

No. 20-56291

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

MATTHEW BRACH, ET AL.

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, ET AL.

Defendants-Appellees,

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

HARMEET K. DHILLON
MARK P. MEUSER
DHILLON LAW GROUP INC.
177 Post Street, Suite 700
San Francisco, California 94108
(415) 433-1700

ROBERT E. DUNN
EIMER STAHL LLP
99 South Almaden Blvd., Suite 662
San Jose, CA 95113
(669) 231-8755

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

INTRODUCTION.....	1
ARGUMENT	3
I. The State’s Orders Prohibiting In-Person Education Violate Fundamental Rights Protected By The Due Process Clause	3
A. The Substantive Component of the Due Process Clause Protects the Right to a Basic Minimum Education	4
B. The State’s Orders Deprive Plaintiffs’ Children of a Basic Minimum Education And Cannot Survive Heightened Scrutiny.....	13
II. Separately, The Challenged Orders Violate Parents’ Well- Established Due Process Right to Send Their Children to Private School.....	21
III. The Challenged Orders Cannot Satisfy Rational Basis Review Under the Due Process Clause or Equal Protection Clause	25
A. The Orders Implicate the Equal Protection Clause.....	25
B. The Orders Must Satisfy Heightened Rational Basis Review 28	
C. The State’s Orders Are Irrational and Devastating	31
CONCLUSION.....	35

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Calloway v. District of Columbia</i> , 216 F.3d 1 (D.C. Cir. 2000)	8
<i>Brian B v. Com. of Pa. Dept. of Educ.</i> , 230 F.3d 582 (3d Cir. 2000)	8
<i>Payne v. Peninsula Sch. Dist.</i> , 653 F.3d 863 (9th Cir. 2011)	7
<i>Bd. of Nat'l Res. of State of Wash. v. Brown</i> , 992 F.2d 937 (9th Cir. 1993)	6
<i>AMA Multimedia, LLC v. Wanat</i> , 970 F.3d 1201 (9th Cir. 2020)	24, 25
<i>Angelotti Chiropractic, Inc. v. Baker</i> , 791 F.3d 1075 (9th Cir. 2015)	28, 29
<i>Berea College v. Kentucky</i> , 211 U.S. 45 (1908)	22
<i>Dairy v. Bonham</i> , 2013 WL 3829268 (N.D. Cal. July 23, 2013)	29
<i>Desoto CAB Co., Inc. v. Picker</i> , 228 F. Supp. 3d 950 (N.D. Cal. 2017)	30
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	11

<i>F.C.C. v. Beach Commc'ns, Inc.</i> , 508 U.S. 307 (1993).....	29
<i>Farrington v. T. Tokushige</i> , 11 F.2d 710 (9th Cir. 1926).....	22, 24
<i>Fields v. Palmdale School District</i> , 427 F.3d 1197 (9th Cir. 2005).....	12, 13, 22
<i>Goss v. Lopez</i> , 419 U.S. 565 (1975).....	19
<i>Griswold v. Connecticut</i> , 318 U.S. 4796 (1965).....	12
<i>Guadalupe Organization, Inc. v. Tempe Elementary School District Number 3</i> , 587 F.2d 1022 (9th Cir. 1978).....	7
<i>Kadrmas v. Dickinson Public Schools</i> , 487 U.S. 450 (1988).....	5, 6
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	12
<i>Maynard v. Hill</i> , 125 U.S. 190 (1888).....	10
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....	11
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	21, 24
<i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015).....	9, 10, 11, 12

<i>Papasan v. Allain</i> , 478 U.S. 265 (1986).....	5
<i>Parents for Privacy v. Barr</i> , 949 F.3d 1210 (9th Cir. 2020).....	23
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925).....	21
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	4
<i>Roe v. Wade</i> , 410 U.S. 113 (1973).....	12
<i>San Antonio Independent School District v. Rodriguez</i> , 411 U.S. 1 (1973).....	4, 11
<i>SmithKline Beecham Corp. v. Abbott Labs.</i> , 740 F.3d 471 (9th Cir. 2014).....	30
<i>Town of Greece v. Galloway</i> , 572 U.S. 565 (2014).....	11
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000).....	23
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938).....	30
<i>United States v. Harding</i> , 971 F.2d 410, (9th Cir. 1992).....	8
<i>United States v. Pickard</i> , 100 F. Supp. 3d 981 (E.D. Cal. 2015).....	30

United States v. Sineneng-Smith,
140 S. Ct. 1575 (2020)..... 24

United States v. Wilde,
74 F. Supp. 3d 1092 (N.D. Cal. 2014)..... 31

Washington v. Glucksberg,
521 U.S. 702 (1997)..... 9

Williams v. Chater,
110 F.3d 72 (9th Cir. 1997)..... 24

Other Authorities

Alyce McFadden, *Biden, teachers unions confront school reopening*,
OpenSecrets.org (Feb. 9, 2021)..... 31

Berkeley Lovelace, Jr., *CDC director says schools can safely reopen
without vaccinating teachers*, CNBC (Feb. 3, 2021) 1

Cal. State Budget 2020–21 (K-12 Education)..... 28

California Department of Education, *CARES Act Funding*, CARES Act
Funding Overview Table (Feb. 12, 2021) 27, 28

Ctrs. For Disease Prevention & Control, *Operational Strategy for K-12
Schools Through Phased Mitigation* (Feb. 12, 2021) 1

Ctrs. For Disease Prevention & Control, *Transmission of SARS-CoV-2
in K-12 schools* (updated Feb. 12, 2021)..... 2

Data Story of Covid-19 & Schools, *Insights for Education* (last visited
February 21, 2021), <https://infographic.education.org/insights/en/> 33

Emma Dorn, et al., *COVID-19 and learning loss—disparities grow and students need help*, McKinsey & Company (Dec. 8, 2020)..... 14, 15

Emma Dorn, et al., *COVID-19 and student learning in the United States: The hurt could last a lifetime*, McKinsey & Company (June 1, 2020) 15, 16

Eric Ting, *These California politicians have taken the most money from the state’s biggest teacher’s union*, SFGate (Feb. 8, 2021)..... 31

Erica L. Green, *Surge of Student Suicides Pushes Las Vegas Schools to Reopen*, The New York Times (Jan. 24, 2021) 18

Evidence Summary: TK-6 Schools and COVID-19 Transmission, Cal. Dep’t of Pub. Health (Dec. 20, 2020) 20

Jen Christensen, *Covid-19 school closings linked to increase in depression and suicide, study finds*, CNN (Sept. 12, 2020) 17

Joao Pedro Azevedo, et al., *Learning losses due to COVID-19 could add up to \$10 trillion*, The Brookings Institution (July 30, 2020)..... 16

Jocelyn Gecker, *San Francisco sues schools, cites high of suicidal students*, Associated Press (Feb. 12, 2021)..... 18

LA teachers union pushes back on CDC’s roadmap for reopening schools, ABC (Feb. 13, 2021) 31

Many LA schools still have some steps to follow before reopening, ABC (Feb. 17, 2021)..... 19

Michael T. Hartney & Leslie K. Finger, *Politics, Markets, and Pandemics: Public Education’s Response to COVID-19*, Brown University (October 2020)..... 30

Phyllis W. Jordan, *What Congressional Covid Funding Means for K-12 Schools*, FutureEd (Feb. 18, 2021) 27

Rationale: California’s Safe Schools for All Plan, Cal. Dep’t of Pub. Health (Dec. 30, 2020) 18

Ryan M. Hill, et al., *Suicide Ideation and Attempts in a Pediatric Emergency Department Before and During COVID-19*, American Academy of Pediatrics (Dec. 16, 2020) 17

UTLA, *The Same Storm, but Different Boats: The Safe and Equitable Conditions for Starting LAUSD in 2020-2021*, at 10-11 (July 2020) ... 31

Where Schools Are Reopening in the US, CNN (updated Feb. 11, 2021), <https://www.cnn.com/interactive/2020/health/coronavirus-schools-reopening/>..... 33

INTRODUCTION

California’s disastrous experiment with school closures, now headed into its second year, continues to devastate the lives of millions of children. The educational setbacks alone will cost California students billions of dollars in lifetime earnings, while the forced isolation has caused an alarming spike in depression, anxiety, and even suicide. None of this necessary. As scientists around the world have recognized since last summer—and the State finally admitted in December 2020—COVID-19 does not pose a significant health risk to children, and students are not a significant source of transmission to adults. The primary risk from opening schools comes from adult-to-adult transmission, but other “essential” businesses involving far more adult-to-adult contact have operated all year using a few basic mitigation strategies. These strategies have also proven effective in schools across the country and around the world. In light of this evidence, the CDC has recently urged schools to open.¹ Yet despite

¹ See Berkeley Lovelace, Jr., *CDC director says schools can safely reopen without vaccinating teachers*, CNBC (Feb. 3, 2021), <https://tinyurl.com/51gxiz7c>; Ctrs. for Disease Prevention & Control, *Operational Strategy for K-12 Schools Through Phased Mitigation* (updated Feb. 12, 2021), <https://tinyurl.com/1ukzktsb>; Ctrs. For Disease Prevention & Control, *Transmission of SARS-CoV-2 in K-12 schools* (updated Feb. 12, 2021), <https://tinyurl.com/1a9xf9nn>.

receiving around \$13 billion from the federal government to help schools open safely, and allegedly devoting more than \$500 million of its own money to school districts, the State continues to bar the doors to California's schools.

The State's refusal to resume in-person education has deprived Plaintiffs' children, and hundreds of thousands of other children, of a basic minimum education. The State contends that such deprivation is constitutionally acceptable so long as there is a *conceivable* basis for closing schools. That toothless standard would allow the State to close schools across the State *every year* to prevent the spread of influenza. Indeed, the State could invoke that standard to close schools permanently to curb greenhouse gas pollution from cars and school buses, or for any other supposedly worthy goal. But education is far too important to be so casually sacrificed. Like other fundamental rights, including the right to pursue private education, the right to a basic minimum education is deeply rooted in our Nation's history and inherent in the concept of ordered liberty. Whether considered fundamental, quasi-fundamental, or merely important, the State should not be allowed to condemn children to ignorance and poverty (or worse) without satisfying *some form* of

heightened scrutiny. Because the State has utterly failed to demonstrate that the school closure orders are narrowly tailored to the State's asserted interest in slowing the spread of COVID-19, or that the orders have any rational scientific foundation, this Court should reverse and remand with instructions to enter summary judgment for Plaintiffs.

ARGUMENT

I. The State's Orders Prohibiting In-Person Education Violate Fundamental Rights Protected By The Due Process Clause

As Plaintiffs have demonstrated, children have a fundamental, or at least quasi-fundamental, right to a basic minimum education. The Supreme Court has also long recognized parents' fundamental right to control their children's education without state interference. The State's orders that prevented children from attending school for nearly a year infringe on both rights and thus must be subject to some form of heightened scrutiny, which the State cannot satisfy. The State's arguments to the contrary are based on a misreading of Supreme Court precedent and a misunderstanding about the nature of fundamental rights.

A. The Substantive Component of the Due Process Clause Protects the Right to a Basic Minimum Education

1. Both parties acknowledge that the Supreme Court has not yet recognized a full-fledged (as opposed to quasi-) “fundamental right to education.” Ans.Br.24; AOB.38.² The parties disagree, however, about whether recognition of such a right has been *foreclosed* by binding precedent. It has not.

The State contends that *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and *Plyler v. Doe*, 457 U.S. 202 (1982), preclude recognition of a fundamental right to a basic minimum education. Ans.Br.25–26. But *Rodriguez* did not involve a claim that the state had denied children “an opportunity to acquire ... basic minimal skills,” and the Court acknowledged that “some identifiable quantum of education” could be “constitutionally protected.” 411 U.S. at 36–37. In *Plyler*, where the state *did* deprive “children [of] a basic education,” the Court applied heightened scrutiny and invalidated the statute. 457 U.S. at 223. Neither of those decisions rejected the premise that the right to a basic minimum

² The parties also agree that “fundamental rights” are defined similarly for both due process and equal protection analyses. Ans.Br.24. n.7.

education is fundamental. As the Court later clarified in *Papasan v. Allain*, 478 U.S. 265 (1986), “*Rodriguez and Plyler*” did “not ... definitively settle[] the question[] whether a minimally adequate education is a fundamental right.” *Id.* at 285.

The State contends that, regardless of *Papasan*'s clear statement, the Court decisively resolved the status of the asserted right two years later in *Kadrmass v. Dickinson Public Schools*, 487 U.S. 450 (1988). Ans.Br.26. Not so. *Kadrmass* involved an equal protection challenge to a state statute allowing some school districts, but not others, to assess school busing fees. 487 U.S. at 452. Although the plaintiffs complained that the fee deprived them of “minimum access to education,” the Court recognized that such a right was not implicated because the affected child “continued to attend school during the time that she was denied access to the school bus.” *Id.* at 458. Thus there was no need to decide whether the Due Process Clause protects a fundamental right to a basic minimum education.

In declining to apply heightened scrutiny to the challenged state statute, the *Kadrmass* Court noted in passing that it had not yet “accepted the proposition that education is a ‘fundamental right.’” *Id.* But it acknowledged that a “heightened level of [judicial] scrutiny” applies in the

“unique circumstances” where a state completely denies children an education. *Id.* at 459. Because such circumstances were not present in *Kadrmas*, the Court declined to strike down the challenged statute, reasoning that since the “Constitution does not require [that busing] be provided at all” the state was not required to “offer it for free.” *Id.* at 462. In short, *Kadrmas* left the constitutional status of the right to a basic minimum education exactly where it stood after *Papasan*.

The State also contends that *this Court* has “held that there is no fundamental right” to a basic minimum education. Ans.Br.26–27. Wrong again. The State’s lead case, *Board of National Resources of State of Washington v. Brown*, 992 F.2d 937 (9th Cir. 1993), had nothing to do with the right to education. Instead, it involved a challenge to a federal statute restricting the export of unprocessed timber harvested from federal and state public lands. *Id.* at 941. In rejecting an *amicus*’s argument that heightened scrutiny applies because the case tangentially “involve[d] education,” the court cited *Papasan* and *Rodriguez* for the generic proposition that rational basis applies “in this context.” *Id.* at 944. Because neither *Papasan* nor *Rodriguez* rejected a fundamental right to a basic minimum education, this Court’s citation to these cases in *Board of*

National Resources—without any discussion—plainly does not foreclose the asserted right.

Payne v. Peninsula School District is similarly inapposite, as that case concerned exhaustion requirements under federal disability statutes. 653 F.3d 863, 81–76 (9th Cir. 2011) (en banc), *overruled on other grounds in Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) (en banc). The Court’s characterization of *Plyler*—in a parenthetical—as “finding no enforceable federal constitutional right to a public education” is not binding precedent.

Guadalupe Organization, Inc. v. Tempe Elementary School District Number 3, which predated *Papasan*, is even less helpful to the State. 587 F.2d 1022 (9th Cir. 1978). There, the Court acknowledged that education is an “important interest” but declined to mandate “bilingual-bicultural education.” *Id.* at 1026–27. Unlike in *Guadalupe*, Plaintiffs here are not seeking to control the public school curriculum—they are trying to obtain a basic minimum education for their children.

The two out-of-circuit cases the State relies on are also inapplicable. In *Brian B. v. Commonwealth of Pennsylvania Department of Education*, the court refused to extend *Plyler* to youths convicted as adults who were denied educational opportunities because they were “punished as a result

of their own illegal conduct.” 230 F.3d 582, 586 (3d Cir. 2000). And in *Calloway v. District of Columbia*, the court declined to follow *Plyler* because, in that case, “the doors to the public schools were completely closed,” whereas in *Calloway* “the doors to the schoolhouse remain[ed] open.” 216 F.3d 1, 116 (D.C. Cir. 2000). Here, the schoolhouse doors have been shut for nearly a year.

After relying on circuit precedent containing off-handed references to *Papasan*, *Rodriguez*, and *Plyler*, the State downplays *United States v. Harding*, 971 F.2d 410, (9th Cir. 1992), on ground that the case “was not itself an education case.” Ans.Br.29. But *Harding* unambiguously interpreted *Plyler* as standing for the proposition that “access to public education” is a “quasi-fundamental right[]” and that deprivations of that right are subject to “a heightened level of scrutiny.” *Id.* at 412 n.1. Even if that statement is not binding precedent, it is a correct reading of *Plyler* that this Court should follow.

2. The State does not dispute that the remedy Plaintiffs seek—*i.e.*, an injunction preventing the State from enforcing the school closure orders—“is straightforward and judicially manageable.” AOB.58. Nor does the State deny that education is necessary for virtually any form of civic,

economic, or social activity in American society. Likewise, the State does not contest that the right to a basic minimum education is “deeply rooted in this Nation’s history” and “implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The State nevertheless contends that this right is not fundamental because education “falls outside [the] zone of commonly recognized fundamental rights.” Ans.Br.31. According to the State, substantive due process protects only “against government interference with certain liberty or privacy interests.” Ans.Br.33. That is incorrect, as evidenced by the fact that the Court expressly left the question open in *Papasan*. 478 U.S. at 285.

The State’s cramped view of substantive due process is also at odds with *Obergefell v. Hodges*, 576 U.S. 644 (2015), where the Court held that same-sex couples have a fundamental right to marry. Significantly, the Court did not merely prohibit states from interfering with same-sex couples’ domestic relations; it also insisted that states extend the same “profound benefits” enjoyed by heterosexual couples to same-sex couples. *Id.* at 668. Indeed, the Court described marriage not as something private,

but as a “great public institution” and “building block of our national community.” *Id.* at 669 (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888))

Same-sex couples could not be excluded from this “public institution,” the Court held, but rather must be afforded the “expanding list of governmental rights, benefits, and responsibilities” the law “confer[s] on all married couples,” including “taxation; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.” *Id.* at 670. The Court held that this “constellation of benefits that the States have linked to marriage” could not be denied to same-sex couples. *Obergefell* thus decisively refutes the State’s contention that substantive due process never “guarantee[s] certain obligations to individuals by the State.” Ans.Br.33.

3. The State urges this Court not to recognize a “new fundamental right,” Ans.Br.32, but the historical evidence demonstrates that the right to a basic minimum education is as deeply rooted in our Nation’s history as any previously recognized fundamental right. *See* AOB.46–53. The State asserts that this history did not persuade the *Rodriguez* Court,

Ans.Br.35, but the plaintiffs in that case did not allege that “the system fail[ed] to provide ... the basic minimal skills” required for civic participation. 411 U.S. at 37. The Court thus had no reason to decide whether the Constitution protects the right to a basic minimum education. By contrast, that question is squarely presented here where hundreds of thousands of children have been completely deprived of *any* education by the State’s orders for nearly a year. *See, infra*, I.B.

Forced to admit that nearly every state constitution has recognized the right to an adequate education, the State contends that this historical fact is “not relevant to the *federal* constitutional inquiry.” Ans.Br.35 (emphasis in original). But the Supreme Court has repeatedly looked to state constitutional provisions and state judicial opinions when analyzing federal constitutional claims. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 600–03 (2008) (analyzing “state constitutional protections” enacted immediately after 1789); *Obergefell*, 576 U.S. at 663 (analyzing the opinions of the “highest courts of many States”); *McDonald v. City of Chicago*, 561 U.S. 742, 777–78 (2010) (analyzing state constitutions); *Town of Greece v. Galloway*, 572 U.S. 565, 609–10 (2014) (Thomas, J., concurring) (same). The pervasive state recognition of the right to a basic

minimum education at the time the Fourteenth Amendment was ratified confirms the fundamental nature of the right.

4. Echoing the district court, the State contends that the right to education is not fundamental because there is a “longstanding recognition of state sovereignty in the area of education” such that recognizing any right to education would “unsettle ‘local autonomy.’” Ans.Br.36 (citing *Fields v. Palmdale School District*, 427 F.3d 1197, 1206 (9th Cir. 2005)). The defendants in *Obergefell* made—and the Court rejected—a nearly identical argument. As the Court explained, although marriage is generally committed to the control of state and local authorities, someone excluded from this institution on the basis of race, child support arrears, prisoner status, or sexual orientation has a constitutional claim redressable in federal court. *Obergefell*, 576 U.S. at 664–65, 675–76 (citing cases). Indeed, nearly every time the Court has recognized a substantive due process right it has subverted “local autonomy” in areas historically under state control.³ That education has traditionally been the province of

³ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Roe v. Wade*, 410 U.S. 113, 147-50, 164 (1973); *Griswold v. Connecticut*, 318 U.S. 479, 485-86 (1965).

the states is thus no barrier to the recognition of a federal constitutional right to a basic minimum education.

This Court’s decision in *Fields v. Palmdale School District* is not to the contrary because there the Court held only that “parents have no due process or privacy right to override the determinations of public schools as to the information to which their children will be exposed while enrolled as students.” 427 F.3d at 1200. As Plaintiffs have explained, they are not seeking to control school curricula—they are trying to obtain an education for their children. Given the historical significance of education and its centrality to our National life and character, this Court should not hesitate to recognize a fundamental—or at least affirm the quasi-fundamental—right to a basic minimum education.

B. The State’s Orders Deprive Plaintiffs’ Children of a Basic Minimum Education And Cannot Survive Heightened Scrutiny

The State’s orders have prevented millions of children from attending school in person for nearly a year, consigning them to a “distance learning” regime that fails to provide a basic minimum education—and in many cases provides no education at all. Yet the State, pointing to the availability of remote learning and the Cohorting Guidance, contends that

the challenged orders do not even implicate the asserted right because they “do not completely deny any child access to education.” Ans.Br.30–31 & n.8. The record in this case, supported by an abundance of recent data, refutes that argument.

Although school districts across California have attempted to provide “distance learning,” these efforts have been a dismal failure, especially for minority children, students from low-income households, and those with special needs. *See* 2-ER-237–38 ¶19; 2-ER-254–55 ¶34; 3-ER-464–65 ¶8. A lack of digital access—“devices, internet access, and live contact with teachers”—prevents many students from participating in coursework altogether.⁴ For example, nearly one-third of high school students in the Los Angeles school system never once checked in with their teachers after schools closed last spring. 2-ER-272 ¶6. In one historically underserved Los Angeles community, less than 10% of a 128-student math class “attended” live virtual instruction. 3-ER-338–39 ¶15. Other schools reported similarly discouraging results. 3-ER-459 ¶8 (about 30 percent

⁴ *See* Emma Dorn, et al., *COVID-19 and learning loss—disparities grow and students need help*, McKinsey & Company (Dec. 8, 2020), <https://tinyurl.com/yg6o9p7t>.

attendance); 3-ER-463 ¶5 (participation dwindling from 42 percent down to 2 percent). As the CDC correctly recognized many months ago, “long breaks from in-person education” “are harmful to student learning.” 2-ER-237–38 ¶19.

Recent studies have confirmed the educational damage caused by school closures. A report by McKinsey & Company estimates that “the cumulative learning loss from the past year is substantial, especially in mathematics—with students on average likely to lose five to nine months of learning by the end of this school year.”⁵ Students of color could be six to 12 months behind, compared with four to eight months for white students.⁶ These educational setbacks will have lasting economic effects on children’s lives. The average K–12 student in the United States stands to lose \$61,000 to \$82,000 in lifetime earnings, or the equivalent of a year of full-time work, solely because of COVID-19–related school closures.⁷

⁵ Dorn, *supra*, note 4 (acknowledging that “most experts agree that without any live instruction, many students will struggle to progress”).

⁶ *Id.*

⁷ 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/1hckend3>.

These costs are substantially higher for black and Hispanic Americans.⁸ All this translates into an estimated loss of \$110 billion in annual earnings in the United States across the entire current K–12 cohort.⁹

In response to all this, the State assures the Court that it has developed “substantial resources and guidance to support” the improvement of distance learning. Ans.Br.31 n.8. But merely requiring school districts to draft “Continuity and Attendance Plans” that “meet certain thresholds” will not solve the problems inherent to remote education. *Id.* And though the State claims to have shoveled more than \$5 billion to school districts, it does not point to a single study, or even an encouraging anecdote, suggesting that school districts have learned how to spin straw into gold (or even into copper) over the past several months such that they can now deliver a basic minimum education over Zoom.

⁸ *Id.*

⁹ *Id.* (calculating that \$98.8 billion would be associated with loss of learning, and \$11.2 billion with the increase in the number of high-school dropouts). Globally, students are projected to lose \$10 trillion in labor earnings over their working lives as a result of school closures. See Joao Pedro Azevedo, et al., *Learning losses due to COVID-19 could add up to \$10 trillion*, The Brookings Institution (July 30, 2020), <https://tinyurl.com/4u327rk9>.

The State’s failure to demonstrate any meaningful improvement in the education provided is not surprising because even where children have access to technology, remote learning hinders children’s cognitive development. *See* AOB.11–13. In fact, prolonged screen time can even damage children’s brains. 2-ER-320 ¶8; 2-ER-322 ¶¶7,12. The State’s purported efforts to expand “access to devices and technology,” Ans.Br.31 n.8, simply ignores this well-developed body of scientific evidence.

The State also ignores the detrimental impact the challenged orders have on students’ emotional and mental health. Student suicides, attempted suicides, and suicidal ideation have skyrocketed since schools shut their doors. *See* ER 3-464–65 ¶8. Recent studies have directly linked these pathologies to school closings.¹⁰ This suicide epidemic recently pushed the Clark County school district in Las Vegas, Nevada, the fifth largest school district in the United States, towards reintroducing in-person learning—even though COVID-19 cases in the region were still

¹⁰ *See, e.g.*, Ryan M. Hill, et al., *Suicide Ideation and Attempts in a Pediatric Emergency Department Before and During COVID-19*, American Academy of Pediatrics (Dec. 16, 2020), <https://tinyurl.com/liaraz4e>; Jen Christensen, *Covid-19 school closings linked to increase in depression and suicide, study finds*, CNN (Sept. 12, 2020), <https://tinyurl.com/yy8uhl3b>.

rising at the time—after a spate of student suicides within the district.¹¹ Closer to home, the number of suicidal children in San Francisco has hit a record high, prompting the city to sue its school district to reopen.¹² As the city explained, there is clear “medical evidence ... that keeping public schools closed is catalyzing a mental health crisis among school-aged children in San Francisco.”¹³ Even the State concedes that “[t]here are [] immediate health-related benefits for children who are provided in-person instruction, including lower rates of anxiety and depression, ... and other positive indicators of public health and wellbeing.”¹⁴ Yet it continues to unconstitutionally withhold those benefits.

Although the Cohorting Guidance allows schools to provide limited in-person services to small groups of disabled students and those with special needs, the State itself has confirmed that the guidance does *not* allow schools in the purple tier to provide in-person instruction to the

¹¹ Erica L. Green, *Surge of Student Suicides Pushes Las Vegas Schools to Reopen*, The New York Times (Jan. 24, 2021), <https://tinyurl.com/3io7xhkb>.

¹² Jocelyn Gecker, *San Francisco sues schools, cites high of suicidal students*, Associated Press (Feb. 12, 2021), <https://tinyurl.com/5kygrm5l>.

¹³ *Id.*

¹⁴ *Rationale: California’s Safe Schools for All Plan*, Cal. Dep’t of Pub. Health (Dec. 30, 2020), <https://tinyurl.com/y9tbpa4x>.

general student body. 3-SER-611. The Cohorting Guidance thus provides no relief for children in schools where most students lack the ability to engage with remote learning. Nor does the availability of a waiver for TK-6 schools in purple-tier counties provide adequate relief. Ans.Br.30. Several Plaintiffs have children in grades 7 through 12, which are not eligible for a waiver, and the orders give local health officers total discretion to deny individual waivers or even refuse to issue waivers altogether.¹⁵

Notwithstanding the harms caused by distance learning, the State contends that the orders should not be subjected to heightened scrutiny because, unlike in *Plyler*, the orders supposedly infringe on Plaintiffs' ability to obtain an education only "temporarily." Ans.Br.30. That argument might have been plausible last Spring, but the State can hardly assert it with a straight face now, having barred kids from classrooms for an entire year. *See Goss v. Lopez*, 419 U.S. 565, 575–76 (1975) ("the total exclusion from the educational process for more than a trivial period" triggers due process review). And the State's insistence that schools cannot

¹⁵ *See, e.g., Many LA schools still have some steps to follow before reopening, ABC* (Feb. 17, 2021), <https://tinyurl.com/yd8cv52d>.

“operate as normal” “until there are significant levels of vaccination or the risks of transmission are otherwise abated,” Ans.Br.4, signals that children will not see the inside of a classroom until Fall 2021, at the earliest, absent this Court’s intervention.

Because the challenged orders are depriving Plaintiffs’ children and countless others of a basic minimum education, the State must satisfy strict scrutiny or some other form of heightened review. Yet the State does not even *attempt* to show how the orders could survive such scrutiny. Nor could the State possibly show that its orders are narrowly tailored given its own recent admission that schools—like other thousands of other “essential” businesses—can be reopened safely with certain common-sense precautions.¹⁶ Given that concession, the clear record in this case, and the fact that children urgently need relief from the State’s unconstitutional orders, the Court should reject the State’s suggestion to remand the case for further factfinding if it concludes that heightened scrutiny is appropriate. Ans.Br.47 n.10. Instead, it should apply the appropriate level of scrutiny and invalidate the State’s unconstitutional policy.

¹⁶ *Evidence Summary: TK-6 Schools and COVID-19 Transmission*, Cal. Dep’t of Pub. Health (Dec. 20, 2020), <https://tinyurl.com/y9cozrn7>.

II. Separately, The Challenged Orders Violate Parents' Well-Established Due Process Right to Send Their Children to Private School

In addition to depriving children of their fundamental right to a basic minimum education, the State's orders deprive parents of their fundamental right to choose their children's educational forum by shuttering private schools. *See* AOB.54.

The State contends that the orders are constitutional because they “only impact the mode of instruction on the exact same terms for both public and private schools.” Ans.Br.38. But that is exactly the type of statute the Supreme Court invalidated in *Meyer v. Nebraska*, 262 U.S. 390 (1923), where the state passed a law forbidding *any school*—public or private—from teaching a foreign language to children who had not yet completed eighth grade. *Id.* at 397. Although the statute did not prevent parents from sending their children to private school, the Court nevertheless struck down the law under the Due Process Clause because it interfered with “the power of parents to control the education of their own” children. *Id.* at 401. As this Court has recognized, *Meyer* and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), “evinced the principle that the state cannot prevent parents from choosing a specific educational

program—whether it be religious instruction at a private school or instruction in a foreign language.” *Fields*, 427 F.3d at 1205 (citation omitted); *see also Farrington v. T. Tokushige*, 11 F.2d 710, 713–14 (9th Cir. 1926) (“If pupils ... choose with the consent of their parents ... to sit together in a private institution of learning while receiving instruction which not in its nature harmful or dangerous to the public, no government, whether federal or state, can legally forbid their coming together, or being together temporarily for such an innocent purpose.”) (quoting *Berea College v. Kentucky*, 211 U.S. 45, 68 (1908)).

The challenged orders here violate the *Meyer-Pierce* principle because they prevent parents from choosing a specific educational program—in-person learning—that will foster their children’s overall well-being. The State notes that some of Plaintiffs’ children are receiving education *remotely* from various private schools. Ans.Br.38 (citing declarations). But these parents have all testified that they want their children to receive an *in-person* education—a choice the State’s orders have now frustrated for nearly a year. For example, after the disastrous experience with distance learning at their public school in the spring of 2020, Plaintiff Walsh and her husband pulled their children out of public

school and enrolled them in private school specifically so that they could obtain an *in-person* education. 3-ER-491–92 ¶¶2, 8. The State subsequently barred her children from receiving the education she had selected. *Id.* ¶9. Other Plaintiffs have similar stories.¹⁷ This case is thus on all fours with *Meyer*. Indeed, the constitutional violation here is more pernicious than in *Meyer* because the State is preventing parents from choosing an educational format that is demonstrably better for their children’s mental and emotional well-being, as well as their educational progress. In short, the challenged orders interfere with “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Parents for Privacy v. Barr*, 949 F.3d 1210, 1229 (9th Cir. 2020) (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

Contrary to the State’s accusation that Plaintiffs are claiming an “absolute right to a private school education exempt from a state’s health

¹⁷ *See, e.g.*, 3-ER-482–83 ¶¶3, 9 (Plaintiff Beaulieu’s daughter is taking classes at private school “via Zoom”); 3-ER-485–86¶¶ 2, 4–5 (Plaintiff Sephton wants to send her 4 ½ year old to private school in person but the challenged orders require distance learning); 3-ER-494 ¶6 (the private school where Plaintiff Hackett sends his son is barred from providing in-person education even though the school made “huge investments of effort and money to comply with the CDC and health directives”); 3-ER-507 ¶¶4, 8 (the “private, parochial” school where Plaintiff Onibokum sends her children has been forced to provide education “via Zoom”).

and safety laws,” Ans.Br.38–39, Plaintiffs recognize the State’s authority to protect public health and “public safety.” *See Farrington*, 11 F.2d at 713 (citation omitted). But where, as here, the State’s orders substantially interfere with parents’ ability to obtain the type of private school education they have selected for their children, the State must show that its restrictions satisfy strict scrutiny. As noted above, the State has not even attempted to carry that heavy burden. Nor could it.

Attempting to avoid the merits, the State contends that this due process argument is waived. Ans.Br.37. But Plaintiffs argued below that “parents have a right ‘to control the education of their’ children.” Dist. Ct. ECF No. 40 at 4 (quoting *Meyer*, 262 U.S. at 401). And this argument is closely related to Plaintiffs’ broader fundamental-rights argument, so it “bear[s] a fair resemblance to the case shaped by the parties.” *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1214 (9th Cir. 2020) (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1582 (2020)); *see also Williams v. Chater*, 110 F.3d 72 (9th Cir. 1997) (appellant “did not waive her argument that the ALJ failed to articulate clear and convincing reasons for rejecting” the doctor’s opinion because it “was encompassed within [appellant’s] more general challenge to the substantiality of the

evidence supporting the ALJ's decision, an issue contested throughout"). In all events, this Court has "discretion" to consider the argument because it is a "pure question of law" and the State was not prejudiced by Plaintiffs' assertion of the argument here. *Wanat*, 970 F.3d at 1214 (citation omitted). The Court should thus reach the merits of the argument and invalidate the challenged orders insofar as they prevent parents from obtaining the in-person education that they want for their children and that many private schools are willing to provide.

III. The Challenged Orders Cannot Satisfy Rational Basis Review Under the Due Process Clause or Equal Protection Clause

Even if the right to education is not fundamental or quasi-fundamental, the State still must demonstrate (1) that there is a rational basis for depriving children of a basic minimum education, and (2) that its discriminatory treatment of students in purple-tier counties seeking to attend class in-person has a rational basis.

A. The Orders Implicate the Equal Protection Clause

The State contends that Plaintiffs' equal protection challenge "fails at the threshold" because the orders do not treat similarly situated groups differently. Ans.Br.51. But the State is plainly treating children in purple-tier counties differently than children in other counties. The State makes

no effort to show that children in red-tier counties—who are allowed to attend school in person—are differently situated from children in purple-tier counties. Given the State’s admission that children are not at serious risk from the disease and are not a significant transmission vector, there is no rational basis for allowing schools in some counties to open while shuttering schools in other counties merely because of background infection levels.

The State also fails to show that there is any meaningful difference between childcare centers, which are allowed to provide in-person services, and schools, which are not. Although the State claims that childcare centers and schools are “distinctly different,” Ans.Br.52, the State itself places schools, day care programs, and camps under the same regulatory umbrella: they are all “supervised care environments,” as defined in the State’s Cohorting Guidance. 3-SER-606. The State asserts that children in camp and daycare “typically spend more time playing and are often outside and more distanced,” Ans.Br.52, but that *ipse dixit* finds no support in the record. On the contrary, childcare is often provided *on school campuses* and some children—including Plaintiffs’ children—have even participated in “distance learning” in their regular classrooms alongside other students

and supervised by adults—but not teachers. *See* 2-ER-51 ¶13; 2-ER-68 ¶ 5; 2-ER-177–78 ¶7; 3-ER-478–79 ¶¶13–14. The State’s decision to allow one type of student gathering while forbidding a nearly identical type of gathering—with the only difference being the absence of a credentialed teacher—plainly implicates the Equal Protection Clause.

The State contends that childcare programs pose a lower risk because they are subject to regulations limiting student-teacher ratios. *Ans.Br.53 n.11*. But nothing prevents the State from temporarily lowering the adult-to-child ratios in schools. That is precisely what the State has done with its Cohorting Guidance, which caps attendance at 14 children and two adults, 3-SER-606. To be sure, adjusting the teacher-to-student ratio could require the State to adopt a hybrid model in some schools, hire additional teachers, or adjust the school day, all of which costs money. But California has received almost *\$13 billion* from the federal government earmarked for education since March 2020.¹⁸ That funding specifically

¹⁸ *See* California Department of Education, *CARES Act Funding*, CARES Act Funding Overview Table (Feb. 12, 2021), <https://www.cde.ca.gov/fg/cr/caresact.asp>; Phyllis W. Jordan, *What Congressional Covid Funding Means for K-12 Schools*, FutureEd (Feb. 18, 2021), <https://tinyurl.com/livv7ehn>.

permits the State to, among other measures, “[e]xtend the instructional school year by,” “increase[e] the number of instructional minutes,” or “tak[e] any other action that increases the amount of instructional time or services provided to pupils based on their learning needs.”¹⁹ For its part, California allocated an additional \$500 million from the general fund for “learning loss” funding to local school districts.²⁰ Lack of funding is not the problem.

B. The Orders Must Satisfy Heightened Rational Basis Review

The State contends that it can indefinitely ban in-person learning in most counties and thus condemn millions of children to a deficient (or non-existent) education without providing a scintilla of scientific evidence to support its decision. Ans.Br.54 (citing *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1087 (9th Cir. 2015)). In other words, regardless of the dismal educational outcomes inflicted by the State’s policies, or the serious and sometimes fatal mental health problems caused by the selective prohibition on in-person learning, the State insists that this Court must

¹⁹ CARES Act Funding Overview Table.

²⁰ Cal. State Budget 2020–21, at 32 (K-12 Education), <https://tinyurl.com/13ui4e4v>.

defer so long as there is a “reasonably conceivable state of facts that could provide a rational basis for the classification.” Ans.Br.54 (quoting *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)). If that standard—which could justify permanent school closures at any time for almost any reason—sounds inappropriate in this context, it’s because it is.

The State’s orders, which are permanently injuring and, in some cases, killing California children, bear no resemblance to the federal statute in *Beach Communications* that regulated cable television facilities or the state law in *Angelotti Chiropractic* that imposed an activation fee on workers’ compensation liens. Here, the State is not allocating various economic burdens unequally—the context in which the “any conceivable basis” standard was born—but rather is depriving millions of children of their ability to learn and socialize with their peers. A more rigorous form of rational basis review—rational basis “with bite”—is thus warranted in this context.

This form of rational basis test “has been applied in ... situations where important but not fundamental rights *or* sensitive but not suspect classification are involved.” *Dairy v. Bonham*, 2013 WL 3829268, at *5 n.4 (N.D. Cal. July 23, 2013) (emphasis added). The State, focusing entirely on

the line of cases dealing with legislative animus, does not dispute that its orders infringe on “important” rights. *United States v. Pickard*, 100 F. Supp. 3d 981, 1005 (E.D. Cal. 2015). Nor could it, as the importance of education has been consistently recognized since before the founding of the Republic. *See* AOB.35. Accordingly, this Court should explore “the government’s actual motivation and justification” for the challenged orders. *Desoto CAB Co., Inc. v. Picker*, 228 F. Supp. 3d 950, 957 (N.D. Cal. 2017).

Moreover, even if the State’s actions evince callousness more than raw animus, a more “searching form of rational basis review,” *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014), is still appropriate because the challenged orders sacrifice the interests of the politically powerless—underprivileged children, Black and Latino children, and disabled children—for the benefit of the politically well connected.²¹ *See United States v. Carolene Products Co.*, 304 U.S. 144, 152

²¹ *See* Michael T. Hartney & Leslie K. Finger, *Politics, Markets, and Pandemics: Public Education’s Response to COVID-19*, Brown University, 1 (October 2020), <https://tinyurl.com/yb925d84> (“[P]olitics, far more than science, shaped school district decision-making”—and “partisanship and teacher union strength best explain how school boards approached reopening.”). One of the most powerful unions in California—the United

n.4 (1938) (calling for “more searching judicial scrutiny” of laws that disadvantage those outside “political processes”). Given this context, the Court should, at minimum, apply “active rational basis review,” in which “facts matter.” *United States v. Wilde*, 74 F. Supp. 3d 1092, 1096 (N.D. Cal. 2014). And here, the facts conclusively demonstrate that the orders do not have a rational basis.

C. The State’s Orders Are Irrational and Devastating

The State continues to insist that it is rational to close schools based on community transmission rates, but the scientific evidence contradicts the State’s assertion that it “ma[de] reasonable decisions based on information and evidence available at the time.” Ans.Br.50. The State has

Teachers Los Angeles—even issued its own set of demands to reopen, including “Medicare for all,” a “wealth tax,” “defund police,” “housing security,” and a “charter [school] moratorium.” UTLA, *The Same Storm, but Different Boats: The Safe and Equitable Conditions for Starting LAUSD in 2020-2021*, at 10-11 (July 2020), <https://tinyurl.com/ydyzzdc5>; see also *LA teachers union pushes back on CDC’s roadmap for reopening schools*, ABC (Feb. 13, 2021), <https://tinyurl.com/yczhnc3v> (While the “nation’s top public health agency said [] that in-person school can resume safely,” UTLA “reiterated” its own “path to safe reopening” with additional requirements). Teachers’ unions have significant political clout, spending “\$43.7 million in 2020” on “[President] Biden and Democratic Senate candidates.” Alyce McFadden, *Biden, teachers unions confront school reopening*, OpenSecrets.org (Feb. 9, 2021), <https://tinyurl.com/yb9sxsfp>. Governor Newsom has received “the most California Teachers Association money” over the past four years. Eric Ting, *These California politicians have taken the most money from the state’s biggest teacher’s union*, SFGate (Feb. 8, 2021), <https://tinyurl.com/yaw3qbq8>.

long been aware of evidence that children are unlikely to contract, transmit, or experience severe symptoms from SARS-CoV-2. *See* ECF No. 22, Ex.4 (citing studies “chosen for their rigor” that were available prior to September 2020). As the State recently admitted, there are certain easily adopted “[c]ore strategies” that “have been associated with low or no transmission, even in communities with high COVID-19 prevalence.” *Id.* These measures include “masks; physical distancing; small, stable groups; hand hygiene; ventilation; screening for symptoms or close contact; and asymptomatic testing.” *Id.*

These are the *exact same* mitigation strategies Plaintiffs’ experts identified and advocated more than six months ago. *See* 2-ER-51 ¶¶11–12, 240, 266–67. Indeed, it has long been recognized that the primary risk of transmission at schools is adult-to-adult transmission, and the State now concedes that such transmission can be dramatically reduced or eliminated by “ensuring places like teacher/staff breakrooms are well-controlled and [] effectively implementing core mitigation strategies for staff as well as students.” ECF No. 22, Ex.4; *see also* 2-ER-240 ¶29; 2-ER-267 ¶26. Because “adults are more likely to adhere to policies for mitigation strategies such as masking and physical distancing,” the State

has ample “control over in-school transmission” among adults. ECF No. 22, Ex.4.²² As of February 21, 2021, 109 countries and 46 states have opened their schools using some combination of these mitigation strategies.²³ Indeed, the CDC has recommended employing these strategies to open schools since last summer. *See* AOB.9 n.9.

The State did not suddenly discover this evidence—Plaintiffs’ experts provided it last Summer shortly after the State doubled down on its disastrous school-closure policy from the Spring. *See* 2-ER-50–51 ¶¶8–10; 2-ER-96–97 ¶¶3–6; 2-ER-218–21 ¶¶22–29; 2-ER-234–37 ¶¶12–16; 2-ER-244–45 ¶¶6–9; 2-ER-272 ¶5; 2-ER-273 ¶¶7–8; 2-ER-276–77 ¶¶5–10. Given the State’s recent concession that outbreaks at schools can be prevented even in communities with high rates of SARS-CoV-2 transmission, ECF No. 22, Exs.3–4—information that was widely

²² The State urges the Court to ignore its recent admissions and instead defer to its expert’s now-discredited assertions in the district court. Ans.Br.47–50. As Plaintiffs explain in their motion for judicial notice and reply in support of the motion, that argument is meritless. ECF Nos. 22, 28.

²³ *See* Data Story of Covid-19 & Schools, *Insights for Education* (last visited February 21, 2021), <https://infographic.education.org/insights/en/>; *Where Schools Are Reopening in the US*, CNN (updated Feb. 11, 2021), <https://www.cnn.com/interactive/2020/health/coronavirus-schools-reopening/>.

available last August—the State cannot hide behind its expert’s baseless speculation that “movement and mixing” at schools “would introduce substantial new risk of transmission of COVID-19.” 1-SER-11.

The State contends that the Cohorting Guidance solves any constitutional problems caused by its school closure orders, Ans.Br.45, but the State’s own FAQs make clear that the purpose of the Cohorting Guidance is *not* to provide an in-person education to all students. See 3-SER-611 (FAQ: “Is the intent to allow for in-person instruction for all students? No.”). Instead, “[t]he purpose of [the Cohorting Guidance] is to establish minimum parameters for providing specialized services, targeted services and support for students while schools are otherwise closed for in-person instruction.” *Id.* The State cannot argue in this Court that the Cohorting Guidance generally ensures that children have “a method and a means ... to receive in-person instruction, even in Tier 1 counties,” Ans.Br.45, while simultaneously warning the public that the Cohorting Guidance should *not* be used to end-run the school closure orders.

Because the challenged orders cannot survive even rational basis review under the appropriate standard, this Court should invalidate them under the Due Process Clause

CONCLUSION

California is now one of only four states mandating school closures on a statewide basis. It is high time for this unconstitutional child abuse to end. 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

HARMEET K. DHILLON
MARK P. MEUSER
DHILLON LAW GROUP INC.
177 Post Street, Suite 700
San Francisco, California 94108
Telephone: (415) 433-1700
Facsimile: (415) 520-6593

ROBERT E. DUNN
EIMER STAHL LLP
99 South Almaden Blvd.
Suite 662
San Jose, CA 95113
Telephone: (669) 231-8755

Counsel for Plaintiffs-Appellants

February 22, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because it contains 6,994 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

February 22, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by 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.

ROBERT E. DUNN
ROBERT E. DUNN