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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 ca-
25 pacity as the Governor of California, *et*
26 *al.*,

27 Defendants.
28

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND FOR
ORDER TO SHOW CAUSE WHY
PRELIMINARY INJUNCTION
SHOULD NOT ISSUE**

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

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1 **INTRODUCTION**

2 With the stroke of a pen, Governor Gavin Newsom has closed all public
3 schools, charter schools, and private schools in 38 of California’s 58 counties, con-
4 signing *millions* of students and their families to another semester (and perhaps a
5 year) of so-called “distance learning,” which has proven an utter failure. The Gover-
6 nor’s one-size-fits-all approach has upended the carefully tailored plans that teachers
7 and administrators have developed to reopen schools this fall safely and effectively.

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

23 One would expect such an enormously disruptive order to be based on over-
24 whelming scientific evidence. But it is not. On the contrary, the scientific data clearly
25 shows that the risks of COVID-19 to school-age children are negligible, as the nu-
26 merous expert declarations submitted by some of the nation’s leading epidemiolo-
27 gists and physicians explain. Indeed, *only one person* under the age of 18 has died
28 of COVID-19 in California. Scientists have also discovered that children hardly ever
transmit the virus to adults. A recent CDC report, based on exhaustive data from

1 South Korea—the country with the most success tracking and tracing the virus’s
2 spread—found that less than 2% of new transmissions were attributed to those be-
3 tween 0 to 20 years old. Less than 1% of new transmissions were attributed to those
4 under 10, the population most in need of in-person education. The CDC has thus
5 urged the nation’s schools to resume in-person education this Fall. Dozens of other
6 countries have reopened their schools without social distancing, mask wearing, or
7 other protective measures—yet none of these countries has reported an increase in
8 new cases resulting from student-to-teacher contact. In short, the Governor’s mora-
9 torium on in-person education is completely at odds with everything we now know
10 about COVID-19.

11 This Court should issue a TRO and preliminary injunction because the order
12 violates the Fourteenth Amendment of the United States Constitution, which protects
13 Californians’ fundamental right to a basic minimum education and forbids states
14 from enforcing laws—especially laws purporting to shutter school-house doors—
15 that are utterly irrational. The order also violates the Constitution’s guarantee of
16 equal protection because while it bars in-person education at schools in counties on
17 the state’s monitoring list (there are currently 38 such counties¹) it allows in-person
18 education at schools in every other county. Whatever level of scrutiny applies to this
19 unequal treatment, the order fails it, because barring in-person education has no ra-
20 tional relationship to the state’s interest in slowing the spread of COVID-19. The
21 order also tramples the rights provided by Title VI of the Civil Rights Act of 1964
22 and other federal laws, which guarantee access to education for students with disa-
23 bilities and prohibit state action having a disparate impact on racial minorities, as
24 closing schools certainly will.

25 The remaining preliminary-injunction factors overwhelmingly favor Plain-
26 tiffs, who represent a diverse, cross-section of the millions of families and students
27 most harmed by the Governor’s order. Nearly every public school district in the state
28 will have begun the Fall term by August 25. And more than half of public schools,

¹ See County variance info, <https://covid19.ca.gov/roadmap-counties/#track-data>

1 and many private schools, are scheduled to resume classes *this week or next*. Chil-
2 dren suffer irreparable harm every day that the state deprives them of their right to
3 quality, in-person education, and the public has no interest in keeping schools closed
4 this Fall because in-person learning does not meaningfully increase the risk of
5 spreading COVID-19. This is thus the rare case warranting immediate judicial inter-
6 vention.

7 To be clear, granting emergency relief in this case will *not* force any teacher
8 to return to the classroom or compel any parent to send their child to school, but it
9 *will* allow schools and school districts to resume in-person education when and how
10 they deem prudent. Accordingly, Plaintiffs respectfully ask this Court to grant a tem-
11 porary restraining order barring Defendants and all other state agents from enforcing
12 the Governor’s order, and to set a hearing on Plaintiffs’ motion for preliminary in-
13 junction “at the earliest possible time.” Fed. R. Civ. P. 65(b)(3).²

14 RELEVANT FACTUAL BACKGROUND

15 **I. Governor Newsom Shuttters California’s Schools in the Spring, Causing** 16 **Extreme Hardship for All Students, but Especially for Poor, Minority,** 17 **and Disabled Students**

18 On March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency
19 as a result of the threat of COVID-19.³ On March 19, 2020, he issued Executive Order
20 N-33-20, which provided that “all residents are directed to immediately heed the cur-
21 rent State public health directives.”⁴ The state public health directive, in turn, required
22
23

24 ² If the Court denies the TRO, Plaintiffs request that the hearing on the motion for pre-
25 liminary injunction be scheduled as soon as possible, and no later than August 24,
26 2020. *See* Local Rule 65-1.

27 ³ Executive Dept. of the State of California, Executive Order N-33-20, March 19,
28 2020, available as of the date of filing: [https://www.gov.ca.gov/wp-content/up-
loads/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).

⁴ 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-
N-33-20.pdf](https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf).

1 “all individuals living in the State of California to stay home or at their place of resi-
2 dence except as needed to maintain continuity of operations of the federal critical in-
3 frastructure sectors[.]” *Id.* As a result, schools across the state closed their doors and
4 transitioned to so-called “distance learning.”

5 The problems of remote education—especially for poor, minority, and disabled
6 children—surfaced almost immediately. Less than two weeks after the school shut-
7 down on March 16, 2020, Los Angeles School District officials admitted that 15,000
8 high-school students were completely unaccounted for and more than 40,000 had not
9 been in daily contact with their teachers.⁵ As one teacher explained, her fifth grade
10 online math class, consisting primarily of poor and minority students, had only a 10%
11 attendance rating. Keech Decl. ¶¶ 7, 15. Another explained that, even high-achieving,
12 affluent students, “struggled with online learning at home” and “missed the important
13 social interactions with their friends.” Gerst Decl. ¶ 5. Yet another saw her students’
14 online participation rate start at only 42% at the beginning of the closure and drop to a
15 mere 2% by the end of the school year. Cunningham Decl. ¶ 5.

16 Later studies showed even more starkly how much students suffered academi-
17 cally from online-only learning. A July 7 study conducted by the Los Angeles Unified
18 School District (LAUSD) showed that, between March 16 and May 22, 2020, “on an
19 average day only about 36% of middle and high school students participated online,”
20 while “[a]bout 25% logged on or viewed work only” “[a]nd about 40% were absent.”⁶
21 A survey of parents in the Palos Verde Unified School District showed that over 60%
22 of parents reported that the amount of “face-to-face” teaching during the shutdown was
23 “not enough.” Brach Decl. ¶ 15.

24 _____
25 ⁵ Howard Blume, *15,000 L.A. high school students are AWOL online, 40,000 fail to*
26 *check in daily amid coronavirus closures*, Los Angeles Times (March 30, 2020),
27 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>.

28 ⁶ *Report reveals disparities among Black, Latino LAUSD students in online learning amid COVID-19 pandemic*, ABC 7 Eyewitness News (July 17, 2020) (hereinafter “ABC 7”), available as of the date of filing: <https://abc7.com/lausd-los-angeles-unified-school-district-race-disparity-racial-divide/6321930/>.

1 A study by Stanford University found that “white, non-poverty, non-“English
2 Language Learner” and non-special education students who were subject to virtual
3 learning were behind their in-person peers to an extent that reflected an equivalent of
4 180 fewer days of instruction in math and 72 fewer days of instruction in reading.”
5 Keech Decl. ¶ 16 (emphasis omitted). Another study by Brown University projected
6 that, as a result of spring shut downs, students likely would achieve only “63-68% of
7 the learning gains in reading relative to a typical school year” and only “37-50% of the
8 learning gains in math.”⁷

9 Minority and disabled students suffered even more from online-only learning.
10 The July 7 study by the LAUSD found that “Black and Latino students showed partic-
11 ipation rates between 10 and 20 percentage points lower than white and Asian peers.”
12 *ABC 7, supra*. And “English learners, students with disabilities, homeless students and
13 those in the foster-care system had lower rates of online participation.” *Id.* As one spe-
14 cial-education teacher explained, there are 795,000 disabled students in California’s
15 schools, and “[w]hen school campuses are closed and education is moved entirely
16 online, many of the guarantees and tenets afforded to special needs children under the
17 Individuals with Disabilities Education Act (‘IDEA’) collapse.” Walker Decl. ¶¶ 4–5.
18 Indeed, “[m]any students with special needs . . . have a myriad of health needs that
19 require services,” which “simply cannot be provided virtually.” *Id.* ¶ 7; *see also* Rear-
20 don Decl. ¶ 10 (“Autistic children require a tremendous amount of direct support,”
21 including for “their developmental, speech, occupational therapy, behavior (i.e., social
22 skills), and academic needs.”). “One survey found that 4 out of 10 families reported
23 that they were not receiving any special education support at all,” and only “1 in 5
24 families reported that they are receiving all the services their children are entitled to on
25 their IEP.” Walker Decl. ¶ 9. The CDC reports that students with disabilities “had sig-
26 nificant difficulties with remote learning.” *The Importance of Reopening America’s*

27 _____
28 ⁷ Megan Kuhfeld, *et al.*, *Projecting the potential impacts of COVID-19 school
closures on academic achievement*, Brown University EdWorkingPaper No. 20-226,
at 2, 23 (May 2020), available as of the date of filing:
<https://www.edworkingpapers.com/sites/default/files/ai20-226-v2.pdf>.

1 *Schools this Fall, supra*; see also Gavin Decl. ¶¶ 9–10 (“disabilities []
2 make it extremely difficult” to learn at home without special assistance afforded by in-
3 person instruction).

4 Beyond these overwhelming difficulties, a complete lack of access to schools
5 caused students—especially poor, minority, and disabled students—to suffer myriad
6 other traumas. As the CDC explained, “[s]chools play a critical role in supporting the
7 whole child, not just their academic achievement,” including the “development of so-
8 cial and emotional skills.”⁸ “Psychological, social, and emotional development re-
9 quires children to both spend time away from parents and with peers, in structured
10 settings, such as school.” McDonald Decl. ¶ 7. “Peer relationships provide a unique
11 context in which children learn a range of critical social emotional skills, such as em-
12 pathy, cooperation, and problem-solving strategies.” Lyons-Weiler Decl. ¶ 25. And the
13 safe, connected environment many students experience at school reduces students’ de-
14 pression, anxiety, and thoughts of suicide, *The Importance of Reopening America’s*
15 *Schools, supra*, while “extended periods of confinement” increase these problems,
16 McDonald Decl. ¶ 7; see also Lyons-Weiler Decl. ¶ 29. Indeed, one psychiatrist has
17 seen children “with cognitive developmental delays like autism” “regress[] in years”
18 from the closures, “and many have become violent towards themselves and their par-
19 ents.” McDonald Decl. ¶ 7. One teacher reported that “[m]any of her students expressed
20 ... a marked increase in feelings of depression, isolation, and anxiety.” Cunningham
21 Decl. ¶ 8. Plaintiff Mitrowke’s 7-year-old son was so emotionally affected by the clo-
22 sures he frequently cries in the shower because he misses his friends, and he continues
23 to suffer daily from the isolation. Mitrowke Decl. ¶¶ 2, 5–6.

24 In sum, school closures in the Spring harmed children by denying them the social
25 interactions they need to develop emotionally, psychologically, and spiritually. Giap
26 Decl. ¶ 3.

27 _____
28 ⁸ *The Importance of Reopening America’s Schools this Fall*, Centers for Disease
Control and Prevention (July 23, 2020), available as of the date of filing:
[https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-
schools.html](https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html).

1 **II. Experts Agree that Continued “Distance Learning” this Fall Will have**
2 **Disastrous Consequences for Children**

3 There is nearly universal agreement that barring in-person learning this Fall will
4 exacerbate the harm done in the Spring. As an initial matter, forcing children to stare
5 at computer screens for extended periods of time has detrimental effects on children’s
6 brains; so much so that prolonged screen time produces imaging results similar to the
7 brains of people on cocaine and alcohol. Sutton Decl. ¶ 8. Reopening schools is thus
8 necessary to prevent children’s brain development from being significantly inhibited.
9 Addison Decl. ¶ 5. And apart from the cognitive setbacks, digital learning has proven
10 to be far less effective than in-person learning. A study by McKinsey & Company
11 concluded that children who receive average-quality online learning this Fall—which
12 many will *not* receive—will lose “three to four months of learning” by January 2021.⁹

13 This disadvantage will be even starker for minority students, who tend to suffer
14 from the “digital divide”—*i.e.* lack of access to technology—and from a lack of access
15 to childcare.¹⁰ Studies show that “Blacks and Latinos are substantially less likely to
16 have a computer at home than are white, non-Latinos,” with some estimates showing
17 that “70.4 percent of whites have access to a home computer,” while “only 41.3 percent
18 of blacks and 38.8 percent of Latinos have access to a home computer.” *Id.* at 4–5.¹¹
19 And low-income families “have trouble finding, accessing, and affording” childcare.¹²

20 ⁹ Emma Dorn, et al., *COVID-19 and student learning in the United States: The hurt*
21 *could last a lifetime*, McKinsey & Company (June 1, 2020), available as of the date of
22 filing: [https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-and-](https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime)
23 *student-learning-in-the-united-states-the-hurt-could-last-a-lifetime*.

24 ¹⁰ See Robert W. Fairlie, *Race and the Digital Divide*, UC Santa Cruz: Department of
25 Economics, UCSC, at 2 (2014), available as of the date of filing:
26 <https://escholarship.org/uc/item/48h8h99w>.

27 ¹¹ See also Daniel Wu, *Coronavirus shutdowns expose low-income Bay Area students’*
28 *struggle to get online*, The Mercury News (Aug. 3, 2020) (“one-quarter of California
students lack adequate access to the internet” a “majority of them are Black, Latinx or
Native American”), available at [https://www.mercurynews.com/2020/08/03/corona-](https://www.mercurynews.com/2020/08/03/coronavirus-shutdowns-expose-low-income-students-struggle-to-get-online/)
[virus-shutdowns-expose-low-income-students-struggle-to-get-online/](https://www.mercurynews.com/2020/08/03/coronavirus-shutdowns-expose-low-income-students-struggle-to-get-online/)

¹² *Coronavirus Impact on Students and Education Systems*, NAACP (last visited July
28, 2020), available as of the date of filing: [https://naacp.org/coronavirus/coronavirus-](https://naacp.org/coronavirus/coronavirus-impact-on-students-and-education-systems/)
[impact-on-students-and-education-systems/](https://naacp.org/coronavirus/coronavirus-impact-on-students-and-education-systems/).

1 Indeed, the McKinsey study predicted that Blacks and Latinos would suffer a 15 to 20
2 percent greater loss in educational gains than other students. Dorn, *supra*.

3 Moreover, as the American Academy of Pediatrics has explained, “[l]engthy
4 time away from school and associated interruption of supportive services often results
5 in isolation, making it difficult for schools to identify and address important learning
6 deficits as well as child and adolescent physical or sexual abuse, substance use, depres-
7 sion, and suicidal ideation.”¹³ See also Victory Decl. ¶ 6 (“children’s hearing and vision
8 problems are typically identified at school”). Indeed, teachers and staff report more
9 than one-fifth of all child-abuse cases. *The Importance of Reopening America’s*
10 *Schools, supra*. During the school closures, “there has been a sharp decline in reports
11 of suspected maltreatment.” *Id.*; see also Victory Decl. ¶ 6 (30% drop in nationwide
12 abuse reports). However, hospitals have seen an *increase* in hospitalizations of children
13 suffering physical abuse. *The Importance of Reopening America’s Schools, supra*. And
14 according to the Rape, Abuse & Incest National Network (RAINN), once shelter-in-
15 place orders were implemented “half the victims receiving help from the National Sex-
16 ual Assault Hotline were minors.”¹⁴ “Many minors are now quarantined at home with
17 their abuser” while being “cut off from their safety net – the teachers, coaches, and
18 friends’ parents who are most likely to notice and report suspected abuse.” *Id.*

19 Finally, many students will be cut off from an important source of food and
20 physical activity. The CDC reports that “more than 30 million children participate in
21 the National School Lunch Program and nearly 15 million participate in the School
22 Breakfast Program.” *The Importance of Reopening America’s Schools, supra*; see also
23 *AAP Guidance, supra* (“Beyond the educational impact and social impact of school
24 closures, there has been substantial impact on food security and physical activity for
25

26 ¹³ *COVID-19 Planning Considerations: Guidance for School Re-entry*, American
27 Academy of Pediatrics (last visited July 28, 2020) (hereinafter *AAP Guidance*), avail-
28 able as of the date of filing: <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>.

¹⁴ *For the First Time Ever, Minors Make Up Half of Visitors to National Sexual Assault Hotline*, RAINN (April 16, 2020).

1 children and families.”) The state has announced no plans to replace this essential so-
2 cial service for needy children.

3 Given the substantial harms caused by school closures, the World Health Organi-
4 zation (WHO) and US Centers for Disease Control (CDC) have each issued guidance
5 on school opening emphasizing that school opening decisions should be based on the
6 “[c]urrent understanding about COVID-19 transmission and severity in children,” the
7 “[l]ocal situation and epidemiology of COVID-19 where the school(s) are located,”
8 and the “[s]chool setting and ability to maintain COVID-19 prevention and control
9 measure.” Bhattacharya Decl. ¶¶ 16-18. The WHO guidance explicitly recommends
10 the consideration of “what harm might occur due to school closure (e.g. risk of non-
11 return to school, widening disparity in educational attainment, limited access to meals,
12 domestic violence aggravated by economic uncertainties etc.), and the need to maintain
13 schools at least partially open for children whose caregivers are ‘key workers’ for the
14 country.” *Id.* Likewise, the CDC guidance suggests keeping schools open even if there
15 is moderate community spread of SARS-CoV-2 infection, with school closures limited
16 only to communities with “substantial” community spread. *Id.* ¶ 18.

17 **III. The Data Show that Children Are Unlikely to Spread the Coronavirus**
18 **or Suffer Adverse Results from COVID-19, and Many European**
19 **Schools Reopen Without Causing a Resurgence of Coronavirus**

20 The CDC now estimates that the population-wide death rate of COVID-19 is
21 0.26%. Lyons-Weiler Decl. ¶ 4. However, the most recent studies “indicate that the
22 fatality rate for those under age 70 is 0.04%, less than or equal to seasonal influenza.”
23 Atlas Decl. ¶ 9. Of particular relevance here, “younger, healthier people have *virtually*
24 *zero* risk of death from [COVID-19].” *Id.* ¶ 11. In fact, as of July 30, “[n]o child under
25 age 18 in the state of California ha[d] died due to infection from the coronavirus since
26 tracking began on February 1, 2020[.]” McDonald Decl. at ¶ 5.¹⁵ The CDC reports a
27 total of 226 COVID-19 deaths in persons under 24 across the US, out of a total of

28 _____
¹⁵ California reported the first death of a minor from COVID-19—a teenager with “un-
derlying health conditions”—on July 31, 2020. *See* Sophia Bollag, *California reports*
the first death of a teen from COVID-19, THE SACRAMENTO BEE (July 31, 2020).

1 26,808 deaths for that age group over the same period from all causes. Lyons-Weiler
2 Decl. ¶ 6. By comparison, influenza and pneumonia not attributed to COVID-19 led to
3 966 deaths over the same period in persons aged 0 to 24. *Id.*

4 And young, healthy people are not just surviving the virus; they have “virtually
5 no risk of serious illness from COVID-19” either. Atlas Decl. ¶ 11. As the CDC has
6 concluded, “children who become infected are [] ‘far less likely to suffer severe symp-
7 toms.’” *Id.* ¶ 13 (citing July 2020 CDC study); *see also* Victory Decl. ¶ 4 (“Children are
8 essentially at zero risk of contracting COVID-19 or becoming ill from the virus if
9 schools were to reopen.”). In fact, many “[s]cientists now believe children may be
10 largely immune to SARS-CoV-2 infection.” Lyons-Weiler Decl. ¶ 7.

11 Transmission rates among children and their teachers are also nominal. “[C]hil-
12 dren are unlikely to be a vector” of COVID 19, Victory Decl. ¶ 5, meaning they “do
13 not pose a severe risk of transmission to adults.” Lyons-Weiler Decl. ¶ 4. “Scientific
14 studies from all over the world [] suggest that COVID-19 transmission among children
15 in schools is low.” Atlas Decl. ¶ 15. For example, the “CDC has published a report on
16 the age distribution of transmission to new cases in South Korea, which found that less
17 than 1% of new transmission detected in the study were attributed to children aged 0
18 to 10 years; similarly, less than 1% of new transmissions were from children aged 11
19 to 20 years.” Lyons-Weiler Decl. at ¶ 14. The most important evidence on childhood
20 spread of the disease comes from a study conducted in Iceland and published in the
21 New England Journal of Medicine, which concluded that, “even if children do get in-
22 fected, they are less likely to transmit the disease to others than adults.”¹⁶ The research-
23 ers did not find “a single instance of a child infecting parents.” *Id.*

24 Presently, there are “22 countries that have their schools open without social
25 distancing, mask wearing, and other measures, yet these countries have not experi-
26 enced an increase in COVID-19 cases or spread of the virus among children.” Victory
27 Decl. ¶ 8; McDonald Decl. ¶ 6. Even more significantly, “these countries have not seen

28 ¹⁶ Daniel F. Gudbjartsson, Ph.D., Agnar Helgason, Ph.D., et al., *Spread of SARS-CoV-2 in the Icelandic Population*, The New England Journal of Medicine, <https://www.nejm.org/doi/full/10.1056/NEJMoa2006100> (June 11, 2020).

1 transmission of the virus between children and their parents or elderly grandparents.”
2 Victory Decl. ¶ 8. On the contrary, one July 2020 study from the University of Dresden
3 concluded that “children appeared to act as a barrier to transmission.” McDonald Decl.
4 ¶ 6. Thus, it is “abundantly clear that children under twelve years of age are not trans-
5 mitting in schools.” Lyons-Weiler Decl. ¶ 23.

6 **IV. Although School Districts in California Begin Preparing to Reopen**
7 **Safely for the 2020-21 School Year, The California Department of Pub-**
8 **lic Health Orders All Schools to Remain Closed, Except for Schools in a**
9 **Small Number of Counties**

10 In light of the obvious deficiencies of remote learning and the low risk of coro-
11 navirus infection among children, teachers have diligently prepared since spring to re-
12 turn to schools. In Palos Verdes, for example, home to approximately 11,000 students,
13 the school district established a reopening committee comprised of 40 staff members,
14 45 medical professionals, 30 elementary parents, and 39 high school parents. Brach
15 Decl. ¶¶ 5, 10. The district purchased personal protective equipment and implemented
16 a mitigation strategy, including such tactics as staggered time arrivals, designated en-
17 trance and exit routes, masks or face shields for teachers and students, and hand sani-
18 tizing stations. *Id.* ¶ 12; *see also* Reardon Decl. ¶¶ 8–9 (describing Capistrano Unified
19 School District encompassing 48,000 students plans to reopen). These mitigation strat-
20 egies are consistent with “commonly accepted public health definitions of safe operat-
21 ing that minimize [health] risks” in schools. Kaufman Decl. ¶ 16. Indeed, many schools
22 “are going above and beyond” by making “huge investments of effort and money to
23 comply with the CDC and health directives” to ensure a safe learning environment.
24 Hackett Decl. ¶ 6.

25 On July 17, 2020, Governor Newsom announced a framework for reopening
26 schools. *See* Ex. 3 to Dhillon Decl. This framework is mandatory under Executive Or-
27 der N-60-20, issued May 4, 2020, which ordered “[a]ll residents ... to continue to
28 obey State public health directives, as made available at <https://covid19.ca.gov/stay-home-except-for-essential-needs/> and elsewhere as the State Public Health Officer may provide.” Ex. 1 to Dhillon Decl. Under the Governor’s framework, reopening hinges

1 on not being on the county monitoring list for two weeks. *Id.* (“Schools and school
2 districts may reopen for in-person instruction at any time if they are located in a local
3 health jurisdiction (LHJ) that has not been on the county monitoring list within the
4 prior 14 days.”). “The state places a county on this list if it meets at least one of six
5 criteria related to the number of COVID-19 PCR tests conducted or positivity rate,
6 number of cases and growth in cases, growth in hospitalizations, or inadequate hospital
7 ICU or ventilator capacity.”¹⁷ “None of these criteria are related to the risks to children
8 or to teachers that arise from reopening schools for in-person teaching.” Bhattacharya
9 Decl. ¶ 20.

10 Yet while the Governor has forbidden in-person education, other, similar oper-
11 ations are permitted in counties on the monitoring list, including childcare facilities
12 and day camps.¹⁸ Indeed, many of the school districts barred from providing in-person
13 education are now offering full-time daycare *on school campuses* for several hundred
14 dollars per-month per-child. Petrilla Decl. ¶¶ 13-14; Ex. 16; Dhillon Decl. ¶ 7. Conse-
15 quently, while children are now unable to learn from teachers in the classroom, parents
16 can pay their school district for the privilege of having their children sit in the *very*
17 *same classrooms* with dozens of other children and receive “distance learning support,”
18 whatever that may mean. Ex. 16.

19 **v. Plaintiffs Have Been and Will Continue to be Harmed by the**
20 **Governor’s Mandatory School Closures**

21 Plaintiffs are a student and several parents adversely impacted by the school clo-
22 sures. Ms. Sephton, for example, has two children, one of whom is a toddler and the
23 other a four-year-old. Sephton Decl. ¶¶ 2–3. Since she must take care of her toddler
24 during the day, “distance learning mode is really no education at all” for her oldest
25

26 ¹⁷ See *COVID-19 Update Guidance: Child Care Programs and Providers*, Cal. Dep’t
27 of Pub. Health (July 17, 2020), available as of the date of filing:
28 <https://files.covid19.ca.gov/pdf/guidance-childcare--en.pdf>.

¹⁸ See *COVID-19 Update Guidance, supra*; *COVID-19 Interim Guidance: Day
Camps*, Cal. Dep’t of Pub. Health (July 17, 2020), available as of the date of filing:
<https://files.covid19.ca.gov/pdf/guidance-daycamps.pdf>.

1 child. *Id.* ¶ 5. Ms. Walsh faces a similar situation with her two children. “[W]hen the
2 school was shut down and education was moved to distance learning, what was pro-
3 vided was not learning in any sense of the word.” Walsh Decl. ¶ 4. Ms. Ruiz is the
4 mother of two sons who both have special needs. “Since school was shut down,” her
5 son has “not been provided with any of his services that are required by his [individu-
6 alized education program].” Ruiz Decl. ¶ 5. Moreover, like many other similarly situ-
7 ated children, “[d]ue to his disabilities, Zoom classes are a useless form of education.”
8 *Id.* ¶ 6. Even children without special needs are dropping basic skills as Mr. Ziegler
9 attests. “As a result of [his] daughter’s school moving to distance-learning, [he] wit-
10 nessed [his] daughter ... fall[] behind in schooling.” Ziegler Decl. ¶ 3. Ms. Beaulieu
11 experienced the same. For her, it was “extremely concerning that [her] son received no
12 Zoom instruction at all from his math teacher the entire time that the school was
13 closed.” Beaulieu Decl. ¶ 8. In addition to academic shortfalls, unnecessary distance
14 learning has caused “behavioral issues” for Mr. Petrilla’s young boy. Petrilla Decl. ¶ 6.
15 Mr. Fleming’s daughter “has worked tirelessly to ... attend her dream college” but may
16 now miss out because of the negative impact on her grades and lost scholarship oppor-
17 tunities. Fleming Decl. ¶ 11.

18 As a result of the Governor’s order, California is currently the *only* state in
19 America with state-level mandates prohibiting school districts from holding in-person
20 classes—a decision affecting millions of students, from kindergarten through high
21 school. Atlas Decl. ¶ 7.

22 LEGAL STANDARD

23 A plaintiff seeking a temporary restraining order and/or preliminary injunction
24 “must establish that he is likely to succeed on the merits, that he is likely to suffer
25 irreparable harm in the absence of preliminary relief, that the balance of equities tips
26 in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def.*
27 *Council, Inc.*, 555 U.S. 7, 20 (2008). A plaintiff need not show that he will prevail at
28 trial, but only that he is “likely” to prevail. *Id.*; see also *Leiva-Perez v. Holder*, 640 F.3d
962, 966 (9th Cir. 2011). Under the Ninth Circuit’s sliding-scale approach, as long as

1 the plaintiff demonstrates the requisite likelihood of irreparable harm and shows that
2 an injunction is in the public interest, a preliminary injunction can still issue so long as
3 serious questions going to the merits are raised and the balance of hardships tips sharply
4 in the plaintiff’s favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–
5 35 (9th Cir. 2011). A “serious question” is one on which the movant “has a fair chance
6 of success on the merits.” *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d
7 1415, 1421 (9th Cir. 1984) (internal quotation marks and citation omitted).

8 **ARGUMENT**

9 **I. THERE IS A STRONG LIKELIHOOD THAT PLAINTIFFS WILL**
10 **SUCCEED ON THE MERITS**

11 **A. Defendants’ Ban on In-Person Instruction at Every School on the**
12 **State’s Monitoring List Violates the Fourteenth Amendment’s Due**
13 **Process and Equal Protection Clauses.**

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

24 **1. The Order Unlawfully Infringes Californians’ Fundamental (Or, At**
25 **Least, Quasi-Fundamental) Right to Education.**

26 The Fourteenth Amendment protects substantive rights not expressly enumer-
27 ated within the Bill of Rights. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2587
28 (2015); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). In particular, “the Due Process
Clause specially protects those fundamental rights and liberties which are, objectively,

1 deeply rooted in this Nation’s history and tradition, and implicit in the concept of or-
2 dered liberty, such that neither liberty nor justice would exist if they were sacrificed.”
3 *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal citations and quota-
4 tion marks omitted). Courts must “exercise reasoned judgment in identifying interests
5 of the person so fundamental that the State must accord them its respect”; “[h]istory
6 and tradition guide and discipline this inquiry but do not set its outer boundaries.”
7 *Obergefell*, 135 S. Ct. at 2598 (citation omitted).

8 Historical analysis confirms that, although the Supreme Court has not (yet) so
9 held, the right to a basic education is “deeply rooted in this Nation’s history and tradi-
10 tion,” stretching back at least as far as ratification of the Fourteenth Amendment and
11 is therefore a fundamental right. More than three-quarters of States recognized an af-
12 firmative right to public school education in 1868, the year that the Fourteenth Amend-
13 ment was ratified. Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v.*
14 *Board of Education*, 2014 Mich. St. L. Rev. 429, 449–63 (cataloging State constitu-
15 tional provisions as of 1868). In particular, 30 states (*i.e.*, 81% of the states at the time)
16 had a constitution that “said explicitly that the state legislature ‘shall’ (*i.e.*, it has the
17 ‘duty’ and therefore it ‘must’) establish a system of free public schools.” Calabresi &
18 Perl, 2014 Mich. St. L. Rev. at 451–54 (listing these 30 states and quoting their consti-
19 tutional provisions). Another three states’ constitutions “arguably conferred a right to
20 a free public education,” whereas only four “states’ constitutions in 1868 did not spe-
21 cifically mention education or the establishment of a system of free public schools.”
22 *Id.* at 455–60.

23 State-provided or -permitted education is “implicit in the concept of ordered lib-
24 erty, such that neither liberty nor justice would exist if they were sacrificed.” *Glucks-*
25 *berg*, 521 U.S. at 720–21 (internal quotation marks omitted). To begin with, the foun-
26 dation of American liberty is our *written* Constitution, under which laws must be pub-
27 lished in *writing* before they may be executed to constrain liberty. Thus, texts lie at the
28 heart of our ordered liberty. Basic learning is also a prerequisite for the activities that
form the basis of citizenship in our republic, including “knowledgeable and informed

1 voting,” comprehending ballot initiatives, and engaging in political speech and dis-
2 course. *See also Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010); *Bd. of Educ. v.*
3 *Pico*, 457 U.S. 853 (1982) (“[T]he Constitution protects the right to receive information
4 and ideas.” (internal quotation marks omitted)). And lack of basic reading and writing
5 skills precludes individuals from constitutionally protected access to the justice system.
6 *Id.*; *see also, e.g., Griffin v. Illinois*, 351 U.S. 12, 19–20 (1956); *Boddie v. Connecticut*,
7 401 U.S. 371, 382–83 (1971).

8 Finally, even if education is not a “fundamental” right, it is at least a “quasi”
9 fundamental right subject to intermediate scrutiny. It is well settled that, under *Plyler*
10 *v. Doe*, “infringements on certain ‘quasi-fundamental’ rights, like access to public ed-
11 ucation, also mandate a heightened level of scrutiny.” *United States v. Harding*, 971
12 F.2d 410, 412 n.1 (9th Cir. 1992) (emphasis added).

13 The Order undoubtedly infringes the fundamental or quasi-fundamental right to
14 a basic education. Even assuming that the state has a compelling interest in preventing
15 the spread of COVID-19, the Governor’s orders are not narrowly tailored to advance
16 that interest. Like Texas in *Plyer*, California here is functionally excluding Plaintiffs—
17 including minority children and families of limited economic means—from the oppor-
18 tunity to attain an education. But unlike in *Plyer*, the schoolhouse doors are not even
19 open to Plaintiffs. California hopes that digital learning will provide an equivalent basic
20 minimum education, but this is fantasy. The evidence shows that distance learning will
21 effectively preclude children from receiving a basic minimum education because (1)
22 many students have no access to the internet, (2) even those who do will receive a
23 significantly impaired education, and (3) truancy will run rampant. *See supra* pp. 4-9,
24 12-13 (describing evidence showing extreme hardship from online learning that ex-
25 cludes children from an education); *see also* Keech Decl. ¶ 14 (“[A]ny model of live
26 daily virtual remote instruction ... is so lacking” that it “largely fails to meet [students’]
27 basic educational needs.”).

28 For example, as extensively documented in the supporting declarations, when
school moved online this Spring, classroom participation evaporated. *See* Cunningham

1 Decl. ¶ 5 (“At the beginning of distance learning in March, I had 42% participation by
2 my students; by the end, I had 4 total students participate, or 2%.”). This is because
3 many “students lacked sufficient access to wifi and computers to be able to participate
4 in distance learning.” *Id.* This is particularly true in low-income families and commu-
5 nities of color. “Nearly 50% of low-income families and 42% of families of color lack
6 sufficient devices at home to access distance learning.”¹⁹ As a result, “up to one-third
7 of high school students in the Los Angeles schools system never checked in with their
8 teachers once.” Dr. Hamilton Decl. ¶ 6.

9 Stanford University comprehensively studied the impact of virtual learning
10 models and concluded that students were behind their in-person peers to an extent re-
11 flecting 180 fewer days of instruction in math and 72 fewer days of instruction in read-
12 ing. *Id.* (attaching study). This study comports with a recent analysis from Brown Uni-
13 versity, in which the researchers concluded that “many teachers have had no contact at
14 all with a significant portion of students ... only 39% of teachers reported interacting
15 with their students at last once a day, and most teacher-student communication oc-
16 curred over email.” Megan Kuhfeld, *supra*, at 9. And this is to say nothing of those
17 children requiring special education. “When school campuses are closed and education
18 is moved entirely online, many of the guarantees and key tenants afforded to special
19 needs children” under normal circumstances “collapse.” Walker Decl. ¶ 5; *see also*
20 Reardon Decl. ¶ 10 (“A prolonged shutdown of schools will have significant negative
21 consequences for children with special needs and handicapping conditions.”).

22 Consider also the social and emotional struggle of children trying to learn on
23 their own. Many students have “expressed ... a marked increase in feelings of depres-
24 sion, isolation, and anxiety” as a result of the “school clotures.” Cunningham Decl. ¶ 8.
25 And the “students most greatly impacted by the shutdown [are] not the middle and
26 upper class students, but the lower income and minority students who already suffer
27

28 _____
¹⁹ Megan Kuhfeld, *et al.*, *Project the potential impacts of COVID-19 school closures on academic achievement*, ANNENBERG INSTITUTE AT BROWN UNIVERSITY, at 10 (May 2020), available as of the day of filing: <https://www.edworkingpapers.com/ai20-226>.

1 from an ever-widening achievement gap.” *Id.* For this reason and others, child psy-
2 chologists have sounded the alarm on the mental health risks of locking down school.
3 Just last month, more than 120 specialists in psychology, mental health, and neurosci-
4 ence concluded that school closures are a “national disaster” because the “impact of the
5 lockdown on learning is incredibly harmful, creating a huge attainment gap, and the
6 most vulnerable and marginalized in society ... are likely to be most affected by this.”²⁰

7 Studies demonstrate why children need to be physically present in schools. Late
8 last month the American Academy of Pediatrics “strongly” recommended that “the
9 coming school year should start with a goal of having students physically present in
10 school.” *AAP Guidance, supra*, ¶ 3. This same Academy noted the health benefits that
11 would otherwise be lost, such as “child . . . development,” “social and emotional skills,”
12 “reliable nutrition,” physical/speech and mental health therapy,” and “opportunities for
13 physical activity” if children are unnecessarily forced to attend school virtually. *Id.* ¶ 1.
14 This comports with the CDC’s recent report, which detailed crucial characteristics that
15 would be lost if in-person schooling is not held, including “development of social and
16 emotional skills,” “a safe environment for learning,” “nutritional needs,” and “physical
17 activity.” *The Importance of Reopening America’s Schools this Fall, supra*. In short,
18 the order undeniably infringes the fundamental (or quasi-fundamental) right to educa-
19 tion, subjecting it to heightened scrutiny.

20 The order violates Defendants’ due process rights regardless whether it is sub-
21 ject to strict scrutiny or intermediate scrutiny. The Governor’s order, which closes
22 every school in 38 counties, is plainly not the least restrictive means of arresting the
23 spread of COVID-19 because children are neither sickened by the disease nor transmit
24 it. *See supra*, pp. 9-11. Nor has the Governor even attempted to narrowly tailor his
25 response to the purported problem—e.g., the spread of COVID-19 in schools.

26
27
28 ²⁰ Professor Ellen Townsend, *et al.*, *Open letter to Gavin Williamson Secretary of State for Education concerning the neglect of children and adolescents in government policy during the UK lockdown*, available as of the date of filing: <https://drive.google.com/file/d/1zytNGOtnySo-YnyU7iazJUVQ0fS2PC1Z/view>.

1 **2. The Order Violates the Equal Protection Clause, Even under**
2 **Rational Basis Review.**

3 The Governor’s order prohibits schools in some counties—those on the state’s
4 monitoring list—from holding in-person classes, while allowing schools in other coun-
5 ties to return to the classroom. Thus, while students in Shasta County can resume in -
6 person learning this Fall, similarly situated students in Los Angeles County, Yolo
7 County, and 36 other counties cannot. This unequal treatment, which will only become
8 more pronounced as some counties manage to get off the state’s monitoring list, is not
9 even “rationally related” to the state’s interest in combatting COVID-19. *City of New*
10 *Orleans v. Dukes*, 427 U.S. 297, 303 (1976)

11 To begin, whether a county is on the monitoring list has *nothing* to do with the
12 prevalence of COVID-19 at schools, or even among children. Instead, a county is
13 placed on the monitoring list based on overall case rates and hospitalization rates. The
14 order simply assumes that it is more dangerous to conduct in-person classes in counties
15 where COVID-19 continues to spread among the general population than in other coun-
16 ties. But that assumption could not “*reasonably* be conceived to be true by the [Gov-
17 ernor]” for several reasons. *Vance v. Bradley*, 440 U.S. 93, 111 (1979). *First*, as Plain-
18 tiffs have explained, the scientific evidence confirms that children are not at risk of
19 being sickened or killed by COVID-19. *See ante* at 9-11. Indeed, *only one* minor in
20 California has died from COVID-19 since the virus began spreading in January and
21 February. *See supra*, fn.13. Children also account for a vanishingly small percentage
22 of total hospitalizations. McDonald Decl. ¶5. Children in hard-hit areas such as Los
23 Angeles are thus just as unaffected by the virus as children in rural parts of the state.
24 And because children do not play a significant role in transmitting the virus to adults,
25 Lyons-Weiler Decl. ¶23, teachers in Orange County are just as safe as teachers in any
26 other county. Indeed, they are significantly safer than essential workers in many other
27 professions who have daily contact with large numbers of adults.

28 *Second*, even the Governor apparently does not believe that allowing children to
congregate in classrooms presents a grave danger of contagion, because he has allowed
thousands of daycare facilities and camps to reopen, even in counties on the monitoring

1 list.²¹ In a bizarre twist, school districts are now offering full-time childcare (for a hefty
2 fee) at the very schools that are now prohibited from providing in-person education.
3 Petrilla Decl. ¶¶13-14; Ex. 16; Dhillon Decl. ¶ 7. There is no reasonable basis for be-
4 lieving that daycare centers and camps are safe but elementary schools are not. Nor is
5 there any reasonable basis to believe that children can safely spend the day at school
6 in “childcare” but cannot safely receive in-person education at that same school. Alt-
7 hough “a government need not provide a perfectly logical solution to regulatory prob-
8 lems, it cannot hope to survive *rational* basis review by resorting to irrationality.” *Mer-*
9 *rifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008).

10 In short, the order fails rational basis because in the name of stopping the spread
11 of COVID-19 and preventing hospitals from being overwhelmed, it prohibits gather-
12 ings by the one population cohort that does not spread virus and is hardly ever hospi-
13 talized by it. Although the state undoubtedly has broad police powers with which to
14 address public health concerns, it cannot enact a discriminatory regulation that lacks
15 any rational connection to the stated goal—as it has done here, with devastating effect.

16 **B. The Order Violates Title VI’s Implementing Regulations Because it**
17 **Disparately Burdens Racial Minorities**

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

25 ²¹ See *fn* 14-15.

26 ²² Section 1983 creates a private right of action against officials who deprive plaintiffs
27 of federal rights while acting under color of state law. See 42 U.S.C. § 1983. Plaintiffs
28 can thus rely on § 1983 here. See *Alexander v. Sandoval*, 532 U.S. 275, 300 (2001)
(Stevens, J., dissenting). Plaintiffs recognize, however, that Ninth Circuit precedent
suggests that § 1983 statute cannot be used by private parties to vindicate a disparate-
impact claim under Title VI’s regulations. See *Save Our Valley v. Sound Transit*, 335

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

5 Although virtually all students here will be “affected” by the Governor’s order,
6 it will inflict *especially* devastating harm on those students whose socioeconomic cir-
7 cumstances do not allow for distance learning *at all* or who are enrolled in schools
8 whose distance-teaching efforts have proven wholly inadequate. Impoverished, vulner-
9 able families in California are disproportionately minorities.²³ In addition to struggling
10 with distance learning, many of these low-income families also do not receive the ser-
11 vices required by their IEPs and are burdened by the additional costs to obtain private
12 assistance or instruction. (*See* Ruiz Decl. ¶¶2, 5, 6, 9, 10,; *see also* Hawkins Decl. ¶¶3,
13 10, 11; Bema Decl. ¶¶4, 6, 8, 9, 12; Ramirez Decl. ¶¶5, 6, 7, 8, 15).

14 **C. Defendants’ Actions Violate Federal Laws Requiring Equal Educa-**
15 **tional Access for Disabled Students**

16 **1. The Order Violates the Individuals with Disabilities Education Act.**

17 The Individuals with Disabilities Education Act (IDEA) requires States to pro-
18 vide disabled students with programming to meet their many needs. A State that re-
19 ceives federal funding under the IDEA “must provide a free appropriate public educa-
20 tion—a FAPE, for short—to all eligible children.” *Endrew F. ex rel. Joseph F. v. Doug-*
21 *las Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017) (citing 20 U.S.C. § 1412(a)(1)).
22 “A FAPE, as the Act defines it, includes both ‘special education’ and ‘related ser-
23 vices.’” *Id.* at 994 (citing 20 U.S.C. § 1401(9)). “‘Special education’ is ‘specially de-
24 signed instruction ... to meet the unique needs of a child with a disability’; ‘related
25 services’ are the support services ‘required to assist a child ... to benefit from’ that

26 F.3d 932 (9th Cir. 2003). If necessary, Plaintiffs intend to ask the Ninth Circuit to re-
27 consider its position en banc, and thus preserve the argument here.

28 ²³ *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.

1 instruction.” *Id.* (citing 20 U.S.C. §§ 1401(26), (29)). The instruction and services pro-
2 vided by school districts must meet each student’s “academic, social, health, emotional,
3 communicative, physical and vocational needs.” *Ashland Sch. Dist. v. Parents of Stu-*
4 *dent E.H.*, 587 F.3d 1175, 1185 (9th Cir. 2009). To meet these needs, a school district’s
5 services include “‘developmental, corrective, and other supportive services,’ such as
6 ‘psychological services, physical and occupational therapy, recreation ... [and] social
7 work services.’” *Id.* (citing 20 U.S.C. § 1401(26)).

8 Providing the IDEA’s mandatory “special education” and “related services” re-
9 quires in-person education for nearly all disabled students. To begin, students with dis-
10 abilities suffer “significant[ly]” from the lack of in-person instruction. *See AAP Guid-*
11 *ance, supra.* Additionally, disabled students require more services than simply in-per-
12 son instruction, including services from specialists such as occupational therapists, be-
13 havior specialists, and counselors. *See* 20 U.S.C. § 1401(26); *e.g.*, *Price v. Common-*
14 *wealth Charter Academy – Cyber School*, 2019 WL 4346014, at *3, *5 (E.D. Penn.
15 Sept 12, 2019); *K.B. on behalf of S.B. v. Katonah Lewisboro Union Free Sch. Dist.*,
16 2019 WL 5553292, at *2 (S.D.N.Y. Oct. 28, 2019). Indeed, “[e]ducation for [] students
17 with disabilities often differs dramatically from ‘conventional’ [] education.” *E.R.K.*
18 *ex rel. R.K. v. Hawaii Dep’t of Educ.*, 728 F.3d 982, 990 (9th Cir. 2013) (citation omit-
19 ted). To meet these needs, and the requirements of the IDEA, school districts must be
20 able to provide at least some in-person services.

21 In addition to these general requirements, “[a] State covered by the IDEA must
22 provide [each] disabled child with [] special education and related services ‘in con-
23 formity with the [child’s] individualized education program,’ or IEP.” *Endrew F.*, 137
24 S. Ct. at 994 (citing 20 U.S.C. § 1401(9)(D)). An IEP must be “reasonably calculated
25 to enable a child to make progress appropriate in light of the child’s circumstances[.]”
26 *Id.* at 999–1000 (citation omitted). And “a material failure” by the school “to imple-
27 ment an IEP violates the IDEA.” *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*,
28 502 F.3d 811, 822 (9th Cir. 2007) (emphasis omitted). “A material failure occurs when

1 there is more than a minor discrepancy between the services a school provides to a
2 disabled child and the services required by the child's IEP.” *Id.*

3 The Governor’s prohibition of all in-person instruction in counties on the state’s
4 monitoring list will make it impossible for schools in the affected counties to imple-
5 ment hundreds of thousands of IEPs, including those of Plaintiffs’ children. Moreover,
6 without the physical presence of teachers who see these children on a daily basis, many
7 children will not be adequately protected from domestic abuse because teachers often
8 cannot see the signs of abuse via Zoom—if the child even attends the remote teaching
9 sessions. Golden Decl. ¶ 7. Although local health officers may grant waivers to ele-
10 mentary schools, this waiver exception applies only to elementary schools and requires
11 consultation with CDPH. Moreover, the criteria to obtain a waiver is nearly impossible
12 to satisfy. Cicchetti Decl. ¶ 14.

13 This complete failure to provide services to students with disabilities violates the
14 IDEA. Moreover, failure to provide any in-person services will cause uncounted “ma-
15 terial failure[s]” to implement the IEPs of disabled students. *See Van Duyn*, 502 F.3d
16 at 822.

17 **2. The Order Violates the Americans with Disabilities Act (ADA) and**
18 **Section 504 of the Rehabilitation Act.**

19 Both the Americans with Disabilities Act (ADA) and the Rehabilitation Act re-
20 quire that public programs provide the same benefits to persons with disabilities pro-
21 vided to those without. “Section 12132 of the ADA precludes (1) exclusion from/denial
22 of benefits of public services, as well as (2) discrimination by a public entity.” *Crowder*
23 *v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996). This statute “was expressly modeled
24 after § 504 of the Rehabilitation Act.” *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1135
25 (9th Cir. 2001), *as amended on denial of reh’g* (Oct. 11, 2001). “To establish a prima
26 facie case of disability discrimination under the ADA, a plaintiff must prove that (1)
27 he is an individual with a disability; (2) he is otherwise qualified to participate in or
28 receive the benefit of some public entity’s services, programs, or activities; (3) he was

1 either excluded from participation in or denied the benefits of the public entity’s ser-
2 vices, programs, or activities, or was otherwise discriminated against by the public en-
3 tity; and (4) such exclusion, denial of benefits, or discrimination was by reason of [his]
4 disability.” *E.R.K.*, 728 F.3d at 992 (citation omitted). And to establish a violation of
5 the Rehabilitation Act, the plaintiff must prove these same elements and “must also
6 prove that the relevant program receives federal financial assistance.” *Id.* And any
7 plaintiff “who requires an accommodation to meet a program’s essential eligibility re-
8 quirements can establish the ‘otherwise qualified’ element of the prima facie case only
9 by producing ‘evidence of the existence of a reasonable accommodation’” *Id.*

10 Here, Plaintiffs have demonstrated a reasonably likelihood of proving a prima
11 facie case of discrimination under the ADA and Section 504. California receives fed-
12 eral funding for education, including under the IDEA to provide special education to
13 disabled students.²⁴ Plaintiff Z.R. is an individual with a disability who is otherwise
14 qualified to receive an education and can do so with a reasonable accommodation. Ruiz
15 Decl. ¶¶ 4-15. Given the inability of schools to provide in-person education under the
16 Order, Z.R. has been denied the benefits of a public education. *See pp.* 34-35. And this
17 denial is due to his disability: without his disability, Z.R. would be able to participate
18 more fully in remote learning. *See supra pp.* 34-35.

19 **II. PLAINTIFFS AND THEIR CHILDREN FACE IMMINENT IRREP-**
20 **ARABLE HARM ABSENT IMMEDIATE INJUNCTIVE RELIEF**

21 As Plaintiffs and their experts have explained, if the Governor’s orders are not
22 enjoined, millions of California children will be deprived of an adequate education.
23 Hundreds of thousands will suffer collateral harm, including abuse, depression, and
24 hunger. There is no adequate legal remedy for these “intangible injuries.” *Arizona*
25 *Dream Act Coalition v. Brewer*, 757 F. 3d 1053, 1068 (9th Cir. 2014) (intangible inju-
26 ries “qualify as irreparable harm”). Moreover, deprivation of constitutionally protected
27 rights—including the rights to due process and equal protection—inexorably creates
28 irreparable harm. *See Elrod v. Burns* 427 U.S. 347, 373 (1976).

²⁴ Available as of the date of filing: <https://www.cde.ca.gov/sp/se/as/leagrnts.asp>.

1 Emergency relief is warranted because schools are scheduled to begin the Fall
2 term in a matter of days or weeks. Nearly every school district in the affected counties
3 is scheduled to begin classes no later than August 25, 2020, and many schools are
4 scheduled to begin even earlier. Dhillon Decl. ¶ 6. Indeed, many private schools, in-
5 cluding those attended by children of named Plaintiffs, will resume classes in a matter
6 of days. *Id.* Without a TRO and preliminary injunction, numerous schools will be
7 forced to scrap their plans for in-person schooling and consign students to the failed
8 “distance learning” model. California’s children have already lost more three months
9 of valuable education—they cannot afford to lose any more time in the classroom.

10 **III. THE REMAINING FACTORS WEIGH IN FAVOR OF GRANTING**
11 **INJUNCTIVE RELIEF**

12 Where the government is the opposing party, the balance of harms and the public
13 interest merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, the Governor’s
14 forced school closures violates Plaintiffs’ Fourteenth Amendment rights, and “it is al-
15 ways in the public interest to prevent the violation of a party’s constitutional rights.”
16 *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (*quoting Elrod*, 427 U.S. at
17 373). Moreover, because children are neither at risk from COVID-19 nor a significant
18 source of transmission to adults, no adverse “public consequences” would result from
19 issuing the TRO and preliminary injunction. *Winter*, 555 U.S. at 24 If schools remain
20 closed, however, not only will children suffer, but thousands of parents will be forced
21 to quit their jobs or reduce their hours, harming their families, the businesses where
22 they work, and the entire economy. Faced with such “preventable human suffering,”
23 the Ninth Circuit has had “little difficulty concluding that the balance of hardships tips
24 decidedly in plaintiffs’ favor.” *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir.
25 2017) (*quoting Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)).

26 **CONCLUSION**

27 For the foregoing reasons, Plaintiffs’ Application should be granted.
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Date: August 3, 2020

Respectfully submitted,
DHILLON LAW GROUP INC.

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