FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2470

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

Appellants,

v.

FLORIDA EDUCATION ASSOCIATION; STEFANIE BETH MILLER; LADARA ROYAL; MINDY FESTGE; VICTORIA DUBLINO-HENJES; ANDRES HENJES; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC.; and NAACP FLORIDA STATE CONFERENCE,

Appellees.

No. 1D20-2472

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

Florida; ANDY TUCK, in his official capacity as the chair of the State Board of Education; STATE BOARD OF EDUCATION; RICHARD CORCORAN, in his official capacity as Commissioner of Education; FLORIDA DEPARTMENT OF EDUCATION; and JACOB OLIVA, in his official capacity as Chancellor, Division of Public Schools,

Appellants,

v.

MONIQUE BELLEFLEUR, individually and on behalf of D.B. Jr., M.B., and D.B.; KATHRYN HAMMOND; ASHLEY MONROE, and JAMES LIS,

Appellees.

On appeal from the Circuit Court for Leon County.
Charles W. Dodson, Judge.

October 9, 2020

ROWE, J.

In March 2020, state and local governments across Florida issued emergency orders that restricted the movement of Floridians, shuttered businesses, and closed public schools. The lockdown orders followed guidelines provided by President Donald J. Trump and the Centers for Disease Control and Prevention (CDC) announcing a fifteen-day strategy to "slow the spread" of the novel coronavirus known as COVID-19. *See* The White House, 15 Days to Slow the Spread (Mar. 16, 2020), https://www.whitehouse.gov/articles/15-days-slow-spread/.

By slowing the spread of the virus, public health officials hoped to "flatten the curve" by reducing the peak number of people requiring health care at one time so that demands on the health care system did not exceed its capacity. *See* Ctrs. for Disease Control & Prevention, Interim Pre-pandemic Planning Guidance (Feb. 2007), https://stacks.cdc.gov/view/cdc/11425.

Following the school closure orders, Florida's schools shifted to online instruction. But soon, the fifteen days to "slow the spread" turned into thirty, and days stretched into months. Florida's schools did not reopen for the rest of the academic year. With a new school year approaching and with COVID-19 still present in Florida, policymakers had to decide when and under what conditions would it be safe enough to reopen schools for in-person instruction. Students, parents, teachers, and policymakers were divided on how to answer that question.

Stakeholders disagreed on what public health metrics should be used to determine when to reopen schools and on the appropriate interventions to implement when schools did reopen (social distancing, mask policies, class sizes, and so on). Underlying these disagreements were very different perceptions about the risks posed by COVID-19, the risks posed by not reopening the schools, and views on which risks were more tolerable. Still, after many public debates and after weighing the risks, parents of 1.6 million Florida students expressed their preference for their children to return to the classroom. Parents of other Florida students, believing that returning to school posed too great a risk, chose online instruction. Teachers were similarly divided. Some were eager to return to the classroom; others were not, expressing health concerns for themselves or others in their household.

Also prominent in the debate over school reopening was the potential for a sharp decrease in funding to school districts if large numbers of students chose not to return to the classroom. Because state funding to school districts is lower for students enrolled in online classes, the expected shortfalls were substantial.

Governor Ron DeSantis, Commissioner Richard Corcoran, the Department of Education, Andy Tuck as Chair of the State Board

of Education, and Jacob Oliva as Chancellor of the Division of Public Schools (collectively, the State) sought to address the different stakeholder preferences for online and in-person instruction and the potential funding losses to school districts. Commissioner Corcoran issued an emergency order that allowed school districts to continue to provide online instruction and offered increased funding to avoid the expected budget shortfalls. But to qualify for increased funding, school districts had to reopen schools for in-person instruction by the end of August.

The Florida Education Association, six Florida teachers, five parents of Florida students, the National Association for the Advancement of Colored People, Inc., and the NAACP Florida State Conference (collectively, Appellees) disagreed with the State's school reopening plan. Appellees thought it too risky to reopen schools because the possibility of contracting and transmitting COVID-19 posed too great a threat to students, teachers, their families, and communities. And by conditioning the offer of increased funding for online instruction on school districts committing to reopening schools for in-person instruction, Appellees claimed that the State "forced" school districts to reopen. Appellees sued in circuit court seeking a declaration that the State failed to meet its constitutional obligation to provide for a safe and secure public school system. They also moved to temporarily enjoin the emergency order. The trial court granted the injunction and then substantially revised the emergency order.

The State appeals. We reverse because Appellees did not meet the requirements for the trial court to issue an injunction. And even if they had, the trial court exceeded the constitutional limits of its authority by rewriting the Commissioner's order.

I. Facts

After Florida's surgeon general declared a public health emergency stemming from the COVID-19 pandemic, Governor DeSantis declared a state of emergency throughout Florida. *See* Fla. Exec. Order No. 20-52 (Mar. 9, 2020). That declaration and later emergency orders granted state agencies authority to waive regulatory statutes and their own rules when "strict compliance with the provisions of any such statute, order, or rule would in any

way prevent, hinder, or delay necessary action in coping with the emergency." *Id.* at 4. The order defined "necessary action" to include "any emergency mitigation, response, or recovery action: (1) prescribed in the State Comprehensive Emergency Management Plan . . .; or (2) ordered by the State Coordinating Officer." *Id.*

Exercising authority granted under that order, the State Coordinating Officer directed the Department of Education (DOE) "to take all appropriate actions coordinated with Florida's school districts, state colleges and other educational providers to promote the health, safety, welfare and education of Florida students under the circumstances presented by this emergency." Fla. Div. of Emerg. Mgmt. Order No. 20-004 at 2 (Mar. 13, 2020).

In response, DOE issued an emergency order closing Florida's public schools for in-person instruction until April 15, 2020. *See* Fla. Dep't of Educ. Order No. 2020-EO-01 at 2 (Mar. 23, 2020). The Commissioner directed public schools to shift to online instruction. *Id.* But despite the initial plan to close schools only through April 15, schools did not reopen for the rest of the school year.

In the months that followed, state and local governments employed strategies to control the spread of the virus, including placing restrictions on public gatherings, limiting business operations, and maintaining school closures. Meanwhile, guidance from public health authorities shifted on how to limit the spread of COVID-19. At first, authorities recommended non-pharmaceutical interventions such as social distancing and handwashing. They later expanded their recommendations to advise individuals to use face coverings. *See* Ctrs. for Disease Control & Prevention, How to Protect Yourself & Others, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html. Still, by June, the number of COVID-19 cases continued to climb.

Even so, most Florida counties, except for Miami-Dade, Broward, and Palm Beach, entered Phase 2 of the Governor's three-phase plan to reopen the state. *See* Fla. Exec. Order No. 20-139 at 1 (June 3, 2020). School districts began discussing when and under what conditions to reopen schools if pandemic conditions persisted. School districts solicited input from students, parents,

and teachers and looked for ways to accommodate their preferences for online or in-person instruction.

But offering both instructional models presented several challenges. The Florida Education Finance Program, which supplies the formulae for state funding to school districts, ties funding to enrollment numbers drawn from periodic surveys. *See* § 1011.62(1)(a), (s), Fla. Stat. (2019); Fla. Admin. Code R. 6A-1.0451(4). Because the costs of online instruction are lower than the costs of in-person instruction, per student funding for online instruction is about twenty-five percent less than funding for in-person classes. *See* §§ 1011.62(1)(s), (11), Fla. Stat. (2019). So the greater the number of students enrolling in online classes, the greater the loss in funding to school districts.

School districts faced another hurdle. Increased online enrollment would delay payments of state funds until the end of the semester because school districts receive payments for online classes only when students successfully complete the classes. *See* § 1002.37(3), Fla. Stat. (2019).

Finally, school districts needed authority to continue to offer online classes outside the Florida Virtual School program. If the State did not grant that authority, school districts expected to lose funding due to decreased student enrollment. School districts expected families to withdraw from public schools and seek alternatives, including homeschooling, private schools, and Florida Virtual School, if they did not offer students the choice of online instruction.

School districts did not face potential funding losses in the spring when they shifted to online instruction. Then, DOE granted school districts the authority to offer online classes outside the Florida Virtual School program. *See* Fla. Dep't of Educ. Order No. 2020-EO-01 at 2. State funding at that point hinged on the student count drawn from the February 2020 enrollment survey. *See* Fla. Admin. Code R. 6A-1.0452(2). And so, school district budgets did not suffer from the effects of increased online enrollment and students withdrawing from public schools. But with the October enrollment survey approaching and with almost half of Florida's

students expected to enroll in online classes, school districts anticipated significant funding shortfalls.

The expected shortfalls prompted the Florida School Finance Officers Association, Inc., an association that includes finance officers from all school districts, to write to the Commissioner and urge him to consider waiving certain statutes and rules. FSFOA proposed that DOE count online students for funding purposes as if they were attending classes in person.

Soon after, the Commissioner issued Emergency Order 2020-EO-06 (Emergency Order). The order addressed the school districts' expected funding shortfalls by waiving strict compliance with certain statutes and rules. *See* Fla. Dep't of Educ. Order No. 2020-EO-6 at 6–7 (July 6, 2020). The waivers allowed school districts to report a student for funding purposes as a brick-and-mortar student, even if the student enrolled in online classes. *Id.* But to obtain the waivers, school districts needed to submit a reopening plan to DOE for approval. *Id.* And for DOE to approve the plans, school districts had to offer students the choice of in-person instruction or online instruction with classes beginning in August. *Id.* The Commissioner's primary objectives were to provide financial stability for school districts, to encourage school districts to reopen schools for in-person instruction with precautions for safety, and to give school districts flexibility to offer online instruction. *Id.*

Even so, the Commissioner emphasized that school districts did not have to submit a reopening plan but could "open in traditional compliance with statutory requirements for instructional days and hours." *Id.* at 6. Thus, school districts that chose not to submit a reopening plan would receive funding according to the statutory formulae authorized by the Legislature and the administrative rules adopted by DOE.

All but one of Florida's sixty-seven school districts submitted a reopening plan. Three school districts—Miami-Dade, Broward, and Palm Beach—received approval for plans that did not provide for reopening schools for in-person instruction until after the first semester. Those three counties remained in Phase 1 of the Governor's Recovery Plan, and local conditions supported a delay

in reopening for in-person instruction. The remaining sixty-three districts committed to reopening schools for in-person instruction in August, while also offering online instruction to students who preferred not to return to the classroom. DOE's approval of these plans allowed school districts to keep offering online instruction without suffering a loss in state funding.

II. Procedural History

Still, Appellees questioned the wisdom of the Commissioner's Emergency Order. They sued in circuit court, seeking a declaration under chapter 86, Florida Statutes (2019) that the State failed to meet its obligation under article IX, section 1(a) of the Florida Constitution to provide for a "safe, secure, and high quality" public school system. Appellees alleged that the Emergency Order "forced" school districts to reopen schools for in-person instruction by threatening school districts with a loss of funding. They argued that the order required students and teachers to return to the classroom when it was unsafe to do so. Appellees sought to enjoin the Emergency Order and moved for a temporary injunction.

After an evidentiary hearing—and seven days before schools needed to reopen under the Emergency Order—the trial court entered an order temporarily enjoining the Emergency Order. It purported to "sever" from the Emergency Order provisions that it found unconstitutional, and then revised the order as follows:

> **I. Reopening Requirements.**
>
> a. All schools open. ~~Upon reopening in August, all school boards and charter school governing boards must open brick and mortar schools at least five days per week for all students, subject to advice and orders of the Florida Department of Health, local departments of health, Executive Order 20-149 and subsequent executive orders. Absent these directives~~, the day-to-day decision to open or close a school must always rest locally with the board or executive most closely associated with a school, the superintendent or school board in the case of a district-run school, the charter governing board in the case of a public charter school or the private school principal, director or governing board in the case of a nonpublic school. Strict compliance with requirements of section 1001.42(4)(f), Florida Statutes, requiring school districts to establish a uniform and fixed date for the opening and closing of schools is waived to the extent necessary to give effect to this Order. In addition, strict compliance with sections 1003.02 and 1011.60(2), Florida Statutes, requiring school districts to operate public schools for a minimum of 180 days or an hourly equivalent is waived to the extent necessary to give effect to this Order~~, consistent with an approved reopening plan~~. Further, strict compliance with the reporting requirements for educational planning and information, as set forth in section 1008.385, Florida Statutes, and Rule 6A-l.0014, Florida Administrative Code, is waived to the extent necessary to give effect to this Order~~, consistent with an approved reopening plan~~.

b. Full panoply of services. Pursuant to the authority granted in section 1001.10(8), Florida Statutes, school ~~districts~~ **boards** and charter school governing boards ~~must~~ **may** provide the full array of services that are required by law so that families who wish to educate their children in a brick and mortar school full time have the opportunity to do so; these services include in-person instruction (barring a state or local health directive to the contrary), specialized instruction and services for students with Individualized Education Programs (IEPs) or live synchronous or asynchronous instruction with the same curriculum as in-person instruction and the ability to interact with a student's teacher and peers ~~as approved by the Commissioner of Education~~. Required services must be provided to students from low-income families, students of migrant workers, students who are homeless, students with disabilities, students in foster care, students who are English Language Learners, and other vulnerable populations.

II. Reopening Plans – Strike entire section.

III. Reporting Flexibility and Financial Continuity.
School districts and charter school governing boards ~~with an approved reopening plan~~ will receive reporting flexibility that is designed to provide financial continuity for the 2020 fall semester.

a. [remains as is]

b. **Full FTE credit for innovative learning environments**. ~~Although it is anticipated that most students will return to full-time brick and mortar schools,~~ some parents will continue their child's education through innovative learning environments, often due to the medical vulnerability of the child or another family member who resides in the same household. As described in this Order, school boards and charter school governing boards ~~with an approved reopening plan~~ are authorized to report approved innovative learning students for full FTE credit. However, students receiving virtual education will continue to receive FTE credit as provided in section 1011.61(1)(c)1.b.(III)-(IV), Florida Statutes.

c. [as is]

IV. [as is]

~~All of the statutory and rule waivers set forth in this Order for school districts and charter schools are contingent upon having an approved reopening plan for the 2020 fall semester.~~

The State appealed. The temporary injunction order was automatically stayed under Florida Rule of Appellate Procedure 9.310(b)(2). But then the trial court granted Appellees' request to vacate the stay. In a previous order, we reinstated the stay in response to the State's motion. We now address the merits of the State's appeal.

III. Standard of Review

We review an order granting a temporary injunction under a hybrid standard of review. *See Sch. Bd. of Hernando Cnty. v. Rhea*, 213 So. 3d 1032, 1037 (Fla. 1st DCA 2017). We review the trial

court's factual findings for an abuse of discretion. *Id.* And we review its legal conclusions de novo. *Id.*

IV. Temporary Injunction

The purpose of a temporary injunction is to maintain the status quo. *See State, Dep't of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So. 3d 466, 472 (Fla. 1st DCA 2018). But an injunction is an extraordinary remedy, and a trial court should grant such relief sparingly. *Id.* To obtain an injunction, the moving party must show "(1) a substantial likelihood of success on the merits, (2) the likelihood of irreparable harm absent the entry of an injunction, (3) a lack of an adequate remedy at law, and (4) that injunctive relief will serve the public interest." *Id.* The trial court must make specific factual findings to support each element, and those findings must be supported by competent, substantial evidence. *Id.* If any one of the elements is not established, the trial court may not grant the injunction. *Id.* As explained below, Appellees established none of the elements required to obtain an injunction.

A. Substantial Likelihood of Success on the Merits

A plaintiff can show a substantial likelihood of success "if good reasons for anticipating that result are demonstrated. It is not enough that a merely colorable claim is advanced." *City of Jacksonville v. Naegele Outdoor Advert. Co.*, 634 So. 2d 750, 753 (Fla. 1st DCA 1994). Appellees are not likely to succeed on the merits of their claims because (1) they lack standing; (2) their claims present nonjusticiable political questions; (3) the relief they request would require the trial court to violate the separation of powers; and (4) they failed to show that the State acted in an arbitrary and capricious manner.

1. Standing

Appellees argue that the State failed to meet its constitutional obligation to provide for a safe and secure public school system. They claim that the Emergency Order requires school districts to reopen schools and forces teachers and students to return to the classroom when it is unsafe to do so. Appellees are unlikely to succeed because they lack standing to bring these claims.

Standing is a question of law, which an appellate court reviews de novo. *See McCall v. Scott*, 199 So. 3d 359, 364 (Fla. 1st DCA 2016). To establish standing to sue, a plaintiff must have a "legitimate or sufficient interest at stake in the controversy that will be affected by the outcome of the litigation." *Equity Res., Inc. v. County of Leon*, 643 So. 2d 1112, 1117 (Fla. 1st DCA 1994). When determining whether a plaintiff has standing, courts consider these three elements:

> First, a plaintiff must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). Second, a plaintiff must establish "a causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Third, a plaintiff must show "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." [*Vermont Agency of Natural Res. v. Stevens*, [529 U.S. 765, 771], 120 S. Ct. 1858 [(2000)].

State v. J.P., 907 So. 2d 1101, 1113 n.4 (Fla. 2004). Appellees established none of those elements.

First, Appellees failed to show how the relief they request would redress their alleged injury—being forced to return to the classroom during the pandemic. The Emergency Order does not require any teacher, staff member, or student to return to the classroom. Nor would an order declaring the Emergency Order unconstitutional and enjoining its enforcement force any school district to close schools. Nor would it prevent school districts from requiring teachers and staff to return to the classroom.

Instead, whatever the outcome of Appellees' lawsuit, the choice of how to deliver education to students remains with Florida's school boards. *See* Art. IX, § 4 (b), Fla. Const. ("The school board shall operate, control and supervise all free public schools within the school district . . . ."). For these reasons, Appellees failed to establish the redressability requirement for standing. *See Sun State Utils., Inc. v. Destin Water Users, Inc.*, 696 So. 2d 944, 945

n.1 (Fla. 1st DCA 1997) (holding that to have standing, a plaintiff must have "a personal stake in the outcome of the proceeding, such as an injury that may be redressed by the suit").

Appellees also have not shown a causal connection between their alleged injury and implementation of the Emergency Order. Appellees had the burden to establish an "injury resulting from the [State's] conduct." *Lujan*, 504 U.S. at 561. That injury had to be "distinct and palpable, not abstract or hypothetical." *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 117 (Fla. 2011).

Appellees cannot meet their burden because the State's conduct caused them no injury. Their alleged injury—being forced to return to the classroom—stems from decisions made by school districts. School districts decide whether to reopen schools for in-person instruction. School districts assign teachers to classrooms and approve or deny their requested accommodations. And school districts decide whether to offer students the choice of online instruction. Because there is no causal link between the State's conduct in issuing the Emergency Order and Appellees' alleged injuries, Appellees failed to establish the causation element required to support standing.

Finally, any injury to a student or teacher from being forced to return to the classroom is purely hypothetical. *See McCall*, 199 So. 3d at 366 (explaining that speculative and conclusory allegations of harm cannot confer standing). Appellees have not alleged that any student has been denied the option to take classes online. Nor have they alleged that any teacher was forced to return to the classroom, denied a requested accommodation from their employing school district, and then suffered harm. Appellees have simply not demonstrated any concrete, palpable injury sufficient to confer standing. *See Sosa*, 73 So. 3d at 117. And so, they are unlikely to succeed on the merits of their claims.

2. Political Question

Appellees are also unlikely to succeed because their complaint presents a non-justiciable political question—whether the State violated its constitutional obligation to "make adequate provision"

for a "safe, secure, and high quality" public school system. Art. IX, § 1(a), Fla. Const.

"The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). Unlike legal questions, political questions "fall within the exclusive domain of the legislative and executive branches under the guidelines established by the Florida Constitution." *Johnson v. State*, 660 So. 2d 637, 646 (Fla. 1995). And so, courts must refrain from answering political questions because it is not the judiciary's role to decide questions that "revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the legislature] or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

To determine whether a case presents a political question, courts consider several factors: (1) the issue raised has been demonstrably and textually committed to a coordinate political department; (2) judicially discoverable and manageable standards for resolving the question are lacking; (3) the court cannot decide the question "without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) the trial court cannot undertake independent resolution of the issue "without expressing lack of respect due coordinate branches of government"; (5) there is "an unusual need for unquestioning adherence to a political decision already made"; and (6) there is a potential of "embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. If any of these circumstances is present, the question is a political one and not justiciable. *Id.*

Several of the justiciability considerations identified in *Baker* are present here. The court cannot decide whether the State has met its obligation to provide for safe and secure schools unless it makes policy determinations reserved for the executive branch and the non-party school districts. Nor can the court determine whether the Governor and the Commissioner, through their delegated emergency authority, met the executive's statutory obligation to address the natural emergency presented by the pandemic. And the court cannot resolve the questions here

"without expressing lack of respect due coordinate branches of government." *Id.* Last, no judicially discoverable or manageable standards exist for the trial court to resolve the questions raised by Appellees' constitutional claims.

Appellees' claims are much like the claims raised in *Coalition of Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996), and *Citizens for Strong Schools, Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 129 (Fla. 2019) (*Citizens II*), where the Florida Supreme Court made clear that the judiciary has no role in determining the adequacy and quality of the public school system.

In *Coalition*, the plaintiffs sought a declaration that the State failed to meet its obligation under article IX, section 1(a) to "allocate adequate resources for a uniform system of free public schools." 680 So. 2d at 402. The trial court dismissed the suit, concluding that whether the Legislature adequately funded the school system fell outside the scope of the judiciary's jurisdiction. *Id.* The supreme court agreed with the trial court's reasoning and held 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." *Id.* at 408. In concluding that the case presented a nonjusticiable political question, the court found two justiciability considerations identified in *Baker* were present: First, the constitution committed the determination of adequacy of funding to the legislature; and second, there were no judicially discoverable and manageable standards that could be applied to determine adequacy. *Id.* (holding that the use of the phrase "by law" in the amendment shows that the text of the Florida Constitution commits education policy to the legislative and executive branches).

Two years after the *Coalition* decision, voters approved changes to article IX, section 1(a) based on a proposal from the Constitution Revision Commission. *See Citizens II*, 262 So. 3d at 129. Before the amendment, article IX, section 1 provided that "[a]dequate provision shall be made by law for a uniform system of free public schools . . . ." With the 1998 amendment, voters approved the addition of the terms "fundamental value,"

"paramount duty of the state," and "efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education." *Id.*

Following the amendment, a new lawsuit challenged whether the State met its obligation to provide for "a high quality system of free public schools that allows students to obtain a high quality education." *Citizens II*, 262 So. 3d at 128. But despite the newly added language requiring "high quality," the supreme court found that "like the appellants in *Coalition*—[the plaintiffs in *Citizens*] fail[ed] to present any manageable standard by which to avoid judicial intrusion into the power of the other branches of government." *Id*. at 129–30.

This case is no different. The terms "safe" and "secure" as used in article IX, section 1(a), lack judicially discoverable or manageable standards. This is especially true when, as here, the State was trying to meet its constitutional obligation to provide for an adequate public school system while also exercising its statutory authority to respond to a natural emergency. Any judicial effort to evaluate the State's compliance with those constitutional and statutory requirements would violate Florida's strict requirement for the separation of powers.

Even so, the trial court found that the terms "safe" and "secure" were judicially manageable. The trial court quoted with approval the lower court finding in *Citizens II* that "Florida's trial courts deal with issues relating to safety and security all day long" and that "[a]llegations of unsafe or unsecure schools can be measured differently and more definitively tha[n] can terms like 'efficient' and 'high-quality.'" The trial court then weighed expert testimony on the COVID-19 pandemic, even while acknowledging that "[t]he medical literature is clearly still in flux and difficult to parse."

The trial court's analysis reveals the perils of judicial decision-making in this policy-laden arena. To measure whether the public school system is "safe" and "secure," the trial court would need to identify standards to make that measurement—beginning by

evaluating the risks posed by COVID-19.[1] And even if the trial court were qualified to isolate and weigh the safety risks posed by the virus, whether it is safe enough to reopen schools is not a binary question answered with a simple yes or no based on the latest public health metrics on COVID-19. The court would still need to consider many other factors to determine whether the State met its obligation to provide for safe and secure schools. *See Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1169 (Fla. 1st DCA 2017) (*Citizens I*) ("[T]he lack of specificity in an operative legal text lends itself to endless litigation over the meaning of subjective and undefined phrases that might function to give guidance to political decision makers as laudable goals, but cannot guide judges in deciding whether a state or local government has in fact complied with the text."). Indeed, the trial court would have to consider the myriad concerns the State had to ponder in deciding whether schools should reopen for in-person instruction—the risks associated with the virus if schools reopen and the risks associated with **not** reopening schools—before deciding which risks were tolerable.

At the hearing on the injunction, the State presented witnesses who testified on the importance of in-person instruction

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[1] As the appendices in these cases show, this is no simple task. Public health authorities disagree on the metrics to be applied and how to interpret those metrics. For example, the parties' experts disagreed on whether positivity rates for COVID-19 reflect community risk. Appellees' expert, Dr. Thomas Burke from the Harvard School of Public Health testified: "we cannot open brick-and-mortar schools, in person teaching, with . . . a community positive rate that's over 5 percent. . . . [b]ecause [of] the risk for rapid expansion, for rapid surge of disease that will harm the population. As well as overwhelm the health system, you know, gets magnified immensely." On the other hand, the State's expert, Dr. Jay Bhattacharya from the Stanford University School of Medicine, testified: "[P]ercent positivity does not actually reflect community risk. It's not a random sample. . . . [U]nder no setting would I say that this number by itself is definitive in deciding whether to open or close a school [or] it's safe to open or close a school district, as far as disease is concerned."

for Florida's most vulnerable students: students with disabilities, students who are homeless, students in foster care, students who are English language learners, and students who are economically disadvantaged. The State's evidence showed that online instruction disadvantages students who do not learn well in an online setting and students who lack access to technology and internet connectivity. The State also offered testimony that school closures in the spring led to severe learning losses for many students. And it submitted studies showing that continued school closures threatened students' mental health, as well as the physical welfare of students who face food insecurity or live in abusive homes. Finally, school closures also caused hardship for families when parents had to work outside the home but could not afford to pay someone to supervise their child during online instruction.

Thus, the State showed that its decision to issue the Emergency Order and provide a plan to reopen schools required it to consider education policy, public health policy, economic policy, and emergency management policy. Such complex decision-making and policy judgments are far beyond the authority of the judiciary. *See Burnett v. Greene*, 122 So. 570, 576 (Fla. 1929) (observing that the judiciary's role is to administer justice, "not to determine the wisdom of a public measure designed to promote the 'public health, convenience or welfare'"). Courts simply lack the expertise and authority to weigh and balance the many public health, social, and economic factors that inform the policy decision made here: when and how to reopen Florida's public schools in the wake of a public health emergency. *See Citizens II*, 262 So. 3d at 143 (Canady, C.J., concurring) ("There is no reason to believe that the judiciary is competent to make . . . complex and difficult policy choices.").

Instead, decisions on "[t]he safety and the health of the people" are entrusted to the politically accountable officials of our state "to guard and protect." *See Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). Answering such profound questions "must necessarily be performed exclusively within the political branches, which by their nature are far more responsive and prompt to address the needs of parents and students than the courts could ever be." *Citizens I*, 232 So. 3d at 1169. This is particularly true

when the political branches "act in areas fraught with medical and scientific uncertainties"; in those circumstances, their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). When they do not exceed those broad limits, the judiciary may not second guess "the policy decisions of the [political branches], no matter how appealing we may find contrary rationales." *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 521 (1981).

Appellees have invited the judiciary to second-guess the executive's discretionary actions exercising emergency powers during a public health emergency to address the health, safety, and welfare of students in Florida's public schools. The courts must decline the invitation.

3. Separation of Powers

Appellees are also unlikely to succeed on the merits because even if their claims were justiciable, the trial court cannot grant their requested relief without wading into the political thicket of education policy, emergency management, and public health policy to determine what is necessary for the State to provide a "safe" and "secure" public school system. But under Florida's strict requirement for the separation of powers, the trial court cannot intrude on the State's discretionary decisions in these policy areas—particularly where the executive exercises its authority to address a public health emergency.

Article II, section 3 of the Florida Constitution provides that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." *See also Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (describing separation of powers as the "cornerstone" of American democracy). Appellees ask the trial court to violate that foundational principle by urging the court to decide policy decisions committed to the executive branch's discretion.

Florida's constitution vests the "supreme executive power" in the Governor, who must "take care that the laws [are] faithfully executed." Art. IV, §1 (a), Fla. Const. The Governor is also "responsible for meeting the dangers presented to this state and

its people by emergencies." § 252.36(1)(a), Fla. Stat. (2019). In meeting those dangers, the Governor may "issue executive orders, proclamations, and rules" which "have the force and effect of law." § 252.36(1)(b), Fla. Stat. (2019).

When Governor DeSantis declared a state of emergency to address the pandemic, he exercised emergency powers granted to him under section 252.36(1)(b). *See Abramson v. DeSantis*, No. SC20-646, 2020 WL 3464376, at *1 (Fla. June 25, 2020) ("[A] pandemic is a 'natural emergency' within the meaning of section 252.34(8). Accordingly, we further conclude that, under section 252.36(1)(b), the Governor has the authority to issue executive orders to address a pandemic in accordance with the Act."). The Governor exercised his discretion to use those same emergency powers to delegate to Commissioner Corcoran the authority to develop a plan to safely reopen public schools.

The Commissioner could have chosen to do nothing and declined to exercise the discretionary authority the Governor delegated to him. Instead, he used that authority to develop a plan that balanced the need to "ensure the quality and continuity of the educational process" and "the comprehensive well-being of students and families" with the need to comply with "safety precautions as defined by the Florida Department of Health [and] local health officials." Fla. Dep't of Educ. Order No. 2020-EO-6 at 1. The Emergency Order reflects the Commissioner's stated intent to offer a means for school districts to obtain increased funding for students who choose online instruction, while also giving students the choice to return to the classroom.

Even so, Appellees quarrel with the Commissioner's exercise of his discretion. They prefer a plan that offers school districts the funding benefits of the Commissioner's plan without the bargained-for consideration of school reopening. That is, Appellees prefer that school districts receive the benefit of the funding waivers—whether schools reopen and whether school districts offer students the choice of in-person instruction. So Appellees asked the court to waive duly enacted statutes and regulations providing for school funding. They also asked the court to compel the State to allocate funds for personal protective equipment and other supplies, to reduce class sizes, to install hand-sanitizing

stations, to add plexiglass shields, to increase staffing, and to increase school clinic capabilities.

When it issued the temporary injunction, the trial court granted much of the relief Appellees requested. The court excised from the Commissioner's order the requirement that school districts submit plans to reopen schools for in-person instruction. And the court waived the statutory and regulatory funding requirements for school districts far beyond what the Commissioner authorized. But in revising the Emergency Order, the trial court improperly exercised powers reserved to the executive branch, and substituted its judgment for the Commissioner's. *See Citizens I*, 232 So. 3d at 1171 ("Absent explicit constitutional authority to the contrary, the legislative and executive branches possess exclusive jurisdiction in [educational policy choices and their implementation].").

And by rewriting the Emergency Order, the trial court directed how DOE and the Commissioner had to exercise their discretion. The trial court's revision required DOE to grant funding waivers to school districts and to allow school districts to offer online instruction outside the programs authorized by the legislature. But the trial court had no authority to direct the executive to act in a specific manner when the constitution and statutes provide for discretion. *See, e.g.*, *Kunz v. Sch. Bd. of Palm Beach Cnty.*, 237 So. 3d 1026, 1030 (Fla. 4th DCA 2018) (declining to order a specific school to conduct its class-size count in a certain manner because "[s]uch decisions are best left to the legislative or executive branch of our government").

Finally, as to Appellees' requests to compel the State to appropriate funds for specific purposes, including protective gear and the like, the trial court has no power to grant such relief. *See* Art. V, § 14(d), Fla. Const. ("The judiciary shall have no power to fix appropriations."); Article VII, § 1(c), Fla. Const.; *see also Corcoran v. Geffin*, 250 So. 3d 779, 785 (Fla. 1st DCA 2018) ("[A]sking the trial court to find that the Legislature was constitutionally required to appropriate specific funds for a specific purpose is akin to asking the court to dictate appropriations. The judiciary lacks the authority to so do.").

Because granting the relief Appellees request would require the trial court to intrude on executive decision-making and violate the doctrine of separation of powers, Appellees failed to show they are likely to succeed on the merits of their claims.

4. Arbitrary and Capricious

Appellees are also unlikely to succeed on their due process claims that the Emergency Order is arbitrary and capricious on its face and in its application. They argue that the Emergency Order lacks any "clear logical guidance" on the approval of school reopening plans. And they assert that DOE applied the Emergency Order in an arbitrary and capricious manner when it rejected some of the reopening plans.

But to prevail on these claims, Appellees would have to prove that no conceivable rational basis supports the State's plan to reopen schools. *See Jackson v. State*, 191 So. 3d 423, 428 (Fla. 2016). The rational basis test does not focus on whether the action by the State "is the most prudent choice, or is a perfect panacea, to cure the ill or achieve the interest intended." *Id*. Rather, if the Emergency Order furthers a legitimate governmental purpose, and is reasonably related to achieve that purpose, the trial court was bound to uphold it. *Id.* The Commissioner's order easily satisfies that test.

The Emergency Order provides that to receive funding waivers, school districts had to "open brick and mortar schools at least five days per week for all students, subject to advice and orders of the Florida Department of Health [and] local departments of health." Fla. Dep't of Educ. Order No. 2020-EO-6 at 2. Appellees contend that the State applied this provision in an arbitrary and capricious manner, alleging that the State advised public health officials not to weigh in on whether schools should reopen.

But contrary to Appellees' suggestion that the Emergency Order required DOH or local health departments to approve school reopening plans, the plain language of the order shows that reopening plans were only "subject to" advice from those entities. And school districts were not set adrift without guidance from

public health authorities about reopening schools. Those authorities gave much guidance on how to safely reopen schools and best practices to follow. As noted in Appellees' complaints, daily reporting (on a statewide and county-wide basis) on COVID-19 cases, hospitalizations, and deaths has been publicly available almost from the outset of the pandemic. *See* Fla. Dep't of Health, Florida's COVID-19 Data & Surveillance Dashboard, https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429. Appellees also acknowledged that the CDC released several guidance documents on the safe reopening of schools.[2] Witnesses for the State and Appellees similarly testified that guidance from public health authorities was available to school districts. A member of the Manatee County School Board testified that his school board was able "to work with the health department to figure out what worked best for the community." And the chief of staff for the Department of Health testified that its "local county health departments would work with any school district on what the best practices are to mitigate the risk of spread and how—best practices how to prevent that, to include social distancing."

Even so, as explained above, the policy questions about when and how to reopen schools cannot be answered simply by referring to available public health data or guidance from public health officials. Whether or not local public health officials consider it safe or prudent to reopen schools, that policy decision is not theirs to make. That decision rests with the elected school board members in each of Florida's school districts who are directly accountable to the people. *See* Art. IX, §4, Fla. Const.

Still, Appellees argue that the State applied the Emergency Order arbitrarily and capriciously when it did not provide standards on how DOE would approve reopening plans. And also when DOE denied Hillsborough County's request to delay reopening brick-and-mortar schools, while granting similar

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[2] *See, e.g.*, Ctrs. for Disease Control & Prevention, Operating schools during COVID-19: CDC's Considerations, https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html.

requests from Miami-Dade County, Broward County, and Palm Beach County.

Neither action was arbitrary or capricious. Appellees' complaint that the Emergency Order lacked sufficient guidance on the approval process for reopening plans ignores that no school district had to submit a reopening plan. Emergency Order at 6 ("Nothing herein requires a district or charter school to submit a plan if the district or charter school wishes to open in traditional compliance with statutory requirements for instructional days and hours."). And DOE's decision to treat Hillsborough County's request differently from similar requests reflected the prevailing local conditions at the time of plan submission. *Id.* at 2–3 ("[T]he day-to-day decision to open or close a school must always rest locally with the board or executive most closely associated with a school . . . .").

Along with alleging that the Emergency Order is arbitrary and capricious in its application, Appellees argue that the order is arbitrary and capricious on its face. But the State presented multiple rational reasons for reopening schools, including evidence that many students would suffer educational, mental, and physical harms if they were unable to return to the classroom. The Emergency Order's preference for reopening schools also aligns with the statutory mandate to reopen schools as soon as possible after an emergency situation occurs. *See* § 1001.10(8), Fla. Stat. (2019).

The offer to provide increased state funding to school districts that reopen for in-person instruction is also rational. Without action by the Legislature or statutory waivers under an executive order, school districts would receive funding under existing statutes and rules that tie funding to student enrollment and offer lower reimbursement for online classes. But because the Commissioner exercised his discretion to provide waivers from the funding statutes and rules, school districts were eligible to receive increased funding. Even if student enrollment decreased and the number of students enrolling in online classes increased. Further, because school districts that reopen schools for classroom instruction are likely to incur increased expenses to address the pandemic, it was rational for the State to distinguish those

districts from districts that chose to keep schools closed for in-person instruction. Thus, Appellees failed to meet their burden to show that there is no conceivable rational basis for the Emergency Order or its conditions on receiving increased funding. *See Agency for Health Care Admin. v. Hameroff*, 816 So. 2d 1145, 1149 (Fla. 1st DCA 2002). And so Appellees are unlikely to prevail on their due process claims.

B. Irreparable Injury

Along with not showing a likelihood of success on the merits, Appellees failed to establish the other elements necessary for the trial court to issue a temporary injunction, including irreparable injury. Appellees argued that without an injunction, they would suffer irreparable injury because the Emergency Order forces school districts to reopen schools and requires students and teachers to return to the classroom—regardless of public health conditions or guidance. If forced to return to the classroom, Appellees contend that students and teachers face irreparable harm "in the form of unquantifiable emotional and physical injuries," including "severe illness, long-term and unpredictable health complications, and . . . death." But these arguments fail because nothing in the Emergency Order requires **any** teacher or **any** student to return to the classroom.

As to teachers, Appellees concede on appeal that the Emergency Order does not **explicitly** require teachers and education staff to return to the classroom. Even so, enjoining the Emergency Order would not prevent the alleged injury to teachers—being required to return to the classroom when it is unsafe to do so. Nothing in the Emergency Order disturbs a school district's discretion to determine when to reopen schools and whether to offer in-person instruction. In fact, the Emergency Order does not require school districts to do anything. Rather, school districts retain the discretion to continue to offer students the choice of in-person instruction, to require teachers to report for duty under their contracts, and to determine teaching assignments. And so, whether a school district assigns them to in-person or online instruction is a matter between those teachers and their employing school districts. Governor DeSantis, Commissioner Corcoran, and the other Appellants have no say in

the matter. And the school districts that **do** have a say are notably absent from this lawsuit.

As to students, enjoining the Emergency Order would not prevent irreparable injury to any student. The Emergency Order does not compel any student to return to a physical classroom. Rather, students and parents are free to choose a brick-and-mortar school for in-person instruction, online instruction from their local school district, Florida Virtual School, private school, or homeschooling. And as stated above, parents of 1.6 million students chose to send their children back to the classroom; other parents chose online instruction.

As to school districts, none has been "forced" under the Emergency Order to offer in-person instruction. It is left to the individual school districts to determine whether offering in-person instruction poses risks to the welfare and safety of their students, teachers, and school personnel. Nothing in the Emergency Order disturbs a school district's discretion to determine when to reopen schools and whether to offer in-person instruction. And nothing in the Emergency Order limits a school district's ability to reopen schools under the funding formulae approved by the Legislature and administered by DOE. And if a school district is not satisfied with the terms offered under the Emergency Order and does not want to reopen for in-person instruction, it is not left without a remedy. If a school district desires increased funding for online instruction, it may petition the Legislature for relief from the funding statutes.

In sum, nothing in the Emergency Order forces school districts to reopen schools for in-person instruction. Nothing in the order requires a student to choose in-person instruction. And nothing in the order forces a teacher to return to the classroom. Because Appellees showed no irreparable injury from the Emergency Order, the trial court erred in entering the injunction.

C. Lack of an Adequate Remedy at Law

Appellees also failed to show that they lack an adequate remedy at law. Many options remain available to parents, students, and teachers who prefer not to return to the classroom.

Teachers and staff who do not wish to return to the classroom can ask their school district for a different assignment. They can also seek remedies under federal law. *See, e.g.*, Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654; Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213. And they can also pursue grievances under their collective bargaining agreements. Because multiple remedies are available to Appellees, they are not entitled to a temporary injunction.

D. Serve the Public Interest

The trial court found that an injunction would serve the public interest by "allow[ing] local school boards to make safety determinations for the reopening of schools without financial penalty." The trial court reasoned that "data-driven decisions based on local conditions will minimize further community spread of COVID-19, severe illness, and possible death of children, teachers and school staff, their families, and the community at large." In reaching this conclusion, the trial court ignored the plans made by school districts to reopen, the preferences of parents and students, and evidence that prolonged closure of schools also harms students.

When the trial court issued the injunction, almost all of Florida's school districts had submitted reopening plans under the Emergency Order and made plans to reopen schools in August. And it bears repeating that not one school district challenged the Commissioner's order. But by untethering the requirement for school districts to open schools for in-person instruction from their receipt of the increased funding under the Emergency Order, the trial court provided school districts with the option to close schools to in-person instruction while still reaping all the benefits offered under the Emergency Order. If school districts exercised that option, students who preferred to return to the classroom would once again need to shift to online classes—even if online instruction did not serve their mental, physical, or emotional needs. Parents who chose to send their children back to the classroom would lose the right to choose the best education setting for their children. And many parents would be left scrambling to find adequate daycare for their children.

Further, had the trial court enjoined—rather than rewritten—the Emergency Order, an injunction would still not serve the public interest. School districts would lose the authority granted under the order to provide students with the option of online instruction outside the Florida Virtual School model. And they would be unable to obtain the increased state funding offered under the Emergency Order. Without the increased funding and flexibility offered under the order, it is doubtful that many school districts could continue to offer online instruction.

So, rather than maintaining the status quo, an injunction would diminish the funding available to school districts, throw into disarray plans made by every school board in the state, and leave parents and students in doubt about their educational options. And thus, an injunction would not serve the public interest.

E. Severability

Lastly, even if Appellees had shown the elements necessary for injunctive relief, the injunction cannot stand because the trial court violated the separation of powers when it rewrote the Commissioner's Emergency Order. When the trial court entered the temporary injunction, it undertook a "severability" analysis of the Emergency Order and purported to strike portions of the order that it found to be unconstitutional. It eliminated the requirement for school districts to submit reopening plans for approval by DOE as a condition of obtaining increased funding. And it expanded the grant of funding waivers to all school districts. The trial court found that "the good and bad features of the Order are not so inseparable in substance that [DOE] would have passed the one without the other."

But the trial court's severance of language from the Emergency Order was improper for three reasons. First, the court granted Appellees relief they did not seek in their complaints or motions for injunctive relief. Appellees asked only that the court enjoin the Emergency Order and declare it unconstitutional. Not until closing arguments on the temporary injunction motion did Appellees urge the court not to invalidate the order as a whole. Only then did Appellees ask the court to strike from the order the

requirement for school districts to reopen the schools and expand the availability of the funding waivers.

Second, even if the severability doctrine could be applied to an order of the executive, the trial court's severance of language from the order defeated one of its central purposes. *See Fla. Dep't of State, Div. of Elections v. Martin*, 916 So. 2d 763, 773 (Fla. 2005) ("Severability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of **legislative** enactments where it is possible to strike only the unconstitutional portions." (emphasis added) (quoting *Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999))). The trial court reasoned that it could excise from the order the requirement that school districts provide in-person instruction while expanding the funding waivers to all school districts. The trial court found that the condition of providing in-person instruction was not essential because when schools closed in the spring, the Commissioner authorized funding waivers without that condition. But by stripping the incentive for school districts to offer students the choice of in-person instruction, the trial court frustrated the Commissioner's intent in issuing the order. That intent is apparent on the face of the Emergency Order.

The order provides that "extended school closures can impede educational success of students, impact families' well-being and limit many parents and guardians from returning to work." Fla. Dep't of Educ. Order No. 2020-EO-6 at 1. It also recognizes that schools "provide many services to students that are critical to the well-being of the students and families, such as nutrition, socialization, counseling, and extra-curricular activities." *Id.* This language emphasizes that the Emergency Order's purpose was to encourage school districts to reopen for in-person instruction. By striking from the order the condition for schools to reopen for in-person instruction, the trial court provided school districts with an incentive to halt in-person instruction—contrary to the Commissioner's intent.

Finally, the trial court misapplied the severability doctrine by striking the word "must" and adding the word "may" in the section of the order on reopening requirements, converting the provision that school districts reopen schools for in-person instruction to receive funding waivers from a mandatory condition to an optional

one. Courts apply the severability doctrine only to strike objectionable language; severability is not a means "for the wholesale substitution of other language for language that is stricken." *Fla. Dep't of State v. Mangat*, 43 So. 3d 642, 650 (Fla. 2010). By purporting to enjoin the Commissioner's order by rewriting it and substituting the court's preferred language, the trial court acted far beyond its constitutional limits. *See State ex rel. Welch v. Gay*, 41 So. 2d 893, 894 (Fla. 1949) ("[I]t is not our province to rewrite a law."); *see also Fine v. Moran*, 77 So. 533, 536 (Fla. 1917) ("[I]t is not permissible to strike out words of plain, definite meaning and substitute others in order that the purpose of the act, after such remodeling, may more nearly conform to our notions as to its purpose and be congruent with our views as to what language should have been used."). It is not the role of the courts to make laws or execute them; and it is not within the judiciary's authority to substitute its policy views for those of a coequal branch of government. *See* THE FEDERALIST NO. 47 at 301 (Clinton Rossiter ed. 1961) (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.") And so, even if Appellees had shown that they were entitled to a temporary injunction, the trial court's order cannot stand.

For these reasons, we reverse the order of the trial court and vacate the temporary injunction entered against the State.

REVERSED and VACATED.

WINOKUR and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

David M. Wells, Kenneth B. Bell, Lauren V. Purdy, and Nathan W. Hill of Gunster, Yoakley & Stewart, P.A., Tallahassee, for Appellants Governor Ron DeSantis; Commissioner Richard Corcoran; Andy Tuck as Chair of the State Board of Education; the State Board of Education; the Florida Department of Education; Jacob Oliva as Chancellor, Division of Public Schools.

Joseph W. Jacquot, General Counsel; Raymond F. Treadwell, Deputy General Counsel; and Joshua E. Pratt, Assistant General Counsel, Executive Office of the Governor, Tallahassee, for Appellant Governor Ron DeSantis.

Matthew H. Mears, General Counsel; Judy Bone, Deputy General Counsel; and Jamie M. Braun, Assistant General Counsel, Department of Education, Tallahassee, for Appellants Commissioner Richard Corcoran; Andy Tuck as Chair of the State Board of Education; the State Board of Education; the Florida Department of Education; and Jacob Oliva as Chancellor, Division of Public Schools.

Katherine E. Giddings and Kristen M. Fiore of Akerman LLP, Tallahassee; Gerald B. Cope, Jr. of Akerman LLP, Miami; and Ryan D. O'Connor of Akerman LLP, Orlando, for Appellees Florida Education Association; Stefanie Beth Miller; Ladara Royal; Mindy Festge; Victoria Dublino-Henjes; Andres Henjes; National Association for the Advancement of Colored People, Inc.; and NAACP Florida State Conference.

Jacob V. Stuart of Jacob V. Stuart, P.A., Orlando; and William J. Wieland of Wieland & Delattre, P.A., Orlando, for Appellees Monique Bellefleur, Kathryn Hammond, Ashely Monroe, & James Lis.

Raquel A. Rodriguez of Buchanan Ingersoll & Rooney PC, Miami; and Jarrett B. Davis of Buchanan Ingersoll & Rooney PC, Tampa, for Foundation for Excellence in Education, amicus curiae in support of Appellants.

William E. Ploss, Coral Gables, for Florida Alliance of Retired Americans, amicus curiae in support of Appellees Florida

Education Association; Stefanie Beth Miller; Ladara Royal; Mindy Festge; Victoria Dublino-Henjes; and Andres Henjes.