In the Supreme Court of the State of California

ORANGE COUNTY BOARD OF EDUCATION; PALM LANE CHARTER SCHOOL; JUAQUIN CRUZ; ANGELA MILLER; and CECILIA OCHOA,

Petitioners,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, SANDRA SHEWRY, in her official capacity as the State Public Health Officer and Department of Public Health Director,

Respondents.

Case No. S264065

Original Petition for Writ of Mandate

RESPONDENTS' PRELIMINARY OPPOSITION TO PETITION FOR A WRIT OF MANDATE

XAVIER BECERRA
Attorney General of California
CHERYL L. FEINER
Senior Assistant Attorney General
GREGORY D. BROWN
Supervising Deputy Attorney General

*JOSHUA N. SONDHEIMER
Deputy Attorney General
State Bar No. 152000
455 Golden Gate Avenue,
Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-4420
Fax: (415) 703-5480
Joshua.Sondheimer@doj.ca.gov
Attorneys for Respondents Governor Gavin Newsom and State Public Health Officer and Director of the Department of Public Health Sandra Shewry, in their official capacities

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INTRODUCTION

Guided by the California Constitution and statutory law, Respondent Governor Gavin Newsom and State officials have appropriately exercised State police powers in responding to the unprecedented, deadly COVID-19 pandemic. This response includes operative public health orders and directives related to kindergarten-through-12th grade schools, including a framework guiding the return to in-person instruction. In an ongoing state of emergency, the Governor and state health officials have quickly fashioned effective public policies that are based on current public health knowledge, that are adjusted as necessary to changing circumstances, and that allow for local input and decision-making to the extent feasible. Petitioners—the Orange County Board of Education, a charter school, and parents of students—fail to establish any basis for an original writ in this Court prohibiting enforcement of the framework.

Petitioners have not presented any basis for this Court to hear in the first instance what petitioners present as a fact-bound suit. Further, they fail to identify any mandatory duty on the part of state officials to refrain from making public health decisions relating to public education. To the contrary, it is the State's duty to take measures deemed necessary to protect public health. And it is well established that courts will refrain from interfering with measures a state deems necessary and appropriate to respond to grave public health threats except when the measures are arbitrary or plainly contravene established rights. Petitioners offer no valid basis to interfere

with state officials' exercise of their legitimate police powers, or to bar the State and state public health officials from playing any role in establishing a framework for when and how students may return to classroom learning.

Petitioners' constitutional claims are also without merit. They first contend that public health orders and guidelines (orders) issued by Governor Newsom and the Director of the Department of Public Health, who is also the State Public Health Officer (Officer), governing the return to in-person learning violate students' rights to equal protection. However, this claim fails because the orders do not impact similarly situated groups differently, nor do they deprive any group of students in one district of an education meeting prevailing statewide standards, which include, at present, distance learning. The State, in any event, has made extensive resources available to public schools to ensure that students engaged in distance learning are supported if the schools must provide distance learning this fall.

Petitioners' further contention that the school orders violate federal disability law fail on numerous grounds, including that petitioners fail to establish that their children qualify for specialized education services, petitioners failed to exhaust available administrative remedies, and federal authorities expressly recognize that special education needs can be met through distance learning and that remedies are available in specific cases when the offered services are inadequate. And, the State also has taken substantial measures to ensure that

students with special needs, in particular, receive and have access to necessary support for distance learning.

Finally, petitioners' claim founded on federal Civil Rights Act regulations fails because the regulations do not provide a private right of action.

Respondents do not discount the challenges and burdens that school closures bring for students, families, and school employees. Everyone would prefer that the country was not in the midst of an unprecedented pandemic. But we are, and given current epidemiological trends, schools cannot operate as normal in many communities without imperiling public health. Because the petition fails to establish any basis to enjoin necessary and appropriate measures taken by the State to protect the lives and health of students, teachers and staff, and the public, it should be denied.

BACKGROUND

In response to the public health emergency resulting from the coronavirus pandemic, respondents have taken necessary and appropriate measures to limit the spread of the novel coronavirus and protect the health and lives of California residents. These measures, while establishing rules governing broad aspects of economic, social, and educational activity throughout the State, allow for local decisionmaking and flexibility where conditions warrant, including regarding the return to in-person instruction for schools across the state.

The grave threat to public health posed by the highly contagious and deadly novel coronavirus is beyond dispute.

Twenty-three (23) million confirmed cases of COVID-19, and more than 800,000 deaths, have been reported to date.[1] In the United States, there have been more than 5.7 million reported cases of COVID-19, and the disease has caused the deaths of more than 175,000 people.[2] This includes more than 673,000 reported cases and more than 12,000 deaths in California.[3] More than 68,000 of the confirmed cases involve children ages 0-17.[4]

The coronavirus spreads through respiratory droplets that remain in the air or on surfaces, and may be transmitted unwittingly by individuals who exhibit no symptoms. (See *S. Bay United Pentecostal Church v Newsom* (2020) 591 U.S. __, 140 S.Ct. 1613, 1613 (*South Bay III*) (Roberts, C.J., concurring). There is currently no known cure, no widely effective treatment, and no vaccine. (See *ibid.*) Consequently, measures such as physical distancing that limit physical contact are the only widely recognized, effective way to slow the spread. (See *Gish v. Newsom* (C.D. Cal. Apr. 23, 2020) No. EDCV20-755-JGB (KKx), 2020 WL 1979970, at *4.)

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[1] See World Health Organization, Coronavirus Disease (COVID-19) Weekly Epidemiological Update (August 23, 2020), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports/ (last accessed August 26, 2020).

[2] See Cases and Deaths in U.S. at https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last accessed August 26, 2020).

[3] See https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx (last accessed Aug. 26, 2020)

[4] *Ibid.*

In the face of the threat posed by the pandemic, the Governor and State Public Health Officer acted swiftly to protect public health. After proclaiming a State of Emergency in California on March 4, 2020, the Governor on March 19 issued Executive Order N-33-20, the "Stay-at-Home Order," requiring "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." (Petn., Exh. 1.) The Officer subsequently designated a list of "Essential Critical Infrastructure Workers" under the Order, which includes "workers supporting . . . K-12 schools for purposes of distance learning, provision of school meals, or care and supervision of minors" where remote working is not practical.[5]

The State's ultimate objective is to reopen businesses and institutions affect by the pandemic as promptly as is feasible, consistent with the protection of public health. On April 28, 2020, the Governor announced a "Resilience Roadmap" (Roadmap) to guide the gradual and safe reopening of the State. The Roadmap has four stages: (1) safety and preparedness; (2) reopening of lower-risk workplaces and other spaces; (3) reopening of higher-risk workplaces and other spaces; and (4) an end of the Stay-at-Home Order.[6] To implement the Roadmap, on

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[5] "Government Operations and other community-based essential functions," No. 13, at https://covid19.ca.gov/essential-workforce/ (last accessed August 26, 2020).

[6] Resilience Roadmap, last updated August 3, 2020, at https://covid19.ca.gov/roadmap/#stage-1 (last accessed August 26, 2020).

May 4, 2020, the Governor issued Executive Order N-60-20, providing that all California residents are to continue complying with the Stay-at-Home Order and directing the Officer to establish criteria and procedures for qualifying local jurisdictions to move more quickly through Stage 2 of the Roadmap. (Petn., Exh. 2)

On May 7, 2020, based on her review of current data, the Officer issued an order moving the State into Stage Two, stating that she would "progressively designate sectors, businesses, establishments, or activities that may reopen with certain modifications, based on public health and safety needs" and at "a pace designed to protect public health and safety."[7] Guidance governing the reopening of in-person instruction at schools as part of Stage 2 was initially released on June 5, 2020 as part of the Roadmap.

In response to the surge in COVID-19 positive rates in late June to early July, the Officer on July 13, 2020, issued an order requiring closure of certain establishments that had been permitted to reopen under the Roadmap, and closing additional indoor activities in counties that did not meet certain COVID-19 indicators and preparedness criteria—counties that were therefore included on the State's "County Monitoring List."[8] The

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[7] Order of the State Public Health Officer (May 7, 2020) https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%205-7-2020.pdf

[8] Statewide Public Health Officer Order (July 13, 2020) at https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-

(continued…)

Officer noted that particularly in counties on the Monitoring List, "the risks and impacts of disease transmission are even greater."[9] As the Officer noted, "[t]he science suggests that for indoor operations the odds of an infected person transmitting the virus are dramatically higher compared to an open-air environment." (*Ibid.*)

With respect specifically to schools, the Department of Public Health (Department) issued its COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year on July 17, 2020 (Framework). (Petn., Exh. 4.) The Framework updated guidelines for in-person learning issued at the outset of the pandemic, specifying that "**[s]chools and school districts may reopen for in-person instruction at any time if they are located in a local health jurisdiction (LHJ) that has <u>not</u> been on the county monitoring list within the prior 14 days**." (*Ibid.*, bold in original.)

(…continued)
19/SHO%20Order%20Dimming%20Entire%20State%207-13-2020.pdf.

[9] *Ibid.* The Department uses six indicators to track the level of COVID-19 infection in each county, as well as the preparedness of the county health care system. The indicators include the number of new infections per 100,000 residents, the test positivity rate, and the change in hospitalization rate, among others. A county that does not meet the State's benchmarks is put on the County Monitoring List. See https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19CountyMonitoringOverview.aspx (last accessed August 26, 2020).

The Framework provides that a waiver of the limitation on in-person learning in counties subject to the 14-day threshold "may be granted by the local health officer for elementary schools to open for in-person instruction." (*Ibid.*) The waiver request must be made by the superintendent or equivalent for charter and private schools. (*Ibid.*)

On August 3, 2020, the Department provided further guidance to schools regarding safe resumption of in-person learning. (Petn., Exh. 9.) On the same date, the Department also issued guidance, associated FAQs, and templates to advise and assist elementary schools in counties remaining on the Monitoring List that may elect to seek a waiver from local health officers to allow in-person instruction. (Petn., Exh. 7.)[10]

As of August 25, 2020, the Orange County Health Care Agency, responsible for granting waivers to schools located in that county in which all petitioners are located or reside, had reported that it had received 115 such waiver applications from elementary schools, of which 44 had been approved to date. (Respondents' Request for Judicial Notice (RJN), Exh. 3).

Orange County, meanwhile, was taken off the County Monitoring List on August 23, 2020, just days after petitioners filed and served their petition. (RJN, Exh. 4.) If the County continues with disease data rates that support remaining off the

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[10] For FAQs and template for use by local health authorities to advise schools of the waiver process, see documents dated August 3, 2020 at https://www.cde.ca.gov/ls/he/hn/coronavirus.asp under heading: "California Department of Public Health (CDPH)"

County Monitoring List, the County will be days away from a time when all Kindergarten through 12th Grade (K-12) schools in the County will be free to allow children to return to the classroom under the Framework.

As of this filing, a total of at least twenty-four (24) other counties among California's 58 counties also remained off the County Monitoring List. (*Ibid.*) Schools within any of those 25 counties that have remained or do remain off the list for 14 days also are free to allow children to return to the classroom for in-person learning.

Finally, also just days after petitioners' filing, the Department on August 25, 2020, issued guidance for small groups of students (cohorts) to receive in-person supervision, specialized and targeted services, and other support in settings that include schools that are otherwise not permitted to reopen under the Framework (Cohorting Guidance). (RJN, Exh. 1.) An associated State FAQ document explains that this Cohorting Guidance "authorizes small-group, in-person services in controlled, supervised, and indoor environments such as those operated by local educational agencies (LEAs)." (*Ibid.*) The FAQs further make clear that the Cohorting Guidance "applies to schools that cannot reopen for in-person instruction pursuant to the July 17 Framework, including elementary schools in those jurisdictions that have not received an elementary school waiver through the local public health office." (*Id.* at pp. 1-2, italics added.)

LEGAL STANDARDS APPLICABLE TO THE PETITION

Petitioners seek a peremptory writ of mandate under Code of Civil Procedure, sections 1085, 1086, and 1088. (Petn. 11, fn 5, 23, 24-25.)[11] Section 1085—governing ordinary mandamus—provides that "any court" may issue such writ "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." Section 1086 includes as a prerequisite to the writ that there be no "plain, speedy, and adequate remedy, in the ordinary course of law." Section 1088 allows for an accelerated preemptory writ procedure, in which the writ can issue after notice to the other side and an opportunity to respond, but "only 'when such entitlement is conceded or when there has been clear error under well-settled principles of law and undisputed facts—or when there is an unusual urgency requiring acceleration of the normal process.'" (*Banning Ranch Conservancy v. Superior Court* (2011) 193 Cal.App.4th 903, 919, quoting *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1258.)[12]

A petition for writ of mandate may be granted "to compel the performance of a clear, present, and ministerial duty 'which the

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[11] Relief under section 1085 is sometimes referred to as ordinary mandamus, in contrast to administrative mandamus under Code of Civil Procedure section 1094.5. Relief under section 1094.5 is limited to a challenge to a "final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer."

[12] Section 1088 also applies to petitions for writ of prohibition. (*Lewis*, *supra*, 19 Cal.4th at p. 1245.)

law specially enjoins.'" (*Sacramento County v. Hickman* (1967) 66 Cal.2d 841, 845, citing Code Civ. Proc., § 1085.) A ministerial duty is "an obligation to perform a specific act in a manner prescribed by law whenever a given state of facts exists, without regard to any personal judgment as to the propriety of the act." (*People v. Picklesimer* (2010) 48 Cal.4th 330, 340.) A party must establish "(1) A clear, present and usually ministerial duty on the part of the respondent" and "(2) a clear, present and beneficial right in the petitioner to the performance of that duty[.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 868, internal quotations omitted.)

A writ of mandate may not issue "to control discretion conferred upon a public officer or agency." (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491.) Thus, a writ "will not issue if the duty is not plain or is *mixed with discretionary power* or the exercise of judgment." (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 233, emphasis in original.) When assessing whether mandate relief is appropriate, courts "may not substitute [their] judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld." (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995; see also *Robbins v. Superior Cour*t (1985) 38 Cal.3d 199, 205 [mandamus may lie where "discretion can be exercised in only one way"].)

As discussed in more detail below, state officials' discretion to take reasonable, discretionary, policy- and science-based

protective actions is at is zenith in the face of a recognized public health emergency.

Under section 1085, a petitioner may also seek review of quasi-legislative decisions, and can prevail by establishing that the "decision was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." (*American Coatings Assn. v. South Coast Air Quality Management Dist*. (2012) 54 Cal.4th 446, 460.) The arbitrary or capricious standard of section 1085 is very deferential—even more so than the substantial evidence standard that applies to administrative mandamus—because such decisions involve the "exercise of [] statutorily delegated policymaking discretion." (*Id.* at p. 461.)

As discussed below, the challenged Executive Orders and Public Health Directives are reasonable responses to a serious, statewide, dynamic situation; amply supported by current public health data; and constitutional. The petition should be denied.

REASONS THE PETITION SHOULD BE DENIED

I. THE COURT SHOULD DECLINE TO EXERCISE ITS ORIGINAL JURISDICTION

Even if the petition may establish a colorable basis for writ relief (which, for the reason discussed in more detail below, it does not), the petition fails to demonstrate a sufficient basis for this Court's exercise of original jurisdiction.

This Court "customarily declines to exercise [its original] jurisdiction, preferring initial disposition by the lower courts." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 500.) Original

proceedings at the appellate level are "truly extraordinary" and risk making this Court "a court of first, not last, resort." (*Adams v. Dept. of Motor Vehicles* (1974) 11 Cal.3d 146, 151, fn. 7.) As such, this Court typically exercises its original jurisdiction only in cases of the utmost public importance that present purely legal issues "requir[ing] immediate resolution." (*Cal. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 253; see, e.g., *Briggs v. Brown* (2017) 3 Cal.5th 808 [constitutionality of initiative regarding death penalty procedures].) This is not such a case.

While petitioners suggest that the safety of in-person instruction is undisputed (see, e.g., Petn. 17-18), it is not. Petitioners' assertion that "there is no legitimate medical basis for preventing students from resuming in-person instruction," (Petn. 17) is at best disputed, if not wholly unsupportable in light of contrary evidence among public health researchers and officials and empirical experience with recent school openings around the country. (See Watt Decl. ¶¶ 18, 26, 38 [identifying growing evidence that children are susceptible to severe COVID-19 symptoms including those requiring hospitalization, and can transmit the disease to children and adults working in schools and others; Watt Supp Decl. ¶¶ 4-7.) Respondents are especially concerned about harm to some of the very groups and communities Petitioners highlight in their petition and memorandum. The evidence suggests that low-income communities and communities of color are particularly

vulnerable to the epidemic.[13] Moving too quickly back to in-person learning could have devastating impacts to students in these groups, their families, and everyone in their contact circle.

Nor is it certain that temporary distance learning will result in educational harm, let alone irreparable educational harm, to petitioners and their children. The challenged order does not mandate distance learning for all students throughout the State for the entire school year. Instead, it is designed to be fluid and responsive to regional variation and changing conditions. Schools that start the year with distance learning are permitted to transition to in-person instruction as conditions improve in their county. In light of Orange County's own removal from the County Monitoring List, the children of the individual petitioners and other students in that county whose schools have not already obtained waivers from the in-person learning criteria may soon be able to return to in-person instruction if those trends continue. Moreover, at least 44 elementary schools in Orange County alone have obtained waivers allowing in-person instruction, with numerous additional applications pending. The rapidly evolving facts further counsel against this Court exercising its original jurisdiction.

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[13] See, e.g., Akintobi et al., *Community Engagement of African Americans in the Era of COVID-19: Considerations, Challenges, Implications, and Recommendations for Public Healt,*. Prev Chronic Dis 2020;17:200255 (Aug. 13, 2020), available at https://www.cdc.gov/pcd/issues/2020/20_0255.htm?s_cid=pcd17e83_x (accessed 8/28/2020).

As the dozen declarations that petitioners have filed with their petition demonstrate, petitioners base their claims on factual assertions. The State (and its public health experts) strongly disagree on the risks posed by COVID-19 to children and by children who may carry and spread the novel coronavirus. Even assuming Petitioners have stated a claim that a court may consider, this Court's original jurisdiction is properly reserved for considerations of matters that do not rest on resolution of factual, scientific disputes. Petitioners' fact-laden claims, if not summarily rejected, are better addressed by the trial courts in the first instance.

Nor have petitioners demonstrated that proceeding first in the trial courts would provide an inadequate remedy. Petitioners provide no explanation why a lower court would be unable to timely resolve their claims. This omission is particularly telling given that other plaintiffs in other actions have already brought related challenges to the same state public health directives affecting schools. In one such case, a federal district court has already considered and denied a fully-briefed motion for a temporary restraining order. (RJN, Exh. 5). In another case, the parties fully briefed a temporary restraining order in San Diego Superior Court, but stipulated to convert it to a preliminary injunction based on San Diego's exit from the Monitoring List and likely ability of schools to reopen as a result. There is no basis to conclude that a trial court would be unable to similarly resolve any motion or claims brought by petitioner in the event that Orange County is not able to resume in-person instruction

under the challenged orders in the near future. Having waited more than one month after the Department issued its In-Person Learning Framework on July 17, 2020, before filing suit, petitioners fail to demonstrate any urgency for review or issuance of an "immediate" stay of these and other challenged Department guidelines.

II. PETITIONERS FAIL TO IDENTIFY ANY RELEVANT MINISTERIAL DUTY OR BASIS FOR WRIT RELIEF

Although Petitioners' claims are based on their contentions that mandatory distance learning violates students' rights, Petitioners do not seek, nor are they entitled to obtain, relief that would ensure that students in their counties receive in person instruction. Indeed, they expressly disclaim seeking relief that compels in-person learning statewide, seeking instead to substitute their discretion for that of the Governor and the Officer. Petitioners' unsupported and incoherent claims fail to establish any basis for writ relief.

Petitioners expressly disclaim that they are seeking a ruling "directing schools to reopen in person instruction," or that would permit schools to provide in-person instruction without safeguards "consistent with the CDC's recommendations for safety guidelines." (Petn. 23, ¶ 16.) Instead, petitioners contend that they seek "an order which permits *public schools and parents* to choose an appropriate education model and decide whether CDC and State Guidelines can be implemented in such a way as to permit a safe reopening of in-person instruction." (*Ibid*., emphasis added.) That is, petitioners appear to seek relief that would leave the decision whether to reopen schools for in-person

instruction, to continue distance learning, or to use some other approach, out of the hands of state authorities and leave it entirely at the discretion of public schools and parents of students.

As a threshold matter, it is logically incoherent to contend that distance learning violates the educational rights of children, while seeking relief that would permit local schools to utilize distance learning if those local schools deem it appropriate. Moreover, petitioners point to no legal basis for the proposition that the Governor and state officials may not issue and enforce directives or guidance regarding public health and safety in the state's public schools. To the contrary, state law provides the Governor and state officials with discretion to make decisions on such matters. The Governor has authority to declare emergencies under the Emergency Services Act, including those based on "epidemic" or "disease," and to issue orders necessary to carry out his emergency authority, which orders carry the force of law. (Gov. Code, §§ 8558, subd. (b), 8567, subd. (a).) Likewise, California's Communicable Disease Prevention and Control Act authorizes the Department to "establish and maintain places of quarantine or isolation" and to "take measures as are necessary" to ascertain the nature of any "contagious, infectious or communicable disease" and "prevent its spread." (Health & Saf. Code, §§ 120135, 120140).

Petitioners, therefore, fail to identify any ministerial duty requiring state officials to refrain from issuing directives or guidelines regarding public health conditions that must be met prior to return to in-person instruction. Courts have long

recognized that states have broad authority to respond to public-health emergencies and that it is not a court's role "to determine which one of two modes [is] likely to be the most effective for the protection of the public against disease. (*Jacobson v. Massachusetts* (1905) 197 U.S. 11, 30.)

Indeed, petitioners appear to acknowledge in asserting that when and how to restart in-person learning should be left in the hands of schools and parents without the involvement of state or local public health officials, those determinations necessarily involve the exercise of discretion. Critical considerations include balancing the benefits of in-school instruction with the imperative to protect the health and lives of students and their families, teachers and school employees, and the public at large.

The petition ultimately seeks to control the manner in which respondents have exercised that discretion. In the absence of any law prohibiting respondents from exercising the discretion petitioners seek to give to local schools instead, petitioners have failed to identify a ministerial duty that supports mandamus relief.

III. THE CHALLENGED DIRECTIVE IS A CONSTITUTIONAL EXERCISE OF THE GOVERNOR'S EMERGENCY POWER AND PUBLIC HEALTH STATUTES TO RESPOND TO A PANDEMIC

A. Standard of Judicial Review of a State Public-Health Emergency

Contrary to Petitioners' expectations, an attack of the State's efforts to combat the COVID-19 pandemic for supposedly

violating the California Constitution's Equal Protection Clause (art. I, § 7) law calls for deferential judicial scrutiny.

> It is a well-recognized principle that it is one of the first duties of a state to take all necessary steps for the promotion and protection of the health and comfort of its inhabitants. The preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the Legislature, within its police power, may take action . . .In other words, health regulations enacted by a state under its police power and providing even drastic measures for the elimination of disease, whether in human beings, crops, or cattle, in a general way are not affected by constitutional provisions, either of the state or national government.

(*Patrick v. Riley* (1930) 209 Cal. 350, 354-355; and see *Abeel v. Clark* (1890) 84 Cal. 226, 229-231) This Court should apply this well-settled standard of deference to the present actions by the political branches of government in response to the COVID-19 pandemic.[14]

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[14] Numerous federal courts have taken a similar deferential approach to government challenges to California's efforts to combat COVID-19. See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 140 S.Ct. at pp. 1613-1614 [declining to enjoin enforcement of a State order banning in-person religious services]; *Best Supplement Guide, LLC v. Newsom, et al.*, (E.D. Cal. May 22, 2020) No. 2:20-cv-00965-JAM-CKD, 2020 WL 2615022, at *3–7 [concluding that the State's orders are a "constitutional response to an unprecedented pandemic"]; *Givens v. Newsom*, (E.D. Cal. May 8, 2020) No. 2:20-cv-00852-JAM-CKD, 2020 WL 2307224, at *3–5 [concluding that the plaintiffs were unlikely to succeed on their challenge to stay-at-home orders]; *Monica Six, et al. v. Newsom, et al.*, (C.D. Cal. May 22, 2020) __ F. Supp. 3d __, No. 820-cv-00877-JLS-DFM, 2020 WL 2896543 at *1–7 [same]; *Cross Culture Christian Ctr. v. Newsom*, (E.D. Cal. May 5, 2020) __ F. Supp. 3d __, No. 2:20-cv-00832-JAM-CKD, 2020 WL 2121111, at *3–5 [the State's orders "bear a real and

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These same considerations make mandamus particularly inappropriate to challenge state officials' and agencies' exercise of police powers in a time of crisis, where quick action is required, information is imperfect and knowledge of the disease is rapidly evolving, and the consequences of taking the wrong course potentially catastrophic. Speaking to the current COVID-19 pandemic and California's state-level response, Chief Justice Roberts observed that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" (*S. Bay United Pentecostal Church v Newsom* (2020) 591 U.S. __, 140 S. Ct. 1613, 1613-1614 (Roberts, C.J., concurring in denial of application for injunctive relief) (*South Bay III*), quoting *Jacobson, supra*, 197 U.S. at p. 38; see also *Abeel v. Clark, supra,* 84 Cal. at pp. 226, 229-231 [upholding state law that required schools to exclude any "child or person" who was not vaccinated against smallpox; observing that Legislature was vested with "large discretion" not readily subject to "control by the courts"].)

Here, petitioners ask this Court to order the Governor and the California Department of Public Health to allow the Orange

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substantial relation to public health"]; *Gish v. Newsom*, No. 5:20-cv-00755-JGB-KKX, 2020 WL 1979970, at *4–5 (C.D. Cal. Apr. 23, 2020), *appeal docketed*, No. 20-55445 (9th Cir. Apr. 28, 2020) [performing a similar analysis].

County School Board and local schools to make their own decisions—effectively, to grant them a blanket waiver from the Executive Orders and public health directives based on the Board's assertions about risks in that locale and the Board's views about whom COVID affects and how COVID spreads. (Petn. 23, ¶ 16.) [15] As discussed below, however, petitioners have identified no law that requires that result, and, indeed, in the State's informed judgment, it would be irresponsible and dangerous for the State to simply step back and leave decisions about how to respond to the pandemic solely to each county, city, town, and local school district in California.

Petitioners' allegations of legal violations resulting from respondents' purported bar on in-person instruction, in addition to lacking a rational connection to their requested relief, lack any merit taken on their own terms.

B. Respondents' Orders Do Not Violate Students' Rights to Equal Protection

Petitioners cannot prevail on their equal protection claim because they cannot establish the respondents' orders burden one

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[15] The relief petitioners seek might more appropriately fit under a petition for writ of prohibition (Code Civ. Proc., § 1105), but this provision would provide them no greater right to relief or change the outcome of their petition. The writ of prohibition is the counterpart to the writ of mandate, prohibiting action rather than requiring it. That writ, similarly, cannot serve to control an official's or agency's discretion. It is well settled that a writ of prohibition may not issue to prevent an abuse of discretion. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 287-291; *Diaz–Barba v. Superior Court* (2015) 236 Cal.App.4th 1470, 1482.)

class of similarly situated persons to the exclusion of others. Nor can they establish that starting the school year with distance learning in any county remaining on the Monitoring List—a county may at any time meet the "reopening" criteria—falls fundamentally below any prevailing statewide standard as they must to support their claim.

A petitioner claiming a violation of equal protection must first establish that the challenged governmental action adopts a classification that discriminates against an identifiable group of people. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 258.) Additionally, Petitioners must establish that the differential treatment involve groups that are "similarly situated." (*People v. Mendoza* (2016) 62 Cal.4th 856, 912.) Only when a classification that disfavors one similarly situated group over another has first been established may courts consider whether an allegedly disfavored class is suspect or the disparate treatment has a real and appreciable impact on a fundamental right or interest to warrant strict scrutiny. (*Butt v. State of California* (1992) 4 Cal.4th 668, 685-686 (*Butt*).)

Respondents acknowledge the State's ultimate responsibility to ensure a level of educational equality that meets constitutional standards. However, "principles of equal protection have never required the State to remedy all ills or eliminate all variances in service." (*Butt, supra,* 4 Cal.4th at p. 686.) Disparities may rise to level where the State, rather than school districts, has a duty to intervene and remediate them, such as enrollment patterns across school district lines that results in racial isolation in

schools and deprivation of an integrated educational experience (*Tinsley v. Palo Alto Unified School Dist.* (1979) 91 Cal.App.3d 871, 903-04) or an "extreme and unprecedented" deprivation of services offered by a school district relative to what is offered to other students statewide (*Butt*, *supra*, 4 Cal.4th at p. 687). But these are not those facts, and no authority supports extending the right to equal educational opportunity in this manner. Respondents' actions neither classify students by group, suspect class or otherwise, nor deny students in one district an education that falls below prevailing statewide standards, and therefore meet the requirements of the state equal protection clause as applied to educational opportunity.

1. Respondents' Orders Treat Students Throughout the State Equally

Petitioners fail to demonstrate that the challenged orders discriminate against identifiable groups, and therefore fail to and cannot establish the first element necessary to support a class discrimination theory.

Petitioners acknowledge that they must demonstrate that the orders discriminate against an identifiable class of persons. (Petn. 34.) Yet, they cannot satisfy a critical element of the analysis, which is that to constitute an identifiable class, "group members must have some pertinent common characteristic other than the fact that they are assertedly harmed" by the statute or order at issue. (*Vergara v. State* (2016) 246 Cal.App.4th 619, 646 (*Vergara*.))

The challenged orders establish the same rules for re-establishing in-person instruction throughout the state, and

therefore on their face treat all students equally. Petitioners cannot establish that respondents' orders establish any overt classifications based on the disadvantaged groups they identify, and have not established that all members of such groups are adversely affected or even that all members of such groups are subject to distance learning because of respondents' orders.

Nor can petitioners establish that the harms they allege—and in particular, the alleged disparate impact on particular groups (Petn. 34-42)—are caused by the challenged orders themselves, rather than other factors such as how a particular school conducts its distance learning program. (See *Vergara*, *supra*, 246 Cal.App.4th at pp. 648-651 [reversing a trial court judgment that had invalidated teacher tenure statutes for violating equal protection, holding that there was no evidence that the challenged statutes inevitably caused the disparate impact in students' educations].) Indeed, many students are distance learning as the result of local decisions not to return to in-person instruction rather than a result of the challenged orders.[16]

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[16] On July 13, 2020, before the July 17, 2020 State Order was issued, the Los Angeles and San Diego Unified School Districts had already announced that they would be starting the 2020-2021 school year with distance only learning. See https://www.sandiegounified.org/newscenter/node/2285. Additional school districts followed, announcing that they would open the 2020-2021 school year with distance-only learning, including San Francisco Unified, Sacramento Unified, Long Beach Unified, Santa Ana Unified, and Oakland Unified, to name a few. See Louis Freedberg, *Pace of California schools planning to*

(continued…)

Further, petitioners have not shown that the alleged harms to certain groups are the inevitable result of distance learning itself, rather than local school decisions, or that these harms cannot be mitigated by schools that take proactive steps to meet their students' needs and keep them engaged during distance learning. Ptitioners offer no limiting principle to their theory: the differences they allege in access to educational benefits by certain groups may apply with similar if not equal force to in-person instruction. (See, e.g., *Butt*, 4 Cal.4th at 686 ["Of course, the Constitution does not prohibit all disparities in educational quality or service"].) At a minimum, petitioners' claims present disputed issues of material fact that are not well suited to this Court's exercise of original jurisdiction.

2. Respondents' Orders Do Not Result in Differences Between Districts that Fall Below Any Identified Prevailing Statewide Education Standards

With respect to petitioners' claim that the school orders infringe on the fundamental right to public education, a finding of constitutional disparity "depends on the individual facts" and may not be made "[u]nless the actual quality of [a particular] district's program, viewed as a whole, falls fundamentally below

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(…continued)
open with distance learning accelerates, EdSource (July 15, 2020, accessed on August 22, 2020, at https://edsource.org/2020/pace-of-california-schools-looking-to-open-with-distance-learning-accelerates/636134 (noting that as of July 15, 2020, the school districts that announced re-opening with distance learning include one half of the state's 30 largest school districts).

prevailing *statewide* standards[.]" (*Butt, supra,* 4 Cal.4th at pp. 686-689, italics added.) Thus, "the equal protection clause precludes the State from maintaining its common school system in a manner that denies the students of one district an education basically equivalent to that provided elsewhere throughout the State." (*Id.* at p. 685.)

In *Butt*, all Richmond Unified School District students were threatened due to a financial crisis with being deprived of six weeks of school, unlike students in every other district in the State. (See *Butt*, *supra*, 4 Cal.4th at pp. 703-704.) Thus, in *Butt*, the "prevailing statewide standard" was a full school term, which every other district in the State was providing its students. Here, petitioners fail to, and cannot, establish a "prevailing statewide standard" against which their opportunity to access education could be measured as against other California students.[17]

Indeed, there is no dispute that respondents' orders establish statewide criteria applicable to all counties and public schools, and therefore establish distance learning subject to state guidelines as an acceptable statewide standard during the current COVID-19 crisis. Students in Orange County and elsewhere that have begun the school year with distance learning, thus, are on equal footing with students in other counties that, pursuant to respondents' orders or local health

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[17] Such a showing is necessarily fact-intensive where, as here, it is not grounded in a statutory requirement, in contrast to *Butt* (4 Cal. 4th at p. 687 fn. 14). This further counsels against granting relief in the first instance, without a record developed below containing findings on any disputed factual issues.

orders or choices by school leaders, who also are not able to attend classes in person.

Moreover, the recently issued guidance on cohorts authorizes all schools that are otherwise not authorized to reopen for traditional in-person instruction to provide supervision and services to students in small groups, expressly allowing all schools to provide in-person instructional support, access to technology, and other necessary supports to high-need students. Petitioners have not presented evidence demonstrating that the currently operative state orders deprive students of educational services in a manner that implicates the constitutional right.

Even if plaintiffs had met the threshold requirements for an equal educational opportunity claim, the State has a compelling interest in issuing the orders, which are necessary to protect the public from a deadly and highly contagious disease. This is especially true with respect to the application of the Orders to counties that have not remained off the Monitoring List for more than 14 days, and therefore have an elevated virus risk. Petitioners dispute the public health determinations underlying the challenged orders (which are based on available evidence and account for the uncertainty and continually emerging science about the disease), contending that the risk of COVID-19 to children remains low. However, petitioners' contentions on this point are controverted by growing evidence of serious health risks posed by the disease to children and recent examples of outbreaks in schools that have fully reopened, which petitioners fail even to acknowledge. (Sondheimer Decl., Exh. 1 [Declaration

of James Watt (Watt Decl.) at ¶ 18] and Exh. 2 [Supplemental Declaration of James Watt (Watt Supp. Decl.) ¶¶ 4-7.) As several courts have noted in response to similar arguments that California's public health directives are unwarranted the spread of COVID-19 has been slowed, petitioners "fail to account for the possibility" that this may be true precisely "because of" the public-health orders that are seeking to invalidate. (*Monica Six v. Newsom*, __ F. Supp. 3d __, No. 820-cv-00877-JLS-DFM, 2020 WL 2896543 at *8; see also *Best Supplement*, 2020 WL 2615022, at *3 ["Plaintiffs wholly fail to grapple with the possibility that the health of their neighbors is a symptom of the stay at home orders, rather than evidence that the restrictions aren't needed."].)

Critically, petitioners also overlook the substantial risk to teachers, school staff, and others in the community—particularly those in the most vulnerable populations at high risk of death from the disease—posed by children traveling to and remaining in school in close proximity indoors with other children and school staff. Children undeniably may be asymptomatic carriers and spreaders of the coronavirus. (Watt Decl., ¶¶ 27-39; Watt Supp. Decl., ¶¶ 4-7.) The orders are well within the State's powers to determine and apply measures deemed necessary to protect public health during a public health crisis, and this Court should defer to the judgment of public health experts in the face of the scientific uncertainty around this new and highly virulent disease. (See *S. Bay III*, *supra*, 591 U.S. __, 140 S. Ct. at pp. 1613-1614; *Patrick v. Riley* (1930) 209 Cal. 350, 354-355; *Abeel*, *supra*, 84 Cal. at pp. 229-231.)

3. The State Has Already Taken Unprecedented Action in Response to Disparities that May Arise from Distance Learning

Even assuming that Petitioners could establish a violation of the right to equal educational opportunity (which they cannot), the appropriate remedy would be to direct Respondents to take appropriate action to remedy the violation. (*Butt*, *supra*, 4 Cal.4th at p. 695-96 [recognizing the separation of powers doctrine and the need to "strive for the least disruptive remedy adequate to its legitimate task" as bases to affirm order directing state defendants to ensure "'by whatever means they deem appropriate' that students would receive their educational rights"].) Petitioners' requested relief—striking down a public health order—is incongruous to the alleged harms. Petitioners have not established that it is the only remedy, and it would unquestionably be "disruptive" to the state's ongoing response to a public health crisis, potentially calling into question countless other measures being undertaken to protect the public.

Moreover, petitioners ignore that the State has, in fact, proactively taken steps to redress adverse impacts that students may experience from distance and to prevent some of the challenges around distance learning that occurred last spring, when schools unexpectedly and without much notice had to close due to the pandemic's outbreak. The State has adopted new laws and guidance requiring public schools to meet certain thresholds for distance learning and the provision of services to students with special needs, and appropriated more than $5 billion in

additional funding to public schools for the 2020-21 school year to address learning loss that may have occurred last spring, and to provide additional supports and services to improve delivery of education this year, including if distance learning continues. (See Declaration of Rachel Maves (Maves Dec.), attached as Sondheimer Decl., Exh. 3.) Because the State has proactively taken steps to mitigate impacts if public schools must implement distance learning, not only is the evidence petitioners present around the putative constitutional harm stale, but the State also has already acted.

IV. PETITIONERS HAVE NOT ESTABLISHED THAT THE STATE'S RESPONSE TO THE PANDEMIC IS UNLAWFUL

A. Petitioners Cannot Establish A Claim for Violation of Federal Disability Statutes

Petitioners' claim asserting violations of the Individuals with Disabilities Education Act (IDEA) and Americans with Disabilities Act (ADA) is wholly defective because: 1) petitioners lack standing to assert their IDEA claim; 2) petitioners cannot pursue their claim pursuant to 42 U.S.C. section 1983 (Section 1983); 3) petitioners failed to identify any effort to exhaust administrative remedies; 4) federal authorities recognize that distance learning during the pandemic does not, by itself, contravene federal disability requirements; and 5) their claim is unsupported in light of extensive measures the State has undertaken to ensure students with special needs arising from distance learning have specialized support available.

First, Plaintiffs Orange County Board of Education and Palm Lane Charter School lack statutory standing to bring this

claim. (See *Lake Washington School Dist. No. 414 v. Office of Superintendent of Public Instruction* (9th Cir. 2011) 634 F.3d 1065, 1068-1069 [district lacked standing to challenge state's alleged "systematic violation of the IDEA"). Section 1415 of the IDEA "establishes a private right of action for disabled children and their parents" and "creates no private right of action for school boards or other local education agencies apart from *contesting* issues raised in the complaint filed by the parents on behalf of their child." (*Id*. at p. 1068, emphasis added).

At the same time, none of the parent-petitioners Cruz, Miller, or Ochoa allege that their children have an individualized education program (IEP) pursuant to the IDEA. The IDEA requires that students with disabilities be provided a free appropriate public education (FAPE) through an IEP. (20 U.S.C. §§ 1412(a)(1), 1414(d) (2006).) However, petitioners fail to allege that any of their children have an IEP that provides for services that they are not receiving, or that their child's school district refused to develop an IEP for their child, nor do they provide competent evidence that their children have a disability that would require the provision of special education and related services through an IEP.

Second, petitioners improperly assert their disability claim under Section 1983. (Petn. 10.) Section 1983 does not provide a cause of action for violation of the IDEA or ADA. (*Blanchard v. Morton School Dist*. (9th Cir. 2007) 509 F.3d 934, 938; *Vinson v. Thomas* (9th Cir. 2002) 288 F.3d 1145, 1155-1156.)

Third, petitioners' claim is barred because they failed to demonstrate any effort to exhaust administrative remedies to secure the services they allege are needed to support students with special needs. Before a plaintiff may assert a FAPE violation in court, she must first exhaust the available administrative remedy through a special-education due-process hearing. 20 U.S.C. § 1415(l); 20 U.S.C. § 1415(i)(2)(A). When a plaintiff has failed to exhaust the required administrative remedy, the complaint is subject to dismissal. *Albino v. Baca,* 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc).

Exhaustion of administrative remedies is required when the gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if the claim is "not phrased or framed in precisely that way." (*Fry v. Napoleon Community Schools* (2017) 137 S. Ct 743, 755.) Petitioners' ADA claim is premised on the same alleged violation of educational access. (See Petn. 51 [asserting children with disabilities "will not receive equal privileges or adequate accommodations"].) Thus, petitioners' ADA-based claim also is subject to the IDEA's administrative remedy and exhaustion requirement. (*Payne v. Peninsula School Dist.* (9th Cir. 2011) 653 F.3d 863, 880; *Paul G. v. Monterey Peninsula Unified School Dist*. (9th Cir. 2019) 933 F.3d 1096, 1102 (*Paul G.*) [as gravamen of plaintiff's Rehabilitation Act claim was alleged denial of FAPE, plaintiff was barred from seeking systemic relief against agency for failure to exhaust remedies].)

There are three categories of exceptions to the requirement to exhaust the due process administrative remedy: (1) it would be futile to go to due process, (2) the educational agency has adopted a policy or pursued a practice of general applicability that is contrary to law, or (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies. (*Doe v. Arizona Dep't of Educ.* (9th Cir. 1997) 111 F.3d 678, 681, 683-684 (finding exhaustion not excused on its facts); *Hoeft v. Tucson Unified Sch. Dist*. (9th Cir. 1992) 967 F.2d 1298, 1303 (same).) Plaintiffs have not established that any of these exceptions apply here.

Petitioners' first argument that exhaustion would be futile and relief "improbable" because school districts lack authority to override respondents' orders mischaracterizes the exhaustion requirement. Even assuming petitioners' children are entitled to an IEP, petitioners do not nor could they establish that it is categorically impossible for their children to receive FAPE under respondents' orders. The purpose of an administrative hearing would, of course, not be to consider challenges to the orders, but rather whether a student is entitled to and was denied particular educational support. The exhaustion requirement permits a determination in the first instance of such individualized and fact-intensive issues necessary to determine whether a student is being denied FAPE, and, if so, what student-specific remedies are appropriate under the circumstances. (*Hoeft v. Tucson Unified Sch. Dist.* (9th Cir. 1992) 967 F.2d 1298, 1303.) Petitioners offer no basis to conclude that such a hearing would be insufficient to determine whether they were being denied FAPE. Indeed, the

U.S. Department of Education's Office of Special Education Programs (OSEP) in March 2020 provided guidance in March 2020 advising that school districts should attempt to provide FAPE "to the greatest extent" possible during the COVID-19 pandemic, and that this may include distance learning. (See Sondheimer Decl., Exh. 4 [Declaration of Heather Calomese (Calomese Decl.) ¶¶ 6, 8 and Exhibits RR at 2 and SS at 2, thereto].)

The exception for "systemic" claims, on which petitioners also rely, is far narrower than they suggest and inapplicable here. Exhaustion for such alleged systemic claims is excused only if there has first been a preliminary determination by an administrative law judge that a student involved in the matter has actually been denied a FAPE by a school district. (See *Paul G.*, *supra*, 933 F.3d at p. 1102.) Additionally, a claim is considered "systemic" only "if it concerns the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act." (*Ibid.*, internal quotation omitted.) Because petitioners failed to avail themselves of the administrative hearing process, they cannot satisfy the first condition. Nor can they establish the second condition, foremost because the obligation for schools to deliver FAPE remains in place and the administrative process—as described above—is capable of redressing instances where an individual student may be denied FAPE as a result of school closures. (See *Doe By & Through Brockhuis v. Arizona Dept. of Educ.* (9th Cir. 1997) 111

F.3d 678, 682 [claim is not systemic if "it involves only a substantive claim having to do with limited components of a program" and "the administrative process is capable of correcting the problem"].) Although petitioners challenge orders with statewide effect, petitioners' claims nonetheless are brought by individual petitioners, and the determination of any failure to provide a FAPE to which their children may be entitled involves a highly individualized, fact-specific inquiry, an issue that can and must be determined, in the first instance, by a hearing officer. (*Paul G.*, *supra*, 933 F.3d at pp. 1101-1102; *S.B. v. California Dept. of Educ.* (E.D. Cal. 2018) 327 F.Supp.3d 1218, 1256, 1258-59.)

Petitioners provide no support, finally, for their assertion that pursuing their administrative remedies would cause "severe or irreparable harm." To the extent a school fails to deliver FAPE to a student while providing distance learning, appropriate relief, including compensatory education, is available through the administrative process. (See 20 U.S.C. 1415(e)(2), 1415(i)(2)(C)(iii); *Forest Grove v. T.A.* (2009) 557 U.S. 230, 243-244 n. 11 (2009) [administrative hearing officer can award appropriate relief]; *Sch. Comm. of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 339-371 [reimbursement]; *Student W. v. Puyallup Sch. Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 [compensatory education].)

Fourth, petitioners' claim lacks merit because OSEP guidance expressly recognizes that distance learning is not

inconsistent with a FAPE and disability laws. As the office stated in its March 2020 guidance letter, the current

> exceptional circumstances may affect how all educational and related services and supports are provided . . . . [T]he provision of FAPE may include, as appropriate, *special education and related services provided through distance instruction provided virtually, online, or telephonically* . . . [and] schools may not be able to provide all services in the same manner that they are typically provided . . . . [F]ederal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency.

(Calomese Decl., Exh. SS at 1-2 thereto, italics added.)

Finally, petitioners' IDEA claim rests entirely on evidence of what occurred in the spring. As noted above, the State has since taken extensive measures, and appropriated billions of dollars in additional resources, to prepare for distance learning should it become necessary and ensure that students with special educational needs receive necessary support during this unprecedented time. (See Maves Decl. ¶¶ 4-15; Calomese Decl. ¶¶ 4-13.) Additionally, operative public health directives for schools authorize small group supervision and instruction, subject to certain conditions to protect public health, at schools that otherwise are not permitted to reopen. (RJN, Exh. 1.) This expressly contemplates the provision of special education and related services under IEPs, especially where a school has concerns about whether they can be delivered effectively through distance learning. (*Id.*, Exh. 2.) Given the significant steps the

State has taken to support delivery of FAPE as the pandemic has unfolded and the unquestioned ability of schools to deliver services required by an IEP in-person even while generally providing distance learning, petitioners have not, and cannot, come close to establishing an IDEA violation that supports the prospective relief they seek here.

B. Petitioners Lack Any Right of Action for Alleged Violations of Title VI Regulations

Petitioners cannot bring a private right of action under Section 1983 based on disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964. (*Alexander v. Sandoval* (2001) 532 U.S. 275, 293 [holding that as Title VI does not "display an intent to create a freestanding private right of action" to enforce the regulations, [w]e therefore hold that no such right of action exists"]; see also *Save Our Valley v. Sound Transit* (9th Cir. 2003) 335 F.3d 932 [holding that Department of Transportation's disparate impact regulation under Title VI "cannot create individual rights enforceable through § 1983"].)

V. THE EXECUTIVE ORDERS AND PUBLIC HEALTH DIRECTIVES ARE REASONABLE AND SUPPORTED

COVID-19 poses an unprecedented risk to the health of all Californians.[18] The purpose of the challenged orders is of the

[18] As discussed elsewhere in this Preliminary Opposition, Petitioners attempt to dispute this reality. In arguing against the legitimacy of the State's purpose for the orders, they misrepresent data regarding the risk of COVID-19 transmissions in school-aged children. (Petn. at 50; see also Ex. 18.) In fact, the study included as Exhibit 18 expressly cites the importance of school closures and found that 10-19 year olds were the likeliest group to transmit the virus to household contacts.

utmost significant—to aid in remedying this "broad and general social [and] economic problem." (*Alameda Cty. Deputy Sheriff's Assn. v. Alameda Cty. Employees' Retirement Assn.* (2020) 9 Cal.5th 1032, internal citation and quotation marks omitted.) The orders protect the health not only of students, but also of Petitioner schools' broader communities, in particular their most vulnerable populations at high risk of death from the disease, and the State at large.

The State has supported its decisions with reasonable considerations—recognizing the evolving nature of the virus, its differential impact across the state, the need for flexibility, and the importance of coordination with local authorities. (Exec. Order N-60-20 [Petn. Ex. 2.]) These reasoned considerations undergird the phased reopening plan, allowing schools to reopen "at any time" once the county in which they are located has met criteria established by the Officer. (Petn. Ex. 4.)

The State's approach is reasonable and appropriate, and furthers the legitimate and significant public purpose of protecting public health. Petitioners' claims to the contrary are without merit.

CONCLUSION

The Court should summarily deny the petition.[19]

Dated: August 28, 2020 Respectfully submitted,

XAVIER BECERRA
Attorney General of California
CHERYL L. FEINER
Senior Assistant Attorney General
GREGORY D. BROWN
Supervising Deputy Attorney General

/s/ Joshua Sondheimer
JOSHUA N. SONDHEIMER
Deputy Attorney General
Attorneys for Respondents

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[19] If the Court is inclined to grant the petition, respondents request an opportunity to file a formal response.

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENTS' PRELIMINARY OPPOSITION TO PETITION FOR A WRIT OF MANDATE uses a 13 point Century Schoolbook font and contains 9,316 words.

Dated: August 28, 2020

XAVIER BECERRA
Attorney Generalof California

/s/ Joshua Sondheimer
JOSHUA N. SONDHEIMER
Deputy Attorney General
Attorneys for Respondents

DECLARATION OF ELECTRONIC SERVICE

Case Name: Orange County Board of Education, et al. v. Newsom, et al.
No.: S264065

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On August 28, 2020, I electronically served the attached:

1. RESPONDENTS' PRELIMINARY OPPOSITION TO PETITION FOR A WRIT OF MANDATE
2. REQUEST FOR JUDICIAL NOTICE (w/ Exhibits A-F)
3. DECLARATION OF JOSHUA SONDHEIMER IN SUPPORT OF RESPONDENTS' PRELIMINARY OPPOSITION TO PETITION FOR A WRIT OF MANDATE (w/ Exhibits 1-4)

by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on August 28, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Robert H. Tyler
Tyler & Bursch, LLP
25026 Las Brisas Road
Murrieta, California 92562
rtyler@tylerbursch.com
Attorney for Petitioners
(served via TrueFiling)

Jennifer L. Bursch
Tyler & Bursch, LLP
25026 Las Brisas Road
Murrieta, California 92562
jbursch@tlyerbursch.com
Attorney for Petitioners
(served via TrueFiling)

Cody J. Bellymeyer
Tyler & Bursch, LLP
25026 Las Brisas Road
Murrieta, California 92562
cbellmeyer@tylerbursch.com
Attorney for Petitioners
(served via TrueFiling)

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 28, 2020, at San Francisco, California.

N. Codling	*/s/ N. Codling*
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **ORANGE COUNTY BOARD OF EDUCATION v. NEWSOM (SHEWRY)**
Case Number: **S264065**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **joshua.sondheimer@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
PRELIMINARY OPPOSITION	Orange County.Master
ADDITIONAL DOCUMENTS	Sondheimer Declaration w Exhibits 1-4.PDF
REQUEST FOR JUDICIAL NOTICE	RJN Revised w Exhibits A-F.PDF

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jennifer Bursch Tyler & Bursch, LLP 245512	jbursch@tylerbursch.com	e-Serve	8/28/2020 3:40:24 PM
Robert Tyler Tyler & Bursch LLP	rtyler@tylerbursch.com	e-Serve	8/28/2020 3:40:24 PM
Todd Grabarsky Office of the Attorney General	todd.grabarsky@doj.ca.gov	e-Serve	8/28/2020 3:40:24 PM
Joshua Sondheimer California Dept of Justice, Office of the Attorney General 152000	joshua.sondheimer@doj.ca.gov	e-Serve	8/28/2020 3:40:24 PM
Cody Bellmeyer	cbellmeyer@tylerbursch.com	e-Serve	8/28/2020 3:40:24 PM

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/28/2020
Date

/s/Nicole Codling
Signature

Sondheimer, Joshua (152000)

Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General

Law Firm