Indicating.)

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

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

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

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

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

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

25 The executive order directed the Florida

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 So that's the background.

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

4 Court reporter, you still okay?

5 THE REPORTER: (Indicates affirmatively.)

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

7 THE REPORTER: (Indicates negatively.)

8 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

1 law was violated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 The First District Court of Appeal in

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

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

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

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

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

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

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

1 Yet the Florida Supreme Court in *Citizens v.*
2 Florida State Board of Regents [sic], 262 So.3d
3 127 at 137 (Florida 2019) quoted from an earlier
4 decision in *Coalition vs. Chiles*, 680 So.2d 400,
5 408 (Florida 1996) -- so that's 25 years ago --
6 quote, We hold that the legislature has been
7 vested with enormous discretion by the Florida
8 Constitution to determine what provision to make
9 for an adequate and uniform system of free public
10 schools, end quote.

11 In both those cases, the court, the way I
12 read them, was dealing with a claim that the
13 legislature had failed to sufficiently fund the
14 public schools. In general, funding decisions by
15 the legislature have been granted substantial, as
16 you can tell from these two cites, substantial
17 deference by the appellate courts in Florida.

18 However, the issue here is not whether the
19 state has adequately funded the school system.

20 Last year, the First District Court of Appeal
21 said in the *DeSantis vs. FEA* case, quote, Whatever
22 the outcome of appellees' lawsuit, the choice of
23 how to deliver education to students remains with
24 Florida's school boards, end quote, 306 So.3d
25 1202, 1214 (Florida First DCA 2020).

1 Although the State retains responsibility for
2 establishing a system of public education through
3 laws, standards, and rules to assure efficient
4 operation of a system of public education, the
5 school -- the state constitution states that each
6 county constitutes a school district.
7 Responsibility for the actual operation and
8 administration of all schools within the districts
9 appears to be delegated by law to the school of
10 the respective districts. In this regard, all
11 public schools conducted within the district are
12 under the direction and control of the district's
13 school board, 46 Fla. Jur. 2d, schools,
14 universities, and colleges, Section 19.

15 Here's a little bit of the rub here in my
16 case. Although subject to the Parents' Bill of
17 Rights, the setting of local policies for health
18 and safety of students substantially remains a
19 local function, I think. And I add "I think"
20 because the case law to my mind is still all over
21 the place on this.

22 Florida is a large state, including small,
23 rural communities to large, densely populated
24 counties. What is appropriate in one county may
25 not be appropriate in another county. Thus, a

1 one-size-fits-all policy for student health and
2 safety as dictated by Tallahassee, in other words,
3 by the State, runs contrary to Article IX, Section
4 4(b) of the Florida Constitution.

5 If that were literally true, then somebody
6 would have challenged the constitutionality of the
7 Florida Bill of Rights, which I'll talk about in a
8 minute. But no one has.

9 I have ruled in cases, and been affirmed by
10 the First District, that various levels of school
11 reform relating to how teachers are paid, all
12 sorts of things, extensive school reform, was --
13 did not violate Article IX, Section 4(b).

14 I ruled a year or two ago that the
15 legislature's bills regarding charter schools
16 didn't violate Section IX 4(b). They agreed with
17 me on that. But they didn't agree with me that
18 the school boards had standing to file suit to
19 contest the constitutionality of those bills. So
20 I was reversed on the standing question and
21 affirmed on the -- what I call the separation of
22 powers local control question.

23 I just have to say that the law is not clear
24 and certain enough for me to rule to grant relief
25 under -- hold on -- Count -- just a second. I

1 think it's Count I. Let me see. No. Under Count
2 II. I am going to decline the invitation to grant
3 relief pursuant to Count II of the complaint.

4 Again, this may be something the parties want
5 to appeal and maybe the law can be clarified on
6 this point. But I don't feel it's certain enough
7 from my standpoint to grant relief.

8 Anyway, analysis --

9 Still okay, court reporter?

10 THE REPORTER: (Indicates affirmatively.)

11 THE COURT: Okay.

12 Anybody need a break?

13 Okay. Analysis of Florida's -- Florida
14 Parents' Bill of Rights. I'm sure I eventually
15 will butcher this name. I may call it the police
16 bill of rights. No telling what I'm going to call
17 it. But I'm referring to the Florida Bill of
18 Rights.

19 As this case has proceeded, the Florida Bill
20 of Rights -- I'm sorry. The Florida Parents' Bill
21 of Rights and its use to effect the anti-mask
22 policy has become the focal point. In this case,
23 a new law called the Parents' Bill of Rights,
24 which is now known as Florida Statute Sections
25 1014.01-.016 (2021) -- it's so new that it's not

1 even on my statutory statute cite online of
2 Florida laws. And it is also described as -- it's
3 in my notebook here. Hold on. Here we go. It's
4 described as Chapter 21-199, House Bill Number
5 241.

6 This bill was passed this year by the Florida
7 legislature. I believe I recall I saw that the
8 governor, in fact, did sign it. I believe the
9 governor did sign the bill. And it took effect
10 July 1, 2021, about 26 days before the roundtable
11 and about 29 days before the executive order.
12 Yes.

13 This is a brand-new law. There is no
14 appellate decision, when I last checked, which was
15 a couple days ago, interpreting this law. It's
16 now about seven weeks old. There's one lawsuit in
17 Jacksonville, a circuit lawsuit, brought pursuant
18 to this law against the school over there. But as
19 far as I know, there's been no court rulings which
20 give interpretation on that case. That's all I've
21 been able to find.

22 So it's up to me. It's my job, not the job
23 of any witness in this case, it's my job to
24 interpret the Florida Bill of Rights. Then at
25 some point it may be up to the appellate court to

1 decide if they agree or disagree with my
2 interpretation.

3 So it's important to note that the Florida
4 Bill of Rights was not in effect when the First
5 District Court of Appeal decided the DeSantis vs.
6 FEA case. So that's one point of distinction
7 between the cases.

8 Another point of distinction between the
9 cases is that there is no -- there was no state of
10 emergency in effect when the executive order was
11 issued as there was in the DeSantis case.

12 A third point of distinction is the DeSantis
13 case said that the order in that case did not
14 require the school districts to do anything. In
15 this case, the order and the consequences it set
16 up and directed resulted in ordering the school
17 districts to not pass a mandate with no parental
18 opt-out. If you do do that, as was stated, there
19 will be consequences. And we've already seen that
20 that's happening now.

21 So here's the issue. What does the Bill of
22 Rights say and what does it authorize people to
23 do? Well, I read the Bill of Rights. I think I'm
24 on my seventh or eighth reading. I read it again
25 last night, at about 1:15 this morning. I've read

1 the legislative history. It seems to be
2 consistent with my reading of the statute. Now,
3 granted, if the plain reading of the statute is
4 clear and you can interpret it, it's really
5 improper to try to rely on outside legislative
6 history because that's written by one or two
7 people that may or may not be valid. I'm just
8 saying it seems to agree with what -- how I read
9 it.

10 So the provision of the law that is most
11 relevant here is Florida Statute 1014.03. And
12 it's called -- the title of it is infringement on
13 parental rights. It says, The state or any of its
14 political subdivision or any governmental unit --
15 that would cover school boards; that is any
16 governmental unit -- or any other institution may
17 not infringe on the fundamental rights of a parent
18 to direct the upbringing, education, health care,
19 and mental health of his or her minor child.

20 Now, what I've heard in this case, that's
21 where the reading has been stopped by the
22 defendants in this case. Here's what the rest of
23 it says: cannot infringe on fundamental rights on
24 education and health care without demonstrating
25 that such action is reasonable and necessary to

1 achieve a compelling state interest and that such
2 action is narrowly tailored and is not otherwise
3 served by a less restrictive means.

4 So what that law says -- this is how I
5 interpret it -- is normally you can't interfere
6 with the rights of parents to direct schooling and
7 education unless there's a reasonable basis to do
8 so, that your action is reasonable and it's a
9 legitimate reason to do so that's of interest
10 throughout the state, that you narrowly tailor it
11 so you don't get excessive on what you're doing,
12 and there's no other less restrictive means to
13 accomplish that.

14 So what does that mean here? It doesn't ban
15 mask mandates at all. It doesn't require that a
16 mask mandate must exclude a parental opt-out at
17 all. What it does do is say, if someone disagrees
18 with a policy that's been adopted, then they can
19 bring an authorized proceeding or review, whatever
20 is required by the Florida law, to say to the
21 school board, say, okay, show me how this is
22 reasonable, show me how this is necessary to
23 achieve a compelling state interest, and show me
24 that it's narrowly tailored.

25 For example, if you have a mask mandate, if

1 it said the mask mandate applies to all school
2 students and all alumni, eh, that might be not
3 narrowly tailored. If it says it shall apply for
4 the next three years, that would probably be not
5 otherwise served by less restrictive means.
6 There's any number of examples you can come to.

7 But that's what the Bill of Rights means. It
8 does not authorize the governor or the Department
9 of Education, state Board of Education to say to
10 schools: You cannot adopt a blanket face mask
11 policy unless it has a parental opt-out. It does
12 not say that.

13 What it does say is that if you do that, it
14 has to be reasonable, support a state purpose, has
15 to be narrowly drawn and not otherwise
16 accomplished by some other means.

17 So let me go -- pick back up on my notes. I
18 was freewheeling then, as you can tell. So let me
19 go back to my notes.

20 For example, this law doesn't violate -- or
21 doesn't make illegal other laws in Florida
22 relating to mandatory vaccines. There are some
23 opt-outs for religious reasons or medical reasons
24 for mandatory vaccines by the statute. But
25 Florida -- the Florida legislature -- this is one

1 of the reasons it gave me pause on the remedy
2 under Count II. Florida legislature passed 100 --
3 this is from memory -- 2 or 3 point something,
4 that says you have to take six or seven different
5 vaccines for polio and all these mumps, measles,
6 et cetera. You have to take those vaccines before
7 you even get in the front door of a school in
8 Florida.

9 Now, there are -- as I understand, there are
10 some religious opt-outs, and I would not be
11 surprised if there are not some sort of health
12 opt-outs. There probably are people that have
13 deep allergic reactions to certain things and they
14 shouldn't be taking them.

15 But in general, that law is much more an
16 infringement on parents' rights to control the
17 health of their children than a face mask policy.
18 That's sticking a needle in their arm and putting
19 a vaccine in there that's going to, you know, for
20 example, polio, mumps, and measles, going to
21 affect them the rest of their life. There's no
22 undoing those vaccines once they go in.

23 So I will tell you anecdotally, when I came
24 to FSU in 1968, for some reason I had escaped
25 having a smallpox vaccination. I had to go to

1 Dr. Simmons' office in Auburndale, Florida, and
2 get a smallpox vaccination because it was required
3 that I get that before I got into FSU.

4 So that's one example of how you weigh these
5 competing interests and the reasonableness of the
6 law that does actually infringe, at least in part,
7 on parental rights.

8 Here's another example. There's a chapter of
9 law in Florida called Chapter 39. Chapter 39 sets
10 forth procedures in cases which we call child
11 dependency cases. And the purpose of that law is
12 to provide for care, safety and protection of
13 children, to ensure secure and safe custody of
14 children, and to prevent child abuse, neglect and
15 abandonment. This statute passed by the Florida
16 legislature states that, quote, The health and
17 safety of children served shall be of paramount
18 concern, end quote. That law permits under court
19 supervision children to be removed from their
20 parents temporarily and in some cases permanently.
21 It requires -- it allows the court to order
22 medical care, psychiatric treatments. It requires
23 the court to have the child go through various
24 programs and counseling, requires the parents to
25 go through programs and counseling, all of which

1 violates the parents' right to control their
2 child. But they don't have the right to harm
3 their child, which is the, you know, underpinning
4 of Chapter 39. There are dependency court
5 proceedings going on right now in every county of
6 the state of Florida.

7 So, therefore, another example of how, yes,
8 parents' rights are very important. I'm a parent.
9 Parents' rights are very important. But they're
10 not without some reasonable limitation depending
11 upon safety and reasonableness and compelling
12 state need usually regarding health care or
13 condition of the child.

14 The Parents' Bill of Rights expressly gives
15 governmental entities -- school board's a
16 governmental entity -- to adopt policies
17 concerning health care and education of children
18 in school, that expressly they have the right to
19 do that, even if those policies affect the
20 parents' rights to make decisions in those areas.
21 This statute allows governmental agencies such as
22 a school board to adopt health care policies if
23 the policy is reasonable and necessary to achieve
24 a compelling state interest, narrowly tailored,
25 and not otherwise served by a less restrictive

1 means.

2 As it relates to school boards adopting
3 mandatory face mask policies with no parental
4 opt-out provision, there's no prohibition in the
5 Parents' Bill of Rights to adopting such a policy,
6 none, as long as that policy is reasonable and
7 otherwise complies with the provisions I've just
8 outlined in the Parents' Bill of Rights.

9 The defendants do not have authority under
10 this law to a blanket mandatory ban against a face
11 mask policy that it -- that does not provide a
12 parental opt-out. They simply do not have that
13 authority, unless they give the school boards
14 their due process rights granted by the Florida
15 legislature to make a showing of reasonableness,
16 support a state policy, narrowly tailored, no
17 lesser means you can achieve the same thing.

18 This statute does not support a statewide
19 order or any action interfering with a
20 constitutionally provided authority of local
21 school districts to provide for the safety and
22 health of children based on the unique facts on
23 the ground in a particular county.

24 The law of Florida does not permit the
25 defendants to punish school boards for adopting a

1 face mask mandate if the school boards have been
2 denied their due process rights under the Parents'
3 Bill of Rights to show that their policy is
4 reasonable and meets the requirements of the law.

5 If the defendants act to deny the school
6 districts due process rights provided by the law,
7 as appears to be the case here in at least the
8 Broward and Alachua County case, and if they
9 enforce, strictly enforce any other rule,
10 regulation, policy, executive order, whatever
11 basis you want to call it, then they are acting
12 without authority and they are refusing to comply
13 with the provisions, laws set forth by the
14 legislature.

15 Remember, the legislature has its own
16 protection by the separation of powers. They pass
17 laws. Unless that law is unconstitutional -- it
18 has not been challenged by either side -- I can't
19 tell the legislature I'm just not going to -- I'm
20 not going to follow that law; I don't agree with
21 it. I can't do that. Governor can't do that.
22 Department of Education, state Board of Education,
23 they can't do that.

24 If I go to Quincy and I take the 90 exit off
25 I-10 where there's about three or four different

1 speed limits, when it goes down to 35, I have to
2 drive 35, even if I don't think -- even if I might
3 think that that's not high enough. When it goes
4 up to 40, I can drive up to 40. When it goes back
5 down to 35, I can drive 35. I don't have
6 authority to not obey laws and regulations that
7 are lawfully passed simply because I don't agree
8 with them. That's the underpinning of our entire
9 judicial system.

10 And in a minute I'm going to show you one
11 reason why I'm not giving you relief, plaintiffs,
12 in another complaint -- portion of your complaint
13 because I feel like the First District has
14 essentially instructed me inferentially to not
15 grant that relief. I'll get to that in a minute.

16 So with regard to the Parents' Bill of
17 Rights, the school districts -- the Bill of Rights
18 permits school districts to enact, including, but
19 not limited to, mask mandates, no parent opt-out,
20 policies that relate to health education -- health
21 care and education. The school districts are not
22 required to give permission in advance to pass
23 these policies. To do otherwise would submit
24 local schools to endless court suits and/or
25 administrative proceed- -- hearings on innumerable

1 local policy decisions that would just make
2 practically running a school impossible.

3 For example, if a school board decided they
4 were going to ban high school students from
5 leaving campus during the school hours, like to go
6 get lunch or something, they're not required to
7 prove that that's reasonable before they do it.
8 If someone challenges it, they can. They'll say,
9 all right, this is just during school. The
10 purpose of this is to keep them at school so they
11 won't get in trouble, so they'll probably eat
12 better, they will not have their attention
13 diverted by being away from school and they won't
14 do things they normally wouldn't do in school.

15 I don't know about now, but that was the
16 policy when I was in high school, which was
17 strictly enforced. That's just one minor policy.
18 And it was the safety of the students and ability
19 to keep the students out of trouble, keep them at
20 school so they don't go off in a car, have an
21 accident or otherwise get into serious trouble.

22 That actually impairs a parent's rights to
23 say -- say the parent wants the child to come home
24 every day to the house and eat lunch with him or
25 her. Such a policy would impair that right. The

1 school board, if it's challenged on that, would
2 then have to show the rational basis for it, why
3 they're doing it, how it's narrowly drawn, et
4 cetera.

5 That's one of many things that go along.
6 Dress codes, not having a knife in your
7 backpack -- that might be a state criminal law --
8 and any number of things, no fighting on campus,
9 all those things are day-to-day decisions schools
10 and school boards make all the time. I don't
11 think the Department of Education has any real
12 interest in getting involved in those sorts of
13 things.

14 However, the face mask issue has -- a lot of
15 people have a lot of opinions on that. It doesn't
16 mean that they can't raise those opinions. It
17 just means that the school board, after they pass
18 the policy, they must demonstrate, when
19 challenged, that it meets the requirements of the
20 state Parents' Bill of Rights.

21 If it doesn't meet those challenges, then
22 they can't do it. And it's because of the fact
23 that the legislature passed that bill and it's not
24 been challenged as unconstitutional I feel
25 constrained to say the state can take action

1 regarding face masks under the home rule section.
2 The legislature -- not as to face masks, but the
3 legislature has passed a policy which affects
4 rights -- school boards' rights to enact policies,
5 but it hasn't tied their hands. It's just said
6 you have to make it reasonable and you have to be
7 ready to show that.

8 So the standard of proof -- let me go back
9 here. If there's an objection by a parent or the
10 department to a policy, whether it's school mask
11 or not -- face mask or not, there has to be some
12 sort of authorized proceeding that's authorized by
13 law, a due process proceeding, that allows the
14 school board to show why its policy is acceptable
15 under the school board -- I'm sorry, the school
16 board -- the Parent -- Florida Parents' Bill of
17 Rights.

18 The standard of proof a school board must
19 meet in showing this reasonableness is not beyond
20 a reasonable doubt, is not reasonable and there's
21 no rational basis that can be stated against it.
22 That's not the standard. The standard is, is it
23 reasonable. It's a reasonableness standard.
24 That's a much lower standard than you would have
25 if you're trying to disallow a policy of the

1 legislature or the governor because you say it is
2 not rational. There you have to show there's --
3 either he has no authority or there's no rational
4 basis whatever to support that policy. That's not
5 the standard when a school board has to justify
6 policies it passes pursuant to the Parents' Bill
7 of Rights. Their standard is reasonableness.

8 Here I think I'm required to make some
9 comments on the evidence. The evidence clearly
10 demonstrates that the recommendation of the CDC
11 for universal masking of students, teachers, and
12 staff represents the overwhelming consensus of
13 scientists, medical doctors, and medical
14 organizations. The evidence submitted by the
15 defendant I think reflects a minority, perhaps
16 even a small minority, of medical and scientific
17 opinion. That's the reason I can't say there's no
18 rational basis for the governor's policy under a
19 different legal theory in a different county.

20 You can agree or disagree. Both sides may
21 end up appealing this order.

22 So although no individual school system's
23 policy is in front of me, I have heard significant
24 evidence concerning the medical and scientific
25 basis for face mask policies, and I conclude that

1 this evidence demonstrates that face mask policies
2 that follow CDC guidance are at this point in time
3 reasonable and consistent with the best scientific
4 and medical opinion and guidance in the country at
5 this time. That's not to say that they might be
6 in force for too long, they might be not narrowly
7 structured, or for some other reason.

8 But the evidence presented in this trial --
9 part of the issues in this trial is, are the CDC
10 guidelines, are those -- is that a rational basis
11 for masking? They are. However, that could
12 change very shortly. Their guidance could change.
13 Conditions on the ground could change. Conditions
14 from county to county could change. A very
15 small -- small-populated rural county might have a
16 different analysis or needs and requirements than
17 Miami-Dade County does.

18 I also find -- this finding is not intended
19 to be binding on any party, the defendants in this
20 case or any school, because the policies have not
21 been litigated and each school district has unique
22 circumstances and conditions. This is just my
23 analysis as a factfinder of the evidence. And it
24 also is relevant as to another ruling I'm going to
25 make at the end.

1 The school district which adopts a policy,
2 such as a mask mandate, is acting within
3 discretion given to it by the legislature in the
4 Florida Parents' Bill of Rights. So long as the
5 requirements of the policy provided for in the
6 Parents' Bill of Rights are met, the doctrine of
7 separation of powers requires that the
8 discretionary power exercised by the school board
9 cannot be interfered with by the judiciary or
10 executive branch of government and neither the
11 judiciary nor executive can substitute their
12 judgment for that of the school board.

13 Remember, I'm not -- this is not something I
14 made up. This power has been given to the school
15 boards very recently by a bill that the governor
16 signed.

17 My ruling in this case, if you want to put it
18 in one sentence, is I am enforcing the bill passed
19 by the legislature in requiring that anyone who
20 uses that bill has to follow all provisions, not
21 part of the provisions.

22 So let me move on real quickly here. I'm
23 about finished. So these are some nature of some
24 additional findings and rulings. They might
25 duplicate things I've already said. Again, this

1 is where editorial discretion is acceptable. I'll
2 tell you where -- in some areas where it's not.
3 These are findings. And I think they're
4 consistent with what I've said already. And I'm
5 about to finish.

6 The purpose of the executive order and the
7 actions it set in motion were to prohibit local
8 school boards from adopting face mask mandates
9 that did not include a parental opt-out provision.

10 The defendants have contended by their
11 actions and positions in this case that the
12 Florida Parents' Bill of Rights authorizes them to
13 enforce this blanket prohibition.

14 The defendants have additionally used threats
15 of enforcement and enforced actions generated as a
16 result of the executive order to enforce this
17 blanket prohibition.

18 The defendants contend that the Parents' Bill
19 of Rights as referenced in the executive order
20 authorized actions of the defendants seeking to
21 enforce the blanket prohibition on school boards
22 adopting face mask mandates which did not include
23 a parental opt-out provision.

24 The defendants' assertion in this regard is
25 incorrect because the Parents' Bill of Rights does

1 not ban school board face mask mandates. The
2 law -- the law expressly permits school boards to
3 adopt policies regarding the health care of
4 students, such as a face mask mandate, even if a
5 parent disagrees with that policy. The law
6 requires only that the policy be reasonable, is
7 necessary to achieve a compelling state interest,
8 and be narrowly tailored and not otherwise served
9 by a less restrictive means.

10 As I've said before, if the Department of
11 Education or some other interested person
12 challenges that, then that might have to be proven
13 by the school board in some -- or demonstrated in
14 some due process proceeding of some sort which
15 would also allow an entry into the appellate
16 system.

17 The actions of the defendants do not pass
18 constitutional muster because they seek to
19 deprive -- excuse me -- they seek to deprive the
20 school boards in advance and without the school
21 boards' right to show the reasonableness of the
22 policy. The law does not require that the school
23 board get permission for a policy in advance. It
24 requires only that if a policy is challenged, it
25 has the burden to prove its validity under the

1 guidelines of the statute.

2 Therefore, an executive order and/or an
3 agency action or an executive action which bans
4 under all circumstances a face mask mandate for
5 schoolchildren without a parental opt-out does not
6 meet constitutional muster because such action
7 exceeds the authority given to the defendants
8 under the Parents' Bill of Rights law passed by
9 the Florida legislature.

10 Seeking to enforce a policy through the
11 executive order and through actions that violate
12 the provisions of the Parents' Bill of Rights is,
13 by definition, arbitrary and capricious because
14 there is no reasonable or rational justification
15 for not following -- excuse me -- no reasonable or
16 rational justification for not following all of
17 the provisions of a duly enacted and authorized
18 Florida law.

19 A policy or action which violates the
20 Parents' Bill of Rights cannot be lawfully
21 enforced by the defendants.

22 The executive order and/or agency action as
23 described above and heard in this case which
24 violates the Parents' Bill of Rights exceeds any
25 authority to issue the executive order to the

1 extent it sets in motion or causes a violation of
2 the Parents' Bill of Rights and exceeds the
3 authority of the defendants that was granted to
4 them by the legislature in the Parents' Bill of
5 Rights.

6 An executive order ordering or setting in
7 motion a violation of the Parents' Bill of Rights
8 is without legal authority.

9 Further, such action, in other words,
10 ordering something which -- or taking an action
11 which is a violation of a Florida Statute, is, by
12 definition, arbitrary, unreasonable, and violates
13 the separation of powers doctrine because it would
14 exceed the powers granted by the legislature in
15 the Parents' Bill of Rights because such action
16 would not permit the school board authority which
17 has adopted a mask mandate to demonstrate the
18 reasonableness of it, whether it was necessary to
19 achieve a compelling state interest, is narrowly
20 tailored, and not otherwise served by a less
21 restrictive means, all of which is expressly
22 permitted by the legislature in the Florida Bill
23 of Rights.

24 As previously stated earlier in this order, a
25 school district adopting a policy such as a mask

1 mandate is acting within its discretion. It has
2 been given this discretion by the Florida
3 legislature in the Parents' Bill of Rights, so
4 long as the requirements for the policy provided
5 for in the Parents' Bill of Rights are met -- I'm
6 not saying the legislature has unbridled
7 discretion. They can't just do -- I'm sorry, the
8 school boards. They can't just do whatever they
9 want to. They can't do that. They have to meet
10 the requirements the legislature has set forth to
11 authorize them to take certain acts involving
12 education and health.

13 But so long as they do that, the doctrine of
14 separation of powers requires that the
15 discretionary power exercised by the school board
16 cannot be interfered by the judiciary or by the
17 executive branch of government, and neither the
18 judiciary nor the executive can substitute their
19 judgment for the school board's power.

20 I do not grant relief pursuant to Counts I
21 and II. I think I is safe schools, II is local
22 rule. This I want in the order. So this is not
23 something you can leave on the editing floor.

24 I do not grant relief pursuant to those
25 counts because, especially as to Count I, which is

1 the safe schools, I do not believe the proof rises
2 to the level required by the decision in DeSantis
3 vs. FEA, 306 So.3d 1202, First District 2020, and
4 other cases discussing the burden of proof for
5 claims such as those brought in Counts I and also
6 on the Article IX, Section 4(b), local rule basis
7 for school boards.

8 This doesn't mean that I think the policy is
9 right or that I've made any value judgment about
10 it one way or the other. It simply means -- I
11 have to say this plain, as your own expert said
12 this; I don't accept the argument that
13 circumstances dispute it -- that there is at least
14 some dispute in the medical community on this
15 issue. And it doesn't have to be a lot of dispute
16 to make this something I can't grant relief on.

17 I think this is mandated by the First
18 District in that decision. Again, you're not
19 going to offend me if you disagree. You're
20 totally not going to offend me if you appeal.
21 Neither the other side either. But it's the way I
22 see it. And I think I'm required to follow the
23 First District's directions in that regard.

24 The DeSantis case doesn't deal with the
25 legislative bill of rights. It didn't deal with a

1 direct violation of a law passed by the
2 legislature. It didn't deal with the aspect of
3 the legislature where there's no authority to --
4 there's no authority to violate a Florida law. It
5 doesn't exist. The legislature didn't deal with
6 that in the DeSantis vs. FEA case.

7 So I'm not granting relief on Counts I and
8 II.

9 I am granting relief, as I stated it, it fits
10 in both the other counts, as I stated.

11 Also, I grant the motion to dismiss Count V.
12 For whatever reason, the plaintiffs did not sue an
13 indispensable party, which was the Department of
14 Health.

15 And let me make one other comment on that.
16 Count V requested that I declare that rule
17 unconstitutional. I cannot order anything -- I
18 cannot issue an order to the Department of Health
19 to say you have to strike your rule. I can't
20 order to the Department of Health you can't do
21 something with this rule.

22 We do know that emergency rules run out in 60
23 days unless reestablished. So this rule is what?
24 It's probably almost 30 days in.

25 But I'm not saying that I'm limited in my

1 ability to enjoin or otherwise prohibit the
2 defendants in this case from violating the
3 Parents' Bill of Rights. I'm simply saying I
4 can't do anything that affects the Department of
5 Health because they're not a party to this suit.

6 So I am granting the motion to dismiss Count
7 V on that basis. However, I do -- I interpret my
8 ruling and it is based upon my continued ability
9 to enjoin or otherwise prohibit defendants from
10 engaging in certain actions that violate the
11 Parents' Bill of Rights.

12 Now, let me go back. Injunction. I had not
13 originally intended early in the case to grant an
14 injunction. I do now. I want to say this. I am
15 not granting an injunction against the governor of
16 Florida. I am granting an injunction against the
17 other defendants who are the ones who are
18 primarily involved in enforcement actions. I
19 believe that -- and the governor himself, to the
20 extent that the other defendants are, isn't
21 involved in enforcement, as far as I know, on a
22 day-to-day basis because the Department of
23 Education, state board of health [sic], they're
24 set up to do enforcement of rules.

25 I grant a permanent injunction and enjoin the

1 defendants, except for the governor, from
2 violating the Florida Parents' Bill of Rights by
3 taking any action on whatever basis they take it,
4 by taking any action to effect a blanket ban on
5 face mask mandates with no parent opt-out by local
6 school boards. And I grant an injunction against
7 denying the school boards their due process rights
8 granted by the statute to permit them to
9 demonstrate the reasonableness of the mandate and
10 other factors stated in law.

11 I am not enjoining the defendants from
12 enforcing the Florida Bill of Rights, so long as
13 they enforce the complete statute and don't omit
14 portions of it. I'm just banning them from
15 violating the Florida Bill of Rights. So they
16 still have full powers. It's a law of Florida.
17 It's in force. It's passed by the legislature,
18 signed by the governor. Defendants can enforce
19 the law, but they have to do so in accordance with
20 the terms of the law. And at least until someone
21 rules otherwise, this has -- in the means that
22 I've set out, they must allow a due process
23 proceeding of some sort to allow for a showing of
24 the reasonableness, et cetera.

25 I also enjoin the defendants, but not the

1 governor, from -- I'm not saying the governor can
2 go -- go out and start doing these things. I'm
3 just saying I don't think his role is in the same
4 scope of enforcement as these other agencies are.
5 I also enforce the defendants as named -- enjoin
6 the defendants as named from enforcing the
7 executive order and the policies it caused to be
8 generated and any resulting policy or action which
9 violates the Parents' Bill of Rights.

10 In granting this injunction, I find that the
11 act or conduct to be enjoined violating the Bill
12 of Rights is a clear legal right. There's no
13 adequate money at law. In other words, a legal
14 remedy, a money judgment or some other remedy at
15 law, doesn't remedy the peril, damage and danger
16 caused by unlawful failure to follow this statute.
17 Also a case I'll cite for you on that is Oxford,
18 O-x-f-o-r-d, International Bank vs. Merrill Lynch,
19 374 So.2d 54, Florida DCA 1979.

20 In this case, an irreparable injury that's
21 demonstrated by the increased risk of the Delta
22 variant infection is demonstrated by CDC guidance
23 and the overwhelming medical evidence that's in
24 this record if universal face masks are blocked,
25 in violation, in violation of the Parents' Bill of

1 Rights. The continuing constitutional violation
2 is in and of itself irreparable harm, according to
3 the law, Board of County Commissioners vs. Home
4 Builders Association of West Florida, 2021 WL,
5 Westlaw, 3177293, First District of Florida, July
6 28th, 2021.

7 Again, I think I've done the other rulings.
8 But what I want to say is I'm requiring that the
9 parties follow the statute called the Parents'
10 Bill of Rights. I'm enjoining the parties from
11 violating the statute. I've set forth a means of
12 it. I'm not saying that any particular part of
13 school policy can't be reviewed under that
14 statute. I'm not saying yes or no to any
15 particular policy. I'm simply saying schools can
16 adopt policies dealing with health and education.
17 And to the extent they may affect a parent's right
18 to control their children's education or health,
19 then it's incumbent on the school board, if
20 challenged in that policy, to demonstrate its
21 reasonableness and the other factors in the law.

22 This ruling was not contained in the DeSantis
23 vs. FEA case. And the reason it wasn't contained
24 is that these issues were not before the First
25 District Court of Appeal. It doesn't mean that

1 they're bound to agree or whatever with me.

2 That -- they have a complete, full right, which I
3 appreciate and I honor their right to do this, to
4 review this and agree or disagree.

5 But I want to make it clear to you lawyers,
6 to the public, perhaps even to the First District,
7 I read that DeSantis decision multiple times. My
8 intent was to follow it where I felt it applied to
9 this case, which is the reason I ruled as I did on
10 the safe schools provision of your complaint.

11 I interpreted the statutes as I believe the
12 plain -- I read the statute as written. I read it
13 as written and interpreted it as written. I think
14 that's my job. Defense counsel admitted it was my
15 job to enforce the statute.

16 So that's where we are. I don't know if I've
17 brought any light to this conversation or not. I
18 understand that it's possible all of you disagree
19 with me on some portion of my ruling. I
20 understand that. And I don't take any offense at
21 disagreement by anyone. You all are very good
22 lawyers. I respect you. I respect your clients.

23 But the one thing I have done, which is the
24 only thing I promised you in this case, I worked
25 till there was no time left to work on this. I

1 mean, at ten o'clock this morning, I was typing in
2 edits on my notes. That's why I was late. I also
3 was trying to decipher some of my 2:00 a.m.
4 handwriting, which was not the easiest in the
5 world.

6 I have considered everything I can possibly
7 consider. I've listened to great arguments on
8 both sides. I've tried to make some sense out of
9 this law. And to me, it all comes down to the
10 issues that I've laid out here. That's where I
11 am. That's my ruling.

12 I'm going to ask the plaintiffs to draft an
13 order. I'm going to ask that you get it to me by
14 Monday. I expect you to continue spending the
15 same effort in this case that I spent in this
16 case. And there's plenty of you to sit around and
17 draft an order out with this sort of verbal detail
18 in two days -- in three days. Monday's three.

19 Then when you do it, I want you to send it to
20 plaintiffs' [sic] counsel. I don't expect that
21 they'll agree with the order. But I want them to
22 be able to give me a comment within a day of what
23 areas they think are wrong or don't reflect my
24 ruling, those sorts of things.

25 So I would just ask you, counsel, send it to

1 plaintiffs' -- I'm sorry -- send it to defense
2 lawyer. Go ahead and email me the order. That
3 way if you email it to me, I will be able to edit
4 it.

5 But I will not sign anything until I hear
6 from the plaintiffs the next day their comments on
7 the order. And email that to me also. It will
8 give me the ability to review those comments.

9 And then I will -- I don't know what my
10 schedule is next week. I have an emergency
11 hearing in another case at three o'clock today.
12 So I think next week is a hearing week for me.
13 But I'll take the time that it takes to review the
14 order and get it where I think it accurately
15 reflects the ruling.

16 But most of what I told you I read. Not all.
17 And I think it's probably, if you listen to the --
18 if you have an audio, if you listen to that, I
19 think you can tell where I added some additional
20 comments that are not in writing.

21 I do recognize that some of my findings at
22 the end duplicate the findings I said before. But
23 I reached the point where my ability to edit and
24 say things only once in every topic was -- had
25 expired. So that's why I say I understand

1 editing -- sometimes I said it twice because I
2 wanted to make sure that I got it said. And
3 that's a common trait we all lawyers do.

4 So I do recognize, for example, the
5 separation of powers finding with regard to school
6 boards, I know I said it twice. And it might
7 actually be almost exactly the same. I'm not
8 saying you have to put it in there twice. I'm
9 just saying I was writing this late at night and I
10 just wanted to make sure that I had it in there.
11 And I changed it two or three times from the way I
12 originally wrote it.

13 So, anyway, I don't know that we'll see each
14 other again. We may. But thank you very much to
15 everyone in the case.

16 I have always enjoyed working with
17 Jacksonville lawyers. I've always felt
18 Jacksonville lawyers practiced law very similar to
19 the way Tallahassee lawyers do. They're very
20 professional. They still can make verbal
21 commitments with each other. So, Mr. Abel and
22 your firm, and Mr. Bean and Mr. Burns, I have
23 enjoyed working with you.

24 And all the other lawyers too. And I expect
25 the plaintiffs' lawyers to be working this

1 weekend, as I will be, but on something else.

2 And Mr. Abel will -- if you get it before
3 Monday, send it to Mr. Abel and his firm as soon
4 as you get it -- your order done. I know it's not
5 easy to draft an order on these cases in such a
6 short timeframe, but I kind of feel like I've done
7 a big part of the work, given you the bones of the
8 order at least and you can go from there.

9 MR. ABEL: Your Honor, may I direct a
10 question to the Court? This is Mike Abel.

11 THE COURT: Yes, sir.

12 MR. ABEL: Your Honor's laid out a schedule
13 for presenting a final order to Your Honor, and
14 Your Honor has also done a very good job of
15 apprising observers of this process of issues that
16 lawyers may know, but it's helpful to the
17 observers of the process to also learn.

18 And so can we -- I want to clarify, Your
19 Honor, that your ruling that you've announced from
20 the bench today will not become effective until a
21 final order is entered and signed and docketed by
22 the Court.

23 THE COURT: See, Mr. Abel, this is why I
24 respect you so much, because you have articulated
25 something which I kicked back and forth in my

1 head.

2 I'm going to make my ruling effective as of
3 the date of the written order. And this is why:
4 I don't want confusion out there. I think we need
5 to have a written order -- we have a verbal order.
6 You know that it will probably be reported. The
7 press is usually accurate. But any human person
8 can misinterpret something.

9 And it seems to me, Mr. Abel, that unless you
10 disagree, it makes more sense to make it effective
11 when the written order is signed.

12 MR. ABEL: I believe that's the most
13 beneficial to the process, and appreciate the
14 Court's comments.

15 THE COURT: All right. All right. Thank you
16 so much.

17 MR. GALLAGHER: One comment, if I could.

18 THE COURT: As y'all know, I don't like to
19 miss lunch, so I'm going to leave and go get
20 lunch.

21 MR. GALLAGHER: One brief question, Your
22 Honor, if I could.

23 THE COURT: Yes, Mr. Gallagher.

24 MR. GALLAGHER: You were referencing the
25 different numerical counts in the -- your ruling.

1 I just want to confirm that Counts III and IV you
2 decided to grant relief in favor of plaintiff. I
3 think that's the case, but I didn't hear you say
4 that exactly.

5 THE COURT: I granted relief within the
6 context of my ruling. I and II, I did not grant
7 relief on. V, I dismissed. VI is the injunctive
8 relief. But no relief against the governor in VI.
9 I just don't think with the way the structure of
10 government works -- that's the injunction count --
11 I don't think it's necessary to enter an
12 injunction against the governor. And I just -- I
13 decided not to do that.

14 MR. GALLAGHER: Thank you, Your Honor.

15 THE COURT: I think the governor will follow
16 the law that's decided by the courts, one. And
17 the school board people are enjoined, so there's
18 just really no reason to enjoin the governor.

19 And so if you do appeal, appeal fast. That's
20 why I want the order out fast. So I recognize we
21 may have one or two hearings that will be
22 necessary after I enter the order, but we'll cross
23 that bridge when we get to it.

24 MR. GALLAGHER: Thank you, Your Honor.

25 THE COURT: All right. Thanks a lot. We're

1 adjourned. Thank you.

2 Thank you, madam court reporter.

3 (Proceedings concluded at 12:34 p.m.)
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REPORTER'S CERTIFICATE


STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I, Deborah W. Gonyea, Registered Merit Reporter, Certified Realtime Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings via Zoom and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 30th day of August, 2021.



Deborah W. Gonyea, RMR, CRR

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