

CASE NO. \_\_\_\_\_

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

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IMMANUEL SCHOOLS; LINFIELD CHRISTIAN SCHOOL;  
CALVARY MURRIETA; CALVARY CHAPEL OF SAN JOSE;  
CLOVIS CHRISTIAN SCHOOLS, LLC; REGINA BAILEY; NICOLE  
HILL; KATIE MACDONNELL; and JENNY PIERCE HEIL

*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.*

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**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**

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**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:

IMMANUEL SCHOOLS; LINFIELD CHRISTIAN SCHOOL;  
CALVARY MURRIETA; CALVARY CHAPEL OF SAN JOSE;  
CLOVIS CHRISTIAN SCHOOLS, LLC; REGINA BAILEY; NICOLE  
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*Petitioners,*

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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.*

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 IN THE FIRST INSTANCE;  
MEMORANDUM 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:**

**INTRODUCTION**

**Necessity of Writ Relief**

Governor Newsom's defiance of the rule of law and disregard for the constitution usurped Private Schools' contractual rights and detrimentally effected the learning of students across the 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 struggle to learn the fundamentals of education in their early years. 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 private education system. There is a 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 and, in some cases, will be exposed to an abusive environment which will further impact their development. Accordingly, Petitioners request an immediate stay of the



orders as well as an issuance of a peremptory writ of mandate in the first instance.<sup>1</sup>

### **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 Executive Order N-33-20 ordering “all residents are directed to immediately heed the current State public health directives.” (Exhibit 1)<sup>2</sup> 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.” But did not specifically mention schools as he vested power in the CDPH to make determinations about the re-openings of “businesses and spaces” (Exhibit 2)<sup>3</sup>

On July 17, 2020, Newsom announced a framework to reopen schools. (Exhibit 3)<sup>4</sup> 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

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<sup>1</sup> Code of Civil Procedure § 1088; *see also Lewis v. Sup. Ct.*, (1999) 19 Cal. 4th 1232 (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].

<sup>2</sup>Newsom 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>

<sup>3</sup>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>; Decl of Bhattacharya ¶ 21.

<sup>4</sup> 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/>

within the prior 14 days.” (Exhibit 4)<sup>5</sup> As of August 18th, 42 of the 58 counties are currently on the monitor list including Riverside County, Fresno County, Los Angeles County, and Napa County. (Exhibit 5)<sup>6</sup> 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 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.<sup>7</sup>

In anticipation of the distance learning framework, the California Legislature and Governor Newsom enacted a budget that provided an additional \$5.3 billion (consisting of \$4.8 billion in federal funds) in funding for public schools in recognition of the deficiencies in the distance learning model as these funds would be necessary to attempt to ensure schools could provide rigorous and grade appropriate distance learning through the provision of electronic devices and additional funding to facilitate daily interaction for children, class assignments equivalent to in-person instructed, and additional support for English learners and special

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<sup>5</sup> 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>

<sup>6</sup> *County Data Monitoring List* (August 20, 2020) available at the time of filing at: <https://covid19.ca.gov/roadmap-counties/>

<sup>7</sup> 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>

education students. (Exhibit 6)<sup>8</sup> These funds were not made available to private schools and, as a result, private schools were left at a disadvantage to provide equal interaction, assignments, and support which would be equivalent to in-person learning.

While private schools were originally told that waivers were available, these waivers are unavailable in numerous counties. (Exhibit 7)<sup>9</sup> Accordingly, Private Schools are forced to implement a distance learning model without equivalent funding to the public school system 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. Private schools anticipate opening during the month of August, and some have already opened at the time of this instant Petition. 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 private schools will be irreparably damaged due to the mandatory adoption of a distance learning model.<sup>10</sup> Longevity and sustainability are quickly becoming a conversation point in correspondence between private schools statewide.<sup>11</sup>

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<sup>8</sup> 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/>; see also Newsom G, *California State Budget 2020-21*, available at the time of filing at: <http://www.ebudget.ca.gov/FullBudgetSummary.pdf>

<sup>9</sup> *Ibid.*; Decl. of Tremayne ¶¶ 3-4.

<sup>10</sup> Decl. of ¶¶ 4-7; Decl. of Horton ¶ 4; Decl. of Munguia ¶ 6-7; Decl. of Bonjorni ¶ 13, 14,

<sup>11</sup> Decl. of Bell ¶ 6; Decl. of Horton ¶ 4, 11; Decl. of Wood ¶ 5-7; Decl. of Munguia ¶ 7; Decl. of Snow ¶ 7; Decl. of Bonjorni ¶ 13, 14.

Teachers and school districts are issuing staggering reports of deceased student involvement after implementing the distance learning school model. For example, Los Angeles County Unified School District, (LAUSD) indicated that, “36% of middle and high school students participated online,” and “25% logged on or viewed work only” and “40%” were absent altogether. (Exhibit 8)<sup>12</sup> 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.<sup>13</sup> This absence of technology and the “digital divide” that exists among 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 learning. (Exhibit 30, 31)<sup>14</sup> By implication, the Governor’s office concedes that broadband speeds are insufficient to meet the requirements and strains of distance learning place students at a further disadvantage as they are unable to connect in a manner which is consistent with in-person instruction. This impact is further magnified in the private school system as these schools and students do not have access to the same funding and

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<sup>12</sup> *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/>.

<sup>13</sup> *Ibid.*; See also Exhibit 29, EdSource, *Thousands of California Students Still Without Laptops and Wi-Fi for Distance Learning*, see available as of the date of filing at: <https://edsource.org/2020/thousands-of-california-students-still-without-laptops-and-wi-fi-for-distance-learning/628395>; See also Exhibit 30, Multichannel News, *California Mandates Close to Digital Divide* (August 19, 2020) available as of the date of filing at: <https://www.multichannel.com/news/california-mandates-close-to-digital-divide>

<sup>14</sup> 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>

benefits available in the public education system to overcome the difficulties of distance learning. Teachers and staff from the petitioning schools report that students have difficulties with distance learning and acknowledge that the distance learning system is a failure to students.<sup>15</sup> The third grade teacher at petitioner Immanuel Schools noted that “[t]he quality of the Zoom lessons was negatively impacted by technology glitches, families with more than one child learning in the household, and students’ inability to focus on a computer for hours at a time.”<sup>16</sup>

Concerns with the distance learning model echoed through the declarations of private school parents. Parents note their own child’s difficulties with the distance learning model.<sup>17</sup> One parent, Katie MacDonnell, a law school graduate and practiced litigator, has a student who is diagnosed with ADHD which makes it “difficult...to focus and [they] are prone to impulse control issues.”<sup>18</sup> Ms. MacDonnell notes her child’s unique struggles with distance learning including struggles with self-monitoring, lack of engagement, lack of challenging coursework, and the inability to socialize with peers, ultimately concluding that she was “not an adequate substitute for my children’s hands-on teachers...”<sup>19</sup> Another parent echoed the sentiment stating, “[t]here is no digital or virtual substitute for [private school] educational experience.”<sup>20</sup>

In addition to the reports from school districts themselves, universities continue to study the effects of distance learning on students

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<sup>15</sup> Decl. of Hawes ¶ 6; Decl. of Reimer ¶ 5; Decl. of Wood ¶¶ 13, 15; Decl. of James ¶ 11; Decl. of Munguia ¶¶ 8-9; Decl. of Snow ¶ 9-10.

<sup>16</sup> Decl. of James ¶ 6 Decl. of Bonjorni ¶ 14

<sup>17</sup> Decl. of Bailey ¶ 13; Decl. of N. Hill ¶ 6; Decl. N Hill ¶ 12; Decl. Heil ¶¶ 4, 8-9

<sup>18</sup> Decl. of MacDonnell ¶ 4

<sup>19</sup> Decl. of MacDonnell ¶¶ 5-8.

<sup>20</sup> Decl. of Heil ¶ 5.

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)<sup>21</sup> 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.)<sup>22</sup>

This substantial absence from in-person instruction and the subsequent gaps in learning will disproportionately effect minorities<sup>23</sup> 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)<sup>24</sup> Linda Reimer, the Director of Counseling for petitioner Immanuel

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<sup>21</sup> 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>.

<sup>22</sup> 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>; Decl. of Hawes ¶ 6; Decl. of Reimer ¶ 6; Decl. of James ¶¶ 6-7; Decl. of Munguia ¶ 9;

<sup>23</sup> 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>. ["Blacks and Latinos are substantially less likely to have a computer at home than are white, non-latino"]

<sup>24</sup> *COVID-19 Planning Considerations: Guidance for School Re-Entry*, American Academy of Pediatrics (July, 2020) available as of the date of filing at: <https://services.aap.org/en/pages/2019-novel-coronavirus-covid->

Schools, stated that students “reported to me that it was a struggle to find the self-motivation to attend lessons or office hours via Zoom and/or complete their assignments...[and reported] ... feelings of anxiety, depression, and anger as compared to when Immanuel offered traditional in-person instruction.”<sup>25</sup> 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.”<sup>26</sup> Even in her own practice, Shannae Anderson noted:

I have had patients attempt suicide, relapse into drug and alcohol addiction, and need to be hospitalized for serious emotional distress. The helplessness and powerlessness that many experience in the face of the lockdown can reactivate old trauma wounds which render parents distracted and easily overwhelmed. Having to educate their children at home because of school closures only increases the psychic burden that many parents feel.<sup>27</sup>

Experts nationwide echo these concerns when analyzing student response to distance learning at the end of the 2019-2020 school year.<sup>28</sup> Experts conclude that closure of in-person learning for children is largely detrimental to the health and welfare of children. (Exhibit 12)<sup>29</sup> For

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19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/

<sup>25</sup> Decl. of Reimer ¶ 5.

<sup>26</sup> Decl. of Anderson ¶ 17.

<sup>27</sup> Decl. of Anderson ¶ 22

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

<sup>29</sup> See 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/>; Decl. of Anderson ¶ 11; Decl. of Bhattacharya ¶ 20.

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)<sup>30</sup> Without proper nutrition, mental and physical health issues quickly arise in children.<sup>31</sup>

Indeed, Petitioner schools echo the sentiment as they report a decline in students’ social, emotional, and spiritual development under the distance learning model.<sup>32</sup> Many students are struggling in the online environment as they lack the home support they need to thrive in a distance learning model.<sup>33</sup> 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.”<sup>34</sup> Some parents are left with very few choices but to leave the State to relocate to alternative States which permit safe in-person instruction.<sup>35</sup>

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

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<sup>30</sup> *Ibid.*; see also Decl. of Victory ¶ 14.

<sup>31</sup> Decl. of Melson ¶ 18.

<sup>32</sup> Decl. of Andrews ¶¶ 7, 9; Decl. of Horton ¶¶ 5-6, 8; Decl. of Hawes ¶ 9; Decl. of Reimer ¶¶ 5-7; Decl. of Wood ¶¶ 15, 18; Decl. of James ¶ 10; Decl. of Munguia ¶ 10; Decl. of Snow ¶¶ 9-10; Decl. of MacDonnell ¶ 8;

<sup>33</sup> Decl. of Horton ¶ 8; Decl. of Hawes ¶¶ 3-5; Decl. of Wood ¶ 15; Decl. of James ¶ 9; Decl. of Munguia ¶ 10; Decl. of Snow ¶ 7; Decl. of MacDonnell ¶ 5; Decl. of Heil ¶ 4; Decl. of Anderson ¶¶ 11-26.

<sup>34</sup> Decl. of Melson ¶ 9.

<sup>35</sup> Decl. of MacDonnell ¶ 12; Decl. of Melson ¶ 9.



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)<sup>36</sup>

The CDC, in the same publication, stated that COVID-19 posed a low risk to students. (Exhibit 16)<sup>37</sup> 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)<sup>38</sup> 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.”<sup>39</sup> As summarized by Dr. Mu, there is “no evidence that children are the primary drivers of the infection”<sup>40</sup>

The CDC’s studies enforce the reports of local districts, such as LAUSD, and experts as they recently reported that students with disabilities

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<sup>36</sup> Centers for Disease Control and Prevention, Importance of Reopening Schools, 10th para. (Last Update July 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html#fn20>

<sup>37</sup> *Ibid.*

<sup>38</sup> 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://doi.org/10.3201/eid2610.201315>  
[https://wwwnc.cdc.gov/eid/article/26/10/20-1315\\_article](https://wwwnc.cdc.gov/eid/article/26/10/20-1315_article); See also Decl. of Fitzgibbons ¶13 [reporting no child deaths in Orange County relating to COVID-19.]; Decl. of Bhattacharya ¶ 22; Decl. of Melson ¶ 12.

<sup>39</sup> Decl. of Victory ¶12.

<sup>40</sup> Decl. of Mu ¶ 3 (Dr. Mu concluded that the mortality rate of COVID-19 is significantly lower than reported and “likely closer to that of influenza.”<sup>40</sup> )

had “significant difficulties with remote learning.” (Exhibit 16)<sup>41</sup> Moreover, Dr. Robert Redfield, a director for the CDC recently gave a presentation on a July 14 webinar stating “I think that the cost to our nation in continuing to keep these schools closed is substantial...” specifically noting that there are “far greater suicides” among the student population during the lockdown.<sup>42</sup>

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 private 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.<sup>43</sup> Petitioners, following the established guidelines of the CDPH as well as the CDC can and have developed individualized plans for the resumption of in-person instruction

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<sup>41</sup> *The Importance of Reopening America’s Schools this Fall*, Center for Disease Control and Prevention (July 23, 2020), available as of the date of filing at: <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>

<sup>42</sup> COVID Webinar Series (Transcript): Robert Redfield, MD (July 14, 2020), available as of the date of filing at: <https://www.buckinstitute.org/covid-webinar-series-transcript-robert-redfield-md/>

<sup>43</sup> 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>

in a manner which, according to the CDPH, minimizes the spread of COVID-19 in schools.<sup>44</sup>

Immanuel Schools, a petitioner in this instant writ, has gone above and beyond the reasonable duty of a school to safeguard their students by contracting with a board certified clinical pathologist, Paul Atmajian, M.D., who conducted an antibody test on 198 individuals at the Immanuel Schools school site to assess the herd immunity within the local community.<sup>45</sup> This test was designed to test whether individuals had COVID-19, defeated COVID-19, or were immune to COVID-19.<sup>46</sup> Through the antibody tests, Dr. Atmajian determined that at least 59% of petitioner Immanuel School had developed antibodies for COVID-19.<sup>47</sup> But, to increase the reliability of testing, Dr. Atmajian implemented additional controls, including but not limited to performing tests for SARS-CoV2 proteins at 37 degrees Celsius, use of blocking agents, use of high binding microtiter plates, and the use of three antigenic targets resulting in a lower positivity rate.<sup>48</sup> Under the less reliable test which is frequently used for commercial testing, the same testing would have reported approximately 80% of Immanuel Schools possessing the requisite antibodies for COVID-19, or as otherwise stated, herd immunity at Immanuel Schools.<sup>49</sup> Dr. Atmajian's testing demonstrates that schools can and have obtained herd immunity within their student body. Nevertheless,

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<sup>44</sup> Decl. of Andrews ¶¶ 3-4; Decl. of Horton ¶ 9; Decl. of Hawes ¶¶ 7-8; Decl. of Wood ¶¶ 8-10, 19; Decl. of Munguia ¶ 12; Decl. Snow ¶ 11; Decl. of Fitzgibbons ¶37; Decl. of Bonjorni ¶¶ 6, 10;

<sup>45</sup> Decl. of Wood ¶ 19; Decl. of Atmajian ¶ 7.

<sup>46</sup> Decl. of Atmajian ¶ 7.

<sup>47</sup> Decl. of Atmajian ¶ 7

<sup>48</sup> Decl. of Atmajian ¶ 9.

<sup>49</sup> Decl. of Atmajian ¶¶ 12, 14.

the Governor's office refuses to acknowledge the existence of this scientific data in assessing the scope of its orders.

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)<sup>50</sup> 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.<sup>51</sup>

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 Private Schools across the State of California to safely re-open 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.**

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<sup>50</sup> American Academy of Pediatrics *COVID-19 Planning Considerations: Guidance for School Re-Entry*, (July 25, 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>; Decl. of Bhattacharya ¶ 20.

<sup>51</sup> Decl. Victory ¶ 13.

## **ISSUE PRESENTED**

1. Do Governor Newsom's Executive Orders Unlawfully infringe on the Right to Education?
2. Do Governor Newsom's Executive Orders violate the Equal Protection Clause of the State Constitution?
3. Are the Executive Orders an unconstitutional interference with Private Schools' right to contract under the State Constitution?
4. Even if this Court finds that the Governor's Orders are constitutional, does Governor Newsom have sufficient authority to issue these orders and if so, are they delegable duties?

## **PARTIES, IRREPARABLE INJURY, AND NECESSITY FOR RELIEF**

By this verified petition for a peremptory writ of mandate and immediate stay, Petitioners allege as follows:

1. Petitioner Immanuel Schools is a Nonprofit Corporation that operates a Christian school in the City of Reedley, County of Fresno, State of California.

2. Petitioner Linfield Christian School is a Nonprofit Corporation that operates a Christian school in the City of Temecula, County of Riverside, State of California.<sup>52</sup>

3. Petitioner Calvary Murrieta, a Nonprofit Corporation, operates Calvary Murrieta Christian School in the City of Murrieta, County of Riverside, State of California.<sup>53</sup>

4. Petitioner Calvary Chapel of San Jose, a Nonprofit Corporation, operates Calvary Christian Academy in the City of San Jose, County of Santa Clara, State of California.<sup>54</sup>

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<sup>52</sup> Decl. of Horton ¶ 3.

<sup>53</sup> Decl. of Bell ¶ 2.

5. Petitioner Clovis Christian Schools, a For Profit Limited Liability Corporation, operates a Christian school in the City of Clovis, County of Fresno, State of California.<sup>55</sup>

6. Petitioner Regina Bailey, is an individual who petitions this Court on behalf of their child who attends St. Helena Montessori, a private school operating in the City of St Helena, County of Napa, State of California.

7. Petitioner Nicole Hill, is an individual who petitions this Court on behalf of their child who attends St. Helena Montessori, a private school operating in the City of St Helena, County of Napa, State of California.

8. Petitioner Katie MacDonnell, is an individual who petitions this Court on behalf of their child who attends St. Helena Montessori, a private school operating in the City of St Helena, County of Napa, State of California.

9. Petitioner Jenny Heil, is an individual who petitions this Court on behalf of their child who attends St. Helena Montessori, a private school operating in the City of St Helena, County of Napa, State of California.

10. As Private Schools in California, Petitioners have a strong, direct, and beneficial interest in having state laws faithfully executed in a manner which is consistent with the long-standing principles of the US Constitution and California Constitution as the enjoinder of the unconstitutional actions by Governor Newsom directly impact their finances, business, contractual relations, and day-to-day school operations. Similarly, as parents of school children, the petitioning Parents have a

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<sup>54</sup> Decl. of Munguia ¶ 3.

<sup>55</sup> Decl. of Bonjorni ¶ 3

substantial interest in the outcome of this matter as it deprives their children of full and equal rights guaranteed under both the California and U.S. Constitution.

11. Respondent, Governor Newsom, is sued in his official capacity and Petitioners seek this writ and stay against the Respondent in his official capacity;

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

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

14. The laws which Governor Newsom must follow include the laws of the state of California as well as Federal Laws.

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

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

17. 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.

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

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

20. This case presents an issue of significant statewide interest that must be handled immediately, because of the importance in

maintaining and securing the integrity of the system of government and protect the fundamental right to education and the rights of the private schools perilously close to being forced to close.”

21. It is urgent that this Court issue an order requiring the Governor of California to comply with State and Federal law. Failing to stay the Governor’s actions and issue a peremptory writ in the first instance will undermine the rule of law for California’s entire system of government and will perpetuate the chaos resulting from Governor Newsom’s unlawful orders.

22. 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.

23. 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.

24. Petitioners do not seek a ruling directing schools to reopen in person instruction and do not request that this court permit private 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 private schools to reopen. Rather, Petitioners seek an order which permits private 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.

25. 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.



## **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.

## **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.

## **PRAAYER FOR RELIEF**

WHEREFORE, Petitioners pray as follows:

That this Court:

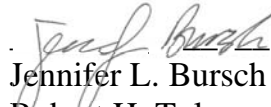
- A. Issue an immediate order commanding Respondents, their deputies, officers, agents, servants, employees, public entities, or persons acting at his behest or direction, to cease and desist from enforcing Executive Orders and Directives against private schools;
- B. Issue an immediate order declaring Governor Newsom's Executive Orders which command private schools to implement a "distance learning" model unconstitutional;
- C. Issue an immediate order declaring the California Department of Public Health's directives 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 private 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 private 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,

  
Jennifer L. Bursch  
Robert H. Tyler  
Cody J. Bellmeyer  
Tyler & Bursch, LLP  
Attorney for Petitioners

## VERIFICATION

I, Marc Horton, on behalf of Linfield Christian 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 20<sup>th</sup> day of August, in Temecula, California.


A handwritten signature in black ink, appearing to read 'M. Horton', written over a horizontal line.

Marc Horton  
Linfield Christian School

## VERIFICATION

I, Brian Bell, on behalf of Calvary Murrieta, 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.

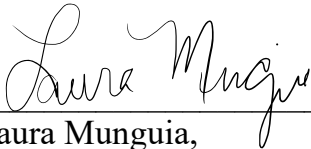
Executed this 20 day of August, in Murrieta, California.

  
\_\_\_\_\_  
Brian Bell  
Calvary Murrieta – Calvary  
Murrieta Christian Schools

## VERIFICATION

I, Laura Munguia, on behalf of Calvary Chapel of San Jose, 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 20 day of August, in San Jose, California.

  
\_\_\_\_\_  
Laura Munguia,  
Calvary Chapel of San Jose -  
Calvary Christian Academy

## VERIFICATION

I, Ryan Wood, on behalf of Immanuel Schools, 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 20 day of August, in Reedley, California.




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Ryan Wood  
Immanuel Schools

## VERIFICATION

I, Kimberly Bonjorni, on behalf of Clovis Christian Schools, LLC, 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.

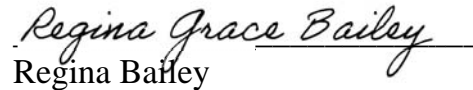
Executed this 20 day of August, in Clovis, California.

  
Kimberly Bonjorni  
Clovis Christian Schools, LLC

## VERIFICATION

I, Regina Bailey, 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 Napa County, California.

  
Regina Bailey



## VERIFICATION

I, Nicole Hill, 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 Napa County, California.

*Nicole Hill* \_\_\_\_\_  
Nicole Hill

## VERIFICATION

I, Katie MacDonnell, 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 Napa County, California.

*Katie MacDonnell* \_\_\_\_\_  
Katie MacDonnell

## VERIFICATION

I, Jenny Pierce Heil, 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 Napa County, California.

  
Jenny Pierce Heil

## **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) <sup>56</sup> 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) <sup>57</sup> After Governor Newsom announced his framework to reopen schools on July 17, 2020, the California Department of Public Health (CDPH) directives ordered private schools to implement a distance learning model if they have been on the CDPH's monitoring list. (Exhibit 4) <sup>58</sup>

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<sup>56</sup>Newsom 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>

<sup>57</sup>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>; Decl of Bhattacharya ¶ 21.

<sup>58</sup> 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/>

Due to the disparate impact on students, minorities, and students with disabilities, 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 private schools to open by implementing safe, compliant policies which are designed to protect student and teacher health. (See Exhibits 7-16)

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.”<sup>59</sup> Here, the issuance of unconstitutional Executive Orders by Governor Newsom which disproportionately impact students, students with disabilities, and minorities 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.

## **II. THE EXECUTIVE ORDERS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE STATE CONSTITUTION**

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.”<sup>60</sup> The Constitutional principles as memorialized by the state constitution requires the state to refrain from

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<sup>59</sup> *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal. 3d 937, 944 (quotation omitted) (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)

<sup>60</sup> Cal. Const., Art. I, § 7.

drawing arbitrary distinctions between different groups of individuals who are “similarly situated with respect to the legitimate purpose of the law...”<sup>61</sup> Prior to determining whether the acts of a Government Official violates a fundamental right, courts determine “the proper level of scrutiny to apply for review.”<sup>62</sup> If the Government’s act targets or burdens a substantial right, courts apply strict scrutiny and analyze whether the law is narrowly tailored to serve a compelling government interest.<sup>63</sup> But, if the Government act does not concern a suspect class, semi-suspect class, or fundamental right, courts apply a rational basis review to determine if the act is rationally related to a legitimate government interest.<sup>64</sup> In an equal protection analysis, the courts will look to determine whether the law discriminates against an identifiable class of persons, and if so, the court applies the appropriate level of scrutiny.<sup>65</sup> Courts apply the same analysis when assessing the constitutionality of a Government action under both Federal and State Equal protection clauses.<sup>66</sup>

Here, the orders discriminate against an identifiable class, students who attend private schools in the State of California. Private school students are a unique and identifiable class outside of public schools as they do not obtain state funding and thus, cannot obtain the same benefits of distance learning which are facilitated through the governmental supplements. Thus, private school students are at a disadvantage as a unique and identifiable class. As set forth below, these private school

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<sup>61</sup> *Benjamin v. Ricks* (1976) 63 Cal. App. 3d 593, 596-597

<sup>62</sup> *Wright v. Incline Village Gen. Improvement District* (9th Cir. 2011) 665 F.3d 1128, 1141.

<sup>63</sup> *Ibid.*; *Washington v. Glucksberg* (1997) 521 U.S. 702, 719-20

<sup>64</sup> *Wright v. Incline Village Gen. Improvement District*, *supra*, 665 F.3d at p. 1141.

<sup>65</sup> *Vergara v. State of California* (2016) 246 Cal.App.4th 619, 645

<sup>66</sup> *Vergara v. State of California*, *supra*, 246 Cal.App.4th at p. 652.

students have a fundamental right to education under the California Constitution and cannot be arbitrarily deprived of these rights through the improper implementation of Executive Orders and CDPH directives without due process of law.

#### **A. Education is a Fundamental Right**

In *Brown v. Board of Education*, the United States Supreme Court stated:

“Today, education is perhaps the most important function of state and local governments. Compulsory School attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. *In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.* Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>67</sup>

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. *Brown* recognized that “education is perhaps the most important function of state and local governments.”<sup>68</sup> Education, is the “very foundation of good

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<sup>67</sup> *Brown v. Board of Education* (1954) 347 US 483, 493 [Emphasis added].

<sup>68</sup> *Brown v. Board of Education*, *supra*, 347 US at p. 493.

citizenship”<sup>69</sup> and is “deeply rooted in this Nation’s history and tradition.”<sup>70</sup> In *Pierce v. Society of Sisters*, the U.S. Supreme Court also recognized that a part of that parents have fundamental liberty interests to direct the upbringing and education of children, which includes their right to send their children to private schools.<sup>71</sup> The right to education is so deeply rooted in the history and tradition of the United States, that this Court previously ruled that it is a fundamental right guaranteed under the California Constitution.<sup>72</sup> “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.”<sup>73</sup> Thus, this Court must apply strict scrutiny as Governor Newsom’s Executive Orders, as effectuated by the CDPH, directly effects the fundamental right to education.<sup>74</sup>

### **B. Governor Newsom’s Orders Do Not Survive Any Level of Scrutiny**

Despite the right to education<sup>75</sup> and the established liberty rights of parents to elect to send their children to private schools<sup>76</sup>, Governor

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<sup>69</sup> *Ibid.*

<sup>70</sup> *Washington v. Glucksberg*, *supra*, 521 U.S. at pp. 720-21.

<sup>71</sup> *Pierce v. Soc’y of Sisters* (1925) 268 U.S. 510, 534-35.

<sup>72</sup> *Serrano v. Priest* (1971) 5 Cal.3d 584, 605 [“*Serrano I*”, stating that education is “the lifeline of both the individual and society.”]; *Serrano v. Priest* (1976) 18 Cal.3d 728, 767-768 [“*Serrano II*”, stating that education “lie[s] at the core of our free and representative form of government.”]; see also Cal. Const. Art. I, § 7; *id.* Art. IV, § 16; *Id.* Art. IX, §§ 1 & 5

<sup>73</sup> *O’Connell v. Super. Ct.* (2006) 141 Cal.App.4th 1452, 1482; *see also Serrano I*, *supra*, 5 Cal.3d at pp. 605-607.

<sup>74</sup> *Serrano v. Priest*, *supra*, 5 Cal.3d at p. 605; *Serrano v. Priest*, *supra*, 18 Cal.3d at pp. 767-768 ; *see also* Cal. Const. Art. I, § 7; *id.* Art. IV, § 16; *id.* Art. IX, §§ 1 & 5.

<sup>75</sup> *Brown v. Board of Education*, *supra*, 347 US at p. 493.

<sup>76</sup> *Pierce v. Soc’y of Sisters*, *supra*, 268 U.S. at pp. 534-35.



Newsom issued numerous Executive Orders<sup>77</sup> and, in cooperation with the CDPH<sup>78</sup>, instructed private schools to implement distance learning, an education model which facilitates absenteeism<sup>79</sup>, subjects students to abusive environments without the daily interaction with mandatory reporters<sup>80</sup>, and causes students to fall months behind in their studies.<sup>81</sup>

The Governor's attempts to justify these actions in a manner which meets the strict scrutiny standard fail by providing the only the narrow justification that the deprivation of the fundamental right to education is justified because it is necessary to "reduce transmission of SARS-CoV-2"<sup>82</sup>

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<sup>77</sup> Newsom 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>; 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>; Decl of Bhattacharya ¶ 21.

<sup>78</sup> 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>

<sup>79</sup> *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/>.

<sup>80</sup> *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-19%20School%20Re-entry%20Interim%20Guidance%20FINAL%20062520.pdf>

<sup>81</sup> *The Importance of Reopening America's Schools this Fall*, Center for Disease Control and Prevention (July 23, 2020), available as of the date of filing at: <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>.

<sup>82</sup> 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:

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.”<sup>83</sup> Even the directive instructing private schools to close acknowledges the development of scientific data as it relates to private schools and the need to carefully analyze the resumption of in-person instruction based on local trends.<sup>84</sup> Rather than staying true to its own recommendation to analyze the potential for reopening based on continuously emerging data, local trends<sup>85</sup>, and contrary to the opinion of the World Health Organization<sup>86</sup>, the CDPH instructed private schools in large counties to close based on the infection rate of massive geographic areas<sup>87</sup> instead of taking into account the actual infection trends in the individual cities which can mitigate the spread in school by implementing CDC and State recommendations to control the low infection rates in youth population.<sup>88</sup>

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

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

<sup>83</sup> *Ibid.* (emphasis supplied)

<sup>84</sup> *Ibid.* (emphasis supplied)

<sup>85</sup> *Ibid.* (emphasis supplied)

<sup>86</sup> Decl. of Bhattacharya ¶¶ 18-19.

<sup>87</sup> California State Association of Counties, *Square Mileage by County*, available at the time of filing at: <https://www.counties.org/pod/square-mileage-county>.

<sup>88</sup> 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 (July 16, 2020) available as of the date of filing at: [https://wwwnc.cdc.gov/eid/article/26/10/20-1315\\_article](https://wwwnc.cdc.gov/eid/article/26/10/20-1315_article); Decl. of Andrews ¶¶ 3-4; Decl. of Horton ¶ 9; Decl. of Hawes ¶¶ 7-8; Decl. of Wood ¶¶ 8-10, 19; Decl. of Munguia ¶ 12; Decl. Snow ¶ 11.

coronavirus as demonstrated through the conceded development of scientific data relating to the transmission in minors<sup>89</sup>, 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.<sup>90</sup> Moreover, there is an absence of rationale or legitimate scientific basis as the current testing system is flawed<sup>91</sup>, inaccurate<sup>92</sup> overbroad<sup>93</sup>, and “flatly inconsistent with the science of public health, biosafety protocols, and with [the] understanding as infectious disease professionals...”<sup>94</sup> Petitioner Immanuel Schools’ study with Dr. Atmajian speaks for itself, herd immunity in youth is possible, exists, and facilitates the same resumption of in-person instruction where approximately 80% of the student population has the requisite antibodies for COVID-19.<sup>95</sup>

Experts conclude that there is no legitimate medical basis for preventing schools from resuming in-person instruction.<sup>96</sup> Expert Sean Kaufmann, who has extensive experience working nationally and internationally as a health education and infectious disease specialist with

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<sup>89</sup> *Ibid.* (emphasis supplied)

<sup>90</sup> See *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-19%20School%20Re-entry%20Interim%20Guidance%20FINAL%20062520.pdf>; 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](https://wwwnc.cdc.gov/eid/article/26/10/20-1315_article)

<sup>91</sup> Decl. Kauffmann ¶16

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> Decl. of Kauffman ¶ 19.

<sup>95</sup> Decl. of Atmajian ¶¶ 7-14

<sup>96</sup> Decl. of Mu ¶ 3; Decl. of Victory ¶¶ 19, 23, 26; Decl. of Anderson ¶ 26; Decl of Fitzgibbons ¶¶ 27, 29, 30,37; Decl. of Kaufmann ¶¶14-19l; Decl. of Atmajian ¶¶ 7-14; Decl. Bhattacharya ¶ 22.

particular expertise in risk mitigation in public health settings,<sup>97</sup> relied on his unique experience in opining that the state’s order lacked a rationale or legitimate scientific basis<sup>98</sup> citing flawed testing system<sup>99</sup>, inaccuracy of CT testing relating to the infection risk in patients who test positive for COVID-19,<sup>100</sup> inaccuracies in the length of time which the individual can test positive<sup>101</sup>, 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...”<sup>102</sup> Dr. Kaufmann’s assertions are supported by the findings of Dr. Atmajian who conducted extensive antibody testing at Immanuel Schools to demonstrates that herd immunity currently exists in some student populations, contrary to the beliefs of the Governor’s office.<sup>103</sup> 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.<sup>104</sup>

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. As demonstrated herein, schools can, and many likely have, obtained the requisite herd immunity to safely reopen without furthering the

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<sup>97</sup> Decl. Kaufmann ¶¶ 1-13

<sup>98</sup> Decl. Kauffmann ¶¶14-15

<sup>99</sup> Decl. Kauffmann ¶16

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> Decl. of Kauffman ¶19.

<sup>103</sup> Decl. of Atmajian ¶¶12, 14

<sup>104</sup> Decl. of Vicotry ¶19; Decl. of Mu ¶ 3; 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.

spread of COVID-19.<sup>105</sup> The mandated distance learning scheme implemented by Governor Newsom violates the equal protection clause as it is a “governmental classifications that affect some groups of citizens differently than others”<sup>106</sup> and creates disparities between classes of students “whose situations are arguably indistinguishable.”<sup>107</sup> 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, and without regard to the available funding to private schools which will place private school students at a disadvantage. Some counties are permitted to implement safety guidelines and follow CDC and expert recommendations<sup>108</sup> 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<sup>109</sup> based solely on county alone despite data that indicates they could resume in-person instruction based on the numbers in their cities.

For example, Riverside County encompasses approximately 7,206 square miles<sup>110</sup> which comprises of twenty-three public school districts

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<sup>105</sup> Decl. of Atmajian ¶ 12, 14.

<sup>106</sup> *Engquist v. Or. Dep’t. of Agric.*, *supra*, 553 U.S. at p. 601

<sup>107</sup> *Ross v. Moffitt* (1974) 417 U.S. 600, 609

<sup>108</sup> Decl. of Mu ¶ 3; Decl. of Victory ¶¶ 19, 23, 26; Decl. of Anderson ¶ 26; Decl. of Fitzgibbons ¶¶ 27, 29, 30, 37; Decl. of Kaufmann ¶¶ 14-19; Decl. of Atmajian ¶¶ 7-14; Decl. of Bhattacharya ¶ 22-24

<sup>109</sup> Decl. of Hawes ¶ 6; Decl. of Reimer ¶ 5; Decl. of Wood ¶¶ 13, 15; Decl. of James ¶ 11; Decl. of Munguia ¶¶ 8-9; Decl. of Snow ¶ 9-10.

<sup>110</sup> California State Association of Counties, *Square Mileage by County*, available at the time of filing at: <https://www.counties.org/pod/square-mileage-county>.

serving a total of thirty-three different towns and communities. Many are small communities which are geographically removed from any large urban centers where the disease is more likely to spread. However, every one of these small communities would be prohibited from reopening in-person education for their children if the county is placed on the monitoring list.

Studies demonstrate that students are less engaged during distance learning. (Exhibit 8)<sup>111</sup> The distance learning model not only effect child participation, but it creates long-lasting learning gaps which have a disproportionate effect on minorities<sup>112</sup> based on their elected attendance at a private school, an entity which does not receive state funding, and public school, an entity which has additional funds to minimize the disparate impact on students who are suffering<sup>113</sup> in a distance learning education model.

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

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<sup>111</sup> *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/>.

<sup>112</sup> 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>. [“Blacks and Latinos are substantially less likely to have a computer at home than are white, non-latino”]

<sup>113</sup> *The Importance of Reopening America's Schools this Fall*, Center for Disease Control and Prevention (July 23, 2020), available as of the date of filing at: <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>.; Decl. of Hawes ¶ 6; Decl. of Reimer ¶ 5; Decl. of Wood ¶¶ 13, 15; Decl. of James ¶ 11; Decl. of Munguia ¶¶ 8-9; Decl. of Snow ¶ 9-10; Decl. of Bailey ¶ 13; Decl. of N. Hill ¶ 6; Decl. N Hill ¶ 12; Decl. Heil ¶¶ 4, 8-9; Decl. of MacDonnell ¶ 4.

of schools violates the schools right to equal protection under the law as guaranteed by the Equal Protection Clause and Petitioners request that this Court fashion an order issuing the relief sought.

### **III. GOVERNOR NEWSOM’S EXECUTIVE ORDERS ARE AN UNCONSTITUTIONAL INTERFERENCE WITH THE PETITIONERS CONTRACTUAL RIGHTS**

California Constitution Article 1, Section 9 provides in pertinent part that "a...law impairing the obligations of contracts may not be passed." In similar fashion the United States Constitution Article 1, Section 10 provides "No State shall . . . pass any Bill of Attainder, ex post facto law, or law impairing the Obligation of Contracts . . ." Legislation running afoul of these constitutional protections can be stricken.<sup>114</sup> These constitutional provisions were put into place to prevent the legislative branch from enacting bills that prevented the performance of existing contractual obligations.

Courts have applied the Contracts Clause of the California constitution to private contracts and hold that the “state cannot impair private contractual...rights.”<sup>115</sup> The State contract clause echoes the rights provided by the Federal Constitution which prohibits the government from impairing contractual obligations between private individuals.<sup>116</sup>

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<sup>114</sup> See generally, *Teachers Retirement Board v. Genest* (2007) 154 Cal.App.4th 1012; see also, *Valdes v. Cory* (1983) 139 Cal.App.3d 773 (granting a writ of mandamus where the state failed to meet its burden to demonstrate the impairment of rights was warranted by an emergency serving to protect societal interests.)

<sup>115</sup> *San Bernardino Public Employees Ass’n v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1222 [holding that “a law impairing the obligation of contracts may not be passed”]; See also *Seaton v. Clifford* (1972) 24 Cal.App.3d 46 , 52 [Decided under the former language of the contracts clause, Cal. Const. Art. I § 16 (1849).]

<sup>116</sup> *Green v. Biddle* (1823) 21 U.S. 1, 92

This Court very recently addressed the application of the *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.*<sup>117</sup> In *Alameda* the court reiterated the rule that both the U.S. and California Constitutions prohibit the enactment of laws which substantially impair contracts, including those between private parties.<sup>118</sup> This Court noted that in evaluating whether the legislation impaired private contractual rights, the U.S. Supreme Court applies a “two-step test.”<sup>119</sup> The court begins with a threshold question asking “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.” Then determines the appropriate level of scrutiny depending on the severity of the impairment.<sup>120</sup> In this analysis, courts consider “the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights.”<sup>121</sup> If the court finds that the law substantially impairs the contract, “the inquiry turns to the means and ends of the legislation”<sup>122</sup> and asks whether the state has a “significant and legitimate public purpose behind the regulation, [citation], such as the remedying of a broad and general social or economic problem. [Citation.]”<sup>123</sup> If the legislation survives that scrutiny, “the next inquiry is whether the adjustment of ‘the rights and

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<sup>117</sup> *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.*, 2020 Cal.LEXIS 4870

<sup>118</sup> *Id.* at p. 49.; see also *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2019) 6 Cal.5th 965, 977 [“Both the United States and California Constitutions contain provisions that prohibit the enactment of laws effecting a ‘substantial impairment’ of contracts, including contracts of employment.”]

<sup>119</sup> *Sveen v. Melin* (2018) 138 S.Ct. 1815, 1821

<sup>120</sup> *Alameda* at pp. 49-50, [citing (*Energy Reserves Group v. Kansas Power & Light* (1983) 459 U.S. 400, 411)]

<sup>121</sup> *Ibid.* [Citing *Sveen v. Melin*, *supra*, 138 S.Ct. at p. 1822].

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*



responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.’”<sup>124</sup>

Every year, private schools enter into hundreds of contracts with each enrolled students which requires them to provide a Christian based education.<sup>125</sup> The Governor’s Executive Orders and the CDPH directives substantially impair these contracts as the mandatory implementation of distance learning impedes Petitioner’s ability to complete its contractual obligations which places some Petitioners in a position of serious financial jeopardy due to the failure to comply with their contractual obligations, loss of students, and the assumption of contractual liability stemming from hundreds of potential breach of contract allegations from parents.<sup>126</sup> The result is that some Petitioners may be unable to continue operations or will be unable to offer similar services to future students.<sup>127</sup> Governor Newsom attempts to justify this substantial interference with the Petitioners’ contractual rights by asserting that the implementation of distance learning is necessary to further the government’s significant and legitimate public purpose of slowing the transmission of COVID-19 in counties which are on the State monitoring list. Similar to Petitioners arguments above, the Executive Orders and CDPH directives cannot survive this scrutiny where scientific studies and expert testimony<sup>128</sup> establishes that a low risk to

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<sup>124</sup> *Ibid.*

<sup>125</sup> Decl. Brian J. Bell ¶ 4.

<sup>126</sup> Decl. Brian J. Bell ¶¶ 4-6; Decl. Marc Horton ¶4; Decl. of Munguia ¶ 4; Decl. of N. Hill ¶ 8;

<sup>127</sup> Decl. Brian J. Bell ¶ 7; Decl. Marc Horton ¶¶ 4, 11.

<sup>128</sup> Decl. of Mu ¶ 3; Decl. of Victory ¶¶ 19, 23, 26; Decl. of Anderson ¶ 26; Decl of Fitzgibbons ¶¶ 27, 29, 30,37; Decl. of Kaufmann ¶¶14-19l; Decl. of Atmajian ¶¶ 7-14

students exists and that less than 2% of COVID-19 transmissions occur in individuals under the age of 20.<sup>129</sup>

Even if this Court finds that Governor Newsom's actions survive the first step of the analysis, "the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" <sup>130</sup>

The Governor's actions are unreasonable and inappropriate to justify the public purpose of the issuance of the Executive Orders and CDPH directives where there is a low risk of student transmission and a low health risk to students<sup>131</sup> and where distance learning is contrary to the opinions of the medical community.<sup>132</sup>

Accordingly, Petitioners ask that this Court issue the relief requested and stay the enforcement of the Governor's unconstitutional actions which violate Petitioners' constitutional rights under the contracts clause of both the State and Federal Constitution.

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<sup>129</sup> 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>; 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](https://wwwnc.cdc.gov/eid/article/26/10/20-1315_article); see also Decl. of Fitzgibbons ¶35.

<sup>130</sup> *Alameda* at pp. 49-50, [citing (*Energy Reserves Group v. Kansas Power & Light* (1983) 459 U.S. 400, 411)]

<sup>131</sup> 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>

<sup>132</sup> Decl. of Mu ¶ 3; Decl. of Victory ¶¶ 19, 23, 26; Decl. of Anderson ¶ 26; Decl of Fitzgibbons ¶¶ 27, 29, 30,37; Decl. of Kaufmann ¶¶14-19

#### **IV. GOVERNOR NEWSOM LACKS THE AUTHORITY UNDER STATE LAW TO ISSUE THESE ORDERS AND ARE NON-DELEGABLE DUTIES**

Power and authority to make and enforce laws to protect public health and safety is limited.<sup>133</sup> The Governor is granted the authority to declare a state of emergency when he makes a finding under Government Code § 8558 (conditions required) and either (1) is requested by a City or County to declare an emergency or (2) he finds that local authority is inadequate to cope with the emergency.<sup>134</sup> A state of emergency “means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons ... caused by ... epidemic ... which, by reason of their magnitude, are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county ... and require the combined forces of a mutual aid region or regions to combat ....”<sup>135</sup> But, “[t]he Governor shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant.”<sup>136</sup>

During a State of Emergency the Governor has “...complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California...”<sup>137</sup> “In exercise thereof, he shall promulgate, issue, and enforce such orders and regulations as he deems necessary...”<sup>138</sup>

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<sup>133</sup> See Cal. Const. Article XI Section 7; *see also Miller v. Board of Public Works* (1925) 195 Cal. 477, 484.

<sup>134</sup> Cal Gov Code § 8625.

<sup>135</sup> Cal. Gov. Code § 8558.

<sup>136</sup> Cal. Gov. Code § 8629.

<sup>137</sup> Cal. Gov. Code § 8627

<sup>138</sup> *Ibid.*

**A. The State of Emergency Should Have Already Been Terminated**

On March 18, 2020, Governor Newsom penned a letter to the President of the United States stating, “[w]e project that roughly 56% of our population - 25.5 million people - will be infected with the virus over an eight week period.”<sup>139</sup> The Governor provided the projection in conjunction with a request that the USNS Mercy Hospital Ship be sent to Los Angeles to “help decompress the health care delivery system” in order to have the ability to address “critical care needs.”<sup>140</sup> The projection, at the time, was consistent with proclamations made when declaring the March 4, 2020 state of emergency indicating that “the number of persons needing medical care may exceed locally available resources” and that mitigation efforts will be necessary “to respond to an increasing number of individuals requiring medical care and hospitalization.”

But, contrary to the projections, there are only 632,667<sup>141</sup> persons who contracted the virus within the State of California today. In fact, during the six week period that the USNS Mercy Hospital Ship was stationed in the LA docks, the doctors only treated 77 patients. As addressed above, studies and experts consistently demonstrate that the

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<sup>139</sup> 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>

<sup>140</sup> *Ibid.*

<sup>141</sup> 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=n](https://public.tableau.com/views/COVID-19CasesDashboard_15931020425010/Cases?:embed=y&:showVizHome=n)  
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rates are even lower in the student population, particularly between individuals under the age of 10.<sup>142</sup>

Flattening the curve and slowing the transmission of coronavirus throughout the State of California assured that State hospitals were not overrun, and ensuring there was sufficient capacity in the hospitals, are the core considerations for Governor Newsom declaring a state of emergency. The continuing state of emergency should have been terminated because all of the Governor's stated concerns have been sufficiently resolved. If the state of emergency is no longer valid, the Executive Orders and CDPH directives are similarly invalid. Accordingly, the Petitioners request that this Court issue an order invalidating the Executive Orders and CDPH directives even if the laws are found to be constitutional.

**B. The Emergency Services Act is unconstitutional Because It Grants Unbridled Discretion To The Governor Over All Liberty Interests and Fails To Establish Any Termination or Judicial Review Process**

"It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."<sup>143</sup>

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<sup>142</sup> 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 Battacharya ¶¶ 24-37.

<sup>143</sup> *Shuttlesworth v. Birmingham* (1969) 394 U.S. 147, 151 (quoting *Staub v. City of Baxley* (1958) 355 U.S. 313, 322).

Furthermore, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible.<sup>144</sup>

Governor Newsom wields the Executive Powers under the State of Emergency like a sword, exercising greater discretion than that of granting a license or waivers. Instead, the Emergency Services Act grants the Governor unbridled discretion to suspend all civil protections indefinitely including, but not limited to, the suspension of any law, prohibiting all assemblies, suspending the liberty of movement, suspending in-person instruction to the detriment of students right to education, and interfering with contractual obligations of Petitioners among other restrictions without due process of the law.<sup>145</sup>

Five months after the declared state of emergency, the Governor continues to suspend liberty rights, including those of students and private schools, for unlimited durations based on unproven projections and contrary to scientific reports from experts and the CDC. Therefore, the

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<sup>144</sup> *Freedman v. Maryland* (1965) 380 U.S. 51, 59; *Vance v. Universal Amusement Co.* (1980) 445 U.S. 308, 316 (striking statute on ground that it restrained speech for an “indefinite duration”

<sup>145</sup> Cal Gov Code § 8627 (“During a state of emergency the Governor shall, to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter. In exercise thereof, he shall promulgate, issue, and enforce such orders and regulations as he deems necessary, in accordance with the provisions of Section 8567”); See also, Cal Gov Code § 8567(a) (“The Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter. The orders and regulations shall have the force and effect of law”); Cal. Gov. Code § 8571 (the Governor may suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency ... where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency”).)

Governor's order unlawfully violates the principles against granting a single governmental official unbridled discretion over civil liberties without any limit on the duration of such restrictions. The CDPH's authority and basis for implementing and issuing directives relating to private schools and the suspension of in-person instruction is derived from the Governor's state of emergency. Thus, Petitioners request that this Court issue an appropriate order staying the enforcement of the Governor's executive orders and the CDPH directives and permit students to elect to return to in-person instruction.

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

**A. 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, beneficial, and effective.”<sup>146</sup> 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 private schools and their students

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<sup>146</sup> *Ross v. Bd. of Educ.* (1912) 18 Cal. App. 222, 225

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.

**B. 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.<sup>147</sup>

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 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 private 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 as many of these schools may never open again.<sup>148</sup>

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

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<sup>147</sup> *Lewis, supra*, 19 Cal. 4th at p. 1234; *see also Alexander v. Superior Court*, 5 Cal. 4th 1218 (1993); *Ng v. Sup. Ct.* (1992) 4 Cal. 4th 29, 35 (clear error under established law and unusual urgency are factors for *Palma* procedure).

<sup>148</sup> Decl. Brian J. Bell ¶¶ 4-6; Decl. Marc Horton ¶4; Decl. of Munguia ¶ 4; Decl. of N. Hill ¶ 8.




writ of mandate in the first instance, Petitioners respectfully request this Court to give *Palma* notice to Respondents.<sup>149</sup>

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.<sup>150</sup> 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.

### **CONCLUSION**

For all of 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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<sup>149</sup> *Palma*, *supra*, 36 Cal. 3d at p. 178; *see also Ng*, *supra*, 4 Cal. 4th at p. 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”).

<sup>150</sup> Cal. Civ. P. Code § 1088. *Palma*, *supra*, 36 Cal. 3d at p. 180.