

**No. 20-56291**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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MATTHEW BRACH, ET AL.

*Plaintiffs-Appellants,*

*v.*

GAVIN NEWSOM, ET AL.

*Defendants-Appellees,*

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On Appeal From The United States District Court  
For The Central District of California  
Case No. 2:20-cv-06472-SVW-AFM  
The Honorable Stephen V. Wilson

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**OPENING BRIEF OF PLAINTIFFS-APPELLANTS**

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## **DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiffs-Appellants state that they are all natural persons.

## TABLE OF CONTENTS

DISCLOSURE STATEMENT .....	ii
INTRODUCTION .....	1
STATEMENT OF JURISDICTION .....	5
STATEMENT OF THE ISSUES .....	6
I. Whether Defendants’ orders preventing schools in certain counties from offering in-person education violate the Due Process Clause.....	6
II. Whether Defendants’ orders preventing schools in certain counties from offering in-person education violate the Equal Protection Clause. ....	6
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	6
STATEMENT OF THE CASE .....	7
I. Factual Background.....	7
A. Shutting Schools Causes Extreme Hardship For Children, Especially Poor, Minority, And Disabled Children.....	7
B. Record Evidence Shows That Children Do Not Spread COVID-19 Or Suffer Adverse Results From COVID-19.....	17
C. Defendants’ Orders Prevent Plaintiffs’ Children From Attending School in the Fall.....	20
D. Plaintiffs’ Children, Like Countless Other Children in California, Are Not Receiving A Basic Minimum Education ...	23
E. The State Changes Course, Agreeing with Plaintiffs and Their Experts that School Closures Harm Children and That Children Are Not a Major Source of Coronavirus Spread, but Nevertheless Refuses to Open Schools.....	25
II. Procedural History .....	29
STANDARD OF REVIEW.....	33
SUMMARY OF ARGUMENT .....	33

ARGUMENT ..... 38

I. The State’s Orders Prohibiting In-Person Education Should Be Enjoined Because They Infringe On The Due Process Rights Of Plaintiffs And Their Children And Cannot Survive Heightened Scrutiny ..... 38

    A. Supreme Court and Ninth Circuit precedent support the existence of a fundamental right to a basic minimum education and recognize parents’ right to choose their children’s educational forum ..... 39

    B. The substantive component of the Due Process Clause protects the right to a basic minimum education ..... 45

        1. Basic education is deeply rooted in our Nation’s history .... 46

        2. Basic Education is Implicit in the Concept of Ordered Liberty ..... 50

    C. The district court erred in holding that the State’s orders do not interfere with fundamental rights ..... 53

    D. The State’s orders cannot survive any form of heightened scrutiny because they are not narrowly tailored to further a compelling government interest ..... 58

II. The Order Violates Due Process and Equal Protection Even Under Rational Basis Review ..... 64

CONCLUSION ..... 69

STATEMENT OF RELATED CASES ..... 71

CERTIFICATE OF COMPLIANCE..... 72

CERTIFICATE OF SERVICE..... 73

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Bd. of Educ. v. Pico</i> , 457 U.S. 853 (1982).....	60, 61
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954).....	57, 72
<i>Calvary Chapel Dayton Valley v. Sisolak</i> , --F.3d--, 2020 WL 7350247 (9th Cir. Dec. 15, 2020).....	43, 66
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010).....	60
<i>City of Revere v. Mass. Gen. Hosp.</i> , 463 U.S. 239 (1983).....	63
<i>Dairy v. Bonham</i> , 2013 WL 3829268 (N.D. Cal. July 23, 2013) .....	72
<i>Desoto CAB Co., Inc. v. Picker</i> , 228 F. Supp. 3d 950 (N. D. Cal. 2017).....	72, 73
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976).....	63
<i>Fields v. Palmdale School District</i> , 427 F.3d 1197 (9th Cir. 2005).....	50, 52, 62
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	63
<i>Heller v. Doe</i> , 509 U.S. 312 (1993).....	71
<i>Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.</i> , 565 U.S. 171 (2012).....	48
<i>Kadrmas v. Dickinson Pub. Sch.</i> , 487 U.S. 450 (1988).....	50
<i>Lazy Y Ranch, Ltd. v. Behrens</i> , 546 F.3d 580 (9th Cir. 2008).....	72
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803).....	58
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....	53, 56

<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	40, 51, 57, 62
<i>Monclova Christian Academy v. Toledo-Lucas Cty. Health Dep’t</i> , -- F.3d --, 2020 WL 7778170 (6th Cir. Dec. 31, 2020).....	70
<i>Nunez by Nunez v. City of San Diego</i> , 114 F.3d 935 (9th Cir. 1997).....	66
<i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015).....	passim
<i>Oswalt v. Resolute Indus., Inc.</i> , 642 F.3d 856 (9th Cir. 2011).....	37, 38
<i>Papasan v. Allain</i> , 478 U.S. 265 (1986).....	39, 50, 54
<i>Penilla v. City of Huntington Park</i> , 115 F.3d 707 (9th Cir. 1997).....	64
<i>Perry v. Schwarzenegger</i> , 704 F. Supp. 2d 921 (N.D. Cal. 2010).....	47
<i>Pierce v. Soc’y of the Sisters of the Holy Names of Jesus &amp; Mary</i> , 268 U.S. 510 (1925).....	41, 51, 62
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	passim
<i>Powers v. Ohio</i> , 499 U.S. 400 (1991).....	61
<i>Roe v. Wade</i> , 410 U.S. 113 (1973).....	52
<i>Roman Catholic Diocese of Brooklyn v. Cuomo</i> , 141 S. Ct. 63 (2020).....	43, 66
<i>San Antonio Ind. School District v. Rodriguez</i> , 411 U.S. 1 (1973).....	passim
<i>SmithKline Beecham Corp. v. Abbott Labs.</i> , 740 F.3d 471 (9th Cir. 2014).....	66, 67, 73
<i>Town of Greece v. Galloway</i> , 572 U.S. 565 (2014).....	56
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000).....	52
<i>United States v. Harding</i> , 971 F.2d 410 (9th Cir. 1992).....	40, 50, 66, 72

*United States v. Navarro*,  
800 F.3d 1104 (9th Cir. 2015)..... 70

*United States v. Pickard*,  
100 F. Supp. 3d 981 (E.D. Cal. 2015) ..... 44, 72

*United States v. Windsor*,  
570 U.S. 744 (2013)..... 67

*Vance v. Bradley*,  
440 U.S. 93 (1979)..... 76

*Washington v. Glucksberg*,  
521 U.S. 702 (1997)..... 41, 53, 56, 57

*Wisconsin v. Yoder*,  
406 U.S. 205 (1972)..... 60

*Witt v. Dep’t of Air Force*,  
527 F.3d 806 (9th Cir. 2008)..... 67

**Statutes**

28 U.S.C. § 1291 ..... 6

28 U.S.C. § 1331 ..... 6

28 U.S.C. § 1331 ..... 6

28 U.S.C. § 1343 ..... 6

Cal. Educ. Code, § 48200..... 57

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U.S. CONST. art. I § 9..... 58

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(Sept. 6, 2016) ..... 58

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retrospective closed cohort study* (Working Paper, Apr. 23, 2020)..... 33

Arnaud Fontanet et al., *SARS-CoV-2 infection in primary schools in  
northern France: A retrospective cohort study in an area of high  
transmission* (Working Paper June 29, 2020)..... 33

California Blueprint Data Archive, Cal. Dep’t of Pub. Health,  
(last visited Jan. 4, 2021)..... 24

Carl Kaestle, *Pillars of the Republic: Common Schools and American  
Society 1780–1860* (1983) ..... 54

<i>Cases and Deaths Associated with COVID-19 by Age Group in California</i> , Cal. Dep’t of Pub. Health (Dec. 29, 2020) .....	68
Chen Stein-Zamir, <i>A large COVID-19 outbreak in a high school 10 days after schools’ reopening, Israel, May 2020</i> , Eurosurveillance (July 2020) .....	33
<i>Coronavirus Impact on Students and Education Systems</i> , NAACP (last visited Dec. 10 2020).....	13
<i>COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year</i> , Cal. Dep’t of Pub. Health (July 17, 2020) .....	23
<i>COVID-19 Interim Guidance: Day Camps</i> , Cal. Dep’t of Pub. Health (updated July 29, 2020) .....	73
<i>COVID-19 Planning Considerations: Guidance for School Re-entry</i> , American Academy of Pediatrics.....	18
Daniel F. Gudbjartsson et al., <i>Spread of SARS-CoV-2 in the Icelandic Population</i> , The New England Journal of Medicine (June 11, 2020)...	32
Daniel Wu, <i>Coronavirus shutdowns expose low-income Bay Area students’ struggle to get online</i> , The Mercury News (Aug. 3, 2020).....	64
Daniel Wu, <i>Coronavirus shutdowns expose low-income Bay Area students’ struggle to get online</i> , The Mercury News (August 3, 2020)..	12
<i>Data Story of COVID-19 &amp; Schools</i> , Insights for Education (last visited January 4, 2021) .....	21
David McCullough, <i>John Adams 364</i> (2001).....	53
Emma Dorn, et al., <i>COVID-19 and student learning in the United States: The hurt could last a lifetime</i> , McKinsey & Company (June 1, 2020).....	13
<i>Evidence Summary: TK-6 Schools and COVID-19 Transmission</i> , Cal. Dep’t of Pub. Health (Dec. 30, 2020) .....	3
Executive Dept. of the State of California, <i>Proclamation of a State of Emergency</i> (March 4, 2020) .....	8
<i>Executive Order N-33-2</i> , Executive Dept. of the State of California, (March 19, 2020) .....	8
<i>For the First Time Ever, Minors Make Up Half of Visitors to National Sexual Assault Hotline</i> , RAINN (April 16, 2020).....	18
George Washington’s Farewell Address (1796).....	54
<i>Governor Newsom Unveils California’s Safe Schools for All Plan</i> , Office of Gov. Gavin Newsom, (Dec. 30, 2020) .....	28



Hannah Natanson, *What It’s Like to Learn Online From Inside a Homeless Shelter*, *The Washington Post* (Jan. 3, 2021)..... 14

Howard Blume & Sonali Kohli, *15,000 L.A. high school students are AWOL online, 40,000 fail to check in daily amid coronavirus closures*, *Los Angeles Times* (March 30, 2020) ..... 9

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Jeffrey Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 27 (2018) ..... 55

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*Report reveals disparities among Black, Latino LAUSD students in online learning amid COVID-19 pandemic*, ABC 7 Eyewitness News (July 17, 2020)..... 9

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*Summary: California’s Safe Schools for All Plan*, Cal. Dep’t of Pub. Health (Dec. 30, 2020) ..... 2, 28

Supinda Bunyavanich, Anh Do, & Alfin Vicencio, *Nasal Gene Expression of Angiotensin-Converting Enzyme 2 in Children and Adults* (Research Letter, May 20, 2020) ..... 33

*The Federal Right to an Adequate Education*, 81 *Geo. Wash. L. Rev.* 92 (2013) ..... 56

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*Update COVID-19 Testing Guidance*, Cal. Dep’t of Pub. Health (July 14, 2020)..... 75

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## INTRODUCTION

When the history of the COVID-19 pandemic is written, Governor Newsom’s decision to prevent millions of children from attending school in person for nearly a year will be one of its most tragic chapters. Since March of 2020, hundreds of thousands of children have essentially been kicked out of school—whether because they lack the technological resources to engage with “online learning” or because their parents cannot assist them. Countless other children have fallen behind academically despite their efforts to remain engaged because teachers cannot provide the individualized attention they need. And for many students the consequences of social isolation have been even more dire, including domestic abuse, depression, hunger, and suicide. School closures have also been crippling for families, as many parents have had to quit their jobs or cut their hours to supervise their children’s distance “learning.” These consequences have predictably fallen hardest on the most vulnerable—students from disadvantaged backgrounds, many of whom are Black and Latino—and those with disabilities and special needs.

The State’s nearly year-long moratorium on in-person education is especially indefensible given the overwhelming scientific evidence that

COVID-19 poses a negligible risk to school-age children and that children are not a significant transmission vector of the disease. The primary risk of viral spread at schools is adult-to-adult transmission, a risk that can be mitigated through the same protocols used at tens of thousands of other “essential” businesses and locations where far more adults come into contact with each other than in schools. For these reasons, many other states and countries have reopened schools. Yet none has reported an increase in new cases resulting from student-to-teacher contact.

Even the State apparently now agrees that schools do not pose a health risk to children or the wider community. On December 30, 2020, the California Department of Public Health (CDPH) issued California’s Safe Schools for All Plan, which acknowledges that “[r]esuming in-person instruction is critical for kids, families, and communities throughout the state,” but does not rescind the school-closure orders.<sup>1</sup> As CDPH now agrees—based on studies conducted in the spring and identified by Plaintiffs’ experts—“children get COVID-19 less frequently and have less

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<sup>1</sup> *Summary: California’s Safe Schools for All Plan*, Cal. Dep’t of Pub. Health (Dec. 30, 2020), <https://tinyurl.com/y8kv8ehm>.

severe disease compared to adults.”<sup>2</sup> Studies from around the world also show that even when children do get infected, they most often “get the infection from an adult household contact,” not their classmates. *Id.* In fact, the Centers for Disease Control and Prevention (CDC) has found that, “for students, going to schools was not associated with having a positive COVID-19 test.” *Id.* CDPH further concedes that “[i]n studies of open schools in America and around the world, children do not seem to be major sources of transmission—either to each other or to adults.”<sup>3</sup>

Plaintiffs in this case are parents of children and a current high school student affected by the Governor’s school closure orders. The right to a basic minimum education is fundamental—it is deeply rooted in our Nation’s history and traditions and inherent in the concept of ordered liberty—but the State’s disastrous experiment with so-called “distance learning” has deprived them of this basic right in violation of the Due Process Clause. The orders also violate due process because banning in-

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<sup>2</sup> *Evidence Summary: TK-6 Schools and COVID-19 Transmission*, Cal. Dep’t of Pub. Health (Dec. 30, 2020) (hereinafter *Evidence Summary*), <https://tinyurl.com/y9cozrn7>.

<sup>3</sup> *Rationale: California’s Safe Schools for All Plan*, Cal. Dep’t of Pub. Health (Dec. 30, 2020) (hereinafter *Rationale*), <https://tinyurl.com/y9tbpa4x>.

person education at private schools interferes with certain Plaintiffs' long-recognized right to choose the forum for their children's education. The school-closure orders also violate the Equal Protection Clause because they irrationally treat schools differently than daycare centers and treat schools in certain counties differently than others even though schools are not associated with any significant transmission of COVID-19. The school-closure orders cannot survive strict scrutiny—or any type of heightened judicial review—because they are not narrowly tailored to the government's asserted interest in combatting the spread of COVID-19. Indeed, the orders cannot survive even the rigorous rational basis review appropriate for “important” but not “fundamental” rights, because there is no evidence that closing schools will advance the government's asserted interest in preventing community spread of the virus.

The district court nevertheless granted *sua sponte* summary judgment to Defendants, holding that Plaintiffs' children do *not* have a fundamental right to a basic minimum education. Applying the most toothless form of rational basis review, it upheld the orders—despite the massive harms they are imposing on millions of California children—because the orders had at least a “conceivable” basis.

The district court's decision cannot be squared with precedent from the Supreme Court and this Court signaling that the right to a basic minimum education is fundamental, or at least quasi-fundamental, and that deprivations of that right should be subjected to a heightened standard of review. Nor can the decision be reconciled with the Supreme Court's longstanding precedent holding that parents have a due process right to send their children to private school without state interference. Under any heightened standard—including rational basis with bite—the orders should be enjoined because in-person education, when conducted responsibly, does not threaten the health of the community.

Accordingly, this Court should reverse the district court's erroneous decision and direct the district court to issue summary judgment in favor of Plaintiffs.

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this appeal of the district court's order granting *sua sponte* summary judgment to Defendants pursuant to 28 U.S.C. § 1291. The district court issued its summary judgment order on December 1, 2020, 1-ER-2, and Plaintiffs timely filed their notice of appeal on December 3, 2020, 3-ER-553. The district court had jurisdiction in this

case under 28 U.S.C. §§ 1331 and 1343 because Plaintiffs allege that Defendants deprived them of their rights secured by the U.S. Constitution and federal law.

### **STATEMENT OF THE ISSUES**

1. Whether Defendants' orders barring children in certain counties from attending school in person violate the Due Process Clause of the Fourteenth Amendment.
2. Whether Defendants' orders barring children in certain counties from attending school in person violate the Equal Protection Clause of the Fourteenth Amendment.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

This case implicates the Fourteenth Amendment to the U.S. Constitution. The relevant portion of the Fourteenth Amendment states:

No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.



## STATEMENT OF THE CASE

### I. Factual Background

#### A. Shuttering schools causes extreme hardship for children, especially poor, minority, and disabled children

On March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency as a result of COVID-19.<sup>4</sup> 2-ER-128. On March 19, the Governor issued an Executive Order requiring “all residents ... to immediately heed the current State public health directives.”<sup>5</sup> Those directives, in turn, required “all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors.” *Id.* As a result of this directive, schools across the State were forced to close their doors and transition to “distance learning.”

Almost immediately after the State shuttered schools, the problems of remote education began to manifest, especially for poor, minority, and disabled students. Los Angeles School District officials reported that

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<sup>4</sup> Executive Dept. of the State of California, *Proclamation of a State of Emergency* (March 4, 2020), <https://tinyurl.com/vcv3lxs>.

<sup>5</sup> *Executive Order N-33-2*, Executive Dept. of the State of California, ¶ 1 (March 19, 2020), <https://tinyurl.com/usxne6p>.

15,000 high school students were unaccounted for and more than 40,000 had not been in daily contact with their teachers.<sup>6</sup> A study by the Los Angeles Unified School District (LAUSD) showed that, between March 16 and May 22, “on an average day only about 36% of middle and high school students participated online,” while “[a]bout 25% logged on or viewed work only” “[a]nd about 40% were absent.”<sup>7</sup>

A study by Brown University projected that because of the spring shutdowns students would likely achieve only “63–68% of the learning gains in reading relative to a typical school year” and only “37–50% of the learning gains in math.”<sup>8</sup> Those results were unsurprising. A Stanford University study found in 2015 that even “white, non-poverty, non-‘English Language Learner’ and non-special education students who were

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<sup>6</sup> Howard Blume & Sonali Kohli, *15,000 L.A. high school students are AWOL online, 40,000 fail to check in daily amid coronavirus closures*, Los Angeles Times (March 30, 2020), <https://tinyurl.com/y2ldy5dp>. Every article cited in this brief, save for one (noted below) was cited in the briefs before the district court.

<sup>7</sup> *Report reveals disparities among Black, Latino LAUSD students in online learning amid COVID-19 pandemic*, ABC 7 Eyewitness News (July 17, 2020), <https://tinyurl.com/yaoa3at2>.

<sup>8</sup> Megan Kuhfeld, et al., *Projecting the potential impacts of COVID-19 school closures on academic achievement*, Brown University EdWorkingPaper No. 20-226, at 2, 23 (May 2020), <https://tinyurl.com/y622m5t2>.

subject to virtual learning were behind their in-person peers to an extent that reflected an equivalent of 180 fewer days of instruction in math and 72 fewer days of instruction in reading.” 3-ER-339, 3-ER-342–56 ¶ 16 & Ex. 15.

These hardships fall even more harshly on minority, poor, and disabled students. Online participation for these students has been as low as 10 percent in some cases. 3-ER-337–39 ¶¶ 7, 15; 3-ER-463 ¶ 5. The LAUSD found that “Black and Latino students showed participation rates between 10 and 20 percentage points lower than white and Asian peers.” *ABC 7, supra* n.7. “English learners, students with disabilities, homeless students and those in the foster-care system had lower rates of online participation.” *Id.* The CDC reports that students with disabilities “had significant difficulties with remote learning.”<sup>9</sup>

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<sup>9</sup> *The Importance of Reopening America’s Schools this Fall*, Centers for Disease Control and Prevention (July 23, 2020), <https://tinyurl.com/ya2bvnm>. The CDC subsequently removed this document from its website upon request from a congressional subcommittee. Natalie Dreier, et al. *CDC removes documents about reopening schools amid coronavirus pandemic*, WPXI (Nov. 19, 2020), <https://tinyurl.com/y9rqd58c>.

This additional disadvantage to poor and minority students is caused, at least in part, by the “digital divide” (lack of access to technology) and by lack of access to childcare. Studies show that “Blacks and Latinos are substantially less likely to have a computer at home than are white, non-Latinos.”<sup>10</sup> Indeed, some estimates show that “70.4 percent of whites have access to a home computer,” while “only 41.3 percent of blacks and 38.8 percent of Latinos have access to a home computer.” *Id.* Moreover, a report by Common Sense shows that “one-quarter of California students lack adequate access to the internet,” and a “majority of [these students] are Black, Latinx, or Native American.”<sup>11</sup> In addition to a lack of access to technology, low-income families “have trouble finding, accessing, and affording” childcare.<sup>12</sup> A study by McKinsey & Company predicted that Blacks and Latinos would suffer a 15 to 20 percent greater loss in

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<sup>10</sup> Robert W. Fairlie, *Race and the Digital Divide*, UC Santa Cruz: Department of Economics, UCSC, at 6 (Sept. 9, 2014), <https://tinyurl.com/yypb6wst>.

<sup>11</sup> Daniel Wu, *Coronavirus shutdowns expose low-income Bay Area students’ struggle to get online*, The Mercury News (August 3, 2020), <https://tinyurl.com/ydgc9p3m>.

<sup>12</sup> *Coronavirus Impact on Students and Education Systems*, NAACP (last visited Dec. 10 2020), <https://tinyurl.com/yaqqatmt>.

educational gains than other students as a result of continued school shutdowns.<sup>13</sup> Indeed, the study predicted that even average-quality online education during the fall semester would cause children to lose “three to four months of learning” by January 2021. *Id.* A recent article in the Washington Post, which highlights the damage virtual learning has done to homeless children, reports that the “shift to online learning has drastically widened existing equity gaps in U.S. education, driving drops in attendance, college applications and academic performance among the nation’s most vulnerable students.”<sup>14</sup>

School closures have also caused, and will continue to cause, myriad other traumas to children. First, it harms children’s brain development. “[S]ocialization is a critical part of a child’s education.” 2-ER-273 ¶ 9. “Psychological, social, and emotional development requires children to both spend time away from parents and with peers, in structured settings, such as school.” 2-ER-270 ¶ 7. “Peer relationships provide a unique context

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<sup>13</sup> Emma Dorn, et al., *COVID-19 and student learning in the United States: The hurt could last a lifetime*, McKinsey & Company (June 1, 2020), <https://tinyurl.com/y4uepmb6>.

<sup>14</sup> Hannah Natanson, *What It’s Like to Learn Online From Inside a Homeless Shelter*, The Washington Post (Jan. 3, 2021), <https://tinyurl.com/y68tg2at>.

in which children learn a range of critical social emotional skills, such as empathy, cooperation, and problem-solving strategies.” 2-ER-252–53 ¶ 25. “Opportunities for this socialization are not likely to occur via distance learning.” 2-ER-253 ¶ 26. Moreover, forcing children to stare at computer screens for long periods of time has a detrimental effect on their brains. 2-ER-320 ¶ 8. Indeed, prolonged screen time “produc[es] imaging results similar to the brains of people on cocaine and alcohol.” *Id.* Instead, “[d]eveloping brains need guided stimulation for effective neural pathways [or synapses] to be established.” 2-ER-322–23 ¶ 7. “Experiences that are provided through the back and forth interactions among teachers, students, and peers determine whether these synapses are strengthened or weakened.” 2-ER-323 ¶ 7. Therefore, “[a]ll children are at risk of cognitive-developmental difficulties as well as adaptive and social-emotional difficulties from being denied the experiences that can only be effectively provided with face-to-face interactions with a skilled teacher within an educational environment, and with interactions with peers.” 2-ER-324 ¶ 11. “Without in-person instruction, children’s brain development will be harmed. *Id.* ¶ 12. This evidence suggests that the negative

academic effects of school closures will extend far beyond the immediate academic year.

Second, preventing children from interacting with teachers and peers at school harms them psychologically. The safe, connected environment that many children experience at school reduces their depression, anxiety, and thoughts of suicide. CDC *supra* n.9. By contrast, children who are socially isolated can often develop “low self-esteem,” as well as “depression, anxiety, concomitant increased use of psychotropic medicines, and suicide.” 2-ER-254 ¶ 29. “[E]xtended periods of confinement provoke numerous mental and emotional illnesses such as depression, anxiety, phobias, self-harming behaviors and suicide.” 2-ER-270 ¶ 7. Recent “[s]tudies and surveys in Asia, Australia, the U.S., Canada, China and Europe have shown overall worsening mental health in children and teens since the pandemic began.”<sup>15</sup> For example, “[b]y early fall, many Massachusetts ERs were seeing about *four times* more children and teens in psychiatric crisis weekly than usual.” *Id.* (emphasis added). One

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<sup>15</sup> Lindsey Tanner, *ER Visits, Long Waits Climb for Kids in Mental Health Crisis*, Associated Press (Dec. 5, 2020), <https://tinyurl.com/ybshf3gu>.

California psychiatrist reported seeing children with autism “regress[ ] in years” from the closures, “and many have become violent towards themselves and their parents.” 2-ER-270 ¶ 7. One teacher reported that “[m]any of [her] students expressed ... a marked increase in feelings of depression, isolation, and anxiety” as a result of the school closures. 3-ER-464–65 ¶ 8. Another teacher reported that her students “expressed feelings of loneliness, depression, and anxiety.” 3-ER-460 ¶ 10. Even students whose families could afford tutors suffered from decreased “morale” and “missed the important social interactions with their friends.” 3-ER-468 ¶ 5. Students suffering depression and anxiety cannot learn effectively.

The experience of Plaintiffs’ children likewise confirms these observations. Plaintiffs Mitrowke, Petrilla, Hawkins, Brach, and Beaulieu have observed signs of depression and anxiety in their children. 3-ER-505 ¶¶ 6; 2-ER-65 ¶ 5; 3-ER-510 ¶ 15; 3-ER-474 ¶ 7; 3-ER-484 ¶ 15. When Plaintiff Onibokum’s children “went to summer camp,” by contrast, they “returned much happier—the social interaction they had with other children was vital to their well-being.” 3-ER-507 ¶ 10. These experiences are not isolated events: children throughout the State have been experiencing such psychological trauma from the closures that the State



has had to increase funding to help children cope with these problems. *See, e.g.,* 2-ER-144, 2-ER-169–71.

Third, preventing children from attending school in person places them at higher risk for abuse. “Lengthy time away from school and associated interruption of supportive services often results in isolation, making it difficult for schools to identify and address ... child and adolescent physical or sexual abuse, substance use, depression, and suicidal ideation.”<sup>16</sup> When schools are open, teachers and staff report more than one-fifth of all child-abuse cases.<sup>17</sup> *See also* 3-ER-472 ¶ 7. During the closures, “there has been a sharp decline in reports of suspected maltreatment.”<sup>18</sup> *See also* 2-ER-315 ¶ 6. However, family services agencies have seen an *increase* in hospitalizations of children suffering physical abuse.<sup>19</sup> And according to the Rape, Abuse & Incest National Network, once shelter-in-place orders were implemented, “half of the victims

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<sup>16</sup> *COVID-19 Planning Considerations: Guidance for School Re-entry*, American Academy of Pediatrics (hereinafter AAP Guidance), <https://tinyurl.com/ybkfjx9m>.

<sup>17</sup> CDC, *supra* n.9.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

receiving help from the National Sexual Assault hotline were minors.”<sup>20</sup> Because of these orders, “[m]any minors are now quarantined at home with their abuser” while being “cut off from their safety net – the teachers, coaches, and friends’ parents who are most likely to notice and report the suspected abuse.” *Id.* Children suffering such abuse are unlikely to progress academically, regardless of the sophistication of their schools’ “distance learning” program.

Finally, school shutdowns cut children off from an important source of food and physical activity. “Beyond the education impact and social impact of school closures, there has been substantial impact on food security and physical activity for children and families.”<sup>21</sup> *See also* 3-ER-471–72 ¶ 5. Indeed, “more than 30 million children participate in the National School Lunch Program and nearly 15 million participate in the School Breakfast Program.”<sup>22</sup> Hungry children will inevitably fall behind academically.

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<sup>20</sup> *For the First Time Ever, Minors Make Up Half of Visitors to National Sexual Assault Hotline*, RAINN (April 16, 2020), <https://tinyurl.com/y958klp5>.

<sup>21</sup> *AAP Guidance*, *supra* n.16.

<sup>22</sup> CDC, *supra* n.9.

**B. Record evidence shows that children do not spread COVID-19 or suffer adverse results from COVID-19**

“The overwhelming weight of scientific data suggests that the risk of transmission of the virus from younger people aged 20 and below to older people is small or negligible.” 2-ER-218 ¶ 22. “Numerous recent studies performed in Europe have shown low rates of infection among children attending school and low rates of transmission of the virus from children to adults.” 2-ER-269–70 ¶ 6; *accord* 2-ER-276-77 ¶¶ 6–10; 2-ER-218–20 ¶¶ 23–27; 2-ER-236–37 ¶ 16. A study out of the UK this Fall “confirmed that ‘there is very little evidence that the virus is transmitted’ in schools.” 2-ER-96 ¶ 4. A study out of Greece concluded that, “while children become infected by SARS-CoV-2, they do not appear to transmit infection to others.” 2-ER-96–97 ¶ 5. Indeed, “the overwhelming bulk of scientific studies that have examined the topic—including the best studies, which take pains to distinguish correlation from causation—find that children play a limited role in spreading COVID-19 infection to adults.” *Id.* ¶ 6.

Given the overwhelming evidence that children are a negligible source of coronavirus spread, many nations have opened their schools without seeing an increase in coronavirus cases. “Most European nations

have re-opened their schools, and none have reported a meaningful increase in pediatric illness or measurable transmission from children to adults.” 2-ER-270 ¶ 6. As of August 3, 2020, there were “22 countries that ha[d] their schools open without social distancing, mask wearing, and other mandates, yet these countries [did] not experience[] an increase in COVID-19 cases or spread of the virus among children” or “between children and their parents or elderly grandparents.” 2-ER-316 ¶ 8. Many more countries—more than one-third worldwide—have fully opened schools since August.<sup>23</sup> Most states have likewise allowed local decisionmakers to reopen schools without state interference.<sup>24</sup>

Moreover, COVID-19 poses almost no danger to children and younger adults. “Younger, healthier people [ ] have virtually no risk of serious illness from COVID-19.” 2-ER-234 ¶ 12. Indeed, “[l]ess than one percent of New York City’s hospitalizations [for COVID] have been patients under 18 years of age.” *Id.* (footnote omitted). “[C]ompared to those between the ages of 18–29, children aged 5–17 are 9 times less likely

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<sup>23</sup> *Data Story of COVID-19 & Schools*, Insights for Education (last visited January 4, 2021), <https://tinyurl.com/y37hhxj5>.

<sup>24</sup> *Where Schools Are Reopening in the US*, CNN (Dec. 15, 2020) (hereinafter *Schools Are Reopening*) <https://tinyurl.com/y2crs3rd>.

to be hospitalized and 16 times less likely to experience death.” 2-ER-59 ¶ 14. In Santa Clara County, “[t]he infection fatality rate is 0% among people between 0 and 19 years,” “0.013% for people between 20 and 39 years,” “0.16% for people between 40 and 69 years,” and “1.3% for people above 70 years.” 2-ER-226 ¶ 39. “Unlike seasonal flu, which kills approximately 200 children per year nationally, the coronavirus largely spares children.” 2-ER-269 ¶ 5; *accord* 2-ER-244–45 ¶ 6; *see also* 2-ER-314 ¶ 4 (“[D]ata indicate that children are at far greater risk of critical illness from influenza than from COVID-19.”).

And in the extremely unlikely event that children pass the coronavirus on to adults, the risk to teachers and staff is likewise minimal because most of them are not in the most at-risk age group. “Approximately 56% of public-school teachers in the United States are under the age of 40,” and “80% are under the age of 55.” 2-ER-316 ¶ 9; *accord* 2-ER-237 ¶ 17. “For COVID-19 patients under 70” the “infection fatality rate” is around 0.05%. 2-ER-223 ¶ 32; 2-ER-233 ¶ 9.

In sum, as Plaintiffs’ experts explained “opening schools can be done safely, children play a negligible role in disease spread to adults, and the mortality risk from COVID-19 infection is small in children.” 2-ER-96 ¶ 3.

By contrast, the harm to children from the closure of schools is devastating and well-documented—and likely irreversible. *Supra* I.A.

**C. Defendants’ Orders Prevent Plaintiffs’ Children From Attending School in the Fall**

On July 17, 2020, Governor Newsom announced a framework for reopening schools. 2-ER-134–39.<sup>25</sup> This framework allowed schools to reopen only if “they are located in a local health jurisdiction (LHJ) that has not been on the county monitoring list within the prior 14 days.” 2-ER-135. (footnote omitted). Elementary schools located in jurisdictions on the monitoring list could obtain waivers to conduct in-person learning from “the local health officer” “in consultation with labor, parent and community organizations.” *Id.* at n.2. On August 28, the California Department of Public Health replaced the county monitoring list with a tier-based system, equating the prior county monitoring list with Tier 1 of the new system.<sup>26</sup>

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<sup>25</sup> *COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year*, Cal. Dep’t of Pub. Health (July 17, 2020) (hereinafter “July 17 Order”), <https://tinyurl.com/y495p4v2>.

<sup>26</sup> *Statewide Public Health Officer Order*, Cal. Dep’t of Pub. Health (Aug. 28, 2020), <https://tinyurl.com/y99u2zp7>.

The various counties in which Plaintiffs' children attend school have fared differently, but many schools in these counties have never had the opportunity to open their doors to in-person instruction. Plaintiff Brach's children attend school in Los Angeles County. 3-ER-473–74 ¶¶ 1, 7–8. So too do the children of Plaintiffs Fleming, Ruiz, and Bema. *See* 3-ER-487 ¶¶ 1–2; 3-ER-495 ¶¶ 1–2; 3-ER-498 ¶¶ 1–2. Los Angeles County has never moved out of Tier 1,<sup>27</sup> meaning that schools in Los Angeles County have never been permitted to open without a waiver, which are only available to elementary schools. Several Plaintiffs have children that attend school in Orange, Riverside, San Diego, Santa Clara, and Ventura Counties. *See* 3-ER-477–78 ¶¶ 1–5; 3-ER-482 ¶¶ 1–3; 3-ER-485 ¶¶ 1–2; 3-ER-489 ¶¶ 1–2; 3-ER-491–92 ¶¶ 1–2, 8; 3-ER-493 ¶¶ 1–2; 3-ER-501 ¶¶ 1–2; 3-ER-504 ¶¶ 1–2; 3-ER-507 ¶¶ 1, 3–4; 3-ER-509 ¶¶ 1–2. While these counties did move out of Tier 1 for a short time, they have since returned to that Tier.<sup>28</sup>

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<sup>27</sup> *See generally California Blueprint Data Archive*, Cal. Dep't of Pub. Health, (last visited Jan. 4, 2021), <https://tinyurl.com/y8pw3xvl>.

<sup>28</sup> *See California Blueprint Data Archive*, *supra* n.22.

Therefore, any school that did not previously open is once again barred from doing so.<sup>29</sup>

But for the July 17 Order banning in-person instruction in most California counties, many schools would have offered such instruction. For example, in preparation for reopening in the Fall, the Palos Verdes Unified School district in Los Angeles County, of which Plaintiff Brach is a Governing Board Member, “Established Reopening Committees” and “purchased and implemented a personal protective equipment (PPE) and Mitigation Strategy.” 3-ER-474 ¶¶ 10–12. However, the July 17 Order prevented the district from opening. 3-ER-475 ¶ 16. Likewise, prior to the July 17 Order banning in-person instruction, Plaintiff Hackett’s son’s school in Los Angeles County was “going above and beyond, making huge investments of effort and money to comply with the CDC and health directives, so that children c[ould] safely attend school in person.” 3-ER-494 ¶ 6. Other Plaintiffs’ schools similarly planned to reopen for in-person learning. *See, e.g.*, 3-ER-458 ¶ 3; 3-ER-328 ¶¶ 8–9.

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<sup>29</sup> Schools that did open in those counties are not required to close when the county returns to Tier 1. *See* July 17 Order.



**D. Plaintiffs’ children, like countless other children in California, are not receiving a basic minimum education**

Plaintiff Hackett reported that, within four days of the start of the fall semester, he and his sixth-grade son “began experiencing various I.T.-related hardships,” despite a “strong internet connection and the robust I.T. support provided by” their private school. 2-ER-71 ¶¶ 4–5. As Hackett explained, “remote instruction does NOT come close to replacing actual in-school, in-person teaching and learning. Remote lessons and instructions are not always clear,” and his son “cannot easily return to ask questions after the allotted online lesson time is over.” *Id.* ¶ 7.

Plaintiff Zeigler explained that his second-grade daughter “is frustrated and repeatedly gets upset just trying to ‘attend’ the virtual classes” due to “I.T.-related issues.” 2-ER-68-69 ¶ 6. Zeigler’s daughter attended “day camp” “in a classroom with approximately 12–15 students” of unknown ages, to be supervised by a “chaperone” while engaging in online learning, but was not allowed to be taught with her peers in that very same classroom by a qualified instructor. *Id.* ¶¶ 5–6.

Plaintiff Onibokum explained that “[t]he depth of the distance learning via Zoom is nowhere close to what kids were receiving during in-

class sessions.” 3-ER-507 ¶ 8. Plaintiff Beaulieu, whose daughter’s private school provided “much more interaction” in its distance learning than did her son’s public school, nevertheless saw that her daughter “had difficulty with the lack of one-on-one, face-to-face interaction with her teachers” and “had difficulty turning in assignments on time.” 3-ER-483 ¶¶ 7–11.

For Plaintiff Fleming’s daughter, a high-school senior, the change to online learning also resulted in a loss of ability to improve grade point averages, as schools moved to a credit/no credit grading system. 3-ER-487–88 ¶ 5–6. And standardized testing was not available to assess her progress in school. *Id.* ¶ 7. Combined with this inability to improve her GPA or otherwise assess her progress, Fleming’s daughter likewise cannot participate in extra-curricular activities. *Id.* ¶ 9. All of this negatively impacts her ability to improve her candidacy for college acceptance and scholarships. *Id.* ¶¶ 6–10, 12.

The other Plaintiffs have similarly reported that their children are not receiving even a basic minimum education through so-called distance learning. 3-ER-474–75 ¶¶ 7–8, 14–16; 3-ER-478 ¶¶ 5–9; 3-ER-486 ¶ 5; 3-ER-491–92 ¶¶ 4–7; 3-ER-496 ¶¶ 5–6, 11–13; 3-ER-498–99 ¶¶ 4–11; 3-ER-502 ¶¶ 8–12; 3-ER-504–5 ¶¶ 3–5; 3-ER-510 ¶¶ 8–15.

**E. The State changes course, agreeing with Plaintiffs and their experts that school closures harm children and that children are not a major source of coronavirus spread, but nevertheless refuses to open schools**

On December 30, 2020, Governor Newsom announced the “Safe Schools for All Plan.”<sup>30</sup> The plan includes \$2 billion in additional funding “for the safe reopening of schools beginning in February, with a priority for returning the youngest children (TK-2nd grade) and those who are most disproportionately impacted first.”<sup>31</sup> The plan also focuses on implementation of safety and mitigation measures, “including testing, PPE, contact tracing, and vaccinations.” *Id.* The plan does not, however, lift the July 17 ban on in-person instruction and would allow schools to reopen only in counties “with a seven-day average of fewer than 28 cases per 100,000 residents.”<sup>32</sup>

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<sup>30</sup> *Governor Newsom Unveils California’s Safe Schools for All Plan*, Office of Gov. Gavin Newsom, (Dec. 30, 2020), <https://tinyurl.com/y7ugmwj6>.

<sup>31</sup> *Summary: California’s Safe Schools for All Plan*, Cal. Dep’t of Pub. Health (Dec. 30, 2020), <https://tinyurl.com/y7otzspy>.

<sup>32</sup> P. Willon, et al., *Newsom promises \$2 billion in hopes of reopening elementary schools beginning in February*, Los Angeles Times (Dec. 30, 2020), <https://tinyurl.com/ycev3t92>.

Importantly, the State provided a “rationale” and “science” to explain this new plan, which mirror Plaintiffs’ arguments below and rely on the same studies as Plaintiffs’ experts. For example, the State’s rationale explains that “in-person instruction is critical for learning and growth,” and that “the social-emotional skills cultivated in the youngest grades are foundational for future wellbeing.”<sup>33</sup> The State now admits that “[t]here are [ ] immediate health-related benefits for children who are provided in-person instruction, including lower rates of anxiety and depression, higher rates of immunizations, and other positive indicators of public health and wellbeing,” and that “[i]n-person instruction also helps school staff to detect and address child abuse and neglect.” *Id.* These are *precisely* the assertions that Plaintiffs and their experts made below. *See* 2-ER-252–54 ¶¶ 25–26, 29; 2-ER-270 ¶ 7; 2-ER-273 ¶ 9; 2-ER-315 ¶ 6; 2-ER-322–25 ¶¶ 7, 11–12; 3-ER-471–72 ¶¶ 5, 7.

The State also now agrees with Plaintiffs that “children get COVID-19 less frequently and have less severe disease compared to adults,” that “transmission [of SARS-CoV-2] among or from students is uncommon” and

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<sup>33</sup> *Rationale, supra* n.3.

that there is a “low risk of transmission in elementary schools.”<sup>34</sup> To support these assertions, the State cites many of the *same studies* Plaintiffs’ experts cited below.<sup>35</sup> There thus can be no serious argument from the State that children are likely to spread COVID-19.

The State’s new policy runs directly counter to its assertions below, despite there being virtually no change in the scientific data. For example, Defendants argued below that “[r]eopening schools for in-person instruction in communities with high COVID-19 rates is risky.” 2-ER-102; 2-ER-41–42. But CDPH now asserts that “[e]ven in communities with many COVID cases, we do not see many outbreaks in schools.”<sup>36</sup> The State also asserted below that there is a “growing consensus that: children are susceptible to infection by COVID-19 and transmission.” 2-ER-102; 2-ER-41. CDPH now concedes, however, that “[r]esearch across the globe shows that children get COVID-19 less often than adults, and when they do get sick, they get less sick than adults. ... In studies of open schools in America

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<sup>34</sup> *Evidence Summary, supra* n.2.

<sup>35</sup> *Compare id., with* 2-ER-218–19 ¶¶ 23, 24 (citing the same studies from Iceland and France)

<sup>36</sup> *Rationale, supra* n.3.

and around the world, children do not seem to be major sources of transmission—either to each other or to adults.”<sup>37</sup> The State told the district court that “the current positive rate data may not accurately reflect the actual rate of infection of children and the transmission between children and adults because testing of children is sparse and children may have less severe symptoms or be asymptomatic.” 2-ER-102; 2-ER-41. CDPH now asserts that “[o]riginally it was thought that they might be less frequently diagnosed due to less testing because children are more often asymptomatic or have less severe symptoms. However, population-wide studies in Iceland and Spain using antibody tests that assess prior infection at any time find that children have lower rates of infection compared to adults.”<sup>38</sup> But the studies from Iceland and Spain cited by the State were published *before* Defendants filed their brief in the district court.<sup>39</sup> Indeed, nearly all of the studies cited by the State were published

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<sup>37</sup> *Rationale, supra* n.3.

<sup>38</sup> *Evidence Summary, supra* n.2.

<sup>39</sup> See Daniel F. Gudbjartsson et al., *Spread of SARS-CoV-2 in the Icelandic Population*, *The New England Journal of Medicine* (June 11, 2020), <https://tinyurl.com/y7aawr7w>; accord 2-ER-218, ¶ 23; see also Marina Pollán et al., *Prevalence of SARS-CoV-2 in Spain (ENE-COVID): a*

before the completion of briefing in the district court and the start of the Fall semester and identified by Plaintiffs' experts.<sup>40</sup>

## II. Procedural History

Plaintiffs commenced this action on July 21, 2020, against Governor Newsom, Attorney General Becerra, Sonia Y. Angell, the State Public Health Officer and Department of Public Health Director, and Tony Thurmond, in his official capacity as State Superintendent of Public Instruction and Director of Education (hereinafter "Defendants" or "State"). Plaintiffs amended their complaint on July 29, 2020, challenging

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*nationwide, population-based seroepidemiological study*, *The Lancet* (Aug. 22, 2020), <https://tinyurl.com/ya7ob462>; *see also* 2-ER-102; 2-ER-40–41.

<sup>40</sup> *See* CDPH, *Evidence Summary*, *supra*, n.2 (citing Yanshan Zhu et al., *A meta-analysis of the role of children in SARS-CoV-2 in household transmission clusters* (Working Paper, March 30 2020) (updated Dec. 4, 2020); Supinda Bunyavanich, Anh Do, & Alfin Vicencio, *Nasal Gene Expression of Angiotensin-Converting Enzyme 2 in Children and Adults* (Research Letter, May 20, 2020); Kristine Macartney et al., *Transmission of SARS-CoV-2 in Australian educational settings: a prospective cohort study*, *The Lancet* (Aug. 3, 2020); Arnaud Fontanet et al., *SARS-CoV-2 infection in primary schools in northern France: A retrospective cohort study in an area of high transmission* (Working Paper June 29, 2020) (cited in 2-ER-218–19, ¶ 24); Arnaud Fontanet et al., *Cluster of COVID-19 in northern France: A retrospective closed cohort study* (Working Paper, Apr. 23, 2020); Chen Stein-Zamir, *A large COVID-19 outbreak in a high school 10 days after schools' reopening, Israel, May 2020*, *Eurosurveillance* (July 2020); Jennifer Head et al., *The effect of school closures and reopening strategies on COVID-19 infection dynamics in the San Francisco Bay Area: a cross-sectional survey and modeling analysis* (Working Paper, Aug. 7, 2020).

the Governor's orders as violating their children's due process and equal protection rights under the Fourteenth Amendment, as well as their educational rights under Title VI of the Civil Rights Act of 1964 and federal disability statutes. 3-ER-515–52.

On August 3, 2020, Plaintiffs filed a motion for temporary restraining order and for an order to show cause why a preliminary injunction should not issue, seeking to enjoin the Governor from enforcing his Order closing schools. *See* 2-ER-173. On August 17, the Court held a status conference, at which it asked the parties for supplemental briefing on the issues of standing and the exceptions to the IDEA's exhaustion requirement. *See* 2-ER-100.

The district court denied Plaintiffs' application for a temporary restraining order on August 21, 2020. *See* 1-ER-22. The court initially scheduled a hearing on Plaintiffs' preliminary injunction motion for August 31, 2020, but later rescheduled the hearing to September 10, 2020. *See* 2-ER-98. That hearing never occurred, however, because the court vacated it and issued an order indicating that the court was considering a *sua sponte* grant of summary judgment in favor of Defendants. *See* 2-ER-



61. Plaintiffs filed an opposition to this suggestion, Dist. Ct. Dkt. 61, and Defendants filed a brief supporting it, 2-ER-40.

Although briefing was completed by September 25, 2020, the district court waited until December 1, 2020 to grant *sua sponte* summary judgment in favor of the State. 1-ER-2–21. The court held that the Plaintiffs had standing to bring their challenge to the State’s school-closure orders because their alleged injuries were caused by the order and a favorable ruling from the court would redress their injuries. 1-ER-6–10. The court further held that Plaintiffs’ claims were not mooted by the fact that some Counties had moved from Tier 1 to Tier 2, or by the State’s cohorting guidance, which allows schools to provide in-person assistance to a limited number of students for certain purposes. 1-ER-10–11. The court explained that “[s]everal Plaintiffs attend school ... in counties [still] subject to the statewide restrictions on in-person learning” and, despite the cohorting guidance, the children of at least one plaintiff still could not receive in-person instruction. *Id.*

On the merits, the court held that Plaintiffs were not entitled to relief on their due process and equal protection claims. 1-ER-11–16. As to due process, the court held that “Plaintiffs have not established that the Due

Process Clause of the Fourteenth Amendment contains a fundamental right to basic education.” 1-ER-11. The court further held that “[e]ven if the Court did recognize a fundamental right to basic education, the Court would be left without criteria to apply to the facts of this case” because “Plaintiffs present absolutely no standard for what should count as a minimally adequate education.” 1-ER-13. The court therefore granted summary judgment to Defendants on the due process claim. *Id.* As to equal protection, the court held that, “[b]ecause the Court has rejected Plaintiffs’ argument that there is a fundamental right to basic education, rational basis review applies to their Equal Protection claim.” *Id.* The court concluded that “Defendants have set forth plausible policy reasons for limiting in-person learning in Tier 1 counties with higher rates of confirmed COVID-19 cases and higher positivity rates.” 1-ER-14. The court also rejected Plaintiffs’ statutory claims, finding that they were required to exhaust administrative remedies before asserting claims under federal disability statutes. 1-ER-17-21.

Plaintiffs promptly filed their notice of appeal on December 3, 2020. *See* 3-ER-553.

## STANDARD OF REVIEW

This Court reviews “de novo [a] district court’s grant of summary judgment.” *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011). This Court “determine[s], viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.” *Id.*

## SUMMARY OF ARGUMENT

I. Defendants’ school closure orders violate the Due Process Clause because they infringe on Plaintiffs’ fundamental rights and the orders cannot survive heightened scrutiny.

A. The district court declined to recognize a fundamental right to a basic minimum education because the Supreme Court has never expressly recognized such a right, but the absence of precedent does not prevent lower courts from protecting fundamental rights. For example, lower courts recognized that same-sex couples have the fundamental right to marry before the Supreme Court did so in *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015). And although the Supreme Court “has not yet definitively settled the question[] whether a minimally adequate education is a

fundamental right,” *Papasan v. Allain*, 478 U.S. 265, 285 (1986), its decisions in *Plyler v. Doe*, 457 U.S. 202 (1982), and *San Antonio Ind. School District v. Rodriguez*, 411 U.S. 1 (1973), highlight the importance of the right to civic participation and strongly suggest that deprivations of the right should be subject to heightened scrutiny. Indeed, this Court has cited *Plyler* for the proposition that the right to education is “quasi-fundamental.” *United States v. Harding*, 971 F.2d 410, 412 n.1 (9th Cir. 1992).

The orders also interfere with certain Plaintiffs’ ability to send their children to private school, and the Supreme Court has long held that the Due Process Clause protects parent’s right to choose their children’s educational forum. *See Meyer v. Nebraska*, 262 U.S. 390, 401, 403 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

**B.** The substantive component of the Due Process Clause protects the right to a basic minimum education because the right is “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [the right] were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702,

720–21 (1997). The centrality of public education to our Republican form of government has been recognized since the Founding, and the right has been protected by nearly every state constitution since Reconstruction. Our Republic depends on an educated citizenry, and without education it is impossible to participate fully in our civic processes, including voting and jury duty. The right to a basic minimum education is thus fundamental, or at least quasi-fundamental, and thus subject to heightened judicial review.

C. The district court held that the right to a basic minimum education could not be fundamental because the Due Process Clause supposedly protects only negative rights, not positive rights to government benefits. That conclusion is wrong for two reasons. First, to the extent the orders prevent Plaintiffs from sending their children to private schools, the orders violate a negative right that the Supreme Court has recognized for nearly a century. An injunction would not require the State to provide any benefits to these children—it would simply prevent the government from interfering with their education. Second, the district’s premise is incorrect because the Supreme Court has held that the Due Process Clause *does* protect rights to certain public benefits. For example, in *Obergefell* the

Court upheld a substantive due process right to same-sex marriage and held that states were prohibited from depriving same-sex couples of “the constellation of benefits that the States have linked to marriage.” 576 U.S. at 670.

**D.** Both the Supreme Court and this Court have recently confirmed that ordinary standards of constitutional review apply during a pandemic. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *Calvary Chapel Dayton Valley v. Sisolak*, --F.3d--, 2020 WL 7350247 (9th Cir. Dec. 15, 2020). Because the right to a basic minimum education is fundamental, or at least quasi-fundamental, and because Plaintiffs’ have a substantive due process right to send their children to private school without government interference, the State must satisfy heightened scrutiny. It cannot do so because the orders are not narrowly tailored to further the government’s asserted interest in reducing the spread of COVID-19. Scientific evidence clearly demonstrates that children are at little risk from the disease and that even when infected Children typically do not transmit the disease to adults. Even CDPH now admits that schools can be opened safely given this scientific evidence. Defendants could reduce the risk of adult-to-adult spread in schools by

requiring common-sense precautions employed at thousands of workplaces and locations where adults congregate in far greater numbers than in schools.

**II.** The orders violate due process and equal protection even under rational basis review. Because education is, at minimum, an “important” right, state deprivations of the right must satisfy a more “rigorous rational basis review”—often referred to as rational basis with bite. *See United States v. Pickard*, 100 F. Supp. 3d 981, 1005 (E.D. Cal. 2015). The orders cannot survive this level of scrutiny for two reasons. First, they irrationally discriminate between schools and daycare centers. Whereas the State allows adults to provide daycare to groups of school-age children—sometimes even in school buildings—it does not allow adults to educate the same groups of children in the same physical spaces. The state has not provided even a conceivable basis for this distinction. Second, the State discriminates against children who attend schools in “Tier 1” counties even though there is no evidence that in-person schooling contributes to community spread. Moreover, the PCR tests used to determine the tier level for each county does not even track community spread. The number of positive tests and the percentage of positive tests is largely a function of

testing levels and the tested populations, and the test itself can return a positive result *weeks* after an individual has ceased to be infectious, meaning a positive result does not indicate any risk to the community. The orders should thus be enjoined even if the Court determines that rational basis review is the appropriate legal standard.

## ARGUMENT

### **I. The State's Orders Prohibiting In-Person Education Should Be Enjoined Because They Infringe On The Due Process Rights Of Plaintiffs And Their Children And Cannot Survive Heightened Scrutiny**

The right to a basic minimum education is deeply rooted in our Nation's history and tradition and inherent in the concept of ordered liberty. Although the Supreme Court has not definitively decided whether such a right is so fundamental that any deprivation must be subject to strict scrutiny, it has highlighted the importance of the right to civic participation and invalidated state efforts to abridge it. The Supreme Court has also held for more than a century that the Constitution protects parents' fundamental right to choose their children's educational forum.

The State's school closure orders violate these fundamental rights, but district court granted summary judgment to Defendants because, in



its view, the Fourteenth Amendment does not “contain[] a fundamental right to basic education.” 1-ER-11. In support of that legal conclusion, the district court asserted that (1) “the Supreme Court has declined to recognize such a right” and Plaintiffs did not present “case law that would support a fundamental right to minimum education”; (2) substantive due process protects only “liberty and autonomy” and does not “require a government service of a certain quality”; and (3) even if the court were to recognize a fundamental right to a basic minimum education, Plaintiffs did not provide a “standard for evaluating what should count as a minimally adequate education.” 1-ER-11. None of those reasons withstands scrutiny.

**A. Supreme Court and Ninth Circuit precedent support the existence of a fundamental right to a basic minimum education and recognize parents’ right to choose their children’s educational forum**

1. Although the district court correctly noted that there is no binding precedent from the Supreme Court or this Court recognizing a fundamental right to a basic minimum education, 1-ER-11, lower courts need not wait for higher courts to define the contours of a constitutional right before they protect it. On the contrary, “[t]he identification and

protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.” *Obergefell*, 576 U.S. at 663. For example, the Supreme Court had not yet recognized that same-sex couples have the right to marry when the district court struck down Proposition 8 in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010) (recognizing that the “right to marry protects an individual’s choice of marital partner regardless of gender”). Similarly, “the Courts of Appeals [] uniformly recognized the existence of a ‘ministerial exception[]’ grounded in the First Amendment” for nearly fifty years before the Supreme Court finally did so in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 188 (2012). The absence of binding precedent is not a barrier to judicial relief.

In all events, the two Supreme Court cases the district court relied on—*Plyer v. Doe* and *San Antonio Independent School District v. Rodriguez*—support *Plaintiffs’* argument, not the State’s, because both decisions highlight the importance of education and suggest that state deprivations of the right to a basic minimum education should be subject to heightened scrutiny.

*Rodriguez* involved an equal protection challenge to the “Texas school finance system.” 411 U.S. at 6. The gravamen of the complaint was that schools in wealthy areas of the state received greater per-pupil allotments than schools in poorer parts of the state. *Id.* at 11–16. Unlike here, *Rodriguez* did not involve a situation where children across the state effectively “receiv[ed] no public education.” *Id.* at 23–24 (noting that plaintiffs did not “persuasively discredit[] ... the State’s assertion” that it had “assure[d] every child in every school district an adequate education”). Indeed, plaintiffs made “no charge” that “the system fail[ed] to provide each child with an opportunity [to] acquire the basic minimal skills” provided by public schooling. *Id.* at 37; *see id.* at 25 n.60. The Court explained, however, that if a class of persons were “absolutely precluded from receiving an education,” that would be “a far more compelling set of circumstances for judicial assistance.” *Id.* Such compelling circumstances exist here, where the State has barred millions of children from in-person education for nearly a year.<sup>41</sup>

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<sup>41</sup> *See, e.g.*, 3-ER-483 ¶¶ 7–8; 3-ER-499 ¶ 5; 3-ER-504 ¶ 4; 3-ER-502 ¶ 9; 3-ER-495–96 ¶¶ 5–6; 3-ER-485–86 ¶ 5; 3-ER-491–92 ¶ 4.

In *Plyler*, the state *did* seek to deny certain “children a basic education.” 457 U.S. at 223. The Court noted that because education had not yet been held a “fundamental right,” a “State need not justify by compelling necessity every variation in the manner in which education is provided to its population.” *Id.* But it made clear that denying “children a basic education” would “deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.” *Id.* Given the importance of education, the Court applied a form of heightened scrutiny, requiring the state to show that the denial of education “furthers some substantial state interest.” *Id.* at 230. Because the state law could not survive such heightened scrutiny, the Court invalidated it. *Id.* In short, *Plyler* “recognized that infringements on certain ‘quasi-fundamental’ rights, like access to public education, [ ] mandate a heightened level of scrutiny.” *Harding*, 971 F.2d at 412 n.1 (citing *Plyler*, 457 U.S. at 217–18).

Although *Rodriguez* and *Plyler* both suggest that state deprivations of the right to a basic minimum education should be subject to heightened review, the Supreme Court “has not yet definitely settled the question[] whether a minimally adequate education is a fundamental right” that

would be subject to strict scrutiny. *Papasan*, 478 U.S. at 285; accord *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 466 n.1 (1988) (Marshall, J. dissenting) (noting that the issue “remains open today”). This Court has not settled the issue either. The district court noted that in *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), the court declined to hold that parents have a due process right “to control the content or format of public education.” 1-ER-12. But that holding has no relevance here because Plaintiffs are not seeking to vindicate any parental right to control public school curriculum. Rather, those Plaintiffs whose children attend public school are seeking to vindicate their *children’s rights* to obtain a basic minimum education.

Given the absence of any precedent foreclosing a substantive due process right to a basic minimum education—and the language from *Rodriguez*, *Plyler*, and *Harding* suggesting that the right to education is at least quasi-fundamental—the district court should have “exercise[d] reasoned judgment” to determine whether the right asserted here is “so fundamental that the State must accord [Plaintiffs] its respect.” *Obergefell*, 576 U.S. at 664. Because the answer to *that* question is unequivocally

“yes,” *see infra* I.B, this Court should reverse the district court’s erroneous decision.

2. Several Plaintiffs send their children to private schools, yet the orders also prohibit private schools from providing in-person education. This prohibition functionally interferes with Plaintiffs’ ability to send their children to the schools of their choosing and thus runs afoul of nearly a century of Supreme Court precedent holding that the parents have a fundamental right to choose their children’s educational forum. *See Meyer*, 262 U.S. at 403; *Pierce*, 268 U.S. at 534–35. While the Court has framed the right at issue as a fundamental liberty interest, Justice Kennedy has noted that “*Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles,” binding upon the States through the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting). In either event, the right is fundamental, and this Court has held that “the state cannot prevent parents from choosing a specific educational program,” *Fields*, 427 F.3d at 1205–06, such as private, in-person instruction, without meeting heightened scrutiny. *See Troxel*, 530 U.S. at 65–66 (plurality op.); *Id.* at 80 (Thomas, J., concurring in the judgment).

**B. The substantive component of the Due Process Clause protects the right to a basic minimum education**

The Supreme Court has long held that the Fourteenth Amendment protects substantive rights not expressly enumerated within the Bill of Rights. *See, e.g., Obergefell*, 576 U.S. 644; *Roe v. Wade*, 410 U.S. 113, 152–53 (1973). “[T]he Due Process Clause specifically protects those fundamental rights and liberties which are objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Glucksberg*, 521 U.S. at 720–21; *accord McDonald v. City of Chicago*, 561 U.S. 742, 767–78 (2010) (plurality opinion) (applying the *Glucksberg* framework). Access to a basic minimum education is a fundamental right deeply rooted in this Nation’s history and necessary to the concept of ordered liberty. Any burden on this right must therefore survive heightened scrutiny. At minimum, access to a basic minimum education is a “quasi-fundamental” or “important” right subject to heightened scrutiny.

**1. Basic education is deeply rooted in our Nation's history**

From the beginning of our nation, education has been regarded as critical for our republic to survive and flourish. As John Adams wrote, “[t]he education of a nation 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.” David McCullough, *John Adams* 364 (2001). Thomas Jefferson stated that each citizen would need “to know his rights; to exercise with order and justice those he retains; to choose with discretion the fiduciary of those he delegates and to notice their conduct with diligence, with candor and with judgment.” Thomas Jefferson, *The University of Virginia* (1818), in *The Complete Jefferson* 1097 (Saul Padover ed., 1943). In his farewell address, George Washington proclaimed: “Promote then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.” George Washington’s Farewell Address (1796).<sup>42</sup> The Founders’ commitment to broad-based education

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<sup>42</sup> <https://tinyurl.com/yxzzyybg>.



was also reflected in a stipulation in the Land Ordinance of 1785, enacted by the Congress of the Confederation, which required each new town to set aside “the lot No. 16 ... for the maintenance of public schools within the said township.” *Papasan*, 478 U.S. at 268 (citing 1 Laws of the United States 565 (1815)).

Public schools became systematic and universal in most states starting in the 1830s. At this time, the combination of rapid industrialization, population growth, mobility, and immigration fueled a broad-based “common school” movement to implement a free public-school system dedicated to moral education and good citizenship. See Carl Kaestle, *Pillars of the Republic: Common Schools and American Society 1780–1860* (1983). This movement in the early and mid-1800s persuaded “many States [to] amend[] their constitutions, requiring the legislature (in the words of many a state constitution) to create a ‘thorough and efficient’ system of public schools.” Jeffrey Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 27 (2018) (internal citations omitted).

While the “common school” movement took hold in the 1830s in the Northern States, virtually none of the Southern states required universal

public education before the Civil War. See Derek W. Black, *The Fundamental Right to Education*, 94 Notre Dame L. Rev. 1059, 1088–95 (2019). After the Civil War, however, as a condition to readmission to the Union, Congress required states to include in their constitutions a provision guaranteeing public education. *Id.* at 1088–89. By 1868, the year the Fourteenth Amendment was ratified, more than three-quarters of the States recognized an affirmative right to public-school education. Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 Mich. St. L. Rev. 429, 449–63, 556 (2014) (cataloging all State constitutional provisions as of 1868).

This is significant because “Article V of the federal Constitution requires a three-quarters consensus of the states to amend the Constitution.” *Id.* at 443–444. Such pervasive state constitutional recognition at the time the Fourteenth Amendment was ratified “objectively” establishes the fundamental nature of the right to basic minimum education. *Glucksberg*, 521 U.S. at 720–21, 723; accord *McDonald*, 561 U.S. at 777–78 (same historical analysis for Second Amendment); *Town of Greece v. Galloway*, 572 U.S. 565, 609–10 (2014) (Thomas, J., concurring) (assessing scope of the Establishment Clause, as

incorporated against the states through Fourteenth Amendment, based on State constitutions circa 1868).

Significantly, by 1875, every state in the union but one had a clause in its constitution calling for universal public education. Black, *supra* at 1094. In the century following the ratification of the Fourteenth Amendment, thirteen new states sought admission to the Union, all of which included education mandates in their constitutions. *Id.* at 1093. Accordingly, for more than a century, *every state* has had compulsory education laws. Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 *Geo. Wash. L. Rev.* 92, 127 (2013) (“By 1918, education was compulsory in every state of the union.”). Children throughout California and the nation are thus compelled to attend school full time (or be home-schooled). *See* Cal. Educ. Code, § 48200, *et seq.*

As the Supreme Court explained in *Brown v. Board of Education*, “education is perhaps the most important function of state and local governments,” as demonstrated by our “[c]ompulsory school attendance laws and the great expenditures for education.” 347 U.S. 483, 493 (1954); *accord Meyer*, 262 U.S. at 400 (“The American people have always regarded education and acquisition of knowledge as matters of supreme

importance which should be diligently promoted.”). In short, the right to a basic minimum education is deeply rooted in our Nation’s history.

**2. Basic education is implicit in the concept of ordered liberty**

It is equally clear that the right to basic education is “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if [it] were sacrificed.” *Glucksberg*, 521 U.S. at 721. Indeed, “the grave significance of education both to the individual and to our society’ cannot be doubted.” *Rodriguez*, 411 U.S. at 24.

To begin with, the foundation of American liberty is our written Constitution. *See Marbury v. Madison*, 5 U.S. 137, 176–78 (1803) (declaring “a written constitution” to be “the greatest improvement on political institutions” that came before the American experiment). Likewise, under our written Constitution, laws must be published in writing before they may be executed to constrain liberty. *See* U.S. CONST. art. I § 9 (prohibiting the enactment of any “ex post facto law” by Congress or state legislatures). Thus, a basic education enabling citizens to read and understand our governing texts is at the heart of our nation’s concept of ordered liberty.

The Founding Fathers recognized that basic education is essential if liberty and justice is to survive our republican form of government, and that schools would be “needed to produce well-informed protectors of republican government.” Alan Taylor, *The Virtue of an Educated Voter*, *Am. Scholar* (Sept. 6, 2016).<sup>43</sup> In the words of Benjamin Rush: “[i]f the common people are ignorant and vicious, ... a republican nation can never be long free.” *Id.* The Supreme Court specifically recognized in *Plyler v. Doe* “the importance of education in maintaining our basic institutions,” noting that “education has a *fundamental role* in maintaining the fabric of our society.” 457 U.S. at 221 (emphasis added).

State supreme courts have recognized the same. Since 1973, there have been cases regarding the equity and adequacy of education in at least 45 of the 50 states. Michael A. Rebell, *Flunking Democracy: Schools, Courts and Civic Participation* 50 (2018). Thirty-two of those states’ highest courts have held that “preparation for capable citizenship is the primary purpose or a primary purpose of” education. *Id.* at 57. No state court has denied the proposition. *Id.* And many of these courts discussed

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<sup>43</sup> <https://theamericanscholar.org/the-virtue-of-an-educated-voter/>.

in detail the specific skills, knowledge, experiences, and values afforded by a basic education that is required for civic participation. *Id.* at 57–61. As Professor Balkin of Yale Law School explained, “when lots of different states from different parts of the country agree that these rights deserve protection, they are more likely to be 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 662–63, 676.

Basic education is also a prerequisite for conduct and activities that form the basis of our citizenship. For example, basic education is critical to participation in the political process, including knowledgeable and informed voting, comprehending ballot initiatives, and engaging in political speech and discourse. See *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”); *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality op.) (“[T]he Constitution protects the right to receive information and ideas.”); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we

are to preserve freedom and independence.”). Education likewise is necessary to engage in military service and to comply with mandatory government requirements such as selective service registration or tax forms. In fact, “the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs.” *Pico*, 457 U.S. at 876 (Blackmun, J., concurring).

Education is also critical for preparing citizens to perform jury service, which the Supreme Court has recognized as the “most significant opportunity to participate in the democratic process” other than “voting,” which also requires an informed citizenry. *Powers v. Ohio*, 499 U.S. 400, 407 (1991); *Pico*, 457 U.S. at 868 (plurality op.). In short, the historical and fundamental importance of basic education in our republic is well established.

**C. The district court erred in holding that the State’s orders do not interfere with fundamental rights**

1. The district court declined to recognize a fundamental right, in part, because it believed that the Due Process Clause generally protects individuals from intrusive government action rather than securing benefits. 1-ER-12. That may be so, but the court’s conclusion does not

follow from its premise. Here, Plaintiffs include both public- and private-school parents. With respect to those parents who have chosen to send their children to private school, the State's orders are plainly intrusive, as they prohibit Plaintiffs' children from attending schools that stand ready to educate them in person. *See* 3-ER-328–30 ¶¶ 8, 14; 3-ER-507 ¶ 4; 3-ER-493 ¶ 2; 3-ER-492 ¶ 8; 3-ER-485 ¶ 2; 3-ER-482 ¶ 3. These Plaintiffs are not asking the State to provide any sort of public benefit—instead, they are asking for the State to stop interfering with their right make decisions concerning their children's education. By preventing Plaintiffs from attending even *private* schools in person, the State is effectively depriving these parents of their ability to choose “the educational forum itself.” *Fields*, 427 F.3d at 1207; *see also Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 400–01.

Indeed, preventing parents from moving their children to private schools may have been the *entire point* of the Governor's school-closure order. It is no coincidence that the Governor ordered schools to close shortly after several large public-school districts—under pressure from teachers' unions—announced that they would not reopen for in-person



education in the Fall.<sup>44</sup> If some public schools decided to close for the year while private schools remained open, many parents would likely have enrolled their children in private schools.<sup>45</sup> Instead of allowing that to happen, Defendants barred hundreds of thousands of Californians, including several Plaintiffs, from sending their children to schools that are not funded or operated by the state. That is a quintessential deprivation of liberty. *See, e.g.*, 3-ER-506–08.; 3-ER-493–94; 3-ER-491–92; 3-ER-485–86; 3-ER-482–84.

Beyond that, the district court’s premise—that the Due Process Clause is not implicated whenever the state denies a benefit—is unsound. The Supreme Court’s education cases have expressly left open the possibility of the right to a basic minimum education, *see supra* I.A., negating any argument that its recognition is impossible. And contrary to the district court’s assertion, the Supreme Court has held that the Due

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<sup>44</sup> *See, e.g.*, Howard Blume, Sonali Kohli, *L.A. Unified will not reopen campuses for start of school year amid coronavirus spike*, Los Angeles Times (July 13, 2020), <https://tinyurl.com/ycrnmsgg>.

<sup>45</sup> *See, e.g.*, Katie Reilly, *Public Schools Will Struggle Even More as Parents Move Kids to Private Ones During the Pandemic*, Time (Aug. 31, 2020), <https://tinyurl.com/y8s56ey6> (“While teachers’ unions have opposed plans for in-person learning, threatening to strike[,] ... most private school teachers are not unionized” and are available for classroom instruction for children who are moving from public education to private.).

Process Clause *does* protect so-called positive rights. In *Obergefell*, for example, the Supreme Court recognized a substantive due process right to same-sex marriage, a legal union that confers certain *benefits* under state law. 576 U.S. at 663–70 (noting “the constellation of benefits that the States have linked to marriage”). The right to a basic minimum education is also consistent with other goods and services that other constitutional provisions *require* states to provide in a broad array of situations, including medical care while in police custody, *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239 (1983), medical care while in prison, *Estelle v. Gamble*, 429 U.S. 97 (1976), counsel to criminal defendants, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and recourse when the state creates a danger, *Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997) (per curium).

2. The district court also believed that it would have no “criteria to apply to the facts of this case” if it recognized a right to basic education. 1-ER-13. But that conclusion makes little sense here because Plaintiffs are not quibbling with the quality of the curriculum, the qualifications of the teachers, or the funds devoted to their children’s schools. On the contrary, Plaintiffs’ have demonstrated that the State’s orders are completely depriving them of *any* meaningful education. *See, e.g.*, 3-ER-496 ¶¶ 5–6; 3-

ER-491–92 ¶4; 3-ER-486 ¶5; 3-ER-483 ¶ 8. Online classes are “useless” for children with special needs, 3-ER-496 ¶ 6, schools are leaving students “to teach themselves,” 3-ER-491–92 ¶ 4, distance learning is “no education at all” for many impoverished children, 3-ER-486 ¶5, some teachers are not even showing up online, 3-ER-483 ¶ 8, and numerous households lack internet access altogether.<sup>46</sup> Even for those children who do have access to the necessary technology, distance learning has been (and continues to be) woefully inadequate. *See* 2-ER-237–38 ¶¶ 19–21; 2-ER-251–56 ¶¶ 19–37; 2-ER-270 ¶ 7; 2-ER-272–73 ¶¶ 6, 9; 2-ER-315 ¶ 6; 2-ER-319–20 ¶¶ 5–8; 2-ER-322–24 ¶¶ 6–12; 3-ER-328–29 ¶¶ 10–12; 3-ER-333–34 ¶ 9; 3-ER-337–40 ¶¶ 9–19; 3-ER-459–61 ¶¶ 8–13; 3-ER-463–66 ¶¶ 4–13; 3-ER-336–37 ¶¶ 4–9; 3-ER-478 ¶ 10; 3-ER-483–84 ¶¶ 6–16; 3-ER-487–88 ¶¶ 4–12; 3-ER-489–90 ¶¶ 3–8; 3-ER-491–92 ¶¶ 4–7; 3-ER-498–99 ¶¶ 4–8, 11–12; 3-ER-504–05 ¶¶ 3–6; 3-ER-509–10 ¶¶ 9–16; 3-ER-495–96 ¶¶ 5–17; 2-ER-64–65 ¶¶ 5–6; 2-ER-67–69 ¶ 6; 2-ER-71–72 ¶¶ 4–9; 2-ER-73–74 ¶¶ 5–6. Notably, the State has never disputed—nor could it—that Plaintiffs’ children are

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<sup>46</sup> *See* Daniel Wu, *Coronavirus shutdowns expose low-income Bay Area students’ struggle to get online*, The Mercury News (Aug. 3, 2020) (“[O]ne-quarter of California students lack adequate access to the internet” a “majority of them are Black, Latinx or Native American”), <https://tinyurl.com/yy2dgk3d>.

being denied a basic minimum education. Accordingly, regardless whether courts may have to grapple with the contours of the right in future cases, it is unnecessary to do so here.

Moreover, the relief Plaintiffs seek in this case would not require the district court to micro-manage school districts or maintain ongoing supervision over Defendants' operations. The remedy here is straightforward and judicially manageable: enjoin Defendants' school closure orders, thus allowing school districts and individual schools to decide for themselves whether to reopen consistent with their constitutional obligations.

**D. The State's orders cannot survive any form of heightened scrutiny because they are not narrowly tailored to further a compelling government interest**

Because the orders are burdening fundamental—or at least quasi-fundamental—rights, the State must show that the school closure orders are “narrowly tailored to serve a compelling government interest.” *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 951–52 (9th Cir. 1997). As recent decisions from the Supreme Court and this Court have made clear, ordinary standards of constitutional review still apply during a pandemic. *See, e.g., Diocese of Brooklyn*, 141 S. Ct. 63 (per curiam) (applying strict

scrutiny); *Calvary Chapel*, 2020 WL 7350247 (same). This Court should thus “conduct a serious examination of the need for [the State’s] drastic measure” of closing schools for nearly a year. *Diocese of Brooklyn*, 141 S. Ct. at 68 (“[E]ven in a pandemic, the Constitution cannot be put away and forgotten.”).

Even if strict scrutiny does not apply, the orders should be subjected to a “heightened level of scrutiny.” *See Harding*, 971 F.2d at 412 n.1. “Heightened scrutiny requires something more than traditional rational basis review.” *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014). In *SmithKline*, this Court explained that when courts apply “heightened scrutiny” they do “not consider the possible post-hoc rationalizations for the law.” *Id.* at 480 (citing *Witt v. Dep’t of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008)). On the contrary, they look to the “actual purposes of the law”—they consider facts, not “hypothetical justifications.” *SmithKline*, 740 F.3d at 481–82. Second, courts must ask whether the government’s “legitimate purpose” in fact “*justif[ies]*” the challenged regulation. *Id.* at 482 (emphasis in original) (citing *United States v. Windsor*, 570 U.S. 744, 770, 775 (2013)). When conducting such review, courts must reject the “‘strong presumption’ in favor of the

constitutionality of laws and the ‘extremely deferential’ posture toward government action that are the marks of rational basis review.” *Id.* at 483 (citing Erwin Chemerinsky, *Constitutional Law* 695 (4th ed. 2013)).

Defendants’ orders cannot survive *any* form of heightened review, much less strict scrutiny. The asserted purpose of the Order is to limit the spread of COVID-19 and prevent hospitals from being overwhelmed, *see* 2-ER-128–33, but closing every school in counties with more than 10 positive PCR tests per 100,000 people—*i.e.*, Tier 1 counties—is plainly not the least restrictive means of furthering that interest. As the record shows, and CDPH now concedes, COVID-19 does not present a significant risk of illness to children, and school-age children are not a significant transmission vector. *See supra* pp. 17–20.<sup>47</sup> There is thus no evidence that reopening schools will result in increased hospitalizations or even widespread transmission of the disease.<sup>48</sup> Indeed, *only six* minors in

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<sup>47</sup> *See Rationale, supra* n.3.

<sup>48</sup> Nor is there any evidence that keeping schools closed for nearly a year has protected the State’s hospital capacity. Indeed, that the State found it necessary to issue Regional Stay Home Orders based on strained ICU capacity—more than nine months into the pandemic—suggests that the primary transmission vectors for the virus occur in locations *other than* schools, which is exactly what Plaintiffs’ experts pointed out several months ago.

California died from COVID-19 in 2020.<sup>49</sup> Children also account for a vanishingly small percentage of total hospitalizations. See 2-ER-269 ¶ 5. Children in hard-hit areas, such as Los Angeles, are just as unaffected by the virus as children in rural parts of the state. And because children do not play a significant role in transmitting the virus to adults, 2-ER-269–70 ¶ 6, teachers in Los Angeles County are just as safe as teachers in any other county. Indeed, they are significantly safer than essential workers in countless other professions who have daily contact with large numbers of adults.

And while Plaintiffs’ numerous public health experts provided exhaustive declarations discussing every major scientific study on child transmissions, the State’s lone expert failed to highlight *any* scientific studies showing that children are likely to spread COVID-19. Instead, Dr. Watt opined only that “[i]t is *possible* that in the school setting, as in other settings, asymptomatic transmission *may occur*.” 2-ER-110–11 ¶ 26 (emphasis added). That speculation is plainly insufficient to show that the

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<sup>49</sup> The CDPH website indicates that as of December 29, 2020, a total of six deaths for those under age 18 are associated with COVID-19. *Cases and Deaths Associated with COVID-19 by Age Group in California*, Cal. Dep’t of Pub. Health (Dec. 29, 2020), <https://tinyurl.com/yc3ufcxo>

orders are narrowly tailored to support any legitimate government interest. And CDPH's recent concession that schools have been reopened in other jurisdictions without causing community spread thoroughly discredits Dr. Watts' testimony to the contrary.

To the extent the State is attempting to protect those teachers who may be most susceptible to an adverse reaction from the disease—whether because of age, preexisting conditions, or weakened immune systems—the State could utilize less restrictive means of protecting them, including by providing them with enhanced protective equipment, or allowing them to work remotely or take a leave of absence,. *See* 2-ER-266–67 ¶¶ 25–26. Now that a vaccine is available, at-risk teachers could also be prioritized for early vaccination. The State's choice to use the bluntest possible instrument for advancing its interest dooms the orders under any level of heightened scrutiny. *See Monclova Christian Academy v. Toledo-Lucas Cty. Health Dep't*, -- F.3d --, 2020 WL 7778170 (6th Cir. Dec. 31, 2020) (holding that county's decision to close parochial schools, as well as other schools, could not survive strict scrutiny).

Given its erroneous conclusion that no fundamental rights were at stake, the district court declined to subject the State's orders to any form



of heightened scrutiny. Instead, it considered only whether the State set forth “plausible policy reasons” for excluding children from school. *See* 1-ER-14. The court credited the State’s “*speculation* unsupported by evidence or empirical data” that closing schools was a rational response to the pandemic. 1-ER-15–16 (emphasis added) (citing *United States v. Navarro*, 800 F.3d 1104, 1114 (9th Cir. 2015)). Under this exceedingly deferential standard, the district court credited the State’s unfounded conjecture that “transmission *may happen* between” adults and children, that COVID-19 infections “*could be* expected to increase,” and that viral spread “*could* fan out into different parts of the state.” 1-ER-15 (citing State’s expert Dr. Watt) (emphases added). This was error, but the Court need not remand for further proceedings because the record makes clear that Defendants cannot satisfy any level of heightened review. Instead of remanding, this Court should apply the proper standard of review, hold that Defendants are violating Plaintiffs’ due process rights, reverse the district court’s erroneous grant of summary judgment to the State, and remand with directions to enter summary judgment for Plaintiffs on their due process claim.

## II. The Order Violates Due Process and Equal Protection Even Under Rational Basis Review

Even if a rational basis standard were to apply, the Defendants' orders still cannot pass constitutional muster.

The district court incorrectly concluded that any “facts plaintiffs may prove during the course of litigation” are irrelevant because “[m]ere disagreement with Defendants’ plausible scientific and policy premises does not satisfy Plaintiffs’ ‘burden to negative every conceivable basis which might support’ in-person learning restrictions.” 1-ER-16. But Defendants’ justification for their orders “must find some footing in the realities of the subject addressed by the [regulation].” *Heller v. Doe*, 509 U.S. 312, 321 (1993). And Plaintiffs are entitled to “rebut the facts underlying Defendants’ asserted rationale for a classification, to show that the challenged classification could not reasonably be viewed to further the asserted purpose.” *Lazy Y Ranch, Ltd. v. Behrens*, 546 F.3d 580, 590–91 (9th Cir. 2008).

Moreover, “where important but not fundamental rights ... are involved,” courts typically apply “a more rigorous rational basis review”—sometimes referred to as “rational basis with a bite.” *Pickard*, 100 F. Supp.

3d at 1005; *see also Dairy v. Bonham*, 2013 WL 3829268, \*5 n.4 (N.D. Cal. July 23, 2013) (collecting cases applying the “rational basis with a bite” standard in situations where “important but not fundamental rights” are involved, including *Plyler*). Under these circumstances, “the government’s actual motivation and justification (not just any conceivable basis) may be explored.” *Desoto CAB Co., Inc. v. Picker*, 228 F. Supp. 3d 950, 957 (N. D. Cal. 2017). Defendants have never disputed that the right to a basic minimum education is at least important. Nor could they. *See Plyler*, 457 U.S. at 222; *Brown*, 347 U.S. at 493; *Rodriguez*, 411 U.S. at 30; *Harding*, 971 F.2d at 412 n.1. Accordingly, “a more searching form of rational basis review” is appropriate. *Desoto CAB Company*, 228 F. Supp. 3d at 957 (quoting *SmithKline*, 740 F.3d at 481).

Defendants’ orders fail this more rigorous form of rational basis review because they arbitrarily distinguish between in-person education and a panoply of other circumstances in which groups of children are permitted to gather indoors for an extended period. Thousands of daycare facilities and day camps were permitted to open over the summer, even in

counties with relatively high rates of SARS-CoV-2 transmission.<sup>50</sup> Even more telling, schools have offered, and continue to offer, *full-time childcare on campus* for children of all ages. 2-ER-177–78 ¶ 7; 3-ER-478–79 ¶¶ 13–14. There is no rational reason for allowing schoolchildren to attend daycare at their schools where they are watched by a “chaperone” and complete online coursework from their desks, 2-ER-68–69 ¶¶ 5–6, while prohibiting them from attending school in the same building with the same children merely because a teacher is present.

The orders also irrationally base school reopening determinations on criteria that are irrelevant in a school setting. The number of COVID-19 cases in a county has no bearing on the risk of sending children to school because the risk of transmission from children to adults is negligible. 2-ER-96–97 ¶¶ 4–6; 2-ER-218–20 ¶ 22–27; 2-ER-236–37 ¶ 16; 2-ER-269–70 ¶ 6; 2-ER-276–77 ¶¶ 6–10. Schools in other countries have reopened for in-person instruction with no ill effects. 2-ER-269-70 ¶ 6; 2-ER-316 ¶ 8. So have schools in other states.<sup>51</sup> And there is an extremely low risk of serious

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<sup>50</sup> See *COVID-19 Interim Guidance: Day Camps*, Cal. Dep’t of Pub. Health (updated July 29, 2020), <https://tinyurl.com/y6c7xav2>.

<sup>51</sup> *Schools Are Reopening*, *supra* n.19.

illness or death among children who contract SARS-CoV-2. 2-ER-59 ¶ 14; 2-ER-226 ¶ 39; 2-ER-234 ¶ 12; 2-ER-269 ¶ 5. Defendants have not and cannot dispute these facts. 2-ER-50–51 ¶¶ 8–10. On the contrary, CDPH has recently conceded that “children do not seem to be major sources of transmission—either to each other or to adults.”<sup>52</sup> As Plaintiffs’ experts explained in August, and CDPH now admits, “[e]ven in communities with many COVID cases, we do not see many outbreaks in schools,” and “[e]vidence shows that schools with the right mitigation strategies have been able to prevent in-school transmission among students and staff.” *Id.* These admissions—based on evidence that has been available for more than six months—confirms that the State lacks even a conceivable basis for closing schools.<sup>53</sup>

The orders are also irrational because the metrics used to determine whether schools should be open—adjusted case rates and test positivity

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<sup>52</sup> *Rationale, supra* n.3.

<sup>53</sup> This district court concluded that Defendants’ expert supplied a rational basis because his declaration referred to “examples, epidemiological data, and scientific studies,” 1-ER-16, but these studies were not specific to *schools*. On the contrary, Dr. Watt provided little more than generic data about SARS-CoV-2’s transmissibility combined with speculation that such transmission *could* occur at schools, which the CDPH now admits is unlikely and which Plaintiffs’ experts have shown is exceedingly rare.

rates—are based on flawed data that does not correlate with the level of risk presented by in-person education. The cornerstone of Defendants’ metrics is the polymerase chain reaction (“PCR”) test, which detects SARS-CoV-2. The PCR test can report a positive result for up to 80 days after a person encounters the virus, which is long after a person ceases to be infectious. 2-ER-57–58, ¶ 8. CDPH acknowledges that a positive PCR test result is not indicative of infectiousness and states that “proof of a negative test should not be required prior to returning to the workplace after documented COVID infection.”<sup>54</sup> Using PCR test positivity rates to determine whether to close schools while admitting that these same rates are not informative enough to determine whether one can go to work is irrational.

The assertion that closing schools reduces the spread of COVID-19, even though children are highly unlikely to transmit the virus and may currently attend daycare in their regular classrooms, cannot “reasonably be conceived to be true” by Defendants. *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Because in-person instruction does not pose a risk for the

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<sup>54</sup> *Update COVID-19 Testing Guidance*, Cal. Dep’t of Pub. Health (July 14, 2020), <https://tinyurl.com/y42pw9bt>.

transmission of COVID-19, closing schools cannot be seen as a rational way to further Defendants' stated purpose of reducing the risk of transmission of COVID-19.

### CONCLUSION

For the reasons set forth above, this Court should reverse the district court's grant of summary judgment and remand with instructions to grant summary judgment in favor of Plaintiffs.

Respectfully Submitted,

/s/ Robert E. Dunn

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January 4, 2021



**STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28-2.6, Appellants state that they are not aware of any related cases.

/s/ Robert E. Dunn  
ROBERT E. DUNN

January 4, 2021

## CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because it contains 13,620 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook type.

*Robert E. Dunn* \_\_\_\_\_

ROBERT E. DUNN

January 4, 2021

## CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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