IN THE CIRCUIT COURT OF THE NINETEETH JUDICIAL CIRCUIT IN AND FOR INDIAN RIVER COUNTY, FLORIDA CIVIL DIVISION

JENNIFER PIPPIN
ALEXANDRA NOBREGAS
NICOLE CAMPANELLI
SANDY CAMPIGLIA
et al
Plaintiffs/Petitioners,

CASE # 312020CA000654XXXXXX

v.

INDIAN RIVER COUNTY SCHOOL BOARD, FLORIDA
Defendant/Respondent.
_____/

CONSOLIDATED VERIFIED PLAINTIFFS' EMERGENCY COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF WITH INCORPORATED MOTION FOR TEMPORARY RESTRAINING ORDER AND MEMORANDUM OF LAW

Plaintiffs', in the cases captioned above, by and through their undersigned attorney, and pursuant to Florida Statute § 26.012 (3), (2019) and to Rule 1.610, Fla.R.Civ.P., respectfully move this Court for the entry of a Temporary Restraining Order or, in the alternative, move for a Preliminary Injunction enjoining Defendant, INDIAN RIVER COUNTY SCHOOL BOARD, FLORIDA, from compelling Students to wear face masks as a requirement to attend school. Attached hereto are Affidavits of Verification supporting the request for extraordinary relief articulated herein, which also incorporate the Complaint in this action as a verified basis for the relief requested. Because a violation of Florida Sunshine Act is alleged in accordance with ARTICE I, § 24(B), immediate handling of this complaint is required pursuant to Florida Statute § 119.11(a). In support of the relief requested herein, would show the following:

I. INTRODUCTION TO THE COMPLAINT

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
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> *Brown v. Board of Education of Topeka*, 347 U.S. 483, at 493 (1954).

1. The intent of this lawsuit is to empower parents, whose love for their children cannot be questioned, and have the sole right to make decisions in their children's best interest. As of this writing, there is not one single instance, anywhere in the entire world, where one single school teacher has contracted COVID 19 from a student. Zero cases. Anywhere on planet earth.[1] This lawsuit seeks to protect children from an irrational policy that proposes to protect them, but has the effect of actually harming children[2]. The irrational policy[3] proposed by the Indian River County School Board

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[1] Schools have been open in Florida and across the United States for months. So far, schools do not seem to be stoking community transmission of the coronavirus, according to data emerging from random testing in the United States and Britain. Elementary schools especially seem to seed remarkably few infections. "The more and more data that I see, the more comfortable I am that children are not, in fact, driving transmission, especially in school settings," said Brooke Nichols, an infectious disease modeler at the Boston University School of Public Health. Britain and the Netherlands have kept schools open with few restrictions on class sizes or requirements for mask-wearing. Yet they, too, have shown limited transmission among younger children or from children to their parents, Dr. Nichols noted. "We see a similar pattern in places where they're doing nothing at schools, so I find that fascinating," she said. The data from Britain suggests, however, that clusters even among older children may not always lead to infections at home. Random testing in schools there showed sharp increases in infections among children older than 11, but the spikes did not seem to translate to a rise in adult cases. "Schoolchildren Seem Unlikely to Fuel Coronavirus Surges, Scientists Say", New York Times, October 24, 2020.

[2] As of 15 September 2020, and according to the American Academy of Pediatrics, the following statistics concerning COVID 19 are published: Out of a children population of 77.9 million, the overall rate of COVID 19 in children is 661 cases per 100,000 children in the population. To date, there has been only 4 deaths involving Children in the State of Florida. Nationally, influenza in children has killed over twice as many as COVID 19. 166 children under 14 have died from Influenza this year, (as compared to 188 the year before throughout the United States).

[3] The assumption of policies requiring the wearing of face masks is that doing so will arrest the spread of COVID 19 and protect individuals. These assumptions appear to be false in light of the increasing evidence that facemasks do not work. On October 23, 2020, the United States experienced the highest number of positive tests for COVID 19 at

(hereinafter referred to as "IRCSB"), is a hidden effort to impose a heavy burden on students and parents alike for exercising their fundamental rights afforded to them under the Florida Constitution, thereby making it virtually impossible to enjoy those rights.

2. The IRCSB has placed parents in a position to subject their children to real harm totally unrelated to COVID 19, both physical and psychological, if they choose to send them to school, as would be their right to do so under the Florida Constitution. The policy of mandatory face mask wear for students of tender years leaves parents with little choice: subject their children to a policy that is not in the best interest of the child, or to be compelled to home school their children in a manner that is both separate and unequal, and also results in additional harms unrelated to COVID 19. Most parents cannot make such a choice, given their own work requirements. This "Sophie Choice" is being foisted upon the citizens of Indian River County in an irrational way, in violation of the Florida Constitution.

3. Because a fundamental constitutional right is impacted, the IRCSB policy is not narrowly tailored to meet any compelling interest, and fails normal constitutional scrutiny. The Florida Constitution requires the state to offer its citizens a free public education for its children. In addition, such educational opportunities must be "uniform". As such, any regulation that would interfere with the delivery of the fundamental right to a free and uniform public education must be based on a compelling interest, be narrowly tailored to meet that interest, and pass strict judicial scrutiny. A free public education is a fundamental right, protected by the Florida Constitution, and any such policy that interferes with this right must survive the highest judicial scrutiny.

85,085. The increase in the number of COVID 19 positives has come in spite of increase use of facemask across the entire United States. In comparison, the average number of positive cases of COVD 19 in the month of June, during a period of time with increase testing, is less than 1/3 this number. As more evidence accumulates contradicting these assumptions, it calls into question every rational behind polices that require the use of facemasks.

4. However, the IRCSB has instituted a policy of required face mask wear for students in order to attend school that serves no compelling, let alone, rational purpose when analyzed through the prism of the actual science with respect to COVID 19 and in comparison, to the potential harm to students that will be incurred if this policy of required long term face mask wear is implemented. In fact, it is a policy instituted not based on reliable data or science, but on irrational fear and the politics of the day. Such policy is not in a minor child's best interest, but actually serves to harm a child's well-being.

5. The IRCSB contemplates requiring children, as young as five (5) years of age, to wear face masks, up to 7 hours a day, five days a week, in spite of little to no scientific evidence to support that these same individuals are susceptible of spreading the COVID 19 pandemic.[4]

6. Further, the imposition of face mask wearing for minor children does not serve a rational purpose because the policy does not, and cannot, meet the policy objectives proposed by this policy (e.g. to stop the spread of COVID 19).[5] One need only to look to the 57 nations that comprise the European Union to see that this policy is utterly irrational where schools are open and in session, and without any requirements to wear a face mask as are being proposed by the IRCSB.[6]

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[4] A study by the Netherlands' National Institute for Health (RIVM) published on Wednesday, July 15, 2020, concluded that children under the age of 12 play little role in transmitting the new coronavirus. The study in the country's leading medical journal Nederlands Tijdschrift Voor Geneeskunde followed the progress of the disease in 54 families, including 227 people in all. Studies in other countries have previously found that children are less often infected by the virus and, once infected, less often become seriously ill.

[5] Arnaud Fontanet, an epidemiologist at the Pasteur Institute, and his colleagues started an investigation in Crépy-en-Valois in late March to see whether they could piece together the virus' reach in the town and its schools. In six elementary schools, they found a total of three children who had caught the virus, likely from family members, and then attended school while infected. But, as far as the researchers could tell, those younger children didn't pass the virus on to any close contacts. "It's still a bit speculative," says Fontanet, who shared results from the high school on 23 April and from the elementary schools on 29 June, both on the preprint server medRxiv. Children younger than 11 or 12, on the other hand, "probably don't transmit very well. They are close to each other in schools, but that is not enough" to fuel spread.

[6] In some schools in Germany, students wear them in hallways or bathrooms, but can remove them when seated at their (distantly spaced) desks. Austria reopened with this approach, but abandoned masks for students a few weeks later,

7. In short, contrary to the Florida Education Unions position, it is not the adults in the room that need protection from the children, rather, it is the children that need protection from the adults, who should be the one's wearing the masks that protect people from a source carrier.[7] To that end, the face masks that are to be worn under this policy offer little to no protection for students, and risk harm in other ways to these students.[8] That is the definition of a policy that fails a rational basis test, let alone strict scrutiny.

8. In addition, when a policy is instituted that requires minors to wear masks, as is being done here, it meets the definition of a medical device.[9] Such wearing of a device interferes with the parents right to choose the medical decisions and treatments for their minor children. In short, the IRCSB does not have the legal authority to order a medical device be worn, over a long period of

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when officials observed little spread within schools. In Canada, Denmark, Norway, the United Kingdom, and Sweden, mask wearing was optional for both students and staff.

[7] The CDC reports as of 8 August 2020, that "[m]ost reported cases of coronavirus disease 2019 (COVID-19) in children aged <18 years appear to be asymptomatic or mild." Since March 1, 2020, COVID-NET has identified 576 pediatric COVID-19–associated hospitalizations. 42 percent of that number had one or more underlying conditions. The total deaths for children <18 for COVID 19 are approximately 78.

[8] Centers for Disease Control and Prevention (CDC) guidance states that standard N95 respirators reduce the wearer's exposure by filtering out around 95 percent of air particles, while those with exhalation valves allow "unfiltered exhaled air to escape into the sterile field." Dr. Matthew L. Springer, a cardiologist at the University of California, San Francisco, told the San Francisco Chronicle that masks with these values are "practically useless." "Given that most of the value of these masks is not to protect the wearer but to protect others from a potentially contagious asymptomatic wearer, those one-way valves make the masks practically useless for protecting others," he said. "So all those potentially contagious people are spewing unfettered large respiratory droplets, probably even in a concentrated stream going through the valves."

In addition, most masks only protect as a form of source control. Masks may be more effective as a "source control" because they can prevent larger expelled droplets from evaporating into smaller droplets that can travel farther. Because minors are far less likely to contract COVID 19, and are less likely to spread the virus to others, masks as a form of "source" control loess their efficacy with respect to minor children.

[9] According to the United States Food and Drug Agency, a face mask is a device, with or without a face shield, that covers the user's nose and mouth and may or may not meet fluid barrier or filtration efficiency levels. It includes cloth face coverings as a subset. It may be for single or multiple uses, and if for multiple uses it may be laundered or cleaned. There are many products marketed in the United States as "face masks" that offer a range of protection against potential health hazards. Face masks are regulated by FDA when they meet the definition of a "device" under section 201(h) of the Act. Generally, face masks fall within this definition when they are intended for a medical purpose. Face masks are regulated under 21 CFR 878.4040 as Class I 510(k)-exempt devices (non-surgical masks).

time, five days a week, for the privilege of enjoying a free public education, as defined by the Florida Constitution. Such medical devices do not meet the pre-conditions of requiring certain inoculations to attend school, nor are they a proper definition of school clothing that schools may regulate.

9. At its heart, therefore, this case seeks to protect and vindicate fundamental liberties that citizens of the United States enjoy free from government interference. In the instant case, Plaintiffs' are Florida and Indian River County citizens and parents of young children whose liberties protected by both the Florida and United States Constitutions have been denied through the arbitrary application of a Face mask rule for their children issued under a declared State of Emergency.

10. The liberties protected by the Constitution are not conferred or granted by government to then be rescinded at the will and whims of government officials. These God-given liberties are possessed by the people, and they are guaranteed against government interference by the United States and Florida Constitution, which are the supreme law of the land.

11. Any government that has made the grave decision to suspend the liberties of a free people during a health emergency should welcome the opportunity to demonstrate-both to its citizens and to the courts-that its chosen measures are absolutely necessary to combat a threat of overwhelming severity.

12. The government should also be expected to demonstrate that less restrictive measures cannot adequately address the threat. Whether it is strict scrutiny or some other rigorous form of review, courts must identify and apply a legal standard by which to judge the constitutional validity of the government's anti-virus actions.

13. Governments wield the highest state power when confronting a health crisis. But ample police powers to administer health, safety, and welfare matters do not obviate state and local officials' grave duty to safeguard civil liberties. The "Flatten the Curve" campaign to avoid hospital

overload was within state powers as a legitimate and attainable regime.

14. Good intentions toward a laudable end are not alone enough to uphold governmental action against a constitutional challenge. Indeed, the greatest threats to our system of constitutional liberties may arise when the ends are laudable, and the intent is good-especially in a time of emergency. In an emergency, even a vigilant public may let down its guard over its constitutional liberties only to find that liberties, once relinquished, are hard to recoup and that restrictions-while expedient in the face of an emergency situation-may persist long after immediate danger has passed. Thus, in reviewing emergency measures, the job of courts is made more difficult by the delicate balancing that they must undertake.

15. However, any legitimate action that infringes upon civil liberties must closely target the root of crisis. Executive orders by the School Board, that interfere with a child's right to a free public education, must be clearly defined, narrowly tailored, attain a compelling interest, and not violate equal protection under Florida Law. None of these elements are met in this case.

II. A SUMMARY OF THE REASONS FOR EMERGENCY AND EXTRAORDINARY RELIEF

16. The Florida Constitution holds at Article IX the following:

> a) The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

17. As is patently clear, the continued closures of school's risk "scarring the life chances of a generation of young people," as stated by an open letter published last month and signed by more than 1500 members of the United Kingdom's Royal College of Pediatrics and Child Health. The

alternative being offered to forcing a child of tender years to wear a mask five days a week, 7 hours a day, is home schooling.

18 Virtual education is often a pale shadow of the real thing and left many parents juggling jobs and childcare. In short, a virtual education is inconsistent with the Florida Constitution. Lower-income children who depend on school meals will go hungry. And yet, the policy of the IRCSB compels parents to choose between sending their minor children to school in a manner that is not in their best interest, versus having to go through virtual education that is insufficient. Such virtual education expects a child of tender years to sit in front of a computer screen for 6 hours a day, monitored by their parent. What working parent is capable of doing that, and what child will sit still in front a computer screen hour after hour, day after day. There are innumerable studies that show that extended screen time as proposed by IRCSB is ultimately harmful to the child and is not in a child best interest.

19. Early data from a landmark National Institutes of Health (NIH) study that began in 2018 indicates that children who spent more than two hours a day on screen-time activities scored lower on language and thinking tests, and some children with more than seven hours a day of screen time experienced thinning of the brain's cortex, the area of the brain related to critical thinking and reasoning.

20. But this is exactly what the IRCSB is proposing to do to students who refuse to comply with the Board's mask rule. Such screen time is not only unhealthy and bad for a child's eye's[10],

[10] A new study appearing in Ophthalmology, the journal of the American Academy of Ophthalmology, offers further evidence that at least part of the worldwide increase in nearsightedness has to do with near work activities; not just screens but also traditional books. And, that spending time outdoors—especially in early childhood—can slow the progression of nearsightedness.

brain development,[11] and has a deleterious effect on a child's mental and physical growth.[12] Expecting a child to wear a mask 7 hours a day, or sit in front a computer for an equal period of time, requiring a parent to monitor the child at the expense of their own jobs, is a Hobbesian choice[13] indeed.

21. From the studies listed above we can determine the following without any dispute:

- Children appear significantly less likely to acquire COVID-19 than adults when exposed;
- There is reasonable evidence that there are significantly fewer children infected in the community than adults;
- Children are rarely the index case in a household cluster in the literature to date; and
- It is not clear how likely an infected child is to pass on the infection compared to an infected adult, but there is no evidence that they are any more infectious.

The most parsimonious explanation for all the above seems to be that children are less susceptible to becoming infected, therefore fewer of them have become infected, and children have therefore

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[11] A new study from Cincinnati Children's Hospital Medical Center published in JAMA Pediatrics showed concerning evidence that brain structure may be altered in kids with more screen use. Researchers looked at brain MRIs in 47 preschoolers and found that screen time over the AAP's recommendations was associated with differences in brain structure in areas related to language and literacy development.

According to David Anderson, Ph.D., a clinical psychologist and senior director of National Programs and Outreach at the Child Mind Institute, it's especially important "to be very cautious when using screens with young kids, as this study highlights, as young kids are in a critical developmental period." At this stage, children "require face-to-face interaction," said Anderson to reach developmental milestones including building language and social skills. During this time they also develop empathy, the ability to understand emotion, and "build stamina to navigate personal situations," he said.

[12] Dr. Jennifer F. Cross, attending pediatrician and a developmental and behavioral pediatrics expert at NewYork-Presbyterian Komansky Children's Hospital. "If young children spend most of their time engaging with an iPad, smartphone, or the television, all of which are highly entertaining, it can be hard to get them engaged in non-electronic activities, such as playing with toys to foster imagination and creativity, exploring outdoors, and playing with other children to develop appropriate social skills. Interacting almost exclusively with screens would be like working out only your arm muscles and nothing else. You would have really strong arm muscles, but at the expense of overall fitness."

[13] A Hobson's choice is a free choice in which only one thing is offered. Because a person may refuse to accept what is offered, the two options are taking it or taking nothing. In other words, one may "take it or leave it".

infrequently brought the infection into their homes.

21. FIRST: It is a violation of the Florida Constitution to fail to offer children a free public education. Imposing a requirement to receive that education that serves no rational basis violates this requirement.

22. SECOND: In addition, offering as an alternative a virtual education regimen that forces a parent to stay with the minor is an inadequate alternative that violates Article IX of the Florida Constitution. A virtual classroom is not the classroom, and children subject to a virtual education are receiving a separate and unequal education. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

23. THIRD: In addition, requiring students to wear face masks as a medical device, interferes with a parent right to determine medical treatments for their child. Parents have a legal right to make treatment decisions on behalf of their young children. Such rights are normally rebuttable: they can be set aside by courts where parents' decisions pose a significant risk to the life or well-being of the child. However, in all cases, such arrangements create a presumption in favor of parental rights in the absence of an existing and existential threat to the life of child. In all cases involving these judgments with regards to medical treatment of children, family autonomy is not absolute, but may only be limited where it appears that parental decisions will jeopardize the health or safety of a child through the exercise of a specific court order based on a specified determination involving a specific minor that such evidence exists. Given the facts as presented by science that COVID 19 presents a far reduced risk to the health of minors then, for example, the flu, it calls into the question the rational and authority that the IRCSB has to interfere with parental authority in these matters.

24. FOURTH: The IRCSB policy also violates numerous other provisions within the Florida Constitution. Chief among those rights and liberties are those found in Article 1 of the Florida Constitution.[14] The IRCSB policy as applied violated equal protection as found within the Florida Constitution, Article I, § 2, due process under § 9, and the right of privacy under § 23.

25. FIFTH: The Indian River County School board policy enacted on 18 August 2020 to empower the Superintendent of Schools to provide for "procedures or guidelines" for face mask wear technically violates the Florida Sunshine Act Article I, § 24(B) of the Florida Constitution. The Superintendents face mask guidelines, enacted under this specific authority, were apparently done so without proper prior notice and public comment. The Florida Sunshine Act does not envision ratification of procedures that impact Fundamental rights "prospectively" but rather after such procedures and guidelines are properly noticed to the public, and the pubic given their right to comment on the same, and thereafter ratified. In this regard, the present Indian River County School Board's face mask policy violates the tenants of the Florida Sunshine Act.

III. STANDARD OF REVIEW

26. It is of vital importance that this court understands and gets correct the standard of review.

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[14] Article 1, Sections 2, 9, 21 and 23 the Florida Constitution provides, in pertinent part:

a. SECTION 2. Basic rights. —All-natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

b. SECTION 9. Due process. —No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

c. SECTION 21. Access to courts. —The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

d. SECTION 23. Right of privacy. —Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

This is not a face mask lawsuit asserting some silly right to shop at Publix without a face mask, nor does this complaint suggest that a local county commissions lack the requisite legal authority to require citizens at large to don a mask while in public. Clearly, State and County governmental entities possess the proper legal authority to require such during a declared state of emergency involving a highly contagious pandemic based on a rational basis level of review. However, that is not the case here. This is a case about who has the proper authority under the Florida Constitution to make these determinations in the best interest of children; the parents or the school board. Plaintiffs' assert that the correct Standard of Review for Plaintiffs' Claim is Strict Scrutiny of the child's fundamental right to an education, and that any regulation that interferes with that right must be based on a compelling interest that is narrowly tailored to meet that interest. *See Debra P. v. Turlington,* 644 F.2d 297 (11th Cir 1976).[15] As will be pointed out below, the citizens of the State of Florida and the State Legislature have made it eminently clear that education of Florida residents is a **fundamental** right.

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[15] Most of the major cases in Florida dealing with education concern school funding and do not directly address the issue of the standard of review as put forth in the instant case.

In 1981, in *Department of Education v. School Board of Collier County*, the Florida Supreme Court found that the Legislature may distribute funds unequally on the basis of public-school students' educational need.

In 1996, the Florida Supreme Court dismissed *Coalition for Adequacy and Fairness in School Funding v. Chiles*, 680 So. 2d 400 (1996), a case in which plaintiffs alleged that the State was violating the then-current education article in the State constitution. In 1998, after this ruling, the voters approved the current, stronger education article.

In 2006, the Florida Supreme Court, in *Bush v. Holmes*, 919 So. 2d at 397 found a voucher law unconstitutional because it caused the State to foster plural, non-uniform systems of education in violation of the constitutional mandate for a uniform system of free public schools.

The Court found that the "efficient, safe, secure, and high quality" language provides constitutional standards to measure the adequacy provision found in the second sentence of section 1. The Court also concluded that the constitution imposes "a maximum duty on the state to provide for public education that is uniform and of high quality."

In 2009, separate plaintiffs filed *Citizens for Strong Schools (CSS) v. Florida State Bd. of Educ.*, SC18-67 (Fla. 2019), claiming that the State's education funding system violated the constitution's education article. It was not until 2019 that the Florida Supreme Court dismissed the case holding that the Petitioners' failed to present the courts with any roadmap by which to avoid intruding into the powers of the other branches of government.

27. For this court to apply strict scrutiny, the school board must have passed a regulation that infringes upon a fundamental right. As will be explained below, these matters, in addition to other elements, all exist in a multiple way as shown in Plaintiffs' complaint. In short however is that in Florida, education for minors under 16 is a fundamental right to all residents.

28. Currently, the state constitution obligates the state to provide for "a *uniform*, efficient, safe, secure, and high-quality system of free public schools that allows students to obtain a high-quality education." Art. IX, § 1(a), Fla. Const. This is no passing fad or aspirational platitude. Rather, the constitution indicates that "It is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders."

29. In 1998, the citizens of the State of Florida amended the State Constitution concerning the rights of Florida's children to receive a free public education. The 1998 amendment was a response to a 1996 school funding case, *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (1996), in which the Florida Supreme Court ruled that the plaintiffs' failed to present an appropriate standard for determining "adequacy" under the existing education Article.

30. In response to the *Coalition* ruling, Florida voters amended the state constitution in 1998 to provide standards for adequacy, namely by requiring that the school system be "efficient, safe, secure and high quality." The amendment also emphasized that education was a **"fundamental value"** and reinstated the notion that education was a "paramount duty" – language that had been deleted from the constitution in 1885.

31. Education, under the current standard of Article IX, is the only substantive government function that has its own constitutional article. Other articles deal with branches of government, or certain government fundamentals such as taxation or elections. Arguably, education is the most important function of state governments under our federal system.

32. As the Supreme Court has noted, Florida's constitution once contained a very strong educational mandate. The Constitution of 1868 provided that "[i]t is the paramount duty of the State to make ample provision for the education of all children residing within its borders, without distinction or preference."[16] The constitutional revision passed by the voters in 1998 re-adopted this language.

33. Accordingly, Florida's current education clause includes the strongest language in the country. The education clause states that "education of children is a fundamental value of the people" and requires adequate provision to be made by law for a "uniform, efficient, safe, secure and high-quality system of free public schools." It is strong because it recognizes children's right to education and mandates that it is a "paramount duty of the state" to provide for high-quality education.

34. When the members of the 1998 Constitution Revision Commission (CRC) held public hearings across Florida in their year-long tour, the issue of education was salient. At that time, Florida's educational achievement levels were among the worst in the country. One of the recommendations of the 1998 CRC was an amendment to the education clause of the constitution. The CRC's recommended amendment was put directly on the ballot, and it passed with 71 percent of the votes. It led to Florida's constitutional education clause becoming the strongest in the country.

35. Following the amendment, a comprehensive set of legislative policies were adopted in June of 1999. To meet the state's constitutional duty to provide all children the opportunity to obtain a high-quality education, the state of Florida enacted the "School Readiness Act" to prepare at-risk children for school. It established an "Opportunity Scholarship Program", which would allow students from failing schools to attend a public school that is performing satisfactorily or to attend an

[16] Fla. Const. art. VIII, §1 (1868).

eligible private school. To ensure improvements in quality of teaching across public schools, the state raised standards for certifying professional educators, established a statewide system for in-service professional development, and increased accountability for postsecondary programs that prepare future educators.

35. To ensure continuous and improved learning, the Legislature added requirements for public schools to monitor attendance, to reach out to families whose children display a pattern of nonattendance, and to find appropriate remedies to enforce school attendance. In addition to amending Section 1, other sections of the education clause in Florida's constitution were amended in 1998 to authorize the reorganization of Florida's education system. The objective was to centralize the structure of governance in order to align responsibility with accountability for academic success and funding efficiency. It required a new state board of education consisting of seven members appointed by the governor (subject to confirmation by the Senate), and it required that the State Board of Education appoint the Commissioner of Education. These changes were codified in 2000 as the Florida Education Governance Reorganization Act of 2000.

36. The Florida Board of Education was granted the authority for education from pre-kindergarten through graduate school education (K-20), and it took over responsibilities from numerous commissions and boards that were eliminated. In 2002, the citizens of Florida initiated two more constitutional amendments with the objective of introducing specific prescriptions in the constitution to ensure that the goal of "high-quality" education is met. The first proposal required the legislature to restrict the number of students in a classroom and for the legislature to provide the funds to do so. It passed with 52.4 percent of the votes. The second citizen-initiated proposed amendment in 2002 required the establishment of free voluntary universal pre-kindergarten that would ensure a high-quality learning opportunity for every four-year-old child in Florida. It passed with 59.2 percent

of the votes.

37. A recent decision within the week from the Federal District Court for the Western District of Pennsylvania is dispositive on the issue of the level of review. In *County of Butler v. Thomas Wolf,* Civil Action No. 2:20-cv-677 (W.D. Penn September 13, 2020), the District Court held that certain executive orders issued by the Governor of Pennsylvania were unconstitutional by applying higher levels of scrutiny. (Exhibit 1). Instructive was the Court's specific rejection of *Jacobson* v. *Massachusetts,* 197 U.S. 11, 31 (1905), and a rational basis level of review. In holding that "[o]rdinary constitutional scrutiny will be applied", the court stated:

> While respecting the immediate role of the political branches to address emergent situations, the judiciary cannot be overly deferential to their decisions. To do so risks subordinating the guarantees of the Constitution, guarantees which are the patrimony of every citizen, to the immediate need for an expedient solution. This is especially the case where, as here, measures directly impacting citizens are taken outside the normal legislative or administrative process by Res alone. There is no question that our founders abhorred the concept of one-person rule. They decried government by fiat. Absent a robust system of checks and balances, the guarantees of liberty set forth in the Constitution are just ink on parchment. There is no question that a global pandemic poses serious challenges for governments and for all Americans. But the response to a pandemic (or any emergency) cannot be permitted to undermine our system of constitutional liberties or the system of checks and balances protecting those liberties. Here, Defendants are statutorily permitted to act with little, if any, meaningful input from the legislature. For the judiciary to apply an overly deferential standard would remove the only meaningful check on the exercise of power.
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> Id. at page 20-21.

38. What should be obvious is that the intent of the citizens of the State of Florida, as express through numerous pieces of separate legislation, and as specifically expressed in the Florida Constitution, is that the education of Florida residents, and most specifically her children, is a fundamental right. Notwithstanding those cases dealing with funding schemes of local schools which implicate separation of powers doctrine, what is being dealt with in the instant case is a **regulatory** scheme that places a burden on children in order to exercise their fundamental right to an education.

Such a scheme must be narrowly tailored, and pass strict judicial scrutiny, in order to be sustained.

39. Because a specific constitutional right is being violated by the IRCSB, the standard of review is Strict Scrutiny. The IRCSB face mask policy must have a compelling interest, and be narrowly tailored. For the aforementioned reasons state *infra*, the IRCSB fails even a rational basis test.

IV. JURISDICTION AND VENUE

40. The Plaintiffs' in this action are a number of individuals who reside in Indian River County who have minor children who attended Indian River County Public Schools who are impacted by the order of the IRCSB, and whose civil liberties and constitutional rights are being violated.

41. This is an action for declaratory and injunctive relief, that also seeks a restraining order (TRO), and this action is related to the separate actions specified herein.

42. This in an action challenging the constitutionality of the face mask policy instituted against the Plaintiffs' by the IRCSB.

43. This is an action for temporary and permanent injunctive relief and for a declaratory judgment and related relief. The jurisdiction of this Court is invoked pursuant to Chapter 86 et.seq. Florida Statutes, which authorizes circuit courts to enter declaratory judgments related to controversies within the jurisdiction of the circuit court. The jurisdiction of this Court is also invoked pursuant to Rule 1.610, Fla.R.Civ.Pro., Chapter 26.012(3), Florida Statutes, which authorizes the circuit courts to enter injunctions, and the inherent power of Florida courts to grant injunctive and declaratory relief.

44. The jurisdiction of this Court is also invoked pursuant to Article I, § 2, 9, 21, and 23, and Article IX, of the Constitution of the State of Florida. The jurisdiction of this Court is also invoked pursuant to *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996), abrogated on other grounds *Steel*

Co. v. Citizens for Better Env., 523 U.S. 82 (1998) (noting that government may impose a curfew during times of emergency but they must be imposed in good faith, have a factual basis, and be necessary to maintain order) and *SW v. State*, 431 So. 2d 339 (2DCA 1983), "Government has a legitimate right to enact laws for the protection of minors, but such laws must reasonably relate to their purpose without unduly limiting individual freedoms."

45 An actual and existing controversy exists between Plaintiffs' and Defendant Indian River County School Board relative to their respective rights and duties as set forth herein.

46. Venue is proper in Indian River County, because Indian River County is the County where the Plaintiffs' and Defendants' are located, and where relief is sought from the enforcement of the unconstitutional threat to personal and property rights brought about through enforcement of the challenged order.

V. PARTIES AND PLAINTIFFS' STATEMENT OF JURISDICTIONAL ALLEGATIONS ESTABLISHING STANDING, RIPENESS AND A RIGHT TO RELIEF

47. Plaintiff Jennifer Pippin and the minor's father reside in Indian River County and have one minor child enrolled in Indian River County Schools. S.J.P. attends high school in Indian River County. Plaintiff contends that their minor child should be permitted to attend a brick and mortar school, without being compelled to wear a face mask. As parents, they feel they have the right to decide how to raise their child, and have their child's best interests in mind. Plaintiff contends that wearing a face mask is not in the best interest of her child.

48. Plaintiff Alexandra Nobregas resides in Indian River County and has one minor child enrolled in Indian River County Schools. V.N. attends elementary school in Indian River County. The Plaintiff contends that her minor child should be permitted to attend a brick and mortar school, without being compelled to wear a face mask. The Plaintiff believes that wearing masks is

detrimental to her child's emotional and psychological trauma and that a mask provides no protection. In short, the wearing of a face mask for her minor child is causing and has caused more harm to her, both physically and psychologically, and Plaintiff believes that her child should be able to attend school without being compelled to wear a face mask. Plaintiff believes that she has her child's best interest in mind, and knows better than the school board what is best for her child.

49. Plaintiff Nichole Campanelli resides in Indian River County and has one minor child enrolled in Indian River County Schools. V.T. attends elementary school in Indian River County. The Plaintiff contends that her minor child should be permitted to attend a brick and mortar school, without being compelled to wear a face mask. The Plaintiff believes that wearing masks is detrimental to her child's health and that a mask provides no protection. In short, the wearing of a face mask for her minor child causes more harm to him, both physically and psychologically, then a face mask would help. Plaintiff believes that she has her child's best interest in mind, and knows better than the school board what is best for her child.

50. Plaintiff Sandy Campiglia resides in Indian River County and has one minor child enrolled in Indian River County Schools. C.J.C. attends elementary school in Indian River County. The Plaintiffs' contend that her minor child should be permitted to attend a brick and mortar school, without being compelled to wear a face mask. The Plaintiff values her child's health and believes that wearing masks represents a threat to her minor children's physical health and emotional wellbeing. Plaintiff's child has already suffered dental injuries as a direct result to having been compelled to don a face mask pursuant to the IRCSB face mask policy. Plaintiff does not want her child to be compelled to wear mask in school because she feels that wearing a mask provide will not provide proper protection. Additionally, she feels strongly that wearing a mask is harmful to her child's health, and will not allow him to be a productive student.

51. At all times material hereto, Defendant INDIAN RIVER COUNTY SCHOOL BOARD, FLORIDA, was and is a political subdivision of the State of Florida. Naming INDIAN RIVER COUNTY SCHOOL BOARD, FLORIDA, as a Defendant in this action is intended to include all INDIAN RIVER COUNTY PUBLIC SCHOOLS, FLORIDA representatives, employees, and agents, including but not limited to, the Indian River County School Superintendent and the School Board, all public and public charter schools, and all employees and agents under whose authority to enact and enforce these policies and regulations is duly governed and limited by, *inter alia*, Sec.286, et.seq., Florida Statutes (Florida "Sunshine" law) and Article I, Section 24, Florida Constitution, as well as the defined authorization to carry out county government responsibilities under Chapter 125, Florida Statutes, duly governed, limited and enumerated by, *inter alia* Sec.125.01, Sec. 125.011, Sec. 125.66 and Sec. 286, et.seq. of the Florida Statutes (Florida Constitution, effective July 1, 1993).

52. Plaintiffs' assert that their position, as set forth in this Complaint, is legally sound and supported by fact and law (see enclosure 1).

53. The Defendants' threatened actions in the form of a face mask order for minor children to enjoy a right protected by the Florida Constitution and one which interferes with other rights and privileges as is shown in this complaint created a bona fide controversy between the parties, and Plaintiffs' are in doubt as to their rights, privileges and immunities with respect to the IRCSB face mask order. Plaintiffs' require, therefore, a declaratory judgment determining their rights, privileges and immunities, and relief from unconstitutional and illegally imposed face mask order of the IRCSB

54. There is a clear, present, actual, substantial and bona fide justifiable controversy between the parties. All conditions precedent to the institution and maintenance of this cause of action have occurred or have been performed.

55. The acts, practices and jurisdiction of the Defendant, IRCSB, as set forth herein, were

and are being performed under color of state law and therefore constitute state action within the meaning of that concept.

56. Plaintiffs are and will be threatened with adverse treatment and a denial of due process and their civil rights, and compelled to receive separate and unequal education in violation of the Florida Constitution, on the basis of the face mask order of the IRCSB that is hopelessly vague. In addition, Plaintiffs rights to determine how medical services are delivered to their children are interfered with in violation of the Florida Constitution. Further, the IRCSB face mask order treats individuals differently based on no recognizable status., thereby violating the Equal Protection Doctrine as found under the Florida Constitution. Additionally, although the School Board initial vote complied with the Florida Sunshine Act, how the face mask order was implemented is in violation of the Act.

57. Plaintiffs have no adequate remedy at law. No amount of money damages could adequately compensate the Plaintiffs for the irreparable harm described herein, specifically the deprivation of constitutionally protected fundamental rights.

58. Plaintiffs and the public at large will suffer irreparable injury if injunctive relief is not granted, and Defendants' are permitted to enforce the provisions of the IRCSB face mask order.

59. The public interest would best be served by the granting of injunctive relief, and, indeed, the public interest is disserved by permitting the enforcement of invalid face mask order of the IRCSB and the flawed procedures in violation of Florida Statute's that resulted in this flawed and vague order that violates numerous constitutional rights, as set forth herein.

60. The financial and non-financial losses the Plaintiffs have suffered is the direct result of the discriminatory, irrational, and unequal restrictions from the IRCSB face mask order and the overreaching adoption and enforcement of the order's challenged herein.

61. Plaintiffs' and the public at large will suffer irreparable injury if injunctive relief is not granted, and if the Defendant is permitted to enforce the provisions of the offending face mask order.

62. Plaintiffs' have engaged the undersigned to prosecute this action and vindicate their rights under the law and Plaintiffs' would request an award of attorneys' fees.

VI. GENERAL ALLEGATIONS

A. DESCRIPTION OF THE HISTORY LEADING TO THE SUPERINTENDENT REQUIRING THE WEARING OF PROECTIVE FACE COVERINGS

63. In December 2019, a cluster of pneumonia cases, caused by a newly identified β-coronavirus, occurred in Wuhan, China. The World Health Organization (WHO) officially named the disease as coronavirus disease 2019 (COVID-19).

64. On February 29, 2020, the United States reports the first death on American soil.

65. On March 1, 2020 the Governor of the State of Florida issued Executive Order Number 20-51, declaring that a public health emergency exists throughout the State of Florida as a result of the spread of the COVID-19 virus; and

66. On March 9, 2020 the Governor of the State of Florida issued Executive Order Number 20-52, declaring that a state of emergency exists throughout the State of Florida as a result of the spread of the COVID-19 virus and its imminent threat to health and welfare of the citizens of Florida.

67. WHO declared the outbreak a pandemic on March 11, 2020 Two days later, on March 13, 2020, a US national emergency is declared over the novel coronavirus outbreak.

B. A DESCRIPTION OF IRCSB FACE MASK ORDER

68. On Monday, July 7, 2020 an Executive Order was issued by the Governor of Florida indicating that all Florida school districts must offer a 5-day, brick & mortar option as part of their

instructional models during the Fall 2020 reopening of schools. The School Board of Indian River County approved a 37-page policy, with two appendixes and a section of Frequently Asked Questions. This policy specifically addresses the wearing of face masks.:

> The School District of Indian River County is committed to establishing and maintaining physically and psychologically safe learning environments for all students and staff. The creation of structures and processes that support optimal working and learning environments enhances the physical and mental well-being of students and staff and maximizes educational outcomes. Amidst the COVID19 crisis, ensuring student and staff safety has rightfully become central to planning efforts and considerations related to the transition back to school in August 2020. Our district has invested numerous hours and resources in planning for school reopening to ensure that student staff and safety is maintained while offering students and families varied options for receiving instruction. These varied instructional options will serve to accommodate the diverse health, safety, and learning needs present within our community.
>
> The School District of Indian River County has developed a number of specialized preventative health and safety measures to mitigate the risk of spreading COVID-19 in district and school settings. As students and staff return to physical school settings, they will experience some significant modifications to school and work environments. These modifications were made after careful review and consideration of guidelines set forth by the American Academy of Pediatrics and Centers for Disease Control and Prevention, school health officials, local physicians and health professionals, COVID-19 data, district Think Tanks and workgroups, and feedback from members of our school community.

69. The IRCSB face mask policy consisted of the following provisions:

> Face coverings will be required for all staff and students when social distancing is not possible, and during school arrival, dismissal, and transition times. If your child forgets their face covering, they will be provided with a disposable mask.
>
> The following exemptions to the face covering requirements apply: people eating or drinking; people for whom a face covering would cause an impairment due to a health condition (physician's note required); students with an IEP who have related, individualized needs; individuals observing social distancing in accordance with CDC guidelines; individuals who need to communicate with someone who is hearing impaired; and students and staff participating in recess and physical education classes while maintaining social distancing.
> Enforcement.

> Every attempt will be made to educate the student and family on the importance of wearing a face covering to minimize the spread of COVID-19. Schools will work with students and families to identify a more appropriate instructional model if a face covering cannot be worn (with the exception of the exemptions outlined above).

70 There is no scientific evidence to suggest that those students and individuals who qualify for an exception for reasons clearly *unrelated* to Title VII, 42 U.S.C. § 2000d et seq, are immune from contracting COVID 19. Such exceptions, such as eating lunch, instructional delivery or engaging in strenuous activities, would make the general rule of a face mask wear for all others fail even a rational basis test, and would violate the Florida Constitutional requirement of equal protection as found under Article I, § 2.

VII. COMPLAINT

FIRST CLAIM FOR RELIEF

THE FACE MASK ORDER FROM THE SUPERINTENDENT OF THE INDIAN RIVER COUNTY SCHOOL BOARD VIOLATES THE FLORIDA CONSTITUIONAL REQUIREMENT OF PROVIDING A FREE PUBLIC EDUCTION

71. Plaintiff incorporates herein by reference each and every allegation contained in paragraphs 1-70 of this Complaint as though fully set forth herein.

72. The Florida Constitution, Article IX states, in part, that the education of children is a fundamental value of the people of the State of Florida. Because a free public education is guaranteed in the Florida Constitution, any impediments to receiving that education must have a compelling interest and be narrowly tailored to meet that interest. *Grutter v. Bollinger*, 539 U.S. 306 (2003)

73. The Center for Disease Control ("CDC") has made clear that "Schools are an important part of the infrastructure of communities and play a critical role in supporting the whole

child, not just their academic achievement."[17] Nowhere in the guidance provided to local schools by the CDC is any information about compelling students to wear face masks.

74. Children cannot be expected to wear masks of any kind for the duration of a school day. At some point, the mask has to come off; even adult medical professionals take breaks. And anyone who's worked with young children knows they will play with their masks and not even realize they're doing it. It's simply unrealistic to expect otherwise. What occurs is that minor children will touch their face far more often than they would.

75. Parents, and not the school board, are in the best position to determine whether or not their minor children are capable of wearing face covering, and if they have the ability to do so for up to 7 hours a day, five days a week.

76. Because many parents strongly object to their minor children wearing face masks for extended periods of time, every day of the school year, children are being forced to dis-enroll from public school in favor of distance learning. Distance learning does not provide the same level of education as that receiving classroom instruction.

77. The face mask policy is irrational because it does not protect students. To contrary, all evidence suggests that children are less susceptible to catching COVID 19, or spreading it, and on the rare occasions that they contract COVID 19, received the virus from adults, rather than spreading COVID 19 to one another or to other adults.[18]

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[17] Preparing K-12 School Administrators for a Safe Return to School in Fall 2020. Guidance from the CDC to school Districts.

[18] How easily children catch the disease? On this front, we have five studies (three published and two pre-print) to help inform us. These studies all look more-or-less at the same thing, which is contact tracing. From cases that have been confirmed positive (an index case), they trace back all the people who that case has been in contact with over the recent past and test all of them for COVID-19 to see how many of them caught the illness from exposure to that index case. The proportion of people who have had contact that subsequently became infected is referred to as the Attack Rate (AR). Broadly speaking contacts can be split into two groups: household and non-household (this is important as obviously you are much more likely to transmit to someone in your house). We can also split them up according to age, and see if there is any difference in the number of children who catch the illness compared to adults.

78. The evidence in fact points out that minor children rarely contract COVID 19.[19] On those occasions when a minor contracts COVID 19, the symptoms are often relatively minor, and rarely if ever led to death.[20] In point of fact, the science indicates that the Flu is up to three (3) times

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A study from Shenzhen in China was the first to be released in pre-print in March and is now published in the Lancet ID. This study assessed 1286 contacts of 391 initial cases and showed children had a similar attack rate to the population average (7.4% vs 7.9%), but interestingly were much less likely to be symptomatic. This finding caused a lot of concern, but more data has emerged since.

A pre-print study from Japan was released shortly after. They examined 2496 contacts of 313 domestically acquired cases and found a much lower attack rate in children (7.2% males, 3.8% females) compared to adults (22% in people aged 50 -59 years).

Another pre-print study from Guangzhou in China examined 2017 close contacts of 212 confirmed cases. The overall attack rate was 12.6%, however, the attack rate in children was 5.3%. They calculated an odds ratio of acquiring infection in children of 0.27 (0.13 – 0.55) compared to adults >60 years of age.

A study published in Clinical Infectious Diseases assessed household contacts in particular. They assessed 392 contacts of 105 index cases in Wuhan, China (they had more stringent eligibility criteria to ensure they had correctly identified the index case in the household i.e. the person who brought the infection in). Of the 100 contacts under 18 years of age, only four became infected. This was compared to an attack rate of 21.9% among adult household contacts (making an overall attack rate of 16%).

A further study published in Science included some far-reaching assessments of transmission, but for our purposes, we will look at their findings regarding secondary attack rates in children. This was a contact tracing study from the Hunan CDC in China. They assessed 114 clusters (some clusters had more than one index case) and 7375 contacts. A regression analysis to adjust for other factors that influence AR (the type of transmission, travel history, etc) to determine the odds of becoming infected at different age groups. They found an odds ratio of 0.34 (0.24–0.49) for children under 14 years, compared to the reference group of 15-64 years (consistent across models).

[19] Iceland tested 6% of their entire population and found dramatically lower numbers of cases in children, including 6.7% children under 10 positive in "targeted testing" (symptomatic or high risk due to contacts) compared to 13.7% of those 10 and older, and found 0 children under 10 years positive in population screening (by invitation) compared to 0.8% of those over 10 years.

The Italian principality of Vo tested >85% of their population following their first death from COVID-19, and found no positive cases in children despite 2.6% of the population being positive. This finding was repeated when they tested again two weeks later – despite a number of children living in households with confirmed positive contacts.

Finally, a study in The Netherlands is undertaking community serology testing (looking for antibodies against SARS-CoV-2 as evidence of current or previous infection) and has released preliminary results. They have found 4.2% of adults are positive compared to 2% of those aged <20 years.

[20] On April 6, the C.D.C. published preliminary findings on pediatric coronavirus cases in the United States. According to the report, 2,572 cases occurred in children younger than 18, and those children were significantly less likely to become seriously ill from the virus than American adults were. They also appeared less likely than adults to develop the main coronavirus symptoms like fever, cough or shortness of breath.

more deadly to minor children then COVID 19.[21]

79. Scientists are yet to find a single confirmed case of a teacher catching coronavirus from a pupil anywhere in the world, according to Dr. Mark Woolhouse, an infectious disease epidemiologist at Edinburgh University. Professor Woolhouse, a member of the UK government's scientific advisory group, Sage, said that in hindsight closing schools in March was probably a mistake, but the limited role children play in spreading the virus only became clear further along the infection curve. Dr. Woolhouse is quoted as saying: "One thing we have learnt is that children are certainly, in the five to 15 brackets[22] from school to early years, are minimally involved in the epidemiology of this virus."[23]

80. Such a policy of requiring face masks fails even a rational basis test, and is clearly not in a child best interest when assessed through a factual, rather than fear based, lens. It is simply not rational to believe that an ill-fitting mask, designed for the face of an adult, will be properly worn by young children, 6-7 hours day, five days a week.

81. Even if one wishes to assume that masks likely blunt spread at school, children—even more than adults—find them uncomfortable to wear for hours and may lack the self-discipline to wear them without touching their faces or freeing their noses. Such discomfort overrides any potential public health benefit.

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[21] According to the CDC, as of August 14, 2020, there were 169 Pediatric deaths due to the Flu. There has been a total of 49 deaths of minors under the age of 15 due to COVID 19.

[22] A peer review study published in the journal Nature Medicine found that children and teenagers are only half as likely to get infected with the coronavirus as adults age 20 and older, and they usually don't develop clinical symptoms of covid-19, the disease caused by the virus. The study, is based on a survey of six nations: Canada, China, Italy, Japan, Singapore and South Korea. The researchers developed mathematical models to interpret the demographic patterns of covid-19 cases in those countries. Age-dependent effects in the transmission and control of COVID-19 epidemics Nicholas G. Davies, Petra Klepac, Yang Liu, Kiesha Prem, Mark Jit, CMMID COVID-19 working group & Rosalind M. Eggo Nature Medicine (June 16 2020)

[23] School closures 'a mistake' as no teachers infected in classroom: The Times of London, published 22 July 2020.

82. The policy proposed, without public comment or debate, is not supported by the evidence, the facts, the science, or the law. The evidence is that minor children are less suspectable to catching COVID 19. The facts show that no child has ever passed the virus to a teacher. The science makes clear that adults wearing mask protect children, not the other way around. The law clearly shows that this policy fails a rational basis test, let alone a test based on strict scrutiny, with no compelling interest, and where the policy itself is not narrowly tailored. A narrowly tailored policy would compel all adults to wear face masks. A narrowly tailored test would allow for students' temperatures to be monitored and do what is possible to maintain social distancing in the classroom. A narrowly tailored policy would involve having students wash their hands frequently. An order that compels students to wear a face mask, that is not properly fitted, and which invites the very conduct we would hope to avoid (having hands touching the face) is a recipe for failure.

83. Plaintiffs' have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendant is enjoined from implementing and enforcing the Orders. Pursuant to Section 26.012 (3), F.S., 2019 and to Rule 1.610, Fla.R.Civ.P., Plaintiffs' are entitled to declaratory relief and preliminary, and permanent injunctive relief invalidating and restraining enforcement of the IRCSB face mask order.

84. Plaintiffs' found it necessary to engage the services of private counsel to vindicate their rights under the law and request the award of attorney fees to vindicate their rights.

SECOND CLAIM FOR RELIEF

THE FACE MASK ORDER FROM THE SUPERINTENDENT OF THE INDIAN RIVER COUNTY SCHOOL BOARD CREATES A SYSTEM OF EDUCATION THAT IS BOTH SEPARATE AND UNEQUAL

85. Plaintiff incorporates herein by reference each and every allegation contained in paragraphs 1-70 of this Complaint as though fully set forth herein.

86. Forced mask wear is compelling individual who feel strongly that such requirements are not in the child best interest, as described above, are being forced into a Virtual and e-learning

87. In addition, those students who either refuse to comply or cannot comply with the IRCSB face mask order will be relegated to virtual learning off campus.

88. Such e-learning is inadequate, and provides a separate and unequal education in violation of the Florida Constitution. In addition, to engage in eLearning has a cost to the parents involved. While the IRCSB insists that this type of education will be free, that is not the case. Both Spectrum and Frontier required individuals to pay a fee in order to participate this past spring, and the IRCSB admits that both corporations have made it clear that they will not be providing cost free Wi-Fi and internet.

89. In traditional classrooms, teachers can give students immediate face-to-face feedback. Students who are experiencing problems in the curriculum can resolve them quickly and directly either during the lecture or during the dedicated office hours. Personalized feedback has a positive impact on students, as it makes learning processes easier, richer, and more significant, all the while raising the motivation levels of the students. E-Learning, on the other hand, still tends to struggle with student feedback.

90. The eLearning methods currently practiced in education tend to make participating students undergo contemplation, remoteness and a lack of interaction. As a result, many of the students and teachers who inevitably spend much of their time online can start experiencing signs of social isolation, due to the lack of human communication in their lives. Social isolation coupled with a lack of communication often leads to several mental health issues such as heightened stress, anxiety, and negative thoughts.

91. Lack of self-motivation among students continues to be one of the primary reasons

why students fail to complete online courses. In traditional classrooms, there are numerous factors which constantly push students towards their learning goals. Face-to-face communication with professors, peer-to-peer activities, and strict schedules all work in unison to keep the students from falling off track during their studies. In the setting of an online learning environment, however, there are fewer external factors which push the students to perform well. In many cases, the students are left to fend for themselves during their learning activities, without anyone constantly urging them on towards their learning goals.

92. All educational disciplines are not created equal, and not all study fields can be effectively used in e-learning. For now, at least. eLearning tends to be more suitable for social science and humanities, rather than scientific fields which require a certain degree of hands-on practical experience.

93. Asides from providing what is a separate and unequal education that is a poor substitute for those receiving education that is hands on and in school, one that is not free in any sense of the word, it is also unhealthy to sit a small child in front of a computer screen 6 hours a day.

94. Aside from providing what is a separate and unequal education that is a poor substitute for those receiving education that is hands on and in school, eLearning is an unhealthy alternative. The American Academy of Pediatrics recommends parents place a reasonable limit on media. Elementary school-age children who watch TV or use a computer more than 2 hours per day are more likely to have emotional, social, and attention problems. Those problems include: educational problems, Obesity, Sleep problems and Violence.[24]

95. A new study from Cincinnati Children's Hospital Medical Center published in JAMA

[24] According to the American Academy of Child and Adolescent Psychiatry.

Pediatrics showed concerning evidence that brain structure may be altered in kids with more screen use. According to David Anderson, Ph.D., a clinical psychologist and senior director of National Programs and Outreach at the Child Mind Institute, it's especially important "to be very cautious when using screens with young kids, as this study highlights, as young kids are in a critical developmental period." At this stage, children "require face-to-face interaction," said Dr. Anderson, in order to reach developmental milestones, including building language and social skills.

96. According to Dr. Jennifer F. Cross, attending pediatrician and a developmental and behavioral pediatrics expert at NewYork-Presbyterian Komansky Children's Hospital: "If young children spend most of their time engaging with an iPad, Smartphone, or the television, all of which are highly entertaining, it can be hard to get them engaged in non-electronic activities, such as playing with toys to foster imagination and creativity, exploring outdoors, and playing with other children to develop appropriate social skills. Interacting almost exclusively with screens would be like working out only your arm muscles and nothing else. You would have really strong-arm muscles, but at the expense of overall fitness." (See EXHIBIT 6).

97. The entire point to Count II in Plaintiffs complaint is that **compelled** eLearning violates a student's Fundamental right to a "**uniform**, efficient, safe, secure and **high-quality** system of free public schools." Because eLearning that is imposed on a class of student who cannot, or choose not, to wear a face mask is to provides a separate and unequal education that is neither "safe", "efficient", "uniform" nor of "high quality", such a compelled process violates student's fundamental right. In this regard, the HCSB policy is NOT narrowly tailored to meet a compelling interest.

98. The IRCSB policy concerning face masks results in some parents having to choose between the adverse impacts associated with long term face mask wear, and the deleterious effects of eLearning. This is why the LSCB policy fails to meet the criteria required when interfering with

child's fundamental right to a free education by enacting a policy that is narrowly tailored in order to obtain a compelling interest. Instead, the IRCSB face mask policy creates far more problems then it would ever hope to solve, at the short- and long-term expense to children.

99. Plaintiffs' have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendant is enjoined from implementing and enforcing the Orders. Pursuant to Section 26.012 (3), F.S., 2019 and to Rule 1.610, Fla.R.Civ.P., Plaintiffs' are entitled to declaratory relief and preliminary, and permanent injunctive relief invalidating and restraining enforcement of the IRCSB face mask order.

100. Plaintiffs' found it necessary to engage the services of private counsel to vindicate their rights under the law and request the award of attorney fees to vindicate their rights.

THIRD CLAIM FOR RELEIF

THE FACE MASK ORDER FROM THE SUPERINTENDENT OF THE INDIAN RIVER COUNTY SCHOOL BOARD VIOLATES PARENTAL AUTHORITY TO DETERMINE THEIR MINOR CHILD'S MEDICAL TREATMENT

101. Plaintiff incorporates herein by reference each and every allegation contained in paragraphs 1-70 of this Complaint as though fully set forth herein.

102. The IRCSB policy that requires minors to wear face masks, as is being done here, meets the definition of a medical device.[25] Quoting from the FDA: "Face masks, when they are intended for a medical purpose such as source control (including uses related to COVID-19) and surgical masks are medical devices." Source control is the exact stated purpose of the IRCSB policy.

[25] According to the United States Food and Drug Agency, a face mask is a device, with or without a face shield, that covers the user's nose and mouth and may or may not meet fluid barrier or filtration efficiency levels. It includes cloth face coverings as a subset. It may be for single or multiple uses, and if for multiple uses it may be laundered or cleaned. There are many products marketed in the United States as "facemasks" that offer a range of protection against potential health hazards. Facemasks are regulated by FDA when they meet the definition of a "device" under section 201(h) of the Act. Generally, facemasks fall within this definition when they are intended for a medical purpose. Facemasks are regulated under 21 CFR 878.4040 as Class I 510(k)-exempt devices (non-surgical masks).

Said policy is to ensure that asymptomatic carriers of COVID-19 do not spread the virus to others.[26] Such wearing of a device interferes with the parents right to choose the medical decision and treatments for their minor children in violation of Article I, § 23 of the Florida Constitution.

103. The CDC and other agencies make clear that face masks worn by children are not a substitute for social distancing. Further, most government agencies make clear that minor children should not wear masks while outside. The IRCSB policy requires a mask be worn at all times, inside or outside, from the bus stop to the school house door.

104. The decision to wear a face mask is that of the parents to make, not the IRCSB. Florida law has traditionally recognized the right of parents to make health care decisions on their children's behalf, on the presumption that before reaching the age of majority, young people lack the experience and judgment to make fully informed decisions. The wearing of face masks, under these facts, is not one of those rare exceptions that permits the Government to overcome parental consent in the child's best interest. COVID 19 does not represent that level of imminent and immediate threat to minor children, more so than influenza for example, to allow government to overcome the rights of the parents on this issue.

105. Parents have the responsibility and authority to make medical decisions on behalf of their children. This includes the right to refuse or discontinue treatments, even those that may be life-sustaining. While most physicians believe it is in a child's best interest to receive the routine childhood vaccinations and therefore recommend them to parents, they do not generally legally challenge parents who choose not to vaccinate their children. Even if that was the case, a vaccination

[26] During the COVID-19 public health emergency, a face mask for a medical purpose that is intended for use as source control, is not labeled as a surgical mask, and is not intended to provide liquid barrier protection, may be authorized under the "umbrella" EUA for face masks without submitting documentation to the FDA if the face mask meets the eligibility requirements.

is a one-time event. What is proposed here is the wearing of a medical device for extended periods. A parent may feel quite strongly that such a medical device is not in the child's best interest.

106. In order to overcome the parents right in determining a child's medical care, the policy must be one that is so compelling, that the life of child is in clear danger but for the treatment. Such policy must be narrowly tailored and executed in only the most unique factual settings (e.g. lifesaving chemotherapy treatment; necessary blood transfusion; or kidney dialysis, to name a few). In light of the science that shows that COVID 19 up to three time less likely to kill a child then the flu, none of the factors normally required to overcome parental consent exist.

107. Therefore, any mandatory rule that requires the wearing of face masks that interferes with parental consent is patently illegal and unconstitutional, because it interferes with the parental rights to choose what medical devices their children must be compelled to use, and also interferes with the fundamental right to receive a free public education. Keep in mind that a medical device, according to the Federal Government and Federal regulations, is far more expansive then just "surgical" masks. In every case, a face covering or mask, as applied in this case, is a medical device as defined by the FDA and Federal regulations.

108. As stated *infra,* there is little to no scientific evidence to support the proposition that minors are a source carrier of COVID 19. Additionally, the wearing of masks by those who so choose mitigates their risk. However, the rights of others go only as far as the nose of the Plaintiff. The Plaintiffs' have a right to determine what touches their child's nose, not the government.

109. Accordingly, Plaintiffs' have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendant is enjoined from implementing and enforcing the Orders. Pursuant to Section 26.012 (3), F.S., 2019 and to Rule 1.610, Fla.R.Civ.P., Plaintiffs are entitled to declaratory relief and preliminary, and permanent injunctive relief

invalidating and restraining enforcement of the IRCSB face mask order.

110. Plaintiffs' found it necessary to engage the services of private counsel to vindicate their rights under the law and request the award of attorney fees to vindicate their rights.

FOURTH CLAIM FOR RELEIF

VIOLATIONS OF THE FLORIDA CONSTITUTION THE FACE MASK ORDER FROM THE SUPERINTENDENT OF THE INDIAN RIVER COUNTY SCHOOL BOARD VIOLATES THE EQUAL PROTECTION CLAUSE ENSRHINED IN ARTICLE 1, § 2. 9. 21 and 23 OF THE FLORIDA CONSTITUTION

111. Plaintiff incorporates herein by reference each and every allegation contained in paragraphs 1-70 of this Complaint as though fully set forth herein.

112. Article I of the Florida constitution contains important provisions regarding the basic rights of all Florida citizens to be treated equally before the law and to have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. While there is no single, inflexible test by which our courts decide whether the requirements of procedural due process have been met, fundamentally it has been defined by the Courts to mean a structure of laws and procedures that hears before it condemns and proceeds upon inquiry and renders a judgment after trial.[27] Unfortunately, none of these fundamental requirements were met in the underlying Face mask Orders that subjects

[27] *See Watson v. Pest Control* commission of Florida, 199 So2nd 777 (4th DCA, 1967). The constitutional guarantee of due process extends to every type of legal proceeding. *See Pelle v. Dinners Club*, 287 So2nd 737, (Fla. DCA 3rd Dist 1974); *Tomayko v. Thomas*, 143 So2nd 227 (Fla. 3rd DCA, 1962); *State ex rel. Barancik v. Gates*, 134 So2nd 497 (Fla. 1961); It cannot be simply ignored by labeling the proceedings as merely "quasi-judicial" or administrative. Nor can it be merely colorable or illusory. See *Ryan's Furniture Exchange v. McNair*, 120 Fla 109, 162 So. 483 (1935). Nor can it be a mere sham or pretense, *Robbins v Robbins*, 429 So2nd 424, 3rd DCA (1983). As outlined in the case of *Neff v. Adler*, 416 So2nd 1240 at 1242-43 (Fla 4th DCA 1982) the fundamentals of procedural due process include a hearing before an impartial decision-maker, after fair notice of the charges and allegations with a fair opportunity to present one's own case. Fundamental due process includes the duty of the individual presiding over the hearing to apply a correct principle of law or rule, see *State v. Smith*, 118 So2nd 792 (Fla.1st DCA, 1960).

children to wear face masks based on an irrational fear that these very same children catch and spread COVID 19.

Equal Protection Under Article 1 § 2

113. Florida constitutional guarantee of equal protection and the Fourteenth Amendment's guarantee of equal protection are substantially equivalent and analyzed in similar fashion. Florida's constitutional guaranty of equal protection under Article 1 § 2 of the Florida Constitution has been defined to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness. In the instant case, the face mask order has the practical effect of treating different classes of students differently. The disparate and unequal treatment of these separate entities is not fully explained and has no rational basis.

114. Equal Protection refers to the idea that a governmental body may not deny people equal protection of its governing laws. The governing body state must treat an individual in the same manner as others in similar conditions and circumstances. There can be no compelling or rational basis to compel a student to accept what is without dispute, a separate and unequal eLearning education that is also harmful, while other students enjoy face to face learning, over the issue of a face mask.

115. Courts have generally ruled that most classifications imposed by the government do not deny persons equal protection of the laws. Generally, a legislature may make distinctions among people for any proper purpose, as long as the distinction is rational.[28] There must be a logical relationship between the purpose of a law and any classification of people that it makes.

[28] To pass the rational basis test, the statute or ordinance must have a legitimate state interest, and there must be a rational connection between the statute's/ordinance's means and goals.

Without this "rational basis," a law will be struck down when challenged in court.[29] However, in this case, we are dealing with a Constitutional right to received a free public education. Therefore, the test is far higher. The proposed distinctions here must have a compelling interest, and be narrowly tailored, and pass strict scrutiny.[30]

116. Thus, even *arguendo* if there is no fundamental right to a basic minimum education, Defendants—by choosing to provide a brick and mortar education to some students but not to others—have still violated Plaintiffs' constitutional rights. There is some debate in the courts over what level of scrutiny applies when a discrete group is denied access to education. The Plaintiffs' argue that under *Plyler v. Doe*, 457 U.S. 202 (1982), a form of heightened scrutiny applies in such cases, see *id.* at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest."). Plaintiffs' also contend that even if this heightened scrutiny did not apply, there could be no rational justification for denying Plaintiffs an adequate education (eLearning) while providing one (brick and mortar) to other students throughout the district.[31]

117. Thus, because the Defendant treats Plaintiffs' differently from other similarly situated persons, and second, that this difference in treatment is not supported by a sufficiently

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[29] *Reed v. Reed*, 404 U.S. 71 (1971), the United States Supreme Court invalidated an Idaho statute that preferred males over females in the selection of a probate administrator. The Court explained that the equal protection issue was "whether a difference in the sex of the competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the statute]." The Court concluded that it did not since it was arbitrary to prefer men over women merely to avoid hearings on the merits.

[30] *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So.2d 612, 635 (Fla. 2003).

[31] "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Zobel v. Williams*, 457 U.S. 55, 60 (1982). At its core, the Clause says that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

strong governmental interest, it violates Florida's protections for Equal Protection, by failing to provide a "uniform" system of education.[32]

118. First, the history of public education in this country, as with many things, is inextricably tied to race. And so, while it did not directly concern substantive due process, *Brown v. Board of Education*, 347 U.S. 483 (1954), is important in assessing whether any aspect of education amounts to a fundamental right. *Brown* of course examined whether racially segregated schools inherently violated the Equal Protection Clause of the Fourteenth Amendment. Id. at 487–88. The Court found they did, holding that "in the field of public education the doctrine of 'separate but equal' has no place." *Id.* at 495.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493.

119. Plaintiffs' assert that on the one hand, if "education is perhaps the most important function of state and local governments" and is "required in the performance of our most basic public responsibilities," *id.*, and under the Florida Constitution, must be "uniform", how could it not be "implicit in the concept of ordered liberty" or otherwise fundamental to our social order? *Washington v. Glucksberg*, 521 U.S. 702 at 721 (1997). On the other, how could the state be

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[32] E.g., id. at 439–40; *Jolivette v. Husted*, 694 F.3d 760, 771 (6th Cir. 2012); *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011); *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006).

compelled to provide an education if education needs to be equal only "where the state has undertaken to provide it"? *Brown*, 347 U.S. at 493. In short, eLearning fails this test, because it provides an inadequate, separate and unequal education, that is not "uniform".

120. Additionally, the face mask order at issue here is utterly irrational in light of how COVID 19 operates. Either everyone needs to wear a mask to ensure safety, or not. What is really being done is to provide a series of regulations to be seen to be doing something but in reality, has no basis in science or has the potential to create more health problems for those compelled to follow the regulation. In the case of the IRCSB face mask regulation, exceptions are made for individuals who are considered students with "special needs" but not for any others. Students with health exceptions, not specified, are also excluded. However, the science concerning COVID 19 tells us that these are the exact individuals who need the most protection. Instead, they are given special privileges not applied to others students, and in doing so, violate equal protection, for no valid rational purpose

121. There must be a logical relationship between the purpose of a regulation and any classification of people that it makes. Without this "rational basis," a law will be struck down when challenged in court. However, it is here that the regulation in question interferes with a fundamental right, and imposes upon those who either cannot or will not comply concerning face mask wear to be consigned to a system of education that is unconstitutionally inferior and always harmful. Such policy, therefore, requires a higher level of scrutiny than just a rational basis test, because the regulation creates a class of individuals whose fundamental right to a "uniform, efficient, safe, secure and high-quality system of free public schools" is denied.

Due Process Under Article 1 § 9

122. Article I, § 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law..."[33] Under Florida Statutes § 1006.09, a Student may be suspended only in accordance with the school board's rules. The face mask rule is not a rule that has been formally adopted by the school board, but rather a policy statement put forth by the Superintendent. The United States Supreme Court has developed a two-prong analysis it applies when determining whether an asserted right is fundamental.[34] First, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Glucksberg*, 521 U.S. at 720–21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). The Supreme Court has applied a holistic approach to this historical analysis, tracing the evolution of an asserted right through or even beyond the history of our country, *e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593–97 (2015); *Glucksberg*, 521 U.S. at 710–19. The second prong of the inquiry looks to whether the asserted right is "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg*, 521 U.S. at 721 (quoting *Palko*, 302 U.S. at 325–26). While these prongs

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[33] See generally *Stromberg v. California*, 283 U.S. 259 (1931) (voided a state statute on grounds of its interference with free speech. State common law was also voided, with the Court in an opinion by Justice Black asserting that the First Amendment enlarged protections for speech, press, and religion beyond those enjoyed under English common law).

The Due Process Clause of the Fourteenth Amendment says that no state shall "deprive any person of life, liberty, or property, without due process of law." The Clause is most commonly seen as guaranteeing procedural protections whenever the state attempts to deprive someone of their life, liberty, or property interests—so-called procedural due process. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). But the Clause has also been read to recognize that certain interests are so substantial that no process is enough to allow the government to restrict them, at least absent a compelling state interest. E.g., *Washington v. Glucksberg*, 521 U.S. at 719–21; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–47 (1992); Collins, 503 U.S. at 125. This substantive due process is the basis for Plaintiffs' claim.

[34] The Supreme Court has recognized that basic literacy is foundational to our political process and society. In *Yoder*, the Court noted that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Wisconsin v. Yoder,* 406 U.S. 205, at 221.

are sometimes tied together, *see, e.g.*, *Kerry v. Din*, 135 S. Ct. 2128, 2134 (2015) (plurality opinion), *Obergefell* made clear that this historical inquiry may illuminate even newly recognized injustices that reveal a fundamental right. [35]

123. Defendants' face mask orders imply that students who do not comply with the IRCSB face mask regimen will be moved out of the public schools and into distant learning. This is tantamount to an expulsion from the public school, and has great implications to families who have work requirements, and are unable to monitor their child during the day.

124. Beyond recognizing the existence of a right to a basic minimum education, it is also important to define its contours, at least for the purposes of this case. The Supreme Court has "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721 (quoting *Flores*, 507 U.S. at 302). This description does not need to circumscribe the outer-most limit of the right, but must at least define the extent of the right needed to resolve the matter at hand. Importantly, the right defined in this complaint is narrow in scope. It does not seek a guarantee of an education at the quality that most have come to expect in today's America (but that many are nevertheless denied). Rather, the right this complaint seeks is to guarantees the education needed to provide access to skills that are essential for the basic exercise of other fundamental rights and liberties, most importantly participation in our political system.

125. The IRCSB policy states clearly that "The District will work with families to identify the more appropriate learning path if face coverings will not be worn." Translation: expulsion from

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[35] "The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." *Obergefell* ,135 S. Ct. at 2598.

public schools and placement into distant learning for those failing to comply, on the grounds that the failure to wear a face mask is a disruption to the classroom. The secondary effect of this policy is to employ teachers as the face mask police for children who lack the maturity level to comply with this policy on a long-term basis, hour after hour, day after day.

126. This violates the due process rights of the parents and the minor, because the policy itself does not provide a clear process by which these decisions are to made. Some children are going to simply be incapable of maintaining the discipline necessary to wear a mask for hours at a time. The standard being applied to students is far more strident then any similar policy that is applied to adults.

127. Most significantly, every meaningful interaction between a citizen and the state is predicated on a minimum level of literacy, meaning that access to literacy is necessary to access our political process. Further, the unique role of public education as a source of opportunity separate from the means of a child's parents creates a heightened social burden to provide at least a minimal education. Thus, the exclusion of a child from a meaningful education by no fault of her own should be viewed as especially suspect. In sum, the state provision of a basic minimum education has a longstanding presence in our history and tradition, and is essential to our concept of ordered constitutional liberty. Under the Supreme Court's substantive due process cases, this suggests the right to an education should be recognized as a fundamental right.

. 128. Schools should be safe, and students should not have to be afraid. But students must also be able to enjoy the freedoms that enable them to learn and thrive. However, the policy as stated by the IRCSB allows for the failure to wear a mask by a student to be defined as disruptive conduct, subject to discipline. Such passive conduct has never once been defined by any school policy as requiring discipline.

129. This policy has the absurdity of taking teachers, who have absolutely no medical training whatsoever, to monitor the use of a medical device, on minor children, who lack the requisite maturity and discipline to wear a device for extended periods beyond what is expected of grown adults. Never before has a standard been employed to minors that is higher and stronger in nature than that applied to the adults. The school teachers will get a break through out the day. During these breaks, one envisions that the school teacher themselves will take a break from wearing a mask. However, the students get no such accommodations. Failure to comply has consequences.

130. It is also important to remember that the consequences of this policy are employed for violating a rule that has absolutely no rational basis whatsoever, and does absolutely nothing to protect the students or teachers involved.

Right of Privacy Under Article 1 §23

131. The Florida Constitution protects every" natural person has the right to be let alone and free from governmental intrusion into the person's private life".

132. Interpreting the Privacy Amendment, the Florida Supreme Court has recognized a fundamental right to privacy in Florida[36] that is broader and more protective than the federal right to privacy offered by the Fourteenth Amendment to the U.S. Constitution.[37] Whereas the Fourteenth Amendment's liberty protections extend to specific "zones of privacy"[38] (e.g., marriage,[39]

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[36] See *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1246 (Fla. 2017); *State v. J.P.*, 907 So. 2d 1101, 1110 (Fla. 2004); *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998); *City of North Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995); *Winfield v. Division of Pari-Mutuel Wagering, Dept. of Business Regulation*, 477 So. 2d 544, 547 (Fla. 1985).

[37] *Gainesville Woman Care, LLC*, 210 So. 3d at 124; *Winfield*, 477 So. 2d at 547–48 (Fla. 1985); *see Griswold v. Connecticut,* 381 U.S. 479 (1965) (recognizing an implicit right to privacy under the "liberty" protections of the Fourteenth Amendment to the U.S. Constitution).

[38] *Roe v. Wade*, 410 U.S. 113, 152 (1973).

[39] See *Obergefell v. Hodges*, 576 U.S. __ (2015); *Loving v. Virginia*, 388 U.S. 1 (1967).

procreation,[40] contraception,[41] abortion family,[42] relationships,[43] and child rearing and education[44]), Florida's Privacy Amendment "extends to all aspects of an individual's private life…, and it ensures that the state cannot intrude into an individual's private life absent a compelling interest."[45]

133. The Florida standard for privacy is broader than the less-defined federal standard. The Florida standard for privacy demands that government justify any intrusion into one's privacy with (1) a compelling state interest and (2) the least intrusive means to accomplish that compelling state interest. The addition of Florida's Privacy Amendment undoubtedly enhances Floridians' right to protect themselves from a broad range of governmental intrusions.

134. Florida Supreme Court Justice Ben F. Overton has acknowledged that Florida's Privacy Amendment "has had its greatest effect on Floridians in the area of personal autonomy.

135. A parent's ability to make decisions about one's own children has been recognized in areas such as discipline, education, and health care as having both liberty and privacy interests. A similar concern could apply to governmental intervention in parental decisions relating to home schooling and other alternative education decisions.

136. The IRCSB requirements that minor children wear face masks in order to enjoy their fundamental right to a free education also interferes with their privacy rights as protected by the

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[40] See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Buck v. Bell*, 274 U.S. 200 (1927).

[41] See *Eisenstadt v. Baird* 405 U.S. 438 (1972).

[42] See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); Roe, 410 U.S. 113.

[43] See *Prince v. Massachusetts*, 321 U.S. 158 (1944).

[44] *Cleveland Board of Education v. La*Fleur, 414 U.S. 632 (1974); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebr*aska, 262 U.S. 390 (1923).

[45] Honorable Ben F. Overton & Katherine E. Giddings, The Right of Privacy in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion, 25 FLA. ST. U. L. REV. 25, 40–1 (1997).

Florida Constitution. Such face mask policy interferes with parental decision making, and also runs a foul of this constitutional protection.

137. Plaintiffs' have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendant is enjoined from implementing and enforcing the Orders. Pursuant to Section 26.012 (3), F.S., 2019 and to Rule 1.610, Fla.R.Civ.P., Plaintiffs' are entitled to declaratory relief and preliminary, and permanent injunctive relief invalidating and restraining enforcement of the IRCSB face mask order.

138. Plaintiffs' found it necessary to engage the services of private counsel to vindicate their rights under the law and request the award of attorney fees to vindicate their rights.

FIFITH CLAIM FOR RELIEF

THE FACE MASK ORDER FROM THE SUPERINTENDENT OF THE INDIAN RIVER COUNTY SCHOOL BOARD WAS ADOPTED IN VIOLATION OF ARTICLE I, § 24(B) OF THE FLORIDA CONSTITUION

139. Plaintiff incorporates herein by reference each and every allegation contained in paragraphs 1-70 of this Complaint as though fully set forth herein.

140. Section 286.0105, Florida Statutes, requires:

> Each board, commission, or agency of this state or of any political subdivision thereof shall include in the notice of any meeting or hearing, if notice of the meeting or hearing is required, of such board, commission, or agency, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency, or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. Where a public board or commission acts as a quasi-judicial body or takes official action on matters that affect individual rights of citizens, in contrast with the rights of the public at large, the board or commission is subject to the requirements of section 286.0105, Florida Statutes. Op. Att'y Gen. Fla. 81-06 (1981).

141. The IRCSB face mask order adopted empowers the Superintendent, appears to have been done without any notice to the general public, and with no chance for the public comment prior to implementation, and thereafter allowed unilateral policies to be implemented with respect to face masks.

142. While the Indian River County School Board adoption of the overall policy complied with the Florida Sunshine Act, the policy enacted that empowers the Superintendent to act unilaterally does not. The process by which the Superintendent of Indian River County schools is empowered to enact "procedures or guidelines" that impact fundamental rights of the Plaintiffs violate multiple Florida Statutes, and is allowing government to enact policies prospectively, rather than after the public has a chance to weigh in on the specifics.

143. Article I, Section 24(b) of the Florida Constitution requires all meetings of public entities to be in public and noticed. The specific face mask policies and guidelines have been placed into effect by the Superintendent with no notice, or hearing, prior to their being put into effect. The devil is the details. While the IRCSB did allow for public notice and comment on the overall concept of the policy, the actual policy itself was yet to be determined. It is mythology that is in question here. The IRCSB has not yet ratified, nor has notice or public comment been permitted, on the policy that is in actual effect. In that regard, the policy placed into effect by the Superintendent falls outside of the Act.

144. Article I, Section 24(b) of the Florida Constitution requires all meetings of public entities to be in public and noticed. "All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature

shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution. Any exemptions from complying with this requirement must be specifically spelled out in state law.

145. Fla. Stat. 286.0115(2) states: Members of the public shall be given a reasonable opportunity to be heard on a proposition before a board or commission. The opportunity to be heard need not occur at the same meeting at which the board or commission takes official action on the proposition if the opportunity occurs at a meeting that is during the decision-making process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action.

146. Florida Statute 286.0115(3) provides the following exemption: The requirements in subsection (2) do not apply to:

> (a) An official act that must be taken to deal with an emergency situation affecting the public health, welfare, or safety, if compliance with the requirements would cause an unreasonable delay in the ability of the board or commission to act;

147. However, the nature of how this face mask policies are adopted unilaterally, without hearing or public comment, and done so at the very last minute, clearly shows that the need for such actions that avoids Florida Constitutional requirements did not constitute an emergency in any sense of the word. The COVID 19 pandemic and associated emergency orders have been in place for over 6 months. On the first day of school, the Indian River County school board adopts a policy to empower the Superintendent to essentially make it up as he sees fit, without public input or comment on those "procedures or guidelines".

148. This exemption to the Sunshine Act applies only to an emergency situation, and it is not a blanket exemption for all acts taken during an emergency declaration.

149. Pursuant to at least Florida black-letter law, acts of boards in violation of sunshine

requirements do not have the force of law, unless subsequently adopted or ratified in a manner consistent with open government requirements. It is noteworthy that the School Board voted to empower the Superintendent to create "procedures or guidelines" but to date, have not noticed and ratified the same.

150. Finally, Florida Stat 252 established the emergency powers of the Governor and counties. It does not provide a specific exemption for compliance with section 286. In parts pertinent to this situation, Florida Statute 252.46(2) states:

> All orders and rules adopted by the division or any political subdivision or other agency authorized by ss. 252.31-252.90 to make orders and rules have full force and effect of law after adoption in accordance with the provisions of chapter 120 in the event of issuance by the division or any state agency or, if promulgated by a political subdivision of the state or agency thereof, when filed in the office of the clerk or recorder of the political subdivision or agency promulgating the same. All existing laws, ordinances, and rules inconsistent with the provisions of ss. 252.31-252.90, or any order or rule issued under the authority of ss. 252.31-252.90, shall be suspended during the period of time and to the extent that such conflict exists.

151. Violations of Florida's Sunshine Law can bring stiff and far reaching consequences, some of which are not just against the board members, Superintendent, etc. involved. For starters, there can be criminal penalties. If a board member, Superintendent, etc. knowingly violates the Sunshine Law, the individual is likely guilty of a second-degree misdemeanor.

152 Furthermore, an individual can be removed from office or suspended. Specifically, the Governor may suspend elected or appointed officials who are indicted for misdemeanor violations arising out of their official duties

153. Section 286.011(4), Florida Statutes. Section 286.011(4) essentially states that when a violation is found, the plaintiff's reasonable attorney's fees shall be assessed. The fees can be assessed against the individual board members, Superintendent, etc. unless they sought and took the advice of the board's, commission's, etc. attorney.

154. The Sunshine Law extends to the discussions and deliberations as well as the formal action taken by a public board or commission or an individual Superintendent acting in the capacity of the board. There is no requirement that a quorum be present for a meeting of members of a public board or commission to be subject to section 286.011, Florida Statutes. Instead, the law is applicable to any gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which foreseeable action will be taken by the public board or commission. *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973).

155. Section 119.11(1), Florida Statutes, mandates that actions brought under Ch. 119 are entitled to an immediate hearing and take priority over other pending cases. See, *Matos v. Office of the State Attorney for the 17th Judicial Circuit*, 80 So. 3d 1149 (Fla. 4th DCA 2012) ("[a]n immediate hearing does not mean one scheduled within a reasonable time, but means what the statute says: immediate"). See also *Clay County Education Association v. Clay County School Board,* 144 So. 3d 708 (Fla. 1st DCA 2014). "The purpose of the hearing is to allow the court to hear argument from the parties and resolve any dispute as to whether there are public records responsive to the request and whether an exemption from disclosure applies in whole or in part to the records." *Kline v. University of Florida*, 200 So. 3d 271 (Fla. 1st DCA 2016).

156. Attorney fees in such cases are warranted. Additionally, based on the foregoing, a temporary injunction is appropriate.

157. Plaintiffs' found it necessary to engage the services of private counsel to vindicate their rights under the law and request the award of attorney fees to vindicate their rights.

VIII. MEMORANDUM OF LAW FOR CONSIDERATIONS FOR THE ISSUANCE OF INJUNCTIVE RELIEF

158. A temporary injunction should be granted where there is a showing of:

(1) the likelihood of irreparable harm and the unavailability of an adequate remedy at law, (2) the substantial likelihood of success on the merits, (3) that the threatened injury to petitioner outweigh any possible harm to the Defendant, and (4) that the granting of the preliminary injunction will not disserve the public interest. See *Cosmic Corp. v. Miami-Dade County,* 706 So.2d 347 (Fla. 3d DCA, 1998). The same considerations generally apply to the issuance of a Temporary Restraining Order, usually an emergency procedure to maintain the status quo until an injunction hearing can be held. In this submittal, the Plaintiffs' will set forth a substantial and sufficient basis to show that each of these separate criteria are met and the facts and law set forth herein clearly justify the injunctive relief sought.

159. There are numerous grounds upon which this court can grant relief:

a. Regulation is irrational and narrowly tailored: IRCSB face mask regulation that is a pre-requisite for school attendance and takes the decision away from parents is not narrowly tailored. Beyond that, the IRCSB fails to even make a rational, let alone compelling, case for its existence.

1. There is no rational, let alone compelling narrowly tailored basis for a policy that compels elementary and middle school students to wear a mask all day, every day, in a world where these same individuals are unlikely to get sick, hospitalized or die. This is especially true given the context that the flu is far more dangerous.

2. If masks are effective, then the mere fact that a student chooses not to wear a mask should have zero impact upon those who do.[46] The science from throughout the entire world

[46] A peer reviewed study published in the journal Nature Medicine found that children and teenagers are only half as likely to get infected with the corona virus as adults age 20 and older, and they usually don't develop clinical symptoms of COVID-19, the disease caused by the virus. The study is based on a survey of six nations: Canada, China, Italy, Japan, Singapore and South Korea. The researchers developed mathematical models to interpret the demographic patterns of COVID-19 cases in those countries. Age-dependent effects in the transmission and control of COVID-19 epidemics Nicholas G. Davies, Petra Klepac, Yang Liu, Kiesha Prem, Mark Jit, CMMID COVID-19 working group & Rosalind M. Eggo Nature Medicine (June 16 2020)

is in, and makes clear that the risk of spread of COVID-19 to and from students is being overstated.

3. Even if one wishes to assume that face masks blunt the spread of COVID-19 at school, children—even more than adults—find them uncomfortable to wear for hours and may lack the self-discipline to wear them without touching their faces or freeing their noses. Such discomfort overrides any potential public health benefit. In addition, however, is that the student's inability to have the necessary discipline to wear a face mask, one that will provide little to no protection, ultimately results in that very student being expelled from the school and placed in eLearning.

4. A narrowly tailored policy might consider the science and treat elementary and middle school students differently than high school students. Rather than a policy that is based on a scientific rationale, we have before the court an ad-hoc policy that is more an attempt to do something, ostensibly to provide political cover. Protecting elected officials' future political prospects is a poor policy proscription when it violates student's fundamental rights to attend school. There are many things that can be done. Students' temperatures can be taken daily. Maintain social distancing when possible, and the common use of hand washing and cleaning of the class rooms. All of these are just as, if not more, effective at keeping the spread of COVID-19 at bay.

b. eLearning is not uniform and insufficient: Compelled eLearning for students unable or incapable of face mask wear consigns students to an unconstitutional separate and unequal education. It is completely without dispute that eLearning is not the equivalent of face to face instruction. Such compelled separate and unequal education violates the Florida Constitution. Students may not be expelled from school without due process, denied equal protection of the law, and be required to engage in an activity where the scientific evidence clearly states is unhealthy for brain development. The health risks associated with eLearning are far more serious than the risks of COVID-19. It is without dispute that COVID-19 health risks to children are less than the flu. However, the HCSB

would consign children compelled eLearning knowing the following, which is undisputed scientifically accepted as a fact:

1. The child becomes less engaged in their real-time environment = less sensory stimulation.[47] If most of the early experiences of a child are with media devices, there are usually no social and physical skills involved. While a child is engaged in screen time they are in a passive state; hence, they are sensory-deprived.

2. Too much screen time weakens communication and social skills. Speaking of stimulation, longer screen time gives little to no room for communication and social skills.[48]

3. Longer exposure to rapid image-changes increases the risk of attention problems.[49] (See Exhibit 8)

4. Screen time is commonly associated with childhood hyperactivity. Dr Paul Thomas, a board-certified fellow of the American Academy of Pediatrics and one of the top pediatricians in the U.S. says that a variety of content is very important for a child's development and that parents need to be involved in the choice of content. Yet, IRCSB controls the content, and how it is delivered, taking away from the parent to ability to manage what their children see and hear through a computer screen.

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[47] Biologically speaking, Dr Dimitri Christakis, a pediatrician from the Seattle Children's Hospital and an international expert on children and media states: "*We are born with a lifetime supply of neurons, but that's not what actually grows. It's the connections between those brain cells we call synapses that account for that brain growth. And those synapses form based on early experiences…*"

[48] According to Dr Amit Sood, a professor of Medicine at Mayo Clinic College of Medicine, on his take on **neural predispositions**: *"The more time we spend in default mode, the more risks of dementia, attention deficit, anxiety, and depression."*

[49] Early data from a landmark National Institutes of Health (NIH) study that began in 2018 indicates that children who spent more than two hours a day on screen-time activities scored lower on language and thinking tests, and some children with more than seven hours a day of screen time experienced thinning of the brain's cortex, the area of the brain related to critical thinking and reasoning.

5. Screen time increases risks of weight gain and sleep-deprivation.

c. Policy violates parental rights: The parent's rights in making determinations about their children implicate "fundamental liberty interests" (*See M.N. and V.N., Parents of B.N. v. Southern Baptist Hospital of Florida, Inc*, 648 So.2d 769 (Fla 1st DCA 1994). There is absolutely no dispute that face masks, as are being used in accordance with IRCSB policy, is a medical device. The regulation of this device is not being done by trained medical personnel. In addition, it interferes, unconstitutionally, with parental rights. As stated earlier, for those parents who believe face masks provide protection, the mere fact that the student next to them is not will have no impact upon their child. However, if the face mask is seen to provide no protection, then what is the possible rational to support the IRCSB policy. Either face masks work, or they do not. My not wearing a mask has zero alleged impact upon anyone else if they work. If face masks do not work, then we are wasting time. There is no middle ground.

1. In addition, however, are the actual risks that face masks pose to young students who are compelled to wear them in ways that create more hazards to their health. It is not disputed that young children find masks more annoying than their older peers, and lack the maturity or discipline to keep their hands away from their face. Essentially, face masks are serving to trap the germs that spread sickness, allowing the child to breathe those germs in day after day.

2. In order to overcome the parent's right in determining a child's medical care, the policy must be one that is so compelling, that the life of child is in clear danger but for the treatment. Such policy must be narrowly tailored and executed in only the most unique factual settings (e.g. lifesaving chemotherapy treatment; necessary blood transfusion; or kidney dialysis, to name a few). In light of the science that shows that COVID-19 is several times less likely to harm a child than the flu, none of the factors normally required to overcome parental consent exist.

d. Policy violates the Florida Constitution: There are numerous Florida Constitutional grounds upon which this court may grant injunctive relief.

1. There is no objective system of due process to determine whether a child may forgo a mask. The system as presently designed is totally arbitrary. To expel a student from school simply because they cannot or will not wear a mask violates Article 1, section 9 of the Florida Constitution, because it has the effect of denying that student his/her fundamental right to an education under Article 9 that is not separate and unequal.

2. In addition, compelled eLearning violates Article 1, section 2 of the Florida Constitution as discussed above. Finally, as stated above, the right of privacy as protected by Article 1, section 23 is violated by the IRCSB policy.

A. THE ENFORCEMENT OF THE CHALLENGED FACE MASK ORDER IS CAUSING PLAINTIFFS' IRREPARABLE HARM AND PLAINTIFFS' HAVE NO ADEQUATE REMEDY AT LAW

160. The Plaintiffs 'in this action are residents who seek judicial review, due to the unlawful nature of the IRCSB face mask order and in the manner in which it was adopted in violation of Florida Statutes.

161. The pertinent portions of this order, all of which point to its unconstitutionality, are set forth in aforementioned sections, but the bottom line is that the IRCSB is presently requiring parents to make long terms decisions as to whether to enroll the children in brick and motor schools or to go with eLearning. Once enrolled, a parent is not allowed to change their minds. Therefore, a decision needs to made immediately if the rights of the Plaintiffs' are to be protected.

162. The IRCSB face mask mandate manifests a clear and present threat to the civil liberties of Plaintiffs' resulting in several forms of irreparable harm, vastly exceeding any form of harm simply compensable with money damages. The most egregious form of the irreparable harm occasioned by

the challenged order is found in the loss of constitutional rights and freedoms manifest in the Plaintiffs' rights to engage in the conduct of their lives without excessive government interference with orders that have no nexus to the goals they attempt to achieve. In every case, the IRCSB face mask order is not narrowly tailored, and fails to achieve its compelling interest while interfering with Plaintiff fundamental right to a free public education that is not separate and unequal.

163. The Plaintiff's rights and freedoms include, generally, the right to due process of law, the right to equal protection of the law, the right to privacy and the fundamental right to enjoy a free public education. The loss of any constitutional right or freedom, in and of itself, constitutes irreparable harm. See *Tampa Sports Authority v. Johnston,* 914 So.2d 1076 (Fla. 2d DCA 2005).

164. The further problem with the Defendants' face mask policy is that it creates no limiting principle; rather it would be used as a bludgeon to empower government beyond any reasonable measure with absolutely no recourse for the citizens at large. The "limiting principle" phrase may be largely unfamiliar, but it's not complicated: A legislative body is limited in its regulatory powers. In the case of Article I powers, Congress has the power to do what it may please as limited by the overall principles of the Constitution. In the case of the IRCSB, the Florida Constitution serves as a limiting principle. In short, Inherit Authority to regulate must have a limiting principle. In the instant case, the IRCSB proposes no limiting principle when you consider that the flu, on average, is over three times more deadly then COVID-19. If the IRCSB wants to suggest that they have a compelling interest in maintaining "safe" schools, then they can compel face masks forever under their theory of the case.

165. So, applying this principle to the instant case, the court is asked to consider three numbers that are not disputed. These numbers are, "zero", "four" and "one hundred and sixty-six" (166). As of this writing, there has yet to be one recorded case of a teacher contracting COVID-19

from student anywhere on planet earth. In addition, according to the American Academy of Pediatrics, out of a child population of 77.9 million, the overall rate of COVID-19 in children is 680 cases per 100,000 children in the population. To date, there have been only 4 deaths involving Children in the State of Florida. Nationally, influenza in children has killed over three times as many as COVID-19. In 2020 alone, 166 children under 14 have died from Influenza this year, (as compared to 188 in 2017/18 throughout the United States).

166. While Defendants failed to provide any specific rationale in their policy, one surmises that the rationale behind requiring children as young as 5 to wear a face mask five days a week, 6 hours a day (except at lunch time, which begs the question of whether COVID-19 takes a break during lunch, which would also defeat the purpose of face masks) is to stop the spread of a deadly contagion and to protect students (Exhibit 1). However, as is clear, influenza is far more deadly to students. If the Defendants rational for COVID-19 are sustained, then students should be prepared to wear face masks permanently, because there is absolutely no limiting principle to stopping government power, and its secondary effects. It is important to point out that the IRCSB policy does not rest on the Governor's emergency order. It is simply a policy put into place based on the policy directive of the school board and the Superintendent. Therefore, one can only surmise that based on Defendants theory, the IRCSB would have within its power the ability to require face masks at all times, ostensibly to protect children and personnel from contracting a deadly virus (to wit, seasonal flu).

167. This next point should not be understated. Face masks are not an article of clothing to be regulated. A face mask is a medical device. This is a fact that is without question. According to the United States Food and Drug Agency (FDA), a face mask is a medical device, with or without a face shield that covers the user's nose and mouth and may or may not meet fluid barrier or filtration efficiency levels. It includes cloth face coverings as a subset. It may be for single or multiple uses,

and if for multiple uses it may be laundered or cleaned. Face masks are regulated by FDA when they meet the definition of a "device" under section 201(h) of the Act. Generally, face masks fall within this definition when they are intended for a medical purpose such as "source control. The CDC defines "source control" as the "use of cloth face coverings or face masks to cover a person's mouth and nose to prevent spread of respiratory secretions when they are talking, sneezing, or coughing."

168. It is also important to note and therefore logically follows that the IRCSB policy requires untrained medical personnel, to wit, teachers, to regulate the wear of these medical devices over any objections of the parents. How teachers, who have no training in medicine, can be given authority over a child to regulate the use of a medical device, and under what legal authority would allow such conduct, is not yet known.

169. The irreparable harm described above is the direct result of the threatened enforcement of the face mask order against the Plaintiffs' and their children, and the application of the unconstitutional provisions of the order against Plaintiffs'. Plaintiffs' have no adequate remedy at law because there is no plain, certain, prompt, speedy, sufficient, complete, practical, or efficient way to attain the ends of justice without enjoining *immediately* the threatened enforcement of the face mask order.

B. THE MAINTENANCE OF THE STATUS QUO IS JUSTIFIED AND NECESSARY WHILE THIS MATTER IS LITIGATED

170. The status quo prior to the Superintendent's unilateral action to impose a face mask rule upon the Plaintiffs' should be maintained while litigation is ongoing. Plaintiffs' should be allowed to make a decision voluntarily as to whether their minor children will or will not wear a face covering while attending school, as is their right under the Florida Constitution. without fear of harassment by the School Board employees, or any functionary assigned by the IRCSB to "enforce"

or "inspect" the subject activities. Plaintiffs' other constitutional rights and the maintenance of the status quo require the issuance of a TRO and subsequent temporary injunction.[50]

171. In the instant action, the last "peaceable non-contested condition" that preceded this controversy was that the Plaintiffs' were enjoying their rights to enroll their minor children to enjoyh their fundamental right to a free public education unencumbered by governmental interference. The status quo should be preserved by the issuance of a TRO and subsequent temporary Injunction.

C. PLAINTIFFS' HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS INVALIDATING THE CHALLENGED LEGISLATION

172. The next consideration in evaluating the grant of injunctive relief is whether the party seeking the injunction shows a substantial likelihood of success on the merits. In the instant action, Plaintiffs' can and have shown numerous grounds supporting the relief requested, any one of which would be sufficient to justify the injunctive relief sought herein, and all of which clearly establish that the challenged legislation is invalid and unconstitutional.

173. Equally as dominant as a "general rule" is the fact that the injunctive remedy is appropriate, on proper showing of injury, to restrain the enforcement of an invalid law. *Daniel v. Williams*, 189 So. 2d 640 (Fla. Dist. Ct. App. 2d Dist. 1966); *Board of Com'rs of State Institutions v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67 (Fla. Dist. Ct. App. 1st Dist. 1958)(emphasis added). The injury may consist in the right to earn a livelihood and continue in one's employment. *Watson v. Centro Espanol De Tampa*, 158 Fla. 796, 30 So. 2d 288 (1947). Persons who are the subject of harassment by overzealous, improper, or bad-faith use of valid statutes may be afforded the protection

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[50] ... The status quo preserved by a temporary injunction is the last peaceable non-contested condition that preceded the controversy, *Bowling v. National Convoy & Trucking Co.*, 135 So. 541 (Fla. 1931). One critical purpose of temporary injunctions is to prevent injury so that a party will not be forced to seek redress for damages after they have occurred. *Lewis v. Peters*, 66 So.2d 489 (Fla. 1953). ... *Bailey v. Christo*, 453 So.2d 1134 (Fla. 1st DCA 1984).

of injunctive relief. *Kimball v. Florida Dept. of Health and Rehabilitative Services*, 682 So. 2d 637 (Fla. Dist. Ct. App. 2d Dist. 1996). The instant action manifests all these components. *Metropolitan Dade County v. Florida Processing Co.*, 218 So. 2d 474 (Fla. Dist. Ct. App. 3d Dist. 1969)(emphasis added). [51]

D. THE PUBLIC INTEREST AND "BALANCING TEST"

174. The Constitutions of the State of Florida and the United States are the ultimate expressions of the public interest. As a result, the Plaintiffs' rights to enjoy their constitutionally protected rights to conduct their lives free from government intrusion and interference, enjoy due process of law, equal protection of the laws, and the numerous other rights articulated in the above sections cannot be lawfully abridged through the enforcement of the IRCSB face mask order. The greatest public interest lies in the freedoms and rights to due process guaranteed by the Constitution.[52] Therefore, the overall public interest is served by safeguarding these Constitutional freedoms and the right to due process.

E. NOTICE REQUIRMENTS OF THE FLORIDA RULE OF CIVIL PROCEDURE 1.610

175. A Temporary Injunction may be granted without written or oral notice to the adverse party only if it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition. Time is of the essence for both Plaintiffs' and the Defendant as the LSCB and the Plaintiffs' must make decisions based on the state of play. Asking the IRCSB to

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[51] The circumstances must be exceptional and the danger of irremediable loss must be great and immediate. *Pohl Beauty School v. City of Miami,* 118 Fla. 664, 159 So. 789 (1935). Both conditions are present in this action.

[52] ... Similarly, the public interest is served by any abatement of unconstitutional activity. *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1071, (7th Cir. 1976). *Decker, supra.* See, also, *DiDomenico v. Employers Cooperative Industry Trust*, 676 F.Supp. 903 (N.D. Ind. 1987) and *Zurn Constructors, supra.*

move on a dime, given the size of the district, is not reasonable. Plaintiff as well need to be able to make decisions as to where their minor children will go to school, whether with the Indian River County Public Schools, home schooling, private schooling or something else. In all cases, time is not a luxury that anyone has at this point. That has been clearly shown in the pleadings as stated, *infra*.

176. In addition, F.R.C.P. 1.610 requires that the movant's attorney must certify in writing any efforts that have been made to give notice and the reasons why notice should not be required. In this case, counsel does certify that the School Board will be served concurrently with the electronic filing of this complaint. However, for this court to grant relief, we urge this court to give consideration that notice should not be required as a pre-requisite to granting relief, as the injuries to Plaintiff's and those similarly situated is immediate, ongoing, and compelling.

177. While the undersigned counsel is cognizant of the notice requirements of Rule 1.610, in the alternative, the Plaintiffs seek and expedited proceeding, given the nature of the Fundamental rights impacted by the Defendants'.

IX. CONCLUSION

Plaintiffs' have demonstrated their entitlement to either a Temporary Injunction under Florida law and further still have demonstrated their entitlement to either a Preliminary or Permanent Injunction under State law. As shown herein, Plaintiffs' will suffer irreparable harm if injunctive relief and a Temporary Injunction do not issue: as a matter of law, there is no adequate remedy at law for the current and continued deprivation of their constitutional rights and Plaintiffs' have a clear legal right to the relief requested and a substantial likelihood of success on the merits in this action. Most importantly, the public interest demands the preservation of constitutional rights and representation by the people in law-making by the officials they elect for this function. Accordingly,

this Court is requested to hold an appropriate hearing and **GRANT** the request for ***Temporary Injunction***, temporarily enjoining the Defendant and IRCSB from further enforcement of the face mask order, until such time as a full evidentiary hearing can be held on the issuance of a permanent injunction.

WHEREFORE, Plaintiffs' respectfully request this Court grant the relief requested herein, and issue a Temporary Injunction against Defendants', enjoining the enforcement of the Face mask Order against Plaintiffs' and all other citizens of Indian River County, pending the Court's determination of the merits of an application for a Permanent Injunction.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs' respectfully requests that this Court GRANT the following relief:

a) Declaring the IRSCB Face mask Order as an unconstitutional violation of Article IX, Florida Constitution in that the order interferes with the Fundamental Right to receive a free and uniform public education, and;

b) Declaring the IRSCB Face mask Order as an unconstitutional violation of Article IX, Florida Constitution in that the order compels Plaintiffs' to accept an educational platform in the way of eLearning that is separate and unequal, and;

c) Declaring the IRCSB Face mask Order as an unconstitutional violation of Article I, § 23 of the Florida Constitution in that the Face mask Order interferes with Parental Rights over their children's use or nonuse of a medical devices, and;

d) Declaring the IRCSB Face mask Order as an unconstitutional violation of Article I, § 2 of the Florida Constitution in that the Face mask Order violated both Equal Protection, and;

e) Declaring the IRCSB Face mask Order as an unconstitutional violation of Article I, § 9 of the Florida Constitution in that the Face mask Order violated the Due Process rights of the Plaintiffs', and;

f) Declaring the IRCSB Face mask Order as an unconstitutional violation of Article I, § 23 of the Florida Constitution in that the Face mask Order violated the Plaintiffs' Rights to Privacy, and;

g) Declaring the implementation of the IRCSB Face mask Order violates Article I, § 24(B) of the Florida Constitution, and;

h) Awarding any and all attorney's fees and costs as authorized by law;

i) Awarding any and all actual, consequential and special damages to which Plaintiffs' may be entitled.

j) Such other and further relief as this Court deems fit, just, and equitable.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been furnished to the Indian River County School Board, at 6500 57th Street, Vero Beach, FL 32967, and to Ms. Suzanne D'Agresta, Esquire, at sdagresta@orlandolaw.net and by regular service of process on this 28th day of October 2020.

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