

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

FLORIDA STATE CONFERENCE
OF NAACP; J.W. by and
through her next of friend John
Walsh; S.W. by and through her
next of friend John Walsh;
JOHN WALSH in his individual
capacity; Z.L. by and through
his next of friend Tera Thaddies;
and, TERA THADDIES in her
individual capacity,

Petitioners,

vs.

FLORIDA DEPARTMENT OF
HEALTH,

Respondent.

CIVIL C.:

Emergency Rule 64DER21-12

PETITION FOR REVIEW OF EMERGENCY RULE

Pursuant to sections 120.54(4) and 120.68(9), Florida Statutes, Petitioners, the Florida State Conference of NAACP (“FL NAACP”); J.W. by and through her next of friend John Walsh; S.W. by and through her next of friend John Walsh; John Walsh in his individual capacity; Z.L. by and through his next of friend Tera Thaddies; and, Tera Thaddies in her individual capacity, petition this court for review of Emergency Rule 64DER21-12 (the “Emergency Rule”) published

by the Respondent, the Florida Department of Health (“DOH”). The Emergency Rule, among other provisions, bars local public schools from requiring students to wear face masks to control the spread of COVID-19. The Emergency Rule exceeds DOH’s statutory power because requiring masks as a preventative measure does not constitute an immediate danger to the public health, safety, or welfare, and the Emergency Rule is not necessary to protect the public from such an immediate danger as required under Section 120.54(4)(a), Florida Statutes. Petitioner requests an order quashing sections (1)(d) and (6)(a)-(c) of the Emergency Rule.

REASON FOR INVOKING JURISDICTION

Under Florida’s Administrative Procedure Act, a person whose substantial interests are affected by an emergency rule may challenge an emergency rule directly before a District Court of Appeal, without first proceeding before the Department of Administrative Hearings, to review the “agency’s findings of immediate danger, necessity, and procedural fairness prerequisite to the adoption of an emergency rule pursuant to s. 120.54(4).” § 120.68(9), Fla. Stat.; *see also* § 120.54(4), Fla. Stat. Venue is proper

in this District because Petitioners J.W., S.W., John Walsh, Z.L., and Tera Thaddies reside in it. § 120.68(2)(b), Fla. Stat.

THE EMERGENCY RULE

I. THE DOH EMERGENCY RULE WAS NOT NECESSARY TO RESPOND TO AN IMMEDIATE DANGER.

On July 30, 2021, Governor Ron DeSantis issued Executive Order 21-175, *see* Appendix Tab A, at A.004, directing that DOH issue regulations “to ensure safety protocols for controlling the spread of COVID-19 in schools...” that are “... in accordance with Florida’s ‘Parents’ Bill of Rights’ and protect parents’ right to make decisions regarding masking of their children in relation to COVID-19.” On August 6, 2021, DOH met for just an hour and issued Emergency Rule 64DER21-12, “Protocols for Controlling COVID-19 in School Settings.” *See* Appendix Tab B, at A.009.

Petitioners respectfully request that this Court quash sections (1)(d) and (6)(a)-(c) of the Emergency Rule. Section (1)(d) of the Emergency Rule bars public schools from mandating masks. It states, “Students may wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian to opt-out the student from wearing a face covering or

mask.” See A.011. Sections (6)(a)-(c) of the Emergency Rule purport to address “non-discrimination” and “harassment” against “students whose parents have opted them out of a mask or face covering requirement.” See A.011.

DOH’s stated justification for issuing the Emergency Rule and “for finding an immediate danger to the public health, safety, or welfare” is that “a recent increase in COVID-19 infections, largely due to the spread of the COVID-19 delta variant, coincides with the imminent start of the school year” and concludes that “it is imperative that state health and education authorities provide emergency guidance to school districts concerning the governance of COVID-19 protocols in schools.” See A.010. It then addresses Executive Order 21-175 and incorporates it by reference. *Id.*

DOH’s purported “reason for concluding that the procedure is fair under the circumstances” is that the “emergency rule is necessary in light of the recent rise in COVID-19 cases in Florida and the urgent need to provide COVID-19 guidance to school districts before the upcoming school year commences.” See A.010. DOH also claimed “insufficient time to adopt the rule through non-emergency

process” because the Emergency Rule was not issued until August 6, 2021. *Id.*

In fact, however, the “immediate” circumstances to which the DOH claims the Emergency Rule responds have long been foreseeable. In total, from the start of the pandemic in early 2020 through August 12, 2021, Florida has logged 2,877,214 COVID-19 cases, of which 476,101 have been people under 20-years-old.¹ Indeed, Florida currently accounts for one-fifth of the nation’s new COVID-19 cases.² Tragically, 40,766 Floridians have died. *Id.* While public schools initially closed in March 2020 to control the spread of the pandemic, they re-opened and, during the 2020-21 school year, provided in person instruction. The start of the 2021-22 school year follows a full year of a raging pandemic and in-person schooling.

II. MASK MANDATES DURING A PANDEMIC PROMOTE PUBLIC HEALTH, SAFETY AND WELFARE, NOT ENDANGER THEM.

¹ Florida Department of Health, “COVID-19 Weekly Situation Report,” at 7 (Aug. 13, 2021), ww11.doh.state.fl.us/comm/_partners/covid19_report_archive/covid19-data/covid19_data_latest.pdf.

² Bob Curley, “Why Florida Is the Hardest Hit State During This COVID-19 Surge,” Healthline (Aug. 5, 2021), <https://www.healthline.com/health-news/why-florida-is-the-hardest-hit-state-during-this-covid-19-surge>.

According to the CDC, “[m]asks are primarily intended to reduce the emission of virus-laden droplets (“source control”), which is especially relevant for asymptomatic or presymptomatic infected wearers who feel well and may be unaware of their infectiousness to others, and who are estimated to account for more than 50% of transmissions.”³ The CDC has stated expressly: “Mask use should be required on school buses and other public transportation; school systems should take appropriate steps to ensure compliance with this requirement by students, staff, and others.”⁴ Primarily, “[c]loth face coverings or masks are intended to protect other people – not the wearer – by helping to keep the wearer’s respiratory droplets from

³ Centers for Disease Control and Prevention, “Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2,” (May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fmore%2Fmasking-science-sars-cov2.html.

⁴ Centers for Disease Control and Prevention, “Operational Strategy for K-12 Schools through Phased Prevention,” (May 15, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/operation-strategy.html>.

reaching others.”⁵ Thus, a decision not to wear a mask has the primary risk of directly putting others at risk.

In addition, masks “help reduce inhalation of these droplets by the wearer (“filtration for wearer protection”).”⁶ But it is the combination of these two that is most effective: “The community benefit of masking for SARS-CoV-2 control is due to the combination of these effects; individual prevention benefit increases with increasing numbers of people using masks consistently and correctly.” As this Court has put it, “requiring individuals to cover their nose and mouth while out in public is intended to prevent the transmission from the wearer of the facial covering to others (with a secondary benefit being protection of the mask wearer).” *Machovec v. Palm Beach Cty.*, 310 So. 3d 941, 946 (Fla. 4th DCA 2021). That is, mask wearing is primarily for the protection of others and the *promotion of* public health, safety, and welfare.

⁵ Centers for Disease Control and Prevention, “COVID-19 Employer Information for Bus Transit Operators,” <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/bus-transit-operator.html>.

⁶ *Id.*

Experience and research have shown that, with proper precautions, schools were able to reopen without significantly accelerating the rate of community spread.⁷ Some school districts required masks, while others did not. Districts that did not require masks had higher rates of community spread of COVID associated with school reopening than those that did.⁸ Notably, schools requiring masks were in compliance with the June 2020 DOH Advisory recommending that “[a]ll individuals in Florida should wear masks in any setting where social distancing is not possible.”⁹

Governor DeSantis also took steps as early as the summer of 2020 to ensure that schools would be providing in-person instruction

⁷ Centers for Disease Control and Prevention, “Guidance for COVID-19 Prevention in K-12 Schools,” (Aug. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

⁸ Timothy Doyle, et. all, “COVID-19 in Primary and Secondary School Settings During the First Semester of School Reopening — Florida, August–December 2020,” Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report (March 22, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7012e2.htm>.

⁹ Florida Department of Health, “Public Health Advisory,” (June 24, 2020), <http://www.floridahealth.gov/newsroom/2020/06/062020-1640-covid19.pr.html>.

later that year and in the 2020-21 school year. Indeed, in this school year, many schools are no longer able to provide the synchronous remote instruction that was authorized last school year by a now-expired emergency order.¹⁰ As such, there was no indication that Districts intended to rescind their COVID-19 safety precautions in the 2021-22 school year, especially in light of surging COVID-19 rates, the Delta variant, increased numbers of students on campus and because children under 12 years old remain ineligible for COVID-19 vaccines.

The SARS-CoV-2 Delta variant is now the predominant form of the virus in the United States.¹¹ It is more than two times as infectious as the original COVID-19 strain and there is reason to believe it causes more severe illness in unvaccinated people.¹² Most

¹⁰ State of Florida Department of Education Emergency Order No. 2020-EO-66 (July 6, 2020), <https://www.fldoe.org/core/fileparse.php/19861/urlt/DOE-2020-EO-06.pdf>.

¹¹ Centers for Disease Control and Prevention, “Delta Variant: What We Know About the Science,” (Aug. 6, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>.

¹² *Id.*

children presently cannot be vaccinated for COVID-19 and pediatric intensive care beds are filling up across areas most impacted by the variant, with pediatric ICU beds hitting 100 percent capacity in some locations.¹³

STANDING

Petitioner FL NAACP is the state affiliate of the national NAACP, the nation's oldest and largest civil rights organization. FL NAACP is a membership organization dedicated to securing political, educational, social, and economic equality rights in order to eliminate race-based discrimination and its adverse effects and to ensure the health and well-being of all persons. As part of this mission, FL NAACP is committed to eliminating discrimination on the basis of race in healthcare and public education. FL NAACP has standing to bring this action on behalf of its individual members in families with children attending public schools in Florida. Protecting and enhancing public schools, which are attended disproportionately by

¹³ Adriana Gómez Licón, "Florida's COVID-19 deaths rise as it leads in hospital rates," Associated Press (Aug. 13, 2021), <https://apnews.com/article/health-florida-coronavirus-pandemic-99078a3511ff7bf6a84d4f547608fe30>.

children of color, is one of the FL NAACP's core missions. It also has advocated to protect communities of color, who have suffered disproportionately from the ravages of COVID-19, through comprehensive public health policies.

Petitioner FL NAACP, has standing where “a substantial number of its members, although not necessarily a majority, are ‘substantially affected’ by the challenged rule ... [T]he subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.” *NAACP, Inc. v. Fla. Bd. of Regents*, 863 So. 2d 294, 298 (Fla. 2003) (quoting *Florida Home Builders Ass’n v. Department of Labor & Employment Security*, 412 So.2d 351, 353-54 (Fla.1982)). Here, a substantial number of the FL NAACP's members are families with children, a core part of the NAACP's mission is protecting the rights of children in public schools and eliminating the adverse effects of race-discrimination in healthcare and public education, and vacatur of an Emergency Rule is a remedy of the kind appropriate for an association to receive. According to the CDC, “COVID-19 has unequally affected many racial and ethnic minority groups, putting

them more at risk of getting sick and dying from COVID-19.”¹⁴ This trend has been observed in Florida as well.¹⁵ And the FL NAACP has consistently fought to protect communities of color from this disproportionate impact of COVID.¹⁶

The Petitioners that are individual children attend Palm Beach County schools. Until August 19, 2021, the Palm Beach School Board complied with the DOH order and allowed children to attend school unmasked with parental consent. While its school board has now changed course and voted¹⁷ to require masks for all students except

¹⁴ Centers for Disease Control and Prevention, “Health Equity Considerations and Racial and Ethnic Minority Groups,” (Apr. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

¹⁵ Shenae Samuels-Staple, “The State of COVID-19 in Florida and South Florida: An Early Look at Disparities in Outcomes,” Florida Health Justice Project (May 2020), <https://www.floridahealthjustice.org/the-state-of-covid-19-in-florida-and-south-florida.html>.

¹⁶ NAACP FL et. al., “Re: Recommendations for Conducting a Safe General Election During the COVID-19 Pandemic,” Letter (Sept. 3, 2020), <https://www.naacpldf.org/wp-content/uploads/2020.09.03-Recommendations-for-Conducting-a-Safe-Election.pdf>.

¹⁷ Andrew Marra, “Palm Beach County schools cancel mask opt-out for students, defying Gov. DeSantis,” (Aug. 18, 2021), <https://www.palmbeachpost.com/story/news/education/2021/08/18/palm-beach-county-public-schools-cancel-mask-opt-out-students/8190024002/>.

those with medical reasons that prevent them from wearing masks, there is a reasonable probability that, if the rule remains in effect, the district will be compelled to comply with it. Governor DeSantis has described the school board as “violating the law” and warned of “consequences” for the Board’s actions.¹⁸ The State Board of Education is investigating other school districts that have taken the same position, threatening financial sanctions and even the removal from office of school board members who vote for mask mandates.¹⁹

While masks were not required, in the first five days of school 1,412 students were ordered to quarantine at home because they had been in close proximity to someone diagnosed with COVID-19.²⁰ Dr.

¹⁸ Sooji Nam, “Disappointing’: Governor’s office responds to Palm Beach County School Board’s mandatory mask mandate,” wpbf.com (Aug. 19, 2021), <https://www.wpbfc.com/article/florida-governor-desantis-palm-beach-county-school-mask-mandate/37347679>.

¹⁹ Andrew Atterbury, “Florida threatens to remove school officials who disobey DeSantis,” Politico (Aug. 17, 2021), <https://www.politico.com/states/florida/story/2021/08/17/florida-threatens-to-remove-school-officials-who-disobey-desantis-1390160>.

²⁰ Sonja Isgar, “As PBC COVID cases rise, county’s top health official says spread not in classrooms — yet,” Palm Beach Post (Aug. 16, 2021), <https://www.palmbeachpost.com/story/news/education/2021/08>

Alina Alonso, Palm Beach County’s top health official, has warned that the risk of in-school transmissions could drastically increase due to “unvaccinated children, fuller classrooms, and wiggle room in the mandate to wear masks.”²¹ As of August 18, 2021, the number of students in quarantine skyrocketed to about 3,000, and more than 11,000 students, or 6.6% of the school district’s students, had already opted out of wearing masks.²² The sheer number of people who attended school unmasked and who were exposed to unmasked people while the Emergency Rule was followed significantly increased the level of danger for the individual child Petitioners.

Petitioner John Walsh is J.W.’s father and guardian. He brings this suit as next of friend to J.W. and S.W. and on his own behalf. Petitioner J.W. is a nine-year-old student enrolled in the School District of Palm Beach County. She is a student with disabilities and

/16/palm-beach-county-covid-cases-rise-top-health-official-says-spread-not-classrooms-yet/8128061002/

²¹ *Id.*

²² Luli Ortiz, “‘We’ll never comply:’ Tensions rise during Palm Beach County School Board Meeting,” CBS12 News (Aug. 18, 2021), <https://cbs12.com/news/local/well-never-comply-tensions-rise-during-palm-beach-county-school-board-meeting>.

qualifies for Exceptional Student Education (“ESE”) under the exceptionalities of language impairment, occupational therapy, speech impairment, and other health impairment. J.W. is a child with Down syndrome and is under the care of multiple physicians: her pediatrician, cardiologist, hematologist, endocrinologist, ENT, and neurologist. According to J.W.’s pediatrician, due to J.W.’s “high risk medical condition, she cannot be in a situation with other unvaccinated and unmasked persons, because contracting COVID would be potentially deadly to her.” The pandemic comes on the heels of J.W. recovering from double pneumonia in late 2019, where she was hospitalized in the PICU for twelve days and barely managed to avoid being put on a ventilator. Throughout the pandemic in the 2020-21 school year, J.W. attended synchronous remote classes and received speech therapy, language therapy, and occupational therapy on Zoom. In the 2021-22 school year that just started, J.W. is unable to return to school because of her complex medical conditions and the steady rise of COVID-19 cases in Palm Beach County,²³ yet she

²³ See n. 20, above.

is unable to participate in synchronous remote learning because it is no longer available.

Petitioner John Walsh's older daughter and J.W.'s sister, Petitioner S.W., is 17 years old and enrolled in the School District of Palm Beach County. For the 2021-22 school year, S.W. is attending high school, in-person, where she wears her mask. Even though S.W. diligently wears her mask and is fully vaccinated, there are times where she removes it to have lunch and to drink water. S.W. is also concerned about the number of students who did not wear masks while the Emergency Rule was being followed. Due to the number of students in her school, it is impossible to practice proper social distancing. While S.W. does not have complex medical complications, if S.W. contracts COVID-19 and infects her little sister, Petitioner J.W., it could be deadly. Petitioner John Walsh also has an interest in his right to make health and education decisions for his children, including the decision to send his children to free and safe public schools as guaranteed by the Florida Constitution, which has been infringed upon by the Emergency Rule.

Petitioner Tera Thaddies is Z.L.'s mother and guardian. She brings this suit as next of friend to Z.L., her son, and on her own

behalf. Petitioner Z.L. is 11 years old and enrolled in the School District of Palm Beach County. He has been home from school since August 12, 2021, due to the increased number of students who have returned to school without masks, the sharp rise in COVID-19 cases across the state, and the need to keep their family safe. Z.L. was diagnosed with autism when he was four years old, and is in an ASD cluster program at school where he receives various support services. Last year, that included behavioral support for children with autism to ensure proper mask wearing. That is not happening this year. If Z.L. were to contract COVID-19, not only would it be of great concern for his health and safety, but also for Petitioner Tera Thaddies' health. In the past year, Petitioner Tera Thaddies lost her partner of 20 years, and Z.L.'s father, to COVID-19 complications. She was also diagnosed with lupus and rheumatoid arthritis, which is an autoimmune and inflammatory disease, both of which she is struggling to manage. While Petitioner Tera Thaddies is vaccinated, it is unclear how effective the vaccine would be if she were to contract COVID-19 due to her underlying health conditions. She is the sole caregiver and parent for Z.L. and cannot afford to risk even more serious health conditions or death from contracting COVID-19.

Petitioner Tera Thaddies has an interest in her right to make health and education decisions for her son, including the decision to send Z.L. to a free and safe public school as guaranteed by the Florida Constitution, which has been infringed upon by the Emergency Rule.

Petitioners John Walsh, J.W., S.W., Tera Thaddies, and Z.L. all have standing under Florida's Administrative Procedure Act because each of them is a "party who is adversely affected by final agency action is entitled to judicial review." § 120.68(1)(a), Fla. Stat. "In order to meet the substantially affected test ..., the petitioner must establish: (1) a real and sufficiently immediate injury in fact; and (2) that the alleged interest is arguably within the zone of interest to be protected or regulated." *Lanoue v. Fla. Dep't of L. Enf't*, 751 So. 2d 94, 96 (Fla. 1st DCA 1999) (quoting *Ward v. Board of Trustees of the Internal Improvement Trust Fund*, 651 So.2d 1236, 1237 (Fla. 4th DCA 1995)). Here, the Emergency Rule gives Petitioners J.W., S.W., and Z.L., a "choice" between being held out of school without services or a quality education and going to school and risking COVID-19 infection to themselves and their families. Either way, the fact that J.W.'s older sister, S.W., has attended public school where masks have not been mandatory or enforced continues to expose them and

their family to severe illness and death. Likewise, the fact that Z.L. has attended public school where masks have not been mandatory or enforced continues to expose his widowed mother and sole caregiver, Petitioner Tera Thaddies, to even more severe illness and death.

The fact that their District has temporarily chosen to defy the Emergency Rule is immaterial. Petitioners are still adversely affected because they are at serious risk of soon being forced to attend a partially unmasked school or be exposed to family members who do if the State is successful in its unrelenting efforts to compel districts to comply. Petitioners should not have to wait until they are once again at direct risk of death to challenge the rule that threatens to place them there again. And DOH should not be able to abuse its power to pass a Rule so unjust that it is widely defied and then use that defiance to escape challenges to the legality of that rule.

ARGUMENT

I. LEGAL STANDARD

Under Florida's Administrative Procedure Act, an agency has power to issue an emergency rule only if it is "necessary" to address "immediate danger to the public health, safety, or welfare" as follows:

If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger. The agency may adopt a rule by any procedure which is fair under the circumstances if:

1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.
2. The agency takes only that action necessary to protect the public interest under the emergency procedure.
3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances.

...

§ 120.54(4)(a), Fla. Stat.

“In actions such as this, the courts do not generally concern themselves with the substantive validity of the emergency rule; rather, the concern is whether the agency followed the requirements of section 120.54(4)(a), Florida Statutes.” *Hartman-Tyner, Inc. v. Div. of Pari-Mutuel Wagering, Dep’t of Bus. & Pro. Regul.*, 923 So. 2d 559, 562 (Fla. 1st DCA 2006). “Because of the accelerated process, not only may emergency rules be appealed directly, without exhaustion of administrative remedies, but the courts, in the few instances in

which the issue has arisen, have not been hesitant in striking down emergency rules which were not adopted in strict compliance with” the statutory limitations on emergency rulemaking. *Krajenta v. Div. of Workers’ Comp., Dep’t of Lab. & Emp. Sec.*, 376 So. 2d 1200, 1202 (Fla. 2nd DCA 1979) (citations omitted).

II. DOH’S FINDINGS OF “DANGER, NECESSITY, AND PROCEDURAL FAIRNESS” CANNOT BE SUPPORTED.

DOH’s Emergency Rule exceeds its emergency powers under Section 120.54(4) for two reasons: public school mask mandates were not an “immediate” emergency; and, even if they were, the Emergency Rule was not a “necessary” response to a public danger. DOH does not assert in the Rule that the likelihood many districts would continue using mask mandates to mitigate the spread of COVID-19 was at all unexpected. Yet, it chose to act on the eve of the new school year at the direction of Governor Ron DeSantis’s Executive Order 21-175. A.004. Florida’s APA does not allow state agencies to delay acting until there is no time for notice and comment, and then use their own delay as justification for emergency rulemaking. Even had it been timely, the Emergency Rule is not “necessary” to its stated goals of protecting children because the four

corners of the rule, to which this Court is limited in its review, contains no evidence that the Emergency Rule’s mask provisions will make children safer, encourage more children to come to school, or prevent any infringement of parents’, guardians’, or children’s statutory or constitutional rights.

A. School Mask Mandates Were Not an “Emergency.”

“In order to utilize emergency rulemaking procedures, rather than employing standard rulemaking, an agency must express reasons at the time of promulgation of the rule for finding a genuine emergency. Those reasons must be factually explicit and persuasive.” *Fla. Health Care Ass’n v. Agency for Health Care Admin.*, 734 So. 2d 1052, 1053 (Fla. 1st DCA 1998). The reasons the DOH provided here are anything but “factually explicit and persuasive.” While the surge in COVID-19 cases due to the Delta variant may indeed have been surprising to some, the Emergency Rule makes clear that it is not intended to address or mitigate that rise in cases. Instead, the “emergency” the Emergency Rule describes is districts’ *response* to that surge in cases. As the Emergency Rule puts it: “[b]ecause a recent increase in COVID-19 infections ... coincides with the imminent start of the school year, it is imperative that state health

and education authorities provide emergency guidance to school districts.”

At no point in the Emergency Rule does the DOH even suggest that the fact that public schools would be requiring masks in the fall was unexpected or unknown to the DOH in sufficient time to issue this Emergency Rule through ordinary rulemaking. Indeed, the mask requirement in some districts was merely a continuation of a practice that existed *before* the surge in cases. In responding to this indisputable fact, the DOH may not now add to that statement of its reasons. *Fla. Ass’n of Homes & Servs. for Aging, Inc. v. Agency for Health Care Admin.*, 252 So. 3d 313, 316 (Fla. 1st DCA 2018) (“the record on appeal is limited to the four corners of the emergency rules themselves.”).

Because the Emergency Rule does not suggest that either the date of school reopening or the fact that many schools would very likely continue to require masks were unknown to the DOH many months ago, those are not appropriate topics for emergency rulemaking. The law is clear that “[a]n agency’s delay in proceeding to standard rulemaking does not justify the use of an emergency rule.” *Fla. Health Care Ass’n*, 734 So. 2d at 1054; *see also Golden*

Rule Ins. Co. v. Dep't of Ins., 586 So. 2d 429, 431 (Fla. 1st DCA 1991) (“[T]his court has invalidated emergency rules based on reasons which, upon analysis, we found were rooted in avoidable administrative failure and/or inaction.”); *Postal Colony Co., Inc. v. Askew*, 348 So.2d 338, 342 (Fla. 1st DCA 1977) (“[E]mergency created wholly by an agency’s failure to take timely action cannot justify extraordinary suspensions or extensions of the statutory schedule.”).

Even if the Court could consider other matters, the only other relevant document that could potentially be part of the record is Executive Order 21-175. *See* A.004. But that document may not be used to justify the Emergency Rule because Section 120.54(4) provides that “[t]he agency” that promulgates the rule, must “publish[] in writing at the time of, or prior to, its action the specific facts and reasons for finding” that the Emergency Rule meets the requirements of the statute. Information contained in an Executive Order by the Governor is plainly not “publish[ed]” by the Department of Health.

Moreover, even if Executive Order 21-175 were part of the record, which it is not, the only fact it contains relevant to whether

mask mandates are an unexpected “emergency,” other than the surge in Delta variant cases, is the Governor’s own signature of a bill creating a “Parents’ Bill of Rights” on June 29, 2021. HB 241 (2021).²⁴ That law, though, was passed and ordered enrolled on April 22, 2021. At that point, DOH knew that it would become law if Governor DeSantis signed it. If delays in signing a bill could justify issuing emergency rules implementing it, the executive would have an easy method of temporarily evading the APA on all new legislation.

Further, the Parents’ Bill of Rights, which is cited in the Emergency Rule and Executive Order 21-175, makes no mention whatsoever of masks. This is despite the fact that mask mandates had been the practice in some school districts prior to passage of the legislation. If state legislators had wanted masks encompassed in the law, they could (and presumably would) have expressly written such a provision into the law. They chose not to do so.

Furthermore, the Parents’ Bill of Rights does not even purport to allow a parent to make decisions about whether someone else’s

²⁴ Fla. Senate, “HB 241,” (2021), <https://www.flsenate.gov/Session/Bill/2021/241>.

child should be exposed to a deadly virus. Instead, the statute provides that parents may make “health care decisions” for their own children, Section 1014.04(1)(e), Fla. Stat. Any assertion that wearing a mask is primarily a decision regarding the latter is baseless. Indeed, a court in this District recently rejected almost exactly this argument:

Appellants’ argument that the individuals required to wear facial coverings are being subjected to forced “medical treatment” distorts the nature of the County’s mask ordinance. ... [R]equiring facial coverings to be worn in public is not primarily directed at treating a medical condition of the person wearing the mask/shield. Instead, requiring individuals to cover their nose and mouth while out in public is intended to prevent the transmission from the wearer of the facial covering to others (with a secondary benefit being protection of the mask wearer). Requiring facial coverings in public settings is akin to the State’s prohibiting individuals from smoking in enclosed indoor workplaces.

Machovec v. Palm Beach Cty., 310 So. 3d 941, 946 (Fla. 4th DCA 2021), *review denied*, No. SC21-254, 2021 WL 2774748 (Fla. July 2, 2021). The term “health care” while undefined in the bill, means “the services provided, usu[ally] by medical professionals, to maintain and restore health.” Black’s Law Dictionary (11th ed. 2019). If the fact that masks have a protective effect on children’s health were enough to make wearing one a “health care decision” which parents could refuse, then the same would be true for municipal rules requiring

children to wear helmets when riding bicycles, and school rules requiring students to use eye-protection when performing experiments in chemistry class, banning vaping, imposing school dress code requirements in the interest of student safety, or requiring students to wash their hands after using the bathroom.²⁵

B. The Emergency Rule is Not Necessary to Prevent an “Immediate Danger to the Public Health, Safety, or Welfare.”

Even if public schools’ requirement that students wear masks had been a response to some truly unexpected situation, the Emergency Rule would still fail because it is not “necessary” to address “immediate danger to the public health, safety, or welfare.” § 120.54(4), Fla. Stat. On its face, it makes the public less safe by limiting the ability of schools to protect their students and staff from COVID-19. The Emergency Rule states that its purpose is “to encourage a safe and effective in-person learning environment for

²⁵ Unlike Federal courts, those in Florida may not give deference to an agency’s interpretation of a statute. Art. V., § 21, Fla. Const. (“In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency’s interpretation of such statute or rule, and must instead interpret such statute or rule de novo.”).

Florida’s schoolchildren during the upcoming school year; to prevent the unnecessary removal of students from school; and to safeguard the rights of parents and their children.” However, none of these justifications are coherent or consistent with barring Districts from requiring masks.

First, the Emergency Rule says nothing, other than one stray reference to children with disabilities, about *how* limiting mask mandates is meant to “encourage a safe and effective in-person learning environment.” Allowing persons to more easily infect others cannot possibly make an environment safe. Nor can the significant increase in the number of students being required to quarantine and miss weeks of school encourage an effective in-person learning environment.

The Executive Order (if it could be considered) asserts vaguely that masks “*may* lead to negative health and societal ramifications” (surely almost any action *may* do so) and that “forcing children to wear masks *could* inhibit breathing, lead to the collection of dangerous impurities including bacteria, parasites, fungi and other contaminants, and adversely affect communication in the classroom and student performance.” A.004 (*emphasis added*). But it does not

assert that either of these supposed risks is certain or even probable. More importantly, the fact that the DOH—the state agency with actual expertise in medical matters—chose not to repeat these assertions, while repeating others—and hence we do not know if it agrees with them—shows the wisdom of the APA in compelling *the agency* to state with particularity the reasons behind an emergency rule. Nor did the DOH or the Governor produce any data from the last school year, during which hundreds of thousands of students in Florida and millions across the country attended school wearing masks, to support such specious assertions.

The Emergency Rule also references a desire to “protect children with disabilities or health conditions who would be harmed by certain protocols, such as face masking requirements.” A.010. But the Emergency Rule’s requirement that *all* parents, not merely the ones whose children have such disabilities, be allowed to opt-out of wearing a mask is not “necessary” to achieve this goal. Moreover, a child *with* disabilities or health conditions who would be harmed by certain protocols (and who under every current mask mandate could obtain a medical waiver to the mask requirement) would be less protected and put at greater risk of harm by the

Emergency Rule because thousands of opt-out children *without* such disabilities or health conditions are permitted to more easily infect others.

Second, the Emergency Rule’s reference to “[p]revent[ing] the unnecessary removal of students from school” appears to relate not to its provisions regarding masks, but to a separate section about the duration of quarantines for students exposed to COVID-19, which is not at issue in this petition. To the extent it can be construed otherwise, the Emergency Rule contains no evidence, and indeed does not claim, that mask mandates will prevent any students from attending school, nor does Governor DeSantis’s Executive Order. To the contrary, for medically vulnerable students like Petitioners, the prohibition against and absence of mask mandates indeed does prevent students from attending schools. In contrast, any removal from school of children who have no disabilities or health conditions is wholly discretionary, *i.e.*, *not* necessary.

Third, the rule’s references to “safeguard[ing] the rights of parents and their children” (A.010) is an apparent reference to a desire to both ensure that COVID-19 control measures “do not violate Floridians’ constitutional freedoms” and to comply with the

Parents' Bill of Rights. Courts across the country have upheld the constitutionality of mask mandates. See *Mahovec*, 310 So. 3d at 948 (holding that mask mandates do not violate the Florida Constitution); *W.S. by Sonderman v. Ragsdale*, No. 1:21-CV-01560-TWT, 2021 WL 2024687, 2021 U.S. Dist. LEXIS 98185, 5 (N.D. Ga. May 12, 2021) (rejecting equal protection challenge to school mask mandate on rational basis review); *Whitfield v. Cuyahoga County Public Library Foundation*, 2021 WL 1964360, at *2 (N.D. Ohio May 17, 2021) (“[F]ederal, state and local governments may govern what must worn in public spaces, particularly when the health and safety of the general public are at issue.”); *Wall v. Centers for Disease Control & Prevention*, No. 6:21-CV-975-PGB-DCI, 2021 WL 3008566, at *2 (M.D. Fla. June 15, 2021) (mask mandate did not implicate constitutional right to travel); *Oakes v. Collier Cnty.*, No. 2:20-cv-568-FTM, 2021 WL 268387, 2021 U.S. Dist. LEXIS 15174, 4 (M.D. Fla.

Jan. 27, 2021) (mask mandate for stores did not violate equal protection clause or First Amendment).²⁶

Mask mandates also do not implicate the Parent’s Bill of Rights because that statute does not address masks at all, as discussed above. Even if it did and even assuming *arguendo* that wearing a mask was a healthcare decision for one’s own child, which it is not, the Parents’ Bill of Rights allows local governments to abridge the rights of parents to make healthcare decisions for their children after “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.” § 1014.03, Fla. Stat. The Emergency Rule does not assert that masks are not such a narrowly tailored means

²⁶ See also *Denis v. Ige*, No. CV 21-00011 SOM-RT, 2021 WL 1911884 (D. Haw. May 12, 2021); *Forbes v. City of San Diego*, No. 20-cv-00998-BAS-JLB, 2021 WL 843175 2021 U.S. Dist. LEXIS 41687, 11 (S.D. Cal. Mar. 4, 2021); *Stewart v. Justice*, No. 3:20-0611, 2021 WL 472937, 2021 U.S. Dist. LEXIS 24664, 20 (S.D. W. Va. Feb. 9, 2021); *Shelton v. City of Springfield*, 497 F. Supp.3d 408, 414 (W.D. Miss. 2020); *United States v. Berglund*, 20-cr-00200, 2021 WL 1589548, 2021 U.S. Dist. LEXIS 78476, 2 (D. Minn. Apr. 23, 2021).

and, even if it did, nothing in the Parents' Bill of Rights gives DOH any role in a local government's judgment on that score.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request: an order quashing the sections (1)(d) and (6)(a)-(d) of DOH Emergency Rule 64DER21-12, which prohibit public schools from implementing meaningful mask mandates; Petitioners' costs and reasonable attorneys' fees pursuant to § 120.595, Fla. Stat.; and, all other relief as this Court deems just and proper.

CERTIFICATE OF COMPLIANCE (Fla. R. App. P. 9.045(e))

WE HEREBY CERTIFY that this brief complies with the font requirements of [Florida Rule of Appellate Procedure 9.045\(b\)](#) and the word limitation requirements of [Florida Rule of Appellate Procedure 9.210\(a\)\(2\)\(B\)](#). This brief contains 6,361 words.

ADMINISTRATIVE ORDER NO. 2008-2 **EMERGENCY CERTIFICATION**

Undersigned counsel hereby certify the existence of an emergency and further detail the nature of same in the concurrently filed Request for Emergency Treatment under Administrative Order No. 2014-1 (Amended Effective June 12, 2018).

Dated this 20th day of August, 2021.

Respectfully submitted,

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