

CASE NO. _____

**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,

vs.

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.

**VERIFIED PETITION FOR IMMEDIATE STAY
AND PEREMPTORY WRIT OF MANDATE
IN THE FIRST INSTANCE; MEMORANDUM
OF POINTS AND AUTHORITIES**

IMMEDIATE RELIEF REQUESTED
NO LATER THAN SEPTEMBER 1, 2020
(Palma Notice Requested)

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or
8.498(d)

Supreme Court Case Caption:

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Officer and Department of Public Health Director

Respondent.

Please check here if applicable:

There are no interested entities or persons to list in this Certificate as
defined in the California Rules of Court.

Dated: August 21, 2020



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**VERIFIED PETITION FOR IMMEDIATE STAY
AND PEREMPTORY WRIT OF MANDATE
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OF POINTS AND AUTHORITIES**

**To the Honorable Tani Cantil-Sakauye, Chief Justice of the Supreme
Court of California and to the Honorable Associate Justices of the
Supreme Court of California:**

I. INTRODUCTION

Governor Gavin Newsom recently ushered in a new wave of COVID-19 restrictions which bar in-person schooling for most children in California. In enacting these new restrictions, he has sacrificed the well-being of children, and children's important fundamental interest in receiving equal access to meaningful education. Governor Newsom's arbitrary restrictions on in-person schooling deprives millions of children across California of the opportunity for meaningful education solely based on their county of residence. The fallout from Governor Newsom's decision extends far beyond the educational gap that is growing for students throughout California. Parents are unable to work to provide basic needs for their families, children no longer have mandated reporters seeing them every day to identify situations of abuse¹, and mental health issues are growing for both children and their parents who are lacking normal social interaction with their peers.² The impacts of the Governor's decision threaten to undermine our economy, our safety, our mental well-being, and yet as we learn more about COVID-

¹ Decl. Victory ¶ 13.

² See Robert Redfield, MD *COVID Webinar Series* (Transcript) (July 14, 2020), available as of the date of filing at: <https://www.buckinstitute.org/covid-webinar-series-transcript-robert-redfield-md/>

19 it has become increasingly and abundantly clear that the dire predictions that ushered this state of emergency into being have not come to fruition.³

This Writ presents facial and as-applied challenges to the Governor of California’s May 4, 2020 Executive Order N-60-20 (“State Order”) which requires Californians to obey all State Public Health directives and orders, including the State’s July 17, 2020 “COVID-19 Industry Guidance: School and School-Based Programs” (collectively, “Orders”).⁴ This Writ is brought pursuant to 42 U.S.C. § 1983, on the grounds that the State Order and associated guidance and directives, and Respondents’ enforcement thereof, violate Petitioners’ constitutionally and federally protected rights, including specifically (1) the right to equal protection, free from arbitrary treatment by the State; (2) the right to equal and meaningful access to education, free from arbitrary state action resulting in a disparate impact on those with disabilities (Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, *et seq.*); and the right to access to education despite disability or minority status under Title VI of the Civil Rights Act of 1964.

Necessity of Writ Relief

Governor Newsom’s defiance of the rule of law and disregard for the constitution has detrimentally impacted the learning of students across the

³ California Department of Public Health, *COVID-19: Cases* (August 18, 2020) available as of the date of filing at: https://public.tableau.com/views/COVID-19CasesDashboard_15931020425010/Cases?:embed=y&:showVizHome=no; Governor Gavin Newsom, *Letter to the President of the United States* (March 18, 2020) available as of the date of filing at: <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.18.20-Letter-USNS-Mercy-Hospital-Ship.pdf>

⁴Newsom G (2020) Executive Order N-60-20, available as of the date of filing at: <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.4.20-EO-N-60-20-text.pdf>.

State of California in violation of the Equal Protection Clause. The eyes of the country are set firmly on California to determine whether the court will right the wrongs being committed against children across the State as they are being denied fundamental aspects of education. This writ questions the constitutionality and legality of Governor Newsom's Executive Orders, a matter of utmost legal importance, and asks this honorable Court to prevent the irreparable injury to students in the State's public education system. There is statewide interest in the issue as some parents of both private and public school students are presently in the impossible and irreconcilable position where they are being forced to choose between providing for their family or facilitating education, a fundamental right. As indicated by numerous studies, students across the State will fall behind in their education under the distance learning model in contrast to their right to education and, in some cases, will be exposed to an abusive environment which will further impact their development. This is particularly true of students with special needs, economically disadvantaged students, minority students, and students from single parent households. Accordingly, Petitioners request an immediate stay of the orders as well as an issuance of a peremptory writ of mandate in the first instance.⁵

Immediate Judicial Action is Necessary to Address Governor Newsom's Executive Orders

On March 4, 2020 Governor Newsom declared a State of Emergency throughout the State of California due to the coronavirus pandemic. Thereafter, on March 19, 2020, California Governor Newsom issued

⁵ Code of Civil Procedure § 1088; *see also Lewis v. Sup. Ct.*, (1999) 19 Cal. 4th 1232, 164-65 (Baxter, J. concurring) [Issuing a peremptory writ in the first instance reflects recognition that, on occasion, immediate judicial action is necessary to prevent or correct unauthorized or erroneous action by the respondent where there is great urgency].

Executive Order N-33-20 ordering “all residents are directed to immediately heed the current State public health directives.” (Exhibit 1) ⁶ Later, on or about May 4, 2020, Governor Newsom issued Executive Order N-60-20 in which he ordered “All residents are directed to continue to obey State public health directives” and vested power in the CDPH to make determinations about the re-openings of “business and spaces.” (Exhibit 2) ⁷

On July 17, 2020, Newsom announced a framework to reopen schools. (Exhibit 3)⁸ Under his plan, “Schools and school districts may reopen for in-person instruction at any time if they are located in a local health jurisdiction (LHJ) that has not been on the county monitoring list within the prior 14 days.” (Exhibit 4)⁹ As of August 21st, 40 of the 58 counties are currently on the monitor list including Orange County. (Exhibit 5)¹⁰ The plan included a waiver procedure which states:

A waiver of this criteria may be granted by the local health officer for elementary schools to open in-person instruction. A waiver may only be granted if one is requested by the

⁶Newsom G (2020) Executive Order N-33-20, available as of the date of filing at: <https://www.gov.ca.gov/wpcontent/uploads/2020/03/EO-N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-002.pdf>

⁷Newsom G (2020) Executive Order N-60-20, available as of the date of filing at: <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.4.20-EO-N-60-20-text.pdf>; Decl of Bhattacharya ¶ 21.

⁸ Newsom G., *Governor Gavin Newsom Lays Out Pandemic Plan for Learning and Safe Schools* (July 17, 2020) available as of the date of filing at: <https://www.gov.ca.gov/2020/07/17/governor-gavin-newsom-lays-out-pandemic-plan-for-learning-and-safe-schools/>

⁹ California Department of Public Health, *COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School year* (July 17, 2020) available as of the time of filing at: <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Schools%20Reopening%20Recommendations.pdf>

¹⁰ *County Data Monitoring List* (August 20, 2020) available at the time of filing at: <https://covid19.ca.gov/roadmap-counties/>

superintendent, in consultation with labor, parent and community organizations. Local Health Officers must review local community epidemiological data, consider other public health interventions, and consult with CDPH when considering a waiver request.¹¹

While public schools were originally told that waivers were available, these waivers are unavailable in numerous counties and are entirely discretionary. (Exhibit 7)¹² Accordingly, public schools are forced to implement a distance learning model and do not have an administrative remedy available which could permit them to re-open in a safe manner pursuant to the State and CDC Guidelines. Public schools are currently beginning their school year across the state. Thus, immediate action by this Court is necessary to address the constitutionality of Governor Newsom's Executive Orders as students are currently falling behind in their educational endeavors. If the Court does not take immediate action, students and public schools will be irreparably damaged due to the mandatory adoption of a distance learning model.¹³ Specifically, children with special needs, some who are unable to communicate through conversation, are unable to receive the same optimized specialized education to address their unique disabilities.¹⁴ To some, such as Petitioner Joaquin Cruz, this loss of education is far more terrifying than the threats posed by the COVID-19 virus.¹⁵

¹¹ California Department of Public Health, *COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School year* (July 17, 2020) available as of the time of filing at: <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Schools%20Reopening%20Recommendations.pdf>

¹² *Ibid.*

¹³ Decl. of Garcia ¶¶7-10.

¹⁴ Decl. of Cruz ¶¶ 6-11.

¹⁵ Decl. of Cruz ¶ 14.

Teachers and school districts are issuing staggering reports of reduced student involvement after implementing the distance learning school model. For example, Los Angeles County Unified School District, (LAUSD) indicated that between March 16, 2020 and May 22, 2020, “36% of middle and high school students participated online,” while “25% logged on or viewed work only” and “40%” were absent altogether. (Exhibit 8)¹⁶ Similarly, the study found that minority and disabled students disproportionately suffered more during online-only learning. (Exhibit 9)¹⁷ Teachers from Orange County are reporting similar difficulties sustained by students under the distance learning model noting that the distance learning program fails to provide students with the same level of education.¹⁸

Concerns with the distance learning model are echoed through the declarations and experiences of public school parents.¹⁹ Parents note their own child’s difficulties with the distance learning model.²⁰ Angela Miller, a working single mother, tells an all too familiar story of her child’s regression during the distance learning model²¹, stating that “...the daily screen time and lack of personal attention provided disastrous” noting “[h]e was unable to sit still”, was “unable to focus”, and the “inability to be successful at his studies” left him frustrated.²²

¹⁶ *Report Reveals Disparities Among Black, Latino LASUSD students in online learning amid COVID-19 Pandemic*, ABC 7 Eyewitness News (July 17, 2020), available as of the date of filing at: <https://abc7.com/lausd-los-angeles-unified-school-district-race-disparity-racial-divide/6321930/>.

¹⁷ *Ibid.*; Decl. of Garcia ¶¶7-10

¹⁸ Decl. of Garcia ¶¶7-10;

¹⁹ Decl. of Miller ¶¶ 9-10

²⁰ Decl. of Miller ¶¶9-11

²¹ Decl. of Miller ¶ 11.

²² Decl. of Miller ¶ 10

In addition to the reports from school districts themselves, universities continue to study the effects of distance learning on students nationwide. Brown University recently conducted a study and projected that students' learning would be drastically effected as they will only make "63-68% of the learning gains in reading relative to a typical school year" while only making "37-50% of the learning gains in math." (Exhibit 10)²³ Similarly, McKinsey & Company found in a recent study that children who participate in distance learning this fall may fail as students will lose up to "three to fourth months of learning" by 2021. (Exhibit 11)²⁴

This substantial absence from in-person instruction and the subsequent gaps in learning will disproportionately effect minorities²⁵ and may have long-term psychological and mental health impacts on children as distance learning makes "it difficult for schools to identify and address important learning deficits as well as child and adolescent physical or sexual abuse, substance use, depression, and suicidal ideation." (Exhibit 12.)²⁶

²³ Megan Kuhfeld, et al., *Projecting the potential impacts of COVID-19 School Closures on Academic Achievement*, Brown University Ed. Working Paper No. 20-226 at 2, 23 (May 2020), available as of the date of filing at: <https://www.edworkingpapers.com/sites/default/files/ai20-226-v2.pdf>.

²⁴ Emma Dorn et al., *COVID-19 and student learning in the United States: The Hurt could Last a Lifetime*, McKinsey & Company (June 1, 2020), available as of the date of filing: <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime>; see also Decl. of Miller ¶¶ 10-14.

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

²⁶ *COVID-19 Planning Considerations: Guidance for School Re-Entry*, American Academy of Pediatrics (July, 2020) available as of the date of filing at: <https://downloads.aap.org/AAP/PDF/COVID->

These observations are reflected in practice by psychologist Shannae Anderson, Ph.D., who opined that “[t]he state-wide lockdown has created a mental health crisis that put children at a greater risk for abuse than ever before.”²⁷

Experts nationwide echo these concerns when analyzing student response to distance learning at the end of the 2019-2020 school year.²⁸ Experts conclude that closure of in-person learning for children is largely detrimental to the health and welfare of children. (Exhibit 12)²⁹ For example the American Academy of Pediatrics (“AAP”) opined that many health benefits received from in-person instruction will be lost including, “child ... development,” “social and emotional skills,” “reliable nutrition,” physical/speech and mental health therapy,” and “opportunities for physical activity,” if in-person instruction is not permitted. (Exhibit 12)³⁰ Students are consistently demonstrating set backs due to a lack of in-person instruction as it hinders social and emotional skills which are crucial to learning how to function in day-to-day activities.³¹ The social and emotional aspects of education that are taken for granted everyday in the lives of older generations, and those same benefits are being unlawfully stripped from the

19%20School%20Re-entry%20Interim%20Guidance%20FINAL%20062520.pdf

²⁷ Decl. of Anderson ¶ 17.

²⁸ Decl. of Anderson ¶ 9; Decl. of Fitzgibbons ¶¶ 9, 30; Decl. of Victory ¶ 10; Decl. of Mu ¶ 3; Decl. Bhattacharya ¶ 20.

²⁹ See American Academy of Pediatrics, *COVID-19 Planning Considerations: Guidance for School Reentry* (June 25, 2020), <https://downloads.aap.org/AAP/PDF/COVID-19%20School%20Re-entry%20Interim%20Guidance%20FINAL%20062520.pdf>; Decl. of Anderson ¶ 11; Decl. of Bhattacharya ¶ 20.

³⁰ *Ibid.*; see also Decl. of Victory ¶ 14; Decl. of Miller ¶¶ 10-14

³¹ Decl. of Miller ¶¶ 10, 18-20; Decl. of Cruz ¶ 12

education of millions of students.³² Experts ultimately conclude that there is no legitimate medical basis for preventing schools from resuming in-person instruction.³³

Indeed, Petitioners echo the sentiment as they report a decline in students' social and emotional development under the distance learning model.³⁴ Many students are struggling in the online environment as they lack the home support they need to thrive in a distance learning model.³⁵ Bridget Melson, a certified marriage and family therapist counselor, states "Many of these parents are either ill-equipped or unable to stay home to educate their children – especially if it is a one income home."³⁶

The Center for Disease Control (CDC) also strongly encourages states to resume in-person instruction for the sake of the health and welfare of the children. In a recent publication by the CDC, they stated:

Extended school closures are harmful to children's development of social and emotional skills. Important social interactions that facilitate the development of critical social and emotional skills are greatly curtailed or limited when students are not physically in school... [r]outine in-person contacts provide opportunities to facilitate social-emotional development that are difficult, if not impossible, to replicate through distance learning. (Exhibit 16)³⁷

³² California Department of Education, *Fingertip Facts on Education in California* (Accessed August 20, 2020) available at the time of filing at: <https://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp>

³³ Decl. of Victory ¶¶ 19, 23, 26; Decl. of Anderson ¶ 26; Decl. of Fitzgibbons ¶¶ 27, 29, 30, 37; Decl. of Kaufmann ¶¶ 14-19; Decl. of Bhattacharya ¶ 22.

³⁴ Decl. of Miller ¶¶ 10, 18-20; Decl. of Cruz ¶ 12; Decl. of Ochoa ¶¶ 6-7.

³⁵ Decl. of Miller ¶ 12; Decl. of Cruz ¶¶ 12-13; Decl. of Ochoa ¶¶ 4-5.

³⁶ Decl. of Melson ¶ 9.

³⁷ Center for Disease Control and Prevention *The Importance of Reopening America's Schools this Fall*, (July 23, 2020), available as of the date of filing at: <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>.

The CDC, in the same publication, stated that COVID-19 posed a low risk to students. (Exhibit 16)³⁸ In a study conducted by the CDC, South Korea conducted its own and reported that less than 2% of COVID-19 transmissions occurred between individuals from the ages 0-20 with less than 1% of transmissions below the age of 10. (Exhibit 18)³⁹ Similarly, Kelly Victory, M.D., the previous Chief Medical Officer for Whole Health Management, opined that “children are essentially at zero risk of contracting COVID-19 or becoming ill from the virus if school were to reopen.”⁴⁰

Significantly, the decision to close schools disparately impacts minorities students who suffer from the modern “digital divide” and who lack the home support to facilitate distance learning.⁴¹ The “digital divide” refers to the lack of access to technology that affects minority populations.⁴² This absence of technology and the “digital divide” that it is creating between students was acknowledged by Governor Newsom’s recent issuance of Executive Order N-73-20 which ordered state agencies to pursue a minimum broadband speed goal of 100 megabits per second to facilitate distance

³⁸ *Ibid.*

³⁹ Choe YJ, Park O, Park SY, Kim YM, Kim J, et al. *Contact tracing during coronavirus disease outbreak, South Korea, 2020. Emerg Infect Dis.* 2020 Oct (July 16, 2020) available as of the date of filing at: https://wwwnc.cdc.gov/eid/article/26/10/20-1315_article; See also Decl. of Fitzgibbons ¶13; Decl. of Bhattacharya ¶ 22.

⁴⁰ Decl. of Victory ¶12.

⁴¹ NAACP, *Coronavirus Impact on Students and Education Systems*, (July 28, 2020) available at the time of filing at <https://naacp.org/coronavirus/coronavirus-impact-on-students-and-education-systems/>

⁴² See Robert W. Fairlie, *Race and the Digital Divide*, UC Santa Cruz: Department of Economics, UCSC (2004) available as of the time of filing at: https://cjitc.ucsc.edu/docs/r_digitaldivide9.pdf

learning.⁴³ By implication, the Governor’s office concedes that broadband speeds are insufficient to meet the requirements and strains of distance learning further placing students at a disadvantage as they are unable to connect in a manner which is consistent with in-person instruction.

Similarly, studies report that minority students are often unable to obtain the necessary technology at home to facilitate distance learning as approximately 60% do not have access to a computer or the families lack the necessary experience to operate computers in a productive manner.⁴⁴ The CDC reports that students with disabilities also “had significant difficulties with remote learning.”⁴⁵

Students with unique special needs flourish from in-person instruction with many students relying on the public education system to provide for their unique health, safety, and unique learning needs which are otherwise unavailable virtually. Indeed, many students with special needs have a myriad of health needs that require services including assistance with eating, balancing, etc., which simply cannot be provided virtually. In particular, autistic students have special requirements which mandate direct support for the proper developmental, speech, occupational therapy, behavioral, and academic needs.⁴⁶ Until face to face sessions can resume, children with severe issues will continue to see regression in the development of these key areas for students with special needs.⁴⁷

⁴³ Newsom G, Executive Order N-73-20 (August 14, 2020) available at the time of filing at: <https://www.gov.ca.gov/wp-content/uploads/2020/08/8.14.20-EO-N-73-20-text.pdf>

⁴⁴ *Id.* at 4–5; Decl. of Ochoa ¶ 5.

⁴⁵ Centers for Disease Control and Prevention *The Importance of Reopening America’s Schools this Fall*, (July 23, 2020) available as of the date of filing at: <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>.

⁴⁶ Decl. of Garcia ¶ 9.

⁴⁷ Decl. of Garcia ¶ 8.

Despite the CDC recommendation, expert recommendations, and the day-to-day reports from school districts, Governor Newsom, in cooperation with the California Department of Public Health (CDPH) and legislature, crafted orders which mandated distance learning for schools across the State of California resulting in irreparable injury to students, those with disabilities, and minorities. The state's actions completely disregard recommendations of established health entities which purports to establish guidelines to minimize the spread of COVID-19 for in-person instruction even if counties return to the monitoring list.⁴⁸

Petitioners do not have a plain, adequate, or speedy remedy which would permit the safe reopening of in-person instruction prior to the educational year as many schools across the state are opening or planning to open within the month of August. Once distance learning resumes, students across the state will continue to fall behind at a rate which cannot be undone. Some students will fall behind academically, while others will resume their instruction in a hopeless environment plagued by atrocities such as physical abuse, sexual abuse, and substance abuse which will have devastating lifelong effects. (Exhibit 12)⁴⁹ Schools facilitate more than education. Schools prevent devastating lifelong effects on children by acting as the primary front for child abuse and neglect reporting which has fallen nearly 30% nationwide since school closures last year.⁵⁰

⁴⁸ California Department of Public Health, *COVID-19 Industry Guidance: Schools and School Based Programs*, (August 3, 2020) available as of the date of filing at: <https://files.covid19.ca.gov/pdf/guidance-schools.pdf>

⁴⁹ American Academy of Pediatrics, *COVID-19 Planning Considerations: Guidance for School Re-Entry*, (July, 2020)

available as of the date of filing at: <https://downloads.aap.org/AAP/PDF/COVID-19%20School%20Re-entry%20Interim%20Guidance%20FINAL%20062520.pdf>

⁵⁰ Decl. Victory ¶ 13.

As a result, Petitioners must Petition this honorable Court for an order staying Governor Newsom’s Executive Orders and the enforcement of said orders to permit public schools across the State of California to safely reopen in a manner which is consistent with the CDC and State Guidelines and prevent the inevitable harm to students. **Accordingly, Petitioner respectfully requests immediate relief, not later than August 30, 2020.**

II. QUESTION PRESENTED

1. Do Governor Newsom’s Executive Orders violate the Equal Protection Clause of the California Constitution?
2. Do Governor Newsom’s Executive Orders violate the IDEA or the ADA?
3. Do Governor Newsom’s Executive Orders violate Title VI regulations?

III. PARTIES

1. Petitioner Orange County Board of Education (“OCBE”) is a five-member elected board of trustees which serves some of Orange County’s most vulnerable student populations and provides support and mandated fiscal oversight to 27 school districts serving more than 600 schools and nearly 500,000 students. OCBE provides direct instruction to students through its own alternative and special education programs. OCBE through a majority vote brings this instant petition out of necessity as they are in an irreconcilable positions where they must choose between complying with the Governor’s Executive Orders in violation of the constitutional rights of their students, or upholding the constitution by reopening and subjecting themselves to criminal culpability, expulsion from office, and loss of funding.⁵¹

2. Petitioner Palm Lane Charter School is an elementary public charter school located in the City of Anaheim, County of Orange, State of California.

⁵¹ Decl. of Williams ¶¶ 8-9.

3. Petitioner Juaquin Cruz (“Mr. Cruz”), is an individual who petitions this Court on behalf of his three children (ages eleven, nine, and seven) who attend public schools in Santa Ana Unified School District in the City of Santa Ana, County of Orange, State of California. Each of his children attend public schools in Santa Ana Unified School District.

4. Petitioner Angie Gonzalez (“Ms. Gonzalez”), is an individual who petitions this Court on behalf of her five children (ages fifteen, eleven, six, four, and one) who attend public schools in Santa Ana Unified School District in the City of Santa Ana, County of Orange, State of California.

5. Petitioner Cecilia Ochoa, is an individual who petitions this Court of behalf of her three children who attend public schools in Santa Ana Unified School District in City of Santa Ana, County of Orange, State of California.

6. Respondent Gavin Newsom (“Governor Newsom”), is sued in his official capacity and Petitioners seek this write and stay against the Respondent in his official capacity.

7. Respondent Sandra Shewry, is sued in her official capacity as the State Public Health Officer and Department of Public Health Director.

8. As a public official, Governor Newsom must follow the state constitution, state laws, and federal law.

9. As a public official, the Governor has a fiduciary duty to Petitioners as California citizens and public entities to uphold and faithfully execute the laws and the duties of his office.

10. The Governor has breached his fiduciary duty to Petitioners and to the citizens of California by disregarding the California Constitution and Federal Law.

11. The Governor has caused disorder to the civil system of government in California through Executive Orders which demonstrate a willful disregard for the State and Federal Law.

12. There is no plain, speedy, or adequate remedy at law because Governor Newsom is committing ongoing violations of the State and Federal Law despite constitutional authority to the contrary. Code Civ. Proc., § 1086.

13. Petitioners' entitlement to relief is obvious in nature, because the applicable law in this matter is clear and unambiguous.

14. To ensure immediate compliance and to give a decisive and final answer, this Court is the appropriate tribunal to hear such an important question of law.

15. Petitioners request that the court exercise its original jurisdiction and grant an immediate stay issue from this Court as soon as possible, with the peremptory writ in the first instance to follow after the requirements for notice are met. Cal. Const., art. VI, § 10.

16. Petitioners do not seek a ruling directing schools to reopen in person instruction and do not request that this court permit public schools to open without appropriate actions which are consistent with the CDC's recommendations for safety guidelines. Similarly, Petitioners do not request a mandatory order directing public schools to reopen. Rather, Petitioners seek an order which permits public schools and parents to choose an appropriate educational 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 for the benefit of students who would otherwise be irreparably harmed.

17. Petitioners base the prayer for relief on this verified petition and the attached memorandum of points and authorities, hereby incorporated by reference as if set forth in full.

IV. JURISDICTION

This Court has original jurisdiction over this matter pursuant to Article VI, § 10 of the California Constitution as well as Code of Civil procedure §§ 1085 and 1086, and Rule 8.486 of the California Rules of Court

to decide a matter which presents issues of great public importance that must be promptly resolved.

V. TIMELINESS OF PETITION

This Petition is timely filed in response to Governor Newsom’s July 17, 2020 actions as it is filed within one month of the order, and within weeks of the California Department of Public Health’s waiver documentation which was released on or about August 4, 2020. Petitioners now bring this Petition respectfully requesting interim relief pending a review of this instant writ, whether oral argument is requested or not.

VI. PRAYER FOR RELIEF

WHEREFORE, Petitioners pray as follows:

That this Court:

- A. Issue an immediate order commanding Respondents, their deputies, officers, agents, servants, employees, public entities, or persons acting at his behest or direction, to cease and desist from enforcing Executive Orders and directives against public schools;
- B. Issue an immediate order declaring Governor Newsom’s Executive Orders which command public schools to implement a “distance learning” model unconstitutional;
- C. Issue an immediate order declaring the California Department of Public Health’s directives, which command schools to implement a “distance learning” model unconstitutional;
- D. Issue a peremptory writ of mandate in the first instance commanding Respondents, their deputies, officers, agents, servants, employees, public entities, or persons acting at his behest or direction, to cease and desist from enforcing Executive Orders and directives against public schools;
- E. Issue a peremptory writ of mandate in the first instance declaring Governor Newsom’s Executive Orders and California Department of Public


Health's directives which command public schools to implement a "distance learning" model unconstitutional;

F. Award Petitioners the costs of this proceeding; and

G. Award Petitioners any other and further relief the Court considers proper.

Dated: August 21, 2020

Respectfully submitted,

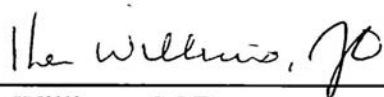


Robert Tyler
Jennifer L. Bursch
Tyler & Bursch, LLP
Attorney for Petitioners

VERIFICATION

I, Ken Williams, M.D., on behalf of the Orange County Board of Education, am a citizen of the United States and a resident of the State of California, have read the foregoing Verified Petition For Immediate Stay And Peremptory Writ Of Mandate In The First Instance; Memorandum Of Points And Authorities, I have personal knowledge of the facts alleged herein, and I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed August 21, 2020 at Irvine CA, California.

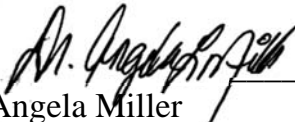


Ken Williams, M.D.

VERIFICATION

I, Angela Miller, on behalf of the Palm Lane Charter School, am a citizen of the United States and a resident of the State of California, have read the foregoing Verified Petition For Immediate Stay And Peremptory Writ Of Mandate In The First Instance; Memorandum Of Points And Authorities, I have personal knowledge of the facts alleged herein, and I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 20th day of August, in Orange County, California.



Angela Miller
Palm Lane Charter School

VERIFICATION

I, Angela Miller, a citizen of the United States and a resident of the State of California, have read the foregoing Verified Petition For Immediate Stay And Peremptory Writ Of Mandate In The First Instance; Memorandum Of Points And Authorities, I have personal knowledge of the facts alleged herein, and I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

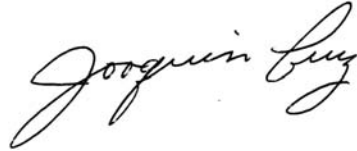
Executed this 20th day of August, in Orange County, California.


Angela Miller _____

VERIFICATION

I, Juaquin Cruz, a citizen of the United States and a resident of the State of California, have read the foregoing Verified Petition For Immediate Stay And Peremptory Writ Of Mandate In The First Instance; Memorandum Of Points And Authorities, I have personal knowledge of the facts alleged herein, and I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 20 day of August, in Orange County, California.


A handwritten signature in cursive script that reads "Juaquin Cruz". The signature is written in black ink and is positioned above a horizontal line.

Juaquin Cruz

VERIFICATION

I, Cecilia Ochoa, a citizen of the United States and a resident of the State of California, have read the foregoing Verified Petition For Immediate Stay And Peremptory Writ Of Mandate In The First Instance; Memorandum Of Points And Authorities, I have personal knowledge of the facts alleged herein, and I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 21 day of August, in Orange County, California.


Cecilia Ochoa (Aug 21, 2020 08:19 PDT)

Cecilia Ochoa

MEMORANDUM OF POINTS AND AUTHORITIES

In support of Petitioners' Request for a Peremptory Writ of Mandate and Immediate Stay, Petitioner presents this Memorandum of Points and Authorities for Writ of Mandate under the California Constitution, Article VI § 10, the California Code of Civil Procedure §§ 1085 and 108, and California Rules of Court, rule 8.486.

DISCUSSION

I. THIS PETITION MERITS THIS COURT'S ORIGINAL JURISDICTION.

As set forth above, Governor Newsom declared a State of Emergency for the coronavirus pandemic on March 4, 2020. Shortly thereafter, he issued Executive Order N-33-20 which ordered "all residents are directed to immediately heed the current State public health directives." (Exhibit 1)⁵² On May 4, 2020, Governor Newsom issued Executive Order N-60-20 which reiterated the earlier order stating, "All residents are directed to continue to obey State public health directives." (Exhibit 2)⁵³

Governor Newsom announced his framework to reopen schools on July 17, 2020. (Exhibit 3)⁵⁴ Under his plan, reopening hinges on not being on the county monitoring list for two weeks. "Schools and school districts may reopen for in-person instruction at any time if they are located in a local

⁵²Newsom G (2020) Executive Order N-33-20, available as of the date of filing at: <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>

⁵³Newsom G (2020) Executive Order N-60-20, available as of the date of filing at: <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.4.20-EO-N-60-20-text.pdf>; Decl of Bhattacharya ¶ 21.

⁵⁴ Newsom G., *Governor Gavin Newsom Lays Out Pandemic Plan for Learning and Safe Schools* (July 17, 2020) available as of the date of filing at: <https://www.gov.ca.gov/2020/07/17/governor-gavin-newsom-lays-out-pandemic-plan-for-learning-and-safe-schools/>

health jurisdiction that has not been on the county monitoring list within the prior 14 days.”

Due to the disparate impact on minority students, economically disadvantaged students, students with disabilities, and student from single parent households, as well as studies by experts, school districts, and the CDC, Petitioners were forced to bring this instant Petition to cure the constitutional violations by Governor Newsom in cooperation with the CDPH and permit public schools to open by implementing safe, compliant policies which are designed to protect student and teacher health.

This Court has original jurisdiction to issue a writ of mandate. Cal. Const. art VI, § 10. The Court may exercise its original jurisdiction in “cases in which the issues presented are of great public importance and must be resolved promptly.”⁵⁵ Here, the issuance of unconstitutional Executive Orders by Governor Newsom and CDPH directives which disproportionately impact on vulnerable and needy students in blatant violation of the law presents a question of great public importance.

For the following reasons, Petitioners urge this Court to end this errant behavior by the Governor of California and the CDPH.

⁵⁵ *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal. 3d 937, 944 (original jurisdiction accepted for petition raising the validity of California Education Code section dealing with student transportation); *see, e.g., Bramberg v. Jones* (1999) 20 Cal. 4th 1045, 1054 (jurisdiction accepted of challenge to initiative relating to congressional term limits); *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal. 3d 805, 812 (jurisdiction accepted of challenge to initiative making fundamental changes to automobile insurance regulation); *Brosnahan v. Eu* (1982) 31 Cal. 3d 1, 3 (jurisdiction accepted of action to prevent the Secretary of State from placing initiative measure on primary election ballot)

II. RESPONDENTS’ ORDERS BANNING IN-PERSON INSTRUCTION AT ALL PUBLIC SCHOOL IN COUNTIES ON THE STATE’S MONITORING LIST VIOLATES THE EQUAL PROTECTION CLAUSE.

As its name suggests, equal protection of the laws assures that people who are “ ‘similarly situated for purposes of [a] law’ ” are generally treated similarly by the law.⁵⁶ This case is about equal protection in education – “the lifeline of both the individual and society.”⁵⁷ Education “lie[s] at the core of our free and representative form of government.”⁵⁸ And it serves as “the bright hope for entry of the poor and oppressed into the mainstream of American society.”⁵⁹ Indeed, education serves such a “distinctive and priceless function” that the Supreme Court has declared it to be a fundamental right guaranteed by the California Constitution.⁶⁰ At a minimum, the right to education guarantees that “all California children should have equal access to a public education system that will teach them the skills they need to succeed as productive members of modern society.”⁶¹

Article I, Section 7 of the California Constitution states: “A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.”⁶² The Constitutional principles as memorialized by state constitution requires the state to refrain from drawing arbitrary distinctions between different groups of individuals who are

⁵⁶ *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253

⁵⁷ *Serrano v. Priest* (1971) 5 Cal.3d 584, 605 [“Serrano I”].

⁵⁸ *Serrano v. Priest* (1976) 18 Cal.3d 728, 767-768 [“Serrano II”].

⁵⁹ *Serrano I, supra*, 5 Cal.3d at pp. 608-609.

⁶⁰ *Ibid.*; see also Cal. Const. Art. I, § 7; *id.* Art. IV, § 16; *id.* Art. IX, §§ 1 & 5.

⁶¹ *O’Connell v. Super. Ct.* (2006) 141 Cal.App.4th 1452, 1482; *see also Serrano I, supra*, 5 Cal.3d at pp. 605-607.

⁶² Cal. Const, Art. I, § 7.

“similarly situated with respect to the legitimate purpose of the law...”⁶³ As established above courts will apply a strict scrutiny standard when the Government action is aimed as a suspect class, semi-suspect class, or fundamental right, and will apply rational basis review when the Government action is not aimed at those classes or rights.⁶⁴ Courts apply the same analysis when assessing the constitutionality of a Government action under both Federal and State Equal protection clauses.⁶⁵

In equal protection analysis, the threshold question is whether the legislation under attack somehow discriminates against an **identifiable class of persons**; only then do the courts ask the further question of whether this identifiable group is a **suspect class** or whether the action impinges a fundamental right, thus requiring the discrimination to be subjected to close scrutiny.⁶⁶

1. The Executive Orders Discriminate Against An Identifiable Class Of Persons

Here, the Orders discriminate against four identifiable classes: special needs students, racial minorities, economically disadvantaged, and students from single-parent households. These identifiable classes are suspect classes, *and* education is a fundamental right. Therefore, close scrutiny is required.

i. Economically Disadvantaged

Respondents’ Orders banning in-person instruction at every school on the state’s monitoring list discriminates against the poor because school closures disproportionately affect families of poor students. “In equal protection analysis, the threshold question is whether the legislation under

⁶³ *Benjamin v. Ricks* (1976) 63 Cal. App. 3d 593, 596-597.

⁶⁴ *Wright v. Incline Village Gen. Improvement District* (2011) 665 F.3d 1128, 1141.

⁶⁵ *Vergara v. State of California* (2016) 246 Cal.App.4th 619, 652.

⁶⁶ *Id.* at p. 645

attack somehow discriminates against an identifiable class of persons. Only then do the courts ask the further question of whether this identifiable group has a fundamental right that is being interfered with, thus requiring the discrimination to be subjected to close scrutiny.”⁶⁷. In *Vergara*, the court stated economically disadvantaged and minority students were generally considered a suspect class and an identifiable class under equal protection analysis.⁶⁸ It is easy to understand how students of poor families suffer disproportionately when compared to students of wealthy families by not being able to go to school. In a study by McKinsey & Company during the spring of 2020 it stated only 60% of low income students logged into online instruction regularly compared with 90% of high income students.⁶⁹ Online learning is less effective than in person instruction, and this is more pronounced for students lacking substantial wealth. Significantly, however, online learning harmed students in less affluent districts to a greater degree than those in higher affluent districts.⁷⁰

In a study by CPRE, it reviewed the COVID-19 response plans of 477 school districts across the country. The study found more affluent districts were more than twice as likely as the districts with the highest concentrations

⁶⁷ *Id.* at p. 652

⁶⁸ *Id.* at p. 555.

⁶⁹ See Emma Dorn et al., *COVID-19 and student learning in the United States: The Hurt could Last a Lifetime*, McKinsey & Company (June 1, 2020), available as of the date of filing: <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime>

⁷⁰ See Raj Chetty, Et Al., *How Did COVID-19 and Stabilization Policies Affect Spending and Employment? A New Real-Time Economic Tracker Based on Private Sector Data*, (June 17, 2020) available as of the date of filing at: https://opportunityinsights.org/wp-content/uploads/2020/05/tracker_paper.pdf.

of low-income students to require at least some teachers to provide live, real-time instruction.⁷¹

Here, students in low income districts will suffer because they will not engage in live interaction as much as students in high income districts. Live, real time instruction is significantly better than a recorded lecture because of the ability of the teacher to assess the students and modify their instruction accordingly. Additionally, students will not be able to interact in real time if there is no live, real time instruction and this will decrease student's engagement with the material and necessary social interactions. Economically disadvantaged are provided a substandard education when compared to their peers because they will experience less live interaction with teachers and will subsequently engage less.

Unfortunately, a variety of factors contribute to students with less financial means not logging in to online instruction including, but not limited to, lack of a computer and unreliable internet connection. These resources are more readily available to wealthier students compared to economically disadvantaged students. Additionally, often families with less financial resources have two working parents, who struggle to facilitate distance learning for their children while simultaneously working to provide for basic needs.⁷² The fundamental right to education of students whose families have less financial resources is being interfered with because online learning will disproportionately harm low income students compared to wealthy students, depriving them of education during a pivotal time of their lives.

⁷¹ See Betheny Gross and Alice Opalka, *Too Many Schools Leave Learning to Chance During the Pandemic*, CPRE Reinventing Public Education, (June 2020) <https://www.crpe.org/publications/too-many-schools-leave-learning-chance-during-pandemic>.

⁷² Decl. of Gonzalez ¶5-13.

Wealthier parents can afford to pay for “pandemic pods” for their children while poor parents may not be able to afford these, which will further the digital and educational divide. A “pandemic pod,” or home-schooling pods, is where groups of three to 10 students learn together in homes under the tutelage of the children’s parents or a hired teacher. If wealthier students drop out of school and join a “pandemic pod” this could cause funding for already starved public schools to drop further.⁷³ Economically disadvantaged families will be less able to afford “pandemic pods” and this will further the digital divide. This will also give wealthier students an exponential advantage compared to poor students as in person interaction between the teacher and student proves to be much more effective compared to virtual studies.

The Orange County Board of Education’s “White Paper” stated poorer families and families with special-needs children suffered the most from the shutdown. The “White Paper” stated, “But continuing the shutdown despite new science and data, our experts said, has been a mistake with disastrous implications for children, their families and community. It hardly goes without saying that poorer families with fewer options, and families with special-needs children, have suffered most from the shutdown.”⁷⁴ For the myriad of reasons stated above, banning in-person instruction discriminates against poor students, as an identifiable class, because poor

⁷³ See Melinda Wenner Moyer, *The New York Times*, *Pods, Microschools and Tutors: Can Parents Solve the Education Crisis on Their Own* (July 22, 2020) available at the time of filing at: <https://www.nytimes.com/2020/07/22/parenting/school-pods-coronavirus.html>.

⁷⁴ See Orange County Board of Education, *White Paper, Special Community Forum on “Opening Schools in Orange County.”* (July 13, 2020) available at the time of filing at: <https://ocde.us/Board/Documents/2020%20Agendas/Special%20Meeting%20Agenda%2007.13.2020.pdf>.

students suffer disproportionately in an online learning environment compared to wealthier students.

ii. Racial Minorities

Respondents' Orders banning in-person instruction at all schools in a county on the state's monitoring list discriminates against minority students because school closures disproportionately affect minority students. In *Vergara*, the court ruled that poor and minority students were generally considered a suspect class under equal protection analysis and therefore would also be an identifiable class.⁷⁵ In a study by McKinsey & Company the study stated 60-70% of hispanic and black students were online regularly as opposed to 90% of high income students and the learning loss was probably be greater for low income, black and hispanic students as opposed to white students.⁷⁶ By banning in person instruction, minority students will not be as engaged and will be disproportionately impacted more than white students. This will further the digital divide between minority and white students and will affect their educational outcomes in the future.

The NAACP issued a statement stating the lack of in person instruction creates problems disproportionately affecting the African American community as follows: "For students of color at all levels across the country, school closings create problems even more urgent than the interruption of their educations."⁷⁷ The article also cited data from the

⁷⁵ *Vergara*, 246 at 555.

⁷⁶ Emma Dorn et al., *COVID-19 and student learning in the United States: The Hurt could Last a Lifetime*, McKinsey & Company (June 1, 2020), available as of the date of filing:
<https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime>

⁷⁷ See NAACP, *Coronavirus Impact On Students And Education Systems*, (accessed 8/20/2020) available at the time of filing at:

National Center on Education Statistics that showed data that at high-poverty schools where more than 75% of students are eligible for Federal Free or Reduced-Price Lunch Program (FRPL) black students accounted for 44% of those attending. At schools where 50 – 75% percent of students are eligible for FRLP, black students made up 30% of the student population. Students relying on the FRPL for a daily meal will be denied this opportunity if schools are not open in the fall. These students may be forced to skip meals they would otherwise would not have skipped.

Minorities are more likely to have unreliable internet connection than their white counterparts, which will further increase the digital divide and educational opportunities. In a Pew Research study from 2018, 17% of teenagers have difficulty completing homework assignment because they do not have reliable access to a computer or internet connection. This number increases to 25% for black teenagers.⁷⁸ This digital divide will further be exasperated due to the shutdown of schools. Banning in-person instruction discriminates against minority students as an identifiable class because minority students suffer disproportionately in an online learning environment compared to white students.

iii. Special Needs

Respondents' orders banning in-person instruction at all schools in counties on the state's monitoring list discriminates against special needs students because school closures disproportionately affect families of special needs students. Online instruction is not a sufficient alternative for in person

<https://naacp.org/coronavirus/coronavirus-impact-on-students-and-education-systems/>.

⁷⁸ See Monica Anderson and Andrew Perrin, *Nearly one-in-five teens can't always finish their homework because of the digital divide*, Pew Research Center, (October 26,2018) available at the time of filing at:

<https://www.pewresearch.org/fact-tank/2018/10/26/nearly-one-in-five-teens-cant-always-finish-their-homework-because-of-the-digital-divide/>.

instruction for students with special needs and will detrimentally effect learning for these students.⁷⁹ Students with disabilities make up 14% of the public-school student population.⁸⁰ In the 2018-2019 school year over 725,000 students in California received special education services and males, African Americans, English language learners, and foster youth are disproportionately represented relative to their representation among all students.⁸¹ Schools must provide alternative services for these students and an online format will be a significant obstacle in providing these services.

According to John Watson, founder of the Evergreen Education Group in Colorado, “Many students are severely disabled and the reality is that their instruction isn’t going to work online,” Online schools are typically “schools of choice,” he says, and in many cases “parents recognize that being in a school is better for them.”⁸² Here, special needs students will suffer more so than regular students because many of the necessary

⁷⁹ See American Academy of Pediatrics, COVID-19 Planning Considerations: Guidance for School Reentry (Last Updated June 25, 2020), <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>; Decl. of Anderson ¶ 11; Decl. of Bhattacharya ¶ 20.

⁸⁰ See Adam Newman, *Parents’ Perspective & CARES Act Update: How the K-12 Community Is Responding*, Tyton Partners, (March 31, 2020) available at the time of filing at: https://tytonpartners.com/library/2177-2/?utm_campaign=2019%20K12%20Newsletters&utm_source=hs_email&utm_medium=email&utm_content=85516555&_hsenc=p2ANqtz9ZdRegKTim7Qr4C9vB50mQAYOtXAu9kKRj6PvaPeZ1UMXnW_cVGrKX4stkobYc llJcI4mRX4v1sjzBDWuPBx-Iv-n_Gg&_hsmi=85516555.

⁸¹ See Gabriel Petek, *Overview of Special Education in California*, Legislative Analyst’s Office (November 6, 2019) available at the time of filing at: <https://lao.ca.gov/reports/2019/4110/overview-spec-ed-110619.pdf>.

⁸² See Julie Young and William Donovan, *Shifting Special Needs Students To Online Learning In The COVID-19 Spring Challenges For Students, Families, And Teachers*, available at the time of filing at: <https://files.eric.ed.gov/fulltext/ED605503.pdf>.

accommodations are only available in person.⁸³ The online format does not work for many special needs students and this will severely curtail the educational outcomes of these students.⁸⁴

Special needs students who study in person perform significantly better than those who do not. The Individuals with Disabilities Education Act (IDEA), mandates the provision of a free and appropriate public school education for eligible students ages 3–21. Special education students who spend at least 80 percent of the school day in general education classrooms perform far better than those who do not.⁸⁵

Student engagement for special needs students is already a challenge in classrooms, and distance learning may heighten those challenges. Students with disabilities are often disengaged when content is not accessible to them due to their disability.⁸⁶ This disengagement fosters low personal expectations and lack of self-confidence.⁸⁷ Therefore, banning in-person instruction discriminates against students with special needs, as an identifiable class, because special needs students suffer disproportionately in an online learning environment compared to students without special needs.

iv: Marital status

Respondents' Orders banning in-person instruction at every school on the state's monitoring list discriminates against single parents because school closures disproportionately affect single parent families. Single mothers are

⁸³ Decl. of Garcia ¶¶ 1-10.

⁸⁴ *Ibid.*

⁸⁵ See National Center for Education Statistics, *Students With Disabilities* (May 2020) available at the time of filing at:

https://nces.ed.gov/programs/coe/indicator_cgg.asp.

⁸⁶ See Debra Herburger, *Considerations for Teachers Providing Distance Learning to Students with Disabilities*, WestEd (May 2020)

<https://www.wested.org/resources/providing-distance-learning-to-students-with-disabilities/>

⁸⁷ *Ibid.*

more likely than married mothers to be in the labor force, but they were also more likely to be in poverty.⁸⁸ Additionally, 30% of children in single-mother households live in poverty, compared with 8% of children in married households.⁸⁹ Here, families of single parents suffer disproportionately compared to students of married parents by not being able to go to school in person. Because single parent homes are more likely to be in poverty, these homes will not be able to afford private instruction or “pandemic pods” that married- parent and wealthier families can afford and therefore, as an identifiable class, are subject to discrimination.

This will harm student’s social and emotional skills.⁹⁰ Banning in-person instruction discriminates against single-parent, as an identifiable class, because single-parent families suffer disproportionately in an online learning environment compared to married-parent families and schools must reopen in the fall.

2. Several Of The Identifiable Classes Of Persons Are Suspect Classes

Minorities and the poor are suspect classes for equal protection analysis in the educational setting, thus requiring the discrimination to be subjected to close scrutiny. According to *Vergara*, “Race is generally considered a “suspect classification” under equal protection analysis.”⁹¹ “In the context of education, under California law, wealth is considered a suspect

⁸⁸ See The Pew Research Center *The Changing Profile of Unmarried Parents*, (April 25, 2018) available at the time of filing at: <https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents/>.

⁸⁹ *Ibid.*

⁹⁰ See Centers for Disease Control & Prevention, *The Importance of Reopening America's Schools This Fall*, (July 23, 2020) available at the time of filing at: <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>.

⁹¹ *Vergara*, *supra*, 246 Cal. App at 555.

classification as well.”⁹² Here, poor and minority students are a suspect class because they are discriminated against and will not have the same opportunities as wealthy and white students if schools are not reopened in the fall. As identified at length above, by prohibiting in person instruction these students will fall further behind academically, socially and thus are discriminated against. Therefore, under equal protection analysis, minorities and poor students in the education context are suspect classes.

3. The Executive Orders Infringe on The Fundamental Right To Education

When the government enacts law which burdens a substantial right, courts apply strict scrutiny and analyze whether the law is narrowly tailored to serve a compelling government interest.⁹³ The U.S. Supreme Court has previously held that the interests of education are one of the most important to a citizen’s welfare which must be available to all equally. As the U.S. Supreme Court indicated in *Brown v. Board of Education*, education is important for the welfare of its citizens and many experts have stated that in-person learning for schools is imperative to the development and overall welfare of the children.

In order to fulfill the constitutional promise of a meaningful education for all California children, “the State itself has broad responsibility to ensure basic educational equality.”⁹⁴ The State must provide a public education system “open on equal terms to all,”⁹⁵ with “substantially equal opportunities for learning.”⁹⁶ Where “substantial disparities in the quality and extent of availability of educational opportunities” persist, the State has

⁹² *Ibid.*

⁹³ *Washington v. Glucksberg* (1997) 521 U.S. 702, 719-20

⁹⁴ *Butt v. California* (1992) 4 Cal.4th 668, 681.

⁹⁵ *Id.* at p. 680

⁹⁶ *Serrano II, supra*, 18 Cal.3d at pp. 747-748.

a duty to intervene and ensure “equality of treatment to all the pupils in the state.”⁹⁷ And when the State's laws infringe on the fundamental right to educational opportunity, as they do here, it is unquestionably the role of the courts to invalidate those unconstitutional laws.⁹⁸

Despite the right to education⁹⁹, Governor Newsom issued numerous Executive Orders and, in cooperation with the CDPH, instructed public schools to implement distance learning, an education model which encourages absenteeism and causes students to fall months behind in their studies.

4. The Executive Orders Fail Any Applicable Level Of Scrutiny

“Under equal protection analysis, any law which interferes with a fundamental interest or a suspect classification must be subjected to close scrutiny and overturned unless the measure serves some compelling state interest and is carefully and narrowly defined to minimize its interference with the fundamental interest.”¹⁰⁰ In cases involving “suspect classification” or touching on “fundamental interests ” a more stringent test is applied and the courts have adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny; “the state bears the burden of establishing not only that it has compelling interest which justifies the law but that the distinctions drawn are necessary to further its purpose.”¹⁰¹

The Governor’s attempts to meet the strict scrutiny standard fail here as the only justification presented is that the deprivation of the fundamental right to education is justified because it is necessary to “reduce transmission

⁹⁷ *Id.* at p. 747.

⁹⁸ See, e.g., *Serrano II, supra*, 18 Cal.3d at pp. 776-777; *cf. Brown v. Bd. of Educ.* (1954) 347 U.S. 483, 493.

⁹⁹ *Brown v. Board of Education, supra*, 347 US at p. 493.

¹⁰⁰ *Altadena Library Dist. v. Bloodgood*, (1987) 192 Cal. App. 3d 585, 592

¹⁰¹ *D'Amico v. Bd. of Med. Examiners* (1974) 11 Cal. 3d 1, 27

of SARS-CoV-2”¹⁰² despite the concession that “evidence and data about COVID-19 transmission, including variations by age...continues to emerge regularly” and “in-person school reopening and closure should be based on available evidence as well [as] state and *local* disease trends.”¹⁰³ The Executive Orders and subsequent directives cannot survive a strict scrutiny challenge where, as here, it is not the least restrictive means of furthering the government’s goal of reducing the transmission of coronavirus as demonstrated through the conceded development of scientific data relating to the transmission in minors¹⁰⁴, as well as studies reporting a low risk to students and indicating that less than 2% of COVID-19 transmissions occur in individuals under the age of 20.¹⁰⁵ Moreover, as established above, there is an absence of rationale or legitimate scientific basis as the current testing system is flawed¹⁰⁶, inaccurate¹⁰⁷ overbroad¹⁰⁸, and “flatly inconsistent with the science of public health, biosafety protocols, and with [the] understanding as infectious disease professionals...”¹⁰⁹ Experts conclude

¹⁰²California Department of Public Health, *COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School year* (July 17, 2020) available as of the time of filing at: <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Schools%20Reopening%20Recommendations.pdf>

¹⁰³ *Ibid.* (emphasis supplied)

¹⁰⁴ *Ibid.* (emphasis supplied)

¹⁰⁵ See American Academy of Pediatrics, *COVID-19 Planning Considerations: Guidance for School Reentry* (Last Updated June 25, 2020), <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>; Choe YJ, Park O, Park SY, Kim YM, Kim J, et al. *Contact tracing during coronavirus disease outbreak, South Korea, 2020. Emerg Infect Dis.* 2020 Oc (July 16, 2020) available as of the date of filing at: https://wwwnc.cdc.gov/eid/article/26/10/20-1315_article

¹⁰⁶ Decl. Kauffmann ¶16

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ Decl. of Kauffman ¶19.

that there is no legitimate medical basis for preventing schools from resuming in-person instruction.¹¹⁰

Expert Sean Kaufmann, who has extensive experience working nationally and internationally as a health education and infectious disease specialist with particular expertise in risk mitigation in public health settings,¹¹¹ relied on his unique experience in opining that the state’s order lacked a rationale or legitimate scientific basis¹¹² citing flawed testing system¹¹³, inaccuracy of CT testing relating to the infection risk in patients who test positive for COVID-19,¹¹⁴ inaccuracies in the length of time which the individual can test positive¹¹⁵, and opining that the State’s overbroad closure of public schools was “flatly inconsistent with the science of public health, biosafety protocols, and with our understanding as infectious disease professionals...”¹¹⁶ The Governor’s orders, even by scientific standards, fail to meet a strict or even a rational scrutiny as there is an absence of evidence and no medical basis for continuing to keep schools closed.¹¹⁷

Even if this Court does not find that Education is a Fundamental Right for purposes of the California Constitution, Governor Newsom’s actions are not rationally related to the state’s interest in controlling the spread of coronavirus. The mandated distance learning scheme implemented by Governor Newsom violates the equal protection clause as it is a

¹¹⁰ Decl. of Victory ¶¶ 19, 23, 26; Decl. of Anderson ¶ 26; Decl of Fitzgibbons ¶¶ 27, 29, 30,37; Decl. of Kaufmann ¶¶14-19; Decl. Bhattacharya ¶ 22.

¹¹¹ Decl. Kaufmann ¶¶ 1-13

¹¹² Decl. Kauffmann ¶¶14-15

¹¹³ Decl. Kauffmann ¶16

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Decl. of Kauffman ¶19.

¹¹⁷ Decl. of Vicotry ¶19; Decl. of Victory ¶¶ 19, 23, 26; Decl. of Anderson ¶ 26; Decl of Fitzgibbons ¶¶ 27, 29, 30,37; Decl. of Kaufmann ¶¶14-19; Decl. of Bhattacharya ¶ 17.

“governmental classifications that affect some groups of citizens differently than others”¹¹⁸ and creates disparities between classes of students “whose situations are arguably indistinguishable.”¹¹⁹ As established herein, the framework for reopening schools facially, and as-applied, arbitrarily results in the disparate treatment of schools and children throughout California based on the county they reside in without even a rational basis assessing whether the community the school resides in is at a higher risk of spreading COVID-19 than a school in similar communities in counties not on the list. Some counties are permitted to implement safety guidelines and follow CDC and expert recommendations¹²⁰ for safely reopening their school in a manner which is safe for children to resume in-person instruction, while others must implement distance learning to the detriment of their students based solely on county alone despite data that indicates they could resume in-person instruction based on the numbers in their cities.

Studies demonstrate that students are less engaged during distance learning. (Exhibit 8)¹²¹ The distance learning model not only effect child participation, but it creates long-lasting learning gaps which have a disproportionate effect on minorities.¹²²

Even the Governor apparently does not believe that allowing children to congregate in classrooms presents a grave danger of contagion because he

¹¹⁸ *Engquist v. Or. Dep’t. of Agric.* (2008) 53 U.S. 591, 601

¹¹⁹ *Ross v. Moffitt* (1974) 417 U.S. 600, 609

¹²⁰ Decl. of Victory ¶¶ 19, 23, 26; Decl. of Anderson ¶ 26; Decl of Fitzgibbons ¶¶ 27, 29, 30,37; Decl. of Kaufmann ¶¶14-19.

¹²¹ ABC 7 Eyewitness News, *Report Reveals Disparities Among Black, Latino LASUSD students in online learning amid COVID-19 Pandemic*, (July 17, 2020), available as of the date of filing at: <https://abc7.com/lausd-los-angeles-unified-school-district-race-disparity-racial-divide/6321930/>.

¹²² Robert W. Fairlie, *Race and Digital Divide*, UC Santa Cruz: Department of Economics, UCSC (2014), available as of the date of filing at: <https://escholarship.org/uc/item/48h8h99w>.

has allowed thousands of daycare facilities and camps to reopen, even in counties on the monitoring list. There is no reasonable basis for believing that daycare centers and camps are safe but elementary schools are not. Although “a government need not provide a perfectly logical solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality.”¹²³ The Orders are the height of irrationality. In the name of stopping the spread of COVID-19, they prohibit gatherings by the one population cohort that *does not spread* virus. And to prevent hospitals from being overwhelmed, they target the one group of people that is hardly ever sickened from COVID-19. Although the state undoubtedly has broad police powers with which to address public health concerns, it cannot enact a discriminatory regulatory regime that lacks any rational connection to the stated goal—as it has done here, with devastating effect.

Based on the preceding, the mandatory closures of in-person learning is not rationally related to the interest of protecting the people’s health and welfare nor is the classification based on counties narrowly tailored to such interests. Thus, the mandatory closure of in-person learning of schools violates the schools right to equal protection under the law as guaranteed by the Equal Protection Clause.

III. RESPONDENTS’ ORDERS BANNING IN-PERSON INSTRUCTION AT ALL SCHOOLS IN COUNTIES ON THE STATE’S MONITORING LIST VIOLATES THE IDEA/ADA

The Individuals with Disabilities Education Act (IDEA) obligates the State of California to provide disabled students with a free appropriate public education (“FAPE”) for disabled children.¹²⁴ Under the act, “[s]pecial education” is ‘specially designed instruction’ which is designed to meet the

¹²³ *Merrifield v. Lockyer* (2008) 547 F.3d 978, 991.

¹²⁴ *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1* (2017) 137 S. Ct. 988, 993

disabled child’s unique needs in order to ensure the child receives adequate and beneficial instruction.¹²⁵ In the public school setting, this instruction must meet the student’s unique “academic, social, health, emotional, communicative, physical and vocational needs.”¹²⁶

In order to provide the special education and services mandated by IDEA, in person instruction is necessary.¹²⁷ Studies show that students with disabilities disproportionately suffer from the distance learning model.¹²⁸ Thus, in order to meet the mandatory requirements of IDEA, public school districts must conduct in person instruction which is specially designed to aid disabled students and meet their specialized education needs in a manner which is consistent with the student’s IEP.¹²⁹ Schools which fail to provide an IEP that is designed to meet the student’s individualized needs are in violation of IDEA.¹³⁰ As established by experts, the current distance learning model does not meet this standard. Vanessa Garcia, a licensed speech pathologist, notes that under the current distance learning model students were unable to live stream sessions, “suffered significantly because of not having live therapy sessions”, did not routinely check in in for assignments, and ultimately her sessions resulted in “little more than pushing out

¹²⁵ *Ibid.*

¹²⁶ *Ashland Sch. Dist. v. Parents of Student E.H.* (2009) 587 F.3d 1175, 1185

¹²⁷ Decl. of Garcia ¶¶5-10

¹²⁸ American Academy of Pediatrics, *COVID-19 Planning Considerations: Guidance for School Reentry*, (June 25, 2020) available as of the date of filing at: <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>

¹²⁹ *Andrew F.*, *supra*, 137 S. Ct. at p. 994

¹³⁰ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 822.

assignments.”¹³¹ In short, “[s]tudents did not receive any direct services from March 2020 until June 2020.”¹³²

Respondents’ Orders prohibiting all in-person instruction violate the IDEA. Under the Order, all schools remain closed for in-person instruction that are located in a county on the state monitoring list.¹³³ And while local health officers may grant waivers to elementary schools, allowing them to reopen even if the county is on the monitoring list, this waiver exception applies only to elementary schools and requires consultation with CDPH.

Because of the regulations and near impossibility of obtaining a waiver a significant portion of California’s schools will be unable to provide sufficient in-person services to their students with disabilities. Moreover, failure to provide any in-person services will cause uncounted “material failure[s]” to implement the IEPs of disabled students.¹³⁴

Likewise, the Americans With Disabilities Act Of 1990 (ADA) prohibits places of public accommodations from discriminating against any individual “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations.”¹³⁵

Under ADA, all public schools are considered places of public accommodations and thus bound to comply with the duties that are attributed to such institutions under the act.¹³⁶ ADA prohibits places of public accommodations from discriminating against any individual “on the basis of disability in the full and equal enjoyment of the goods, services, facilities,

¹³¹ Decl. of Garcia ¶¶ 6-7.

¹³² Decl. of Garcia ¶7.

¹³³ See Newsom G (2020) Executive Order N-60-20, available as of the date of filing at: <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.4.20-EO-N-60-20-text.pdf>.

¹³⁴ See *Van Duyn, supra*, 502 F.3d at p. 822.

¹³⁵ 42 U.S.C. § 12182(a) (2009).

¹³⁶ 42 U.S.C. §12181 (7)(J) (2009)

privileges, advantages, or accommodations.”¹³⁷ ADA defines discrimination as “a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.”¹³⁸ ADA also further provides that “Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”¹³⁹

The elimination of all in-person learning for would render it unfeasible to comply with the Petitioner’s duties under the ADA. Many children with learning, hearing and or sight disabilities will not receive equal privileges or adequate accommodations through distance learning programs. As a result, the state’s mandated shutdown of in person learning will result in many children with disabilities being left behind and will force schools to incur liability for monetary damages because of its inability to provide accommodations for their disabled students equal to other students as required by the ADA provisions.¹⁴⁰

While a petitioner must generally exhaust administrative remedies before bringing claims under the IDEA or seeking “adequate education for disabled youth” under other laws,¹⁴¹ this requirement is subject to numerous exceptions. First, exhaustion is not required when “it would be futile to use the due process procedures.”¹⁴² Second, exhaustion is not required when the

¹³⁷ 42 U.S.C. § 12182(a) (2009).

¹³⁸ 42 U.S.C. § 12182(b)(2)(A)(iii) (2009).

¹³⁹ 42 U.S.C. § 12182(b)(1)(B) (2009)

¹⁴⁰ See 42 U.S.C. § 12188 (b)(2) (2009)

¹⁴¹ *Doe By & Through Brockhuis v. Arizona Dep’t of Educ.* (9th Cir. 1997) 111 F.3d 678, 680–81, 685 (citing 20 U.S.C. § 1415(e)(2), (f))

¹⁴² *Hoelt v. Tucson Unified Sch. Dist.* (9th Cir. 1992) 967 F.2d 1298, 1303–04 (citation omitted)

challenged policy is one “of general applicability that is contrary to the law,”¹⁴³ which occurs when the claim involves the administrative “procedures themselves, or requires restructuring of the education system itself.”¹⁴⁴ Third, exhaustion is not required when “it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g. the hearing officer lacks the authority to grant the relief sought).”¹⁴⁵ Finally, exhaustion is not required when exhaustion would cause severe or irreparable harm.¹⁴⁶

When considering whether an exception applies, courts focus on “whether pursuit of administrative remedies will further the general purposes of exhaustion,” which is to “allow for the exercise of discretion and educational expertise by state and local agencies, afford full exploration of technical educational issues, further development of a complete factual record, and promote judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.”¹⁴⁷

Petitioners were not required to exhaust administrative remedies for four independently sufficient reasons. First, “it would be futile to use the due process procedures.”¹⁴⁸ The issues created by the Orders cannot be solved by filing complaints with school districts as the districts have no authority to override the Governor’s Order. For the same reason, “it is improbable that

¹⁴³ *Ibid.* (citation omitted)

¹⁴⁴ *Doe By & Through Brockhuis, supra*, 111 F.3d at p. 682.

¹⁴⁵ *Hoeft, supra*, 967 F.2d at pp. 1303–04 (citation omitted).

¹⁴⁶ *D.E. v. Cent. Dauphin Sch. Dist.* (3d Cir. 2014) 765 F.3d 260, 275; *see also Meridian Joint Sch. Dist. No. 2 v. D.A.* (9th Cir. 2015) 792 F.3d 1054, 1068–69 (explaining that exhaustion is not required when right sought to be vindicated is “time-sensitive”).

¹⁴⁷ *Hoeft, supra*, 967 F.2d at pp. 1302–03.

¹⁴⁸ *Hoeft, supra*, 967 F.2d at pp. 1303–04

adequate relief can be obtained by pursuing administrative remedies.”¹⁴⁹ Third, the claim here is systemic as the Orders prohibit schools from providing any in-person education whatsoever.¹⁵⁰ Finally, “exhaustion would cause severe or irreparable harm.”¹⁵¹ Indeed, so likely and impending is irreparable harm that Petitioners have asked for an immediate injunction of the Order. And exhausting administrative remedies here would serve none of the purposes of exhaustion, as the challenge to the Order is not fact-bound, but rather involves a legal challenge to a statewide order affecting every student in the State of California.

IV. RESPONDENTS’ ORDERS VIOLATE TITLE VI REGULATIONS AS THEY DISPARATELY BURDEN MINORITIES

The Civil Rights Act of 1964 prevents discrimination on the basis of “race, color, or national origin.”¹⁵² The Civil Rights Act, otherwise referred to as Title VI, implemented regulations which prevent governmental entities from discriminating against these classes in federally funding programs, such as public schools.¹⁵³ Courts hold that “[t]he basis for a successful disparate impact claim involves a comparison between two groups - those affected and those unaffected by the facially neutral policy. This comparison must reveal that although neutral, the policy in question imposes a “significantly adverse or disproportionate impact” on a protected group of individuals.”¹⁵⁴ When analyzing the basis for a disparate impact claim, courts look to the statistics of a particular area, including the population base and racial makeup.¹⁵⁵

¹⁴⁹ *Ibid.*

¹⁵⁰ *See Handberry v. Thompson* (2d Cir. 2006) 446 F.3d 335, 344.

¹⁵¹ *D.E.*, 765 F.3d at 275.

¹⁵² 42 U.S.C. §2000d

¹⁵³ 28 C.F.R. §42.104

¹⁵⁴ *Tsombanidis v. W. Haven Fire Dep’t* (2003) 352 F.3d 565, 575.

¹⁵⁵ *Darensburg v. Metro Transportation Comm’n* (2011) 636 F.3d 511, 519.

All students are “affected” by the Governors orders. However, the discriminatory effect of the orders is magnified in that it applies predominantly to low income counties comprising of higher percentages of racial minorities. This disparity was addressed above in full regarding the disparate treatment of minorities in relation to equal protection. Families across the State of California who are already in poor socioeconomic circumstances continue to struggle through the distance learning model as those with low-income cannot afford to receive the same services as those which were previously provided during in person instruction.

V. IRREPARABLE HARM WHICH, IF LEFT UNADDRESSED, WILL BE DETRIMENTAL AND THUS, THE NEED FOR JUDICIAL ACTION AND IMMEDIATE URGENT IS NECESSARY

Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages.¹⁵⁶ Because intangible injuries generally lack an adequate legal remedy, “intangible injuries [may] qualify as irreparable harm.”¹⁵⁷ The deprivation of a constitutionally protected right such as those protected by the Fourteenth Amendment’s Equal Protection Clause inexorably creates irreparable harm.¹⁵⁸

VI. NO ADEQUATE REMEDY AT LAW

The nature of the Executive Orders is such that no adequate remedy at law exists. “[M]andamus may be invoked in those cases where remedy by any other form of action or proceeding would not be equally as convenient,

¹⁵⁶ See *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.* (9th Cir. 1991) 944 F.2d 597, 603.

¹⁵⁷ *Arizona Dream Act Coalition v. Brewer* (9th Cir. 2014) 757 F. 3d 1053, 1068.

¹⁵⁸ See *Elrod v. Burns* (1976) 427 U.S. 347, 373.

beneficial, and effective.”¹⁵⁹ Because Petitioners request that the Governor and, by extension the CDPH, be required to execute the duties of a public office in a manner that is consistent with the well-established provisions of the State and Federal Constitution, the writ of mandate is the most “convenient, beneficial, and effective” relief available. Indeed, this case is precisely the sort that the writ of mandate is designed to remedy: reigning in public officials who are ignoring the constitution in the enactment of law through the powers vested in them during declared states of emergency. Without the intervention of this Court, the Governor’s Executive Orders will continue to effect public schools and their students until the end of the declared state of emergency. Accordingly, Petitioners petition this Court which is able to provide remedy most expediently under the extraordinary writ and immediate stay procedures.

VII. THE WRIT SHOULD BE ISSUED IN THE FIRST INSTANCE

Under Cal. Civ. P. Code § 1088 and other applicable law, this Court should issue a peremptory writ in the first instance. A court may issue a peremptory writ in the first instance where petitioner’s entitlement to relief is so obvious that no purpose could reasonable be served by plenary consideration of the issue.¹⁶⁰

This Petition requires this Court’s immediate attention and the issuance of the writ in the first instance. The entitled relief is obvious: require Governor Newsom and the CDPH to comply with the Constitutional framework of the Federal and State Constitution. The violations of the right to education, equal protection clauses, and the contracts clauses

¹⁵⁹ *Ross v. Bd. of Educ.* (1912) 18 Cal. App. 222, 225

¹⁶⁰ *Lewis, supra*, 19 Cal. 4th at p. 1234; *see also Alexander v. Superior Court* (1993) 5 Cal. 4th 1218; *Ng v. Sup. Ct.* (1992) 4 Cal. 4th 29, 35 (clear error under established law and unusual urgency are factors for *Palma* procedure).

unambiguously establish that the Governor exceeded his powers in the declared state of emergency. Moreover, as explained previously, there is unusual urgency in this matter – every public school in the State of California will be reopening with a distance learning model to the detriment of their students within the next month –requiring acceleration of the normal process.

Because Petitioners have effected personal service of this petition and a notice of an application for a writ of mandate in the first instance on Governor Newsom on this date and seek an immediate stay and peremptory writ of mandate in the first instance, Petitioners respectfully request this Court to give *Palma* notice to Respondent.¹⁶¹

A peremptory writ may issue in the first instance when at least ten days is given and each party has sufficient opportunity to be heard.¹⁶² In this case, 10 days notice is being given to allow the party sufficient time to be heard. Additionally, as noted *infra*, unusual urgency exists. Tens and thousands of students statewide will suffer or are currently suffering through the deprivation of their education rights based on arbitrary county closures which do not directly reflect the city transmission rates. This harm will continue until Governor Newsom’s flagrant disregard for constitutional law is addressed by this Court.

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¹⁶¹ *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal. 3d 171, 178; *see also Ng*, 4 Cal. 4th at 35 (*Palma* procedure proper when “there has been clear error under well-settled principles of law and undisputed facts . . . or when there is an unusual urgency”).

¹⁶² Cal. Civ. P. Code § 1088. *Palma, supra*, 36 Cal. 3d at p. 180.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the relief sought in the Verified Petition for a Peremptory Writ of Mandate in the First Instance and Request for Immediate Stay.

Dated: August 21, 2020

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