

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

Case No.: 1D21-_____
Original Proceeding

GINA DORTCH, BRAD GONZALEZ, SCOTT BURFORD, AMBER
BURFORD, NICHOLE CARLISLE, CARRIE GILLESPIE, KIM HICKEY,
AMANDA MOORE, MICHAEL TICKEL, AMANDA WEBER, AMANDA
DONOHO, DEE BASSO, SHELISA WINGENBACH,
KATIE LEWANDOWSKI, GREGORY ADAME, HEATHER WALLACE,
GARY DESJARDINS, MICHELLE PETTY, TARAN HELM, JEFF SELLERS,
SEAN COLLINS, and TIA BESS,

Petitioners,

v.

ALACHUA COUNTY SCHOOL BOARD,
Superintendent Carlee Simon, DUVAL COUNTY
SCHOOL BOARD, Superintendent Diana Greene,

Respondents.

EMERGENCY PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

School boards have a statutory duty to obey state law. They may not simply ignore a law they dislike or even challenge its validity. Indeed, this Court has repeatedly reaffirmed the well-established doctrine of “public official standing,” which recognizes that public officials may *not* attack the validity of those laws that they are duty bound to obey. *See, e.g., Sch. Bd. of Collier Cnty. v. Fla. Dep’t of Educ.*, 279 So. 3d 281, 288-89 (Fla. 1st DCA 2019). Yet despite this well-entrenched doctrine, the Alachua County School Board (“SBAC”) and Duval County School Board (“SBDC”), along with Carlee Simon, as Superintendent of SBAC, and Diana Greene, as Superintendent of SBDC (collectively, the “School Boards”), have decided that they will operate independently from the state government and official guidance from the Florida Department of Health (the “Department”) in its official capacity and become laws unto themselves.

The School Boards are vehemently opposed to certain protocols in the Florida Department of Health’s Emergency Rule 64DER21-15 (the “Emergency Rule”), which includes protocols for controlling COVID-19 in public school settings. But under the codified structure of governance applicable to Florida’s educational system, school

boards lack authority to disagree with or attempt to override state law. Rather, they are duty bound to follow the laws of Florida. The School Boards may not make up their own laws and rules and, under the public official standing doctrine, the School Boards lack any standing even to attack the validity of the Emergency Rule.

The School Boards understand they are acting unlawfully. Multiple letters from official State agencies with supervisory authority over the School Boards have reminded them of their statutory duties and pointed out their failures to comply with law. They have even been financially sanctioned by the Board of Education, but remain defiant. Superintendent Simon has appeared many times on national news networks publicly expressing her disagreement with the State's policies and vowing to continue to make up her own laws and rules for Alachua County. Not to be outdone, the Duval County School Board just voted to "explore" moving forward with litigation challenging the State's policies despite knowing that it lacks standing to do so.

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction under article V, section 3(b)(8), of the Florida Constitution and Florida Rule of Appellate Procedure

9.030(b)(3) to issue a writ of mandamus. Mandamus is a common law remedy that is used to enforce an established legal right by compelling a public officer or agency to perform a duty required by law. Like other original proceedings in the appellate courts, mandamus is governed by the requirements of Rule 9.100 of the Florida Rules of Appellate Procedure.

Mandamus is the proper remedy to require the performance of ministerial duties imposed under Florida statute. *Volusia Cty. v. Eubank*, 151 So. 2d 37, 49 (Fla. 1st DCA 1963); *State v. Coachman*, 60 So. 344 (Fla. 1912) (action in mandamus to require the Board of County Commissioners of Pinellas County to call an election on the question of whether the county seat of that county should be relocated). “Mandamus is a remedy to command performance of a ministerial act that the person deprived has a right to demand or a remedy by which public officials or agencies may be coerced to perform ministerial duties that they have a clear legal duty to perform.” *Pace v. Singletary*, 633 So. 2d 516, 517 (Fla. 1st DCA 1994) (internal quotes omitted). “In addition to a mere ministerial duty on the part of the respondent, the petitioner must have a specific legal right for the enjoyment, protection, or redress of which the discharge

of that duty is necessary. Mandamus issues only on the showing of a clear legal right to compel the performance of an indisputable duty.”

Id. (internal quotes, cites, brackets omitted).

STATEMENT OF THE FACTS

On September 22, 2021, the Department adopted the Emergency Rule, which establishes “Protocols for Controlling COVID-19 in School Settings.”¹ App. 1. The Emergency Rule was promulgated under the Department’s statutory authority to implement rules governing the control of preventable communicable diseases in schools. *Id.* (citing § 1003.22(3), Fla. Stat.). The Department published a Notice of Emergency Rule, including the full text of the rule, in the September 23, 2021, issue of the Florida Administrative Register. App. 1. The Notice of Emergency Rule set forth the Department’s “Specific Reasons for Finding an Immediate Danger to the Public Health Safety or Welfare” and the “Reason for Concluding that the Procedure is Fair under the Circumstances” as required by section 120.54(4), Florida Statutes. App. 1.

¹ The Emergency Rule updated a prior version of the rule, 64DER21-15, which repealed and replaced prior emergency rule 64DER21-12.

As required by section 120.54(4)(a), the Department’s Notice of Emergency Rule identified specific facts and reasons supporting its finding that an immediate danger to the public health, safety, or welfare required emergency action. Because a recent increase in COVID-19 infections—resulting from the newly emergent COVID-19 Delta variant—coincided with the imminent start of the 2021–22 school year, it was imperative that state health and education authorities provide emergency guidance to school districts concerning protocols for controlling COVID-19 in school settings. *Id.*

Acting under its statutory authority in section 1003.22(3) to adopt rules governing the control of preventable communicable diseases in public schools, and following consultation with the Florida Department of Education (“FDOE”), the Department’s Emergency Rule instituted COVID-19 protocols to “permit students to continue in-person learning, to minimize the detriment to student and school personnel from the added burden of recurrent removal of students, and to benefit the overall welfare of students in Florida[.]” *Id.* The Emergency Rule noted that “removing healthy students from the classroom for lengthy quarantines should be limited[.]” that it was intended to “protect children with disabilities or health

conditions that would be harmed by certain protocols, such as face masking requirements[,]” and that the Department “observed no meaningful difference in the number of COVID-19 cases in school-aged children in counties where school districts have imposed mask mandates.” *Id.*

Most specifically, the Emergency Rule noted that the order “directs that any COVID-19 mitigation actions taken by school districts comply with the Parents’ Bill of Rights, and protect parents’ right to make decisions regarding masking of their children in relation to COVID-19.” *Id.* The text of the rule provides as follows with regard to parents’ decision to utilize face masks:

(d) Schools may adopt requirements for students to wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian of the student to opt the student out of wearing a face covering or mask at the parent or legal guardian’s sole discretion.

Id.

With regard to quarantine procedures, the Emergency Rule provides that:

(3) PROTOCOLS FOR STUDENTS WITH EXPOSURE TO COVID-19. Schools shall allow parents or legal guardians the authority to choose how their child receives education after having direct contact with an individual that is positive for COVID-19:

(a) Parents or legal guardians of students who are known to have been in direct contact with an individual who received a positive diagnostic test for COVID-19 may choose one of the following options:

1. Allow the student to attend school, school-sponsored activities, or be on school property, without restrictions or disparate treatment, so long as the student remains asymptomatic; or

2. Quarantine the student for a period of time not to exceed seven days from the date of last direct contact with an individual that is positive for COVID-19.

Id.

Notwithstanding the clear language of the Emergency Rule, Superintendent Simon announced that the School Board of Alachua County would not comply, and subsequently did not comply. The SBAC did not provide parents with any discretionary face mask opt-out, and it continued its policy of quarantining healthy children by refusing to allow them to return to school after a contact-tracing report despite a lack of symptoms. On September 23, 2021, the FDOE sent a letter to Superintendent Simon and SBAC Chair Leanetta McNealy. App. 2. The FDOE letter stated plainly that the SBAC was not in compliance with the Emergency Rule. On September 24, 2021, Superintendent Simon responded to the FDOE's letter and, in sum, reiterated her and the SBAC's intention to continue to not comply. App. 3.

The SBAC's current face mask policy does not provide parents with the ability to opt out at their sole discretion:²

² Available at: <https://www.sbac.edu/Page/30520>, last accessed at 2:38pm on September 30, 2021.

Mask Opt-Out Options

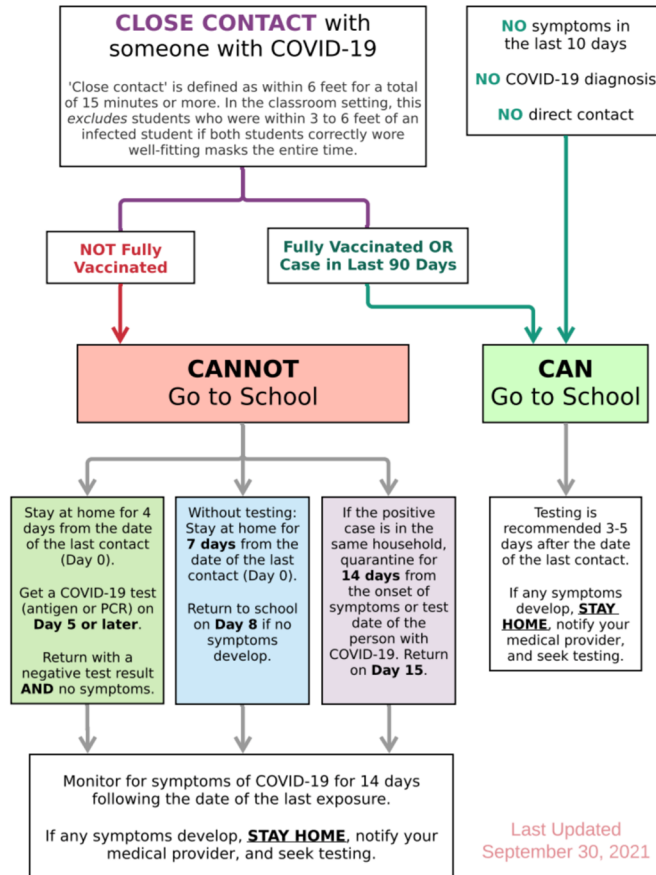
Families may opt-out of the district's mask policy by applying for a **Florida Hope Scholarship** to attend a different public or private school. The scholarship provides transportation funding for students attending a school in a different district.

Families wishing to apply for a Hope Scholarship will need to complete the state's [Hope Scholarship Notification Form](#) and have it signed by their school's principal. Under Incident Type, the state asks families to check 'Harassment' and write 'COVID-19' next to it. More information, including instructions on what to do with the completed form, is available [here](#).

The parents/guardians of students who are unable to wear a mask can complete the Student Mask Opt-Out Medical Exemption [form](#). This form must be signed by a licensed medical doctor, a licensed osteopathic physician or a licensed advanced registered nurse practitioner.

The SBAC's byzantine quarantine policy requires healthy students who've been contact-traced to any other student having a positive Covid test to stay home for *at least* five days, every single time it happens:³

³ Available at: <https://www.sbac.edu/Page/30518>, last accessed at 3:29pm on September 30, 2021.



On October 1, 2021, SBAC amended its quarantine rule again, this time stating that it was adhering to the Federal Centers for Disease Control guidelines for schools, and not the Emergency Rule:⁴

⁴ Available at: <https://www.sbac.edu/covid19>, last accessed at 12:16pm on October 1, 2021.

UPDATE: Stay-Home Exception for Classroom Close Contacts

Alachua County Public School families:

After consulting with our medical advisors, the district is updating its contact tracing procedures for students in the classroom setting. The new guidelines are in line with the latest guidance from the Centers for Disease Control (CDC), and reduce the number of students who are directed to stay home from school.



A student who was within six feet of someone with COVID-19 for a total of 15 minutes is considered a close contact and will be directed to stay home UNLESS

1. The student is fully vaccinated against COVID-19 and has no symptoms.
2. The student has recovered from COVID-19 in the last three months and has no symptoms.

Under the new guidelines, a student who was within three to six feet of a student with COVID-19 in a classroom setting is NOT considered a close contact and will NOT be directed to stay at home if BOTH students were consistently and correctly wearing masks the entire time.

The new guidelines apply ONLY to students who have contact with another student who has COVID. They do NOT apply if the contact was outside of the classroom, or within the student's home. They do NOT apply if either the person with COVID or the contact is an adult. They also do not apply if students have symptoms. Any student with symptoms or who is waiting for COVID test results should remain at home.

This update adopts the most recent [definition of close contact](#) from the CDC, which continues to recommend masking as part of an overall plan to reduce the spread of COVID in schools.

Superintendent Simon has commented repeatedly on national media about her intention to defy state law and the Emergency Rule. On September 23, 2021, for example, Superintendent Simon told CNN that “[W]e will be reviewing the new rules and any notifications we receive from the State with our legal counsel and medical advisors. In the meantime, we will continue to follow the masking and quarantine policies currently in place in our schools.”⁵

Similarly stubborn in its defiance of the clear language of the Emergency Rule, the SBDC made clear in an Emergency Board Meeting held on September 28, 2021, that it too would not comply. Although the overwhelming majority of parents at the meeting spoke

⁵ Available at <https://www.cnn.com/2021/09/22/us/florida-desantis-students-covid-symptoms/index.html>. See also “Opinion: Why our school district is defying Florida’s ban on mask mandates — even if it means we lose funding,” Washington Post, August 9, 2021, available at <https://www.washingtonpost.com/opinions/2021/08/09/florida-schools-mask-mandate-ban-desantis-alachua/>.

in opposition to the continuance of SBDC’s mask policy, the SBDC announced that its protocol for face masks remains unchanged and reiterated that face masks are required for students unless they have a properly completed medical opt-out form.⁶

Like SBAC, the SBDC’s mask policy does not provide parents with the ability to opt out at their sole discretion:⁷

Duval County Public Schools students must wear a face covering over both nose and mouth while inside a school or administrative facility. If the student has a medical, physical, or psychological condition that prevents wearing a face covering, parents and guardians may opt their child out of this requirement by providing medical certification through the district’s process.

Students who do not follow the guidelines may be charged with a Code of Student Conduct infraction and be subject to the appropriate consequences.

The SBDC’s quarantine policy is ill-defined and, in response to the issuance of the Department’s Emergency Rule, Superintendent Greene appears to have only altered quarantine procedures in Duval County *elementary* schools.⁸

On September 30, 2021, Superintendent Greene and the SBDC responded to the September 23, 2021 letter from the FDOE. App. 5. Although the letter states that, due to reductions in the positivity

⁶ Available at <https://www.teamduval.org/2021/09/27/district-ends-practice-of-shifting-elementary-classrooms-online/>, last accessed at 4:31pm on September 30, 2021.

⁷ Available at <https://dcps.duvalschools.org/facemask>, last accessed at 4:37pm on September 30, 2021.

⁸ See “District ends practice of shifting elementary classrooms online”, published September 27, 2021 and last accessed at 4:41pm on September 30, 2021.

rate, the SBDC's policy now provides for an opt-out, it does so under a rubric that would remove the discretionary opt-out if positivity rates shift again by a small amount. In sum, SBDC confirmed its intent not to comply and instead rely on SBDC's policy with its reliance on County metrics.

On September 28, 2021 and September 30, 2021, the Petitioners served *Notices of Demand and to Cease and Desist* on the SBAC and SBDC, respectively, demanding that they come into immediate compliance with the Emergency Rule. App. 4. Both Boards failed to respond in any way.

NATURE OF RELIEF SOUGHT

Petitioners request a writ of mandamus requiring Superintendent Simon and SBAC, and Superintendent Greene and SBDC, to comply with the Department's Emergency Rule, particularly to the extent of providing parents with an opt-out to the School Boards' mask policies *at parents' sole discretion*, and allowing parents to send their healthy (non-symptomatic) children to school at their own discretion.

"[T]his Court's precedent prevents the Schools Boards from challenging a rule they are required to apply." *Scott v. Francati*, 214

So. 3d 742, 749 (Fla. 1st DCA 2017). The Florida Constitution guarantees parents the fundamental right to a free, high-quality public education, Article IX, § 1(a), Fla. Const., which is being burdened, if not outright frustrated, by the School Boards’ unlawful policies. The Parents’ Bill of Rights guarantees parents the fundamental right to make the decisions about their own childrens’ health care, § 1014.04(1)(e), Fla. Stat., not the School Boards or their “legal counsel and medical advisors.”

Mandamus is the proper remedy to require school boards and superintendents to lawfully comply with the Emergency Rule, the Florida Constitution, Florida Statutes, and the Parents’ Bill of Rights. Therefore, Petitioners seek a writ of mandamus and an order directing the SBAC, Superintendent Carlee Simon, the SBDC, and Superintendent Diana Greene to comply with the Emergency Rule.

ARGUMENT

I. The Florida Constitution Requires School Boards to Comply with State Rules and Laws

Article IX of the Florida Constitution affords the State explicit constitutional authority to provide laws governing Florida’s statewide system of public schools and to supervise that system on an ongoing

basis. Article IX, section 1(a) of the Florida Constitution requires the State to make “adequate provision . . . *by law* for a uniform, efficient, safe, secure, and high quality system of free public schools that allow students to obtain high quality education.” (Emphasis added). Article IX, section 2 of the Florida Constitution gives the State Board of Education “such supervision of the system of free education as is provided by law.” Thus, under article IX, the authority of local school boards to operate, control, and supervise local public schools is subject to the State’s continuing supervisory authority over Florida’s “system of free public schools” as “provided by law.” Art. IX, §§ 1, 2, Fla. Const.

Similarly, Article IX, Section 2 of the Florida Constitution gives the State Board of Education “such supervision of the system of free public education as is provided by law.” Florida courts have recognized that “[t]he Florida Constitution . . . creates a hierarchy under which a school board has local control, but the State Board supervises the system as a whole. This broader supervisory authority may at times infringe on a school board’s local powers, but such infringement is expressly contemplated—and in fact encouraged by the very nature of supervision—by the Florida Constitution.” *Sch. Bd.*

Of Collier Cty. v. Fla. Dep't of Educ., 279 So. 3d 281, 292 (Fla. 1st DCA 2019) (internal citations omitted).

This hierarchy and system of authority is further detailed in Florida's education code. Pursuant to section 1000.03(3), Florida Statutes, "[t]he State retains the responsibility for establishing a system of public education through laws, standards and rules to assure efficient operation of an Early Learning-20 system of public education," and "[l]ocal educational authorities" are tasked with "fully and faithfully comply[ing] with" the laws, standards and rules prescribed by the State. The obligation of local school districts to act in conformance with state law is reiterated in section 1001.32, Florida Statutes, which provides:

The district school system must be managed, controlled, operated, administered, and supervised as follows:

(1) District system.—The district school system shall be considered as a part of the state system of public education. **All actions of district school officials shall be consistent and in harmony with state laws and with rules and minimum standards of the state board.** District school officials, however, shall have the authority to provide additional educational opportunities, as desired, which are authorized, but not required, by law or by the district school board.

(2) District school board.—In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards shall operate, control, and supervise all free public schools in their respective districts and may exercise any power *except as expressly prohibited by the State Constitution or general law.*

(3) District school superintendent.—Responsibility for the administration and management of the schools and for the supervision of instruction in the district shall be vested in the district school superintendent as the secretary and executive officer of the district school board, as provided by law. . . .

§ 1001.32, Fla. Stat. (emphasis added); *see also* § 1001.30, Fla. Stat.

(“The responsibility for the actual operation and administration of all schools needed within the districts *in conformity with rules and minimum standards prescribed by the state*, and also the responsibility for the provision of any desirable and practicable opportunities authorized by law beyond those required by the state, are delegated by law to the school officials of the respective districts.” [(emphasis added)]).

Next, section 1001.51(13) requires a superintendent to cooperate with other agencies and ensure that all laws relating to child welfare are enforced:

(13) Cooperation with other agencies.—

(a) Cooperation with governmental agencies in enforcement of laws and rules.—Recommend plans for cooperating with, and, on the basis of approved plans, **cooperate with federal, state, county, and municipal agencies in the enforcement of laws and rules pertaining to all matters relating to education and child welfare.**

§ 1001.51, Fla. Stat. (emphasis added).

In sum, the Florida Constitution creates an hierarchy under which the State supervises the education system as a whole. *Sch. Bd. Of Collier Cty.*, 279 So.3d at 292; *Sch. Bd. of Palm Beach Cty. v. Fla. Charter Educ. Found., Inc.*, 213 So. 3d 356, 360 (Fla. 4th DCA 2017). While school boards administer the day-to-day operations of local schools, they must do so “in harmony” with the state laws and rules they are statutorily required to follow. *Id.*

II. Petitioners Have Met the Elements Necessary for a Writ of Mandamus

The six elements required for a writ of mandamus are:

- (1) the petitioner has a clear and certain legal right,
- (2) to the performance of a particular duty,
- (3) by a government or a representative of the government,
- (4) whose performance of that duty is ministerial and not discretionary,

(5) who has failed to perform despite an adequate request,
and

(6) who has left the petitioner with no other legal method
for obtaining relief.

Huffman v. State, 813 So. 2d 10 (Fla. 2000); *Pino v. Dist. Court of Appeal, Third Dist.*, 604 So. 2d 1232 (Fla. 1992); *Caldwell v. Estate of McDowell*, 507 So. 2d 607 (Fla. 1987); *English v. McCrary*, 348 So. 2d 293, 2 Media L. Rep. (BNA) 1903 (Fla. 1977); *State ex rel. Long v. Carey*, 121 Fla. 515, 164 So. 199 (1935).

(1) Petitioners have a clear and certain legal right. Pursuant to the Emergency Rule, the Florida Constitution, and the Parents' Bill of Rights, the Petitioners enjoy fundamental rights to opt out of the School Boards' face mask policies in their *sole discretion* and to send their healthy children to school in order to obtain a free, high-quality education. Neither SBAC nor Superintendent Simon, nor SBDC nor Superintendent Greene, have any right to create a "law unto themselves." To the contrary, they know full well that they are "defying" the law, and have said as much in various public statements.

(2) ... to the performance of a particular duty. The duty required to be performed by the School Boards and Superintendents Simon and Greene is clearly expressed in the Emergency Rule, which they are required to comply with. The State Constitution and Florida statutes guarantee the performance of these officials.

(3) ... by a government or a representative of the government. SBAC and SBDC are government actors, and Superintendents Simon and Greene are representatives of the government.

(4) ... whose performance of that duty is ministerial and not discretionary. As explained above, the School Boards and Superintendents Simon and Greene are required to comply with the Emergency Rule; it is not discretionary.

(5) ... who have failed to perform despite an adequate request. Petitioners adequately requested that the School Boards and Superintendents Simon and Greene perform their duties when they sent their Notices of Demand, but the School Boards and Superintendents Simon and Greene have failed to perform. In truth, the Notices of Demand were futile anyway, as evidenced by Superintendent Simon's numerous public statements of intention to continue to defy the Emergency Rule, and SBDC's clear intent to

persist with its mask mandate despite overwhelming public comment in opposition at the Tuesday, September 28, 2021 Emergency Board Meeting.

(6) who has left the petitioner with no other legal method for obtaining relief. The Petitioners, whose constitutional rights are being irreparably harmed, have no other legal remedy available to them for immediate relief.

CONCLUSION

Needless to say, if school boards can simply make up their own rules, hire their own public policy and medical advisors, and ignore State data and guidance, then the entire constitutional system of government of the State of Florida becomes irrelevant. That is a recipe for chaos. In essence, under their own authority, the School Boards have created their own, independent departments of health, competitive and — in their view — superior to the constitutional Department of Health. This is a dangerous precedent, if permitted to stand.

For the reasons above, this Court should grant this petition and issue a writ of mandamus directing the SBAC, the SBDC, Superintendent Simon, and Superintendent Greene to immediately

comply with the Emergency Rule, provide parents with an opt-out to the mask policy at their sole discretion, and permit healthy (non-symptomatic) children to attend school exempt from quarantine at the parents' discretion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was filed with the Clerk of Court through the Florida e-Portal and that a copy was sent via facsimile to the counsel listed below on this 1st day of October, 2021.

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County and
Superintendent Diana
Greene

/s/ Seldon J. Childers

Seldon J. Childers
Florida Bar No. 61112

CERTIFICATE OF COMPLIANCE

I certify that this Petition was prepared in Bookman Old Style, 14-point font, and is otherwise in compliance with the Florida Rules of Appellate Procedure 9.045(b) and 9.100(g).

/s/ Seldon J. Childers
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Florida Bar No. 61112