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UNMASKING THE POWER DYNAMIC BETWEEN LOCAL SCHOOL BOARDS AND THE STATE EXECUTIVE BRANCH: IMPLICATIONS FOR FUTURE LOCAL SCHOOL SAFETY PROTOCOLS

Karla Cejas*

ABSTRACT

The COVID-19 pandemic brought attention to the government's power in controlling the operation of public schools. The legal and political differences among local school boards and the State's COVID policies were exemplified in media headline battles pertaining to schools reopening and the Governor's so-called "anti-mask mandate." The State capitalized on its emergency powers at the expense of providing local school boards with the autonomy to enact district-wide protective measures. Local school boards faced several challenges in arguing against State Emergency Orders including a difficulty with proving state compulsion to comply with its directives, overly broad statutory language providing limited guidance, and judicially-created doctrines like the political question doctrine and separation of powers preventing court intervention. There is still an opportunity for school boards to enact district-specific COVID protective measures and return the power over emergency decisions to the local, most community representative level. First, school boards should argue, as other states recognize, that the broad State Constitutional mandate to provide for safe public schools implies a court review mechanism to ensure basic, educational standards are being met. Second, section 1001.42 of the Florida Statutes grants school boards the power to protect student welfare and supervise the daily operation of schools, which should allow school boards to implement their own safety protocols to meet local needs.

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I. INTRODUCTION

On March 11, 2020, the World Health Organization ("WHO") officially categorized the coronavirus "COVID-19" or "COVID" as a pandemic.[1] A virus once contained in isolated news headlines suddenly transformed into a silent guest within U.S. domestic territory. Stock markets plunged, public events were cancelled, and President Trump declared a national emergency.[2] By March 17, 2020, COVID cases were documented in all fifty U.S. states, and at least 100 Americans were reported to have died from COVID.[3] Government officials at the federal, state, and local levels were pressured to craft an immediate and effective response to protect Americans from a seemingly unprecedented crisis.

While states contemplated whether to enact stay-at-home orders and workplaces shifted to remote work, local school districts also considered whether or not students would transition to online learning.[4] On March 16, 2020, Miami-Dade County Public Schools decided to close all schools

1 Ivan Pereira & Arielle Mitropoulos, *A Year of COVID-19: What Was Going on in the US in March 2020*, ABC NEWS (Mar. 6, 2021, 10:06 AM), https://abcnews.go.com/Health/year-covid-19-us-march-2020/story?id=76204691.

2 *Id.*

3 Will Feuer, *Coronavirus Has Now Spread to All 50 States and DC, US Death Toll Passes 100*, CNBC (Mar. 17, 2020, 6:58 PM), https://www.cnbc.com/2020/03/17/coronavirus-has-now-spread-to-all-50-states-us-death-toll-passes-100.html.

4 *See* Pereira & Mitropoulos, *supra* note 1 (finding that San Francisco closed schools before a national emergency was declared, being one of the first school districts in the nation to do so).

districtwide after COVID cases were reported in Miami-Dade County.[5] Local school boards across the State of Florida ("State") had to quickly respond to a fluid situation, while still ensuring continuity and quality in education. Officials at the State level also had their own ideas about how to properly ensure the State was meeting its educational goals amidst a pandemic.

Florida Education Commissioner Richard Corcoran issued Emergency Order 20-E0-1 on March 23, 2020, strongly recommending that schools close due to the pandemic, thereby creating a more uniform guideline for all local school boards in Florida to follow.[6] Since the pandemic continued into the summer of 2020, the Florida Department of Education then had to consider whether in person instruction would resume in the Fall. As a result, Corcoran issued Emergency Order 2020-E0-6 ("Order") during the preceding summer, which required local school boards to submit a reopening plan that satisfied state requirements, and most contentiously, school funding was determined by the number of students physically present in the classroom.[7] Lawsuits and disagreements over the scope of executive state power in education followed the issuance of the order.

State officials emphasized their constitutional obligations to ensure the "safety" of students, while teacher unions argued the Order was arbitrary and capricious, and, therefore, exceeded the scope of state constitutional powers.[8] Courts had to determine the limitations of the concept of "safety" framed in terms of its usage in the Florida Constitution included alongside other normative terms like "uniform" and "high-quality."[9] In the background of the legal analysis courts had to face the question of whether the political question doctrine and separation of powers prevented the judiciary from ruling on the scope on executive power from the start.[10] The recent court decision in *DeSantis v. Florida Educational Ass'n* found that the political question doctrine did indeed bar the court from holding that the executive exceeded

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5 *See* Press Release, Miami-Dade County Public Schools, M-DCPS Announces Districtwide School Closures Effective Monday, March 16, 2020 (Mar. 13, 2020), https://news.dadeschools.net/cmnc/new/29440.

6 Fla. Exec. Order No. 20-E0-1 (Mar. 23, 2020), https://www.fldoe.org/core/fileparse.php/19861/urlt/DOEORDERNO2020-EO-01.pdf; *see* Fla. Educ. Ass'n v. DeSantis, No. 2020-CA-001450, 2020 Fla. Cir. LEXIS 2693, at *3 (Fla. Cir. Ct. Aug. 24, 2020).

7 Fla. Exec. Order No. 20-E0-6 (July 6, 2020), https://www.fldoe.org/core/fileparse.php/19861/urlt/DOE-2020-EO-06.pdf; *see Fla. Educ. Ass'n*, 2020 Fla. Cir. LEXIS 2693, at *3–4.

8 *See Fla. Educ. Ass'n*, 2020 Fla. Cir. LEXIS 2693, at *5.

9 FLA. CONST. art. IX, § 1.

10 DeSantis v. Fla. Educ. Ass'n, 306 So. 3d 1202, 1215 (Fla. Dist. Ct. App. 2020).

its constitutional powers, therefore allowing the State to enact its school opening procedures.[11]

Not only did the constitutional relationship between state and local power face challenges over school reopening, but it also made headlines on the issue of so-called "anti-mask mandates" at the state-level.[12] Florida Governor Ron DeSantis and the Florida Department of Education also used the threat of withholding funding to dissuade local school districts from enacting mask mandates in schools.[13] The State argued that parents should decide whether their children should wear a mask independent of a school-wide mask mandate.[14] Even though the Florida Supreme Court has yet to determine the issue, the Florida First District Court of Appeal has allowed Governor DeSantis to enforce his anti-mask mandate for the time being.[15] The Florida Legislature ("Legislature") codified the prevention of school district mask mandates into law as well.[16]

The effectiveness of school safety policies during this pandemic will define the educational outcomes for a generation of young, impressionable students. Beyond parents and students directly implicated in the public educational system, Floridians at large should remain informed on the decisions their elected officials are making pertaining to school safety in these especially uncertain moments. Although there may be contentious debate about the effectiveness of state-level COVID-19 policies in protecting the safety of students and teachers within local school districts, state courts have acquiesced in allowing the State to minimize school board independence in enacting district-wide COVID protective policies. Florida courts have decided that statutory ambiguity and the judicially created political question and separation of powers doctrines ultimately favor the Florida legislative and executive branches to define the scope of their emergency powers considering both school reopening and mask mandates.

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11 *Id.*

12 *See* Emily Bloch, *State Withholds Funds Equal to Duval School Board Members' Salaries for Keeping Mask Mandate*, FLA. TIMES-UNION (Oct. 29, 2021, 6:11 PM), https://www.jacksonville.com/story/news/education/2021/10/29/florida-desantis-withholds-funds-equal-duval-county-school-board-salaries-covid-mask-mandate/6197771001/; Parker Branton & Ian Margol, *Broward Schools Pushes Back Over Mask Mandate as State Withholds Over $500 Million in Funding*, WPLG INC. (Sept. 11, 2021, 10:13 AM), https://www.local10.com/news/local/2021/09/11/broward-schools-pushes-back-over-mask-mandate-as-state-withholds-over-500-million-in-funding/.

13 David Selig, *Florida Can Keep Punishing Schools for Mask Mandates – For Now*, WPLG INC. (Sept. 11, 2021, 12:31 AM), https://www.local10.com/news/florida/2021/09/10/florida-can-keep-punishing-schools-for-mask-mandates-for-now/.

14 *Id.*

15 *Id.*

16 H.R. HB.1B, 2021B Leg., Spec. Sess. (Fla. 2021).

As it stands, there is a broad state-recognized power to establish safety standards in schools, yet no judicial oversight to ensure the State is adequately meeting its statutory grant. This power imbalance compromises the legislative intent to provide the State and local school boards concurrent power over K-12 education. Even though school boards face various limitations including the competing influence of individual rights, difficult legal standards in arguing state compulsion, and federalist court doctrines, there is still opportunity to regain local power. First, a background on the Florida Constitution will explain why courts have struggled with defining statutory ambiguity in determining the bounds of state power over public education. Along with ambiguity, judicially created doctrines like that of political questions prevent courts from intervening in education-related lawsuits in the interest of maintaining balance between the branches of government. Second, an analysis weighing various factors competing with local school board autonomy including individual rights and harsh state compulsion standards leads to the recommendation outlined below for local school boards to reclaim their power over enacting district wide emergency measures.

Using a two-pronged approach, first, school boards should argue the broad statutory language granting state power over schools creates an implied judicial review mechanism to guarantee that the State is acting in accordance with its responsibility to provide safety in schools. This will allow impartial judges to weigh evidence to determine if the State's COVID policies are in the best interest of school safety. Second, school boards should utilize section 1001.42 of the Florida Statutes to argue various sections within the statute grant local school boards broad discretionary power over the operation of schools.[17] Specifically, the power over the establishment and control of schools, along with the responsibility over student welfare, should also implicate the power to enact district-wide emergency measures.[18]

II. BACKGROUND

A. *Florida Constitution Article IX*

The Florida Constitution defines the State's power in ensuring adequate educational goals. It is a "paramount duty of the state to make adequate provision for the education of all children residing within its borders."[19] The

17 *See* FLA. STAT. § 1001.42 (2022).

18 *See* FLA. STAT. §§ 1001.42(4), (8) (2022).

19 FLA. CONST. art. IX, § 1.

State of Florida has an interest in providing all students access to quality public education. Moreover, the State is also charged with making an adequate provision "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."[20] The normative aspect of words like "uniform" and "safe" have left courts to decide whether the judiciary should determine the bounds of executive power in the realm of education, or whether it should be left to the Legislature.

B. *Florida Courts Facing Statutory Ambiguity*

Florida courts tasked with the responsibility of filling in statutory gaps have ultimately deferred the issue to the Legislature absent articulable standards.[21] As a result, courts are less likely to intervene in cases that question the State's authority over public schools. The Florida Supreme Court demonstrated deference to the State's determination of its statutory grant of power in *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*. In that case, a special interest group sought declaratory relief against the State claiming the State failed to deliver on the individual, fundamental right to education by failing to provide adequate resources to the uniform system of public schools referenced in the Florida Constitution.[22] The plaintiffs argued inequalities manifested through economic disadvantage, students with disabilities, and language barriers prevented all students from attaining the same quality of education.[23] The Florida Supreme Court analyzed various prior cases that further defined "uniformity" and agreed with the holding in *School Board of Escambia County v. State* that school boards must operate subject to a common plan or to serve a common purpose.[24] In *School Board of Escambia County*, the court held that even though it was not explicitly stated in the Florida Constitution, each county does not need to have the same amount of school board members in the interest of maintaining constitutionally mandated uniformity.[25] The *Chiles* court followed the reasoning in prior cases that purposefully avoided construing a restrictive uniformity clause, holding that uniformity allows for

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20 *Id.*

21 *See* Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 406–07 (Fla. 1996); Acad. for Positive Learning, Inc. v. Sch. Bd., 315 So. 3d 675, 684 (Fla. Dist. Ct. App. 2021).

22 *Coal. for Adequacy & Fairness in Sch. Funding*, 680 So. 2d at 402.

23 *Id.*

24 *Id.* at 406.

25 Sch. Bd. of Escambia Cnty. v. State, 353 So. 2d 834, 837 (Fla. 1977).

variation and no school district is required to mirror another.[26] However, the same legal guidance in determining the meaning of "adequacy" was not present, so the court was unable to intrude on the Legislature's powers in providing further meaning to it.[27] Courts could measure uniformity by analyzing whether funds were distributed equally, for example, but the determination of "adequacy" involved a policy determination the court believed was more appropriately in the Legislature's domain.[28]

The court's holding in *Coalition for Adequacy & Fairness in School Funding*, shows that courts analyze the normative words within the Florida Constitution based on the likelihood the application of the word crosses into the realm of policy.[29] Those challenging State actions should focus on presenting courts with articulable standards, rather than more abstract ideals in persuading the judiciary that the issue is within its jurisdictional power.[30] The court in *Citizens for Strong Schools, Inc*. held that courts may not constitutionalize the Legislature's educational standards as those standards tend to change over time.[31] The plaintiffs in that case alleged that the State failed to meet its constitutional duty to provide uniform, safe, and high quality public schools.[32] The dissent argued that Florida courts have defined ambiguous statutory standards before, yet there is a unique hesitation to enter the realm of education.[33] The dissent further stated that courts are fully capable of looking to the dictionary meaning of words alongside other related statutes to determine judicial standards.[34]

As demonstrated in *Academy for Positive Learning, Inc*., statutory language is the preferable standard for judicial guidance over prior drafts of a bill or a final bill analysis.[35] In that case, the appellants, consisting of charter schools and parents, sought declaratory and injunctive relief against the Palm Beach School Board for allegedly misappropriating charter school funding in violation of a county referendum and state statutes outlining that students enrolled in a charter school shall be funded "the same as" students enrolled in public school.[36] There, the school board made an unsuccessful argument

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26 *Coal. for Adequacy & Fairness in Sch. Funding*, 680 So. 2d at 406.

27 *Id.* at 406–07.

28 *Id*. at 407.

29 *Id.*

30 *See* Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., 262 So. 3d 127, 141 (Fla. 2019).

31 *Id.*

32 *Id.* at 129.

33 *Id*. at 149 (Pariente, J., dissenting).

34 *Id*. at 154 (Pariente, J., dissenting).

35 Acad. for Positive Learning, Inc. v. Sch. Bd., 315 So. 3d 675, 684 (Fla. Dist. Ct. App. 2021).

36 *Id.* at 678.

that a legislative amendment means that the amended provisions did not exist in the prior version of the statute.[37] Without resorting to the merits of whether the amended provision changed the meaning of the statute, the court held that regardless, the original statute's plain meaning should be read as funding charter schools and public schools the same.[38] It was unpersuasive as a matter of law that the Legislature considered but did not adopt a retroactive application of their clarifying amended statutory language.[39]

Courts must also consider separation of powers in determining whether the issue at hand is committed to another branch of government. In *Coalition for Adequacy & Fairness in School Funding*, the court found that the plaintiffs were essentially asking the court to determine the appropriate amount of funding for public education, which should be exclusively handled by the Legislature.[40] Moreover, the political question doctrine also prevented the court from ruling on the issue because it found a coordinate political department already had a textually demonstrable commitment to the issue, and there was a lack of judicial standards to resolve the issue as well.[41] Therefore, the plaintiffs could not demonstrate any proposed standard to follow in defining uniformity and whether such standard would risk judicial intrusion into other branches of government.[42] The political question doctrine and separation of powers are a constant limitation on the court's ability to review the State's actions apart from statutory ambiguity as explained throughout this comment.

C. *1998 Amendment to Florida Constitution Article IX*

The Florida Legislature reformed the uniformity clause in 1998 given the challenges the court faced in applying the prior ambiguous language.[43] The amended provision added that public schools should "allow[] students to obtain a high quality education" to further inform the definition of uniformity.[44] Following this change, there has been somewhat of a judicial presumption favoring the Legislature's role in defining the Florida Constitution, again decreasing the likelihood courts will intervene in cases

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37 *Id.* at 683–84.

38 *Id.* at 684.

39 *Id.*

40 Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 408 (Fla. 1996).

41 *Id.*

42 *Id.*

43 *See* FLA. CONST. art. IX, § 1; Annabelle V. Gonzalez, *Who Benefits from Leaving the "Bad" School?*, 14 FIU L. REV. 649, 666 (2021).

44 *See* FLA. CONST. art. IX, § 1.

challenging the State's role over public education.[45] The Constitutional revision also codified that education is a "fundamental value" and "a paramount duty of the State."[46] Even though ambiguous statutory language limits court intervention, the inclusion of the paramount duty language grants courts an opportunity to serve as a supervisory body to ensure the State is meeting its constitutional responsibility.

In *Bush v. Holmes*, the plaintiffs were concerned citizens who wanted the court to decide whether an Opportunity Scholarship Program (OSP), which allowed the State to pay a child's tuition to attend private school, was unconstitutional.[47] The Florida Supreme Court used the 1998 amended language in the Florida Constitution to determine whether the State violated its constitutional duty in making "adequate provision" for a "uniform, efficient, safe, secure, and high-quality system of free public schools."[48] In line with the judicial presumption in favor of the Legislature's flexible means in fulfilling the State's grant over public schools, the court reasoned statutes are clothed with a presumption of constitutionality, and courts should give a statute a constitutional construction when such a construction is reasonably possible.[49] The court, however, found that the OSP undermined the system of public schools by using public funds to pay for private schooling, further contributing to nonuniformity in public education.[50]

The court here maintained a more restrictive view of Article IX because it considered that the constitutional mandate to provide for public education is limited in the means by which the mandate shall be executed. [51] Even after the 1998 Amendment was crafted to clarify the ambiguous language surrounding the uniformity of schools, the court had to review the revised language *in pari materia* with other constitutional provisions to further inform its analysis.[52] Reading the initial "paramount duty" language alongside the following sentence describing "uniform, efficient, safe, and secure public schools," the court determined that the State's fundamental duty to provide education must be exclusively delivered through the means of public education.[53] Therefore, courts will read the Florida Constitution's

45 Gonzalez, *supra* note 43, at 667.

46 Bush v. Holmes, 919 So. 2d 392, 403 (Fla. 2006).

47 *Id.* at 397.

48 *Id.* at 398.

49 *Id*. at 405.

50 *Id.*

51 *Id.* at 406.

52 *Id.*

53 *Id.* at 407.

normative words alongside its accompanying language to further define its meaning.

III. POLITICAL QUESTION DOCTRINE AND SEPARATION OF POWERS

Not only is the textual, constitutional backbone of Article IX crucial to understand the power distribution between the State and local school boards, but also courts must weigh the political question and separation of powers doctrines to determine if they are barred from ruling on the issue entirely. These concepts, rooted in federalism, are particularly consequential because even if the State acts beyond the bounds of precedent, courts may be unable to provide a remedy if another branch of government is tasked with resolving the issue, posing another hurdle for those challenging state-level actions.

A. *Political Questions: Baker v. Carr*

The most famed example of the political question doctrine as explained in modern jurisprudence is found in *Baker v. Carr*. The case reached the Supreme Court after the plaintiffs brought suit under 42 U.S.C. §§ 1983 and 1988 alleging that Tennessee's apportionment of legislative representation violated Equal Protection under the Fourteenth Amendment.[54] The Supreme Court held that the subject matter of this case pertaining to an Equal Protection claim was appropriately within federal jurisdiction, but the plaintiffs did not have standing to bring their claim to federal courts following a lack of clear evidence of disadvantage as a result of the voting apportionment.[55] Most importantly, the Court "considered the contours" of the political question doctrine to determine if the case was nonjusticiable.[56] The political question doctrine is a function of separation of powers because courts will avoid ruling on subject matters already committed to another branch to preserve the delineations of power that the Framers of the Constitution intended.[57] Further, the Court found that politically related issues do not automatically trigger the political question doctrine.[58]

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54 Baker v. Carr, 369 U.S. 186, 187–88 (1962).

55 *Id.* at 203, 206.

56 *Id.* at 210.

57 *See id.*; Kunz v. Sch. Bd. of Palm Beach Cnty., 237 So. 3d 1026, 1027 (Fla. Dist. Ct. App. 2018); Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., 262 So. 3d 127, 135–36 (Fla. 2019).

58 *See Baker*, 369 U.S. at 209; Nat Stern, *Don't Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. PA. J. CONST. L. 153, 160 (2018).

The Court listed likely factors that hinted at a political question including: a textual commitment of the issue to a political branch; a lack of judicial standards; the impossibility of making a judicial decision without a policy determination outside of judicial discretion; the impossibility of a court taking independent resolution without disrespecting the branches of government; a special need to adhere to a political decision; or the potential for multiple pronouncements from different political branches on the same issue.[59] Applying the factors, the Court found that the political question doctrine did not bar intervention because the judicial standards pertaining specifically to the Equal Protection clause were well-defined by courts and were not exclusively committed to another branch.[60] Following the aftermath of *Baker*, some scholars have recognized that the refusal of courts to decide the merits of a claim based on the political question doctrine practically serves as an acceptance of the government's actions.[61] Moreover, state courts use *Baker* as the pinnacle example of the political question doctrine, yet its principles do not transfer as seamlessly to state-level issues.[62]

State constitutions and the federal Constitution often have a similar delineation of power between branches of government, but they may differ in how allocation of power is distributed between the branches themselves.[63] As a result, the *Baker* factors may not be as helpful for state-level courts. Education is also not included in the federal Constitution, yet is an important part of many if not all state-level constitutions.[64] Lawsuits pertaining to the guarantee of public education are typically dismissed under the political question doctrine because of their broad and descriptive nature, non-self-executing identity based on positive rights, and close ties to public finance.[65] Without an implied self-executing mechanism of review, the political question doctrine arguably prevents courts from intervening on another branch's realm of authority. Similarly, financial decisions and budgeting are often committed to the state legislature.

The *Baker* test can usually prevent judicial involvement in cases challenging state actions in providing public education that include a textual commitment to another branch, a lack of judicial standards, and a making of

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59 *Baker*, 369 U.S. at 217.

60 *Id.* at 226.

61 Stern, *supra* note 58, at 168.

62 *Id.* at 180; *see also* DeSantis v. Fla. Educ. Ass'n, 306 So. 3d 1202, 1215 (Fla. Dist. Ct. App. 2020).

63 Stern, *supra* note 58, at 174–75.

64 *Id.* at 188.

65 *Id.*

a policy determination outside of judicial discretion.[66] However, some courts have rebutted the *Baker* factors by arguing that the language within the state constitution itself grants a fundamental, public right to education, allowing state courts to determine if such guaranteed standards are met.[67] In addition, the concept of self-execution is often viewed in tandem with a fundamental right in order for courts to overcome the political question doctrine for positive rights like education.[68] Therefore, the statutory articulation of quality public schools inherently should include a judicially implied power to ensure certain standards are being met to preserve the right to education. Judges are well equipped in their more politically insulated capacity to review all relevant information in determining whether the State is meeting its educational goals.

B. *Separation of Powers*

Separation of powers and the political question doctrine are similar concepts both rooted in American legal jurisprudence in favor of limited government. The Florida Constitution also explicitly contains a separation of powers clause explaining that no person in one branch shall exercise powers appertaining to another branch, unless otherwise stated in the constitution.[69] The Supreme Court has further held that the separation of government power into three branches is essential to the preservation of liberty.[70] Even though there are separate branches of government with their own assumed realm of influence, in *Cooper v. Aaron*, the Supreme Court ruled that its constitutional interpretations are binding on all other government officials.[71] State courts, however, retain an independent sovereignty in the federal system because state courts operate outside of the federal judicial branch.[72] State constitutions grant and limit the state court's power.[73]

On its face, this does not mean state courts must give federal courts precedence, unless stipulated in the state constitution.[74] Therefore, even

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66 *Id.* at 189–90; Kunz v. Sch. Bd. of Palm Beach Cnty., 237 So. 3d 1026, 1027 (Fla. Dist. Ct. App. 2018); Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., 262 So. 3d 127, 135 (Fla. 2019).

67 Stern, *supra* note 58, at 194; *see also* Abbeville Cnty. Sch. Dist. v. State, 335 S.C. 58, 69 (1999); Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 295 Conn. 240, 332 (2010) (Palmer, J., concurring).

68 Stern, *supra* note 58, at 195.

69 FLA. CONST. art. II, § 3.

70 *See* Misretta v. United States, 488 U.S. 361, 380 (1989).

71 *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958); Lee J. Strang, *State Court Judges Are Not Bound by Nonoriginalist Supreme Court Interpretations*, 11 FIU L. REV. 327, 329 (2016).

72 Strang, *supra* note 71, at 331.

73 *Id.* at 333.

74 *Id.*

though courts have used separation of powers as a justification to avoid statutory interpretation of Article IX, there is an opportunity to redefine the separation of powers argument. Similar to the reasoning courts used to work around the political question doctrine, one may argue that the state constitution informs whether the courts are an appropriate forum to resolve the issue. The Florida Constitution grants the State with a "paramount" duty to oversee public education.[75] As a result, the Florida Constitution has impliedly granted courts the authority to ensure the State is complying with its constitutional duty. School boards may argue that courts can intervene in school safety cases considering the political question and separation of powers doctrines.

IV. ANALYSIS: DETERMINING SPECIFIC AREAS OF CONTROL BETWEEN LOCAL SCHOOL BOARDS AND THE STATE BOARD OF EDUCATION

Local school boards have advantages and disadvantages in the legal battles against the State over COVID safety measures. Broad statutory language enables school boards to argue statutory interpretations favorable to their COVID safety measure preferences. Not only can school boards argue that the State's constitutional grant of the paramount duty over public schools inherently means courts may intervene to ensure minimum educational standards are met,[76] but they can also utilize various provisions in section 1001.42 in favor of enacting independent COVID protocols.[77] However, school boards face challenges in arguing the State overstepped its constitutional bounds in enacting COVID measures in schools.

First, individual rights have emerged as a guiding principle for the countermovement against government mandates, and courts must consider that other opt outs have historically been allowed for health-related, vaccine mandates. Second, those challenging state-level COVID reopening policies have had the difficult burden of proving unconstitutionality because the State must exhibit compulsion without giving school boards any meaningful compliance alternatives. Third, the political question doctrine and separation of powers generally limit judicial intervention in cases challenging state-level authority over education. Considering the challenges school boards face in enacting their own respective COVID measures, there is still opportunity for

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75 FLA. CONST. art. IX, § 1.

76 Conn. Coal. for Just. in Edu. Funding, Inc. v. Rell, 295 Conn. 240, 308 (2010).

77 *See* FLA. STAT. §§ 1001.42(4), (8) (2022).

local school board districts to prevail and allow individual districts to adopt COVID plans that meet their respective community needs.

A. *Local School Board Statutory Powers*

The Florida Constitution provides further guidance regarding control over education as it is shared between government bodies. It specifies that the State Board of Education "shall be a body corporate and have such supervision of the system of free public education as is provided by law."[78] In addition, it also says that each county shall constitute a school district, and that "[t]he school board shall operate, control, and supervise all free public schools within the school district."[79] Analyzing these constitutional provisions alongside Article IX, Section 1, whereby the State must maintain "adequate," "safe," and "uniform" public schools, there is overlap in the powers granted to both local and state governmental bodies.[80] The State and school boards' shared authority over schools leads to legal battles over particular areas of influence, like in the case of a pandemic.

Arguably, COVID regulations relating to school closures and mask mandates should be justified by the local school board's statutory realm of authority. The Florida Legislature has granted local school boards the authority to determine the daily operational opening and closing of schools and the protection of student safety and welfare, among other important responsibilities.[81] However, because of the unique nature of a pandemic that endangers the health and safety of students, courts must also consider the State's concurrent power in ensuring student safety.[82] Conflict ensues when local school boards and the State disagree on policy, as demonstrated by the pandemic, since both entities will likely have differing means of implementing safety measures. Also, there is ambiguity in the term and usage of "safety" alongside other normative statutory definitions that Florida courts have had to grapple with.[83]

School boards also exercise their own respective power. First, local school boards are given authority over the daily operation of public schools.[84] The school board's operational power is further demonstrated in *Orlando v.*

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78 FLA. CONST. art. IX, § 2.

79 FLA. CONST. art. IX, § 4.

80 *See* FLA. CONST. art. IX, § 1.

81 *See* FLA. STAT. § 1001.42 (2022).

82 *See* FLA. CONST. art. IX, § 1.

83 *See* Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., 232 So. 3d 1163, 1170 (Fla. Dist. Ct. App. 2017).

84 *See* FLA. STAT. § 1001.42 (2022).

Broward County. In *Orlando*, a mother filed a negligence complaint against the School Board of Broward County for the alleged wrongful death of her son on school board owned property.[85] The son was struck by a car after being released from school during rush hour traffic, and the mother argued that the school board had knowledge of the dangerous traffic conditions surrounding her son's school.[86] The court held that planning level decisions like determining the school hours of the day are within the school board's discretion, and such decisions entitle the school board to sovereign immunity.[87]

Another example of the school board's daily operational authority is the power to assign students to sex-specific bathrooms.[88] In *Adams*, a high school sought to enforce the school district's unwritten bathroom policy that assigns students to use bathrooms based solely on the student's reported sex.[89] The court found that the school policy did not pass intermediate scrutiny because the policy did not favor the school's purported interest in protecting student privacy.[90] Even though the school board had the authority to enact bathroom policies, the gender bathroom assignment was improperly and arbitrarily based off of original enrollment forms, which could date back years when the child first entered the school system.[91] The court prevented local school boards from treating members of the same transgender group differently based off of potentially outdated information.[92]

Second, the determination of balancing concurrent state-level and local powers is less straightforward in the context of protecting student "safety" during a pandemic. While the court in *Citizens for Strong Schools, Inc*. suggested that the terms "safe" and "secure" are subject to judicially manageable standards, the application of the terms to different fact patterns vary and it is difficult to ascertain clear overarching rules.[93] However, the court held that "high quality" did not have any manageable standards.[94] The dissent in *Citizens for Strong Schools, Inc.*, also pointed out the lack of clarity of Article IX, Section 1, thereby requiring courts to make policy judgments

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85 Orlando v. Broward Cnty., 920 So. 2d 54, 56 (Fla. Dist. Ct. App. 2005).

86 *Id.* at 57.

87 *Id.* at 58.

88 Adams v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299, 1306 (11th Cir. 2021).

89 *Id.*

90 *Id.* at 1308.

91 *Id.* at 1309.

92 *Id.* at 1309–10.

93 *See* Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., 232 So. 3d 1163, 1167 n.3 (Fla. Dist. Ct. App. 2017).

94 *Id.* at 1168.

to determine how "efficient, safe, secure, [or] high quality" the school system must be.[95] The dissent explained that the Legislative branch should handle educational policy determinations or else separation of powers between the government branches is violated.[96] The courts cannot supplement the Florida Constitution's lack of clear standards and bypass the Legislature's authority.[97] The dissent also included cases from other states like Pennsylvania and Rhode Island where courts found that the legislature, not courts, should clarify any absence of educational standards.[98] There is a concern that allowing judges the power to define educational norms would deprive the public from expressing their ideas as typically reflected in the legislative process.[99]

Other states, like Washington, have used similar, broad statutory language to create financial pressure to comply with mask mandates rather than prohibit them.[100] Washington has parallel statutory language compared to Florida because it grants the State with the power "to protect the health, safety, and general welfare of students within the State of Washington."[101] Some parents pressured school districts not to comply with Governor Jay Inslee's mask mandate, but local school boards have argued even if one has personal disagreements with the mandate, not complying would be incredibly detrimental to the financial stability of local districts.[102] It is important to note that even with similar, broad statutory language allowing the state to act in accordance with preserving student "safety," Washington has enacted one of the strictest COVID restrictions in the country. Governor Inslee's emergency order also required all public, private, and charter school employees to receive the COVID vaccine.[103] Medical and religious exemptions applied for all school employees included in the vaccine mandate.[104] The institutional

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95 Haridopolos v. Citizens for Strong Sch., Inc., 81 So. 3d 465, 477 (Fla. Dist. Ct. App. 2011) (Roberts, J., dissenting).

96 *Id.* at 478.

97 *Id.*

98 *Id.* at 480.

99 *Id.* at 481.

100 Ray Miller-Still, *Enumclaw School Board Member Tackles Masks, Sex-ed, and CRT in Year-End Speech*, THE COURIER-HERALD (Dec. 21, 2021, 10:14 AM), https://www.courierherald.com/news/enumclaw-school-board-member-tackles-masks-sex-ed-and-crt-in-year-end-speech/.

101 WASH. ADMIN. CODE § 181-87-010 (2022).

102 Miller-Still, *supra* note 100.

103 Monica Velez & Jonathan O'Sullivan, *Inslee Brings Back Statewide Mask Order and Mandates Vaccines for School Workers*, SEATTLE TIMES (Aug. 18, 2021, 2:39 PM), https://www.seattletimes.com/education-lab/inslee-brings-back-statewide-mask-order-and-mandates-vaccines-for-school-workers/.

104 *Id.*

acceptance from local school boards and teachers' unions of Governor Inslee's more stringent COVID restrictions has allowed him to consolidate state power and resources to implement his vision to end the pandemic.[105]

Similarly, the California Third District Court of Appeal upheld the constitutionality of Governor Newsom's executive order requiring county election officials to mail ballots to registered voters and allowing voters to cast their ballot remotely via vote by mail due to pandemic health concerns.[106] The court reasoned that the order was constitutional because it utilized a broad interpretation of state-level statutory emergency powers and recognized the legislature could delegate legislative power when the statute, as in this case, provided implied standards to direct the implementation of policy.[107] Moreover, the court further justified the Governor's order because the legislature had the authority to terminate the emergency at any time providing a safeguard for the delegation of legislative power granted to the executive.[108] While there is support for broad, expansive emergency orders, the government's increasing role in daily life has also sparked protests across the country.[109] Therefore, even if broad statutory language relating to "safety" is used to expand state powers to respond to a pandemic, the debate over individual rights looms in the background.

B. *Safety and Individual Parental Rights*

Individual rights are a large component of Governor Ron DeSantis's public narrative in support of an "anti-mask" mandate.[110] School districts with mandatory mask mandates usually allowed an opt-out only for medical reasons.[111] Parental discretion, as the Governor supports, cannot be used as a reason to opt out on its own.[112] As it currently stands, the latest First District

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105 *Id.*

106 Newson v. Superior Ct., 63 Cal. App. 5th 1099, 1107–12 (2021).

107 *Id*. at 1114–15.

108 *Id.* at 1116–17.

109 *See* Nathan Solis & Hailey Branson-Potts, *Thousands Protest COVID Vaccination Mandates as L.A.'s Verification Rules Kick in*, L.A. TIMES (Nov. 8, 2021, 4:03 PM), https://www.latimes.com/california/story/2021-11-08/thousands-protest-covid-19-vaccine-mandates-in-l-a; *Federal Judge Denies Attempt to Block Dismissal of Unvaccinated New York City Workers*, ABC 7 NY (Feb. 12, 2022), https://abc7ny.com/nyc-vaccine-mandate-vax-covid-vaccinations-deadline/11554808/.

110 *See* The Associated Press, *Florida's On-Again, Off Again Ban on School Mask Mandates is Back in Force*, NAT'L PUB. RADIO (Sept. 10, 2021, 3:58 PM), https://www.npr.org/sections/back-to-school-live-updates/2021/09/10/1036033583/court-desantis-ban-on-school-mask-mandates-back-in-force.

111 *Id.*

112 *Id.*

Court of Appeal ruling reversed the circuit court's stay on enforcement of the Governor's mask mandate ban.[113] Parents may choose to not place a mask on their child even if the local school board has implemented a mask mandate. There are concerns that such a policy would undermine the intent behind a mask mandate, since data tends to show masks work best when most people in a crowded area are wearing one.[114]

The case *Department of Health v. Curry* further demonstrates that individual interests can limit the state's power in ensuring public safety.[115] In that case, the plaintiff-parent sought injunctive and declaratory relief to allow her daughter to attend public school without immunizations claiming that the Department of Health improperly denied the mother's request for a religious exception to immunization.[116] The court concluded that when public health conflicts with the individual parental right to raise their child in accordance with religious practices, the Legislature intended that the latter should ultimately be protected since the State may not inquire further on parental objections.[117] Section 1003.22(9) of the Florida Statutes also allows the Department of Health to prevent children who have not been immunized from attending school in the event of a disease outbreak.[118] However, the same statute directly outlines a religious exception to immunization without any mention of the Department of Health needing to verify the legitimacy of such exception.[119] The statute granted concurrent powers to both the State and local school boards for immunization with the State having the power to promulgate rules regarding immunization, and the school board acting as the enforcement mechanism to enact state-level policies.[120]

The court recognized that an opt-out for vaccines poses a challenge for local school boards arguing against the parental exception for mask mandates. The holding in *Curry* demonstrates the deference courts have given to individual choice in complying with government mandates.[121] In response to government-imposed COVID regulations, section 1014.03 of the Florida Statutes states that no government entity may infringe on the

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113 *Id.*

114 *Use and Care of Masks*, CTR. FOR DISEASE CONTROL & PREVENTION, (Apr. 6, 2021), https://www.cdc.gov/coronavirus/2019-ncov/your-health/effective-masks.html; Maria Godoy, *Yes, Wearing Masks Helps. Here's Why*, NAT'L PUB. RADIO (June 21, 2020, 7:00 AM), https://www.npr.org/sections/health-shots/2020/06/21/880832213/yes-wearing-masks-helps-heres-why.

115 Dep't of Health v. Curry, 722 So. 2d 874, 877 (Fla. Dist. Ct. App. 1998).

116 *Id*. at 875.

117 *Id.* at 877.

118 *See* FLA. STAT. § 1003.22(9) (2022).

119 *Curry,* 722 So. 2d at 877.

120 *Id.* at 876.

121 *See id*. at 877.

fundamental rights of a parent to direct the health care of his or her minor child unless the action "is reasonable and necessary to achieve a compelling state interest and that action is narrowly tailored and is not otherwise served by a less restrictive means."[122]

School boards should argue that their respective mask mandate is reasonable, necessary, and narrowly tailored using data specific to their school district to support the implementation of a mask mandate. The Brevard County School Board's arguments in support of their mask mandate should guide all local school boards in justifying their own under the statute. The Brevard County School Board argued that the protection of students and staff's health and safety is a compelling state interest.[123] Moreover, a mask mandate is reasonable and cannot be served by less restrictive means because the State barred other alternative means like mandatory quarantine of asymptomatic students.[124] The school board emphasized face coverings were the only remaining protection for students and staff to prevent catching the virus.[125] The school board also noted that the mask mandate is narrowly tailored to reflect the prevalence of COVID transmission in the community.[126] Every thirty days, the school board planned to review COVID positivity rates in the district and allow a parent opt-out to the mask mandate once transmission reached the moderate classification under Centers for Disease Control and Prevention ("CDC") guidelines.[127] Therefore, a data-driven, fluid approach to mandating masks in school should pass the statutory limitations placed on school boards to prove the protection of a compelling government interest through narrowly tailored means.

C. *State Compulsion*

School boards can use their statutory powers to enact narrowly tailored COVID protocols within their respective school district. However, another obstacle for school boards emerges if the State imposes an emergency order all local school boards must follow. The Florida Constitution establishes that there is somewhat of a hierarchy of managerial control, yet the State may not unconstitutionally enforce a mandate applicable to school boards unless there

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122 FLA. STAT. § 1014.03 (2022).

123 Letter from Sch. Bd. of Brevard Cnty. to Richard Corcoran, Fla. Comm'r of Educ. (Oct. 6, 2021), https://www.fldoe.org/core/fileparse.php/20012/urlt/Brevard-County-Correspondence-dated-October-6-2021.pdf.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

is a meaningful alternative to compliance.[128] Moreover, the State may not establish a review body intended to bypass the school board's discretion.[129] In *School Board of Palm Beach County v. Florida Charter Education Foundation, Inc*., applicants hoping to open a charter school in Palm Beach County appealed the school board's denial of their charter school application claiming there was insufficient evidence to support the denial.[130] The Charter School Appeal Commission ("CSAC"), the state-level appellate commission, agreed with the applicants in determining that the school board did not present substantial evidence to support the denial of the application.[131]

The school board appealed the reversal from CSAC, claiming that Article IX, Section 4 of the Florida Constitution granted local school boards the exclusive authority to create charter schools under the power to "operate, control, and supervise all free public schools."[132] The court held that the state board did not infringe upon constitutionally granted local school board powers.[133] Further, even if the State infringed on local school board influence, infringement is "expressly contemplated" because the State is the ultimate supervisory authority.[134] CSAC acted as a supervisor over local school board decisions in accordance with the State's statutorily granted authority, and the school board still retained the control over the charter school initiation process.[135] The court discussed that if CSAC had the power to bypass local school boards, then the entity would be unconstitutional.[136] The case was reversed and remanded on separate grounds because the court found CSAC did not comply with the statute's mandate of including fact-based justifications, but it is important to note that the court found the body's existence and supervisory role over local school boards was constitutional.[137]

The court's decision in *School Board of Palm Beach County* can be applied to the COVID-related disagreements between local school boards and the State. The State has an advantage in arguing its statutory supervisory grant allows it to review or overturn decisions even if the subject matter is within the local school board's realm of control, like creating charter schools

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128 Sch. Bd. of Palm Beach Cnty. v. Fla. Charter Educ. Found., Inc., 213 So. 3d 356, 360 (Fla. Dist. Ct. App. 2017); DeSantis v. Fla. Educ. Ass'n, 306 So. 3d 1202, 1221 (Fla. Dist. Ct. App. 2020).

129 *See Sch. Bd. of Palm Beach Cnty.,* 213 So. 3d at 361.

130 *Id.* at 358–59.

131 *Id.* at 359.

132 *Id.*

133 *Id.* at 360.

134 *Id.*

135 *Id.* at 360–61.

136 *Id.* at 361.

137 *Id.* at 363.

or determining local dress codes.[138] However, the State also must adhere to following the statutory framework of regulations that likely accompanies the additional grant of power, or else risk reversal like the court did in *School Board of Palm Beach County*.[139]

In *DeSantis v. Florida Educational Ass'n*, the plaintiff teachers' union sued the Florida Department of Education claiming Emergency Order 2020-E0-06, was unconstitutional because the State failed to provide a "safe, secure, and high quality" public school system.[140] The Order required local school districts to submit a reopening plan for the Fall of 2020, and increased state funding was largely based on the number of students estimated to return to school in person.[141] The plaintiffs argued the Order essentially forced school districts to physically reopen schools, even as the pandemic continued, or face a loss of funding.[142] While the First District Court of Appeal ultimately held that the political question doctrine and separation of powers prevented a ruling on the case as discussed later in this paper, it also held that school districts were not forced under the Order to offer in person classes.[143] The court decided that the Order was constitutional because local school boards were left with discretion in order to determine whether or not to physically open schools.[144] Additionally, the court explained that local school districts who did not want to reopen in person had a statutory remedy to petition to the legislature in order to receive additional funding.[145]

The holding in *School Board of Palm Beach County* demonstrates that state-level compulsion is crucial in determining if the State exceeded its constitutional powers.[146] With this rule in mind, the circuit court in first deciding the school reopening suit found that tying funding to the number of students enrolled in physical instruction amounted to compulsion, in contrast to the First District Court of Appeal's opinion.[147] The court referenced the doctrine of unconstitutional conditions, where the government may not force an individual to give up a constitutional right in exchange for a discretionary benefit granted by the government when the benefit sought has little or no

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138 *See id.* at 361.

139 *See id.* at 363.

140 DeSantis v. Fla. Educ. Ass'n, 306 So. 3d 1202, 1210–11 (Fla. Dist. Ct. App. 2020).

141 *Id*. at 1210.

142 *Id.* at 1211.

143 *Id.* at 1217–18, 1222.

144 *Id.* at 1222.

145 *Id.*

146 Sch. Bd. of Palm Beach Cnty. v. Fla. Charter Educ. Found., Inc., 213 So. 3d 356, 363 (Fla. Dist. Ct. App. 2017).

147 Fla. Educ. Ass'n v. DeSantis, No. 2020-CA-001450, 2020 Fla. Cir. LEXIS 2693, at *8 (Fla. Cir. Ct. Aug. 24, 2020).

relationship to the right.[148] Essentially, the government cannot use funding as a means to force schools across the State to reopen for brick-and-mortar instruction.[149] The court used Hillsborough County as an illustrative example of state compulsion because the State rejected the Hillsborough School Board's plan to delay reopening based on the advice of doctors.[150] The court said the school board's day-to-day statutory power to open or close schools was rendered meaningless by the Order, since school districts complied to avoid a loss of funding.[151]

Comparing the reasoning in both the circuit court and the First District Court of Appeal regarding school reopening, the circuit court correctly recognized that Emergency Order 2020-E0-06 left local school boards with a lack of alternatives which amounted to unconstitutional state compulsion.[152] While the First District Court of Appeal aptly noted that statutory remedies allowed local school boards to petition a denial of funding due to remote instruction, the court failed to weigh the immediate consequences of non-compliance.[153] For example, Hillsborough County specifically had immense financial pressure to acquiesce to state-level opening restrictions because of its lack of capital funding generally.[154] The Hillsborough County School Board Superintendent eliminated more than 300 teaching positions and support staff jobs in Fall of 2020.[155] The pandemic placed an additional financial strain on an already financially-bound school district. The school district had to rely on federal CARES Act[156] funding to avoid a state takeover of its public schools.[157] Therefore, the existence of an appeals mechanism to resolve funding disputes relating to school reopening does not preclude state compulsion considering the dire and unprecedented needs of a pandemic.

Arguably, the State's restrictive COVID measures can also constitute unreasonable state compulsion. A court may decide that tying funding to

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148 *Id.* at *8–9.

149 *Id.* at *9.

150 *Id.* at *9–10.

151 *Id.* at *10.

152 *Id.* at *8–9.

153 DeSantis v. Fla. Educ. Ass'n, 306 So. 3d 1202, 1222 (Fla. Dist. Ct. App. 2020).

154 *Hillsborough Co. Schools Awarded Federal Funds to Avoid State Takeover*, WFTS TAMPA BAY (May 11, 2021, 5:27 PM), https://www.abcactionnews.com/news/in-depth/hillsborough-co-schools-awarded-federal-funds-to-avoid-state-takeover.

155 *Id.*

156 Coronavirus, Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

157 *See Hillsborough Co. Schools Awarded Federal Funds to Avoid State Takeover*, *supra* note 154.

mask mandates, rather than to school reopening as the Florida Department of Education implemented, is an unconstitutional act of state compulsion. In *DeSantis v. Florida Educational Ass'n*, the First District Court of Appeal held that local school boards were still left with the discretion whether to open schools even though the State created a funding incentive to open schools.[158] Opponents to a mask mandate enacted at the state-level may argue that unlike the Order to reopen schools, the compulsory use of masks does not provide local districts as much flexibility in determining how they should comply. A reopening plan could differ in terms of operational daily schedules and employees staffed onsite based on local school board discretion. On the other hand, a mask mandate implies a uniform scheme with a few medical exceptions to maintain an optimal result of protection against disease. State-level regulatory orders must allow local school boards the authority to control and manage the operation of public schools.[159] The State of Florida could, however, use its emergency powers to overcome state compulsion challenges. Florida Statutes grant the Governor the discretion to potentially pass a mask mandate to "meet the dangers of an emergency."[160] The Governor would only have to renew the emergency order every sixty days to remain effective.[161]

Therefore, the State can easily overcome compulsion challenges. The State can use an emergency order or an articulable alternative to compliance to legally justify its COVID mandates. Because courts have broadly interpreted the availability of alternatives, local school boards should note that challenges to the State's action on compulsion grounds are difficult to win considering recent court decisions on school reopening.

D. *Political Question Doctrine and Separation of Powers Revisited*

Even after prevailing on a state compulsion argument, the political question doctrine and separation of powers principle usually allow a state to act without judicial intrusion. Both political question doctrine and separation of powers were rationales the court used in *DeSantis v. Florida Education Ass'n* to justify its refusal to rule on the State's Order to reopen schools.[162] Since the court decided it could not rule on the issue in the interest of

158 *DeSantis*, 306 So. 3d at 1222.

159 *See* Sch. Bd. of Palm Beach Cnty v. Fla. Charter Educ. Found., Inc., 213 So. 3d 356, 360 (Fla. Dist. Ct. App. 2017).

160 *See* FLA. STAT. § 252.36 (1)(a) (2022).

161 *See* FLA. STAT. § 252.36 (2) (2022).

162 *See DeSantis*, 306 So. 3d at 1214, 1218.

preserving the power balance between the branches of government, the judiciary allowed the Order to remain in effect. Consequently, the political question doctrine and separation of powers have helped the Florida Executive branch ("Executive") achieve its pandemic policy vision for public schools.

In *DeSantis v. Florida Educational Ass'n*, the First District Court of Appeal found that several of the *Baker* nonjusticiability principles were present in the case of reopening public schools.[163] The court determined that the decision of whether the State has adequately provided for safe and secure schools would amount to a policy determination that is reserved to the legislative branch.[164] The court also found that deciding whether the Governor and the Commissioner of Education acted in accordance with statutory emergency powers was outside the bounds of judicial power.[165] The court reasoned that answering the questions posed by this case would also express a lack of respect for the coordinate branches of government.[166] Moreover, the court concluded that there were no judicially discoverable or manageable standards for the trial court to resolve the constitutional questions raised in this case.[167] The First District Court of Appeal disagreed with the trial court's determination that there were sufficient judicial principles when defining the statutory definition of safety.[168] The court considered that COVID health metrics are often complex and require a wide analysis of factors to create the safest course of action in reopening schools.[169] The court added that the State provided substantive evidence to support reopening schools, including data showing online instruction hurts the most vulnerable students, and decisions on the safety of people is best entrusted to politically accountable officials.[170]

Separation of powers functioned as a related yet separate reason why the court declined to officially rule on the school reopening debate. The court emphasized Florida's strict requirement for separation of powers.[171] The court cannot intrude on the State's discretionary power in policy areas, especially when the executive branch has used its authority to respond to a public health emergency.[172] The court recognized that the Florida

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163 *Id.* at 1215.

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.* at 1216.

169 *Id.* at 1216–17.

170 *Id.* at 1217.

171 *Id.* at 1218.

172 *Id.*

Constitution grants the Governor the responsibility of responding to emergencies, and the Governor may then issue executive orders armed with the force of law.[173] Here, the Governor delegated his emergency powers to Commissioner Corcoran when the Department of Education promulgated Order No. 2020-E0-6 to reopen schools in Fall 2020.[174] The First District Court of Appeal subsequently found that the trial court improperly rewrote the Order by waiving the statutory funding requirements since the court did not have the authority to direct the Executive to act in a specific manner.[175] The court decided that the Executive had statutory discretion to enact emergency measures and granting the plaintiffs' relief would impede the influence of executive decision making.[176]

Thus, Florida local school boards face several hurdles in implementing COVID policies that potentially conflict with the State's measures. These hurdles include arguing over vague statutory language, competing individual rights, proving difficult state compulsion standards, and acknowledging the limiting judicially-created federalist doctrines. Considering all these challenges, local school boards still have a legal opportunity to enact their own COVID measures as outlined below.

V. RECOMMENDATIONS FOR LOCAL SCHOOL BOARDS TO MAXIMIZE STATUTORY AND POLITICAL POWER

Florida local school boards should follow a two-pronged approach in crafting legal arguments against the State regarding the power to enact COVID emergency measures. First, school boards should argue that Florida Constitution Article IX Section 1 grants the local school boards the power to enact their own district-wide pandemic related measures. Second, school board should utilize section 1001.42 of the Florida Statutes to their advantage in arguing that control over the daily operation of schools and student welfare should translate into the power to enact emergency measures.[177] These two approaches are the most effective bulwark against a growing judicial and legislative acceptance of increasing state-level power over schools during a pandemic or any emergency at large.

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173 *Id.*

174 *Id.*

175 *Id.* at 1219.

176 *Id.* at 1218, 1219.

177 *See* FLA. STAT. §§ 1001.42(4), (8) (2022).

A. *Textual Opportunity Within Article IX*

The first opportunity for local school boards to counteract State emergency powers is to use Article IX to argue that the "adequate provision" for a "uniform, efficient, safe, secure, and high-quality system of free public schools" automatically implies a self-executing mechanism for Florida courts to ensure that the State is meeting its statutory duty.[178] Local school boards can emphasize that without an implied court power to oversee the Executive, the quality of education and safety of Florida students is at risk. Florida courts should follow the example courts in Connecticut and South Carolina have set in recognizing an implied judicial self-executing system to ensure the state is meeting its constitutional responsibilities.[179]

In *Abbeville County School District,* the plaintiffs challenged South Carolina's educational funding system for being inadequate and unfair to poorer districts.[180] The South Carolina Supreme Court found that the broad constitutional mandate to provide free public schools allowed South Carolina courts to define minimally adequate educational standards.[181] Some of these minimum standards included (1) the ability to communicate using the English language, and knowledge of mathematics and physical science; (2) knowledge of economic and historical systems; and (3) academic and vocational skills.[182] The court emphasized that establishing minimum judicial standards does not usurp the legislature's role in creating educational policies, and remanded the case to further determine if educational goals were properly met.[183]

Similarly in *Sheff*, the Connecticut Supreme Court held that the legislature's statutory delegation of power over education does not deprive courts of the authority to determine whether the legislature has fulfilled its duty.[184] The plaintiffs in that case brought suit alleging the state failed to meet its constitutional responsibility because of widespread, unequal educational opportunities for disadvantaged children.[185] The court also reaffirmed that the state has a constitutional obligation to provide all public school children with substantially equal educational opportunities, and courts will review any

178 *See* FLA. CONST. art. IX, § 1.

179 *See* Stern, *supra* note 58, at 194.

180 Abbeville Cnty. Sch. Dist. v. State, 335 S.C. 58, 64 (1999).

181 *Id.* at 68.

182 *Id.*

183 *Id.* at 69.

184 Sheff v. O'Neill, 238 Conn. 1, 15 (1996).

185 *Id.* at 5.

infringements under strict scrutiny.[186] The court decided that racial and ethnic isolation prevents schoolchildren from having substantially equal educational opportunities, mandating the state take appropriate corrective measures.[187]

Using the court's reasoning in *Abbeville County School District*, Florida courts can establish basic standards to ensure the State is meeting its constitutional duty to provide for "safety" in schools without intruding on the Legislature's role to create policy.[188] Florida courts also should not mandate how the Legislature should fulfill its constitutional duties, like the *Sheff* court refused to specify how the state should correct its educational inadequacies. The ability for courts to intervene and rule that the State should change its policies provides a trustworthy review mechanism to hold the State accountable, while still maintaining separations of power in balance. The State may argue that the Legislature exclusively regulates state-level actions, but the Legislature's political whims make it less helpful to face an emergency like a pandemic. Moreover, during Florida Legislative sessions, employer vaccine mandates overshadowed constructive discussion about how school boards can enact their own respective COVID measures as needed to protect district-wide populations.[189] The Florida Legislature has focused on requiring private employers in the State to offer a multitude of exceptions or "opt-outs" in allowing employees to object to the federal vaccine mandate.[190]

A neutral, politically detached judge is best suited to weigh objective data to decide whether the State is overstepping its constitutional bounds or making the right decisions to adequately protect the safety of Florida students. A judge can make a quick, effective ruling in the interest of protecting school districts. The Florida Legislature may be in an ideological tug of war with the Florida Governor over politicized concepts like government mandated vaccines and mask mandates, but the educational experiences of Florida's students remain on the line. Not only students, but countless teachers, administrators, and employees linger in limbo waiting to see if their health and safety will be compromised by the latest State anti-mask COVID mandate.

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186 *Id.* at 25.

187 *Id*. at 25–26.

188 *See* Abbeville Cnty. Sch. Dist. v. State, 335 S.C. 58, 69 (1999); FLA. CONST. art. IX, § 1.

189 C.A. Bridges, *Are Vaccine Mandates Banned in Florida Now? What Happened in the Legislative Special Session*, TALLAHASSEE DEMOCRAT (Nov. 18, 2021, 11:27 AM), https://www.tallahassee.com/story/news/politics/2021/11/18/florida-legislature-special-session-desantis-biden-vaccine-mask-mandate/8663685002/.

190 *Id.*

B. *Textual Opportunity Within Section 1001.42*

As a result of the exigency of the situation, school boards can also use various provisions in section 1001.42 of the Florida Statutes to allow local school board districts to enact their own COVID protective measures. School boards can use their statutory authority to open and close schools in order to determine the schedule in which schools should reopen in person.[191] Given that the COVID pandemic is fluid and ever-changing, local school boards should be able to tailor school reopening to match community needs. The State may argue that its statutory grant to provide for the uniformity of schools allows the Executive to mandate a sweeping reopening policy that applies to all school boards.[192] However, the State's grant to provide for uniformity must also be read alongside the responsibility to provide for safe and high-quality schools as well.[193] Various Florida school board districts, including the Alachua County School Board, have resorted to federal grants in order to properly fund CDC-recommended strategies to prevent the spread of COVID.[194] Schools are less safe if local school boards must rely on federal grants, rather than the State properly funding the reopening of schools from the start.[195] Therefore, even if the State is acting under its power to ensure uniformity, courts should also ensure that schools are safe and have the proper State funding to enact their COVID protection plans.

A school board district-wide mask mandate can be supported by the Florida Statutes. Local school boards have the authority to provide "proper attention to health, safety, and other matters relating to the welfare of students."[196] Local school boards may provide fact-based data to support the implementation of a mask mandate to curb the spread of COVID. The CDC recommended that all individuals two years or older not fully vaccinated should wear a mask in indoor public places.[197] There are arguments to be made in support of a mask mandate considering the prevalence of indoor instruction in schools and the especially contagious nature of the Omicron

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191 *See* FLA. STAT. § 1001.42(4)(f) (2022).

192 *See* FLA. CONST. art. IX, § 1.

193 Bush v. Holmes, 919 So. 2d 392, 406 (Fla. 2006).

194 *See* Press Release, U.S. Dep't of Educ., U.S. Department of Education Awards Project SAFE Funds to Florida School District Following State-Imposed Penalty for Implementing COVID-19 Safety Measures (Sept. 23, 2021), https://www.ed.gov/news/press-releases/us-department-education-awards-project-safe-funds-florida-school-district-following-state-imposed-penalty-implementing-covid-19-safety-measures.

195 *Id.*

196 FLA. STAT. § 1001.42(8)(a) (2022).

197 *Use and Care of Masks*, CTR. FOR DISEASE CONTROL & PREVENTION, (Oct. 25, 2021), https://stacks.cdc.gov/view/cdc/111014/cdc_111014_DS1.pdf.

variant.[198] The Governor, however, has also hosted a roundtable of doctors and epidemiologists who believe that lockdowns and certain mask mandates are not effective at curbing the spread of COVID.[199]

Like the determination of whether the State is meeting its constitutional duties to ensure the safety of students, a judge should also weigh the individual, district-specific considerations to enact a mask mandate based on the school board's power to protect student welfare.[200] A mask mandate can also be justified through the school board's power to adopt dress codes.[201] For example in *Ferrara*, the court held that regulations like hair length that do not affect fundamental freedoms are given a less rigorous standard of judicial review, allowing school boards to impose rational restrictions.[202]

Arguably, a mask mandate does not affect the fundamental freedom of students. School boards already restrict student liberty in a variety of legally accepted forms like preventing students from leaving school grounds, prohibiting membership in high school fraternities and sororities, and preventing students from buying lunch outside of the school cafeteria.[203] The liberties that are afforded the greatest protection include intrusions on speech, religion, and association.[204] A mask mandate would not necessarily prevent speech or intrude on First Amendment protections. It would also apply evenly to all students unless the student qualifies for an exception. In the interest of maintaining separation of powers among the branches of government, the courts should defer to the Legislature to define the possible exceptions to a mask mandate requirement in schools. As it currently stands, the Governor's Executive Order preserving a parent's right to choose whether to comply with a mask mandate is good law with concurrent support from the Florida Legislature.[205]

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198 Kathy Katella, *Omicron, Delta, Alpha, and More: What to Know About the Coronavirus Variants*, YALE MED. (Dec. 10, 2021), https://www.yalemedicine.org/news/covid-19-variants-of-concern-omicron.

199 Steve King, *Governor's Roundtable Features Panelists Opposed to Mask Mandates, Lockdowns*, WPBF NEWS 25 (Mar. 19, 2021, 9:53 AM), https://www.wpbf.com/article/governors-roundtable-features-panelists-opposed-to-mask-mandates-lockdowns/35879171.

200 *See* FLA. STAT. § 1001.42(8)(a) (2022).

201 *See* Ferrara v. Hendry Cnty. Sch. Bd., 362 So. 2d 371, 372 (Fla. Dist. Ct. App. 1978).

202 *Id.* at 374.

203 *Id.*

204 *Id.*

205 *See* H.B. 1B-COVID-19 Mandates, 2021B Leg., Spec. Sess. (Fla. 2021); Press Release, Gov. Ron DeSantis, Governor Ron DeSantis Signs Legislation to Protect Florida Jobs (Nov. 18, 2021), https://www.flgov.com/2021/11/18/governor-ron-desantis-signs-legislation-to-protect-florida-jobs/.

VI. CONCLUSION

Even though recent court decisions have allowed the Executive to wield significant power over the public school system during an emergency, local school boards should not be discouraged. Local school boards can still implement favored COVID protective policies within the bounds of the current law.

For example, Miami-Dade County Public Schools updated its COVID safety protocols at the end of 2021 following the rise of COVID infections.[206] Individual school districts are prohibited by law from passing a mask mandate applicable to students.[207] However, Miami-Dade County Public Schools decided to implement a mask mandate for all adults who entered Miami-Dade School facilities including employees, transportation drivers, and visitors.[208] Masks were highly encouraged for students.[209] Similarly, Broward County Public Schools also reinstated a limited mask mandate before the end of 2021.[210] The Broward County Public Schools' mask mandate included visitors and vendors but did not include students and employees.[211] The Broward County School Board ultimately did not include employees in the mandate because some school board members believed that because students could not be mandated, staff should not be either.[212] Both the Miami-Dade County and Broward County School Boards demonstrate how mask mandates can still be implemented locally, and still follow the Executive and Legislative branch's limitations.

Two approaches remain for local school boards to continue and potentially win the legal debate in implementing their respective COVID measures. First, rather than focus on the inherent ambiguity within the Florida Constitution, school boards should highlight that the broad nature of the State grant to provide free, public education implies the existence of a judicial review mechanism to ensure educational standards are being met. Second, the Florida Statutes also give local school boards power over the

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206 NBC 6 & The Associated Press, *Miami-Dade Schools Requires Adults to Mask Up, Will Follow CDC's Isolation Guidance*, NBC 6 S. FLA. (Dec. 30, 2021, 6:59 PM), https://www.nbcmiami.com/news/local/miami-dade-schools-unveil-updated-covid-protocols-for-spring-semester/2651219/.

207 *Id.*

208 *Id.*

209 *Id.*

210 *Broward Schools Mandates Masks for Visitors; Optional for Students, Employees*, NBC 6 S. FLA. (Dec. 31, 2021, 7:08 PM), https://www.nbcmiami.com/news/local/broward-schools-mandates-masks-for-visitors-optional-for-students-employees/2652247/.

211 *Id.*

212 *Id.*

daily operations of schools and the authority to promote student welfare.[213] These provisions should allow school boards to decide the appropriate means to reestablish in person instruction or set mask protocols during a pandemic. However, textual support can only go so far when the Executive and Legislative branches pass legislation that undermines home rule school board control. As a result, elections provide an opportunity to emphasize school board independence in enacting safety protocols in the public debate sphere. Apart from political partisanship, voters should research a respective candidate's position on school safety issues and consider whether other branches of government should bar local school boards from enacting a safety policy outright.

The debate over COVID protocols shows the State is legally capable of overriding local school board rule during an emergency. The Florida Statutes define an emergency as "any occurrence, or threat thereof, whether natural, technological, or manmade, in war or peace, which results or may result in substantial injury or harm to the population or harm to the population or substantial damage to or loss of property."[214] The expansive State statutory grant of broad emergency powers should concern all Floridians when courts are prevented from reviewing State action. Perhaps some are indifferent when the political ideology of State officials coincides with one's own political persuasion. Nonetheless, there is a political and societal danger in limiting local discretion to act during an emergency.

Floridians should ask themselves whether, considering separation of powers and the federalist principles that underline our intentional multiple branches of government, they are comfortable with the State using compulsory influence to prevent localities from facing an emergency as they see fit. In especially difficult and uncertain times, there is a unique value to the familiarity and understanding found in the public institutions closest to the individual. Our local school boards are not only a representation of community-based governance, but they are also the public entity entrusted to protect and educate society's future. If we can trust the State to succeed against the challenges of a pandemic, then we should especially trust and empower the institutions designed to reflect the will of the people at the local, most personal level as well.

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213 *See* FLA. STAT. § 1001.42 (2022).

214 *See* FLA. STAT. § 252.34(4) (2022).