

20-56291

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**MATTHEW BRACH, et al.,**

Plaintiffs and Appellants,

v.

**GAVIN NEWSOM, in his official capacity  
as the Governor of California, et al.,**

Defendants and Appellees.

On Appeal from the United States District Court  
for the Central District of California

No. 2:20cv06472 SVW (AFMx)  
The Honorable Steven V. Wilson, Judge

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## INTRODUCTION

Governor Gavin Newsom and State officials have adopted appropriate public health orders and guidance using science and data-driven approaches in their efforts to protect Californians during the unprecedented, deadly COVID-19 pandemic. In response to the rapid and deadly spread of COVID-19, Governor Newsom proclaimed a State of Emergency on March 4, 2020, and, on March 19, 2020, issued an executive order directing all Californians to heed State public-health directives. 1-SER-35-39, 41-45. The State Public Health Officer likewise issued a March 19, 2020 order directing Californians to stay at home, with various exceptions to access or support the operation of critical services. 1-SER-85. Since that time, additional orders and guidance have been issued in an effort to limit disease spread, protect the health of vulnerable populations, and mitigate the risks of overwhelming our healthcare system, all while balancing safely reopening sectors of society as warranted by the evolving science.

By this case, Appellants challenged orders and guidance related to education for grades kindergarten through 12 (including transitional kindergarten, hereinafter “TK-12”) and restrictions on reopening schools to in-person instruction. Specifically, Appellants challenged the July 17, 2020 COVID-19 and Reopening In-Person Learning Framework for K-12 Schools

in California, 2020-2021 School Year (the July 17th Order) that temporarily delays re-opening of schools for in-person instruction in counties on the State's Monitoring List<sup>1</sup> due to high rates of communitywide COVID-19 transmission. 1-SER-98-102. The challenged Order was issued at a time when COVID-19 transmission rates had significantly increased and shortly after the Public Health Officer had issued new orders to help mitigate the spread of COVID-19. See 1-SER-7-96.

As this case progressed, additional orders and updated guidance were issued by the California Department of Public Health (CDPH) to address schools and in-person instruction. This included the "Elementary Waiver" process, guidance that allowed schools serving grades Transitional-Kindergarten through 6 (TK-6) to apply for a waiver that would permit them to offer in-person instruction even if the schools were in counties on the

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<sup>1</sup> While the matter was still pending below, the State replaced the Monitoring List with a four-tiered system, known as the Blueprint for a Safer Economy, that placed each county in a particular tier based on its adjusted COVID-19 rates and positivity rates, and tied restrictions on specified settings or sectors to factors known to increase the risk of transmission of COVID-19. For schools, the Blueprint did not materially affect the July 17th Order, as the restrictions applicable when a county was on the former Monitoring List applied for any county in the tier reflecting the highest rate of transmission (Tier 1/Purple Tier) and the metrics and thresholds used for the Monitoring List were roughly equivalent to the metrics and thresholds for the Tier 1.

Monitoring List (subsequently updated to reference Tier 1), the level of highest transmission, under the Blueprint for a Safer Economy, *see* n.1 *supra*), based on scientific evidence establishing the relatively lower risk of transmission among young children. 1-SER-131-142. It also included CDPH's Cohort Guidance, which allows schools that are not permitted to reopen for in-person instruction to offer in-person supervision, services and instruction to children in small stable cohorts, especially for those with the highest needs or who may be particularly struggling with distance learning, as long as specified guidelines are followed to minimize the total number of individuals who may be exposed if a member of the cohort contracts COVID-19. 3-SER-606, 610-614. (Collectively, the Orders.)

Taken together, the Orders: (1) generally prohibit schools from reopening for in-person instruction in counties with high rates of COVID-19 transmission; (2) authorize county public-health officers to grant waivers to permit schools serving grades TK to 6 to reopen in counties where schools are not permitted to reopen under (1) by satisfying certain specified requirements; and (3) authorize all schools, including those not permitted to reopen under (1) and (2), to provide in-person services and instruction to small groups of students in stable cohorts. And they operate against the background of state law in effect for the 2020-21 school year specifying

requirements for distance learning that schools must offer if they are not open for in-person instruction. Cal. Educ. Code §§ 43503, 43504.

Over the course of the ongoing State of Emergency, the Governor and state health officials have modified the Orders and guidance governing schools in response to the most up-to-date public-health knowledge and scientific consensus, and while considering local input and decision-making in key areas to the extent feasible. The State also implemented measures and allocated billions of dollars through the state budget to support students receiving distance education during this trying pandemic.

Appellants, parents of school-aged children and one student, sought an order enjoining enforcement of the Orders, on the grounds that they allegedly violated their constitutional rights by depriving their children of the option of receiving in-person education. Appellants challenge the district court's grant of summary judgment for Appellees on their substantive due process and equal protection claims under the Fourteenth Amendment. Because Appellants fail to establish any legally viable basis to enjoin the appropriate and necessary measures undertaken by the State to protect the lives and health of students, teachers, staff, and the public, the grant of summary judgment should be affirmed.

The State in no way discounts the significant challenges and burdens that school closures and distance learning represent for students, families, and school employees. Everyone would prefer that the country not be in the midst of an unprecedented public-health crisis. But it is. And based on the virulence and deadliness of COVID-19, which has killed more than 46,000 Californians to date,<sup>2</sup> until there are significant levels of vaccination or the risks of transmission are otherwise abated, schools simply cannot operate as normal in communities with high rates of community transmission without imperiling public health.

### **STATEMENT OF JURISDICTION**

The district court had jurisdiction over Appellants' civil rights claims under 28 U.S.C. §§ 1331, 1343. The district court entered a final order on December 1, 2020, granting summary judgment in favor of Defendants. 1-ER-22. Appellants filed a timely notice of appeal on December 3, 2020. 3-ER-553. This Court has jurisdiction over the appeal under 28 U.S.C. § 129.

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<sup>2</sup><https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx>.

## ISSUES PRESENTED

This appeal presents the following issues:

1. Whether the State's public-health related policies governing in-person instruction in schools violate substantive due process under the Fourteenth Amendment; and
2. Whether the State's public-health related policies governing in-person instruction in schools violate the Equal Protection clause of the Fourteenth Amendment.

## STATEMENT OF THE CASE

### **I. COVID-19 AND CALIFORNIA'S RESPONSE TO CONTAIN ITS SPREAD.**

COVID-19 is a highly contagious and potentially deadly infectious disease, which can be readily transmitted when people gather in groups indoors. 1-SER-7-8. The novel coronavirus that causes COVID-19 spreads through respiratory or aerosol droplets that remain in the air, and may be transmitted unknowingly by individuals who exhibit no symptoms. 1-SER-5; *S. Bay United Pentecostal Church v Newsom*, 591 U.S. \_\_\_, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, CJ, concurring) (*South Bay III*). At the outset of the pandemic, there was no known cure, no widely effective treatment, and no vaccine. 1-SER-5. Consequently, measures such as



physical distancing that limit in-person contact are widely recognized as a critical tool for effectively slowing the spread. *Gish v. Newsom*, No. EDCV20-755-JGB (KKx), 2020 WL 1979970, at \*4 (C.D. Cal. Apr. 23, 2020); 1-SER-6.

California responded early to combat and contain the COVID-19 threat. In early December 2019—before the virus was known to have entered the United States, the State began working closely with the national Centers for Disease Control and Prevention, the United States Health and Human Services Agency, and local health departments to monitor and plan for the spread of COVID-19 to the United States. 1-SER-35-39. At that time, the California Department of Public Health (CDPH) began providing COVID-19 related guidance to hospitals, clinics, and other health providers. *Id.*

On March 4, 2020, the Governor proclaimed a State of Emergency in California, making available additional resources to combat the emergency and help the State prepare to address the broader spread of the disease. 1-SER-35-39. On March 19, the Governor issued Executive Order N-33-20, the Stay-at-Home Order, which 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.” The Public Health Officer subsequently designated a list of “Essential Critical Infrastructure Workers” under the Order. 1-SER-47-60.

On April 28, 2020, the Governor announced a “Resilience Roadmap” to guide the gradual and safe reopening of the State. 1-SER-62-75. The Roadmap was based on four stages: (1) safety and preparation; (2) reopening of lower-risk workplaces and other spaces; (3) reopening of higher-risk workplaces and other spaces; and (4) an end to the Stay-at-Home Order. 1-SER-66. To implement the Roadmap, on May 4, 2020, the Governor issued Executive Order N-60-20, providing that all California residents were to continue complying with the Stay-at-Home Order, and directing that the State Public Health Officer establish criteria and procedures for qualifying local jurisdictions to move more quickly through Stage 2 of the Roadmap. 1-SER-78-79.

On May 7, 2020, based on her review of current data, the then State Public Health Officer, Sonia Y. Angell, issued an order transitioning California into Stage Two, stating that she would “progressively designate sectors, businesses, establishments, or activities that may reopen with certain modifications, based on public health and safety needs” and at “a pace designed to protect public health and safety.” 1-SER-82. Guidance governing the reopening of in-person instruction at schools as part of Stage 2

was initially released on June 5, 2020, with other sectors scheduled to reopen in phases throughout the month of June. *See* 1-SER-69.

In response to a surge in COVID-19 cases in late June to early July, 2020, the State Public Health Officer, on July 13, 2020, issued an order closing, statewide, certain activities that had previously been permitted to reopen under the Roadmap, and closing additional indoor activities in those counties on the State’s County Monitoring List. 1-SER-87-90. The Public Health Officer noted that, particularly in counties on the County Monitoring List, “the risks and impacts of disease transmission are even greater.” 1-SER-88.<sup>3</sup> She further explained that:

The science suggests that for indoor operations the odds of an infected person transmitting the virus are dramatically higher compared to an open-air environment. Thus, for those counties on the list, it is necessary to close indoor operations for additional sectors which promote closed-space mixing of populations beyond households and/or make adherence to physical distancing with face coverings difficult.

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<sup>3</sup> At that time, CDPH used six indicators to track the level of COVID-19 infection in each California county, as well as the preparedness of the county health care system—data that includes the number of new infections per 100,000 residents, the test positivity rate, and the change in hospitalization rate, among others. A county that did not meet the State’s benchmarks was put on the County Monitoring List. 1-SER-153-155, 157-158.

1-SER-88, 95-96.

On July 17, 2020, CDPH issued its COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year. 1-SER-98-102; 2-SER-386. It updated its previously issued School Sector Specific Guidelines to specify that “[s]chools and school districts may reopen for in-person instruction at any time if they are located in a local health jurisdiction (LHJ) that has not been on the county monitoring list within the prior 14 days.” 1-SER-98 (emphasis in original). The guidance explained that a waiver of the criteria “may be granted by the local health officer for elementary schools to open for in-person instruction,” and that additional details about the waiver process were forthcoming. *Id.*

On August 3, 2020, CDPH updated its guidance to schools. 1-SER-104-123. It also issued an FAQ and additional documents to provide guidance to schools that wanted to seek a waiver. 1-SER-125-148. This Elementary Waiver Guidance allowed elementary schools in counties on the State’s former Monitoring List, now Tier 1, to apply to their local health officer for a waiver that would allow them to reopen with in-person instruction. *Id.* The materials explained that, “[b]ased on the current best available scientific evidence, COVID-related risks in schools serving

elementary-age students (grades TK-6) are lower than and different from the risks to staff and to students in schools serving older students.” 1-SER-128. Specifically, they noted that, “there appears to be lower risk of child-to-child or child-to-adult transmission in children under age 12,” and a lower risk of infection and serious illness in younger children. 1-SER-31, 128, 131.

There was growing consensus when the July 17th Order and Elementary Waiver Guidance were adopted that: children are, indeed, susceptible to COVID-19 infection and transmission; some children infected with COVID-19 experience serious complications like multisystem inflammatory syndrome; the available data might not accurately reflect actual infection rates among children; and studies on transmission between children and adults were sparse. 1-SER-9, 11, 131-133; 2-SER-253-255, 257-262, 264-269, 277-278, 280-282. Reopening all schools to in-person instruction, even those in counties with the highest COVID-19 rates, thus presented increased risks of communitywide spread because an estimated 6.5 million school-aged children, their parents, teachers and school staff would need to circulate outside of isolated family units and spend significant time indoors where COVID-19 transmission thrived. 1-SER-11. There was also increasing evidence that children over the age of 10 spread the virus in the same manner as adults. 1-SER-8-9. Finally, there were also reports that

schools in other countries, and in sister states, were experiencing COVID-19 outbreaks after reopening for in-person instruction. 1-SER-6-7; 2-SER-253-255, 257-262, 264-269, 271-275, 277-278, 280-281, 287-289. While some research suggested low transmissibility among children, official CDC guidance, analyzing many of the same studies, emphasized that safe reopening of schools was occurring in communities where COVID-19 *spread was low*. ECF No. 35 at 18; 1-SER-9. As noted, the State’s restrictions on reopening to in-person instruction were limited to counties where communitywide spread was *high*. 1-SER-8-9; 2-SER-290.

Thereafter, on August 25, 2020, CDPH issued the Cohort Guidance that permitted in-person instruction in small group cohorts following specified guidelines at schools that were not otherwise permitted to reopen for in-person instruction. 3-SER-606-608, 610-614. The Cohort Guidance was updated on September 4, 2020, to reflect the State’s transition from the Roadmap to the Blueprint. *Id.*

On August 28, 2020, the State introduced its adjusted and reformulated framework for reopening across all sectors, including schools. 3-SER-529-531, 533-538. Commonly referred to as the Blueprint for a Safer Economy, or more formally “California’s Plan for Reducing COVID-19 and Adjusting Permitted Sector Activities to Keep Californians Healthy and Safe,” the

reformulated reopening plan introduced four specific “tiers” based on the levels of communitywide COVID-19 transmission and related criteria. 3-SER-530,534-536. This new framework was intended to “permit a broader range of reopening guided by risk-based criteria pertinent to each sector.” 3-SER-530.

Schools already reopened for in-person instruction were not impacted by the late-August changes. Additionally, under the Blueprint, schools were allowed to reopen for in-person instruction based on equivalent criteria to the July 17th re-opening framework, specifically, “schools in counties within Tier 1 are not permitted to reopen for in-person instruction, with an exception for waivers granted by local health departments for TK-6 grades.” 3-SER-536. Further, schools that are not authorized to reopen, “may provide structured, in-person supervision and services to students under the Guidance for Small Cohorts/Groups of Children and Youth.” *Id.* The Blueprint framework further provided that once a school is out of Tier 1 for at least 14 days, it could resume in-person instruction. *Id.* Once a school

has reopened for in-person instruction, it is not required to close if a county moves back to Tier 1. *Id.*<sup>4</sup>

## **II. THE DISTRICT COURT PROCEEDINGS**

### **A. The Complaint and Temporary Restraining Order Application**

On July 21, 2020, Appellants filed their complaint against Governor Gavin Newsom, Attorney General Xavier Becerra, the then Director of CDPH, Dr. Sonia Angell, and State Superintendent of Public Instruction, Tony Thurmond (collectively, the State). ECF No. 1. On July 29, 2020, Appellants filed the operative First Amended Complaint, adding additional

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<sup>4</sup> Well after the district court issued the challenged summary judgment order on December 1, 2020, 1 ER 2, on January 14, 2021, the State issued a COVID-19 and Reopening In-Person Instruction Framework & Public Health Guidance for K-12 Schools in California 2020-2021 School Year, which consolidated and updated the prior State public health guidance and orders related to schools, including the July 17th Order and Elementary School Waiver Guidance. Defendants-Appellees' Motion for Judicial Notice, Exh. A, at 3-5. It did not modify the Cohort Guidance, which separately remains in place. *Id.* at 5. The Framework sets forth a new Elementary Reopening Process for schools serving grades TK through 6 to return students to in-person instruction in a Tier 1 county, so long as the adjusted COVID-19 rate of daily new cases is not higher than 25 per 100,000, *id.* at 8-9, which is essentially a streamlined version of the prior elementary waiver process. Because this new Framework did not exist when the parties briefed the issue of summary judgment below in August and September 2020, it was never considered by the district court in making its summary judgment ruling. 1-ER-2.



parent plaintiffs and modifying their claims. 3-ER-515-52. By the amended complaint, Plaintiffs challenged the Governor's Executive Order N-60-20 and the State's COVID-19 Industry Guidance for Schools and School Based Programs, which imposed restrictions on in-person education in K-12 grade schools. 3-ER-518.

Alleging, in relevant part, claims for violations of substantive due process and equal protection of the laws under the Fourteenth Amendment, Appellants sought a declaration that the challenged Orders were unconstitutional—facially and as applied—and an injunction barring enforcement of the Orders against them. 3-ER-545-48, 551-52.<sup>5</sup>

On August 3, 2020, Appellants filed an application for a temporary restraining order (TRO), 2-ER-173, which the State opposed on August 9,

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<sup>5</sup> Appellants do not appeal the grant of summary judgment on their remaining claims for violation of Title VI of the Civil Rights Act of 1964 (disparate impact on minorities) and for violation of federal disability rights statutes. AOB 6; 1-ER-16-21. Any arguments that the district court erroneously granted summary judgment on those claims are therefore waived. *See Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1203 n.6 (9th Cir. 2005); *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 858 n.4 (9th Cir. 1999).

2020. ECF No. 35.<sup>6</sup> On August 21, 2020, the district court denied Appellants' TRO application. 1-ER-22-38.

**B. The District Court Grants Summary Judgment for the State.**

On September 1, 2020, the district court indicated, *sua sponte*, that it believed summary judgment should be granted in favor of Defendants, and requested briefing on that issue. 3-SER-519-21.

On December 1, 2020, the district court granted summary judgment in favor of Defendants on all claims. 1-ER-2, 11-21. The district court ruled that the Fourteenth Amendment's due process clause does not recognize a fundamental right to basic education. 1-ER-11. The district court further ruled that, even if it were to recognize a fundamental right to basic education, Appellants had failed to explain what should constitute a minimally adequate education, let alone how several months of remote education posed such grave risks as to amount to a wholesale denial of a basic education. 1-ER-13. Because Appellants had not established a fundamental right to a basic education, the district court ruled that the equal protection claim was subject to traditional rational-basis review. *Id.* The

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<sup>6</sup> All references to pleadings filed below that are not included in the Excerpts of Record or Supplemental Excerpts of Record are to the ECF No. and to the ECF page numbers.

court ruled that, in light of the State’s “compelling interest” in combatting the spread of COVID-19, the State presented “a plausible policy goal for restricting in-person schooling in counties with greater community spread of COVID-19,” and no evidence presented by Appellants could create a genuine issue of material fact under the rational-basis standard. 1-ER-14. Based on a similar analysis, the district court also granted summary judgment on Appellants’ equal protection claim. 1-ER-16.

Appellants’ notice of appeal was timely filed two days later. 3-ER-553.

### **STANDARD OF REVIEW**

This Court reviews the district court’s grant of summary judgment de novo. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017). Constitutional questions are likewise reviewed de novo. *Id.*

The district court’s decision may be affirmed on any ground supported by the record, even if not relied upon by the district court. *See Campbell v. Washington Dep’t of Soc. & Health Servs.*, 671 F.3d 837, 842 n.4 (9th Cir. 2011); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003).

Summary judgment is proper under Federal Rule of Civil Procedure 56 on all or any part of a claim where there is an absence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

*See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment,” and “[f]actual disputes that are irrelevant or unnecessary will not be counted.” *Id.* A dispute about a material fact is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* at 248.

### **SUMMARY OF ARGUMENT**

Appellants’ Due Process and Equal Protection claims fail as a matter of law, and judgment should be affirmed in favor of Appellees on both claims.

Appellants argue that there is a fundamental, or at least quasi-fundamental, right to a basic education under the Fourteenth Amendment, and that even if no federal court has previously recognized such a right, this Court should do so in the first instance. AOB 33-35. Contrary to Appellants’ arguments, precedent from the Supreme Court and this Court confirm that there is no fundamental right to public education under the Fourteenth Amendment. Appellants’ arguments that they nonetheless have a “quasi-fundamental” right to a minimum education based on *Plyler v. Doe*, 457 U.S. 202 (1991), should also be rejected because the Supreme Court

subsequently limited the application of *Plyler* to its unique facts in *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 451, 459 (1988). In contrast to *Plyer*, 457 U.S. at 231, the challenged Orders do not completely deny any of parent-Appellants’ children access to education and the Orders are supported by the undisputed “substantial state interest” in preventing the spread of a deadly pandemic.

Nor is there a basis for the Court to recognize a new fundamental interest in a basic education here. Due process rights are generally liberty or privacy rights, with which the government is prevented from interfering. In contrast, a right to provide a minimum education affirmatively seeks government services. Appellants’ argument that a fundamental right to a basic education should be recognized because of the historical importance of education lacks merit because, as the Supreme Court explained in *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31-35 (1973) (*Rodriguez*), the fact that education is important does not mean that it is a constitutional right. Because there is no fundamental right to a basic education, rational basis review applies.

The challenged Orders survive rational basis review because, as the Supreme Court has recognized, the State has a *compelling* interest in stemming the spread of COVID-19 to protect public health and safety.

*Roman Cath. Diocese of Brooklyn v. Cuomo*, -- U.S. --, 141 S. Ct. 63, 67 (2020) (per curiam). The State's procedures governing the re-opening of schools for in-person instruction are based on evolving science and data regarding the spread of COVID-19 and are more than rationally related to the State's goal of protecting the public from the spread of COVID-19. The Orders themselves provide plausible reasons, grounded in scientific evidence, why the public health principles applied to schools and in-person education, and the State provided expert evidence substantiating the scientific grounding for the Orders.

The district court also properly granted summary judgment on Appellants' equal protection claim. Appellants argue that the challenged Orders improperly treat schools differently than day cares and camps, where children are permitted to gather in-person. Yet schools are not similarly situated to day cares and camps, so Appellants fail to meet the threshold requirement for an equal protection claim. Even if they were similarly situated, the distinction does not implicate a suspect classification and, because there is no fundamental right an education, the Orders are subject to rational basis review. While Appellants concede the fundamental holdings that there is no fundamental right to education under the equal protection clause, they nonetheless argue that a heightened form of rational basis

review applies. AOB 38-39, 59-60. Yet, such “rational basis with a bite” review is limited to cases where there is evidence that a classification was based on animus, and Appellants have not argued that the State issued the Orders based on any animus or motivation to harm any group of students. Because the State’s Orders survive rational-basis review, summary judgment was properly granted on the equal protection claim.

## **ARGUMENT**

### **I. THE STATE’S PUBLIC-HEALTH RELATED RESTRICTIONS ON IN-PERSON INSTRUCTION IN SCHOOLS DO NOT VIOLATE SUBSTANTIVE DUE PROCESS**

#### **A. The Orders Do Not Infringe upon Any Fundamental Rights, and thus Are Reviewed Under the Rational Basis Test, Which They Easily Survive**

The challenged Orders were properly upheld by the district court because they do not infringe upon any fundamental rights, and they are clearly designed to serve the State’s compelling interest in protecting the public health during a deadly pandemic.

The Due Process Clause generally “protects an individual’s fundamental rights to liberty and bodily autonomy.” *C.R. v. Eugene School Dist. 4J*, 853 F.3d 1142, 1154 (9th Cir. 2016). Due process protection thus “refers to certain actions that the government may not engage in.” *Id.* A party alleging a substantive due process claim must meet the “threshold

requirement” of showing that a challenged state action implicates a “fundamental right” before a court will require more than a “reasonable relation to a legitimate state interest to justify the action.” *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (*Glucksberg*). In determining whether such a right is fundamental, courts have required a “careful description” of the asserted interest allegedly at issue. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

If the challenged governmental action infringes on a fundamental right, the court will generally apply strict scrutiny review. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005). Absent a fundamental right, however, strict scrutiny “is inapplicable,” and therefore courts apply rational-basis review. *Litmon v. Harris*, 768 F.3d 1237, 1242 (9th Cir. 2014). Thus, government actions that “do not affect fundamental rights or liberty interests” will be upheld if they are “rationally related to a legitimate state interest.” *Fields*, 427 F.3d at 1208; *see also Glucksberg*, 521 U.S. at 728. Under rational basis review, courts do not “require that the government’s action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did.” *Halverson v. Skagit Cnty*, 42 F.3d 1257, 1262 (9th Cir. 1994) (quoting *Wedges/Ledges of California Inc. v. City of Phoenix*, 24 F.3d 56, 66



(9th Cir. 1994); italics in original). In such a challenge, the plaintiffs “shoulder a heavy burden,” and if it is “at least fairly debatable” that the challenged conduct “is rationally related to a legitimate government interest, there has been no violation of substantive due process.” *Halverson*, 42 F.3d at 1262 (citing and quoting *Kawaoka v. City of Arroyo Grande*), 17 F.3d 1227, 1234 (9th Cir. 1994). “This inquiry is not a ‘license for courts to judge the wisdom, fairness, or logic of legislative choices’; if we find a ‘plausible reason[] for [California’s] action, our inquiry is at an end.’” *Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313-14 (1993).)

# **1. There Is No Fundamental Right to a Minimum Education Under the Fourteenth Amendment**

Appellants argue that the challenged Orders deprive their children of the alleged fundamental right to a basic minimum education. AOB 38-39. Specifically, they claim that because their children allegedly had been or presently are required to participate in school through distance learning, they are being wrongfully deprived of a minimum education. *See, e.g.*, AOB 3-4. Thus, Appellants’ claims are premised not only on the notion that they possess a fundamental right to a basic education, but that such right additionally mandates uninterrupted *in-person instruction*, even in the midst

of a raging pandemic. As Appellants concede (AOB 39), no court has recognized an affirmative right to a basic education, let alone a right to in-person instruction. Nor is a right to a minimum education the type of liberty or privacy right that is protected from government interference under the due process clause.

The Supreme Court has consistently declined to recognize a fundamental right to an education under the Fourteenth Amendment. *See, e.g., Rodriguez*, 411 U.S. at 37 (finding “the District Court’s finding that education is a fundamental right or liberty . . . unpersuasive”); *Plyler*, 457 U.S. at 223-24 (“Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.”); *Papasan v. Allain*, 478 U.S. 265, 284-85 (1986); *Kadrmas*, 487 U.S. at 458.<sup>7</sup> Indeed, Appellants themselves readily concede in their Opening Brief that “there is no binding precedent

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<sup>7</sup> The Supreme Court has primarily addressed this issue in the context of equal protection, and has not directly addressed it in the context of due process. However, Appellants do not argue that fundamental rights should be defined differently for purposes of due process. The Supreme Court has observed that “[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.” *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

from the Supreme Court or this Court recognizing a fundamental right to a basic minimum education.” AOB 39.

This concession, however, vastly understates the state of precedent. As reflected above, binding precedent holds that public education is not a fundamental right under the federal constitution. For example, after discussing the “important” role of education in a free society, the Supreme Court in the *Rodriguez* case emphasized that, “Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.” 411 U.S. at 16, 29-36. Thus, the Supreme Court held, “[w]e have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.” *Id.* at 37.

Subsequently, in *Plyler*, the Supreme Court reiterated that “[p]ublic education is not a ‘right’ granted to individuals by the Constitution.” 457 U.S. at 221. The Court continued, “Nor is public education 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.* at 223. But because the challenged Texas law explicitly denied a discrete class of children of undocumented immigrants *any* education at all, solely based on

their parents' undocumented status, the Supreme Court held that "the discrimination contained in §21.031 can hardly be considered rational unless it furthers some substantial goal of the State." *Id.* at 223-24. After finding that the record did not support the goals purportedly advanced by the law, the Supreme Court held that there was no conceivable justification for Texas's wholesale denial of education to a certain class of students.

Thereafter, in *Papasan*, 457 U.S. at 284, the Supreme Court observed that "*Rodriguez* dictates the applicable standard of review," and the "differential treatment" in education alleged in that case "constituted an equal protection violation only if it is not rationally related to a legitimate state interest." *Id.* at 286 (applying rational basis review to petitioners' allegation that they "have been deprived of a minimally adequate education").

Finally, in *Kadrmas*, the Supreme Court reiterated that it had *rejected* "the proposition that education is a 'fundamental right,'" which requires strict scrutiny when the government interferes with an individual's access to it. 487 U.S. at 458-62 (school-bus fee was constitutional even where it impeded access to the service and getting to school).

In reliance on Supreme Court precedent, the Ninth Circuit has also held that there is no fundamental right to an education under the Fourteenth

Amendment. *See, e.g., Bd. of Nat. Res. of State of Wash. v. Brown*, 992 F.2d 937, 944 (9th Cir. 1993) (rational basis review for equal protection cases based on education); *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 880 (9th Cir. 2011) (recognizing that “there is no enforceable federal constitutional right to a public education,” citing *Plyler*), overruled on other grounds in *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc); *Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1026 (9th Cir. 1978) (holding that, although an important interest, education not a fundamental right guaranteed by the Constitution). Federal district courts within the Ninth Circuit have held similarly. *See, e.g., Whitlow v. California*, 203 F.Supp.3d 1079, 1087 & n.7 (S.D. Cal. 2016) (ruling that claimed denial of right to education based on California’s repeal of personal-belief exception to mandatory vaccination law “failed to show that these classifications burden a fundamental right” because “education is not a fundamental right under the United States Constitution”).

**2. There also is no “quasi-fundamental” right to a basic minimum education**

Appellants argue that even if there is no fundamental right to a minimum education, it should be recognized as a “quasi-fundamental” right

subject to “heightened scrutiny,” pursuant to *Plyler v. Doe*. AOB 42-43.

This argument fundamentally misunderstands federal precedent.

As noted above, *Plyler* concerned a law that completely denied access to education to children of undocumented immigrants. *See* 457 U.S. at 224. After the Supreme Court held public education was not a fundamental right, *id.* at 223, under the specific facts of that case involving manifest intent by Texas to discriminate against “a discrete group of innocent children” by denying them entirely the free public education it offered to other children, the Court held that such discrimination “can hardly be considered rational unless it furthers some substantial goal of the State.” *Id.* at 225. In other words, in scrutinizing the disparate and complete denial of access to public education to a discrete group of students under rational-basis review, the Supreme Court looked to whether the discriminatory law was rationally related to a “substantial,” instead of merely legitimate, state goal, but still confirmed that education is not a fundamental right.

Significantly, the Supreme Court later confirmed in *Kadrmas* that *Plyler*’s application of a “heightened level of equal protection scrutiny” had not been extended “beyond the ‘unique circumstances’ . . . that provoked its ‘unique confluence of theories and rationales.’” *Kadrmas*, 487 U.S. at 458-59 (concluding that “the case before us does not resemble *Plyler*, and we

decline to extend the rationale of that decision to cover this case”); *see also* *Brian B. v. Com. of Pa Dept. of Educ.*, 203 F.3d 582, 586 (3rd Cir. 2000) (citing *Kadrmās* for proposition that “Supreme Court has declined to extend *Plyler*’s heightened scrutiny to other education cases”); *Calloway v. Dist. of Columbia*, 216 F.3d 1, 7 (D.C. Cir. 2000) (applying rational-basis review to claim that statute burdens educational opportunities of disadvantaged group of students, because Supreme Court limited *Plyler* to its unique facts).

Appellants additionally rely on *U.S. v. Harding*, 971 F.2d 410, 412 n.1 (9th Cir. 1992), to argue that the Ninth Circuit has sanctioned intermediate scrutiny for the alleged “quasi-fundamental” right to education. AOB 42-43. *Harding*, however, was not itself an education case, and merely alluded, in dicta in a footnote, to the *Plyler* case in general terms. *Harding*, 971 F.2d at 412 n.1. In any event, this issue is governed by the Supreme Court’s controlling decision in *Kadrmās* declining to extend *Plyler*’s application of heightened scrutiny to other cases.

In addition, Appellants’ argument that the Supreme Court has not yet definitely settled the question of whether a minimally adequate education is a fundamental right subject to strict scrutiny lacks merit. AOB 42-43 (citing *Papasan*, 478 U.S. at 285.) Two years after *Papasan*, the Supreme Court in *Kadrmās* effectively settled that question, when it expressly declined to

recognize a fundamental right where the plaintiffs argued that an ordinance deprived them of “minimum access to education.” *Kadrmas*, 487 U.S. at 458-59. The Supreme Court also declined to find that it was a quasi-fundamental right in that case. *Id.* *Kadrmas* is controlling here.

The facts here are plainly different from *Plyler*. First, the challenged Orders do not completely deny any child access to education. The Orders temporarily restrict in-person instruction only in Tier 1 counties with high rates of transmission of a deadly disease. 1-SER-8-9; 1 SER-98; 2-SER-290; 3-SER-529-531; 2-ER-135-139. They permit TK-6 schools in Tier 1 counties to provide in-person instruction pursuant to a waiver by the local public health officer. 1-SER-125-129, 131-133, 135-136, 138-142, 144-148. The Orders, moreover, expressly authorize all schools to offer in-person services and instruction to stable cohorts of students at any grade level, even when they are not otherwise permitted to reopen through the Cohort Guidance. 3-SER-606-614. The Cohort Guidance is designed to permit schools to bring in those students with the highest needs or challenges with distance learning for in-person instruction. *Id.*

In addition, state law requires schools to offer distance learning if they are closed for in-person instruction. The Legislature enacted new requirements for the provision of “distance learning” during the 2020-2021



school year, including those pertaining to special education law. *See, e.g.*, Cal. Ed. Code §§ 43500, 43503, 43504. The State has also devoted substantial resources to improve the quality of distance learning and mitigate the impact of COVID-19 on students' education.<sup>8</sup>

Finally, the Orders are expressly grounded in the “substantial state interest,” *Plyer*, 457 U.S. at 231, of preventing the spread of a deadly pandemic, *Cuomo*, 141 S. Ct. at 67, in contrast to the animus toward innocent children that the Supreme Court concluded was at issue in the Texas law, *id.* at 230. Accordingly, *Plyler* has no applicability to this case.

**3. The Court should reject Appellants' request to create a new fundamental right to a minimum education because it falls outside zone of commonly recognized “fundamental rights” and would violate federalism principles**

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<sup>8</sup> For example, the State has developed substantial resources and guidance to support school districts' efforts to improve distance learning, 2-SER-300-315, 317-319, 333-334, including requiring school districts to submit a Learning Continuity and Attendance Plan for the 2020-2021 school year, setting forth plans for both in-person and distance learning that meet certain thresholds set by the Legislature. 1-SER-224-235, 237-241; 2-SER-317-319, 341-357. The California Department of Education is also helping schools ensure that students have access to devices and technology. 2-SER-336-337, 339. Moreover, the State budget included a new, one-time investment of \$5.3 billion for school districts to support student achievement, including through distance learning, to mitigate learning loss related to COVID-19. 2-SER-317-319, 321-331, 341-357.

Apparently recognizing that existing law does not support their position, Appellants further argue that this Court should take this opportunity to create a new fundamental right to a basic education. AOB 45-53. As explained above, Supreme Court precedent forecloses this argument. *See Kadrmas*, 487 U.S. at 458-59.

In any event, even if *Kadrmas* were not controlling, this Court should not create the new right suggested by Appellants. The Supreme Court “has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this uncharted area are scarce and open-ended.” *Halverson*, 42 F.3d at 1262 (internal quotations omitted) (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). Thus, the Court cautioned that it must “‘exercise the utmost care whenever we are asked to break new ground in this field’ lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Glucksberg*, 521 U.S. at 720 (internal citations omitted).

Appellants’ asserted right to a minimum basic education is historically not the type of fundamental interest that courts have consistently recognized for purposes of substantive due-process protections. As the Supreme Court already held in *Rodriguez*, the fact that education is important does not mean

that it constitutes a “fundamental right” under the Fourteenth Amendment.

Rodriguez, 411 U.S. at 29-36.

**a. Substantive due process is a limitation on the State’s power, and generally protects governmental intrusion on fundamental personal rights to liberty and privacy**

As the district court in this case ruled, “the structure of the due process doctrine—with its focus on protecting liberty and autonomy—suggests that no fundamental right to basic education exists.” 1 ER 12. Substantive due process protects against government interference with certain liberty and privacy interests, such as the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion. *Glucksberg*, 521 U.S. at 720. It is thus understood as a “limitation on the State’s power,” and not a guarantee of certain obligations to individuals by the State. *DeShaney v. Winnebago Cty. Dep’t of Soc. Serv.*, 489 U.S. 189, 195 (1989).

While appearing to concede that the Due Process Clause generally protects individuals from intrusive government action rather than securing benefits (acknowledging “that may be so” (AOB 53)), Appellants still insist that the Due Process Clause protects rights to certain public benefits. AOB 35-36. Citing *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015), they argue

that the Supreme Court held that states were prohibited from depriving same-sex couples of “the constellation of benefits that the States have linked to marriage.” AOB 35-36. As the district court recognized, however, their reliance on *Obergefell* is misplaced because the entire premise for that decision was the Supreme Court’s holding that “the right to same-sex marriage is a component of the fundamental liberty recognized by the Due Process Clause.” 1 ER 12. Here, however, unlike marriage, a basic education is not a component of a fundamental liberty interest under the Fourteenth Amendment. Thus, *Obergefell* does not support Appellants’ position.

**b. The importance of education does not mean that there is a fundamental constitutional right to a basic education**

Appellants argue that the Court should recognize a fundamental right to a basic minimum education under the due process clause because such a right is “deeply rooted in our Nation’s history” and “necessary to the concept of ordered history,” and because it is important in preparing people for civic participation. AOB 45-53 (citing *Glucksberg*, 521 U.S. at 720-21).

But just because education has historically been an “important” function of state and local government, does not mean it is a “fundamental right” under the Fourteenth Amendment. *Rodriguez*, 411 U.S. at 29-35; *see*

*also id.* at 29-31 (explaining that “the importance of a service performed by the State does not determine whether it must be regarded as fundamental”); *Ambach v. Norwick*, 441 U.S. 68, 77 n.7 (1979) (“As *San Antonio Independent School Dist. v. Rodriguez* recognized, there is no inconsistency between our recognition of the vital significance of public education and our holding that access to education is not guaranteed by the Constitution.”).

Appellants primarily base their argument that the “right to a basic minimum education” is deeply rooted in our Nation’s history not on case law, but on various historical events and law review articles. AOB 49-51. For example, they argue that the vital importance of education to the Nation is demonstrated by the fact that for more than a century every state has had compulsory education laws. *Id.* at 49-50. Yet, that fact was not persuasive to the Supreme Court in holding that education was *not* a fundamental right. *Rodriguez*, 411 U.S. at 29-30.

Referencing *state court* cases that concerned the equity and adequacy of education under state constitutions, Appellants also argue that “preparation for capable citizenship is the primary purpose of education.” AOB 51-52. But whether some *state constitutions* recognize a right to an adequate education is not relevant to the *federal* constitutional inquiry of whether there is a fundamental right to basic education under the Fourteenth

Amendment, which has been resolved by the federal courts, as discussed above. Indeed, it is axiomatic that state constitutions may be more protective than federal constitutional provisions. *See, e.g., Vernon v. City of Los Angeles*, 27 F.3d 1385, 1392 (9th Cir. 1994).

Moreover, as the district court correctly observed in rejecting Appellants’ argument, “a countervailing tradition of local autonomy raises significant doubts about the viability of Plaintiffs’ theory.” 1 ER 28. There is a longstanding recognition of state sovereignty in the area of education, in which the manner of providing public education is generally committed to the control of state and local authorities. *See, e.g., United States v. Lopez*, 514 U.S. 549, 564 (1995); *Fields*, 427 F.3d at 1206. Thus, “Plaintiffs’ proposed constitutional right would at least unsettle ‘local autonomy’ in public education, which the Supreme Court has described as ‘a vital national tradition.’” 1-ER- 28 (citing *Missouri v. Jenkins*, 51 U.S. 70, 99 (1995); *Horne v. Flores*, 557 U.S. 433, 448 (2009)).

Accordingly, Appellants’ arguments that the Court should recognize a fundamental right to a basic education, where the Supreme Court has already declined to do so, should be rejected. This is especially true where, as here, the State’s challenged policy is designed to protect California students and school staff members in response to a deadly global pandemic.

**4. The Due Process Right of Parents to Decide Whether to Send their Children to Public or Private School Is Not Implicated Here**

Appellants additionally argue that the Orders violate the substantive due process rights of the Parent-Appellants whose children attend *private* schools by interfering with their “fundamental right to choose their children’s educational forum.” AOB 44. This argument should be rejected on both procedural and substantive grounds.

As an initial matter, because Appellants did not raise this argument below, it is waived on appeal. *See, e.g., Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007) (recognizing long-standing rule in the Ninth Circuit that generally the Court will not consider arguments that are raised for the first time on appeal).

In any event, Appellants’ argument lacks merit because the challenged Orders decidedly do not infringe upon parental rights to send their children to private school. The Supreme Court has recognized that parents have a substantive due process right to decide *where* to send their children to school, which is part of the fundamental liberty recognized by the due process clause. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972) (rejecting compulsory attendance law’s application to Amish parents in light of its unique burden on their free exercise of religious beliefs by precluding

informal vocational education); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925) (addressing compelled attendance at public schools, thus presenting a direct preclusion from parental choice of a private religious school education).

Unlike the parents in *Pierce* and *Yoder* who were precluded from electing to have their children participate in private religious education, the challenged Orders on their face do not prevent the Parent-Appellants from enrolling their children in private schools. Instead, they only impact the mode of instruction on the exact same terms for both public and private schools. Indeed, according to the evidence submitted below, a number of the Parent-Appellants have been sending their children to private schools. 3-ER-482-484; 3-ER-485-486; 3-ER-507; 3-ER-492; 3-ER-493-494.

Finally, the Court in *Yoder* explicitly recognized “that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers.” *Yoder*, 406 U.S. at 220. Appellants’ attempt to generalize those cases to an absolute right to a private school education



exempt from a state's health and safety laws is unsupported and should be rejected.

**B. The Orders Are Valid Because They Bear a Reasonable Relation to the Compelling State Interest in Protecting Students, Teachers, School Staff, and the Public from a Rapidly Spreading Disease**

Because there is no fundamental interest in a basic minimum education under the substantive component of the Due Process Clause, there need only be a “reasonable relation to a legitimate state interest” to justify the challenged action. *Glucksburg*, 521 U.S. at 722. This “rational basis” standard is easily satisfied here because the State Orders are rationally related to the State's *compelling* interest in containing and mitigating the effects of the COVID-19 pandemic in California.

**1. The State has not only a legitimate, but also a compelling interest in containing and mitigating the effect of the COVID-19 pandemic on education delivery**

“Stemming the spread of COVID–19 is unquestionably a compelling interest.” *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67; see also *South Bay III*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting); *Kansas v. Hendricks*, 521 U.S. 346, 356-57 (1997).

**2. The Orders bear a reasonable relationship to the State's interest in protecting health and safety during the COVID-19 pandemic**

The Orders themselves establish more than plausible policy reasons for limiting in-person learning in Tier 1 counties with higher rates of confirmed COVID-19 cases and higher positivity rates. 3-SER-529-531. (explaining Tier Framework). And, the State has presented expert evidence further substantiating the scientific foundation for the State's approach, even though they are not required to do so under rational-basis review. *See Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1085 (9th Cir. 2015) (“[A] legislative classification must be upheld [under rational basis review] ‘so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.’”) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)).

Taken as a whole, the record establishes that the Orders were designed to mitigate the risks of spreading COVID-19, and were based on factors relevant to those risks, including: (1) how prevalent the virus is at the time in the relevant county; (2) evolving scientific evidence about the degree to

which children of different ages contract and spread the disease; (3) the fact that schools do not just have students, but also have teachers and other staff who have different risks than children; and (4) evidence that risks can be mitigated by keeping groups smaller for in-person instruction.

First, the State has provided a reasonable rationale for restricting in-person learning in counties with the highest COVID-19 rates. The “risks and impacts of disease transmission are even greater” in Tier 1 counties. 1-SER-88. “In these counties, where there are ‘higher levels of community spread,’ there is also an ‘increase [in] the likelihood of infection among individuals at high risk of serious outcomes from COVID-19, including those with underlying health conditions who might live or otherwise interact with an infected individual.’” 1-SER-95. “California has restricted a variety of activities in Tier 1 counties that are deemed higher-risk, particularly those involving ‘indoor operations,’ because ‘the odds of an infected person transmitting the virus are dramatically higher compared to an open-air environment.’” 1-ER 14; 1-SER-93-96.

Further, the State’s Blueprint for a Safer Economy, concerning the “safe progression of opening more businesses and activities in light of the pandemic,” explained that the updated guidance “is informed by increased knowledge of disease transmission vulnerabilities and risk factors” and is

driven by various goals, such as progressing in phases, and “aggressively reduc[ing] case transmission to as low a rate as possible across the state so the potential burden of flu and COVID-19 in the late fall and winter does not challenge our healthcare delivery system's ability to surge with space, supplies and staff.” 3-SER-533. Similarly, the Statewide Public Health Officer’s Order announcing that updated framework for reopening emphasized that “[c]ommunity spread of infection remains a significant concern across the state,” 3-SER-529, and explained that the new framework was “[b]ased on the current state of the pandemic in California and current scientific understanding of transmission” of COVID-19. 3-SER-530.

Thus, the State has consistently based its Orders on informed assessments of the relative risks to the public health due to the spread of COVID-19. Those assessments consistently relied on and were informed by the available scientific evidence and understanding of COVID-19 symptoms, transmission, and health impacts at the time, while recognizing that medical and scientific understanding of the new disease was continuing to evolve with increased data and studies. *See, e.g.*, 1-SER-5-13; 2-SER-388-391.

Second, as CDPH’s updated August 3, 2020 materials explained, “[b]ased on the current best available scientific evidence, COVID-related risks in schools serving elementary-age students (grades TK-6) are lower

than and different from the risks to staff and to students in schools serving older students.” 1-SER-128. Specifically, “there appears to be lower risk of child-to-child or child-to-adult transmission in children under age 12,” and a lower risk of infection and serious illness in younger children. 1-SER-28. The State has responded to current studies and scientific understanding regarding the relative risks posed by COVID-19 to children, particularly for those in elementary school, which appear to be lower than for older children and adults. Based on this information, the State set up an application and approval process for local public health officers to permit TK-6 schools in Tier 1 counties to open for in-person instruction. 1-SER-131-133, 135-136, 138-142, 144-148.

Third, as Dr. Watt, Chief of the Division of Communicable Diseases at CDPH, explained in his August 8, 2020 declaration, “[i]n schools, adults intermingle with children, and transmission may happen between adults, between children, from adults to children, or from children to adults.” 1-SER-8. “By gathering in large groups, and in close proximity to others, individuals put themselves and others at increased risk of transmission, which could be expected to increase the spread of COVID-19 in their communities and in any other communities they visit.” *Id.* This spread “could fan out into different parts of the state, jeopardizing the hard work to

contain COVID-19 that is going on in many communities and placing a further strain on hospitals and other resources across the state.” *Id.* “In-person classroom instruction thus creates increased public risk of COVID-19 transmission until localities have attained sufficient testing, tracking, hospital capacity, and infection rates that indicate epidemiological stability and an ability to treat outbreaks if they occur.” 1-SER-8-9. The “movement and mixing” associated with in-person instruction “would introduce substantial new risks of transmission of COVID-19.” 1-SER-10.

At the press conference on July 17, 2020, announcing the CDPH’s July 17, 2020, COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year, Governor Newsom explained that whether a school could open for in-person instruction would be based on data and community spread of the virus. 2-SER-361-363. He emphasized that the State needs to protect both students and school-staff members:

[E]ducation broadly is absolutely about our kids, but we cannot deny the fact that we have hundreds of thousands of adults that are responsible [for] taking care and educating our kids as well. And their health has to be considered as well. . . . And I am entrusted to be accountable and responsible to their health, as well as the health of my children and your children and our children, our future.

2-SER-364.

Thus, while the relative risks posed by COVID-19 to children may be low, schools do not operate with children alone. The risks to children cannot be viewed in isolation when it comes to opening up schools to in-person instruction, because successful in-person instruction, of course, requires the participation of many adults who themselves live in, and interact with others within, the surrounding community, increasing the risks of COVID-19 transmission and spread of the disease, including to those who have underlying health conditions that make them particularly susceptible to potentially severe COVID-19 health consequences. 1-SER-11.

Fourth, the Cohort Guidance allows schools in any Tier and at any grade level to offer students in-person learning opportunities, as long as they strictly comply with the Guidance. 3-SER-606-614. In arguing that the Orders unconstitutionally deprive children of in-person learning, Appellants simply ignore the Cohort Guidance, which provides a method and means for children, particularly those in need of specialized services, to receive in-person instruction, even in Tier 1 counties.

Especially in light of the deference to which state governments are entitled in making decisions in areas of scientific uncertainty, *see Marshall v. United States*, 414 U.S. 417, 427 (1974), and in responding to public health emergencies, *see Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 68

(members of the judiciary “are not public health experts, and [] should respect the judgement of those with special expertise in this area”),<sup>9</sup> this more than satisfies the rational basis standard. *See United States v. Navarro*, 800 F.3d 1104, 1113 (9th Cir. 2015) (“[A] classification is valid ‘if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993))). The confluence of both state education and public-health policy implicated in the State’s management of the impact of the COVID-19 pandemic on public-school instruction further warrants deference to the well-recognized state sovereignty in these areas. *See, e.g., Lopez*, 514 U.S.

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<sup>9</sup> A majority of the Court in *Roman Cath. Diocese of Brooklyn* expressly recognized the deference due states in the management of public health. *See* 141 S.Ct. at 73 (Kavanaugh, J., concurring) (“‘The Constitution principally entrusts the safety and health of the people to the politically accountable officials of the States.’ Federal courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic.”) (quoting *South Bay III*, 140 S. Ct. at 1613 (2020) (Roberts, C.J., concurring)); *id.* at 75-76 (Roberts, C.J., dissenting) (reaffirming position in *South Bay*); *id.* at 78 (Breyer, J., dissenting) (“[C]ourts must grant elected officials broad discretion when they undertake to act in areas fraught with medical and scientific uncertainties.”); *id.* at 79 (Sotomayor, J., dissenting) (“Justices of this Court play a deadly game second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily”).



at 564; *Marshall*, 414 U.S. at 427. Indeed, the Supreme Court has cautioned that federal courts should exercise restraint in imposing injunctions that “involve areas of core state responsibility, such as public education.” *Horne*, 557 U.S. at 433.

In sum, the Orders governing school re-openings are “reasonably related” to the legitimate—and, indeed, compelling—state interest in protecting the health of Californians and minimizing the spread of COVID-19 in the community during a deadly pandemic.<sup>10</sup>

**C. Appellants’ reliance on post-judgment matters is improper and, in any case, does not undermine the validity of the challenged Orders**

Appellants improperly cite to and rely upon the new Safe Schools for All Plan documents (collectively, “Plan documents”) that the State issued on December 30, 2020, to argue that the State “apparently now agrees that schools do not pose a health risk to children or the wider community.” AOB

2. They subsequently requested judicial notice of those Plan documents.  
Dkt. 22.

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<sup>10</sup> If, however, the Court concludes that any level of scrutiny other than rational basis applies, the matter should be remanded to the district court, which should determine in the first instance whether the challenged Orders survive heightened scrutiny.

The Court should not consider this extra-record evidence that did not exist at the time of the summary judgment briefing and decision below, because it is not relevant to the question of whether there was a rational basis for the respective Orders at the time they were issued. Except in unusual circumstances, the reviewing court will “consider only the district court record on appeal.” *See, e.g., Lowry v. Barnhart*, 329 F.3d 1019, 1024-25 (9th Cir. 2003) (rejecting party’s attempt to add and rely on post-judgment material); *see also Lippi v. City Bank*, 955 F.2d 599, 605 (9th Cir. 1992) (holding the Court’s “review is limited to the record presented to the district court at the time of summary judgment”); *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988) (“Although we review a grant of summary judgment de novo, this court is limited to consideration of issues of fact presented to the district court.”). Because the Court’s review on appeal is “confined to an examination of materials before the lower court at the time” the summary judgment ruling was made, “subsequent materials are irrelevant.” *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988). Thus, Appellees objected to Appellants’ Request for Judicial Notice of the Plan documents. Dkt. 24.

Even if considered on appeal, the Plan documents do not plausibly support Appellants' contention that the State now disclaims that in-person school operations pose a risk of transmission in counties with the highest COVID-19 levels. In fact, the currently applicable guidance maintains the prohibition on in-person instruction in Tier 1, subject to an updated TK-6 waiver process, and with the Cohort Guidance still in effect for schools that are not permitted to reopen. Appellees' Request for Judicial Notice, Exh. A, at 8-9.

Appellants mischaracterize and overstate the significance of the documents. For example, while Appellants assert that the State is newly recognizing the low risk for elementary school-aged children, AOB 25-29, the State had already recognized earlier studies suggesting that COVID-19 affects younger children differently and less severely than older children, and that children under age 10 presented lowered risks, which was precisely the basis for the waiver for K-6 schools in counties on the Monitoring List/Tier 1. 1-SER-128-136. And, as noted above, the State's Plan does not change the fundamental feature of the challenged Orders: schools in Tier 1 counties cannot reopen for in-person instruction, except for TK-6 schools subject to a modified waiver process, while in-person services under the Cohort Guidance remain permitted.

Finally, even if this Court considers the extra-record documents, they do not affect the judgment, as they simply reinforce that this pandemic is an uncertain and evolving public-health crisis. The State is making reasonable decisions based on information and evidence available at the time, and reassessing and refining its approach as more scientific evidence develops. This is reiterated by the “Evidence Summary: TK-6 Schools and COVID-19 Transmission,” document Appellants rely upon, which states: “We have learned a considerable amount since March 2020 regarding schools, through scientific studies of schools or camps that have been open in the U.S. or internationally. Because change is the only constant in the COVID-19 pandemic, we will continue to gather and monitor the evidence carefully, to inform safe and successful schooling.” *See* <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Safe-Schools-for-All-Plan-Science.aspx>.

Contrary to Appellants’ assertions, there is no inconsistency in the State’s approach or rationale for its Orders.

## **II. THE STATE’S PUBLIC-HEALTH RELATED RESTRICTIONS ON IN-PERSON INSTRUCTION IN SCHOOLS DO NOT VIOLATE EQUAL PROTECTION**

Appellants argue that the Orders unfairly target them, as opposed to other allegedly similarly situated groups. The factual underpinnings of their

argument are simply incorrect, in addition to being legally irrelevant under rational-basis review, given Appellants' failure to establish the alleged distinctions are irrational or arbitrary.

**A. The Orders Do Not Treat Similarly Situated Groups Differently**

Appellants contend that the Orders violate equal protection because they “arbitrarily” distinguish between in-person education, on the one hand, and daycare facilities and day camps, on the other. AOB 65-66. But their equal protection claim fails at the threshold because Appellants are unable to establish that these are similarly situated groups who are treated differently by the Orders.

To establish a violation of equal protection, plaintiffs must first show that the government treated them differently from other similarly situated persons. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). Only through a comparison of *similarly situated* persons can “the factor motivating the alleged discrimination can be identified.” *Id.*; *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), quoting *Plyler*, 457 U.S. at 216. “Dissimilar treatment of dissimilarly situated persons does not violate equal protection.” *Klinger v. Dep’t of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994). Further, the groups must be composed of

individuals who are similarly situated to those in the classified group “*in respects that are relevant to the state's challenged policy* [cite].” *Gallinger v. Becerra*, 898 F.3d 1012, 1016 (9th Cir. 2018) (internal citations omitted; emphasis added).

Here, the State’s Orders do not treat alike groups dissimilarly. Appellants’ claim rests entirely on the State Orders’ different treatment of schools compared with daycare centers and camps. AOB 65-66. However, the undisputed evidence in the record establishes that schools are distinctly different from day cares and camps with respect to the risks of COVID-19 transmission, including regarding their purpose, the numbers of children served, and the child-adult ratios present. For example, “in person” school would typically have students sitting near each other indoors for extended periods of class time, whereas in camp and daycare, children typically spend more time playing and are often outside and more distanced. In addition to the lower risks inherent in outdoor activities, camps typically involve smaller “group sizes” and are “mandated to have significantly lower adult-to-child ratios than schools typically have,” both of which reduce the risk of

transmission. 1-SER-7<sup>11</sup>. Accordingly, based on the undisputed facts, K-12 schools are not similarly situated to day cares or camps for purposes of assessing the Orders' restrictions on in-person learning in Tier 1 counties under the Equal Protection Clause. Because the comparator groups at issue are not similarly situated, an Equal Protection claim is not even implicated. See, e.g., *Thornton v. City of St. Helens*, 425 F.3d at 1167.

**B. Even if Schools Were Deemed Similarly Situated to Day Care and Camps for Equal Protection Purposes, the Distinction Would Be Reviewed Under the Deferential Rational Basis Standard**

Even if schools were deemed similarly situated to day cares and camps for equal protection purposes, as discussed above, it is well-established that education is not a fundamental right for purposes of the Equal Protection Clause. See Argument, Section I.A, *supra*. Accordingly, the Orders' distinction between these groups would be reviewed under the deferential

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<sup>11</sup> State regulations provide a hard cap for adult-to-child ratios in childcare settings that are not applicable to schools. Childcare for infants and toddlers is capped at a 4-to-1 and 6-to-1 ratio in family day care settings, see Cal. Code Regs., tit. 22, § 102416.5, and no more than a 15-to-1 ratio in childcare center settings, see *id.* § 101216.3. State preschools must comply with maximum adult-to-child ratios that vary by age, with the largest being 15-to-1. See Cal. Code Regs., tit. 5, § 18290. There are no comparable requirements for schools where the *average* teacher-to-student ratio for public schools in California is 21-to-1. See <https://www.ed-data.org/state/CA>.

rational-basis standard, which turns on whether “the classification rationally further[s] a legitimate state interest.” *See Nordlinger*, 505 U.S. at 10; *see also Rodriguez*, 411 U.S. at 37; *Papasan*, 478 U.S. at 284-85; *Kadrmas*, 487 U.S. at 458; *see ER 12, 13.*

Equal protection “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any *reasonably conceivable state of facts that could provide a rational basis for the classification.*” *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added). When this standard is met, the Court may properly conclude that plaintiffs have no chance of success on the merits of their claims “regardless of what facts plaintiffs might prove during the course of the litigation.” *See Angelotti Chiropractic, Inc.*, 791 F.3d at 1087. In other words, as long as there are “plausible reasons” for challenged government action, the Court’s inquiry is at an end. *Beach Commc'ns*, 508 U.S. at 313-14; *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1154 (9th Cir. 2004). This is because under rational-basis review the government’s choice “is not subject to courtroom fact-finding and may be based on rational speculation unsupported by



evidence or empirical data.” *Angelotti Chiropractic*, 791 F.3d at 1087; *Beach Commc’ns*, 508 U.S. at 315. Under this deferential standard of review, government action “carries with it a presumption of constitutionality that can only be overcome by a clear showing of arbitrariness and irrationality.” *Kadrmas*, 487 U.S. at 451.

Appellants nonetheless argue that the district court should have applied “a more rigorous rational basis review,” or what has been called, “rational basis with bite.” AOB 64. They rely upon *Plyer* and various district-court decisions in support of this position. AOB 64-65. Appellants’ arguments lack merit. Specifically, unlike this case, the cases where “rational basis with bite” have been applied involved evidence of animus towards a particular group. *See, e.g., Bishop v. Smith*, 760 F.3d 1070, 1099 (10th Cir. 2014). As noted above, in *Plyer*, the record reflected that Texas enacted the challenged law excluding children of undocumented immigrants from any education with the intent to discriminate against them because they were a disfavored group. *Plyer*, 457 U.S. at 221-222.

Similarly, the district court cases Appellants rely upon actually confirm that the more searching rational basis review Appellants attempt to invoke applies only where there is evidence of animus or discriminatory intent behind the challenged government action or legislation. *See, e.g., United*

*States v. Pickard*, 100 F. Supp. 3d 981, 1005 (E.D. Cal. 2015) (no justification for applying more rigorous review without evidence of animus or some discriminatory legislative purpose); *Desoto CAB Co., Inc. v. Picker*, 228 F. Supp. 3d 950, 957-58 (N.D. Cal. 2017) (declining to apply heightened-rational-basis review used for “animus cases” because complaint contained insufficient allegations of animus); *Dairy v. Bonham*, 2013 WL 3829268, at \*5 n.4 (N.D. Cal. July 23, 2013) (listing cases in footnote where the heightened version of rational-basis review was applied because there was evidence of animus towards a particular group). As one district court helpfully explained, the “common thread” that runs through “nearly all of the Supreme Court cases where active rational basis review was employed” is a legislative classification that appeared to have been based on “animus or a desire to harm a politically unpopular group.” *United States v. Wilde*, 74 F. Supp. 3d 1092, 1097 (N.D. Cal. 2014) (collecting cases).

Here, in contrast to *Plyler* and the other cases upon which Appellants rely for their argument favoring application of heightened rational-basis review, there was never any allegation or evidence that the challenged state Orders were motivated by animus or desire to harm a politically unpopular group. Indeed, the Orders apply uniformly to schools statewide, with the only variability based on the rate of community transmission of a deadly

disease, belying any suggestion that they target any group. Therefore, heightened rational-basis review does not apply to the challenged Orders.

### **C. The Orders Are Valid Under Rational Basis Review**

The Orders easily survive the applicable rational-basis review. The distinctions the State has made between in-person instruction in schools and in-person day care and camps are certainly “plausible” in light of the differences between them. 1 SER 7.<sup>12</sup> As discussed in detail in the Due Process section above, the Orders are reasonably related to furthering the state’s compelling interest in protecting the public health in the midst of a devastating global pandemic. See Section I.B.2, *supra*. Moreover, under rational basis review for an equal protection claim, a State may move incrementally and focus on one particular problem more so than others. *Cf. Beach Commc’ns, Inc.*, 508 U.S. at 316 (“Congress had to draw the line somewhere; it had to choose which facilities to franchise. This necessity renders the precise coordinates of the resulting legislative judgment virtually

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<sup>12</sup> In any event, Appellants’ argument about groups of students being permitted to be on campus as “daycare” but not for “school”, AOB 65-66, is belied by the Cohort Guidance, which permits schools in Tier 1 to bring in groups of students, especially those with the greatest needs, for in-person instruction. 3-SER-606-614.

unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.”)

## CONCLUSION

For the reasons set forth above, the Court should affirm the judgment.

Dated: February 12, 2021

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FOR THE NINTH CIRCUIT

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**(Appeal)**

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- **SUPPLEMENTAL EXCERPTS OF RECORD (VOLUME 2 OF 3)**
- **SUPPLEMENTAL EXCERPTS OF RECORD (VOLUME 3 OF 3)**
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Declarant



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