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

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

Plaintiffs,

v.

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

Defendants.
_____/

Case No.: 2021-CA-001382

PLAINTIFFS' EMERGENCY MOTION TO VACATE AUTOMATIC STAY

Plaintiffs, LESLEY ABRAVANEL and MAGNUS ANDERSSON, individually and on behalf of S.A. and A.A., minors; KRISTEN THOMPSON, individually and on behalf of P.T., a minor; AMY NELL, individually and on behalf of O.S., a minor; and DAMARIS ALLEN, individually and on behalf of E.A., a minor (collectively "Plaintiffs"), respectfully submit this Emergency Motion to Vacate Automatic Stay resulting from Defendants, GOVERNOR RON DESANTIS, in his official capacity as Governor of the State of Florida; RICHARD CORCORAN, in his official capacity as Florida Commissioner of Education; FLORIDA DEPARTMENT OF

EDUCATION; and FLORIDA BOARD OF EDUCATION's (collectively "Defendants") Notice of Appeal of this Court's Final Judgment.

INTRODUCTION

Pursuant to an expedited schedule, this Court heard arguments on Defendants' Motion to Dismiss on August 19, 2021, and conducted a non-jury trial on August 23, 2021, through August 26, 2021. On August 27, the Court orally announced its ruling. *See* Transcript of Court's August 27, 2021, ruling attached hereto and incorporated herein as **Exhibit A**. On September 2, 2021, the Court issued its Final Judgment ("Order"), finding, *inter alia*, that Executive Order 21-175 ("Executive Order") is unconstitutional and was executed without legal authority. *See* Order attached hereto as **Exhibit B**.

In its Order, the Court denied relief as to Count I: Declaratory Judgment—Violation of Florida Constitution for Unsafe Schools and Count II: Declaratory Judgment—Violation of Florida Constitution for Home Rule, granted relief as to Count III: Declaratory Judgment—Executive Order Undermines Schools' Safety and Makes Arbitrary and Capricious Demands on Public Schools in Violation of the Florida Constitution, Count IV: Declaratory Judgment—Executive Order Exceeds the Authority of the Department of Education and Violates the Florida Constitution, and Count VI: Emergency Injunctive Relief (except as to Defendant Governor), and dismissed Count V: Declaratory Judgment—Department of Health Rule 64DER21-12.

The Court declined to grant an injunction against Defendant Governor. However, the Court issued a permanent injunction and enjoined Defendants RICHARD CORCORAN, in his official capacity as Florida Commissioner of Education; FLORIDA DEPARTMENT OF EDUCATION; and FLORIDA BOARD OF EDUCATION ("Enjoined Defendants") from violating the Parents' Bill of Rights. The Court ordered the Enjoined Defendants not to violate the Parents' Bill of Rights

by taking action to effect a blanket ban on face mask mandates by local school boards and by denying the local school boards their due process rights granted by the statute which permits the local school boards to demonstrate the reasonableness of the mandate and other factors stated in the law. Additionally, the Court enjoined the Enjoined Defendants from enforcing or attempting to enforce the Executive Order and the policies it caused to be generated and any resulting policy or action which violates the Parents' Bill of Rights as outlined in the Final Judgment.

In granting the injunction, the Court found that the act or conduct to be enjoined (violation of the Parents' Bill of Rights) is a clear legal right, there is no adequate remedy at law, and relief is necessary to prevent an irreparable injury. *See* Ex. B at 24.

On September 2, 2021, Defendants filed their Notice of Appeal. Pursuant to Florida Rule of Appellate Procedure 9.310(b)(2), Defendants' Notice of Appeal operated "automatically" as a stay of this Court's ruling, pending appellate review.

VACATION OF THE AUTOMATIC STAY

Although Florida Rule of Appellate Procedure 9.310(b)(2) provides for the entry of the automatic stay, it also provides: "On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay." In applying this provision, the Florida Supreme Court held: "Ordinarily, there are two principal considerations that courts must take into account when deciding whether to vacate a stay: the likelihood of irreparable harm if the stay is not granted and the likelihood of success on the merits by the entity seeking to maintain the stay." *Mitchell* v. *State*, 911 So. 2d 1211, 1219 (Fla. 2005) (citing *Perez* v. *Perez,* 769 So. 2d 389, 391 n. 4 (Fla. 3d DCA 1999)).

With regard to the first criteria, the likelihood of irreparable harm if the stay is not granted, Defendants will suffer no harm, let alone irreparable harm, if the stay is

not granted or is vacated by this Court. The consequence to Defendants of this Court vacating the stay is that during the time of appellate review, Defendants will not be able to enforce the Executive Order. This is at most a *de minimis* administrative burden for the Defendants and does not rise to the level of irreparable harm.

In contrast, there is the very real prospect of irreparable harm to the individual Plaintiffs. An irreparable injury to Plaintiffs is demonstrated by the increased risk of the Delta variant infection, as shown by CDC recommendations and the overwhelming medical evidence that is in the record of this case, if universal face mask mandates are blocked in violation of the Parents' Bill of Rights. *See* Ex. B at 24. A continuing constitutional violation is in and of itself irreparable harm. *Bd. of County Commissioners v. Home Builders Ass'n of W. Florida, Inc.*, 1D20-2227, 2021 WL 3177293, at *3 (Fla. 1st DCA July 28, 2021) (citation omitted).

The automatic stay prevents this Court's Order from taking effect, including the portions of that Order that:

1. Issue a permanent injunction and enjoin the Enjoined Defendants from violating the Parents' Bill of Rights.

2. Order the Enjoined Defendants not to violate the Parents' Bill of Rights by taking action to effect a blanket ban on face mask mandates by local school boards and by denying the local school boards their due process rights granted by the statute which permits the local school boards to demonstrate the reasonableness of the mandate and other factors stated in the law.

3. Issue an injunction enjoining the Enjoined Defendants from enforcing or attempting to enforce the Executive Order and the policies it caused to be generated and any resulting policy or action which violates the Parents' Bill of Rights as outlined in the Final Judgment.

The second criteria—the likelihood of success on the merits by the entity seeking to maintain the stay—also supports vacating the stay. *See Mitchell*, 911 So. 2d at 1219. Defendants are unable to demonstrate that their appeal is likely to succeed on the merits. The Court's well-reasoned decision was orally delivered in over two hours and detailed Plaintiffs' likelihood of success on the merits. *See* Ex. A & B. Plaintiffs' evidence showed that the Executive Order, through its threat of funding cuts, left school districts with no meaningful alternative but to decide to forego issuing mandatory mask mandates. Moreover, the Executive Order was issued during a time where the State of Florida was no longer under a state of emergency. Thus, the Governor's emergency powers had expired; and therefore, the Executive Order was executed without legal authority. Conversely, the Court found that the evidence presented by Defendants through the video presentation of the roundtable was disputed by the science presented during the trial. Additionally, the Court found that Defendants' own exhibits, such as Defendants' Exhibits 19 and 48, supported Plaintiffs' contentions, specifically noting that in the summary of Exhibit 48, it was found that "COVID infection was 37% lower in schools that require teachers and staff members to use masks." *See* Ex. A at 25:17-20. And, Defendants' Exhibit 19 recommends universal masking. *See* Ex. A at 28:12-13. Based on the evidence in the record, this Court did not abuse its discretion in its ruling, including granting the injunction.

Because this Court held that both the facts and the law support Plaintiffs' position, there is no basis for the Court to conclude that Defendants' likelihood of success on the merits warrants maintaining the automatic stay. Rather, it is Plaintiffs who have a likelihood of success on the merits. Because Plaintiffs have a likelihood of success on the merits, it is also appropriate to vacate the stay so that Defendants cannot enforce the Executive Order, and local school boards can determine what is best for their districts without threat or punishment from Defendants.

Furthermore, as addressed above, even if the Order is reversed on appellate review, there is at most a *de minimis* burden to be suffered by Defendants in this action if they are forced to cease enforcement of the Executive Order. Nonetheless, even if Defendants could potentially suffer any meaningful harm, this case presents the type of compelling circumstances that require vacating the stay. In *Tampa Sports Authority v. Johnston,* 914 So. 2d 1076, 1083 (Fla. 2d DCA, 2005), *rev'd on other grounds*, 490 F.3d 820 (11th Cir. 2007), the court held there was a compelling interest in vacating the stay to prevent the government's pat down searches at sporting events as potentially unconstitutional search and seizures, particularly where there was essentially no harm to the governmental authority if the stay were vacated. It stated:

> Johnston would suffer definite, irreparable, and irremediable harm to his important constitutional interests each time the Buccaneers play at home. He would have no ability to avoid or lessen that harm. And even if he were to successfully defend the injunction in this appeal, the expiration of the 2005 season in the meantime would completely deprive him of its benefit.

Id.

Vacating the automatic stay is appropriate when the moving party demonstrates that there are "compelling circumstances" warranting such action. *See Florida Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825, 827 (Fla. 1st DCA 2018); *St. Lucie County v. N. Palm Dev. Corp.*, 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984). An automatic stay is properly vacated where the balance of equities is "overwhelmingly tilted" such that the stay would cause "definite irreparable, and irremediable harm to [] important constitutional interests," to a significantly greater degree than the harm to the government's interest by lifting the stay. *Florida Dep't of Health*, 250 So. 3d at 828; *Tampa Sports Auth.*, 914 So. 2d at 1084.

"Compelling circumstances" are clearly present here. The same likelihood of irreparable harm the Court found warranted issuing the injunction requires the automatic stay to be vacated.

An injury is irreparable if it cannot "be adequately repaired or redressed in a court of law by an award of money damages." *Sun Elastic Corp. v. O.B. Indus.*, 603 So. 2d 516, 518 n. 3 (Fla. 3d DCA 1992). If the automatic stay remains in place, Plaintiffs will continue to face the increased risk of the Delta variant infection, local school boards will continue to face penalties from Defendants from their enforcement of the Executive Order, and local school boards will be faced with the choice of being subject to penalties issued by Defendants or protecting Plaintiffs, students, and school staff by having the ability to issue mandatory mask mandates without parental opt-out.

The Court has already determined that the threatened injuries which warranted issuance of the permanent injunction are irreparable and without an adequate remedy at law. *See* Ex. B at 24. In other words, a legal remedy, a money judgment or some other remedy at law, does not remedy the peril, damage, and danger caused by the unlawful failure to follow the Parents' Bill of Rights. *See Oxford Intern. Bank & Tr., Ltd. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 374 So. 2d 54 (Fla. 3d DCA 1979).

If not vacated, the automatic stay would permit, as this Court held in its Order, the Defendants to enforce an unconstitutionally enacted Executive Order against a local school district which chooses safety—issuing mask mandates without parental opt-out. If the automatic stay remains in place, Defendants would be permitted for the duration of the appeal to enforce the Executive Order and freely expose students and school staff to the increased risk of Delta variant infection, which is a continuing constitutional violation. This constitutes a *per se* irreparable injury, which could not possibly be remedied after the fact. *See Tampa Sports Auth.,* 914 So. 2d at 1080 (automatic stay vacated where deprivation of constitutional right to be free of unreasonable searches was irreparable harm for which there would be no adequate legal remedy after the fact); *Bd. of County Commissioners*, 2021 WL 3177293.

CONCLUSION

For the reasons stated above, the automatic stay of this Court's Final Judgment dated September 2, 2021, should be vacated.

WHEREFORE, based on the foregoing, Plaintiffs respectfully request that this Court vacate the automatic stay of Florida Rule of Appellate Procedure 9.310(b)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of September, 2021, the foregoing was electronically filed with the Clerk of the Courts by using the Florida Courts E-Filing Portal, which will send a notice of electronic filing to the following: **Michael A. Abel, Esquire, Daniel K. Bean, Esquire, Jacqueline A. Van Laningham, Esquire, and Jared J. Burns, Esquire**, ABEL BEAN LAW, P.A., 100 N. Laura Street, Suite 501, Jacksonville, FL 32202, (*mabel@abelbeanlaw.com*; *dbean@abelbeanlaw.com*; *jvanlaningham@abelbeanlaw.com*; *jburns@abelbeanlaw.com*), ***Counsel for Defendants***.

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