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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER

Judge: Hon. Stephen V. Wilson
Courtroom: 10A

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

PUBLICATIONS

INTRODUCTION

Defendants do not dispute that distance learning in the Spring was an unmitigated disaster that deprived millions of California students of an adequate education and subjected hundreds of thousands of children to abuse, depression, isolation, and hunger. Nor do they deny that the Governor's Order will fall hardest on students on the wrong side of the digital divide—many of whom are Black and Latino—and on those with learning disabilities. Instead, Defendants ask this Court to believe that these problems will magically disappear this Fall because the state is throwing $5 billion at the problem, even though schools are not required to *submit plans* for effective distance learning until end of September.

Defendants alternatively contend that the massive injuries the Order will inflict are somehow justified by the current public health situation. Defendants do not seriously dispute that COVID-19 presents only a nominal risk to children—nor could they—but contend, without scientific evidence, that opening schools is dangerous because children may transmit the disease to adults. But as Plaintiffs' experts have explained, *numerous* scientific studies from around the world have demonstrated that children are *not* significant vectors of the disease. Defendants have not submitted a single expert declaration disputing this evidence. Their lone expert—whose declaration does not cite any source material—opines only that it's "possible" that "asymptomatic transmission *may occur*" in the school setting. Watt Decl. ¶ 26 (emphasis added).

On the merits, Defendants contend that the Governor's Order is effectively unreviewable because *Jacobson* supposedly authorizes the executive to suspend constitutional rights as long as necessary to combat a disease. That astonishing argument, if accepted, would give the Governor czar-like powers until he decides to abdicate them—perhaps not until the virus is completely eradicated, which may never happen. Although judicial deference to state decision-makers may be appropriate in the early days of a pandemic when scientific evidence about the scope of the threat is scarce and the public's fears are heightened—which is when some district courts upheld the

various pandemic-related restrictions cited by Defendants—there is now sufficient public information for the Court to perform its traditional constitutional analysis.

When stripped of the *Jacobson* overlay, the case for a TRO is clear. The right to education is fundamental (or at least "quasi-fundamental") and the Order's ban on in-person education plainly infringes it. Defendants do not even attempt to show that the Order is narrowly tailored to advance the state's interest in combatting the spread of COVID-19—nor could they. Indeed, the Order's discriminatory treatment of schools in different counties cannot survive even rational basis review. While day care facilities and summer camps are allowed to provide in-person services, the Order prohibits *all* schools in affected counties from reopening. And whereas school districts are allowed to offer "social distancing support" to students *on campus* (for a fee), schools are prohibited from providing in-person instruction in those same classrooms. Plaintiffs' likelihood of success on the disability claims is even clearer, as Defendants make no effort to show that school districts can possibly provide the services required under the thousands of IEPs using so-called "distance learning." Exhaustion of administrative remedies is not required where, as here, it would be futile.

To prevent the state from irreparably harming millions of children and their families, without any valid public health justification, this Court should immediately grant a TRO and Preliminary Injunction.

ARGUMENT

Plaintiffs' TRO application demonstrates, at minimum, "serious questions" on the merits of their due process, equal protection, and IDEA/ADA claims. Because the balance of hardships and public interest tilt decisively in Plaintiffs' favor, a TRO is appropriate under Ninth Circuit precedent. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Defendants urge the Court not to interfere with the Governor's unilateral decision to ban in-person education across the state because the Order purports to respond to a "health emergenc[y]." Resp. 8 (citing *Jacobson*). But "[n]othing in *Jacobson* supports

the view that an emergency displaces normal constitutional standards." *Spell v. Edwards*, 962 F.3d 175, 181 (5th Cir. 2020) (Ho, J., concurring) (quoting *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting)); *see also In re Abbot*, 954 F.3d 772, 784 (5th Cir. 2020) ("[I]ndividual rights secured by the Constitution do not disappear during a public health crisis."). If the Court were to accept Defendants' argument, "the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land." *Sterling v. Constantin*, 287 U.S. 378, 397 (1932).

Although *Jacobson v. Massachusetts* affirmed that a "community has the right to protect itself against an epidemic of disease which threatens its members," it recognized that judicial intervention is appropriate where the state exercises the police power in "an arbitrary, *unreasonable* manner," or where it goes "so far beyond what is *reasonably required* for the safety of the public, as to authorize or compel the courts to interfere." 197 U.S. 11, 27–28 (1905) (emphases added). Thus, whatever *Jacobson* means, it does not give the Governor *carte blanche* to suspend the Constitution indefinitely without any meaningful judicial review. *See Roberts v. Neace*, 958 F.3d 409, 414–15 (6th Cir. 2020) ("While the law may take periodic naps during a pandemic, we will not let it sleep through one.").[1]

Defendants' reliance on Chief Justice Roberts' concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), which no other justice joined, is also misplaced. There, applicants requested "emergency relief in an interlocutory posture," which the Court grants "sparingly" in "exigent circumstances" when the "legal rights at issue are indisputably clear." *Id.* at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief) (citation omitted). Here, by contrast, Plaintiffs

[1] *Jacobson* was decided in 1905—long before the modern strict-scrutiny framework was developed—and thus any reliance upon *Jacobson* must overcome the significant "challenge of reconciling century-old precedent with … more recent constitutional jurisprudence." *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 926 (6th Cir. 2020). For example, in 1927 the Supreme Court relied on *Jacobson* to uphold Virginia's forcible sterilizations of the "feeble-minded"—a result that would be unthinkable under modern strict-scrutiny analysis. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

need show only that their TRO application raises "serious questions on the merits." *All. for the Wild Rockies*, 632 F.3d at 1135. Plaintiffs have met this requirement.

A. The Order Violates the Fourteenth Amendment Because it Infringes Fundamental Rights and Is Not Narrowly Tailored to Advance the Government's Interest in Combatting the Spread of COVID-19

Education is a Fundamental Right. State-provided education is "deeply rooted in this Nation's history and tradition" and is "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Any infringement of the right to basic minimum education—or discrimination that deprives certain groups of that right—is thus subject to a "heightened level of scrutiny." *United States v. Harding*, 971 F.2d 410, 412. n.1 (9th Cir. 1992).

And while Defendants contend that "no court has recognized a fundamental right to a basic education" (Resp. 14), *Plyer* and *Rodriguez* demonstrate that any infringement on the right to basic minimum education must be met with at least heightened scrutiny. *Plyer v. Doe*, 457 U.S. 202, 221 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973). Moreover, the "identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2016).

In all events, education is at least a "quasi-fundamental right" under settled precedent. *Harding*, 971 F.2d at 412 n.1. Courts have long held that pupils have a "right to be taught," *Farrington v. Tokushige*, 11 F.2d 710, 714 (9th Cir. 1926), *aff'd*, 273 U.S. 284 (1927), and that parents have a right "to control the education of their" children. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). The very concept of "liberty," "[w]ithout doubt, [ ] denotes . . . the right of the individual . . . to acquire useful knowledge." *Id.* at 399. Any burden on the right to education thus raises heightened scrutiny. *See* Carmen Green, *Educational Empowerment: A Child's Right to Attend Public School*, 103 Geo. L. J. 1089, 1127–28 (the test utilized in *Meyer* is "most similar to today's intermediate standard of review").

Defendants contend any fundamental right to education that may exist is a "limitation on the State's power, . . ." not a "guarantee of certain obligations to individuals by

the state." Resp. 15. But the Supreme Court has recognized affirmative fundamental rights, *see Gideon v. Wainright*, 372 U.S. 335 (1963); *Obergefell*, 135 S.Ct. at 2598, and in any event Plaintiffs are asking the Court to enforce constitutional limits on the state's power. And while the State distinguishes due process cases from equal protection cases, Resp. 15, a fundamental right is a fundamental right, regardless of which clause the claim invokes. *See, e.g.*, *Obergefell*, 135 S.Ct. at 2603–04.

Defendants mischaracterize Plaintiffs as advocating for a "fundamental right to in-person school." Resp. 17. Plaintiffs' actual argument is that "the Fourteenth Amendment of the United States Constitution [ ] protects Californians' fundamental right to a basic minimum education," TRO at 2, and that the Order infringes that right because distance learning has proved woefully inadequate. *See id*. 7-9.[2] On this outcome-determinative point, the State cites *no admissible evidence* showing that the many students who lack adequate technology can be educated effectively. Rather, it simply asserts that "all schools in the state must provide instruction to students in the 2020-21 school year, whether by distance learning or in-person instruction." Resp. 12. But simply ordering schools to make bricks without straw will not ensure an adequate education for millions of students, especially those on the wrong side of the digital divide. Indeed, even according to Defendants, "up to 1 million students still need devices for distance learning"—and only "100,000 students" will receive "computing devices" "during the back to school period." RJN Ex. MM.

Defendants also cite a "newly enacted State law" that forces school districts to "submit" a learning plan by September 30, 2020. Resp. 16. This confirms that school districts will start the school year without any concrete plan concerning distance learning for weeks, or months. And even once they do submit their proposals, the plans could be revised or rejected, further delaying their implementation. The evidence thus demonstrates that the Order unreasonably infringes Plaintiffs' fundamental rights.

[2] *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (cited at Resp. 15) is inapposite because Plaintiffs seek to enjoin state action based on federal law.

The Order is Not Narrowly Tailored. When a state regulation burdens a fundamental right, the regulation must be narrowly tailored such that the regulation "is necessary to achieve the articulated state goal." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632 (1969). Here, the "articulated state goal" is "to reduce transmission of SARS-CoV-2."[3] Shuttering schools across California is not "necessary" to achieve that goal because, as even Defendants concede, "children have been found to have a lower risk of child-to-child or child-to-adult transmission and a lower risk of serious infection." Resp. 13; *see also* TRO at 9-11 (citing expert declarations). Indeed, a recent study carried out in 100 institutions in the UK confirmed that "there is very little evidence that the virus is transmitted in schools." Bhattacharya Supp. Decl. ¶ 4.

In response to this voluminous scientific evidence, Defendants offer a handful of cherry-picked news articles that largely misrepresent the scientific evidence. Resp. 11. For example, Defendants mention an outbreak at an Israeli school in May (Resp. 11 n.6; RJN Exs. Y & Z), but the evidence showed that teachers passed the virus to students, not the other way around, likely because children were "crowded into a small closed space and no precautions [were] taken against disease spread." Bhattacharya Decl. ISO Opp'n to RJN. ¶ 4. Moreover, because "no viral sequencing analysis was conducted," "no causal connection should be inferred from the correlation between Israeli school openings and the rise of cases" in the country. *Id.* ¶ 5. The data from tracing studies in South Korea (*see* RJN Ex. CC) indicate nothing "whatsoever about the relative propensity of children and adults to transmit the disease," *id.* ¶ 10, and a recent paper analyzing the same data found "no instances of a child passing the disease to an adult." *Id.* ¶ 11. And while a few students in Georgia and Indiana schools have tested positive (*see* RJN Exs. AA & BB), there is no evidence that any infected students transmitted the virus at school. *Id.* ¶ 14. Finally, the Georgia summer camp (*see* RJN Ex. W) is "no analogy for schools" because "the kids were older, they slept together in crowded cabins, and engaged in lots of singing and screaming." *Id.* ¶ 15.

[3] Cal. Dep't of Pub. Health, *COVID-19 and Reopening In-Person Learning* (July 17, 2020), https://tinyurl.com/y495p4v2.

And many developed symptoms within days of arriving, which "suggests strongly" that they "were infected prior to arrival." *Id.* In short, Defendants have not presented any competent *evidence* that children are transmission vectors.

Nor have Defendants shown that the state's goal could not be achieved through "less drastic means," *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), such as through social distancing, mask wearing, increased hand washing, limited interactions among teachers, etc.—precautions recommended by the CDC. *See, e.g.*, Brach Decl. ¶ 12. The Order is also both under- and over-inclusive, because it permits similar activities such as daycares, and closes schools geographically removed from COVID-19 outbreaks just because they are in the wrong county. *See Kramer*, 395 U.S. at 632. For these reasons, Defendants flunk the narrow tailoring requirement under a quasi-fundamental rights analysis as well. *See Charfauros v. Bd. of Elections*, 249 F.3d 941, 953 (9th Cir. 2001) (Board failed to show that alternative solution was "impractical").

B. The Order Cannot Survive Even Rational Basis Review[4]

For a policy to have a rational basis, it "must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). Plaintiffs may "rebut the facts underlying defendants' asserted rationale for a classification, to show that the challenged classification could not reasonably be viewed to further the asserted purpose." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590–91 (9th Cir. 2008); *see, e.g., Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990).

Here, there is no rational basis for differentiating between similarly situated school districts based on countywide health metrics, because children are highly unlikely to be sickened by or transmit COVID-19. TRO at 9–11. "[V]ague, undifferentiated fears" do not provide a rational basis for "what would otherwise be an equal protection violation." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985).

[4] Plaintiffs have *not* conceded that their equal protection claim is subject only to rational basis review, but to the extent education is a fundamental right, the strict-scrutiny analysis here overlaps with the analysis of the due process claim.

The State asserts that schools in counties on the monitoring list are not similarly situated to those in other counties (Resp. 19), but the state's metrics have *nothing to do* with the risk of COVID-19 transmission in schools. Bhattacharya Decl. ¶ 20. The San Mateo County Health Officer has called the metrics "arbitrary" and "fundamentally flawed,"[5] and the Solano County Health Officer has warned "it may be impossible for his county to get off the watch list."[6] *See Behrens*, 546 F.3d at 589 (Courts need not "accept Defendants' characterizations of *what classifications they made*.").

The Order's irrationality is compounded by the fact that the monitoring list is frozen due to a "data meltdown" involving "hundreds of thousands of missing COVID-19 test results,"[7] preventing the state from adding or removing counties from the list.[8]

Defendants argue that childcare centers and day camps involve smaller groups of children, but private and rural public schools subject to the Order also have low student-to-teacher ratios, and the Governor made no effort to calibrate school closures to class sizes. Defendants also contend that childcare facilities serve only very young children, but school districts are now offering childcare to children of all ages *on campus*—just without an in-person educational component. Dhillon Decl. ¶ 7. Finally, there is no meaningful difference between "[a]llowing *continued* operation of a sector that has been open" (like day camps and childcare centers) and "permitting a sector that has been closed," (like schools) "to reopen." Resp. 19.

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[5] Eric Ting, *San Mateo County health officer assails 'fundamentally flawed' state watch list*, SF GATE (Aug. 6, 2020), https://tinyurl.com/y3apmlgf.

[6] Eric Ting, *Solano County health chief: It may be impossible to get off state watch list*, SF GATE (Aug. 1, 2020), https://tinyurl.com/y65xlmsu.

[7] Dustin Gardiner & Erin Allday, *California's coronavirus response is in crisis mode, as computer glitch makes case data unreliable*, SAN FRANCISCO CHRONICLE (Aug. 7, 2020), https://tinyurl.com/yxs4qyot; Chris Jennewein, *California Public Health Director Resigns After Missing COVID-19 Test Results*, TIMES OF SAN DIEGO (Aug. 10, 2020), https://tinyurl.com/y596g9y2.

[8] TRIBUNE NEWS SERVICE, *State COVID-19 Data Glitch Impacts Contact Tracing, School Reopening Process*, TECHWIRE (August 6, 2020), https://tinyurl.com/y4q7h2ox.

C. The Order Violates Title VI's Implementing Regulations

Although Defendants do not dispute that the Order has a disparate impact on minority students, the parties agree Plaintiffs' Title VI claim is currently foreclosed.

D. Plaintiffs are Likely to Succeed on the Merits of their IDEA, Rehabilitation Act, and ADA Claims

Defendants do not deny that the Order will violate the statutory rights of disabled students, essentially conceding what is abundantly clear: schools cannot provide necessary, federally mandated services to disabled students remotely. *See Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1210 & n.7 (N.D. Cal. 2013) (failure to respond constitutes a concession) (collecting cases). Instead, Defendants avoid the merits by wrongly arguing that Plaintiffs' claims are procedurally barred. Resp. 22–23.

First, Plaintiffs' citation to 42 U.S.C. § 1983 does not render the claims "defective." Resp. 22. Even if Plaintiffs' claims must be raised under Section 1415 of the IDEA, Section 504 of the Rehabilitation Act, and Title II of the ADA, Plaintiffs' Amended Complaint does so. *See* Dkt. 9:36–38. *See Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008) ("Notice pleading requires the plaintiff to set forth in his complaint *claims for relief*, not causes of action, statutes or legal theories."). In any event, the IDEA, ADA, and Rehabilitation Act "have [all] been enforced under § 1983." *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011) (collecting cases), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014).[9]

Defendants' exhaustion argument fares no better. Plaintiffs' claims under the ADA and Rehabilitation Act are not subject to the IDEA's exhaustion requirement because they do not turn on the right to "special education" and "related services," 20 U.S.C.

[9] In *Blanchard v. Morton Sch. Dist.*, 509 F.3d 934 (9th Cir. 2007) (cited at Resp. 22), the court held only that a parent could not use § 1983 to seek compensatory damages when bringing a claim for the prior denial of a FAPE under the IDEA. *Id.* at 937–38. The Court did not hold that all claims involving the right to a FAPE must be brought under 20 U.S.C. § 1415. And in *Vinson v. Thomas*, 288 F.3d 1145 (9th Cir. 2002) (cited at Resp. 22), the court held that "a plaintiff cannot bring an action under 42 U.S.C. § 1983 against a State official in her *individual* capacity to vindicate rights created by Title II of the ADA or section 504 of the Rehabilitation Act." *Id.* at 1156 (emphasis added). Here, Plaintiffs named Defendants in their *official* capacities only.

§ 1401, but rather on the right to receive an education on the same terms as non-disabled students. *See Fry v. Napoleon Cmm'ty Schls.*, 137 S. Ct. 743, 754–55 (2017). When a neutral policy "burdens [disabled] persons in a manner different and greater than it burdens others," that policy "discriminates against [those individuals] by reason of their disability." *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996). Here, the Order discriminates against disabled children on the basis of their disabilities because Z.R. and other disabled children are burdened by the school closures "in a manner different and greater than" other children. *Id.*; TRO at 23–24.

In any event, Plaintiffs were not required to exhaust administrative remedies because "it would be futile to use the due process procedures." *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992) (citation omitted). The issues created by the Orders cannot be solved by filing complaints with the Department of Education, which has no authority to override the Governor's Order. The claims here are also systemic, *id.*, and a plaintiff need not exhaust when alleging an "absence of any services whatsoever." *Handberry v. Thompson*, 446 F.3d 335, 344 (2d Cir. 2006). Indeed, pursuing administrative remedies here would serve none of the purposes of exhaustion, as this case is not fact-bound, but involves legal challenges to a statewide order affecting every student in California. *See Hoeft*, 967 F.2d at 1302–03.

II. DEFENDANTS HAVE NOT SUBMITTED ANY *EVIDENCE* REBUTTING PLAINTIFFS' SHOWING OF IRREPARABLE HARM

As Plaintiffs' Application and supporting declarations demonstrate, children will suffer immediate and irreparable harm if the Order is not enjoined. Most significantly, the ban on in-person education will deprive Plaintiffs and millions of other children of an adequate education. Distance learning harms *all children*, even the well-connected ones, by forcing them to spend countless hours staring at a screen and depriving them of the necessary social interactions that facilitate learning. *See, e.g.*, Lyons-Weiler Decl. ¶ 25; Hamilton Decl. ¶ 9; McDonald Decl. ¶ 7; Brach Decl. ¶ 8; Beaulieu Decl. ¶ 15. And for those on the wrong side of the digital divide, distance learning effectively means *no* learning. Defendants offer no evidence to the contrary.

Hundreds of thousands of children will also suffer collateral consequences resulting from the state's forced isolation, including abuse, depression, and hunger. Apparently unable to find a *single declarant* willing to swear on penalty of perjury that these harms will not materialize, Defendants simply assert that "the State has taken important steps to mitigate any such harms." Resp. 24 (citing RJN Exs. GG-JJ, NN). But the irreparable harm Plaintiffs have identified will not be avoided merely because the state plans to throw money at the problem or because state bureacrats created guidance documents and templates local education agencies can use to describe their plans for distance learning. *See* RJN Exs. GG-JJ, NN. Indeed, Defendants tacitly concede that the Order will cause irreparable harm when they tout the state's funding for "mental health services to address trauma." Resp. 24.

In all events, Defendants do not dispute that deprivation of constitutional rights constitutes irreparable harm, and the Order unlawfully burdens the Fourteenth Amendment rights to due process and equal protection (*see supra* Part I.A–B).

III. A STAY IS FIRMLY IN THE PUBLIC INTEREST

Plaintiffs have submitted overwhelming evidence that a stay is in the public interest because (1) the risk to children from COVID-19 is negligible, (2) children are not a significant transmission vector of the disease; and (3) keeping schools closed will financially cripple thousands of California families and injure the state economy. Once again, Defendants have no meaningful response to any of these points.

First, Defendants do not dispute that COVID-19 is less lethal to children than seasonsal influenza. Although Dr. Watt notes that 30 cases of multisystem inflammatory syndrome in children (MIS-C) have been linked to COVID-19, this uncommon response to the virus has not been lethal to any of the children identified with the condition, and the state can hardly justify an Order barring millions of children from receiving an in-person education on the basis of 30 such cases.

Second, while Plaintiffs' numerous public health experts have provided exhaustive declarations discussing every major scientific study on child transmission, the State's lone expert does not discuss *any* scientific studies and opines only that "it is *possible*

that in the school setting, as in other settings, asymptomatic transmission *may occur*." Watt Decl. ¶ 26 (emphasis added). Instead of using experts, the State improperly asks the Court to take judicial notice of newpaper articles written by non-scientists who often misunderstand the very studies they are reporting. *See* RJN Exs. Y-BB; Pltfs. Opp. to RJN; Bhattacharya Decl. ISO Opp'n to RJN ¶¶ 4-15. Defendants also raise the specter of teachers and staff being "exposed to potential transmission without adequate safety measures" (Resp. 25), and their *amici* fret that various health risks cannot be mitigated or or eliminated (Amicus Br. at 13-18), but school administrators across the state have developed safety protocols to protect teachers and staff from possible infection at school. *See, e.g.*, Brach Decl. ¶¶ 12, 16; Hackett Decl. ¶ 6; Reardon Decl. ¶ 9. Schools around the world and in other states are successfully managing these challenges, and the CDC—well aware of such risks—supports school reopening.

Third, Defendants do not even address the massive economic consequences of closing schools, both for affected families—especially those who cannot afford tutors and must quit their jobs to stay home with children—and the state economy.[10] Survey evidence shows that most childcare responsibilities, including homeschooling, fall on women,[11] indicating that the Order will exacerbate income *and* gender inequality.

The State notes there is a waiver available for elementary schools, but Defendants' admission that there are "lower risks of transmission and infection in children under age 12" (Resp. 25), confirms that the public interest favors *a stay* of the Governor's Order, which prohibits elementary schools from opening for in-person instruction.

CONCLUSION

For the foregoing reasons, the Court should preliminarily enjoin Defendants from enforcing the Order, leaving districts and schools free to decide whether and how to reopen for in-person education, as they are in every other state in the U.S. today.

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[10] *See The COVID-19 cost of school closures*, BROOKINGS (Apr. 29, 2020), https://tinyurl.com/yyktwmpf.

[11] *See* Diana Boesch & Katie Hamm, *Valuing Women's Caregiving During and After the Coronavirus Crisis*, CENTER FOR AMERICAN PROGRESS (June 3, 2020), https://tinyurl.com/y4tvu8km.

Respectfully submitted,

Date: August 12, 2020

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