

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

**RESPONSE OF PLAINTIFFS-APPELLANTS TO
PETITION FOR REHEARING EN BANC**

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

JOSH DIXON
CENTER FOR AMERICAN LIBERTY
5100 Buckeystown Pike, Suite 250
Frederick, MD 21704
(703) 687-6212

ROBERT E. DUNN
EIMER STAHL LLP
99 South Almaden Blvd., Suite 642
San Jose, CA 95113
(408) 889-1650

RYAN J. WALSH
JOHN K. ADAMS
AMY C. MILLER
EIMER STAHL LLP
10 East Doty Street, Suite 80
Madison, WI 53703
(608) 441-5798

Counsel for Plaintiffs-Appellants

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INTRODUCTION

For nearly a year, California's Governor and public health officials (the "State") forced millions of children to stay home staring at computer screens, crippling them academically and sparking an epidemic of depression, anxiety, and suicide. This perverse social experiment was as needless as it was cruel because there was ample data last Summer showing that children are not at serious risk from COVID-19 and rarely transmit the disease to adults.

Plaintiffs in this case include parents whose children were denied an in-person education at the private schools they attend as a result of the State's school-closure orders. The panel, applying the Supreme Court's canonical decisions in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, held that the State's school-closure orders interfered with these Plaintiffs' constitutional right to obtain a private-school education for their children. And because the State did not (and could not) show that a total ban on in-person education was the least restrictive means of slowing the spread of COVID-19, the panel correctly concluded that the State's orders violated the Due Process Clause insofar as they applied to private-school Plaintiffs.

The State’s petition for rehearing en banc contends that this ruling somehow jeopardizes *every* state law that regulates private schools. But the panel’s narrow opinion vindicating parents’ long-established right to choose their children’s educational forum—a right that squarely encompasses the right to obtain that education *in-person*—does not give private schools immunity from state and local building codes or other statutes that regulate well outside the core of the *Meyer-Pierce* right.

The State also faults the panel for applying strict scrutiny instead of rational basis review. But *Meyer* and *Pierce* recognized the *fundamental right* of parents to direct the upbringing and education of their children, and it has long been settled “that ‘[g]overnmental actions that infringe upon a fundamental right receive strict scrutiny.’” Op.49 (quoting *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005)). The panel’s faithful application of that precedent does not warrant en banc review.

Nor does the panel’s case-specific application of two mootness exceptions justify en banc consideration. Indeed, given the State’s history of flip-flopping COVID-19 regulations and the uncertain health situation, the panel’s conclusion that the case was not moot was clearly correct.

STATEMENT

A. Factual Background

In March 2020, Governor Newsom declared a state of emergency and required schools across the state to close their doors, depriving students of an in-person education for the remainder of the 2019-2020 school year. This statewide experiment with “distance learning” was an unmitigated disaster. *See* 3-ER-337–39¶¶7, 15; 3-ER-463¶5. Prolonged isolation from teachers and classmates stunts children’s social and emotional development. 2-ER-273¶9; 2-ER-270¶7; 2-ER-252–53¶¶25–28. And staring at screens all day “produc[es] imaging results similar to the brains of people on cocaine and alcohol.” 2-ER-320¶8; *see also* 2-ER-270¶7; 2-ER-322–24¶¶7, 11; 3-ER-460¶10; 3-ER-464–65¶8; 3-ER-468¶5. Plaintiffs’ children, like countless others, suffered anxiety and depression, while their academic progress ground to a halt.¹

By the Summer of 2020, scientists had confirmed that none of this child abuse was necessary. It was well known that “[y]ounger, healthier

¹ *See, e.g.*, 2-ER-65¶¶5–6; 2-ER-68–69¶6; 2-ER-71¶4–7; 3-ER-474–75¶¶7–8, 14–15; 3-ER-478¶¶5–9; 3-ER-483–84¶¶7–11, 15–16; 3-ER-486¶5; 3-ER-491–92¶¶4–7; 3-ER-496¶¶5–6, 11–13; 3-ER-498–99¶¶4–11; 3-ER-502¶¶8–12; 3-ER-504–05¶¶3–6; 3-ER-507¶8; 3-ER-510¶¶8–15.

people [] have virtually no risk of serious illness from COVID-19.” 2-ER-234¶12; *see also* 2-ER-59¶14; 2-ER-226¶39; 2-ER-314¶4. And “[t]he overwhelming weight of scientific data suggest[ed] that the risk of transmission of the virus from younger people aged 20 and below to older people is small or negligible.” 2-ER-218¶22; *see also* 2-ER-269–70¶6; 2-ER-276–77¶¶6–10; 2-ER-218–20¶¶23–27; 2-ER-236–37¶16; 2-ER-96–97¶5. Based on that evidence, “[m]ost European nations ... reopened their schools” in the Summer of 2020, and “none ha[d] reported a meaningful increase in pediatric illness or measurable transmission from children to adults.” 2-ER-270¶6; *see also* 2-ER-316¶8; 2-ER-96–97¶5. Most states also allowed local decisionmakers to reopen schools without state interference. *See* App. Opening Br. (“AOB”) 18 & n.24.

But not California. On July 17, 2020, mere days after several large public-school districts announced—under pressure from teachers unions—that they would not reopen in the Fall, Governor Newsom issued an order that prohibited all schools from opening until their county was off the County Monitoring List for 14 days. 2-ER-135. The following month, the State issued the “Blueprint for a Safer Economy,” which assigned counties to one of four tiers and prohibited schools in Tier 1 from providing in-

person education subject to certain narrow exceptions. 3-SER-533–538. Although some counties moved out of Tier 1 last Fall, others—including Los Angeles County, where several of Plaintiffs’ children attend school—remained in Tier 1 through the Spring of 2021.

In December 2020, months before any vaccine was widely available, the State finally admitted that schools could be reopened safely.² The State acknowledged that “children get COVID-19 less frequently and have less severe disease compared to adults,” that “transmission [of COVID-19] among or from students is uncommon,”³ and that “[e]ven in communities with many COVID cases, we do not see outbreaks in schools.”⁴ In reaching these conclusions, the State relied on many of the *same studies* Plaintiffs’ experts had cited, as well as other studies published before the beginning of the 2020-2021 school year. *See* AOB 27–29 & nn.35, 38–40.

² *Governor Newsom Unveils California’s Safe Schools for All Plan*, Off. of Gov. Gavin Newsom (Dec. 30, 2020), <https://tinyurl.com/y7ugmwj6>.

³ *Evidence Summary: TK-6 Schools and COVID-19 Transmission*, Cal. Dep’t of Pub. Health (Dec. 30, 2020), <https://tinyurl.com/nvpfhuyk> (updated Apr. 16, 2021).

⁴ *Rationale: California’s Safe Schools for All Plan*, Cal. Dep’t of Pub. Health (Dec. 30, 2020), <https://tinyurl.com/y9tbpa4x>.

B. Procedural History

Plaintiffs—parents of children attending public and private schools—commenced this action four days after Governor Newsom issued his school-closure order. Plaintiffs asserted claims under the Due Process and Equal Protection Clauses and various disability-rights statutes. Plaintiffs filed an application for TRO on August 3, 2020, supported by declarations explaining that the State’s forced “distance learning” model was depriving their children of even a basic minimum education. 3-ER-473–511. The application was also supported by numerous expert declarations establishing the harms inflicted by school closures and setting forth the scientific evidence showing that schools could be opened safely. 2-ER-210–324; 3-ER-326–472.

In response, the State provided a declaration from a public health official who opined, without citing a single study, that “[i]t is possible that in the school setting, as in other settings, asymptomatic transmission may occur.” 2-ER-110¶26. The State did not rebut any of the Plaintiffs’ assertions regarding the academic shortcomings of distance learning or the mental and emotional harms it causes.

The district court denied the TRO and ordered the parties to brief whether summary judgment should be granted *sua sponte* to the State. 2-ER-61–63. In response, Plaintiffs argued, *inter alia*, that “parents have a right ‘to control the education of their’ children” and that the State’s decision to close all schools—including private schools—violated this right because it deprived children of a basic minimum education. Dist. Ct. ECF 40 at 4 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923)).

The district court granted summary judgment to the State on all claims. Plaintiffs immediately appealed and successfully moved to expedite. The panel affirmed in part and reversed in part. Addressing its own jurisdiction, the panel held that even though Plaintiffs’ counties had moved out of Tier 1, the claims were justiciable under two exceptions to mootness. Op.24. Turning to the merits, the panel recognized that the private-school Plaintiffs’ claims “*necessarily* rested on the *Meyer-Pierce* fundamental right of parents to choose their children’s educational forum” because those parents were accusing the State of unconstitutionally *interfering* with their children’s ability to receive a basic minimum education. *Id.* at 37-38. The panel concluded that the State’s decision to close private schools violated those parents’ “fundamental right” to “direct

the education and upbringing of [their] children.” *Id.* at 42. Judge Hurwitz dissented.

REASONS FOR DENYING THE PETITION

I. The Panel Faithfully Applied Binding Precedent.

The State contends en banc rehearing is necessary because the panel recognized a “novel” substantive due process right that would open a Pandora’s Box of challenges to “generally applicable laws” regulating schools. Pet.11. But the panel’s opinion broke no new doctrinal ground. On the contrary, it flowed directly from the Supreme Court’s seminal decisions in *Meyer* and *Pierce* upholding parents’ fundamental right to control their children’s education, and left undisturbed the State’s ability to regulate issues tangential to education, like “disability access” and “building safety.” *Id.* Nor did the panel do anything novel when it applied strict scrutiny to the school-closure orders, as that demanding standard *always* applies when the government infringes on fundamental rights. Because the panel’s opinion faithfully applied binding precedent, en banc consideration is unwarranted.

A. For nearly a century, the Supreme Court has “recognized the fundamental right of parents to make decisions concerning the care,

custody, and control of their children,” including “the right ‘to direct the upbringing and education of children under their control.’” *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925)). This right—“perhaps the oldest of the fundamental liberty interests recognized” by the Court, *id.* at 65—not only protects parents’ freedom to send their child to private school, *Pierce*, 268 U.S. at 535, but also prevents the government from “materially” interfering with parents’ “control” over their children’s education, *Meyer*, 262 U.S. at 401; *see also Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972).

Applying this longstanding precedent, the panel correctly held that the State’s orders banning in-person education “deprived the private-school Plaintiffs of the core aspect of the *Meyer-Pierce* right.” Op.45. After all, “[i]t is hard to imagine a more direct interference with the ‘choice of the educational *forum* itself’ than a prohibition upon in-person instruction in that chosen forum.” Op.46 (quoting *Fields*, 427 F.3d at 1207). Indeed, for some Plaintiffs the opportunity for in-person education was the *main reason* to send their children to private school. *See* 2-ER-65¶4; 3-ER-492¶8. The State’s orders forbidding children “to sit together in a private institution of learning while receiving instruction” plainly implicates the

core of the *Meyer-Pierce* right. *Farrington v. Tokushige*, 11 F.2d 710, 713 (9th Cir. 1926) (quoting *Berea Coll. v. Kentucky*, 211 U.S. 45, 68 (1908) (Harlan, J., dissenting)).

The State contends that *Meyer-Pierce* protects nothing more than the right to *enroll* a child in private school, and that the panel conferred a “novel, substantive due process right to in-person private school instruction.” Pet.11-12. But the State’s “narrow” definition of the right is “refuted by *Meyer* itself.” Op.43. In *Meyer*, the state forbade “the teaching in school of any subject except in English.” 262 U.S. at 400. Although that statute applied equally to all schools and did not bar parents from *enrolling* their children in private schools, the Court nevertheless struck it down as an unconstitutional attempt to interfere “with the power of parents to control the education of their own.” *Id.* at 401.

The panel’s opinion is also consistent with *Pierce*, which “underscored the ‘right of parents to choose schools where their children will receive appropriate mental and religious training.’” Op.48 (quoting *Pierce*, 268 U.S. at 532). As Plaintiffs have demonstrated, “distance learning” is *damaging* to children’s mental development. *See* 2-ER-238¶20; 2-ER-252–53¶¶25–26. And religious education, which often

involves rituals and character formation, plainly requires in-person training. If this Court were to adopt the State's cramped view of the right, the government could effectively force parents to abandon private schools by making it impossible for those schools to fulfill their missions. The State's contention that no fundamental rights are implicated by its orders forcing private schools to adopt such a defective instructional model is thus nothing less than an attack on the *Meyer-Pierce* right itself. But the State's frustration with existing Supreme Court precedent does not justify further proceedings in *this* Court.

To be sure, the Supreme Court has cautioned that private schools are not exempt from all reasonable state regulations. *Pierce* itself expressly acknowledged "the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils[.]" 268 U.S. at 534. Accordingly, nothing in the Constitution prevents the State from ensuring, for example, that private school classrooms accommodate wheelchair access. But such innocuous regulations bear no resemblance to the orders at issue here, which eviscerated the ability of private schools to deliver the very education Plaintiffs sought for their children.

The cases the State cites—all but one of which involved parental efforts to control the curriculum at *public schools*—are not to the contrary. In *Fields*, this Court rejected parents’ attempt to control the teaching of sexual topics in public school, reasoning that *Meyer-Pierce* does not encompass “a broad-based right to restrict the flow of information in the public schools.” 427 F.3d at 1205 (quoting *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995) (emphasis omitted)). And in *Swanson v. Guthrie Independent Scholl District*, 135 F.3d 694, 700 (10th Cir. 1998), the court held that *Meyer-Pierce* does not guarantee parents the right “to send their children to public school on a part-time basis, and to pick and choose which courses their children will take from the public school.” Those cases do not suggest that the State may forbid *private schools* from meeting in-person.

In *Ohio Association of Independent Schools v. Goff*, 92 F.3d 419, 424 (6th Cir. 1996), the court rejected a private-school challenge to statewide testing requirements in certain core subjects. However, the court “acknowledge[d] that in some situations, state-imposed testing requirements could be so intrusive that they could potentially displace private schools’ discretion to fashion their own educational programs.” *Id.*

The State's prohibition on in-person instruction plainly displaced such discretion here and thus "deprive[d Plaintiffs] of a core right ... protected under *Meyer* and *Pierce*." Op.49.

B. As the panel noted, although *Meyer* and *Pierce* were decided before the Court had yet articulated the various levels of scrutiny applicable to due process and equal protection challenges, the "Court has repeatedly characterized the *Meyer-Pierce* right as being 'fundamental.'" Op.49 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). In deciding on the proper standard of review, the panel followed this Court's precedent holding that "[g]overnmental actions that infringe upon a fundamental right receive strict scrutiny." *Id.* (quoting *Fields*, 427 F.3d at 1208).

The State does not argue that the challenged orders survive that demanding standard, nor could it, but instead contends that rational basis review is the proper standard. Pet.13-14. That is incorrect. The State points to *Meyer*, but there the Court explicitly recognized that the state had a rational basis for seeking to require instruction in English: it sought "to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters." 262 U.S. at 402. The Court nevertheless struck down the statute, holding that "[n]o emergency

ha[d] arisen which renders knowledge by a child of some language other than English *so clearly harmful as to justify* its inhibition with the consequent infringement of rights long freely enjoyed.” *Id.* at 403 (emphasis added). Similarly, in *Pierce*, the Court struck down the challenged law because “nothing in the present record . . . indicate[d] that [the private schools] have failed to discharge their obligations to patrons, students, and or the state,” and there were “no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.” 268 U.S. at 535. That is the language of heightened scrutiny, not rational basis.

Runyon v. McCrary, 427 U.S. 160 (1976)—which upheld the constitutionality of 42 U.S.C. § 1981, as applied to bar racial discrimination at private schools—is not to the contrary. There, although the Court recognized parents’ right to “select private schools that offer specialized instruction,” it held that Congress’s “exercise of federal legislative power under § 2 of the Thirteenth Amendment [was] fully consistent with *Meyer*, *Pierce*,” and their progeny. *Id.* at 179. But there are no dueling constitutional provisions here, and this case does not involve *federal* efforts to integrate schools. *Runyon* does not suggest that a *state*

can prohibit children from attending private school merely by proffering a rational basis without any factual support.

Combs v. Homer-Center School District, 540 F.3d 231 (3d Cir. 2008), cuts *against* the State’s position because there the court explicitly recognized the “distinction between actions that strike at the heart of parental decision-making authority on matters of the greatest importance”—such as the school-closure orders here—“and other actions ... that are not of constitutional dimension”—such as building codes and disability access regulations. *Id.* at 249.⁵

In short, it was the State’s draconian school-closure orders that were radical, not the panel’s opinion.

II. The Panel’s Proper Application of Mootness Doctrine Does Not Warrant En Banc Consideration

This Court does not typically convene en banc to flyspeck mootness determinations, and it should not do so here. The State has not identified

⁵ The State cites a few cases from other circuits that applied rational basis to various parental-rights claims, Pet.13 n.14, but none involved statutes burdening the core *Meyer-Pierce* right. See *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996) (challenge to mandatory community-service program at public school); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996) (same); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001) (challenge to public-school uniform policy.)

any precedent from this Court that conflicts with the panel’s decision. Nor has it shown that the mootness ruling involves a “question of exceptional importance.” Fed. R. App. P. 35(a). Instead, the State contends that the panel’s application of two well-established exceptions to mootness could somehow open the door to improper merits rulings in *other* pending cases. But the panel’s holding does not control the outcome in those cases because “[the] mootness inquiry hinges upon ... specifics,” and the pending cases involve different plaintiffs challenging different orders under different legal theories. *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128 n.2 (9th Cir. 2005); *see also Crandall v. Starbucks Corp.*, 249 F. Supp. 3d 1087, 1107 (N.D. Cal. 2017) (“[M]ootness requires a fact-specific inquiry.”); Wright & Miller, 13C Fed. Prac. & Proc. Juris. § 3533.3 (3d ed.) (“A wise answer to [the mootness] question is always bound by the facts of the specific case.”).

In all events, en banc consideration is unnecessary because the panel faithfully applied binding precedent, including the Supreme Court’s recent decision in *Diocese of Brooklyn*, in holding that Plaintiffs’ claims were justiciable under both the “voluntary cessation” and “capable of repetition yet evading review” exceptions.

A. The State contends that “voluntary cessation” does not apply because it did not change its policy—the counties in which the schools operate were simply reclassified under the Blueprint. Pet.16. But as the panel recognized, the Blueprint can “hardly be treated as if it were an independently determined system that limited the Governor’s discretion and ensured that the challenged restrictions would never be reinstated.” Op.25 (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68–69 (2020)). And the State’s assurances that it could not “reasonably be expected” to ban in-person learning again, Pet.16–17, are cold comfort when coming from “officials with a track record of ‘moving the goalposts’” who “retain authority to reinstate those heightened restrictions at any time.” *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (citation omitted). Indeed, while this litigation was pending, the State “tightened Covid-related school restrictions as they [] deemed warranted.” Op.26. And it can do so again “without having to comply with any particular procedural restraints” given the ongoing state of emergency. Op.27.⁶

⁶ The State’s amicus contends that *Diocese of Brooklyn* is distinguishable because “regulations in that case were bi-directional” whereas here the Governor would have to issue “new rules” to close schools. County.Br.15. But the Court reached the merits in *Diocese of Brooklyn* precisely because

The State notes that the Governor has let lapse “a temporary deviation” from the ordinary policy of tying school funding to in-person education. Pet.17. But the existence of that “longstanding” policy did not prevent the Governor from closing schools in March 2020 and would not prevent him from doing so tomorrow. Op.22 n.12.

Nor are school closures off the table as a matter of public policy. The vaccines may “check the virus’s threat,” Pet.17, but only 65.6% of eligible Californians are fully vaccinated.⁷ And according to the CDC, the Delta variant of COVID-19 is highly transmissible “even by fully vaccinated people.”⁸ Infections and hospitalizations in California have recently exceeded the levels reached in the Summer of 2020 when the Governor issued the challenged orders,⁹ and teachers unions across the country are

the Governor’s unfettered discretion left him free to “reinstat[e] the challenged restrictions tomorrow.” 141 S. Ct. at 72 (Gorsuch, J, concurring). Similarly, so long as a state of emergency exists in California, “nothing would prevent” the Governor from reimposing school closures. *Id.*

⁷ <https://covid19.ca.gov/vaccination-progress-data/> (August 26, 2021).

⁸ <https://www.npr.org/2021/07/30/1022909501/dr-anthony-fauci-talks-about-alarming-new-data-on-breakthrough-infections>.

⁹ See Tracking COVID-19 in California, CDPH, <https://covid19.ca.gov/state-dashboard/>.

once again urging school shutdowns.¹⁰ If the Governor survives the recall election in September, he may cave in the face of similar pressure, just as he did last Summer. The Panel’s conclusion that the public-health situation was not sufficiently rosy “to eliminate any reasonable possibility of a future school-closure order,” Op.28, was correct.

B. The “capable of repetition” exception also applies here. Despite “mov[ing] with dispatch throughout this litigation,” “it took seven months from the filing of [Plaintiffs’] First Amended Complaint in July 2020 for the matter to be presented to this court for decision on the merits.” Op.29. And though the case was unquestionably live when it was argued in early March, the panel did not issue its opinion until late July, nearly a year after the complaint was filed. Any “future case” involving a school-closure order “would likely suffer the same fate.” *Id.*

The State’s reliance on *Memphis A. Philip Randolph Institute v. Hargett*, 2 F.4th 548 (6th Cir. 2021), is misplaced because there the individual that provided associational standing for the challenge to

¹⁰See, e.g., Jordan Davidson, *Chicago Teachers Union Threatens Shutdowns Over Delta Variant*, The Federalist, <https://thefederalist.com/2021/08/05/chicago-teachers-union-threatens-school-shutdowns-over-delta-variant/>

absentee voting laws was no longer eligible to vote absentee. *Id.* at 558. Here, by contrast, the State does not dispute that Plaintiffs would be impacted by any renewed school-closure orders. *Hawse v. Page*, 2021 WL 3234293 (8th Cir. July 30, 2021), is also inapposite because there the “Supreme Court’s intervening pronouncements on equal treatment between religious exercise and religious activity” effectively precluded defendant from reimposing the challenged restrictions. *Id.* at *7. There is no comparable Supreme Court decision here to dissuade the Governor from closing schools for a third academic year.

The State’s amicus argues that this dispute is not capable of repetition because the “factual situation” would be different this year than last. County.Br.10. But the relevant factual situation likely to recur is the Governor issuing a school-closure order, without any supporting scientific evidence, that prevents Plaintiffs’ children from attending school in person. The County notes that the *public health situation* might be different this time because of “vaccines” or “other therapies,” *id.*, but the State has contended throughout this litigation that such facts are irrelevant because its orders are subject only to rational basis review. The only reason that changed facts might lead to a different result in the future

is *because* the panel correctly decided to reach the merits here. But for that decision, the dispute in any future case would mirror this one.

Accordingly, notwithstanding the State's alleged "commitment to in-person instruction," Pet.19, the panel did not err in concluding that there was at least a reasonable expectation that this dispute could recur.

CONCLUSION

The Court should deny the petition for rehearing en banc.

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

JOSH DIXON
CENTER FOR AMERICAN
LIBERTY
5100 Buckeystown Pike, Suite 250
Frederick, MD 21704
(703) 687-6212

ROBERT E. DUNN
EIMER STAHL LLP
99 South Almaden Blvd.
Suite 642
San Jose, CA 95113
Telephone: (408) 889-1650

RYAN J. WALSH
JOHN K. ADAMS
AMY C. MILLER
EIMER STAHL LLP
10 East Doty Street
Suite 800
Madison, WI 53703
(608) 441-5798

Counsel for Plaintiffs-Appellants

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form11instructions.pdf>

9th Cir. Case Number(s)

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

Prepared in a format, typeface, and type style that complies with Fed. R. App.

P. 32(a)(4)-(6) and **contains the following number of words:** .

(Petitions and answers must not exceed 4,200 words)

OR

In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 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.

/s/ ROBERT E. DUNN
ROBERT E. DUNN