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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MATTHEW BRACH, an individual,
et al.,

Plaintiffs,

v.

GAVIN NEWSOM, in his official ca-
pacity as the Governor of California, *et*
al.,

Defendants.

Case Number: 2:20-CV-06472-SVW-AFM

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
SUA SPONTE GRANT OF
SUMMARY JUDGMENT**

Judge: Hon. Stephen V. Wilson
Courtroom: 10A

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INTRODUCTION

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Apparently unmoved by the disastrous consequences of last Spring’s experience with school closures, Defendants have closed schools in dozens of counties across the state this Fall, condemning millions of California students to weeks, months, and possibly a full year of so-called “distance learning,” which for many is the same as “no learning.” Defendants have attempted to justify this policy as an essential public health measure, but the evidence in the record overwhelmingly confirms that children are *not* at serious risk from COVID-19 and do *not* present a substantial risk of transmission to adults. Plaintiffs have also presented evidence that the metrics the state is using to determine whether a county will be in Tier 1 (formerly, the monitoring list) are arbitrary and irrational because the majority of individuals who test positive are asymptomatic and *not* infectious, and thus pose no public health risk. But notwithstanding the Order’s devastating consequences and utter irrationality, this Court’s Minute Order issued on September 1, 2020, indicated that the Court was inclined to grant summary judgment *sua sponte* to Defendants. For several reasons, Plaintiffs respectfully urge the Court to reconsider.

First, although the Court has expressed doubts about whether there is a constitutional right to a basic minimum education, the Supreme Court has not foreclosed such a right, and the Ninth Circuit has affirmatively stated that education is at least a “quasi-fundamental right.” *United States v. Harding*, 971 F.2d 410, 412 n.1 (9th Cir. 1992) (citing *Plyler v. Doe*, 457 U.S. 202, 217–18 (1982)). The Ninth Circuit’s conclusion is amply supported by the historical record, and many courts and scholars have recognized that education is an essential pillar of ordered liberty. Although Defendants contend—in the face of all evidence to the contrary—that distance learning can provide a basic minimum education to Plaintiffs and millions of other California children, any factual dispute about whether the Orders infringe on Plaintiffs’ fundamental rights precludes a grant of summary judgment.

1 Second, even assuming that education is something less than a fundamental
2 right, it is, at minimum, an important right that requires a more searching form of ra-
3 tional basis review than the toothless standard courts have applied to run-of-the-mill
4 economic regulations. *See Desoto CAB Co., Inc. v. Picker*, 228 F. Supp. 3d 950, 957
5 (N.D. Cal. 2017). Plaintiffs should thus be given the opportunity to develop the record
6 and test Defendants’ purported justifications for their unprecedented decision to close
7 schools across the state.

8 Third, Defendants have not disputed that the orders violate the ADA, Rehabili-
9 tation Act, and IDEA. Instead, they have argued that Plaintiffs have failed to exhaust
10 administrative remedies. As Plaintiffs have explained, however, a hearing officer
11 could not order a school to provide in-person education in the face of the Governor’s
12 Orders, and exhaustion is not required where it would be futile or where, as here, the
13 challenge is to a systemic barrier to education. To the extent there is a factual dispute
14 about whether the Orders discriminate against Plaintiffs’ children on the basis of their
15 disabilities or deny them a Free and Adequate Public Education, summary judgement
16 is plainly inappropriate.

17 Because Plaintiffs have presented overwhelming evidence showing that the or-
18 ders violate their children’s constitutional and statutory rights, the Court should de-
19 cline to grant summary judgment to Defendants—regardless of how it resolves Plain-
20 tiffs’ motion for preliminary injunction—and allow the parties to develop the record
21 for a fulsome evidentiary hearing.

22 **BACKGROUND**

23 This Court is aware of the facts identified in Plaintiffs’ previous filings. *See*
24 ECF Nos. 28-1; 40. Plaintiffs thus focus on new developments since the Court denied
25 Plaintiffs Application for Temporary Restraining Order. On August 25, the California
26 Department of Public Health released new guidance on “cohorts,” permitting “in-per-
27

1 son child supervision and limited instruction, targeted support services, and facilita-
 2 tion of distance learning” for small groups of children under certain circumstances.¹
 3 On September 4, the California Department of Public Health updated its “Cohorting
 4 Guidance.”² This guidance permits schools to provide in-person services in groups of
 5 up to 16 individuals—14 children and 2 adults—called “cohorts.” *Cohorting Guid-*
 6 *ance*. The guidance allows for the provision of instruction and other “specialized and
 7 targeted support services,” including “occupational therapy services, speech and lan-
 8 guage services, and other medical services, behavioral services, [and] educational sup-
 9 port services.” *Cohorting FAQs* at 3.

10 On August 28, the State Public Health Officer issued an order eliminating the
 11 county monitoring-list and replacing it with a tier-based system.³ The order provides
 12 that any previous order referring to the county-monitoring list “shall refer to those
 13 counties falling within Tier 1” of the new tier-based system. *Id.* The tier-based system,
 14 in turn, relies only on “Adjusted Case Rate” and “Testing Positivity” to determine the
 15 tier.⁴ The system adjusts a county’s positivity rate if the county is “testing [] above
 16 the state average.” *Id.* “If a county’s adjusted case rate for tier assignment and test
 17 positivity measure fall into two different tiers, the county will be assigned to the more
 18 restrictive tier.” *Id.* A county must “remain in a tier for a minimum of three weeks be-
 19 fore being able to advance to a less restrictive tier.” *Id.* Additionally, the State plans to
 20

21
 22 ¹ See *Guidance for Small Cohorts/Groups of Children and Youth*, California Dep’t of
 23 Pub. Health (Aug. 25, 2020); *Providing Targeted Specialized Support and Services at*
 24 *School*, California Dep’t of Pub. Health (Aug. 25, 2020); ECF No. 54-3, Exs. XX and
 25 YY.

26 ² *Guidance for Small Cohorts/Groups of Children and Youth*, California Department
 27 of Public Health (Sept. 4, 2020) (hereinafter “*Cohorting Guidance*”); *Providing*
 28 *Targeted Specialized Support and Services at School* (Sept. 4, 2020) (hereinafter
 “*Cohorting FAQs*”), <https://tinyurl.com/yy673trv>.

³ *Statewide Public Health Officer Order*, California Dep’t of Pub. Health (Aug. 28,
 2020), <https://tinyurl.com/y3z6xdww>.

⁴ *Plan for Reducing COVID-19 and Adjusting Permitted Sector Activities to Keep*
Californians Healthy and Safe, California Dep’t of Pub. Health (Sept. 2, 2020), avail-
 able at <https://tinyurl.com/y4bjr3np>.

1 establish unspecified “health equity measures,” which counties will be required to
 2 meet “to advance a less restrictive tier,” and unspecified “measures addressing health
 3 outcomes.” *Id.* The guidance also provides that counties must move back to a more re-
 4 strictive tier “if [the] county's adjusted case rate and/or test positivity has been within
 5 a more restrictive tier for two consecutive weekly periods.” *Id.* To set the initial tiers,
 6 “effective on Monday, August 31, 2020,” CDPH used data from the two reporting pe-
 7 riods prior to August 28. *Id.* As of September 15, 2020, 30 counties were in Tier 1.⁵

8 STANDARD OF REVIEW

9 In considering whether to grant summary judgment, “the inferences to be drawn
 10 from the underlying facts ... must be viewed in the light most favorable to the party
 11 opposing the motion.” *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Sum-
 12 mary judgment cannot be granted where a “genuine dispute as to any material fact”
 13 exists. Fed. R. Civ. P. 56(a). A genuine issue of material fact exists “if the evidence is
 14 such that a reasonable jury could return a verdict for the non-moving party.” *Anderson*
 15 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Rule 56 is explicit that, in determin-
 16 ing whether summary judgment is appropriate, the court is limited to the “materials in
 17 the record.” Fed. R. Civ. P. 56(c)(1)(A); *see also Easley v. City of Riverside*, 765 Fed.
 18 App’x 282, 284 (9th Cir. 2019) (en banc) (reversing *sua sponte* grant of summary
 19 judgment because “there were disputed issues of fact” based on the record evidence).
 20

21 ARGUMENT

22 I. *Sua Sponte* Summary Judgment Is Inappropriate Because Plaintiffs Have 23 Not Had an Opportunity to Take Discovery

24 Although courts have “power to grant summary judgment *sua sponte*,” the
 25 Ninth Circuit has cautioned that “it is generally inappropriate for a court to issue such
 26 a final judgment on the merits of a claim at the preliminary injunction stage.” *Arce v.*
 27 *Douglas*, 793 F.3d 968, 976 (9th Cir. 2015). This is because “it is unlikely that the
 28

⁵ *Blueprint for a Safer Economy*, available at <https://covid19.ca.gov/safer-economy/>.

1 merits of a claim will be fully ventilated at the early stage of litigation at which a pre-
2 liminary injunction is normally addressed.” *Id*; see also *Pugh v. Goord*, 345 F.3d 121,
3 125 (2d Cir. 2003) (reversing *sua sponte* dismissal because “preliminary injunction
4 motion papers should not be treated as if they were a response to a motion for sum-
5 mary judgment”).

6 A *sua sponte* grant of summary judgment is inappropriate here—regardless of
7 how the Court rules on Plaintiffs’ motion for preliminary injunction—because Plain-
8 tiffs have not yet had the opportunity to take discovery. Specifically, Plaintiffs have
9 not been able to depose Dr. Watt regarding his testimony that schools should be
10 closed because it is “possible” that children “may” transmit SARS-CoV-2. ECF No.
11 35-1 ¶ 26. Nor have Plaintiffs had the opportunity to request documents and commu-
12 nications Defendants relied on to formulate the challenged policies. Discovery would
13 likely reveal that Defendants *knew* that the challenged orders would deprive millions
14 of children of an adequate minimum education, thus defeating any contentions they
15 have made to the contrary in this litigation.

16 Plaintiffs should also be afforded the opportunity to take third-party discovery
17 from the relevant school administrators, teachers, and special education counselors
18 who could support Plaintiffs’ claims that the orders are depriving their children of an
19 adequate minimum education and violating their children’s statutory rights under the
20 ADA, Rehabilitation Act, and IDEA. In short, before granting summary judgment to
21 either party the Court should give Plaintiffs an opportunity to develop the record.

22 **II. Plaintiffs Have Article III Standing**

23 As Plaintiffs have explained, they satisfy all three elements for Article III stand-
24 ing—“injury in fact,” “causal connection,” and “redress.” See ECF No. 55 at 1-6;
25 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Defendants’ arguments to
26 the contrary are unpersuasive.

27 First, Defendants contend that there is no concrete injury when a parent chal-
28 lenges a “method[] of instruction.” ECF No. 54 at 2 (citing *Caldwell v. Caldwell*, 545

1 F.3d 1126 (9th Cir. 2008)). But in *Caldwell* the court held that a parent lacked stand-
2 ing to bring an Establishment Clause claim to vindicate *her own* asserted interest to
3 “informed participation”—not the constitutional rights of her child. *Id.* at 1133. Here,
4 by contrast, Plaintiffs seek to vindicate their children’s constitutional rights to due
5 process and equal protection, and their statutory rights under the disability laws. *See*
6 *Tourgeman v. Collins Fin’l Servs., Inc.*, 755 F.3d 1109, 1114–15 (9th Cir. 2014) (the
7 “injury required by Art. III” may exist either through statutory or constitutional viola-
8 tions).

9 Second, Defendants contend that Plaintiffs’ declarations do not—and could
10 not—establish that any specific school or school district would return to offering
11 solely in-person instruction during the Fall. ECF No. 54 at 4. But Plaintiffs do not
12 have to demonstrate with *certainty* that their children’s schools would open if the Or-
13 der is enjoined. It is enough that an injunction would increase the “likelihood” that
14 their children would receive an adequate minimum education. *See Mayfield v. United*
15 *States*, 599 F.3d 964, 971 (9th Cir. 2010). Giving each school and school district the
16 *freedom* to reopen for in-person instruction, whether through a hybrid model or full-
17 time, would unquestionably increase the likelihood that Plaintiffs’ injuries will be re-
18 dressed. And while local officials “may decide to issue their own similar order requir-
19 ing schools to offer distance learning,” *id.* at 5, standing does not turn on hypothetical
20 actions other government actors may take in the future. *See Vill. of Arlington Heights*
21 *v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 261–62 (1977).

22 **III. *Jacobson* Does not Require This Court to Defer to Defendants’ Proffered** 23 **Justifications for the Orders**

24 In its decision denying a TRO, this Court stated that *Jacobson v. Massachusetts*,
25 197 U.S. 11 (1905), required it to afford Defendants’ Orders a “presumption of consti-
26 tutionality.” ECF No. 51 at 5. But the deferential standard the Supreme Court applied
27 to the public health measure in *Jacobson* does not apply here. “As the Supreme Court
28 has observed, “[t]he Constitution was adopted in a period of grave emergency ... and
its limitations on the powers of the States were determined in the light of emergency,

1 and they are not altered by emergency.” *County of Butler v. Wolf*, 2020 WL 5510690,
2 at *10 (W.D. Pa. Sept. 14, 2020) (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290
3 U.S. 398, 425 (1934) (first alteration in original).

4 To begin, *Jacobson* has been superseded by the modern “tiered levels of scru-
5 tiny.” *Id.*, at *13. “[W]hen the Supreme Court elaborates a new standard for analyzing
6 a constitutional claim, [courts] use [the] most recent formulation, rather than the
7 framework from a decision for a different constitutional claim, made by a different
8 claimant, in a different state, facing a different public health emergency in a different
9 century.” *Bayley’s Campground, Inc. v. Mills*, 2020 WL 2791797, *8 (D. Me. May
10 29, 2020). The proper basis for evaluating Defendants’ policies are through “ordinary
11 canons of scrutiny ... rather than a lesser emergency regimen.” *Butler*, 2020 WL
12 5510690 at *1.⁶

13 Moreover, while “[c]ourts are generally willing to give temporary deference to
14 temporary measures aimed at a fleeting crisis,” *id.* at *9, the *Jacobson* standard (as ap-
15 plied today) is “ill-suited for long-term and open-ended emergencies like the one in
16 which we currently find ourselves.” Wiley, *Coronavirus, Civil Liberties, and the*
17 *Courts*, at 182. “[T]he ongoing and indefinite nature of” restrictions meant to prevent
18 the spread of COVID-19 “weigh[s] strongly against application of a more deferential
19 level of review” because such “restrictions—while expedient in the face of an emer-
20 gency situation—may persist long after immediate danger has passed.” *Butler*, 2020
21 WL 5510690 at *1, 8.

22 Even if *Jacobson* controls the analysis here, the Supreme Court made clear in in
23 that decision that deference applies only when public health conditions render the
24 state’s policy a “necessit[y].” 197 U.S. at 28. But the Court did not hold that it was ap-
25

26 _____
27 ⁶ At the time *Jacobson* was written, the Supreme Court’s standard for evaluating the
28 reasonableness of a public health policy “was far more robust than what we tend to
think of today as ... rational basis review.” Lindsay F. Wiley & Stephen I. Vladek,
Coronavirus, Civil Liberties, and the Courts: The Case Against ‘Suspending’ Judicial
Review, 133 HARV. L. REV. F. 179, 191 (2020).

1 appropriate to defer to *the State's characterization* of the public health circumstances al-
2 legedly justifying the State's action. On the contrary, the Court reviewed the "record"
3 and concluded that smallpox "was prevalent to some extent in the City of Cambridge"
4 and noted that the State's public health measure—mandatory vaccination—was the
5 method "most usually employed to eradicate that disease." *Id.* at 27-28. The Court
6 stressed, however, that if a local community sought to "protect itself against an epi-
7 demic threatening the safety of all" in "an arbitrary, unreasonable manner," or if it
8 took actions "far beyond what was reasonably required for the safety of the public," a
9 court would be "authorize[d] or compel[led] to interfere for the protection" of those
10 harmed by the State's action. *Id.* at 28.

11 Here, Plaintiffs have presented overwhelming evidence that Defendants' un-
12 precedented decision to close schools across the state is arbitrary, unreasonable, and
13 completely out of proportion to the risks posed by in-person schooling. Plaintiffs' ex-
14 perts have presented uncontroverted evidence that children are extremely unlikely to
15 be sickened or die from COVID-19, and that children are not significant transmitters
16 of the disease. ECF No. 28-4 ¶¶ 11–16; ECF No. 28-3 ¶¶ 22–27, 37–39; ECF No. 28-
17 8 ¶¶ 5–6; ECF No. 28-9 ¶¶ 5, 7–8; ECF No. 28-7 ¶¶ 23–25; ECF No. 28-5 ¶¶ 6–9, 14–
18 16; ECF No. 28-11 ¶ 5; ECF No. 28-10 ¶¶ 5–10; ECF No. 52 ¶¶ 4–6; ECF No. 55-2
19 ¶¶ 3–4. Indeed, Defendants have not identified a single documented case anywhere in
20 the world of a child transmitting the disease to a teacher. Closing schools based on
21 Defendants' irrational metrics therefore "go[es] far beyond what [is] reasonably re-
22 quired for the safety of the public." *Jacobson*, 197 U.S. at 28; *see also Roberts v.*
23 *Neace*, 958 F.3d 409, 414-15 (6th Cir. 2020) ("While the law may take periodic naps
24 during a pandemic, we will not let it sleep through one.").

25 *Jacobson* deference is also inappropriate "if a statute purporting to have been
26 enacted to protect public health ... has no real or substantial relation to [that] object[],
27 or is, beyond all question, a plain, palpable invasion of rights secured by fundamental
28 law." 197 U.S. at 31. Defendants' school closure orders violate Plaintiffs' fundamen-
tal right to education, their right to equal protection under the law, and their statutory

1 rights. The orders also “ha[ve] no real or substantial relation” to protecting public
 2 health because at no “point in this litigation” have Defendants “attempted to support
 3 [their] policy choice with expert or medical evidence.” *Adams & Boyle P.C. v. Slatery*,
 4 956 F.3d 913, 926 (6th Cir. 2020).

5 In all events, Defendants’ orders subvert *Jacobson*’s underlying principle—that
 6 public health authorities should “not permit the interests of the many to be subordi-
 7 nated to the wishes or convenience of the few.” 197 U.S. at 29. Whereas in *Jacobson*
 8 the public health authorities sacrificed one person’s liberty to protect thousands of citi-
 9 zens against a deadly outbreak of small pox, Defendants here are sacrificing the well-
 10 being of millions of school children to protect a small number of vulnerable individu-
 11 als who *might* receive the virus from a child and suffer an adverse reaction—individu-
 12 als who could easily be protected through more targeted measures. *Jacobson* does not
 13 authorize public health authorities to sacrifice the many for the few; nor does it require
 14 courts to defer when state or local governments elevate the “wishes or convenience”
 15 of politically connected groups over the vital interests of millions of powerless citi-
 16 zens. *Id.* Accordingly, *Jacobson* does not counsel in favor of deference here.

17 **IV. The Court Should Not Grant Summary Judgment to Defendants on** 18 **Plaintiffs’ Fourteenth Amendment Claims**

19 The Fourteenth Amendment protects substantive rights that are not expressly
 20 enumerated within the Bill of Rights. *See, e.g., Obergefell v. Hodges*, 576 U.S. 644,
 21 663 (2015); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973). “[T]he Due Process Clause
 22 specially protects those fundamental rights and liberties which are, objectively deeply
 23 rooted in this Nation’s history and tradition, and implicit in the concept of ordered lib-
 24 erty, such that neither liberty nor justice would exist if they were sacrificed.” *Wash-*
 25 *ington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal citations and quotation
 26 marks omitted). The right to a basic minimum education, deeply rooted in our nation’s
 27 history and essential for the preservation of ordered liberty, is such a right. Because
 28 Defendants are not entitled to summary judgment on Plaintiffs’ due process and equal
 protection claims as a matter of law—and because there is, at minimum, a material

1 dispute as to whether the Orders deprive Plaintiffs of an adequate minimum educa-
2 tion—the Court should resolve these claims on the merits after further factual devel-
3 opment and an evidentiary hearing.

4 **A. The Constitution Protects the Fundamental Right to a Basic Minimum**
5 **Education.**

6 In its order denying Plaintiffs’ application for a TRO, this Court concluded that
7 Plaintiffs were unlikely to succeed on the merits of their substantive due process claim
8 because “the Supreme Court has not recognized such a right.” ECF No. 51 at 6. But
9 although the Supreme Court has not *yet* recognized a right to basic education, it has
10 deliberately left open that question, observing in cases post “*Rodriguez and Plyler*”
11 that “this Court has not yet definitively settled the question [of] whether a minimally
12 adequate education is a fundamental right.” *Papasan v. Allain*, 478 U.S. 265, 285
13 (1986); *accord Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 466 n.1 (1988) (Mar-
14 shall, J., dissenting) (noting that the issue “remains open today”). And, importantly,
15 the Ninth Circuit has gone one step further in recognizing that “access to public edu-
16 cation” is *at least* a “‘quasi-fundamental’ right[],” the deprivation of which requires “a
17 heightened level of scrutiny.” *Harding*, 971 F.2d at 412 n.1. Regardless, the Supreme
18 Court need not settle the question before courts recognize the right. *See, e.g., Perry v.*
19 *Schwarzenegger*, 704 F. Supp. 2d 921, 991–95 (N.D. Cal. 2010); *accord Obergefell*,
20 576 U.S. at 663 (“There [] have been many thoughtful District Court decisions [in-
21 cluding *Perry*] addressing same-sex marriage—and most of them [] have concluded
22 same-sex couples must be allowed to marry.”). This Court should make explicit what
23 the Ninth Circuit has recognized: access to a basic minimum education is a constitu-
24 tional right that requires application of a heightened level of scrutiny.

25 **1. Basic Education is Deeply Rooted in Our Nation’s History**

26 From the beginning of our nation, education has been regarded as critical for
27 our republic to survive and flourish. As John Adams wrote, “[t]he education of a na-
28 tion instead of being confined to a few schools and universities for the instruction of
the few, must become the national care and expense of the formation of the many.”

1 David McCullough, JOHN ADAMS 364 (2001). Thomas Jefferson stated that each citi-
2 zen would need “to know his rights; to exercise with order and justice those he retains;
3 to choose with discretion the fiduciary of those he delegates and to notice their con-
4 duct with diligence, with candor and with judgment.” THOMAS JEFFERSON, *The Uni-*
5 *versity of Virginia* (1818), in THE COMPLETE JEFFERSON 1097 (Saul Padover ed.,
6 1943). The Founders’ commitment to broad-based education was also reflected in a
7 stipulation in the Land Ordinance of 1785, enacted by the Congress of the Confedera-
8 tion, which required each new town to set aside “the lot No. 16 ... for the maintenance
9 of public schools within the said township.” *Papasan*, 478 U.S. at 268 (citing 1 Laws
10 of the United States 565 (1815)). Public schooling became systemic and universal in
11 most states starting in the 1830s when the combination of rapid industrialization, pop-
12 ulation growth, mobility, and immigration fueled a broad-based “common school”
13 movement to implement a free public school system dedicated to moral education and
14 good citizenship. Carl Kaestle, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND
15 AMERICAN SOCIETY 1780–1860 (1983).

16 Before the Civil War, virtually none of the Southern states required universal
17 public education, but Congress conditioned readmission to the Union on inclusion in
18 the state constitution of a provision guaranteeing public education. Derek W. Black,
19 *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1089–95 (2019).
20 By 1868, the year that the Fourteenth Amendment was ratified, more than three-quar-
21 ters of States recognized an affirmative right to public school education. Steven G.
22 Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014
23 Mich. St. L. Rev. 429, 449–63, 556 (2014) (cataloging all State constitutional provi-
24 sions as of 1868). This is significant because “Article V of the federal Constitution re-
25 quires a three-quarters consensus of the states to amend the Constitution.” *Id.* at 443;
26 *see id.* at 444. Such pervasive state constitutional recognition at the time the Four-
27 teenth Amendment was ratified “objectively” establishes the fundamental nature of
28 this right. *Glucksberg*, 521 U.S. at 720–21, 723; *see also McDonald v. City of Chi-*

1 *cago*, 561 U.S. 742, 777–78 (2010) (plurality opinion) (citing similar historical analy-
2 sis for the proposition that Second Amendment “right to keep and bear arms was also
3 widely protected by state constitutions at the time when the Fourteenth Amendment
4 was ratified,” and thus was incorporated against the states through the Fourteenth
5 Amendment); *Town of Greece v. Galloway*, 572 U.S. 565, 609-10 (2014) (Thomas, J.,
6 concurring) (assessing scope of the Free Exercise Clause, as incorporated against the
7 states through Fourteenth Amendment, based on State constitutions circa 1868).

8 Significantly, by 1875, every state in the union but one had a clause in its con-
9 stitution calling for universal public education. Black, *supra*, at 1094. In the century
10 following the ratification of the Fourteenth Amendment, thirteen new states sought ad-
11 mission to the Union, all of which included education mandates in their constitutions.
12 *Id.* at 1093. Accordingly, for more than a century, *every state* has had compulsory ed-
13 ucation laws. Barry Friedman & Sara Solow, *The Federal Right to an Adequate Edu-*
14 *cation*, 81 Geo. Wash. L. Rev. 92, 127 (2013) (“By 1918, education was compulsory
15 in every state of the union.”). Children throughout California and the nation are thus
16 compelled to attend school full time (or be home-schooled). *See* Cal. Ed. Code, §
17 48200, *et seq.* History and practice make clear that this requirement is justified by the
18 unique importance of education and its deep roots in this Nation’s history and tradi-
19 tion. As the Supreme Court explained in *Brown v. Board of Education*, “education is [
20] the most important function of state and local governments,” as demonstrated by our
21 “[c]ompulsory school attendance laws and the great expenditures for education.” 347
22 U.S. 483, 493 (1954); *see Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“The Ameri-
23 can people have always regarded education and acquisition of knowledge as matters
24 of supreme importance which should be diligently promoted.”).

25 **2. Basic Education is Implicit in the Concept of Ordered Liberty**

26 It is equally clear that the right to basic education is “implicit in the concept of
27 ordered liberty,” such that “neither liberty nor justice would exist if [it was] sacri-
28 ficed.” *Glucksberg*, 521 U.S. at 721. The foundation of American liberty is our written

1 Constitution. *See Marbury v. Madison*, 5 U.S. 137, 176-78 (1803) (declaring “a writ-
2 ten constitution” to be “the greatest improvement on political institutions” that came
3 before the American experiment). Likewise, under our written Constitution, laws must
4 be published in writing before they may be executed to constrain liberty. *See* U.S.
5 Const. art. I §§ 9–10 (prohibiting the enactment of any “ex post facto law” by Con-
6 gress or state legislatures). Thus, a basic education enabling citizens to read, under-
7 stand, and decode our governing texts is at the heart of our nation’s concept of ordered
8 liberty.

9 The Founding Fathers recognized that basic education is essential if liberty and
10 justice were to survive our republican form of government, and that schools would be
11 “needed to produce well-informed protectors of republican government.” Alan Taylor,
12 *The Virtue of an Educated Voter*, AM. SCHOLAR (Sept. 6, 2016), [https://ti-](https://ti-nyurl.com/yylju4ys)
13 [nyurl.com/yylju4ys](https://ti-nyurl.com/yylju4ys). As Benjamin Rush explained, “[i]f the common people are igno-
14 rant and vicious, a republican nation can never be long free.” *Id.* The Supreme Court
15 specifically recognized in *Plyler v. Doe* “the importance of education in maintaining
16 our basic institutions,” noting that “education has a *fundamental role* in maintaining
17 the fabric of our society.” 457 U.S. 202, 221 (1982) (emphasis added).

18 State supreme courts have recognized the same. Since 1973, there have been
19 cases regarding the equity and adequacy of education in at least 45 of the 50 states.
20 Michael A. Rebell, *FLUNKING DEMOCRACY: SCHOOLS, COURTS AND CIVIC PARTICIPA-*
21 *TION* 50 (2018). Thirty-two of those states’ highest courts have held that “preparation
22 for capable citizenship is the primary purpose or a primary purpose of” education. *Id.*
23 at 57. No state court has denied the proposition. *Id.* And many of these courts dis-
24 cussed in detail the specific skills, knowledge, experiences, and values afforded by a
25 basic education that is required for civic participation. *Id.* at 57–61. As Professor Bal-
26 kin of Yale Law School explained, “[W]hen lots of different states from different parts
27 of the country agree that these rights deserve protection, they are more likely to be
28 rights with special constitutional value that all governments are supposed to protect.”
Jack M. Balkin, *LIVING ORIGINALISM* 210 (2011); *accord Obergefell*, 576 U.S. at 662-

1 63, 676 (referring to the significance of the fact that there has “been extensive litigation
2 tion in state and federal courts”).

3 Basic education is also a prerequisite for conduct and activities that form the ba-
4 sis of our citizenship. For example, basic education is critical to participation in the
5 political process, including knowledgeable and informed voting, comprehending bal-
6 lot initiatives, and engaging in political speech and discourse. *See Citizens United v.*
7 *FEC*, 558 U.S. 310, 339 (2010) (“The right of citizens to inquire, to hear, to speak,
8 and to use information to reach consensus is a precondition to enlightened self-gov-
9 ernment and a necessary means to protect it.”); *Bd. of Educ., Island Trees Union Free*
10 *Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (“[T]he Constitution protects the
11 right to receive information and ideas.”); *Wisconsin v. Yoder*, 406 U.S. 205, 221
12 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate ef-
13 fectively and intelligently in our open political system if we are to preserve freedom
14 and independence.”). In fact, “the Constitution presupposes the existence of an in-
15 formed citizenry prepared to participate in governmental affairs.” *Island Trees*, 457
16 U.S. at 876 (Blackmun, J. concurring).

17 Education is also critical for preparing citizens to perform jury service, which
18 the Supreme Court has recognized as the “most significant opportunity to participate
19 in the democratic process” except for “voting,” which also requires an informed citi-
20 zenry. *Powers v. Ohio*, 499 U.S. 400, 407 (1991); *Island Trees*, 457 U.S. at 868
21 (“[J]ust as access to ideas makes it possible for citizens generally to exercise their
22 rights of free speech and press in a meaningful manner, such access prepares students
23 for active and effective participation in the pluralistic, often contentious society in
24 which they will soon be adult members.”). In short, the historical and fundamental im-
25 portance of basic education in our republic is well established.

1 **3. Basic Education is Consistent with Other Constitutional Rights**
2 **and Comports with Local Autonomy in Public Education**

3 In its order denying Plaintiffs’ application for a TRO, this Court expressed
4 “doubts” about recognizing a fundamental right to a basic minimum education be-
5 cause substantive due process rights “*generally*” protect individuals from government
6 action deemed intrusive, and because the manner in which public education is pro-
7 vided is traditionally committed to local state control. ECF No. 51 at 6–7 (emphasis
8 added). Neither observation undermines the constitutional right to basic education.

9 First, in *Obergefell*, the Court recognized a substantive due process right to
10 same-sex marriage, a legal union that confers certain *benefits* under state law. 576
11 U.S. at 663-70. As the Court explained, failing to provide same-sex couples with “the
12 constellation of benefits that the States have linked to marriage” deprives them of their
13 fundamental right to marriage. *Id.* at 670. *Obergefell* thus stands for the proposition
14 that states cannot deny individuals benefits that form the core of a fundamental right.
15 Indeed, the Court has held that the Constitution requires States to provide various
16 other goods and services to individuals in a broad array of situations, including medi-
17 cal care to persons in police custody, *City of Revere v. Mass. Gen. Hosp.*, 463 U.S.
18 239 (1983), medical care to inmates, *Estelle v. Gamble*, 429 U.S. 97 (1976), counsel
19 to criminal defendants, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and recourse
20 when the state creates a danger, *Penilla v. City of Huntington Park*, 115 F.3d 707, 710
21 (9th Cir. 1997) (per curium). To be sure, the Bill of Rights and Fourteenth Amend-
22 ment *primarily* defend individual liberty against government encroachment, but the
23 Supreme Court has taken a broader view of fundamental rights.

24 Second, while the Court is undoubtedly correct that the manner of providing
25 public education is “generally ‘committed to the control of state and local authorities’”
26 *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005), those local author-
27 ities may not deprive children of the right to a minimum education altogether. Indeed,
28 although marriage laws are also generally committed to State control, someone ex-

1 cluded from the institution by race, child support arrears, prisoner status, or sexual ori-
 2 entation has a constitutional claim redressable in federal court. *Obergefell*, 576 U.S. at
 3 664-65, 675.⁷

4 **B. The Order Burdens Plaintiffs’ Fundamental Rights and Cannot Survive** 5 **Heightened Scrutiny**

6 Plaintiffs’ due process and equal protection claims under the Fourteenth
 7 Amendment invoke the same fundamental right to a basic minimum education. When
 8 a constitutional right has been impaired, or unequally denied, the State must justify
 9 that burden under heightened scrutiny. *See Reno v. Flores*, 507 U.S. 292, 301–02
 10 (1993) (substantive due process); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (equal pro-
 11 tection); *cf. Karnoski v. Trump*, 926 F.3d 1180, 1189, 1201 (9th Cir. 2019) (“[T]he
 12 district court should apply a standard of review that is more than rational basis but less
 13 than strict scrutiny” when reviewing claims involving “equal protection and substan-
 14 tive due process guarantees.”). Here, the Order unquestionably burdens the fundamen-
 15 tal right to a basic minimum education—and does so unequally—and Defendants can-
 16 not satisfy *any* form of heightened scrutiny.

17 **1. The Order Burdens Plaintiffs’ Fundamental Rights**

18 As *Plyler* makes clear, depriving children of “a basic education ... den[ies]
 19 them the ability to live within the structure of our civic institutions, and foreclose[s]
 20 any realistic possibility that they will contribute in even the smallest way to the pro-
 21 gress of our Nation.” 457 U.S. at 223. That is precisely what Defendants are doing
 22 here because the Order functionally denies Plaintiffs and millions of other students
 23 across the State—including minority children and families of limited economic
 24 means—of the opportunity to attain an education. Defendants have not disputed that
 25

26 ⁷ This Court also concluded that the Order does not deprive Plaintiffs of a basic mini-
 27 mum education on a “permanent basis.” ECF No. 51 at 7–8 (citing *Plyler*, 457 U.S. as
 28 223). But the Supreme Court has recognized that the “total exclusion from the educa-
 tion process for more than a trivial period” can violate the Constitution. *Goss v. Lopez*,
 419 U.S. 565, 576 (1975). The “period” in *Goss* lasted days, *id.* while the exclusion
 here has already lasted for several weeks and appears likely to last for several months.

1 virtual learning results in functionally no education for many special needs, minority,
2 low-income, English-language-learners, and rural students, nearly one million of
3 whom have or will start the school year without the ability to log into a virtual class-
4 room. ECF No. 54-3 Ex. WW at 1; Doc. 36 Ex. KK at 1. And even for those children
5 that do have access to the necessary technology, distance learning has been (and con-
6 tinues to be) woefully inadequate. *See* ECF No. 28-4 ¶¶ 19–21; ECF No. 28-9 ¶¶ 6, 9;
7 ECF No. 28-8 ¶ 7; ECF No. 28-5 ¶¶ 19–37; ECF No. 28-11 ¶ 6; ECF No. 28-12 ¶¶ 5–
8 8; ECF No. 28-13 ¶¶ 6–12; ECF No. 28-15 ¶¶ 10–12; ECF No. 28-16 ¶ 9; ECF No.
9 28-17 ¶¶ 9–19; ECF No. 28-18 ¶¶ 8–13; ECF No. 28-19 ¶¶ 4–13; ECF No. 28-21 ¶¶
10 4–9; ECF No. 28-24 ¶ 10; ECF No. 28-25 ¶¶ 6–16; ECF No. 28-27 ¶¶ 4–12; ECF No.
11 28-28 ¶¶ 3–8; ECF No. 28-29 ¶¶ 4–7; ECF No. 28-32 ¶¶ 4–8, 11–12; ECF No. 28-34
12 ¶¶ 3–6; ECF No. 28-36 ¶¶ 9–16; ECF No. 28-31 ¶¶ 5–17; ECF No. 55-5 ¶¶ 5–6; ECF
13 No. 55-6 ¶ 6; ECF No. 55-7 ¶¶ 4–9; ECF No. 55-8 ¶¶ 5–6. By denying Plaintiffs’ chil-
14 dren their right to a basic minimum education, and doing so on an unequal basis, De-
15 fendants have burdened Plaintiffs’ constitutional rights to due process and equal pro-
16 tection and thus bear the burden of showing that the orders are narrowly tailored to
17 support the government’s asserted interest in preventing the spread of COVID-19.

18 **2. Even Assuming that the State Has a Compelling Government In-**
19 **terest in Combatting the Spread of COVID-19, The Order Is Not**
20 **Narrowly Tailored**

21 An act passes strict scrutiny only if it “is narrowly tailored to serve a compel-
22 ling government interest.” *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 952
23 (9th Cir. 1997). Here, the Order cannot survive strict scrutiny because closing every
24 school in counties labeled “Tier 1” (formerly those counties on the monitoring list) is
25 plainly not the least restrictive means of arresting the spread of COVID-19, and De-
26 fendants have never contended otherwise. As Plaintiffs have explained, Children are
27 neither sickened by the disease nor transmit it. *See* ECF No. 28-1 at 9–11 (discussing
28 medical evidence of COVID-19 spread among children). Closing schools will thus
have a negligible impact on the public health system or the spread of the disease in the
community. To the extent Defendants are attempting to protect those teachers who

1 may be most susceptible to an adverse reaction from the disease—whether because of
2 age, preexisting conditions, or weakened immune systems—Defendants could have
3 utilized several less restrictive means of protecting them, including allowing those in-
4 dividuals to work remotely or providing enhanced equipment at school for the most
5 vulnerable. Defendants’ decision to choose the bluntest possible instrument for ad-
6 vancing its interest dooms the orders under strict scrutiny.

7 The Order also flunks less-exacting forms of heightened review. *See Harding*,
8 971 F.2d at 412 n.1 (“access to public education” is a right that requires “a heightened
9 level of scrutiny”). “Heightened scrutiny,” according to the Ninth Circuit, “requires
10 something more than traditional rational basis review.” *SmithKline Beecham Corp. v.*
11 *Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014). In *SmithKline*, the Ninth Circuit ex-
12 plained that when courts apply “heightened scrutiny” they do “not consider the possi-
13 ble post-hoc rationalizations for the law.” *Id.* at 480 (citing *Witt v. Dep’t of Air Force*,
14 527 F.3d 806, 817 (9th Cir. 2008)). On the contrary, courts look to the “actual pur-
15 poses of the law.” *SmithKline*, 740 F.3d at 481–82. In other words, courts consider
16 facts and not “hypothetical justifications.” *Id.* Second, courts must ask whether the
17 government’s “legitimate purpose” in fact “justif[ies]” the challenged regulation. *Id.*
18 at 482 (emphasis in original) (citing *United States v. Windsor*, 570 U.S. 744, 770, 775
19 (2013)). As a result, *SmithKline* expressly rejected the “‘strong presumption’ in favor
20 of the constitutionality of laws and the ‘extremely deferential’ posture toward govern-
21 ment action that are the marks of rational basis review.” 740 F.3d at 483 (citing Erwin
22 Chemerinsky, *CONSTITUTIONAL LAW* 695 (4th ed. 2013)).

23 Defendants cannot satisfy heightened scrutiny here. The asserted purpose of the
24 Order is to limit the spread of COVID-19 and prevent hospitals from being over-
25 whelmed. *See* ECF No. 36 Ex. A. But there is no evidence that reopening schools will
26 result in increased hospitalizations or even widespread transmission of the disease. As
27 Plaintiffs have explained, the scientific evidence confirms that children are not at risk
28 of being sickened or killed by COVID-19. ECF No. 28-1 at 9–11. Indeed, *only one*

1 minor in California has died from COVID-19 since the virus began spreading in Janu-
2 ary and February. Children also account for a vanishingly small percentage of total
3 hospitalizations. ECF No. 28-8 ¶ 5. Children in hard-hit areas, such as Los Angeles,
4 are just as unaffected by the virus as children in rural parts of the state. And because
5 children do not play a significant role in transmitting the virus to adults, ECF No. 28-5
6 ¶ 23, teachers in Los Angeles County are just as safe as teachers in any other county.
7 Indeed, they are significantly safer than essential workers in many other professions
8 who have daily contact with large numbers of adults. While Plaintiffs’ numerous pub-
9 lic health experts have provided exhaustive declarations discussing every major scien-
10 tific study on child transmissions, Defendants’ lone expert fails to highlight *any* scien-
11 tific studies. Instead, Dr. Watt opines only that “it is *possible* that in the school setting,
12 as in other settings, asymptomatic transmission *may occur*.” Watt Decl. ¶ 26 (empha-
13 sis added). That speculation is plainly insufficient to show that the Order is narrowly
14 tailored to support any legitimate government interest.

15 **3. Defendants Cannot Satisfy Even Rational Basis Review**

16 Even if this Court were to apply rational basis review, the Order would still not
17 pass constitutional muster. “[T]he precise level of review under the rational basis test
18 is subject to some variation.” *Desoto*, 228 F. Supp. 3d at 957. In some instances, “the
19 government’s actual motivation and justification (not just any conceivable basis) may
20 be explored under ‘a more searching form of rational basis review.’” *Id.* at 957–59 (ci-
21 tations omitted). Courts use a “more searching form of rational basis” review “where
22 important but not fundamental rights or sensitive but not suspect classifications are in-
23 volved.” *United States v. Pickard*, 100 F. Supp. 3d 981, 1005 (E.D. Cal. 2015); *see*
24 *also Dairy v. Bonham*, 2013 WL 3829268, at *5 n.4 (N.D. Cal. July 23, 2013) (col-
25 lecting cases using “rational basis with a bite” in situations in which “important but
26 not fundamental rights” are involved, including *Plyer v. Doe*). There is no question
27 that access to basic education is, at minimum, an “important” right, thus subjecting the
28 order to rational basis with a bite.

1 Defendants cannot satisfy that standard because school closures have no con-
2 nection to Defendants’ asserted public health rationale, *see supra*, and because the
3 state is using completely arbitrary criteria to deprive Plaintiffs of their important right
4 to education. Counties are placed in Tier 1—the most restrictive classification result-
5 ing in school closures—based on “adjusted case rates” and “testing positivity,” but
6 there is no rational basis for using these metrics as a grounds for public policy. “PCR
7 testing is regularly used in public health to help allocate government resources around
8 the nation,” but “it was never intended to be used to make public health decisions as to
9 which industries could remain open and which had to be closed.” Kaufman Decl. Opp.
10 SJ. ¶13

11 The most glaring problem with the PCR tests is that an individual can test posi-
12 tive more than 80 days after encountering the virus—weeks after that person ceases to
13 be infective. ECF No. 55-3. ¶ 8; *See also* Kaufman Decl. Opp. S.J. ¶ 8 (citing BBC ar-
14 ticle). A recent New York Times article has indicated that up to 90% of people testing
15 positive in some states may not be infective—*i.e.*, although they have traces of the vi-
16 rus in their bodies, they cannot transmit the disease to others.⁸ Indeed, CDPH itself
17 recognizes that “proof of a negative test should not be required prior to returning to
18 the workplace after documented COVID infection” because “PCR tests can remain
19 positive long after an individual is not infectious.”⁹ “Rather, symptom- or protocol-
20 based criteria should be used in determining when an employee is safe to return to the
21 workplace.” *Id.* It is striking that while CDPH does not believe a positive test result
22 should keep that particular patient from going to work, it is using the same tests to
23 keep “children across the state of California from returning to school.” Kaufman Decl.
24 Opp. SJ. ¶ 11. Moreover, many individuals who *are* positive may take multiple tests,
25 and every positive test result they receive is counted by the state as a new case. *Id.* ¶ 9.

26
27
28 ⁸ Apoorva Mandavilli, *Your Coronavirus Test is Positive. Maybe It Shouldn’t Be*, NY
TIMES (Sept. 9, 2020, 9:28 AM), <https://tinyurl.com/yymcdfr>.

⁹ California Dep’t of Pub. Health July 14, 2020 “Update COVID-19 Testing
Guidance,” <https://tinyurl.com/y42pw9bt>.

1 A county can thus be placed in Tier 1 even when there is *no* meaningful community
2 spread occurring.

3 Public health experts agree that the “most reliable metric for determining
4 whether a county is experiencing spread is hospitalization” rate. ECF No. 55-4 ¶ 12;
5 ECF No. 55-3 ¶ 7 (“Death rates and hospitalization by age groups has been the main
6 driver in determining the weekly status of infectious disease within the State of Cali-
7 fornia for decades.”). Hospitalizations of positive and suspected patients have de-
8 creased dramatically since late July,¹⁰ indicating that the public health emergency has
9 abated, but Defendants’ updated Blueprint for reopening inexplicably eliminated hos-
10 pitalizations as a metric.¹¹ In short, the Orders have irrationally closed schools based
11 on case counts and positivity rates that do not indicate anything meaningful about the
12 state of public health in a given county.

13 **V. Summary Judgment Is Not Appropriate On Plaintiffs’ Statutory**
14 **Claims And, If It Is, It Can Only Be In Favor Of Plaintiffs**

15 As Plaintiffs have explained, they are not required to exhaust their ADA, Reha-
16 bilitation Act, or IDEA claims. Defendants’ arguments that Plaintiffs were required to
17 exhaust do not carry the day. On the merits, Defendants have not disputed any of
18 Plaintiffs’ evidence supporting their ADA and Rehabilitation Act claims, and there-
19 fore *Plaintiffs* should be entitled to summary judgment on those claims. Defendants
20 similarly have not disputed any of Plaintiffs’ arguments about the failure of a remote-
21 only education system to satisfy the requirements of the IDEA. And to the extent that
22 Defendants contend CDPH’s new guidance relating to cohorts has remedied Plaintiffs’
23 injuries (which it has not) that is an issue of material fact that makes summary judg-
24 ment inappropriate.

25 Plaintiffs’ claims under the ADA and Rehabilitation Act seek a reasonable ac-
26 commodation of in-person instruction, which is not relief that is also available under
27 the IDEA. *See* ECF No. 55 at 11–14. As the Supreme Court explained in *Fry*, not
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¹⁰ COVID-19: Hospitals, <https://tinyurl.com/y3r4otzv>.

¹¹ *Blueprint for a Safer Economy*, <https://covid19.ca.gov/safer-economy/>.

1 every case involving disability discrimination in the provision of education is subject
2 to the IDEA’s exhaustion requirement. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743,
3 752 & n.3, 755–58 (2017). Because the “gravamen” of Plaintiffs’ ADA and Rehabili-
4 tation Act claims does not seek relief for the denial of special education and related
5 services, those claims are not subject to the IDEA’s exhaustion requirement. ECF No.
6 55 at 11–14. Thus, summary judgment in favor of Defendants on these claims is inap-
7 propriate.

8 As to Plaintiffs’ IDEA claims, the Order and CDPH’s new guidance on cohorts
9 set the policy for the entire State’s education system. Thus, Plaintiffs claims are “sys-
10 temic,” challenging statewide orders with the force of law. And for the same reasons
11 that Plaintiffs were not required to exhaust administrative remedies before challenging
12 the original Order, they are not required to exhaust administrative remedies before ar-
13 guing that the updated guidance does not solve the violations caused by the Order. *Id.*
14 While answering the question of whether this new statewide regime still violates the
15 IDEA may require some determinations of fact—for example, whether the limitations
16 on the number and size of cohorts prevent schools throughout the State from provid-
17 ing required services to disabled students—courts analyzing systemic claims are fre-
18 quently faced with issues of fact. *See, e.g., Handberry v. Thompson*, 2015 WL
19 10570793, at *1–*3 (S.D.N.Y. Dec. 2, 2015), *report and recommendation*
20 *adopted*, 2016 WL 1268265 (S.D.N.Y. Mar. 31, 2016) (describing fact-finding pro-
21 cess engaged by the court, including the use of a special master). Indeed, in order to
22 determine whether a system or policy violates the IDEA, a court will often need to
23 make at least some factual determinations about the system or policy and its effect.
24 *See J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 113–15 (2d Cir. 2004) (chron-
25 icling “systemic” cases alleging that certain policies violated the IDEA).

26 In their supplemental brief, Defendants make a number of arguments that ex-
27 haustion is required, but each is meritless. ECF No. 54 at 7-12. As an initial matter,
28 Defendants do not dispute that Plaintiffs’ ADA and Rehabilitation Act claims are not
subject to the IDEA’s exhaustion requirement. *Id.*; *see Ramirez v. Ghilotti Bros. Inc.*,

1 941 F. Supp. 2d 1197, 1210 & n.7 (N.D. Cal. 2013) (failure to respond constitutes a
2 concession) (collecting cases). And while Defendants make much of the difference be-
3 tween the Department of Education and a hearing officer, Defendants never once ar-
4 gue that a hearing officer would have “the authority to grant the relief sought,” *Hoeft*
5 *v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1304 (9th Cir. 1992) (citation omitted),
6 that is, statewide, systemic relief. ECF No. 54 at 7-12. Exhaustion is not required
7 when plaintiffs bring claims seeking systemic relief. *See* ECF No. 55 at 6-11.

8 Attempting to avoid this clear conclusion, Defendants suggest that reimburse-
9 ment and compensatory education will be sufficient to remedy the obvious, wide-
10 spread violations of the IDEA caused by the Order. ECF No. 54 at 8-11. As an initial
11 matter, Plaintiffs are not seeking reimbursement or compensatory education for the
12 IDEA violations that have already occurred. Plaintiffs are seeking to enjoin ongoing,
13 systemic violations of the IDEA. The mandate of the IDEA is for States *to provide*
14 special education and related services to disabled children. *Andrew F. ex rel. Joseph*
15 *F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017) (citing 20 U.S.C.
16 § 1412(a)(1)). Parents of disabled children should not be forced to seek out these ser-
17 vices on their own and then seek reimbursement from the State. More importantly, as
18 Plaintiffs argue, the skills and education lost during this extended and indefinite pe-
19 riod cannot easily, if ever, be recouped, making the harm from school closures irrepa-
20 rable. ECF No. 28-1 at 24-25.

21 Defendants also cite to *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, 933
22 F.3d 1096, 1101–02 (9th Cir. 2019), to suggest that a decision by a hearing examiner
23 is a prerequisite to filing a systemic challenge under the IDEA. ECF No. 54 at 10-11.
24 But that has never been the law and, indeed, is flatly contrary to *Hoeft* and *Porter v.*
25 *Bd. of Trustees of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064 (9th Cir. 2002),
26 as well as countless decisions from other jurisdictions holding that plaintiffs need not
27 exhaust when the hearing officer cannot grant the relief sought. *See King v. Pine*
28 *Plains Cent. Sch. Dist.*, 918 F. Supp. 772, 781 (S.D.N.Y. 1996) (“[A]dministrative
hearing officers . . . generally do not have the authority to set new policies or to alter

1 existing ones,” so “requiring a parent to exhaust his administrative remedies when he
2 is challenging a generally applicable policy or procedure would be futile”); *see also*
3 *Parent/Prof’l Advocacy League v. City of Springfield, Massachusetts*, 934 F.3d 13, 27
4 (1st Cir. 2019) (collecting cases); *Attica Cent.*, 386 F.3d at 113–15; *New Mexico Ass’n*
5 *for Retarded Citizens v. State of N.M.*, 678 F.2d 847, 850–51 (10th Cir. 1982); *Jackie*
6 *S. v. Connelly*, 442 F. Supp. 2d 503, 519 (S.D. Ohio 2006); *Jacky W. v. New York City*
7 *Bd. of Educ.*, 848 F. Supp. 358, 361 (E.D.N.Y. 1994); *Cordero by Bates v. Penn.*
8 *Dept. of Educ.*, 795 F. Supp. 1352, 1362–63 (M.D. Penn. 1992); *Scaggs v. New York*
9 *Dept. of Educ.*, 2007 WL 1456221, at *6–*8 (E.D.N.Y. May 16, 2007) (collecting
10 cases).

11 Defendants also argue that bringing Plaintiffs’ challenge before an administra-
12 tive hearing officer would “permit a determination in the first instance of fact-inten-
13 sive issues critical to the ultimate legal determination: whether the challenged facts
14 support a finding of a denial of a FAPE, and, if so, what student-specific remedies are
15 appropriate under the circumstances.” ECF No. 54 at 7. To be sure, such finding could
16 be useful in “‘textbook’ cases presenting issues involving individual children,” *J.S. ex*
17 *rel. N.S.*, 386 F.3d at 114, but as Plaintiffs have repeatedly explained, this is not a
18 “textbook” case because “the complaint does not challenge the content of Individual-
19 ized Education Programs, but rather the [State’s] total failure” to provide disabled
20 children with a free and appropriate public education. *Id.* at 115.¹² Such a complaint
21 clearly falls within the exception to the exhaustion requirement for challenges seeking
22 systemic relief. *Id.*; *see also Parent/Prof’l Advocacy League*, 934 F.3d at 27; *Hand-*
23 *berry v. Thompson*, 446 F.3d 335, 344 (2d Cir. 2006); *New Mexico Ass’n for Retarded*
24 *Citizens*, 678 F.2d at 850–51; *Jackie S.*, 442 F. Supp. at 519; *King*, 918 F. Supp. at
25 781; *Jacky W.*, 848 F. Supp. at 361; *Cordero by Bates*, 795 F. Supp. at 1362–63;
26 *Scaggs*, 2007 WL 1456221, at *6–*8 (collecting cases). Indeed, one cannot imagine a
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28 ¹² No court has ever held that a plaintiff must bring a systemic challenge as a class
action. ECF No 54 at 9–10 n.7, 11. Indeed, individual plaintiffs frequently bring facial
challenges to laws and regulations. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41,
49–50 (1999); *Bowen v. Yuckert*, 482 U.S. 137, 142–45 (1987).

1 claim more systemic than a challenge to a law closing every school in 30 counties.

2 On the merits, if summary judgment is appropriate on Plaintiffs' ADA and Re-
3 habilitation Act claims, it is appropriate only *in favor* of Plaintiffs. Defendants have
4 not disputed that Plaintiff Z.R. and the children of Plaintiffs Ruiz, Hawkins, Bema,
5 and Ramirez are persons with disabilities as defined by the ADA. Nor have they dis-
6 puted that distance learning burdens these children "in a manner different and greater
7 than" other children. *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996). And
8 Defendants have not disputed that this burden would be alleviated by the "reasonable
9 accommodation" of allowing these children to receive their instruction in person. Be-
10 cause Defendants have not even disputed any the elements of Plaintiffs' prima facie
11 case for discrimination under the ADA and Rehabilitation Act—much less offered any
12 evidence—this court should grant summary judgment to Plaintiffs on these claims.

13 Similarly, Defendants do not dispute that statewide school closures violate the
14 IDEA. Moreover, there is no public-health exception to the federal disability statutes.
15 There exists in the law a "general principle that courts will not second-guess the pub-
16 lic health and safety decisions of state legislatures acting within their traditional police
17 powers." *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996). "However, when
18 Congress has passed antidiscrimination laws such as the ADA which require reasona-
19 ble modifications to public health and safety policies, it is incumbent upon the courts
20 to insure that the mandate of federal law is achieved." *Id.* Thus, when the State prof-
21 fers as a justification for its actions the protection of the public against a disease, dis-
22 trict courts must make "findings of fact regarding the nature of the [] disease, the ex-
23 tent of risk posed by the disease, and the probability that the infected [] would spread
24 it." *Id.* at 1486. Thus, at the very least, a factual dispute exists as to whether the new
25 system of education created by the cohorting guidance passes muster under the IDEA,
26 making summary judgment inappropriate.

27 CONCLUSION

28 For the foregoing reasons, the Court should not grant summary judgment *sua sponte* and should allow Plaintiffs to develop the factual record.

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Respectfully submitted,
DHILLON LAW GROUP INC.

Date: September 15, 2020

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