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

20 **MATTHEW BRACH**, an individual,
21 *et al.*,

22 Plaintiffs,
23 v.

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

27 Defendants.
28

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

**MEMORANDUM OF POINTS AND
AUTHORITY IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Judge: Hon. Dean D. Pregerson

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 With the stroke of a pen, Governor Gavin Newsom has closed all public
4 schools, charter schools, and private schools in 37 of California’s 58 counties,
5 consigning *millions* of students and their families to another semester (and perhaps
6 even a year or more) of so-called “distance learning,” which has proven to be an
7 utter failure. The Governor’s one-size-fits-all approach has upended the carefully
8 tailored plans that teachers and administrators have developed to reopen schools
9 this fall safely and effectively.

10 The effects of this ham-handed policy are as predictable as they are tragic.
11 Thousands of students will essentially drop out of school, whether because they
12 lack the technological resources to engage with “online learning” or because their
13 parents cannot assist them. Thousands more will fall behind academically despite
14 their efforts to remain engaged, because teachers cannot provide the individualized
15 attention they need. And for some students, the forced seclusion will have even
16 more dire consequences, including domestic abuse, depression, hunger, and
17 suicide. The order will also inflict collateral damage on families, as parents are
18 forced to quit their jobs or scale back their hours to supervise their children’s
19 “distance learning.” While affluent families can likely avoid the worst of these
20 problems by hiring tutors, forming educational “pods” with other families, or home
21 schooling, the “distance learning” regime will inflict massive harm on students and
22 parents from disadvantaged backgrounds, many of whom are Black and Latino, as
23 well as those with learning disabilities and special needs. Experts estimate that the
24 Governor’s decision could set the state’s most vulnerable students back a year or
25 more, and some may never recover.

26 Given these enormous state-wide disruptions, one would expect the order to
27 be based on scientific evidence showing that opening schools poses an
28 unacceptable risk of spreading COVID-19. But it is not. On the contrary, the
scientific data has proven that the risks of COVID-19 to school-age children are

1 negligible, as explained in the numerous expert declarations submitted by some of
2 the nation's leading epidemiologists and physicians. Indeed, *not one person* under
3 the age of 18 has died of COVID-19 in California. The disease ravaging our
4 nation's elderly is far less deadly to children than seasonal influenza. Scientists
5 have also discovered that children hardly ever transmit the virus to adults. The
6 CDC recently published a report based on data from South Korea, which found that
7 less than 2% of new transmissions detected were attributed to those between 0 to
8 20 years old. Less than 1% of new transmissions were attributed to those under 10,
9 the population most in need of in-person education. The CDC has thus urged the
10 nation's schools to resume in-person education this fall. Dozens of other countries
11 have already reopened their schools without social distancing, mask wearing, or
12 other protective measures—yet none of these countries has reported an increase in
13 new cases resulting from student-to-student or student-to-teacher contact. In short,
14 the Governor's drastic and devastating moratorium on in-person education is
15 completely at odds with everything we now know about COVID-19.

16 At best, the Governor's order is irrational; at worst, it is downright
17 dangerous. This Court should issue a preliminary injunction because the
18 Governor's order violates the Fourteenth Amendment of the United States
19 Constitution, which protects Californians' fundamental (or, at least, quasi-
20 fundamental) right to a basic minimum education and forbids states from enforcing
21 laws—especially laws purporting to shutter school-house doors—that are utterly
22 irrational. The order also violates the Constitution's guarantee of equal protection
23 because while it bars in-person education at schools in counties on the state's
24 monitoring list (there are currently 37 such counties) it allows in-person education
25 at schools in every other county. Whatever level of scrutiny applies to this unequal
26 treatment, the order fails it, because barring in-person education has no rational
27 relationship to the state's interest in slowing the spread of COVID-19. Nor is it
28 narrowly tailored to further any compelling state interest related to public health.
The order also tramples the rights provided by Title VI of the Civil Rights Act of

1 1964 and other federal laws, which guarantee access to education for students with
2 disabilities and prohibit state action having a disparate impact on racial minorities,
3 as closing schools certainly will.

4 The remaining preliminary-injunction factors overwhelmingly favor
5 Plaintiffs, who represent a diverse, cross-section of the millions of families and
6 students most harmed by the Governor’s order. For example, Plaintiff Jess Petrilla
7 noticed a significant decline in his kindergarten son’s discipline and engagement
8 after his school transitioned to distance learning. His wife was forced to take time
9 off work to oversee her son’s education, and the Petrillas are concerned that their
10 son is going to fall farther behind academically if school is not opened in the fall.
11 Plaintiff Christine Ruiz has two sons in public school who have been diagnosed
12 with autism. Her 15-year old son has an Individual Education Program (“IEP”)
13 mandated by law, but he received none of the services required by the IEP when
14 schools closed in March. Given the individualized attention required by the IEP,
15 the school is unlikely to provide any of those services this fall if the Governor’s
16 ban on in-person education is upheld. Plaintiff Marianne Bema, originally from
17 Cameroon, is a single mother of three school-aged children. Ms. Bema lacks a solid
18 internet connection and faces a language barrier that makes it difficult for her
19 provide the support her children need in the absence of in-person schooling. She is
20 concerned that her children will not progress academically this year if their school
21 remains shuttered. Similar struggles are shared by all of the Plaintiffs, and by
22 millions of other California families.

23 The interests of the public demand that the order be enjoined and that the
24 choice regarding whether and how to open schools safely be returned to the
25 counties, which are more than up to the task of balancing public health against the
26 need to educate our children.

27
28 ///

1 **RELEVANT FACTUAL BACKGROUND**

2 **I. Governor Newsom Shuttters California’s Schools in the Spring, Causing**
3 **Extreme Hardship for All Students, but Especially for Poor, Minority,**
4 **and Disabled Students**

5 On March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency
6 as a result of the threat of COVID-19.¹ On March 19, 2020, Governor Newsom
7 issued Executive Order N-33-20, which provided that “all residents are directed to
8 immediately heed the current State public health directives.”² The state public health
9 directive, in turn, required “all individuals living in the State of California to stay
10 home or at their place of residence except as needed to maintain continuity of
11 operations of the federal critical infrastructure sectors ...”. *Id.* The public health
12 directive provided that its directives “shall stay in effect until further notice.” *Id.* On
13 or about May 4, 2020, Governor Newsom issued Executive Order N-60-20 in which
14 he ordered “All residents are directed to continue to obey State public health
15 directives, as made available at [https://covid19.ca.gov/stay-home-except-for-essential](https://covid19.ca.gov/stay-home-except-for-essential-needs/)
16 [needs/](https://covid19.ca.gov/stay-home-except-for-essential-needs/) and elsewhere as the State Public Health Officer may provide.” *Id.* Governor
17 Newsom’s Order directly conflicts with substantial evidence that closing schools is
18 *more* dangerous to students than allowing students to return to school this fall.

19 The World Health Organization (WHO) and US Centers for Disease Control
20 (CDC) have each issued guidance on school opening emphasize that school opening
21 decisions should be based on the “Current understanding about COVID-19
22 transmission and severity in children”, the “Local situation and epidemiology of
23 COVID-19 where the school(s) are located,” and the “School setting and ability to
24 maintain COVID-19 prevention and control measure”. Bhattacharya Decl. ¶¶16-18.
25 The WHO guidance explicitly recommends the consideration of “what harm might

26 ¹ Executive Dept. of the State of California, Executive Order N-33-20, March 19,
27 2020, available as of the date of filing: [https://www.gov.ca.gov/wp-](https://www.gov.ca.gov/wp-content/uploads/2020/04/N-54-20-COVID-19-text-4.22.20.pdf)
28 [content/uploads/2020/04/N-54-20-COVID-19-text-4.22.20.pdf](https://www.gov.ca.gov/wp-content/uploads/2020/04/N-54-20-COVID-19-text-4.22.20.pdf).

² Executive Dept. of the State of California, Executive Order N-33-20, March 19,
2020, available as of the date of filing: [https://covid19.ca.gov/img/Executive-Order-](https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf)
[N-33-20.pdf](https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf).

1 occur due to school closure (e.g. risk of non-return to school, widening disparity in
2 educational attainment, limited access to meals, domestic violence aggravated by
3 economic uncertainties etc.), and the need to maintain schools at least partially open
4 for children whose caregivers are ‘key workers’ for the country.” *Id.* Likewise, the
5 CDC guidance suggests keeping schools open even if there is moderate community
6 spread of SARS-CoV-2 infection, with school closures limited only to communities
7 with “substantial” community spread. *Id.* ¶18.

8 The CDC estimate of the population-wide death rate of COVID-19 is 0.26%.
9 Lyons-Weiler Decl. ¶4. But the vast majority of this risk is in the elderly and in
10 people whose overall health has been significantly deteriorated prior to infection
11 (e.g., individuals with pre-existing chronic pulmonary illness, whose death rate is
12 6.3%, cardiovascular illness (10.5%), high blood pressure (6%), adults with diabetes
13 (7.3%), and cancer (5.6%)). *Id.* Even these rates—which are from the earliest reports
14 in the outbreak, from Wuhan City in Hubei Province, China—are massively inflated
15 because they are only symptomatic case fatality rates, not infection case fatality rates.
16 *Id.*

17 Unlike pneumonia from influenza viruses, in which the risk of the death to
18 children is increased, COVID-19 death rates are effectively zero for children aged 0-
19 10 and adolescents ages 11-20. *Id.* ¶6. Early data from South Korea, for example,
20 reported zero deaths for children aged 0 to 20 – the same rate indicated by data from
21 Italy. The CDC reports a total of 226 COVID-19 deaths in persons under 24 across
22 the US, out of a total of 26,808 deaths for that age group over the same time period
23 from all causes. Thus, COVID-19 currently accounts for 0.84% of all deaths in
24 people aged 0 to 24 year. *Id.* This does not come close to meeting the criterion used
25 to classify infectious diseases as an “epidemic” (between 6 and 7%). *Id.* By
26 comparison, influenza and pneumonia not attributed to COVID-19 led to 966 deaths
27 over the same time period in persons aged 0 to 24. *Id.* Despite this evidence, the
28 Governor’s stay-at-home order requires all California schools to close their doors

1 only provide online learning; a woefully inadequate form of “education”, especially
2 for minority and disabled students.

3 “[R]eopening of schools is necessary to prevent children’s brain development
4 from being significantly inhibited. Addison Decl. ¶5. “Developing brains need guided
5 stimulation for effective neural pathways to be established [as] [t]hese pathways
6 [known as ‘synapses’] are communication sites where neurons pass nerve impulses
7 among themselves.” *Id.* ¶7. “This process facilitates learning [and] [e]xperiences that
8 are provided through the back and forth interactions among teachers, students, and
9 peers determine whether these synapses are strengthened or weakened. *Id.* If these
10 experiences are inconsistent or interrupted, synaptic pruning will occur and impede
11 ultimate development. Forcing children to stare at computer screens for extended
12 periods of time has detrimental effects on children’s brains; so much so that
13 prolonged screen time produces imaging results similar to the brains of people on
14 cocaine and alcohol. Sutton Decl. ¶8.

15 Digital learning overall has proven to be far less effective than in-person
16 learning. A study by Stanford University found that “white, non-poverty, non-
17 “English Language Learner” and non-special education students who were subject to
18 virtual learning were behind their in-person peers to an extent that reflected an
19 equivalent of 180 fewer days of instruction in math and 72 fewer days of instruction
20 in reading.” Keech Decl. ¶ 16 (emphasis omitted). Another study by Brown
21 University projected that, as a result of spring shut downs, students likely would
22 achieve only “63-68% of the learning gains in reading relative to a typical school
23 year” and only “37-50% of the learning gains in math.” Megan Kuhfeld, *et al.*,
24 *Projecting the potential impacts of COVID-19 school closures on academic*
25 *achievement*, Brown University EdWorkingPaper No. 20-226, at 2, 23 (May 2020).³
26 A study by McKinsey & Company showed that, even for children receiving average-
27 quality online learning in the fall of 2020, students would lose “three to four months
28

³ Available as of the date of filing:

<https://www.edworkingpapers.com/sites/default/files/ai20-226-v2.pdf>.

1 of learning” by January 2021. Emma Dorn, et al., *COVID-19 and student learning in*
2 *the United States: The hurt could last a lifetime*, McKinsey & Company (June 1,
3 2020).⁴

4 This disadvantage is even starker for minority students, who tend to suffer
5 from the “digital divide” and from a lack of access to childcare. The digital divide
6 refers to the lack of access to technology that affects minority populations. *See*
7 Robert W. Fairlie, *Race and the Digital Divide*, UC Santa Cruz: Department of
8 Economics, UCSC, at 2 (2014).⁵ Studies show that “Blacks and Latinos are
9 substantially less likely to have a computer at home than are white, non-Latinos,”
10 with some estimates showing that “70.4 percent of whites have access to a home
11 computer” while “only 41.3 percent of blacks and 38.8 percent of Latinos have access
12 to a home computer.” *Id.* at 4–5. And low-income families “have trouble finding,
13 accessing, and affording” childcare. *Coronavirus Impact on Students and Education*
14 *Systems*, NAACP (last visited July 28, 2020).⁶ Indeed, the McKinsey study predicted
15 that Blacks and Latinos would suffer a 15 to 20 percent greater loss in educational
16 gains than other students. Dorn, *supra*. The CDC reports that students with
17 disabilities also “had significant difficulties with remote learning.” *The Importance of*
18 *Reopening America’s Schools this Fall*, Centers for Disease Control and Prevention
19 (July 23, 2020).⁷

20 The problems of remote education—especially for poor, minority, and disabled
21 children—surfaced almost immediately upon California schools’ transition to online-
22 only learning. Less than two weeks after the school shutdown on March 16, 2020,
23 Los Angeles School District officials admitted that 15,000 high-school students were

24
25 ⁴ Available as of the date of filing: [https://www.mckinsey.com/industries/public-](https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime)
26 [sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-](https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime)
27 [last-a-lifetime](https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime).

28 ⁵ Available as of the date of filing: <https://escholarship.org/uc/item/48h8h99w>.

⁶ Available as of the date of filing: [https://naacp.org/coronavirus/coronavirus-impact-](https://naacp.org/coronavirus/coronavirus-impact-on-students-and-education-systems/)
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⁷ Available as of the date of filing: [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html)
[ncov/community/schools-childcare/reopening-schools.html](https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html).

1 completely unaccounted for and more than 40,000 had not been in daily contact with
2 their teachers. Howard Blume, *15,000 L.A. high school students are AWOL online,*
3 *40,000 fail to check in daily amid coronavirus closures*, Los Angeles Times (March
4 30, 2020).⁸ As one teacher explained, during the lockdown, her fifth grade online
5 math class, consisting primarily of poor and minority students, had only a 10%
6 attendance rating. Keech Decl. ¶¶ 7, 15. Another explained that, even high-achieving,
7 affluent students, “struggled with online learning at home” and “missed the important
8 social interactions with their friends.” Gerst Decl. ¶ 5. Yet another saw her students’
9 online participation rate start at only 42% at the beginning of the closure and drop to
10 a mere 2% by the end of the school year. Cunningham Decl. ¶ 5.

11 Later studies showed even more starkly how much students suffered
12 academically from online-only learning. A July 7 study conducted by the Los
13 Angeles Unified School District (LAUSD) showed that, between March 16 and May
14 22, 2020, “on an average day only about 36% of middle and high school students
15 participated online,” while “[a]bout 25% logged on or viewed work only” “[a]nd
16 about 40% were absent.” *Report reveals disparities among Black, Latino LAUSD*
17 *students in online learning amid COVID-19 pandemic*, ABC 7 Eyewitness News
18 (July 17, 2020).⁹ A survey of parents in the Palos Verde Unified School District
19 showed that over 60% of parents reported that the amount of “face-to-face” teaching
20 during the shutdown was “not enough.” Brach Decl. ¶ 15.

21 Minority and disabled students suffered even more from online-only learning.
22 The July 7 study by the LAUSD found that “Black and Latino students showed
23 participation rates between 10 and 20 percentage points lower than white and Asian
24 peers.” ABC 7, *supra*. And “English learners, students with disabilities, homeless
25 students and those in the foster-care system had lower rates of online participation.”
26 *Id.* As one special-education teacher explained, of the 795,000 disabled students in

27 _____
28 ⁸ Available as of the date of filing: <https://www.latimes.com/california/story/2020-03-30/coronavirus-los-angeles-schools-15000-high-school-students-absent>.

⁹ Available as of the date of filing: <https://abc7.com/lausd-los-angeles-unified-school-district-race-disparity-racial-divide/6321930/>.

1 California’s schools, “[w]hen school campuses are closed and education is moved
2 entirely online, many of the guarantees and tenets afforded to special needs children
3 under the Individuals with Disabilities Education Act (‘IDEA’) collapse.” Walker
4 Decl. ¶¶ 4–5. Indeed, “[m]any students with special needs . . . have a myriad of health
5 needs that require services,” including assistance with “eating, balancing, etc.,” which
6 “simply cannot be provided virtually.” *Id.* ¶ 7; *see also* Reardon Decl. ¶ 10 (“Autistic
7 children require a tremendous amount of direct support,” including for “their
8 developmental, speech, occupational therapy, behavior (i.e., social skills), and
9 academic needs.”). “One survey found that 4 out of 10 families reported that they
10 were not receiving any special education support at all,” and only “1 in 5 families
11 reported that they are receiving all the services their children are entitled to on their
12 [Individualized Education Program].” Walker Decl. ¶ 9.

13 Beyond these overwhelming difficulties, a complete lack of access to schools
14 caused students—especially poor, minority, and disabled students—to suffer myriad
15 other traumas. As the CDC explained, “[s]chools play a critical role in supporting the
16 whole child, not just their academic achievement,” including the “development of
17 social and emotional skills.” *The Importance of Reopening America’s Schools, supra.*
18 “Psychological, social, and emotional development requires children to both spend
19 time away from parents and with peers, in structured settings, such as school.”
20 McDonald Decl. ¶ 7. “Peer relationships provide a unique context in which children
21 learn a range of critical social emotional skills, such as empathy, cooperation, and
22 problem-solving strategies.” Lyons-Weiler Decl. ¶ 25. And the safe, connected
23 environment many students experience at school reduces students’ depression,
24 anxiety, and thoughts of suicide, *The Importance of Reopening America’s Schools,*
25 *supra*, while “extended periods of confinement” increase these problems, McDonald
26 Decl. ¶ 7; *see also* Lyons-Weiler Decl. ¶ 29 (“we may also expect to observe
27 increased incidence of acting-out behaviors as children try to cope with the
28 psychosocial effects not only of isolation but also fear of the unknown”). Indeed, one
psychiatrist has seen children “with cognitive developmental delays like autism”

1 “regress[] in years” from the closures, “and many have become violent towards
2 themselves and their parents.” McDonald Decl. ¶ 7. One teach reported that “[m]any
3 of her students expressed ... a marked increase in feelings of depression, isolation,
4 and anxiety.” Cunningham Decl. ¶ 8. For two students, the impact was so severe that
5 “they were having difficulty getting out of bed in the morning.” *Id.* Plaintiff
6 Mitrowke’s 7-year-old son is so emotionally affected by the closures that she
7 frequently hears him cry in the shower because he misses his friends, and he
8 continues to suffer daily from the isolation. Mitrowke Decl. ¶¶2,5–6. Boiled down to
9 its essence, the Governor’s mandate will harm children by denying them of the
10 necessary social interactions required to develop emotionally, psychologically, and
11 spiritually. Giap Decl. ¶3.

12 Additionally, as the American Academy of Pediatrics explained, “[l]engthy
13 time away from school and associated interruption of supportive services often
14 results in isolation, making it difficult for schools to identify and address important
15 learning deficits as well as child and adolescent physical or sexual abuse, substance
16 use, depression, and suicidal ideation.” *COVID-19 Planning Considerations:
17 Guidance for School Re-entry*, American Academy of Pediatrics (last visited July 28,
18 2020) (hereinafter AAP Guidance);¹⁰ *see also* Victory Decl. ¶ 6 (“children’s hearing
19 and vision problems are typically identified at school”). Indeed, teachers and staff
20 report more than one-fifth of all child-abuse cases. *The Importance of Reopening
21 America’s Schools, supra*. During the school closures, “there has been a sharp decline
22 in reports of suspected maltreatment.” *Id.*; *see also* Victory Decl. ¶ 6 (30% drop in
23 nationwide abuse reports). However, hospitals have seen an *increase in*
24 hospitalizations of children suffering physical abuse. *The Importance of Reopening
25 America’s Schools, supra*. And according to the Rape, Abuse & Incest National
26 Network (RAINN), once shelter-in-place orders were implemented “half the victims
27 receiving help from the National Sexual Assault Hotline were minors.” *For the First*
28

¹⁰ Available as of the date of filing: <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>.

1 *Time Ever, Minors Make Up Half of Visitors to National Sexual Assault Hotline,*
2 RAINN (April 16, 2020). “Many minors are now quarantined at home with their
3 abuser” while being “cut off from their safety net – the teachers, coaches, and
4 friends’ parents who are most likely to notice and report suspected abuse.” *Id.*

5 Finally, students have been cut off from an important source of food and
6 physical activity. The CDC reports that “more than 30 million children participate in
7 the National School Lunch Program and nearly 15 million participate in the School
8 Breakfast Program.” *The Importance of Reopening America’s Schools, supra.* And
9 the AAP explains that “[b]eyond the educational impact and social impact of school
10 closures, there has been substantial impact on food security and physical activity for
11 children and families.” AAP Guidance.

12 **II. The Data Show that Children Are Unlikely to Spread the Coronavirus**
13 **or Suffer Adverse Results from COVID-19, and Many European**
14 **Schools Reopened Without Causing a Resurgence of Coronavirus**

15 Despite the enormous consequences of the COVID-19 pandemic, “the direct
16 daily toll from infection has generally decreased throughout the United States,”
17 including “in the state of California.” Atlas Decl. at ¶ 8. In California, “the stated
18 goal of societal lockdown—avoiding hospital overcrowding in in-patient and ICU
19 bed occupancy—has been accomplished. Indeed, as of July 24, 2020, the latest data,
20 the hospital bed occupancy by COVID-19 patients in California is only about 11
21 percent.” *Id.* “[E]xtensive evidence,” moreover, “all suggest that the overall fatality
22 rate is far lower than early estimates, likely below 0.1 to 0.4%.” *Id.* ¶ 9. The most
23 recent studies “indicate that the fatality rate for those under age 70 is 0.04%, less than
24 or equal to seasonal influenza.” *Id.*

25 Of particular importance and relevance here, “younger, healthier people have
26 *virtually zero* risk of death from [COVID-19].” *Id.* ¶ 11. “No child under age 18 in
27 the state of California has died due to infection from the coronavirus since tracking
28 began on February 1, 2020...[u]nlike the seasonal flu, which kills approximately 200
children per year nationally.” McDonald Decl. at ¶ 5. “[L]iterally, zero deaths[] have

1 occurred in people under 18,” while “0.01 percent of deaths occurred in people under
2 25 years of age” and “only 6.8% of deaths have occurred in people under 49 years of
3 age.” Atlas Decl. ¶ 11. These rates are the same around the world, including from
4 “South Korea [that has] reported zero deaths for children 0 to 20—the same rate
5 indicated by data from Italy.” Lyons-Weiler Decl. ¶ 6. It is not just fatalities that are
6 eluding younger people. “Younger, healthier people likewise have virtually no risk of
7 serious illness from COVID-19.” Atlas Decl. ¶ 11. This is a crucial consideration
8 here because “teaching is generally a relatively young profession”—more than “[h]alf
9 of K-12 teachers are 41 or younger” and “81% are under 55.” *Id.* ¶ 17; Victory Decl.
10 ¶ 9.

11 “Scientists now believe children may be largely immune to SARS-CoV-2
12 infection.” Lyons-Weiler Decl. ¶ 7. For this reason, “[c]hildren are essentially at zero
13 risk of contracting COVID-19 or becoming ill from the virus if schools were to
14 reopen.” Victory Decl. ¶ 4. The “data reported in a May JAMA Pediatrics study flatly
15 stated that ‘children are at far greater risk of critical illness from influenza than from
16 COVID-19.’” Atlas Decl. ¶ 12 (citing study). Even the “CDC concluded that children
17 who become infected are [] ‘far less likely to suffer severe symptoms.’” *Id.* ¶ 13
18 (citing July 2020 CDC study). Underscoring this low risk, “Dr. Anthony Fauci ... has
19 reported that children are unlikely to be among the first individuals to receive any
20 COVID-19 vaccine found to be safe and effective” while also “suggest[ing] that it
21 would be appropriate to re-open schools.” Lyons-Weiler Decl. ¶ 9.

22 Transmission rates among children and their supervisors are also nominal.
23 “[C]hildren are unlikely to be a vector” of COVID 19, Victory Decl. ¶ 5, meaning
24 they “do not pose a severe risk of transmission to adults.” Lyons-Weiler Decl. ¶ 4.
25 “Scientific studies from all over the world [] suggest that COVID-19 transmission
26 among children in schools is low.” Atlas Decl. ¶ 15. For example, the “CDC has
27 published a report on the age distribution of transmission to new cases in South
28 Korea, which found that less than 1% of new transmission detected in the study were
attributed to children aged 0 to 10 years; similarly, less than 1% of new transmissions

1 were from children aged 11 to 20 years.” Lyons-Weiler Decl. at ¶ 14. Presently, there
2 are “22 countries that have their schools open without social distancing, mask
3 wearing, and other measures, yet these countries have not experienced an increase in
4 COVID-19 cases or spread of the virus among children.” Victory Decl. ¶ 8;
5 McDonald Decl. ¶ 6. Importantly, “these countries have not seen transmission of the
6 virus between children and their parents or elderly grandparents.” Victory Decl. ¶ 8.
7 On the contrary, one July 2020 study from the University of Dresden concluded that
8 “children appeared to act as a barrier to transmission.” McDonald Decl. ¶ 6. Thus, it
9 is “abundantly clear that children under twelve years of age are not transmitting in
10 schools.” Lyons-Weiler Decl. ¶ 23.

11 **III. In Light of This Evidence, School Districts in California Began**
12 **Preparing to Reopen Safely for the 2020-21 School Year.**

13 In light of the obvious deficiencies of remote learning and the low risk of
14 coronavirus infection among children, teachers have diligently prepared since spring
15 to return to schools. In Palos Verdes, for example, home to approximately 11,000
16 students, the school district established a reopening committee comprised of 40 staff
17 members, 45 medical professionals, 30 elementary parents, and 39 high school
18 parents. Brach Decl. ¶¶ 5, 10. This district also purchased and implemented a
19 personal protective equipment and mitigation strategy, including such tactics as
20 staggered time arrivals, designated entrance and exit routes, masks or face shields for
21 teachers and students, and hand sanitizing stations. *Id.* ¶ 12; *see also* Reardon Decl. ¶¶
22 8–9 (describing Capistrano Unified School District encompassing 48,000 students
23 plans to reopen). These mitigation strategies are consistent with “commonly accepted
24 public health definitions of safe operating that minimize [health] risks” in schools.
25 Kaufman Decl. ¶ 16. A survey in Palos Verdes also found that an “overwhelming
26 amount (65%) of parents” supported returning the students to school. Brach ¶ 13.
27 Parents who had taken off from work to watch over their children had planned to
28 return to work both because of the benefits “in-person instruction” provides and the
“financial[]” toll missing work has imposed. Hackett Decl. ¶ 8; Petrilla Decl. ¶¶ 8–9;

1 Beaulieu Decl. ¶ 6. Parents of disabled children who took time from work especially
2 looked forward to schools reopening, because “disabilities [] make it extremely
3 difficult” to learn at home without special assistance afforded by in-person
4 instruction. Gavin Decl. ¶¶ 9–10; *see* Walker Decl. ¶10 (“Schools are the best venues
5 to provide students with their legally mandated special services.”).

6 **IV. The California Department of Public Health Orders All Schools to**
7 **Remain Closed, Except for Schools in a Small Number of Counties**

8 On July 17, 2020 Newsom announced a framework for reopening schools.
9 Atlas Decl. ¶7. Under his plan, reopening hinges on not being on the county
10 monitoring list for two weeks. *Id.* (“Schools and school districts may reopen for in-
11 person instruction at any time if they are located in a local health jurisdiction (LHJ)
12 that has not been on the county monitoring list within the prior 14 days.”).¹¹ “The
13 state places a county on this list if it meets at least one of six criteria related to the
14 number of COVID-19 PCR tests conducted or positivity rate, number of cases and
15 growth in cases, growth in hospitalizations, or inadequate hospital ICU or ventilator
16 capacity.” *See COVID-19 Update Guidance: Child Care Programs and Providers*,
17 Cal. Dep’t of Pub. Health (July 17, 2020);¹² *see also* Bhattacharya Decl. ¶20.
18 However, “[n]one of these criteria are related to the risks to children or to teachers
19 that arise from reopening schools for in-person teaching.” *Id.*

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¹¹ The plan also includes the following waiver procedure, which permits a local health officer to waive the reopening limitations if a waiver “is requested by the superintendent (or equivalent for charter or private schools.” *COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year*, State of Cal., Dept. of Pub. Health, (July 17, 2020). The health officer must “consult with CDPH when considering a waiver request.” *Id.*, available at: <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Schools%20Reopening%20Recommendations.pdf>.

¹² Available as of the date of filing: <https://files.covid19.ca.gov/pdf/guidance-childcare--en.pdf>.

1 The most important evidence on childhood spread of the disease comes from a
2 study conducted in Iceland and published in the New England Journal of Medicine.¹³
3 The data for this study comes from Iceland’s systematic screening of its population to
4 check for the virus. The study reports on both a population-representative sample and
5 a sample of people who were tested because of the presence of symptoms consistent
6 with COVID-19 infection. The study team isolated SARS-CoV-2 virus samples from
7 every positive case, sequenced the genome of the virus for every case, and tracked
8 the mutation patterns in the virus. This analysis, along with contact tracing data,
9 allowed the study team to identify who passed the virus to whom. From this analysis,
10 the senior author of the study, Dr. Kari Stefansson, concluded¹⁰ that “[E]ven if
11 children do get infected, they are less likely to transmit the disease to others than
12 adults. We have not found a single instance of a child infecting parents. There is
13 amazing diversity in the way in which we react to the virus.”

14 Nor is it true “that there is no way to safely operate as a school in a county that
15 meets the state’s criteria for placement in the ‘monitoring list.’” Kaufman Decl. ¶ 16.
16 Indeed, other, similar operations are permitted in counties on the monitoring list,
17 including childcare facilities and day camps. *See COVID-19 Update Guidance: Child*
18 *Care Programs and Providers*, Cal. Dep’t of Pub. Health (July 17, 2020);¹⁴ *COVID-*
19 *19 Interim Guidance: Day Camps*, Cal. Dep’t of Pub. Health (July 17, 2020).¹⁵

20 California is the only state in the U.S. that is mandating at the state level that
21 school districts not hold in-person classes, affecting millions of students, rather than
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25 _____
26 ¹³ Daniel F. Gudbjartsson, Ph.D., Agnar Helgason, Ph.D., et al., *Spread of SARS-CoV-*
27 *2 in the Icelandic Population*, The New England Journal of Medicine,
<https://www.nejm.org/doi/full/10.1056/NEJMoa2006100> (June 11, 2020).

28 ¹⁴ Available as of the date of filing: <https://files.covid19.ca.gov/pdf/guidance-childcare--en.pdf>.

¹⁵ Available as of the date of filing: <https://files.covid19.ca.gov/pdf/guidance-daycamps.pdf>.

1 leave that decision to the individual school district. There are currently 5.9 million
2 students K-12 in California.¹⁶

3 **V. Plaintiffs Have Been and Will Continue to be Harmed by the**
4 **Governor’s Mandatory School Closures**

5 Plaintiffs are a student and several parents of students adversely impacted by
6 the school closures. Ms. Sephton, for example, has two children, one of whom is a
7 toddler and the other a four-year-old. Sephton Decl. ¶¶ 2–3. Since she must take care
8 of her toddler during the day, “distance learning mode is really no education at all”
9 for her oldest child. *Id.* ¶ 5. Ms. Walsh faces a similar situation with two children.
10 “[W]hen the school was shut down and education was moved to distance learning,
11 what was provided was not learning in any sense of the word.” Walsh Decl. ¶ 4. Ms.
12 Ruiz is the mother of two sons who have special needs. “Since school was shut
13 down,” her son has “not been provided with any of his services that are required by
14 his [individualized education program].” Ruiz Decl. ¶ 5. Moreover, like many other
15 similarly situated children, “[d]ue to his disabilities, ZOOM classes are a useless
16 form of education.” *Id.* ¶ 6. Even children without special needs are dropping basic
17 skills as Mr. Ziegler attests. “As a result of [his] daughter’s school moving to
18 distance-learning, [he] witnessed [his] daughter ... fall[] behind in schooling.”
19 Ziegler Decl. ¶ 3. Ms. Beaulieu experienced the same. For her, it was “extremely
20 concerning that [her] son received no Zoom instruction at all from his math teacher
21 the entire time that the school was closed.” Beaulieu Decl. ¶ 8. In addition to
22 academic shortfalls, unnecessary distance learning has caused “behavioral issues” for
23 Mr. Petrilla’s young boy. Petrilla Decl. ¶ 6. Mr. Fleming’s daughter “has worked
24 tirelessly to ... attend her dream college” but may now miss out because of the
25 negative impact on her grades and lost scholarship opportunities. Fleming Decl. ¶ 11.

26 All of this is unnecessary because, as explained by Mr. Hackett, some schools
27 “are going above and beyond” by making “huge investments of effort and money to
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¹⁶ Available as of the date of filing:
<https://lao.ca.gov/Education/EdBudget/Details/331>.

1 comply with the CDC and health directives” to ensure a safe learning environment.
2 Hackett Decl. ¶ 6. This is especially true for Mr. Brach who is a member of the Board
3 of Palos Verdes Unified School District. In addition to witnessing his daughter’s
4 “mental health issues” as a result of “isolation,” he has participated with other board
5 members in equipping Palos Verde Unified School District with the necessary
6 “mitigation strategies” to open safely and effectively. Brach Decl. ¶¶ 7, 12. There is
7 therefore no legitimate reason for his daughter and many others like her to be
8 excluded from in-person instruction.

9 California is the *only* state in America with state-level mandates prohibiting
10 school districts from hold in-person classes. Atlas Decl. ¶7. Governor Newsom’s Order
11 impacts millions of students, from kindergarten through high school, yet the State has
12 absolutely no scientific basis for closing schools this fall. *Id.*; *see also*, Bhattacharya
13 Decl. ¶15.

14 LEGAL STANDARD

15 “A plaintiff seeking a preliminary injunction must establish that he is likely to
16 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
17 preliminary relief, that the balance of equities tips in his favor, and that an injunction
18 is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20
19 (2008) (citations omitted). Plaintiffs need not show that they will prevail at trial, but
20 only that they are “likely” to prevail. *See id.*; *Leiva-Perez v. Holder*, 640 F.3d 962,
21 966 (9th Cir. 2011). Alternatively, under the so-called sliding scale approach, as long
22 as the plaintiff demonstrates the requisite likelihood of irreparable harm and shows
23 that an injunction is in the public interest, a preliminary injunction can still issue so
24 long as serious questions going to the merits are raised and the balance of hardships
25 tips sharply in the plaintiffs favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
26 1127, 1134–35 (9th Cir. 2011). A “serious question” is one on which the movant “has
27 a fair chance of success on the merits.” *Sierra On-Line, Inc. v. Phoenix Software,*
28 *Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984) (internal quotation marks and citation
omitted).

1 **ARGUMENT**

2 **I. THERE IS A STRONG LIKELIHOOD THAT PLAINTIFFS WILL**
3 **SUCCEED ON THE MERITS**

4 **A. Defendants’ Order Banning In-Person Instruction at Every School**
5 **on the State’s Monitoring List Violate the Fourteenth Amendment’s**
6 **Due Process and Equal Protection Clauses.**

7 To determine whether a government act violates the substantive component of
8 the Due Process Clause or the Equal Protection Clause, courts begin “by determining
9 the proper level of scrutiny to apply for review.” *Wright v. Incline Vill. Gen.*
10 *Improvement Dist.*, 665 F.3d 1128, 1141 (9th Cir. 2011). “[Courts] apply strict
11 scrutiny if the governmental enactment ‘targets a suspect class or burdens the
12 exercise of a fundamental right.’ *Id.* An act passes strict scrutiny only if it “is
13 narrowly tailored to serve a compelling governmental interest.” *Id.* “If the [act] does
14 not concern a suspect or semi-suspect class or a fundamental right, [courts] apply
15 rational basis review and simply ask whether the ordinance is rationally-related to a
16 legitimate governmental interest.” *Id.* (citation omitted)

17 **1. The Order Infringe Californians’ Fundamental Right to Education,**
18 **Failing Strict Scrutiny**

19 **a. The School Closure Order Implicates Substantive Due**
20 **Process**

21 The Due Process Clause protects substantive rights not expressly enumerated
22 within the Bill of Rights. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2587
23 (2015); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). In particular, “the Due Process
24 Clause specially protects those fundamental rights and liberties which are,
25 objectively, deeply rooted in this Nation’s history and tradition, and implicit in the
26 concept of ordered liberty, such that neither liberty nor justice would exist if they
27 were sacrificed.” *Glucksberg*, 521 U.S. at 720–21 (internal citations and quotation
28 marks omitted). Courts must “exercise reasoned judgment in identifying interests of
the person so fundamental that the State must accord them its respect”; “[h]istory and

1 tradition guide and discipline this inquiry but do not set its outer boundaries.”

2 *Obergefell*, 135 S. Ct. at 2598 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)
3 (Harlan, J., dissenting)).

4 **b. The Fundamental Importance of Education is Deeply**
5 **Rooted in Our History and Jurisprudence**

6 Historical analysis confirms that, although the Supreme Court has not (yet) so
7 held, the right to a basic education is “deeply rooted in this Nation’s history and
8 tradition,” stretching back at least as far as ratification of the Fourteenth Amendment.
9 Indeed, more than three-quarters of States recognized an affirmative right to public
10 school education in 1868, the year that the Fourteenth Amendment was ratified.
11 Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of*
12 *Education*, 2014 Mich. St. L. Rev. 429, 449–63 (cataloging State constitutional
13 provisions as of 1868). In particular, 30 states (*i.e.*, 81% of the states at the time) had
14 a constitution that “said explicitly that the state legislature ‘shall’ (*i.e.*, it has the
15 ‘duty’ and therefore it ‘must’) establish a system of free public schools.” Calabresi &
16 Perl, 2014 Mich. St. L. Rev. at 451–54 (listing these 30 states and quoting their
17 constitutional provisions). Another three states’ constitutions “arguably conferred a
18 right to a free public education,” whereas only four “states’ constitutions in 1868 did
19 not specifically mention education or the establishment of a system of free public
20 schools.” *Id.* at 455–60. It is thus “as clear as day that there was a[] . . . consensus of
21 three-quarters of the states in 1868 that recognized that children have a fundamental
22 right to a free public school education.” *Id.* at 460; compare *McDonald v. City of*
23 *Chicago*, 561 U.S. 742, 777–78 (2010) (plurality opinion) (reviewing same sources).

24 That proportion is significant because “Article V of the federal Constitution
25 requires a three-quarters consensus of the states to amend the Constitution.” *Id.* at
26 443. So, “an Article V consensus of three-quarters of the states in 1868 should be
27 sufficient for establishing that a right is ‘fundamental,’ since it would be sufficient for
28 approval of a constitutional amendment.” *Id.* at 444. In other words, commonplace
state constitutional recognition at the time of ratification “objectively” establishes the
fundamental nature of this right. *Glucksberg*, 521 U.S. at 720–21. It also

1 distinguishes it from other important social benefits that a supermajority of states had
2 not committed to provide by 1868.

3 It is also clear that State-provided or -permitted education is “implicit in the
4 concept of ordered liberty, such that neither liberty nor justice would exist if they
5 were sacrificed.” *Glucksberg*, 521 U.S. at 720–21 (internal quotation marks omitted).
6 To begin with, the foundation of American liberty is our *written* Constitution, under
7 which laws must be published in *writing* before they may be executed to constrain
8 liberty. *See* U.S. Const. art. I §§ 9–10 (prohibiting the enactment of any “ex post
9 facto law” by Congress or state legislatures). Thus, texts lie at the heart of our
10 ordered liberty—and neither liberty nor justice as those concepts are conceived in the
11 American tradition would exist without a shared capacity to decode our governing
12 texts through basic literacy and other skills instilled through in-person schooling.

13 Basic learning is also a prerequisite for the activities that form the basis of
14 citizenship in our republic. For example, reading, writing, and math skills are critical
15 to participation in the political process, including “knowledgeable and informed
16 voting,” comprehending ballot initiatives, and engaging in political speech and
17 discourse. *See also Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010); *Bd. of*
18 *Educ. v. Pico*, 457 U.S. 853, 866–67 (1982) (“[T]he Constitution protects the right to
19 receive information and ideas.” (internal quotation marks omitted)). Literacy skills
20 are also necessary to engage in activities of citizenship, such as enlisting in military
21 service, obtaining government entitlements, and “comply[ing] with mandatory
22 government requirements such as filing tax forms or selective service registration.”
23 And lack of basic reading and writing skills precludes individuals from
24 constitutionally protected access to the justice system. *Id.*; *see also, e.g., Griffin v.*
25 *Illinois*, 351 U.S. 12, 19–20 (1956); *Boddie v. Connecticut*, 401 U.S. 371, 382–83
26 (1971).

27 The necessity of education to ordered liberty explains why public, state-
28 provided learning has such deep roots in our nation’s history. In the words of
Professors Calabresi and Perl, “[a]t a minimum, children must be taught to read so

1 they can read the laws for themselves—a task that many of the Framers would have
2 thought was fundamental.” Calabresi & Perl, 2014 Mich. State L. Rev. at 552.
3 Indeed, education has been singled out for unique treatment among state activities.
4 For a century, every single state has had compulsory education laws. Friedman &
5 Solow, 81 Geo. Wash. L. Rev. at 127 (“By 1918, education was compulsory in every
6 state of the union.”). In other words, children throughout California and the nation are
7 compelled to attend school full time (or be home-schooled) under penalty of fines and
8 jail time. *See* Gershon M. Ratner, A New Legal Duty for Urban Public Schools:
9 Effective Education in Basic Skills, 63 Tex. L. Rev. 777, 823 (1985).

10 History and practice make clear that this deprivation of the liberty that children
11 and their families otherwise would have to pursue activities of their own choosing is
12 justified by the unique importance of education. As the Supreme Court explained in
13 *Brown v. Board of Education*, “education is [] the most important function of state
14 and local governments,” as demonstrated by our “[c]ompulsory school attendance
15 laws and the great expenditures for education.” 347 U.S. at 493; *see also Meyer v.*
16 *Nebraska*, 262 U.S. 390, 400 (1923) (“The American people have always regarded
17 education and acquisition of knowledge as matters of supreme importance which
18 should be diligently promoted.”). Indeed, so crucial is education to ordered liberty
19 that courts require that procedural due process be afforded not when children are
20 confined to school—but when children are expelled or suspended from school, and
21 thus deprived of their interest in a state-sponsored education. *Goss v. Lopez*, 419 U.S.
22 565, 579 (1975) (“[S]tudents facing suspension and the consequent interference with
23 a protected property interest must be given some kind of notice and afforded some
24 kind of hearing...to avoid unfair or mistaken exclusion from the educational process,
25 with all of its unfortunate consequences.”).

26 And while, of course, the Supreme Court has not yet squarely held that there is
27 a fundamental right to education, it has sent powerful signals that it is willing to do so
28 in the right case. Rejecting a constitutional challenge to a state’s school-financing
system, the Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S.

1 1 (1973), nonetheless made explicit that the case before it did *not* present the question
2 of whether there is a fundamental right to “some identifiable quantum of education”
3 sufficient to provide children with the “basic minimal skills necessary for the
4 enjoyment of the rights of speech and of full participation in the political process.” *Id.*
5 at 36–37. And the Court underscored that if a “class of ‘poor’ people” were
6 “absolutely precluded from receiving an education[, t]hat case would present a far
7 more compelling set of circumstances for judicial assistance than the case before” it.
8 *Id.* at 25 n.60. Later, the Court wrote that “[a]s *Rodriguez* and *Plyler* indicate, this
9 Court has not yet definitively settled the question[] whether a minimally adequate
10 education is a fundamental right.” *Papasan v. Allain*, 478 U.S. 265, 285 (1986);
11 *accord Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 466 n.1 (1988) (Marshall, J.,
12 dissenting) (noting that the issue “remains open today”).

13 **c. Barring Access to Schools Has Devastating Consequences.**

14 Prohibiting access to schools burdens a fundamental right to adequate
15 education. In *Plyer v. Doe*, under Texas law, immigrant children who could not
16 establish that they had been legally admitted into the United States were denied a free
17 education in public schools and could attend only if they could afford to “pay a ‘full
18 tuition fee’ in order to enroll.” 457 U.S. 202, 206 & n.2 (1982). Because many could
19 not afford to pay tuition, the law amounted in practice to the “exclusion” by the state
20 of “children from its public schools.” *Id.* at 208. In the Court’s words, “[b]y denying
21 these children a basic education, we deny them the ability to live within the structure
22 of our civic institutions, and foreclose any realistic possibility that they will
23 contribute in even the smallest way to the progress of our nation.” This result could
24 not be reconciled with the Constitution.

25 Like Texas in *Plyer*, California here is functionally excluding Plaintiffs—
26 including minority children and families of limited economic means—from the
27 opportunity to attain an education. Even worse, unlike in *Plyer*, the schoolhouse
28 doors are not even open to Plaintiffs. California hopes that digital learning will
provide an equivalent basic minimum education, but this is fantasy with no basis in

1 any evidence. Quite the contrary, the evidence shows that distance learning will
2 effectively preclude children from receiving a basic minimum education because (1)
3 many students have no access to the internet, (2) of those who do have digital access
4 their educations will be significantly impaired, and (3) truancy will run rampant. *See*
5 *supra* pp. 5-11, 15 (describing evidence showing extreme hardship from online
6 learning that excludes children from an education).

7 For example, as extensively documented in the supporting declarations, when
8 school moved online in the spring, classroom participation evaporated. Cunningham
9 Decl. ¶ 5. “At the beginning of distance learning in March, I had 42% participation
10 by my students; by the end, I had 4 total students participate, or 2%.” *Id.* The reason:
11 “Many of my students lacked sufficient access to wifi and computers to be able to
12 participate in distance learning.” *Id.* This is particularly true in low-income families
13 and communities of color. “Nearly 50% of low-income families and 42% of families
14 of color lack sufficient devices at home to access distance learning.” Megan Kuhfeld,
15 *et al.*, *Project the potential impacts of COVID-19 school closures on academic*
16 *achievement*, ANNENBERG INSTITUTE AT BROWN UNIVERSITY, at 10 (May 2020).¹⁷

17 These are not uncommon occurrences. “[T]he closing of schools this last
18 spring and the conversion from in-class teaching to online instruction turned out to be
19 an educational failure. Up to one-third of high school students in the Los Angeles
20 schools system never checked in with their teachers once.” Dr. Hamilton Decl. ¶ 6;
21 *see also* Keech Decl. ¶ 14 (“[A]ny model of live daily virtual remote instruction ... is
22 so lacking” that it “largely fails to meet [students’] basic educational needs.”).

23 Nor are the results surprising. Stanford University comprehensively studied the
24 impact of virtual learning models and concluded that student were behind their in-
25 person peers to an extent reflecting 180 fewer days of instruction in math and 72
26 fewer days of instruction in reading. *Id.* (attaching study). This study comports with
27 another recent analysis from Brown University in which the researchers concluded
28 that “many teachers have had no contact at all with a significant portion of students

¹⁷ Available as of the day of filing: <https://www.edworkingpapers.com/ai20-226>.

1 ... only 39% of teachers reported interacting with their students at last once a day,
2 and most teacher-student communication occurred over email.” Megan Kuhfeld,
3 *supra* p. 12, at 9. And this says nothing of those children requiring special education.
4 “When school campuses are closed and education is moved entirely online, many of
5 the guarantees and key tenants afforded to special needs children” under normal
6 circumstances “collapse.” Walker Decl. ¶ 5; *see also* Reardon Decl. ¶ 10 (“A
7 prolonged shutdown of schools will have significant negative consequences for
8 children with special needs and handicapping conditions.”).

9 These declarations and more show what common sense immediately grasps.
10 Moving in-person instruction to an unaccountable virtual platform that many students
11 cannot even access functionally forecloses access to a basic minimum education. By
12 denying Plaintiffs access to schools that offer an opportunity to an education,
13 Defendants have effectively consigned Plaintiffs and others at their schools to life in
14 a permanent underclass. Like the students in *Plyler*, Plaintiffs are subject to the
15 “enduring disability” for lack of education and “[t]he inestimable toll of that
16 deprivation on [their] social[,] economic, intellectual, and psychological well-being”
17 that will affect them “each and every day” of their lives.” 457 U.S. at 221–22. The
18 State, in sum, has burdened a constitutional right.

19 **d. The School Closure Order is Not Narrowly Tailored**

20 Because the State is burdening a fundamental right, this Court must apply a
21 heightened form of scrutiny. *Plyler*, 457 U.S. at 217–18, 223–24. Unlike other
22 governmental acts that are permissible if they “bear[] some fair relationship to a
23 legitimate public purpose,” *id.* when the State burdens a “substantive component” of
24 the Fourteenth Amendment, as here, then the act is unconstitutional “unless the
25 infringement is narrowly tailored to serve a compelling state interest.” *Reno v. Flores*,
26 507 U.S. 292, 301–02 (1993). For reasons stated above, namely that the weight of
27 studies shows that children transmission and infection rates cannot justify school
28 closures, the government cannot satisfy that test here. *See supra* pp. 11-14
(describing evidence that children are unlikely to spread or suffer adverse results

1 from the coronavirus). The order ignore “the evidence that the mortality risk and
2 severe adverse health outcome risk to children from COVID-19 disease is small or
3 negligible.” Bhattacharya Decl. ¶ 20. And they ignore “the fact that children are
4 exceedingly unlikely to pass the virus on to adults.” Bhattacharya Decl. ¶ 20, 24,
5 Atlas Decl. ¶ 17-18, 29; and Cincchetti Decl. ¶ 8, 24, 26.

6 More to it, distance learning—when in-person learning is readily available and
7 safe—is no substitute to providing a basic minimum education. Foremost, and as
8 noted, many students lack sufficient means to access digital learning. This is
9 especially true in low-income families and communities of color. *See supra* Kughfeld
10 at 10. If these same students can study and learn in-person, even on a limited basis
11 while in school, but are forced to “learn” through a means in which they realistically
12 cannot access, then the policy is not narrowly tailored. Moreover, numerous studies
13 show that both the quality and quantity of the education declines precipitously when
14 forcibly and haphazardly moved online. Consider first the significant involvement of
15 parents in this environment. “No credible scientist, learning expert, teacher, or parent
16 believes that children aged 5 to 10 years can meaningfully engage in online learning
17 without considerable parental involvement, which many families with low incomes
18 are unable to provides because parents must work outside the home.” Dimitri A.
19 Christakis, MD, MPH, *School Reopening—The Pandemic Issue That is Not Getting*
20 *Its Due*, JAMA PEDIATRICS (May 13, 2020).¹⁸

21 Consider also the social and emotional struggle of children trying to learn on
22 their own. Many students have “expressed ... a marked increase in feelings of
23 depression, isolation, and anxiety” as a result of the “school clotures.” Cunningham
24 Decl. ¶ 8. And the “students most greatly impacted by the shutdown [are] not the
25 middle and upper class students, but the lower income and minority students who
26 already suffer from an ever-widening achievement gap.” *Id.* For this reason and
27 others, child psychologists have sounded the alarm on the mental health risks of
28

¹⁸ Available as of the date of filing:
<https://jamanetwork.com/journals/jamapediatrics/fullarticle/2766113>.

1 locking down school. Just last month, more than 120 specialists in psychology,
2 mental health, and neuroscience concluded that school closures are a “national
3 disaster” because the “impact of the lockdown on learning is incredibly harmful,
4 creating a huge attainment gap, and the most vulnerable and marginalized in society
5 ... are likely to be most affected by this.” Professor Ellen Townsend, *et al.*, *Open*
6 *letter to Gavin Williamson Secretary of State for Education concerning the neglect of*
7 *children and adolescents in government policy during the UK lockdown.*¹⁹

8 Studies demonstrate why children need to be physically present in schools.
9 Late last month the American Academy of Pediatrics “strongly” recommended that
10 “the coming school year should start with a goal of having students physically
11 present in school.” American Academy of Pediatrics, *COVID-19 Planning*
12 *Considerations: Guidance for School Reentry*, ¶ 3 (June 25, 2020).²⁰ This same
13 Academy noted the health benefits that would otherwise be lost, such as “child . . .
14 development,” “social and emotional skills,” “reliable nutrition,” physical/speech and
15 mental health therapy,” and “opportunities for physical activity” if children are
16 unnecessarily forced to attend school virtually. *Id.* ¶ 1. This comports with a
17 recommendation released last week by the Centers for Disease Control. The CDC
18 detailed crucial characteristics that would be lost if in-person schooling is not held,
19 including “development of social and emotional skills,” “a safe environment for
20 learning,” “nutritional needs,” and “physical activity.” *The Importance of Reopening*
21 *America’s Schools this Fall*, CDC (July 23, 2020).²¹

22 All these significant harms and burdens are avoidable. As seen elsewhere,
23 many other states have provided options to attend school, including deploying
24 “hybrid” models of mixed virtual and in-person learning to reduce student contact.

25
26 ¹⁹ Available as of the date of filing: <https://drive.google.com/file/d/1zytNGOtnySo-YnyU7iazJUVQ0fS2PC1Z/view>.

27 ²⁰ Available as of the date of filing: <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>.

28 ²¹ Available as of the date of filing: <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>.

1 See, e.g., Gabby Birenbaum and James Bikales, *Here's your state's plan for*
2 *reopening schools*, THE HILL (July 20, 2020).²² At the very least, other States allow
3 their school districts or counties to deploy specific plans to address both their student
4 population's varying needs and that particular community's COVID-19 case levels.
5 More importantly, these localized plans allow schools to prioritize in-person
6 education for those who are most vulnerable. While remote instruction may play a
7 role in the various counties' approaches, there is no reason to adopt a one-size-fits-all
8 model for the State, and Defendants' insistence on such an approach fails strict
9 scrutiny. Because the State cannot possibly show that an all-out exclusion to basic
10 minimum education is narrowly tailored to protect a compelling government interest,
11 such a prohibition on accessing schools would fail.

12 **2. Regardless of the Level of Scrutiny, the Order Violate Equal**
13 **Protection**

14 "The Equal Protection Clause of the Fourteenth Amendment commands that no
15 State shall "deny to any person within its jurisdiction the equal protection of the
16 laws," which is essentially a direction that all persons similarly situated should be
17 treated alike." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1063 (9th Cir.
18 2014) (quoting *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439
19 (1985)). Where the government unequally infringes on a fundamental right, courts
20 apply strict scrutiny. *City of Cleburne*, 473 U.S. at 440. Rational basis review applies
21 when the government enacts discriminatory social or economic legislation. *Id.* The
22 Supreme Court has also suggested that discrimination affecting "quasi"-fundamental
23 rights will trigger "intermediate" scrutiny. *Plyler v. Doe*, 457 U.S. 202, 230 (1982)
24 (applying intermediate scrutiny when evaluating claims for equal access to education
25 brought by immigrant children unlawfully present in Texas).

26 Here, the Governor's order and guidance prohibit schools in some counties
27 from holding in-person classes while allowing schools in other counties to return to
28

²² Available as of the date of filing: <https://thehill.com/homenews/state-watch/508105-heres-your-states-plan-for-reopening-schools>.

1 the classroom. The dividing line is whether a school is located within a county on the
2 state’s monitoring list. Thus, while students in Shasta County can resume in-person
3 learning this fall, similarly situated students in Los Angeles County, Yolo County,
4 and 30 other counties cannot. The Governor’s unequal treatment of students in
5 California cannot survive review under any level of scrutiny.

6 **a. California’s Children have a Fundamental Right to Education**

7 As Plaintiffs have already explained, education is a fundamental right enjoyed
8 by every child in California. The Governor’s decision to deprive some students of in-
9 person education, but not others, thus infringes on fundamental rights. The Order are
10 thus subject to strict scrutiny, which they cannot survive because even assuming that
11 the state has a compelling interest in slowing the spread of COVID-19, the
12 Governor’s actions here are not the least restrictive means of furthering that goal.
13 Indeed, as the declarations filed in this case confirm, closing schools does *nothing* to
14 advance that goal because children are not at risk from the virus and they do not play
15 a significant role in transmitting it to others. *See, e.g.,* Dr. Atlas Decl., Dr.
16 Bhattacharya Decl., Barke Decl., Dr. Victory Decl., Dr. Lyons-Weiler Decl. In other
17 words, the state’s interest in arresting the spread of COVID-19 could be advanced
18 just as effectively without closing a single school. Because the Order is not the least
19 restrictive means of advancing the state’s asserted interest—while depriving millions
20 of students of their fundamental right to education—the Court should enjoin
21 Defendants from enforcing them.

22 **b. The Right to Education is Subject to Heightened Scrutiny**

23 Even if education is not a “fundamental” right, it is at least a “quasi”
24 fundamental right subject to intermediate scrutiny. It is well settled that, under *Plyler*
25 *v. Doe*, “infringements on certain ‘quasi-fundamental’ rights, like access to public
26 education, also mandate a heightened level of scrutiny.” *United States v. Harding*,
27 971 F.2d 410, 412 n.1 (9th Cir. 1992). Specifically, such infringements are invalid
28 unless they further an important government interest and do so by means that are
substantially related to that interest.

1 The Order undoubtedly infringe the right to a basic education. Like the law
2 *Plyler*, the Order will “impose[] a lifetime hardship on a discrete class of children
3 not accountable for their disabling status. The stigma of illiteracy will mark them for
4 the rest of their lives.” 457 U.S. at 223. “By denying these children a basic
5 education,” the Order threatens to “deny them the ability to live within the structure
6 of our civic institutions” and diminish the “possibility that they will contribute . . . to
7 the progress of our Nation.” *Id.* at 223–24.

8 Because the order fail even rational-basis review, for the reasons given below,
9 *see infra*, they *a fortiori* flunk intermediate scrutiny as well.

10 **c. The School Closure Order Fails Even Rational Basis Scrutiny**

11 In any event, the Order’s discriminatory treatment of school children across the
12 state is not even “rationally related” to the state’s interest in combatting COVID-19.
13 *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). As an initial matter,
14 whether a county is on the monitoring list has *nothing* to do with the prevalence of
15 COVID-19 at schools, or even among children. Instead, a county is placed on the
16 monitoring list based on overall case rates and hospitalization rates. The order simply
17 assumes that it is more dangerous to conduct in-person classes in counties where
18 COVID-19 continues to spread among the general population than in other counties.
19 But that assumption could not “*reasonably* be conceived to be true by the
20 [Governor]” for several reasons. *Vance v. Bradley*, 440 U.S. 93, 111 (1979). *First*, as
21 Plaintiffs have explained, the scientific evidence overwhelmingly confirms that
22 children are not at risk of being sickened or killed by COVID-19. *See ante* at 7-11.
23 Indeed, according to the state’s data, *not one* minor in California has died from
24 COVID-19 since the virus began spreading in January and February. *See ante* at 17.
25 Children also account for a vanishingly small percentage of total hospitalizations.
26 McDonald Decl. ¶5. Children in hard-hit areas such as Los Angeles are thus just as
27 unaffected by the virus as children in rural parts of the state. And because children do
28 not play a significant role in transmitting the virus to adults, Lyons-Weiler Decl. ¶23,
teachers in Orange County are just as safe as teachers in any other county. Indeed,

1 they are significantly safer than essential workers in many other professions who
2 have daily contact with large numbers of adults.

3 *Second*, even the Governor apparently does not believe that allowing children
4 to congregate in classrooms presents a grave danger of contagion, because he has
5 allowed thousands of daycare facilities and camps to reopen, even in counties on the
6 monitoring list.²³ There is no reasonable basis for believing that daycare centers and
7 camps are safe but elementary schools are not. Although “a government need not
8 provide a perfectly logical solution to regulatory problems, it cannot hope to
9 survive *rational* basis review by resorting to irrationality.” *Merrifield v. Lockyer*, 547
10 F.3d 978, 991 (9th Cir. 2008). But the Order is the height of irrationality. In the name
11 of stopping the spread of COVID-19, they prohibit gatherings by the one population
12 cohort that *does not spread* virus. And to prevent hospitals from being overwhelmed,
13 they target the one group of people that is hardly ever sickened from COVID-19.
14 Although the state undoubtedly has broad police powers with which to address public
15 health concerns, it cannot enact a discriminatory regulatory regime that lacks any
16 rational connection to the stated goal—as it has done here, with devastating effect.

17 **B. Defendants’ Order Violate Title VI’s Implementing Regulations**
18 **Because It Disparately Burden Racial Minorities**

19 Title VI of the Civil Rights Act of 1964 provides that “[n]o person in the
20 United States shall, on the ground of race, color, or national origin, be excluded from
21 participation in, be denied the benefits of, or be subjected to discrimination under any
22 program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. And,
23 under Title VI regulations, Defendants may not enforce laws causing a disparate
24 impact on racial minorities with regard to federally funded public programs,
25 including California’s schools. 28 C.F.R. § 42.104(b)(2).²⁴ “The basis for a successful

26 _____
27 ²³ See *fn* 14-15.

28 ²⁴ Section 1983 creates a private right of action against the deprivation of federal rights against officials acting under color of state law. See 42 U.S.C. § 1983; *Alexander v. Sandoval*, 532 U.S. 275, 300 (2001) (Stevens, J., dissenting) (“[I]tigators who in the future wish to enforce the Title VI [disparate impact] regulations against

1 disparate impact claim involves a comparison between two groups—those affected
2 and those unaffected by the facially neutral policy.” *Darensburg v. Metro. Transp.*
3 *Comm’n*, 636 F.3d 511, 519–20 (9th Cir. 2011). “An appropriate statistical measure
4 must therefore take into account the correct population base and its racial makeup.”
5 *Id.*

6 As explained further below, although virtually all students here will be
7 “affected” by the Governor’s order, it will inflict *especially* devastating harm on
8 those students whose socioeconomic circumstances do not allow for distance learning
9 *at all* or who are enrolled in schools whose distance-teaching efforts have proven
10 wholly inadequate. Magnifying both discriminatory effects is that the order applies
11 predominantly to counties comprising higher percentages of racial minorities than the
12 counties that are *not* on the Governor’s watch list and therefore not subject to the
13 closure order.

14 Impoverished, vulnerable families in California are disproportionately
15 minorities.²⁵ While these low-income families struggle with distance learning, many
16 also do not receive the services required by their IEPs and are burdened by the
17 additional costs to obtain private assistance or instruction. (*See* Ruiz Decl. ¶¶2, 5, 6, 9,
18 10,; *see also* Hawkins Decl. ¶¶3, 10, 11; Bema Decl. ¶¶4, 6, 8, 9, 12; Ramirez Decl. ¶¶5,
19 6, 7, 8, 15).

20 _____
21 state actors in all likelihood must only reference § 1983 to obtain relief.”). Plaintiffs
22 rely on § 1983 here, although they recognize that Ninth Circuit precedent suggests that
23 that statute cannot be used by private parties to vindicate a disparate-impact claim
24 under Title VI’s regulations. *See Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th
25 Cir. 2003). If necessary, however, Plaintiffs will argue on appeal that *Save Our Valley*
26 was incorrectly decided and should be overruled, which would put the Ninth Circuit
27 on the correct side of an circuit conflict. *See, e.g., White v. Engler*, 188 F. Supp. 2d
28 730, 743 (E.D. Mich. 2001) (discussing Sixth Circuit precedent).

²⁵ *See* Just the Facts: Poverty in California, Public Policy Institute of California, July
2020, <https://www.ppic.org/publication/poverty-in-california/> (“22.9% of Latinos
lived in poverty, compared to 18.% of African Americans, 15.9% of Asian
Americans/Pacific Islanders, and 12.8% of whites. Though the Latino poverty rate
has fallen from 30.9% in 2011, Latinos remain disproportionately poor—comprising
51.4% of poor Californians but only 39.6% of the state population.”).

1 Plaintiffs Christine Ruiz and her son Z.R. have experienced this firsthand, as
2 Ruiz has had to devote additional resources to hire an outside tutor due to her sons’
3 IEP plans being neglected by the school. The State Order will continue to deprive
4 Plaintiff Z.R. of an equal educational opportunity as distance learning leaves his IEP
5 needs unfulfilled and keeps racial minorities, like the Plaintiffs, at a significant
6 disadvantage from accessing equal educational opportunity.

7 **C. Defendants’ Order Violate Federal Laws Requiring Equal**
8 **Educational Access for Disabled Students**

9 **1. The Order Violate the Individuals with Disabilities Education Act**

10 The Individuals with Disabilities Education Act (IDEA) requires States to
11 provide disabled students with programming to meet their many needs. A State that
12 receives federal funding under the IDEA “must provide a free appropriate public
13 education—a FAPE, for short—to all eligible children.” *Endrew F. ex rel. Joseph F.*
14 *v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017) (citing 20 U.S.C.
15 § 1412(a)(1)). “A FAPE, as the Act defines it, includes both ‘special education’ and
16 ‘related services.’” *Id.* at 994 (citing 20 U.S.C. § 1401(9)). “‘Special education’ is
17 ‘specially designed instruction ... to meet the unique needs of a child with a
18 disability’; ‘related services’ are the support services ‘required to assist a child ... to
19 benefit from’ that instruction.” *Id.* (citing 20 U.S.C. §§ 1401(26), (29)). The
20 instruction and services provided by school districts must meet each student’s
21 “academic, social, health, emotional, communicative, physical and vocational needs.”
22 *Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 1185 (9th Cir. 2009).
23 To meet these needs, a school district’s services include “‘developmental, corrective,
24 and other supportive services,’ such as ‘psychological services, physical and
25 occupational therapy, recreation ... [and] social work services.’” *Id.* (citing 20
26 U.S.C. § 1401(26)).²⁶

27 _____
28 ²⁶ Additionally, “[e]very school district has an affirmative, ongoing duty known as a
‘child find’ obligation,” which requires the district “to actively and systemically seek
out, identify, locate, and evaluate children with disabilities in that district who may be
in need of special education and related services.” *Garcia v. Capistrano Unified Sch.*

1 Providing the IDEA’s mandatory “special education” and “related services”
2 requires in-person education for many, if not all, disabled students. To begin, students
3 with disabilities suffer “significant[ly]” from the lack of in-person instruction. *See*
4 *COVID-19 Planning Considerations: Guidance for School Reentry*, American
5 Academy of Pediatrics (Last Updated June 25, 2020),²⁷ Additionally, disabled
6 students require more services than simply in-person instruction, including services
7 from specialists such as occupational therapists, behavior specialists, and counselors.
8 *See* 20 U.S.C. § 1401(26); *e.g.*, *Price v. Commonwealth Charter Academy – Cyber*
9 *School*, 2019 WL 4346014, at *3, *5 (E.D. Penn. Sept 12, 2019); *K.B. on behalf of*
10 *S.B. v. Katonah Lewisboro Union Free Sch. Dist.*, 2019 WL 5553292, at *2
11 (S.D.N.Y. Oct. 28, 2019). Indeed, “[e]ducation for [] students with disabilities often
12 differs dramatically from ‘conventional’ [] education.” *E.R.K. ex rel. R.K. v. Hawaii*
13 *Dep’t of Educ.*, 728 F.3d 982, 990 (9th Cir. 2013) (citing *Park ex rel. Park v.*
14 *Anaheim Union Sch. Dist.*, 464 F.3d 1025, 1030–31 (9th Cir. 2006) (disabled high
15 school student’s special education included “buttoning, zipping and toilet training”)).
16 To meet these needs, and the requirements of the IDEA, school districts must be able
17 to provide at least some in-person services.

18 In addition to these general requirements, “[a] State covered by the IDEA must
19 provide [each] disabled child with [] special education and related services ‘in
20 conformity with the [child’s] individualized education program,’ or IEP.” *Andrew F.*,
21 137 S. Ct. at 994 (citing 20 U.S.C. § 1401(9)(D)). An IEP must be “reasonably
22 calculated to enable a child to make progress appropriate in light of the child’s
23 circumstances,” which progress must be “markedly more . . . than *de minimis*.” *Id.* at
24 999–1000 (citation omitted). And “a material failure” by the school “to implement an
25 IEP violates the IDEA.” *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d
26 _____
27 *Dist.*, No. SACV162111DOCDFMX, 2019 WL 8884143, at *16 (C.D. Cal. Sept. 27,
28 2019) (citing 20 U.S.C. § 1412(a)(3)(A)).

²⁷ <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>.

1 811, 822 (9th Cir. 2007) (emphasis omitted). “A material failure occurs when there is
2 more than a minor discrepancy between the services a school provides to a disabled
3 child and the services required by the child's IEP.” *Id.*

4 Defendants’ Order prohibiting all in-person instruction violate the IDEA.
5 Under the Order, all schools remain closed. *See* Executive Order N-60-20; *COVID-19*
6 *and Reopening In-Person Learning Framework for K- 12 Schools in California,*
7 *2020-2021 School Year*, California Dep’t of Pub. Health (July 17, 2020) (hereinafter
8 “CDPH Framework”).²⁸ Schools “may reopen for in-person instruction” only if “they
9 are located in a local health jurisdiction (LHJ) that has not been on the county
10 monitoring list within the prior 14 days.” CDPH Framework (footnote omitted). This
11 list currently contains 37 of California’s 58 counties. *County Monitoring List, County*
12 *Variance info.*²⁹ And while local health officers may grant waivers to elementary
13 schools, allowing them to reopen even if the county is on the monitoring list, this
14 waiver exception applies only to elementary schools and requires consultation with
15 CDPH. Moreover, evidence suggests that the criteria to obtain a waiver is nearly
16 impossible to satisfy. Cicchetti Decl. ¶14.

17 Most counties are performing the required number of tests. *Id.* Four counties
18 had fewer than the CDPH criteria of 150 tests performed per 100,000 people based on
19 a 7-day average with a 7-day lag. *Id.* Nevertheless, three passed at least one of the
20 “Case Rate” criteria based on less than 100 per 100,000 over 14 days, or less than a
21 25-case rate and positivity less than 8%. *Id.* The other 54 counties exceeded the
22 number of tests per day criteria but could not satisfy the case level criteria for re-
23 opening. *Id.* There were 23 counties with case rates that exceeded both the CDPH
24 threshold elevated case rate criteria. *Id.* There were another 14 counties that did not

25
26
27 ²⁸ Available as of the date of filing:

28 <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Schools%20Reopening%20Recommendations.pdf>.

²⁹ Available as of the date of filing: <https://covid19.ca.gov/roadmap-counties/#track-data>.

1 CDPH’s case rate per 100,000 (14 day) criteria. *Id.* These 37 counties could not seek
2 a variance. Others would need to file a variance to re-open. *Id.*

3 Thus, the regulations and near impossibility of obtaining a waiver cause a
4 significant portion of California’s schools will be unable to provide any in-person
5 services to their students with disabilities. This complete failure to provide services to
6 students with disabilities violates the IDEA.³⁰

7 Moreover, failure to provide any in-person services will cause uncounted
8 “material failure[s]” to implement the IEPs of disabled students. *See Van Duyn*, 502
9 F.3d at 822. Without the physical presence of a teacher, who knows, sees that child on
10 a daily basis, and cares for that child, the children are unable to be adequately protected
11 from domestic abuse because the teacher is unable to see the signs of abuse via Zoom,
12 that is if the child even has been attending the remote teaching sessions. Golden Decl.
13 ¶7.

14 Plaintiff Ruiz’s experience exemplifies these violations. She notes the
15 difficulties that distance learning causes her sons and that her sons’ IEPs cannot be
16 followed, effectively resulting in no education whatsoever. As she states in her
17 Declaration, Zoom learning is “useless” for her younger special needs child, as he
18 cannot sit still and cannot follow commands given online. Additionally, his school
19 provided him with a link to watch videos lasting a half hour per day. This de minimis
20 “service” does not fulfill his IEP. Plaintiff Ruiz also has concerns for her middle son,
21 who has severe autism, and has hands-on support of his individualized education
22 team, dedicated to him the entire school day. Both of her sons have IEPs that specify
23 precisely what is needed to provide appropriate education and since school was shut
24 down, neither child has been provided with any services required by each child’s IEP.
25 This record provides no reason to believe that the state will suddenly begin providing
26 statutorily mandated special needs services in the fall.

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³⁰ Moreover, the school districts will be unable to adequately seek out and identify children with disabilities, 20 U.S.C. § 1412(a)(3)(A), if school officials do not have regular, in-person contacts with those children.

1 **2. The Order Violate the Americans with Disabilities Act (ADA) and**
2 **Section 504 of the Rehabilitation Act.**

3 Both the Americans with Disabilities Act (ADA) and the Rehabilitation Act
4 require that public programs provide the same benefits to persons with disabilities
5 provided to those without. “Section 12132 of the ADA precludes (1) exclusion
6 from/denial of benefits of public services, as well as (2) discrimination by a public
7 entity.” *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996). This statute “was
8 expressly modeled after § 504 of the Rehabilitation Act.” *Duvall v. Cty. of Kitsap*,
9 260 F.3d 1124, 1135 (9th Cir. 2001), *as amended on denial of reh’g* (Oct. 11, 2001).
10 “To establish a prima facie case of disability discrimination under the ADA, a
11 plaintiff must prove” four elements. *E.R.K.*, 728 F.3d at 992. Plaintiff must prove that
12 “(1) he is an individual with a disability; (2) he is otherwise qualified to participate in
13 or receive the benefit of some public entity’s services, programs, or activities; (3) he
14 was either excluded from participation in or denied the benefits of the public entity’s
15 services, programs, or activities, or was otherwise discriminated against by the public
16 entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of
17 [his] disability.” *Id.* (citation omitted). And to establish a violation of the
18 Rehabilitation Act, the plaintiff must prove these same elements and “must also prove
19 that the relevant program receives federal financial assistance.” *Id.* And any plaintiff
20 “who requires an accommodation to meet a program’s essential eligibility
21 requirements can establish the ‘otherwise qualified’ element of the prima facie case
22 only by producing ‘evidence of the existence of a reasonable accommodation’”
23 *Id.*

24 Here, Plaintiffs have proven a prima facie case of discrimination under the
25 ADA and Section 504. California receives federal funding for education, including
26 under the IDEA to provide special education to disabled students.³¹ Plaintiff Z.R. is
27 an individual with a disability who is otherwise qualified to receive an education and
28 can do so with a reasonable accommodation. Ruiz Decl. ¶¶ 4-15. Given the inability

³¹ Available as of the date of filing: <https://www.cde.ca.gov/sp/se/as/leagrnts.asp>

1 of schools to provide in-person education under the Order, Z.R. has been denied the
2 benefits of a public education. *See* pp. 34-35. And this denial is due to his disability:
3 without his disability, Z.R. would be able to participate more fully in remote learning.
4 *See supra* pp. 34-35.

5 **3. Plaintiffs Were Not Required to Exhaust Administrative Remedies**
6 **Before Raising Claims Under the IDEA, ADA, or Rehabilitation**
7 **Act.**

8 While a plaintiff must generally exhaust administrative remedies before
9 bringing claims under the IDEA or seeking “adequate education for disabled youth”
10 under other laws, *Doe By & Through Brockhuis v. Arizona Dep’t of Educ.*, 111 F.3d
11 678, 680–81, 685 (9th Cir. 1997) (citing 20 U.S.C. § 1415(e)(2), (f)), this
12 requirement is subject to numerous exceptions. First, exhaustion is not required when
13 “it would be futile to use the due process procedures.” *Hoelt v. Tucson Unified Sch.*
14 *Dist.*, 967 F.2d 1298, 1303–04 (9th Cir. 1992) (citation omitted). Second, exhaustion
15 is not required when the challenged policy is one “of general applicability that is
16 contrary to the law,” *id.* (citation omitted), which occurs when the claim involves the
17 administrative “procedures themselves, or requires restructuring of the education
18 system itself.” *Doe By & Through Brockhuis*, 111 F.3d at 682. Third, exhaustion is
19 not required when “it is improbable that adequate relief can be obtained by pursuing
20 administrative remedies (e.g. the hearing officer lacks the authority to grant the relief
21 sought).” *Hoelt*, 967 F.2d at 1303–04 (citation omitted). Finally, exhaustion is not
22 required when “exhaustion would cause severe or irreparable harm.” *D.E. v. Cent.*
23 *Dauphin Sch. Dist.*, 765 F.3d 260, 275 (3d Cir. 2014); *see also Meridian Joint Sch.*
24 *Dist. No. 2 v. D.A.*, 792 F.3d 1054, 1068–69 (9th Cir. 2015) (explaining that
25 exhaustion is not required when right sought to be vindicated is “time-sensitive”).
26 When considering whether an exception applies, courts focus on “whether pursuit of
27 administrative remedies will further the general purposes of exhaustion,” which are to
28 “allow[] for the exercise of discretion and educational expertise by state and local
agencies, afford[] full exploration of technical educational issues, further[]
development of a complete factual record, and promote[] judicial efficiency by

1 giving these agencies the first opportunity to correct shortcomings in their
2 educational programs for disabled children.” *Hoeft*, 967 F.2d at 1302–03.

3 Plaintiffs were not required to exhaust administrative remedies for four
4 independently sufficient reasons. First, “it would be futile to use the due process
5 procedures.” *Hoeft*, 967 F.2d at 1303–04. The issues created by the Order cannot be
6 solved by filing complaints with school districts, as the districts have no authority to
7 override the Governor’s Order. For the same reason, “it is improbable that adequate
8 relief can be obtained by pursuing administrative remedies.” *Id.* Third, the claim here
9 is systemic, *id.*: the Executive Order prohibits schools from providing any in-person
10 education whatsoever. *See Handberry v. Thompson*, 446 F.3d 335, 344 (2d Cir. 2006)
11 (holding that plaintiffs did not need to exhaust administrative remedies when alleging
12 an “absence of any services whatsoever”). Finally, “exhaustion would cause severe or
13 irreparable harm.” *D.E.*, 765 F.3d at 275. Indeed, so likely and impending is
14 irreparable harm that Plaintiffs have asked for an immediate injunction of the Order.
15 *See infra* pp. 38-39. And exhausting administrative remedies here would serve none
16 of the purposes of exhaustion, as the challenge to the Order is not fact-bound, but
17 rather involves a legal challenge to a statewide order affecting every student in the
18 State of California.

19 **II. PLAINTIFFS AND THEIR CHILDREN FACE IMMINENT**
20 **IRREPARABLE HARM ABSENT IMMEDIATE INJUNCTIVE**
21 **RELIEF**

22 “Irreparable harm is traditionally defined as harm for which there is no
23 adequate legal remedy, such as an award of damages. *See Rent-A-Ctr., Inc. v.*
24 *Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).
25 Because intangible injuries generally lack an adequate legal remedy, “intangible
26 injuries [may] qualify as irreparable harm.” *Arizona Dream Act Coalition v. Brewer*,
27 757 F. 3d 1053, 1068 (9th Cir. 2014). The deprivation of a constitutionally protected
28 right such as those protected by the Fourteenth Amendment’s Equal Protection and
Due Process Clauses inexorably creates irreparable harm. *See Elrod v. Burns* 427
U.S. 347, 373 (1976).

1 Notably absent in distance learning is socialization, one-on-one aides and
2 hands-on teacher supports, that are crucial to assisting students with disabilities and
3 absolutely critical to success. Students with special needs are not the only children
4 affected- several Plaintiffs have observed worrisome negative behaviors from lack of
5 socialization in school. Several families have opted to leave school settings with
6 inhumane requirements for children and do the best they can at starting their own
7 alternative education. Sutton Decl. ¶6. This may prove equal to, better than, or worse
8 than prior education provided, but nonetheless imposes breaking of social bonds and
9 economic restrictions on families who counted on the educational system to teach
10 children while adults work. *Id.* The uprooted children suffer; and the school system
11 undergoes a shockwave. *Id.*

12 Plaintiff Brach is concerned for his daughter’s emotional state. Plaintiff Petrilla
13 has noticed a sharp decline in his son’s enthusiasm for learning. Plaintiff Ziegler’s
14 daughter is worried that she might not obtain college scholarship funds for college.
15 Other Plaintiffs have articulated similar concerns based in their experiences.

16 “The irreparable nature of Plaintiffs’ injury is heightened by Plaintiffs’ young
17 age and fragile socioeconomic position. Setbacks early in their careers are likely to
18 haunt Plaintiffs for the rest of their lives. Thus, “a delay, even if only a few months,
19 pending trial represents ... productive time irretrievably lost” to these young
20 Plaintiffs. *Chalk*, 840 F.2d at 710. Plaintiffs’ entire careers may be constrained by
21 professional opportunities they are denied today.” *Brewer* at 1068.

22 **III. THE REMAINING FACTORS WEIGH IN FAVOR OF GRANTING**
23 **INJUNCTIVE RELIEF**

24 Where the government is the opposing party, balancing of the harm and the
25 public interest merge. *See Nken*, 556 U.S. at 435. Thus, the Court asks whether any
26 significant “public consequences” would result from issuing the preliminary
27 injunction. *Winter*, 555 U.S. at 24. “[I]t is always in the public interest to prevent the
28 violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002
(9th Cir. 2012) (*quoting Elrod*, 427 U.S. at 373). “Faced with ... preventable human

1 suffering, [the Ninth Circuit] ha[s] little difficulty concluding that the balance of
2 hardships tips decidedly in plaintiffs’ favor.” *Hernandez v. Sessions*, 872 F.3d 976,
3 996 (9th Cir. 2017) (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)).

4 **CONCLUSION**

5 Plaintiffs’ Motion for a Preliminary Injunction should be granted.

6 Respectfully submitted,

7 Date: July 29, 2020

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