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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MATTHEW BRACH, an individual; JESSE PETRILLA, an individual; LACEE BEAULIEU, an individual; ERICA SEPHTON, an individual; KENNETH FLEMING, an individual; JOHN ZIEGLER, an individual; ALISON WALSH, an individual; ROGER HACKETT, an individual; CHRISTINE RUIZ, an individual; Z.R., a minor; ADEBUKOLA ONIBOKUM, an individual; BRIAN HAWKINS, an individual; TIFFANY MITROWKE, an individual; MARIANNE BEMA, an individual; ASHLEY RAMIREZ, an individual,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California; ROBERT A. BONTA, in his official capacity as the Attorney General of California; TOMÁS J ARAGÓN, in his official capacity as the State Public Health Officer of California and Director of the California Department of Public Health; TONY THURMOND, in his official capacity as State Superintendent of Public Instruction of California and Director of Education of California,

Defendants-Appellees.

No. 20-56291

D.C. No. 2:20-cv-06472-SVW-AFM

OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted March 2, 2021
Pasadena, California

Before: Eugene E. Siler,* Andrew D. Hurwitz, and Daniel P. Collins, Circuit Judges.

Opinion by Judge Collins; Dissent by Judge Hurwitz

COLLINS, Circuit Judge:

Plaintiffs, 14 parents and one student, appeal from the district court's grant of summary judgment dismissing their federal constitutional challenges to the State of California's extended prohibition on in-person schooling during the Covid-19 ("Covid") pandemic. We conclude that, despite recent changes to the State's Covid-related regulations, this case is not moot. As to the merits, we hold that the district court properly rejected the substantive due process claims of those Plaintiffs who challenge California's decision to temporarily provide *public* education in an almost exclusively online format. Both the Supreme Court and this court have repeatedly declined to recognize a federal constitutional right to have the State affirmatively provide an education in any particular manner, and Plaintiffs have not made a sufficient showing that we can or should recognize such a right in this case.

* The Honorable Eugene E. Siler, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

We reach a different conclusion, however, as to the State's interference in the in-person provision of *private* education to the children of five of the Plaintiffs in this case. California's forced closure of their private schools implicates a right that has long been considered fundamental under the applicable caselaw—the right of parents to control their children's education and to choose their children's educational forum. Because California's ban on in-person schooling abridges a fundamental liberty of these five Plaintiffs that is protected by the Due Process Clause, that prohibition can be upheld only if it withstands strict scrutiny. Given the State closure order's lack of narrow tailoring, we cannot say that, as a matter of law, it survives such scrutiny. We therefore reverse the district court's grant of summary judgment as to these five Plaintiffs and remand for further proceedings.

As for Plaintiffs' claims under the Equal Protection Clause of the Fourteenth Amendment, we conclude that the public-school Plaintiffs have failed to make a sufficient showing of a violation of the Equal Protection Clause. The challenged distinctions that the State has drawn between public schools and other facilities are subject only to rational-basis scrutiny, and these distinctions readily survive that lenient review. As to the private-school Plaintiffs, we vacate the district court's judgment rejecting their Equal Protection claims and remand for further consideration in light of the conclusion that the State's actions implicate a fundamental right of those Plaintiffs.

I

This case involves a challenge to various orders that California has issued concerning the operation of schools and other facilities during the current Covid pandemic. The Defendants are various officials of the State of California, whom we refer to collectively as "California" or "the State." Among the Plaintiffs are 10 parents of current California public-school students and one public-school student (collectively, the "public-school Plaintiffs").[1] Also included among the Plaintiffs are five parents (collectively, the "private-school Plaintiffs") who seek to send their children to private school for in-person instruction. The various Plaintiffs contend that, as applied to their schools, California's prohibition on in-person

[1] Three of the Plaintiffs (Kenneth Fleming, Tiffany Mitrowke, and Ashley Ramirez) alleged in the operative complaint that their children attended public school but then failed to mention that detail in their declarations. The State has not contested that their children attend public schools, however, and so the point is properly taken as undisputed for purposes of summary judgment. One parent (Lacee Beaulieu) has one child in public school and one child in private school. Two Plaintiffs (Marianne Bema and Brian Hawkins) do not state, either in their declarations or in the complaint, which types of school their children attend. Given this failure of proof, there is no basis in the record to exclude them from the group of Plaintiffs whose claims fail on the merits—*viz*., the public-school Plaintiffs. Accordingly, they are properly classified as public-school Plaintiffs for purposes of this appeal. One Plaintiff (Alison Walsh) previously had her children enrolled in public school but switched them to private school in the fall of 2020. Because, however, she did not state that she planned to switch them back to public school if the challenged orders were lifted, and because the only relief sought in the complaint is prospective, she is properly classified as only a private-school Plaintiff. By contrast, because Plaintiff Jesse Petrilla has averred that he will switch his current private-school children back to public school upon reopening, he is appropriately deemed to be only a public-school plaintiff.

learning "effectively preclud[ed] children from receiving a basic minimum education" and violated their fundamental rights under the Due Process Clause of the Fourteenth Amendment. Plaintiffs also allege that California's school-closure mandate violated the Equal Protection Clause by "arbitrarily treat[ing] Plaintiffs' children (and other minors attending public and private schools) differently from those in nearby school districts; from those in childcare; and from those attending summer camps, even though all such children and their families are similarly situated." Plaintiffs sought a declaratory judgment, injunctive relief, and other "appropriate and just" relief for the alleged violation of their constitutional rights.

On appeal from the district court's summary judgment against them, Plaintiffs ask us to reverse and remand with instructions to grant summary judgment in their favor. In reviewing the factual and procedural background concerning Plaintiffs' claims, we begin by describing the legal framework of the relevant restrictions that California has placed on the operation of public and private schools, and we then summarize the specific factual context of Plaintiffs' claims.

A

As cases of Covid began to rise in early 2020, government officials across the country began to issue orders seeking to control the spread of the virus. In framing its de jure restrictions, California adopted a comprehensive approach. On

March 19, 2020, the Governor issued Executive Order N-33-20, which directed all California residents "to immediately heed the current State public health directives," including the requirement "to stay home or at their place of residence *except* as needed to maintain continuity of operations of the federal critical infrastructure sectors." *See* Cal. Exec. Order N-33-20 (Mar. 19, 2020) (emphasis added).[2] Under this order, which remained in effect until June 11, 2021, the default rule was that California residents were prohibited "from leaving their homes for any reason, except to the extent that an *exception* to that order granted *back* the freedom to conduct particular activities or to travel back and forth to such activities." *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 944 (9th Cir. 2020) (Collins, J., dissenting). Accordingly, the ability to operate schools (or anything else) turned on what sort of permission State officials granted back either in the form of rules governing "critical infrastructure sectors" or some other exception to the stay-at-home order.

Shortly thereafter, on March 22, 2020, the California State Public Health Officer issued a list of designated "essential" workers who were allowed to leave their homes to support specified critical infrastructure sectors. That list expressly

[2] Previously, the Governor had declared a state of emergency on March 4, 2020, and he issued an executive order on March 12 ordering that "[a]ll residents are to heed any orders and guidance of state and local public health officials." Cal. Exec. Order N-25-20 (Mar. 12, 2020).

included workers teaching at "public and private . . . K-12 schools," but *only* for "distance learning." Although many schools had already independently decided to close by that time, the effect of these orders was to impose a new State mandate that schools remain limited to "distance learning."

On May 4, 2020, the Governor issued Executive Order N-60-20, which reiterated the obligation to "continue to obey State public health directives," which "have ordered all California residents [to] stay home except for essential needs, as defined in State public health directives." Cal. Exec. Order N-60-20 (May 4, 2020). This order addressed the State's issuance of a planned four-stage "Roadmap" for reopening, which defined "Stage 1" as the then-existing largely closed state of affairs. The order stated that, in implementing such a phased reopening, the State Public Health Officer could establish "criteria and procedures" to allow local health officers "to establish and implement public health measures less restrictive" than the State-imposed measures. *Id*. The order further stated that no aspect of the order, including the State Public Health Officer's "establishment or implementation of such criteria or procedures," would be subject to California's "Administrative Procedure Act [('APA')], Government Code section 11340 et seq." *Id*. The order also declared that nothing in these "criteria and procedures" governing local health officers "shall limit the authority of the State Public Health

Officer to take any action she deems necessary to protect public health in the face of the threat posed by COVID-19." *Id*.

In a follow-on May 7, 2020 order, the State Public Health Officer stated that she would "progressively designate sectors, businesses, establishments, or activities that may reopen with certain modifications." *See* Cal. State Public Health Officer Order of May 7, 2020. This order further provided that, "[t]o the extent that such sectors are re-opened, Californians may leave their homes to work at, patronize, or otherwise engage with those businesses, establishments, or activities," provided that, "at all times," they must "practice physical distancing, minimize their time outside of the home, and wash their hands frequently." *Id*. The order reiterated that, apart from any such designated exceptions, the March 19 stay-at-home order "otherwise remains in full effect." *Id*.

The initial Roadmap had suggested that in-person school instruction might be designated as an activity authorized at "Stage 2." However, the State reversed course on its overall reopening plan in mid-July. On July 13, 2020, the State Public Health Officer issued an order generally closing a variety of services (such as bars, indoor dining, movie theaters, and museums) statewide and closing other activities (such as gyms, places of worship, hair salons, and malls) in those counties that appeared on the State's "County Monitoring List" for more than three

days.[3] *See* Cal. State Public Health Officer Order of July 13, 2020. On July 17, 2020, the California Department of Public Health ("CDPH") issued a "Reopening In-Person Learning Framework for K-12 Schools" for the 2020–2021 school year (hereinafter the "Framework"). Consistent with the authority granted in the Governor's May 4 order, this Framework established "criteria" under which "local health jurisdiction[s]" could deviate from the otherwise applicable statewide ban on in-person learning.

Under the Framework's criteria, a school generally could reopen for in-person instruction only if the school's local health jurisdiction had *not* been on the County Monitoring List for the preceding 14 days. If the local health jurisdiction was on the County Monitoring List over that 14-day period, then the school was required to "conduct distance learning only." After consultation with the CDPH, a local health officer could grant a waiver from these criteria, but only in the case of "elementary schools" and only if the relevant school official requested it. As the CDPH later explained, this waiver policy was justified due to the "lower risk of child-to-child or child-to-adult transmission in children under age 12," and the "particularly low" "risk of infection and serious illness in elementary school

[3] A county was placed on the County Monitoring List if it failed to meet the State's benchmarks on various measures, such as the rate of new infections per 100,000 residents, the test positivity rate, and the rate at which hospitalizations were increasing.

children." Once a school reopened, it was required to follow certain protocols, but it was *not* required to close again simply because its local health jurisdiction might *later* be placed on the County Monitoring List. Nonetheless, the Framework set forth guidelines for when closure of an individual school was "recommended." The Framework also specified that, "if 25% or more of schools in a district have closed due to COVID-19 within 14 days," then the relevant "superintendent should close [the] school district."

On August 3, 2020, the CDPH issued detailed guidance for conducting any authorized in-person operations in "Schools and School-Based Programs."[4] The guidance covered such matters as face coverings, social distancing, hand washing, disinfection, and ventilation. On the same day, the CDPH issued an additional memorandum concerning elementary-school waiver requests, and this document stated that the CDPH recommended against waivers for elementary schools in counties with 14-day case rates of more than 200 cases per 100,000 people.

Later that same month, the CDPH issued guidance allowing a "specified subset of children and youth" to meet in "controlled, supervised, and indoor environments," but only in small "cohorts" of no more than 14 children, and with

[4] Although the Q&A document accompanying this Guidance characterized it as a binding "public health directive," the extent to which *each* of the various statements in this document constituted a binding legal prescription is not always clear, because many of them were couched in terms of what "should" be done rather than what "must" be done.

no more than two supervising adults. Such cohorts could meet at a school even if that school was otherwise *not* authorized to conduct in-person instruction. Simultaneously, the CDPH issued a further document that was "intended to supplement" this cohort guidance. That document clarified that the guidance was *not* intended "to allow for in person instruction of all students," but was instead intended "to establish minimum parameters for providing specialized services, targeted services and support for students" whose schools are closed. Accordingly, the document confirmed, only "[i]n-person *targeted, specialized* support and services in stable cohorts is [sic] permissible" (emphasis added). In describing what "qualifies as a specialized and targeted support services [sic]," the document states that this will be determined by "local educational agencies," but that the phrase "include[s] . . . occupational therapy services, speech and language services, and other medical services, behavioral services, educational support services as part of a targeted intervention strategy or assessments, such as those related to English learner status, individualized educational programs and other required assessments."

On August 28, 2020, the Acting State Public Health Officer issued an order announcing an "updated framework for reopening," which eventually became known as the "Blueprint for a Safer Economy." *See* Cal. State Public Health Officer Order of Aug. 28, 2020. Under this new system, California used specified

metrics to assign each county to one of four tiers, ranging from Tier 1 (indicating "Widespread" community transmission) to Tier 4 ("Minimal" transmission). This August 28 order superseded the prior July 13 order that relied on the "County Monitoring List." *Id*. Under the new order, "Tier 1" replaced the County Monitoring List, although the criteria ultimately developed for being assigned to that tier differed from those that would have placed a county on the monitoring list. *Id*. Under the "County Monitoring List" system, a county was placed on the list if either (1) its 14-day case rate was over 100 per 100,000 people; or (2) *both* (i) its 14-day case rate was over 25 per 100,000 and (ii) its 7-day testing positivity rate was over 8 percent. Under the tier system, a county would be assigned to Tier 1 if either (1) its 7-day case rate was over 7 per 100,000 *or* (2) its 7-day test positivity rate was over 8 percent.

In subsequent guidance, the CDPH reiterated that the July 17, 2020 school reopening "Framework" remained in effect, except that any reference to the "County Monitoring List" now referred to "Tier 1" counties. Accordingly, "[s]chools in counties within Tier 1 [we]re not permitted to reopen for in-person instruction," except pursuant to the waiver process for certain elementary school grades. Once a county fell out of Tier 1 for 14 days, then schools were "eligible for reopening at least some in-person instruction" in accordance with the applicable protocols. The CDPH also reaffirmed that, once a school reopened, it

was not required to close again even if its county "move[d] back to Tier 1."

After the district court granted summary judgment in this case, the CDPH revised its school reopening framework on January 14, 2021. Under the State's updated "Reopening In-Person Instruction Framework" (hereinafter the "Revised Framework"),[5] elementary schools in Tier 1 could open for in-person instruction if the county's adjusted case rate remained below 25 cases per 100,000 people per day for at least five consecutive days. In connection with this loosening of the elementary-school closure rules, the Revised Framework terminated the pre-existing waiver process (although previously granted waivers remain valid). This Revised Framework was further updated on March 20, 2021 to allow schools to reopen for in-person instruction for all grades K-12 if the adjusted weekly county case rate fell below 25 per 100,000 population per day.[6] Schools had at least three

[5] The State's unopposed motions for judicial notice are hereby granted. As the State's initial request for judicial notice explains, intervening revisions to California's various orders supersede some of the provisions that Plaintiffs sought to enjoin and are to that extent necessarily relevant to this appeal from the denial of Plaintiffs' claims for declaratory and injunctive relief. We likewise take judicial notice of the State's more recent orders making further relevant modifications. To the extent that some of the items attached to the State's most recent motion might not otherwise be subject to judicial notice, we consider those items in light of Plaintiffs' lack of objection, but only for the limited purpose for which they were offered (namely, to address the issue of mootness). Because Plaintiffs' opposed motion requests judicial notice of press releases and public statements, rather than operative orders and guidance, we deny that motion.

[6] The Revised Framework was later updated but remained the same in the material respects discussed here. *See* Revised Framework (June 4, 2021),

weeks to reopen, even if the county adjusted case rate subsequently surpassed 25 per 100,000 per day. If a school did not reopen within the three-week eligibility window and the case rates once again rose above the reopening threshold, the school was presumably not permitted to reopen for in-person instruction.

In addition, Assembly Bill 86 was enacted into law on March 5, 2021, and it imposed several requirements in connection with the provision of in-person instruction. *See* 2021 Cal. Stat. ch. 10 (A.B. 86). In particular, the law requires that, at least five days before providing in-person instruction for grades 1 to 12, any local educational agency or private school must "post a completed COVID-19 safety plan on its internet website home page." *See* CAL. EDUC. CODE § 32091(b)(1). If a public school is in a county in Tier 1, then its safety plan must also be submitted to the CDPH and the relevant local health agency five days before reopening. *Id.* § 32091(b)(2). In Tier 1 counties, a public school may not provide in-person instruction until it resolves any deficiencies in its safety plan identified by CDPH or the relevant local health agency. *Id.*

On June 11, 2021, the Governor issued Executive Order N-07-21, which formally revoked both Executive Order N-33-20 (the stay-at-home order) and Executive Order N-60-20 (the order on which the State's Blueprint framework of

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https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19-K12-Schools-InPerson-Instruction.aspx#In-Person%20School%20Reopening.

restrictions was based). *See* Cal. Exec. Order N-07-21 (June 11, 2021). As a result, "all restrictions on businesses and activities deriving from that framework, including all aspects of the Blueprint for a Safer Economy," were rescinded. *Id*. The new order, however, expressly preserves the State Public Health Officer's authority to issue Covid-related directives and to do so without regard to the restrictions of California's APA.[7] *Id*. Contemporaneously with the issuance of this new executive order, the State Public Health Officer issued an order, effective June 15, 2021, preserving a limited set of statewide restrictions, including guidance concerning face coverings and provisions governing so-called "Mega Events." *See* Cal. State Public Health Officer Order of June 11, 2021.[8] Notably, this order specifically preserved "the current COVID-19 Public Health Guidance for K-12 Schools in California, the current COVID-19 Public Health Guidance for Child

[7] To the extent that the dissent suggests that the State has eliminated the obligation to obey orders of the State Public Health Officer, *see* Dissent at 5, that is wrong. Executive Order N-07-21's recitals specifically reaffirm that, under the existing provisions of the California Health and Safety Code and other laws, the State Public Health Officer is "empowered to issue *mandatory* public health directives to protect the public health in response to a contagious disease," and the order then continues to expressly exempt "any Orders, guidance, or directives of the State Public Health Officer relating to COVID-19" from the provisions of California's APA. *See* Cal. Exec. Order N-07-21 (emphasis added).

[8] https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Beyond-Blueprint.aspx. *See also* Beyond the Blueprint for Industry and Business Sectors, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Beyond-Blueprint-Framework.aspx.

Care Programs and Providers, and the portions of the current K-12 Schools guidance that have been made explicitly applicable to day camps and other supervised youth activities." *Id*. That Guidance for K–12 schools, in turn, specifically stated that the "Blueprint for a Safer Economy continues to inform the school reopening process." *See* Revised Framework (June 4, 2021). Thus, while all other industries and sectors were no longer governed by the Blueprint, the school reopening process continued to be "based on Tiers, defined using the [county case rate], the 7-day average of daily COVID-19 cases per 100,000 population, and the test positivity in a county." *Id*.

On July 12, 2021, the CDPH issued guidance for the upcoming 2021–2022 school year that adopts a new framework that emphasizes masking and other measures, with the stated aim of maximizing opportunities for in-person instruction. *See* CDPH, *COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School Year*.[9] The guidance states that its requirements and recommendations are "designed," based on the "current scientific evidence about COVID-19," "to enable all schools to offer and provide full in-person instruction." Although the guidance states that CDPH's objective is to enable in-person instruction to continue "even if pandemic dynamics shift," the guidance does not

[9] https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/K-12-Guidance-2021-22-School-Year.aspx.

expressly foreclose the possibility that school closures could be required in the future. *Id*. Indeed, the guidance reaffirms its provisional nature by stating that it "will be reviewed regularly by the [CDPH]," which "will continue to assess conditions on an ongoing basis." *Id*.

B

On July 21, 2020, Plaintiffs filed suit against California requesting declaratory and injunction relief. Plaintiffs subsequently sought a temporary restraining order ("TRO"), which the district court denied. Shortly thereafter, the district court requested briefing on whether it should grant summary judgment *sua sponte*. In opposing summary judgment, Plaintiffs relied largely on the factual presentation they had made in connection with their earlier-filed TRO and preliminary injunction motions. Those submissions included declarations from each of the adult Plaintiffs, and these declarations constitute the primary record evidence concerning the individual Plaintiffs' respective factual situations.

The declarations submitted by the public-school Plaintiffs assert that their children have been harmed by distance learning. For example, Matthew Brach describes detrimental academic and social impacts on his two children. He further asserts that his school district had taken steps "to be able to safely reopen" the schools that his children attend. These steps included purchasing personal protective equipment, handwashing stations, and individual water filling stations,

as well as implementing a mitigation strategy comprising, *inter alia*, staggered arrival times, a lunchtime "grab/go" model, and mask requirements.

The private-school Plaintiffs submitted similar declarations, alleging that their children have suffered emotionally or academically as a result of California's distance-learning mandates. One of these parents, Roger Hackett, has a sixth-grade son who attends Oaks Christian School in Los Angeles County. Hackett alleges that Oaks Christian would have provided in-person instruction but could not do so due to the State's orders. Consequently, his son has received only "remote learning," which in Hackett's view "does NOT come close to replacing actual in-school, in-person teaching and learning." Hackett attested that he would immediately send his son back to school for in-person instruction upon reopening.

After receiving briefing, the district court granted summary judgment to California on December 1, 2020. This expedited appeal followed. "We review de novo the district court's grant of summary judgment." *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011). "[V]iewing the evidence in the light most favorable to the nonmoving party," we must determine "whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.*

II

Before turning to the merits of Plaintiffs' claims, we first address the

threshold issue of whether their claims are moot.[10] After oral argument on March 2, 2021, the counties in which Plaintiffs' schools operate were reclassified so that they no longer fell within Tier 1. The State reclassified Santa Clara County to Tier 2 on March 2; Los Angeles and Orange Counties on March 9; and San Diego, Riverside, and Ventura Counties on March 16.[11] In light of these post-argument developments, we requested and received supplemental briefs from the parties as to whether this matter was now moot. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978) (because mootness "implicates our jurisdiction,"

[10] On appeal, California has not contested the Plaintiffs' Article III standing to bring this suit, and in our view, properly so. Although a few of the declarations presented by Plaintiffs are somewhat barebones, they nonetheless provide a reasonable basis for concluding that their schools' closures were not voluntary but were instead fairly traceable to the State's prohibition on in-person instruction. The declarations therefore likewise confirm that injunctive and declaratory relief would redress Plaintiffs' injuries by ensuring that those schools can provide in-person instruction. That is sufficient to establish the elements of Article III standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (To establish standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."). At the very least, Plaintiffs Brach's and Hackett's declarations amply establish standing by specifically averring that their children's schools were preparing to open for in-person instruction in fall 2020 but were thwarted by the State's orders.

[11] *See* CDPH, *California Blueprint Data Archive*, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CaliforniaBlueprintDataCharts.aspx. A new tier status "goes into effect the Wednesday following each weekly tier assignment announcement on Tuesdays." *See* CDPH, *Blueprint for a Safer Economy*, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19CountyMonitoringOverview.aspx.

court has an obligation to raise it *sua sponte*); *see also Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086 (9th Cir. 2011) ("[A]n actual, ongoing controversy [must] exist at all stages of federal court proceedings.").

The supplemental materials submitted by the State in support of mootness indicate that several of the public-school Plaintiffs' schools opened for in-person instruction before the end of the 2020–2021 school year. Those materials do not affirmatively show that any of the private schools had similarly reopened before the end of the 2020–2021 school year, but the district court record already indicates that Erica Sephton's child's school reopened pursuant to a school-specific waiver in the fall of 2020. Although the evidence it cites is somewhat unclear, the State represents that Oaks Christian School, which Hackett's child attends, reopened before the end of the 2020–2021 school year. At the very least, once their counties were given their new tier assignments, all of Plaintiffs' schools became eligible to reopen under the State's Revised Framework.[12] Under that framework, any schools that actually reopened would not need to close again even

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[12] The dissent notes that a special law regulating the provision of "distance learning" in public school during the 2020–2021 school year became inoperative, by its terms, on June 30, 2021. *See* CAL. EDUC. CODE §§ 43503, 43511. *See* Dissent at 6 n.3. To the extent that the dissent thereby insinuates that the lapsing of this statute would somehow *prevent* a reclosure of schools under the same executive authorities that Defendants invoked, there is no support for that suggestion. Indeed, the dissent overlooks the fact that in March 2020, well before that now-lapsed law took effect, schools in California were already limited to distance learning under those executive authorities. *See supra* at 6–7.

if the school's county returned to Tier 1. And, as noted earlier, the State recently released new guidance for the 2021–2022 school year that does not rely on the tier system or school closures.

Our analysis of mootness in this case is framed by the Supreme Court's recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). There, the Court rejected a comparable claim of mootness in connection with the plaintiffs' challenge to New York's system of Covid restrictions, which used an analogous "zone" system to impose capacity limits for religious services. Similar to California's tier-based system for counties, New York's system classified geographic areas *within* counties or cities into zones based on a combination of pre-set thresholds and other criteria. In New York's case, the thresholds for each respective zone were based on the "7-day rolling average positivity rate" as well as the rate of "new daily cases per 100,000 residents on [a] 7-day average."[13] At the time they first sought relief, the New York plaintiffs' relevant facilities were in either "red" zones, in which "no more than 10 persons may attend each religious service," or in "orange" zones, in which "attendance is capped at 25." 141 S. Ct. at 66. By the time the matter reached the Supreme Court, however, the State had "reclassified the areas in question from orange to

[13] *See New York "Micro-Cluster" Strategy* (Oct. 21, 2020), https://www.governor.ny.gov/sites/default/files/atoms/files/MicroCluster_Metrics_10.21.20_FINAL.pdf.

yellow, and this change mean[t] that the applicants [could] hold services at 50% of their maximum occupancy." *Id*. at 68. The Court declined to treat the matter as moot, citing cases involving the voluntary cessation doctrine, *see id*. (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)), and the rule governing disputes that are capable of repetition but evading review, *see id*. (citing *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007)). As the Court explained, the plaintiffs remained under a threat that the areas would be reclassified, and in the event that that happened, the plaintiffs would likely not be able to secure relief from the Court before experiencing irreparable harm. *Id*. Under these circumstances, the plaintiffs should not have to "bear the risk of suffering further irreparable harm in the event of another reclassification." *Id*. at 68–69.

We conclude that the same two doctrines invoked in *Diocese of Brooklyn* also apply here and confirm that this case is not moot.[14]

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[14] The dissent suggests that *Diocese of Brooklyn* may not have relied on the voluntary cessation doctrine at all, because (according to the dissent) the Court focused its discussion on the rule governing disputes that are capable of repetition yet evading review. *See* Dissent at 9 n.4. That is wrong. On the page of *Friends of the Earth* that *Diocese of Brooklyn* cites, the Court discussed and relied upon *only* the doctrine of voluntary cessation. *See* 528 U.S. at 189 ("The only conceivable basis for a finding of mootness in this case is [Defendant's] voluntary conduct."). *Friends of the Earth* does not even mention the capable-of-repetition-but-evading-review doctrine until several pages later, and then *only* for the limited purpose of explaining why a mootness inquiry is distinct from an Article III

A

To the extent that the State has now removed its prior *per se* school-closure order, that is a result of the State's voluntary conduct in repeatedly changing the framework of restrictions. The general rule is that a "voluntary cessation of allegedly illegal conduct does not deprive the [court] of power to hear and determine the case, *i.e.*, does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). To establish mootness in such circumstances, the defendants bear the "heavy" burden of demonstrating that "'there is no reasonable expectation that the wrong will be repeated.'" *Id*. at 633 (citation omitted); *see also Friends of the Earth*, 528 U.S. at 189 ("The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." (simplified)). California has failed to carry that heavy burden here.

California argues that the voluntary cessation doctrine does not apply at all, because, in its view, the case became moot when the relevant counties were reclassified into lower tiers, and that reclassification, according to the State, is attributable to changes in underlying Covid infection rates, rather than to any changes in California's directives. This argument is foreclosed by *Diocese of*

standing inquiry. *Id*. at 190–91. *Diocese of Brooklyn* thus squarely relied on the voluntary cessation doctrine.

Brooklyn. There, the Supreme Court applied the voluntary cessation doctrine, even though the change in the applicable restrictions was due to reclassifications *within* the zone system established by the New York Governor's executive order, rather than to the adoption of a new system. *See* 141 S. Ct. at 68–69. The Court recognized that New York's then-current matrix of Covid-related restrictions could hardly be treated as if it were an independently determined system that limited the Governor's discretion and ensured that the challenged restrictions would never be reinstated. The Court thus necessarily rejected the very same argument that California presses here.

Because the voluntary session doctrine applies in this case, the question is whether the State has carried its "formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190 (emphasis added). California has failed to do so. The State's supplemental brief insists that it is "entirely speculative" whether Defendants would ever choose to reinstate a school-closure order, and the dissent contends that this comment shows that the State has "disclaimed any such intention." *See* Dissent at 10. On the contrary, the State's coy assertion that it is "speculative" whether it might close schools again merely underscores the State's refusal even to say that it *will not* do so.

Moreover, as the Supreme Court explained in rejecting California's most

recent—and comparable—mootness argument, a challenge to state restrictions is not moot when "officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (quoting *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (Gorsuch, J., statement)). So too, here, nearly the entire edifice of California's oft-changing Covid-related restrictions is the product of Defendants' own unilateral decrees, which have rested on a comparable retention of unbridled emergency authority to promulgate whatever detailed restrictions Defendants think will best serve the public health and the public interest at any given moment.

Thus, during the course of this litigation, Defendants have previously tightened Covid-related school restrictions as they have deemed warranted, most notably when they replaced the "County Monitoring List" with a stricter set of criteria that made it easier for counties to fall under the State's school-closure mandate. *See supra* at 11–12. More recently, they loosened the relevant criteria, thereby facilitating an earlier escape from that restriction by some counties' schools. *See supra* at 13–14. In doing so, Defendants at first notably refrained from abolishing the revised school reopening framework despite the State's decision to exempt all other industry and retail sectors from the restrictions imposed under the "Blueprint for a Safer Economy." *See supra* at 14–16.

Although the CDPH has now released a new framework for the 2021–2022 school year that does not include reliance upon school closures, the Governor and the State Public Health Officer still retain the authority to alter the rules at a moment's notice should changing circumstances, in their view, warrant new restrictions. *See Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1230 n.1 (9th Cir. 2020) (revocation of challenged directive did not moot plaintiffs' claims because "Governor Sisolak could restore the Directive's restrictions just as easily as he replaced them, or impose even more severe restrictions"). And they have reserved the authority to do so without having to comply with any particular procedural restraints: as noted earlier, *see* supra at 14–15, the Governor's most recent executive order continues to waive the requirements of California's APA for any Covid-related CDPH restrictions. The zig-zag course of California's various Covid-related restrictions confirms that the current easing is attributable to Defendants' voluntary conduct and does not render the case moot. *See*, *e.g.*, *Kikumura v. Turner*, 28 F.3d 592, 597 (7th Cir. 1994) (no mootness of constitutional claim seeking injunctive and declaratory relief where public official's policies had "ebbed and flowed throughout the course of the litigation").

Accordingly, if the CDPH became concerned that case rates are increasing, that the pace of immunization has slowed, and that new variants pose a threat, it has the authority to swiftly revise the relevant restrictions and reimpose school

closures, even for reopened schools, in specified areas. The dissent entirely discounts this possibility, *see* Dissent at 10–12, but it provides no justification for its certainty. There is no basis for contending that current case rates are low enough, by themselves, to eliminate any reasonable possibility of a future school-closure order. Indeed, recent case rates in some areas have begun to edge back up towards levels that, under earlier iterations of Defendants' restrictions, would have landed a county in Tier 1 and would have triggered an order to keep schools closed. For example, Defendants at one point used a low 7-day average daily case rate of 7 cases per 100,000 as a benchmark for keeping schools closed, *see supra* at 12, and Los Angeles County's 7-day average daily case rate has exceeded that number ever since July 9, 2021,[15] as the new "Delta" variant of Covid has begun to spread.

The dissent claims that, even if Covid rates "rise, perhaps even precipitously," it is already clear that the State will never again impose distance-learning requirements. *See* Dissent at 10–11. This unsupported speculation ignores the State's heavy burden. Although the State's *current* policy does not rely on school closures and expresses a strong preference for in-person instruction, the question is whether the State has shown that it is "absolutely clear" that "the

[15] *Tracking COVID-19 in California*, https://covid19.ca.gov/state-dashboard/#location-los_angeles.

allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190. Indeed, as the dissent itself notes, a prior surge last summer caused the State to reverse course and abandon its *previous* school reopening plans. *See* Dissent at 3 n.1. Given the State's "track record of 'moving the goalposts'"; its retention of broad "authority to reinstate those heightened restrictions at any time"; and its failure to expressly foreswear ever using school closures again, *Tandon*, 141 S. Ct. at 1297 (citation omitted), we cannot say that the State has carried its "formidable burden" under the voluntary cessation doctrine, *Friends of the Earth*, 528 U.S. at 190.

B

For related reasons, the restrictions at issue here also fall squarely into the category of official acts that are "capable of repetition, yet evading review." *Southern Pac. Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498, 515 (1911); *see also Wisconsin Right to Life*, 551 U.S. at 462. Were we to treat this case as moot, the case would have evaded review despite the Plaintiffs' best efforts to expedite it, and a future case would likely suffer the same fate. Plaintiffs here have moved with dispatch throughout this litigation, and yet it took seven months from the filing of their First Amended Complaint in July 2020 for the matter to be presented to this court for decision on the merits. And even that pace was achieved only because Plaintiffs sought expedited treatment in this court and successfully

resisted the State's efforts to prolong the briefing schedule and to defer the oral argument. Were California again to enforce a distance-learning mandate on Plaintiffs' schools, by the time a future case challenging the new mandate could receive complete judicial review, which includes Supreme Court review, the State would likely have again changed its restrictions before that process could be completed. Effective relief likely could not be provided in the event of any recurrence, which makes this a paradigmatic case for applying the doctrine of "capable of repetition, yet evading review." *See Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855–56 (9th Cir. 1999) (two-year permit could be reviewed despite expiration because two years were not enough to guarantee "complete judicial review, which includes Supreme Court review under our precedent").

Here, too, the dissent fails to apply the correct legal standard. It misreads *Diocese of Brooklyn* to say that the capable-of-repetition-yet-evading-review doctrine would apply here only if Plaintiffs "remain[ed] under a '*constant threat*' that the challenged restrictions will be reimposed." *See* Dissent at 14 (quoting 141 S. Ct. at 68) (emphasis added). But *Diocese of Brooklyn* did not change the long-settled standard, which is whether there is a "reasonable expectation" that the same controversy will recur. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016); *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988) ("[W]e have found

controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable."); *see also Ackley v. Western Conf. of Teamsters*, 958 F.2d 1463, 1469 (9th Cir. 1992) (noting that it is "the defendant, not the plaintiff, who must demonstrate that the alleged wrong will not recur"). There was clearly such a reasonable possibility of reoccurrence in *Diocese of Brooklyn*, given the "constant threat" the plaintiffs in that case faced. 141 S. Ct. at 68. But in finding that circumstance *sufficient* to trigger the doctrine, the Court did not hold that a finding of a "constant threat" was now *necessary* to invoke the doctrine. And for substantially the same reasons set forth earlier, we conclude that California has failed to carry its burden to show that there is no "reasonable expectation" this dispute will recur. *Kingdomware Techs.*, 136 S. Ct. at 1976.

* * *

We therefore conclude that under both the voluntary cessation doctrine and the rule concerning disputes that are "capable of repetition, yet evading review," neither the public-school nor private-school Plaintiffs' claims are moot.

III

Having concluded that the case is not moot, we turn first to the merits of Plaintiffs' due process claims. In doing so, we consider separately the distinct substantive due process claims of the *public*-school Plaintiffs and those of the *private*-school Plaintiffs. We conclude that the district court correctly granted

summary judgment dismissing the former claims, but it erred in dismissing the latter.

A

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Supreme Court has interpreted this guarantee "to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). The public-school Plaintiffs contend that one of the substantive protections conferred by the Due Process Clause is an "affirmative right to public-school education" that meets a "basic minimum" level of instruction. This contention fails, because the Supreme Court has repeatedly declined to "accept[] the proposition that education is a 'fundamental right,'" *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988), and we have likewise stated that there is "no enforceable federal constitutional right to a public education," *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 880 (9th Cir. 2011) (en banc) (citation omitted), *overruled on other grounds in Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc).

The Supreme Court's decision in *San Antonio Independent School District v.*

Rodriguez, 411 U.S. 1 (1973), is particularly instructive. There, the Court addressed a claim that the "Texas system of financing public education" violated the Equal Protection Clause of the Fourteenth Amendment. *See id*. at 4–6. In assessing what level of scrutiny was applicable to the distinctions drawn by that system, the Court considered and expressly rejected the plaintiffs' claim that strict scrutiny must be applied because "the State's system impermissibly interferes with the exercise of a 'fundamental' right," *viz*., the asserted fundamental right to an education. *Id*. at 29; *see also id*. at 35–39.

The Court noted that "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution," and it concluded that there was also no "basis for saying it is implicitly so protected." *Id*. at 35. In reaching that conclusion, the Court emphasized that the asserted right to have the state *affirmatively provide* an education was "significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights," inasmuch as those prior cases all "involved legislation which 'deprived,' 'infringed,' or 'interfered' with the *free exercise* of some such fundamental personal right or liberty." *Id*. at 37–38 (emphasis added) (citations omitted). The Court rejected the plaintiffs' contention that "education is distinguishable from other services and benefits provided by the State," assertedly due to its importance in exercising other rights,

such as "First Amendment freedoms" and the "right to vote." *Id*. at 35. As the Court explained, the plaintiffs' argument had no logical stopping point, because in terms of its contribution to the ability to exercise such other rights, education could not be meaningfully distinguished from other asserted rights-to-benefits that the Court had steadfastly declined to recognize, such a right to "the basics of decent food and shelter." *Id*. at 37 (citing *Lindsey v. Normet*, 405 U.S. 56, 73–74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). There was thus a "critical distinction," the Court concluded, between "'*denying* fundamental rights'" and failing to do enough to provide a benefit that would facilitate the exercise of fundamental rights. *Id*. at 38–39 (citation omitted). Further underscoring this distinction, the Court cited in contrast its prior cases invalidating state laws that interfered with the fundamental right of parents to choose their own *private* educational forum for their children. *Id*. at 39 n.82 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

Subsequent Supreme Court decisions have similarly reaffirmed that "[p]ublic education is not a 'right' granted to individuals by the Constitution." *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Rodriguez*, 411 U.S. at 35); *see also Kadrmas*, 487 U.S. at 458; *Papasan v. Allain*, 478 U.S. 265, 284 (1986). We have likewise declined to recognize the existence of a "federal constitutional right to a public education." *Payne*, 653 F.3d at 880 (citing *Plyler*, 457 U.S. at 221); *see*

also Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3, 587 F.2d 1022, 1026 (9th Cir. 1978) ("[E]ducation, although an important interest, is not guaranteed by the Constitution" and "is not a fundamental right.").

Plaintiffs nonetheless point to language in *Rodriguez* and *Plyler* that they contend supports the view that a failure to provide a *minimum* education would violate substantive due process rights. *See Rodriguez*, 411 U.S. at 25 n.60 (noting that the question before the Court would have been different had Texas "absolutely precluded" a class of persons "from receiving an education"); *id*. at 37 (concluding that the record did not support the view that the Texas "system fails to provide each child with an opportunity to acquire the basic minimal skills" needed to exercise other rights); *Plyler*, 457 U.S. at 223 (noting that the statute at issue deprived a "discrete class of children"—those unlawfully present in the U.S.—of a "basic education"); *cf. Papasan*, 478 U.S. at 285 ("As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the question[] whether a minimally adequate education is a fundamental right."). They point in particular to *Plyler*'s holding that, although education is not a fundamental right, the denial of a "basic education" to "a discrete class of children not accountable for their disabling status" requires a heightened level of constitutional scrutiny. 457 U.S. at 223–24.[16]

[16] In *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992), we referred to this holding in *Plyler* as recognizing a "quasi-fundamental" right to "access to public

But given the Supreme Court's admonition that the courts must "'exercise the utmost care whenever we are asked to break new ground'" in the field of substantive due process, *see Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation omitted), and the Court's express refusal to extend *Plyler*'s "holding beyond the unique circumstances that provoked its unique confluence of theories and rationales," *Kadrmas*, 487 U.S. at 459 (simplified), we have no license to recognize such a novel right here.

Moreover, even if there were grounds to recognize such a right in an appropriate case, Plaintiffs have failed to show that this is such a case. In this regard, Plaintiffs seem to have lost sight of the fact that this case was not brought as a class action. Accordingly, to establish a violation of their asserted constitutional right to a basic minimum education, Plaintiffs had the burden to present sufficient evidence to establish that *their* children (or Plaintiff Z.R. himself, in the case of the one student Plaintiff) were not actually receiving a basic minimum education. On this score, Plaintiffs' barebones declarations are inadequate to create a triable issue of fact. Nearly all of Plaintiffs' declarations on this point are conclusory and lack sufficient factual detail to establish that the

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education." *Id*. at 412 n.1. *Harding* was a case about the constitutionality of crack cocaine sentencing laws and had nothing whatsoever to do with public education or with denying benefits to aliens unlawfully present in the United States. Its passing description of *Plyler* therefore adds nothing to *Plyler* itself and is, in any event, dicta.

difficulties of the distance-learning method have caused or will cause their children to be deprived of a basic minimum education. The only possible exceptions are the declarations of those Plaintiffs who assert that their children are no longer receiving their "individualized education programs" and are not receiving the "free appropriate public education" that is guaranteed to them under the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. But in our en banc decision in *Payne*, we held that a claim for a denial of a free appropriate public education—including the failure to provide the assistance needed to learn basic skills such as reading—"can arise *only* under the IDEA because there is no other federal cause of action for such a claim." 653 F.3d at 880 (emphasis added). In reaching that conclusion, we specifically cited *Plyler* for the proposition that there is "no enforceable federal constitutional right to a public education." *Id*. Thus, to the extent that the public-school Plaintiffs' claimed constitutional right to a basic minimum education is not wholly unsupported as a factual matter, it is squarely barred by our decision in *Payne*.[17]

The public-school Plaintiffs have thus failed to show that they have been deprived of a fundamental right that is recognized under the Supreme Court's or this court's caselaw. Consequently, in reviewing their substantive due process

[17] Although the Plaintiffs who alleged a denial of a "free appropriate public education" had asserted a claim under the IDEA in the district court, that claim has been abandoned on appeal.

challenge to the provision of public education via distance learning, we ask only whether the State's actions "bear[] a rational relation to a legitimate government objective." *Kadrmas*, 487 U.S. at 461–62. California's actions readily satisfy that deferential standard. Abating the Covid pandemic is not only a legitimate state interest, but a compelling one, *Diocese of Brooklyn*, 141 S. Ct. at 67, and California has provided an ample basis for concluding that, as a matter of law, its refusal to allow in-person public school instruction is rationally related to furthering that interest. We therefore affirm the district court's grant of summary judgment to California with respect to the claims of the public-school Plaintiffs.

B

As explained above, the primary reason that the claims of the public-school Plaintiffs fail is that the case authority from the Supreme Court and this court has declined to recognize a federal substantive due process right to the provision of a public education. But the claims of the *private*-school Plaintiffs do not stand on the same footing, and the district court erred in dismissing these claims on summary judgment.

1

Plaintiffs' opening brief on appeal squarely raises the argument that California's school-closure policies violate the fundamental right of several Plaintiffs to educate their children at in-person, *private* schools, thus divesting

them of the "choice of the educational forum itself." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005); *see also Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390. "This right is commonly referred to as the *Meyer-Pierce* right." *Fields*, 427 F.3d at 1204. However, the State argues that this contention was not sufficiently raised and preserved in the district court. We disagree.

In Plaintiffs' operative complaint, Plaintiffs generally alleged that their "Substantive Due Process" rights under the Fourteenth Amendment had been violated by the school-closure orders, which "effectively preclud[ed] [their] children from receiving a basic minimum education." Plaintiffs' claims must be understood against the backdrop of the relevant caselaw, which (as explained earlier) draws a sharp distinction between the alleged fundamental right to the *provision* of a basic minimum public education and the *Meyer-Pierce* right to be free of government *interference* in the choice of a private educational forum. *See supra* at 32–33. Thus, as applied to the private-school Plaintiffs, the complaint's substantive due process claim cannot reasonably be understood as alleging that the State had failed in its obligation to *provide* "a basic minimum education," because those Plaintiffs were not asking the State to provide one. Rather, as to these Plaintiffs, this claim can only be understood as asserting that the State was unconstitutionally interfering with these Plaintiffs' effort to choose the forum that they believed would provide their children with an adequate education. These

Plaintiffs' claims thus *necessarily* rested on the *Meyer-Pierce* fundamental right of parents to choose their children's educational forum. That is especially true given that the allegations of a complaint must be generously construed in the light most favorable to the plaintiff. *See Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).[18]

The two distinct threads of Plaintiffs' claim were also reflected in their district court papers seeking a TRO and an order to show cause why a preliminary injunction should not issue. For example, their reply memorandum in support of that motion argued both that "[s]tate-provided education" was a fundamental right and that the parental right "'to control the education of their' children" that was recognized in "*Meyer v. Nebraska*, 262 U.S. 390, 401 (1923)," was "at least a 'quasi-fundamental right.'" Of course, the *private*-school Plaintiffs were not asserting that their children were being deprived of a "state-provided education," but only that the State was interfering with these Plaintiffs' right to control the education of their children at the private forum of their choice. Plaintiffs' opening memorandum in support of that same motion likewise emphasized the State's interference with *both* "State-provided or -permitted education." Once again,

[18] It is thus "neither logically nor actually the case" that the private-school Plaintiffs *must* be understood as *only* asserting an (inapplicable) claim that the State was failing to provide them with a basic minimum education. *See* Dissent at 18.

because the private-school Plaintiffs were clearly not complaining about the lack of a "State-provided" education, their claims can only be understood as asserting the *Meyer*-*Pierce* right.[19]

After the district court denied Plaintiffs' motion for a TRO and instead requested briefing on whether it should grant summary judgment *sua sponte*, Plaintiffs' opposition again emphasized both the State's failure to provide an education and its affirmative *interference with* children obtaining the education their parents had chosen for them. In response to the district court's observation, in its TRO-denial order, that states have broad discretion as to the manner in which *public* education is provided, Plaintiffs argued both that this comment rested on too narrow a view of state-provided benefits and that, in all events, the State may not act so as to affirmatively "*deprive* children of the right to a minimum education altogether" (emphasis added). In support of this point, Plaintiffs cited *Fields v. Palmdale School District*, 427 F.3d 1197, in which we held that the *Meyer*-*Pierce* right generally does not give parents the authority "to interfere with a *public*

[19] The dissent argues that Plaintiffs' reply memorandum affirmatively disavowed any reliance on the *Meyer*-*Pierce* right, because that reply at one point disputed the State's effort to characterize Plaintiffs' position as resting on a "fundamental right to in-person school." *See* Dissent at 17. The quoted comment, however, was directed at the State's argument that *Rodriguez* made clear that States have wide discretion in deciding how to *provide* education, and it clarified that Plaintiffs were not claiming that the Fourteenth Amendment *prohibited* States from providing an adequate basic minimum education through distance learning. That is not, as the dissent would have it, an abjuration of the *Meyer*-*Pierce* right.

school's decision as to how it will provide information to its students," but instead gives them the right "to be free from *state interference* with their choice of the educational forum itself." *Id*. at 1206–07 (emphasis added). Yet again, Plaintiffs' papers objected both to the State's failure to provide an adequate education (an argument that applied only to the public-school Plaintiffs) and the State's affirmative interference with the provision of education (an argument that also applied to the private-school Plaintiffs). The State's suggestion that these papers should instead be construed as having *sub silentio* jettisoned the claims of the five private-school Plaintiffs is untenable.

The State is therefore wrong in suggesting that the more detailed *Meyer-Pierce* argument that is contained in Plaintiffs' appellate opening brief should have been presented in that form in the district court and that, by not doing so, Plaintiffs forfeited this entire point. As just explained, the *private*-school Plaintiffs unquestionably presented below the *claim* that the State's closure of their private schools violated their Fourteenth Amendment right to choose the educational forum that would best provide an adequate education for their children. Indeed, these Plaintiffs *cannot* reasonably be construed as having presented a claim about the provision of *public*-school education. Having presented their private-school-closure claim below, Plaintiffs "can make any argument in support of that claim [on appeal]; parties are not limited to the precise arguments they made below."

Yee v. City of Escondido, 503 U.S. 519, 534 (1992); *see also United States v. Pallares-Galan*, 359 F.3d 1088, 1094–95 (9th Cir. 2004) (defendant properly raised new argument on appeal to support his underlying claim below). The State's forfeiture contention takes an unrealistically narrow view of the permissible scope of appellate argument. "An argument is typically elaborated more articulately, with more extensive authorities, on appeal than in the less focused and frequently more time pressured environment of the trial court, and there is nothing wrong with that." *Puerta v. United States*, 121 F.3d 1338, 1341–42 (9th Cir. 1997). That principle applies with special force here, in which the district court conducted expedited proceedings that resulted in a *sua sponte* grant of summary judgment before the State even answered the complaint. *Cf. Arce v. Douglas*, 793 F.3d 968, 976 (9th Cir. 2015) (cautioning against the use of *sua sponte* summary judgment at the preliminary injunction stage, when the merits might not yet have been "fully ventilated").

In all events, even if Plaintiffs' *Meyer-Pierce* argument were otherwise forfeited, this is a paradigmatic case for exercising our discretion to consider arguments raised for the first time on appeal. *See El Paso City v. America West Airlines, Inc.* (*In re America West Airlines, Inc.*), 217 F.3d 1161, 1165 (9th Cir. 2000); *see also AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213–14 (9th Cir. 2020). Whether summary judgment was properly granted against the private-

school Plaintiffs on the record before the district court raises a question of law that we review de novo, and we therefore have discretion to consider a new argument as to why that court erred as a matter of law. *See America West*, 217 F.3d at 1165. That the *Meyer-Pierce* issue in this case is a straightforward question of law, together with the importance of the issue, weighs in favor of considering the arguments that have been squarely raised on appeal. *See*, *e.g.*, *Countrywide Home Loans, Inc. v. Lehua Hoopai* (*In re Hoopai*), 581 F.3d 1090, 1096 (9th Cir. 2009). We would thus exercise discretion to consider the private-school Plaintiffs' claims even if we had concluded that their claims had been forfeited.

2

We therefore turn to the merits of the private-school Plaintiffs' contention that California's prohibition on in-person instruction violates their fundamental rights under the Due Process Clause of the Fourteenth Amendment, as recognized in *Meyer-Pierce*. We conclude that the district court erred in dismissing the claims of these Plaintiffs on summary judgment.

a

As we have previously observed, the Supreme Court has long held that "the right of parents to make decisions concerning the care, custody, and control of their children is a fundamental liberty interest protected by the Due Process Clause," and that this right includes "the right of parents to be free from state interference

with their choice of the educational forum itself." *Fields*, 427 F.3d at 1204, 1207; *see also Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality) (noting that the Court had repeatedly "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children," including "the right 'to direct the upbringing and education of children under their control'" (quoting *Pierce*, 268 U.S. at 534–35)). Thus, even as the Court has "'always been reluctant to expand the concept of substantive due process,'" it has repeatedly reaffirmed its recognition, in *Meyer* and *Pierce*, of a "fundamental right[]" to "direct the education and upbringing of one's children." *Glucksberg*, 521 U.S. at 720 (citation omitted); *see also Troxel*, 530 U.S. at 65 (plurality) (describing the *Meyer-Pierce* right as "perhaps the oldest of the fundamental liberty interests recognized" by the Court); *id*. at 80 (Thomas, J., concurring in judgment) (agreeing that, under *Pierce*, "parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them").

The State does not dispute that *Meyer* and *Pierce* recognized a fundamental right of parents concerning the education of their children. Nonetheless, noting that *Pierce* invalidated an Oregon statute that forbade parents from sending their minor children to any school other than a public school, *see Pierce*, 268 U.S. at 530, California insists that the right recognized in *Pierce* consists *only* of the "right to decide *where* to send their children to school." Because California has not

"prevent[ed] the Parents-Appellants from enrolling their children in private schools," the State argues, it has not in any respect infringed the *Meyer-Pierce* right. Rather, the State asserts that all it has done is to alter the "mode of instruction" that must be followed at *both* public and private schools, and it contends that *Meyer* and *Pierce* do not limit its ability to adopt such universal rules. These arguments fail.

The State's narrow reading of the *Meyer-Pierce* right and the State's purported carve-out for generally applicable regulations of all schools are both refuted by *Meyer* itself. There, the Supreme Court confronted a generally applicable Nebraska statute stating that "'[n]o person, individually or as a teacher, shall, *in any private, denominational, parochial or public school*, teach any subject to any person in any language other than the English language.'" 262 U.S. at 397 (emphasis added) (citation omitted). The only exception under the statute was that foreign languages "'may be taught as languages,'" but only after the eighth grade. *Id*. (citation omitted). The Nebraska statute thus had *both* features that California says are enough to evade any constitutional scrutiny: it did not interfere with the decision to enroll in a private school, and it imposed a restriction that was generally applicable to both private and public schools. Nonetheless, the Supreme Court struck down the Nebraska statute, concluding that it impermissibly "attempted materially to interfere . . . with the power of parents to control the

education of their own." *Id*. at 401.[20]

The State's definition of the right is thus unquestionably too narrow. But the Supreme Court has also cautioned against an overbroad reading of the *Meyer-Pierce* right. *See Runyon v. McCrary*, 427 U.S. 160, 177 (1976) (stating that *Pierce* "lent 'no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society'" (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring))); *see also Norwood v. Harrison*, 413 U.S. 455, 461 (1973) (emphasizing the "limited scope of *Pierce*"). In discerning the contours of that right, and whether California's restrictions implicate it, we must be guided by the Supreme Court's insistence on a "'careful description' of the asserted fundamental liberty interest," *Glucksberg*, 521 U.S. at 721 (citation omitted), which ordinarily "must be defined in a most circumscribed manner, with central reference to specific historical practices," *Obergefell v.*

[20] For similar reasons, the dissent is wrong in relying on a strawman argument that the private-school Plaintiffs supposedly are asserting a fundamental right to be exempt from generally applicable regulations. *See* Dissent at 24–25. They instead assert a fundamental right to choose *in-person* private instruction, and the question is whether that right exists and, if so, what standard of scrutiny applies to a regulation that wholly deprives them of that right. Plaintiffs in this case have *not* challenged any of the State's many other Covid-related restrictions beyond the prohibition on in-person instruction (such as health and safety protocols within classrooms). And we are not presented here with a directive that generally regulates schools in a manner that preserves the core of the *Meyer-Pierce* right. *See also infra* note 23.

Hodges, 576 U.S. 644, 671 (2015). Here, a consideration of historical practice and tradition confirms that California has deprived the private-school Plaintiffs of a core aspect of the *Meyer-Pierce* right.

As historically understood, the *Meyer-Pierce* right necessarily embraced a right to choose *in-person* private-school instruction, because—as the State conceded at oral argument—such instruction was until recently the *only* feasible means of providing education to children. Thus, prior to the advent of the internet and associated technology, it would never have been imagined that the *Meyer-Pierce* right did *not* include the right to choose in-person private instruction. We are aware of no authority, for example, suggesting that *Meyer-Pierce* only protected the right of parents to choose correspondence schools for their children. The technological advances of recent years raise the possibility that the *Meyer-Pierce* right might conceivably be deemed to have *expanded* to cover the ability to choose such additional modes of learning, just as the First Amendment right to speak in letters and in newspapers extends to emails and blogs.[21] But the fact that instruction can now also occur online provides no basis for concluding that the traditional, long-understood core of the right—the right to choose a private school offering in-person instruction—has now somehow been *removed* from that right.

[21] No such question is presented here, because the private-school Plaintiffs all prefer in-person instruction. We therefore express no view as to whether a State could insist, over a parent's objection, that a child *not* attend an online school.

That would make no more sense than suggesting that the rise of the internet means that the right to free speech and a free press no longer includes the right to speak to a live audience or to publish in a physical newspaper. Put simply, the fact that technology now makes it possible to have a different type of learning does not mean that the right to choose long-established traditional forms of education has disappeared.

Precedent further confirms the common-sense notion that the *Meyer-Pierce* right includes the right to choose traditional in-person instruction at a private school. In *Fields*, we described the *Meyer-Pierce* right as "the right of parents to be free from state interference with their choice of the educational forum itself." *Fields*, 427 F.3d at 1207. It is hard to imagine a more direct interference with the "choice of the educational *forum* itself" than a prohibition upon in-person instruction in that chosen forum. And in *Farrington v. Tokushige*, 11 F.2d 710 (9th Cir. 1926), we expressly noted that the *Meyer-Pierce* right protected in-person instruction in the course of addressing whether that right was infringed by the Territory of Hawaii's onerous regulation of foreign-language schools. *Id*. at 713–14. In describing the contours of that right, we quoted Justice Harlan's dissenting opinion in *Berea College v. Kentucky*, 211 U.S. 45 (1908), which emphasized the physically congregative aspect of private-school education:

> If pupils, of whatever race—certainly, if they be citizens—choose with the consent of their parents or voluntarily *to sit*

> *together in a private institution of learning while receiving instruction* which is not in its nature harmful or dangerous to the public, no government, whether federal or state, can legally forbid their *coming together*, or *being together* temporarily[,] for such an innocent purpose.

Tokushige, 11 F.2d at 713–14 (emphasis added) (quoting *Berea College*, 211 U.S. at 68 (Harlan, J., dissenting)).[22] We then concluded that, under *Meyer*, Hawaii's burdensome restrictions on private foreign-language schools impermissibly interfered with "the right of a parent to educate his own child in his own way," and with the students' "right to be taught" in such schools. *Id*. at 714. *Tokushige* thus confirms that, as traditionally understood, the *Meyer-Pierce* right includes the right to select a private school at which the students will "com[e] together," "be[] together temporarily," and "sit together in a private institution of learning while receiving instruction." *Id*. at 713–14.

Here, of course, the State insists that, due to the pandemic, physical congregation of students can be dangerous, but that point goes to the question of whether the State's restrictions are *justified* under the appropriate level of scrutiny. It provides no basis for suggesting that the underlying *Meyer-Pierce* right does not even include the ability to choose in-person private-school instruction. It may be

[22] Justice Harlan's dissenting opinion in *Berea College* concluded that Kentucky's prohibition on interracial private schools violated "the rights of liberty and property guaranteed by the Fourteenth Amendment." 211 U.S. at 67. His view that such a statute is unconstitutional was, of course, vindicated by *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny.

that the current once-in-a-century conditions present unique dangers that justify a limit on such in-person instruction, but such contingent circumstances do not establish that, for purposes of defining the *Meyer-Pierce* right, physical congregation of students involves "instruction which" is "*in its nature* harmful or dangerous to the public" and is therefore altogether outside of that right. *Tokushige*, 11 F.2d at 713–14 (emphasis added). The traditional and long-established nature of in-person private schooling refutes any such categorical suggestion.[23]

That the *Meyer-Pierce* right encompasses parents' choice to send their children to in-person schools is further confirmed by the reasoning in *Pierce*, *Meyer*, and their progeny. In emphasizing the importance of parental control over the educational forum for their children, *Pierce* underscored the "right of parents to choose schools where their children will receive appropriate mental and religious training." 268 U.S. at 532; *see also Yoder*, 406 U.S. at 211 (emphasizing the importance of parents' ability to ensure that their children are not "away from their community, physically and emotionally, during the crucial and formative

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[23] Nor is there any other basis for concluding that the particular choices the private-school Plaintiffs have made for their children are otherwise categorically outside the *Meyer-Pierce* right. The State has not suggested, for example, that the particular schools at issue here fail to provide a substantive educational program meeting appropriate standards of rigor and breadth. *Yoder*, 406 U.S. at 213 (noting that States may "impose reasonable regulations for the control and duration of basic education").

adolescent period of life"). As the declarations in this case amply illustrate, the private-school Plaintiffs here are all strongly of the view that distance learning is inimical to the "appropriate mental . . . training" that Plaintiffs want for their children, *Pierce*, 268 U.S. at 532, and that it deprives Plaintiffs' children of the physical and emotional connections they need during the formative years of their childhood, *see Yoder*, 406 U.S. at 211. There can be no serious question that the restrictions at issue here thus "materially . . . interfere . . . with the power of parents to control the education of their own." *Meyer*, 262 U.S. at 401.

Accordingly, we conclude that the private-school Plaintiffs have established that the State's prohibition on in-person instruction deprives them of a core right that is constitutionally protected under *Meyer* and *Pierce*. The only remaining question is whether that deprivation is adequately justified under the appropriate level of scrutiny.

b

Meyer and *Pierce* were decided at a time in which the Supreme Court had not yet articulated the various levels of scrutiny that are familiar to us today. Moreover, the Supreme Court has yet to definitively decide what standard of review applies to infringements of the *Meyer-Pierce* right. *See*, *e.g.*, *Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003). But the Court has repeatedly characterized the *Meyer-Pierce* right as being "fundamental," *Glucksberg*, 521 U.S. at 720; *see also*

Troxel, 530 U.S. at 65 (plurality); *id*. at 80 (Thomas, J., concurring in judgment), and we have held that "[g]overnmental actions that infringe upon a fundamental right receive strict scrutiny," *Fields*, 427 F.3d at 1208. At least where, as here, the challenged restriction wholly deprives the private-school Plaintiffs of a central and longstanding aspect of the *Meyer-Pierce* right, *see supra* at 47–50, the appropriate level of scrutiny therefore must be strict scrutiny.[24]

To satisfy strict scrutiny, California must show that its infringement of the private-school Plaintiffs' rights is "narrowly tailored" to advance a "compelling" state interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). "Stemming the spread of COVID-19 is unquestionably a compelling interest." *Diocese of Brooklyn*, 141 S. Ct. at 67. The only question, therefore, is whether the State has shown that its broad prohibition of in-person education satisfies the narrow-tailoring requirement as a matter of law. It has not.

In *Diocese of Brooklyn*, the Supreme Court held that attendance caps of 10 and 25 people at indoor religious services in areas that were classified as having a high prevalence of Covid were not narrowly tailored. 141 S. Ct. at 67. As the Court explained, such caps were "more restrictive than any COVID–related

[24] As noted earlier, Plaintiffs have not purported to assert a right to choose an educational forum that departs from traditional academic and pedagogical standards, *see supra* note 23; we therefore express no view as to whether the *Meyer-Pierce* right would protect such a choice, nor do we address what standard of review would govern state regulation of educational quality.

regulations" that the Court had upheld; they were "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic"; and they were "far more severe than has been shown to be required to prevent the spread of the virus" at the relevant facilities. *Id*. The same points are applicable here. By prohibiting in-person instruction at the relevant Plaintiffs' schools, California effectively imposed an attendance cap of *zero*, which is much more restrictive than the numerical caps struck down by the Supreme Court for religious services in *Diocese of Brooklyn*.[25] That alone confirms that California's prohibition on in-person instruction is not sufficiently tailored.

Moreover, Plaintiffs presented undisputed evidence that California's broad and lengthy closure of schools was more severe than what many other jurisdictions have done, thereby further negating any suggestion that California adopted the least restrictive means of accomplishing its compelling interest. And Plaintiffs presented evidence that California had failed to narrowly tailor its response

[25] The State points to its cohort guidance, suggesting that this guidance would allow any school to operate so long as it organizes itself into small cohorts of 14 children and 2 adults. But that contention is contradicted by the CDPH's own August 25, 2020 supplement to the cohort guidance, which stated that the guidance did not "allow for in person instruction for all students" and that the guidance only permitted "[i]n-person *targeted, specialized* support and services," such as "occupational therapy services, speech and language services, and other medical services, behavioral services, educational support services as part of a targeted intervention strategy or assessments, such as those related to English learner status, individualized educational programs and other required assessments" (emphasis added).

inasmuch as it stubbornly adhered to an overbroad school-closure order even as evidence mounted that Covid's effects exhibit a significant age gradient, falling much more harshly on the elderly and having little impact, statistically speaking, on children. As the district court noted, Plaintiffs presented "a veritable library of declarations from physicians, academics, and public health commentators" who underscored this key deficiency in California's stated "basis for in-person learning restrictions." California's only response to that evidence was to fall back on two relatively brief expert declarations from a CDPH official (and doctor) who did not deny the indisputable age differential in Covid impacts, but who nonetheless defended the broad school-closure ban on the grounds that, given the mechanics of Covid transmission, "[i]t is possible that in the school setting, as in other settings, asymptomatic transmission may occur." The State's expert did not identify any evidence indicating that children in a school setting would present greater risks of transmission than some of the other activities that the State had authorized, such as operating grocery stores, factories, daycare centers, and shopping malls. While the district court concluded that the State's response was sufficient for rational-basis purposes, the same cannot be said under strict scrutiny. On this record, the State's concerns about transmission would justify a potential range of more narrowly drawn prophylactic measures *within* schools to mitigate such risks; it cannot justify wholesale closure. *See Monclova Christian Acad. v. Toledo-Lucas Cnty. Health*

Dep't, 984 F.3d 477, 482 (6th Cir. 2020) (holding that plaintiffs would likely succeed on the merits of their First Amendment challenge to the closure of religious schools because an Ohio county's shutdown of every school in the county, while allowing gyms, tanning salons, office buildings, and a large casino to remain open, does not survive strict scrutiny). And broad measures that fail to take proper account of relevant differences between the school-age population and others are, by definition, not narrowly tailored.

As with its rigidly overbroad approach to religious services, California once again failed to "explain why it cannot address its legitimate concerns with rules short of a total ban." *South Bay*, 141 S. Ct. at 718 (Gorsuch, J., statement).[26] We certainly cannot say that, as a matter of law, California's "drastic measure" of closing the private-school Plaintiffs' schools for nearly a year survives strict scrutiny. *Diocese of Brooklyn*, 141 S. Ct. at 68.

IV

Finally, we turn to the private-school and public-school Plaintiffs' claims under the Equal Protection Clause. As to the private-school Plaintiffs, we vacate

[26] Five justices joined this section of Justice Gorsuch's statement. Justices Thomas and Alito joined it in full, and Justices Kavanaugh and Barrett expressly "agree[d] with Justice Gorsuch's statement" except for a separate portion not cited here. *See* 141 S. Ct. at 717 (Barrett, J., concurring). The Court's decision pointedly rejected this court's contrary reasoning and result in that case. *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128 (9th Cir. 2021).

the district court's judgment rejecting their Equal Protection claims and remand for further consideration in light of the conclusion that the State's actions implicate a fundamental right of those Plaintiffs. We affirm, however, the district court's rejection of the public-school Plaintiffs' claims under the Equal Protection Clause.

The public-school Plaintiffs argue that the State's challenged orders "arbitrarily treat[] Plaintiffs' children . . . differently from those in nearby school districts; from those in childcare; and from those attending summer camps, even though all such children and their families are similarly situated." Classifications that do not implicate suspect classifications or fundamental constitutional rights "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Because there is no fundamental right to a state-provided basic minimum public education, *see supra* at 31–37, the rational basis test applies here except to the extent that the State's orders could be said to rest on an invidious distinction that would trigger heightened scrutiny. No such distinction is present here. Without more, classifications based on the prevalence of Covid in a particular locality, such as a county, do not implicate a suspect classification. Nor does a distinction between public schools on the one hand and camps and childcare centers on the other. Consequently, the public-school Plaintiffs' equal protection claim must be

analyzed under the rational basis test.

The State's classification based on whether a public school is located in a locality with a high incidence of Covid infection is plainly rationally related to the State's legitimate and compelling interest in preventing Covid-related disease and death. And the State's classification between public schools and other facilities such as camps and childcare centers permissibly and rationally chooses to address an important problem in an "incremental" fashion. *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1085–86 (9th Cir. 2015); *see also Beach Commc'ns*, 508 U.S. at 316.

V

Because the State's evidentiary showing was insufficient to establish, as a matter of law, that its school-closure order was narrowly tailored as applied to the five private-school Plaintiffs,[27] we reverse the district court's grant of summary judgment to the State on those Plaintiffs' substantive due process claim, and we remand for further proceedings.[28] We remand also for the district court to consider

[27] The five private-school Plaintiffs are Roger Hackett, Alison Walsh, Erica Sephton, Lacee Beaulieu, and Adebukola Onibokum. As noted earlier, Beaulieu also has another child in public school. *See supra* note 1. As to her claims involving that child, Beaulieu is a public-school Plaintiff and her claims were properly rejected by the district court.

[28] We have not been presented with any question concerning the validity of any state-imposed protocols for operating a reopened school, and we express no view on any such question.

the private-school Plaintiffs' challenge under the Equal Protection clause in light of our conclusion that the State's actions implicate a fundamental right of those Plaintiffs. We otherwise affirm the district court's grant of summary judgment.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Brach v. Newsom, No. 20-56291

HURWITZ, Circuit Judge, dissenting:

When Plaintiffs filed their operative amended complaint on July 29, 2020, California was dealing with widespread transmission of the deadly COVID-19 virus. The State had devised a series of measures—including suspension of in-person instruction at schools—to slow that transmission. Plaintiffs sought declaratory relief and an injunction against the orders restricting in-person instruction.

But things have changed since the complaint was filed. The State has made substantial progress in battling the pandemic, largely because of the introduction of effective and widely available vaccines. Given that progress, the challenged orders no longer prevent any of Plaintiffs' schools from providing in-person instruction. Indeed, even if case rates rise, no reopened school would be required to close by the challenged orders, and the State has recently issued guidelines for full in-person education for the coming school year.

Despite this drastically changed legal landscape, the majority refuses to recognize that the case before us is moot. But the majority's mootness analysis, while incorrect, does little damage on its own. What is far more troubling is the majority's treatment of the private-school Plaintiffs' constitutional claims. In finding that Plaintiffs have pleaded a substantive due process violation, the majority relies on an argument never raised below. And in addressing that forfeited argument,

the majority casts aside governing law, reimagining the scope of Supreme Court precedent and applying strict scrutiny to the challenged state health directives.

I respectfully dissent.

I

The essential starting point in this case is the history and substance of the State's COVID-19 orders.

A

On March 4, 2020, Governor Gavin Newsom declared a State of Emergency to address the emerging COVID-19 pandemic. COVID-19 is a highly contagious virus that spreads from person to person mainly through respiratory droplets produced when an infected person—even an asymptomatic one—speaks, coughs, or sneezes. People with COVID-19 have reported a wide range of symptoms, with many suffering death or long-term health complications. At the time of the Governor's declaration, there was no widely effective treatment for the virus and no vaccine.

On March 19, 2020, Governor Newsom issued Executive Order N-33-20, requiring California residents to "immediately heed the current State public health directives." Cal. Exec. Order N-33-20 (Mar. 19, 2020); *see also* Cal. Exec. Order N-60-20 (May 4, 2020). Among those directives was one from the State Public Health Officer ordering residents "to stay home or at their place of residence except

as needed to maintain continuity of operations of the federal critical infrastructure sectors." School workers were allowed to leave home only to provide distance learning, and schools were closed for in-person instruction.[1]

On July 17, 2020, the Department of Public Health issued its "COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year" (the "Framework"). The Framework explained that "closures to in-person instruction were part of a broader set of recommendations intended to reduce" COVID-19 transmission. It allowed schools to reopen if located in a county that had "not been on the county monitoring list within the prior 14 days." A county was placed on the monitoring list if (1) its 14-day COVID-19 case rate was over 100 per 100,000 people; or (2) both (i) its 14-day case rate was over 25 per 100,000 people and (ii) its 7-day testing positivity rate was over 8 percent. There were two notable exceptions to the school-closure order: (1) recognizing the lower risks to younger children, elementary schools in listed counties could obtain waivers to conduct in-person learning; and (2) affected schools were allowed to provide in-person instruction in small cohorts, pursuant to guidelines. Once reopened, a school was not required to close even if its county returned to the monitoring list.

On August 28, 2020, the State adopted a modified framework for reopening

[1] The State planned to reopen schools by mid-summer 2020 but was required to abandon that plan after a "significant increase in the spread of COVID-19."

across all sectors (the "Blueprint"). The Blueprint noted that although "[c]ommunity spread of infection remains a significant concern across the state," the State intended "to gradually reopen businesses and activities while reducing the risk of increased community spread." The Blueprint provided "revised criteria for loosening and tightening restrictions on activities" based on the prevalence of COVID-19 in the relevant county and an activity's calculated risk level. The Blueprint assigned each county to a tier, ranging from Tier 1 ("Widespread") to Tier 4 ("Minimal"), reflecting the transmission risk of COVID-19 based on county caseloads and test positivity rates. A county was assigned to Tier 1 if either (1) its 7-day case rate was over 7 per 100,000 people or (2) its 7-day test positivity rate was over 8 percent. Schools were allowed to reopen on criteria equivalent to those in the Framework (with Tier 1 substituted for the county monitoring list). Reopened schools were again not required to close even if their counties returned to Tier 1.

B

On December 30, 2020, while this appeal was pending, Governor Newsom announced the "Safe Schools for All" plan. "Informed by growing evidence of the decreased risks and increased benefits of in-person instruction," especially for younger students, the Plan intended to "create safe learning environments for students and safe workplaces for educators," and to "ensure schools have the resources necessary to successfully implement key safety precautions and mitigation

measures." The proposal was substantively like the State's prior guidance; it prioritized returning young children and those with special needs to schools, but recognized ongoing risks associated with reopening and did not lift the restrictions on in-person instruction.

On January 14, 2021, the Department issued a revised "COVID-19 and Reopening In-Person Instruction Framework" (the "Revised Framework"). It allowed elementary schools in Tier 1 counties to open for in-person classes if the county's adjusted daily COVID-19 case rate was under 25 cases per 100,000 people for five consecutive days. The Revised Framework was later amended to allow reopening for all grades K-12 on the same metric. Each county where Plaintiffs' children or the student-Plaintiff attend school had exited Tier 1 by the second week of April 2021. So, there was "no longer any state-imposed barrier to reopening for in-person instruction" applicable to any of the Plaintiffs.

On June 11, 2021, the Governor formally revoked the stay-at-home order (Executive Order N-33-20) and the order directing residents to heed State public health directives on which the Blueprint framework relied (Executive Order N-60-20). *See* Cal. Exec. Order N-07-21 (June 11, 2021). The Governor acknowledged that "the effective actions of Californians over the past fifteen months have successfully curbed the spread of COVID-19, resulting in dramatically lower disease prevalence and death, in the State." "[A]s of June 9, 2021, 54.3% of eligible

Californians have received a full course of COVID-19 vaccination, raising the level of overall immunity in the State."[2] The Governor's order preserved the State Public Health Officer's authority to issue COVID-19-related directives.

The State Public Health Officer soon thereafter issued an order recognizing that California "is prepared to enter a new phase" and has "made significant progress in vaccinating individuals and reducing community transmission." Cal. State Public Health Officer Order of June 11, 2021. The Officer recognized that "[t]he COVID-19 vaccines are effective in preventing infection, disease, and spread." The Officer noted that the State "must remain vigilant against variants of the disease especially given high levels of transmission in other parts of the world and due to the possibility of vaccine escape." So, the Officer required that all individuals continue to follow the "COVID-19 Public Health Guidance for K-12 Schools in California," which allowed schools to reopen on criteria equivalent to the Revised Framework, and again provided that reopened schools need not close even if case rates rise.[3]

On July 12, 2021, the State Public Health Officer issued its "COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School Year."

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[2] As of July 21, 2021, 61.5% of Californians were fully vaccinated, and another 9.2% were partially vaccinated. *Vaccination Progress Data*, CAL. FOR ALL, https://covid19.ca.gov/vaccination-progress-data/ (last accessed July 7, 2021).

[3] The law allowing school districts to offer distance learning expired on June 30, 2021. *See* Cal. Educ. Code § 43503(a).

"The foundational principle of this guidance is that all students must have access to safe and full in-person instruction and to as much instructional time as possible." The guidance noted that, in California:

> [T]he surest path to safe and full in-person instruction at the outset of the school year, as well as minimizing missed school days in an ongoing basis, is a strong emphasis on the following: vaccination for all eligible individuals to get COVID-19 rates down throughout the community; universal masking in schools, which enables no minimum physical distancing, allowing all students access to full in-person learning, and more targeted quarantine practices, keeping students in school; and access to a robust COVID-19 testing program as an available additional safety layer.

"This guidance is designed to enable all schools to offer and provide full in-person instruction to all students . . . even if pandemic dynamics shift throughout the school year, affected by vaccination rates and the potential emergence of viral variants."

II

The majority's first error is concluding that this case is not moot.

A

"When an intervening circumstance at any point during litigation eliminates the case or controversy required by Article III, the action can no longer proceed and must be dismissed as moot." *Pierce v. Ducey*, 965 F.3d 1085, 1089 (9th Cir. 2020) (cleaned up); *see also Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797-98 (9th Cir. 1999) (noting that an actual controversy must exist "at all stages of review"). This occurs where a plaintiff "no longer has any present interest affected by the [challenged] policy." *Weinstein v. Bradford*, 423 U.S. 147, 148-49 (1975).

That is precisely what occurred here. Plaintiffs seek only declaratory and injunctive relief precluding the State from preventing schools from providing in-person instruction. But they concede that there is "no longer any state-imposed barrier to reopening for in-person instruction" applicable to the schools attended by Plaintiffs' children or the student-Plaintiff. Under the challenged orders, these schools can fully reopen and need not close again even if case rates rise. Indeed, Plaintiffs do not contest the State's assertion that all of the schools and districts identified by their papers "have 'opened' for in-person instruction."

B

The majority does not dispute that no relevant school is either under a closure order or can be placed in one under the challenged orders. However, it holds that this case falls within two familiar exceptions to the mootness doctrine: (1) a defendant cannot moot an action through voluntary cessation of the challenged activity, *see Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013); and (2) the issues raised are capable of repetition yet evading review, *see Turner v. Rogers*, 564 U.S. 431, 439 (2011). Majority Opinion ("Op.") at 22. Neither conclusion withstands analysis.

1

It is basic that "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v.*

Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 174 (2000). But that doctrine does not apply here. The State's purportedly unlawful conduct was enforcing a policy providing that schools may reopen and not be required to reclose if certain benchmarks are met. The State did not "cease[] that conduct at all." *See Pierce*, 965 F.3d at 1090. Rather, it consistently adhered to that policy; the relevant schools just all met those benchmarks. *See id.* In other words, the gamesmanship concerns that animate the voluntary cessation doctrine are not present in this case. *See Already, LLC*, 568 U.S. at 91; *see also Rosemere Neighborhood Ass'n v. U.S. Env't Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009) (noting that the doctrine applies where a party ceased "illegal activity in response to pending litigation").[4]

Even if the voluntary cessation doctrine facially applied, the case would nonetheless still be moot if the State showed it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Rosebrock v. Mathis*, 745 F.3d 963, 971-72 (9th Cir. 2014) (cleaned up). The issue is not whether the State conceivably *could* again order schools to close. Rather, we must consider whether the State has shown that it cannot "*reasonably* be expected" to do so. *Id.* at 971 (emphasis added). The answer to that question is "yes."

[4] The majority's assertion that *Diocese of Brooklyn* "necessarily" rejected this argument, Op. at 23-24, reads too much into the Court's silence. The Court did not specify which of the two doctrines addressed by Plaintiffs applied and, in any event, focused its discussion largely on the notion that, given the timing of religious services, a future dispute might evade review. *See* 141 S. Ct. at 68-69.

My conclusion does not rest on the premise that COVID-19 case rates will not again rise, perhaps even precipitously. Indeed, given the virulence of new variants and the continued reluctance of some to be vaccinated, a rise in case rates is sadly a real possibility. But the issue before us is not whether there will be a future public health crisis. The issue is whether the conduct challenged here, a school-closure order, is "reasonably" likely to be imposed on Plaintiffs' schools in response to that potential crisis. And on that point, the record is compelling.

The challenged orders pose absolutely no barrier to in-person instruction at Plaintiffs' schools. Plaintiffs' counties are no longer subject to the challenged orders for a simple reason—case rates have dropped dramatically. And even if case rates rise to a level that might have triggered closures under earlier iterations of the State's guidance, *see* Op. at 27, this would not require a reopened school to close.

The essential premise of the majority opinion is therefore that there is a reasonable chance that, sometime in the future, the State will impose new and more severe restrictions than those in the challenged orders. The State, however, has disclaimed any such intention. Its actions are in accord with its words. The State's guidance for the coming school year provides for reopening schools with full in-person instruction. Moreover, the State had made clear that "even if pandemic dynamics shift throughout the school year," it does not intend to rely on broad closures, but instead on more targeted measures that would allow children to remain

in school. *Id.* The very "foundational principle" of its guidance is to ensure in-person instruction. *Id.*

The majority rejects all this as a "coy assertion" because the State has in the past changed its regulations and retains the ultimate legal authority to modify its regulations. Op. at 24. But if the bare authority to enact new and different rules is alone enough to avoid mootness, no dispute against a government could be moot. *Cf., e.g.*, *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017). Indeed, although the State has changed certain aspects of the regulations, it has not strayed from the principle that reopened schools need not close again even if case rates rise. The majority fails to accord this consistency, combined with the State's representations as to its plans for the coming school year, the requisite deference. *See Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) (collecting cases holding that governments receive particular deference in this analysis).

On the record before us, the State has plainly met its burden of demonstrating that the challenged conduct—closure of the Plaintiffs' schools—is not reasonably likely to recur. And a suit challenging the current plan, or some hypothetical future plan requiring vaccination or masking rather than school closures, would pose very different issues than those the majority gratuitously undertakes to decide. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed

may not occur at all.") (cleaned up).

2

Disputes are "capable of repetition, yet evading review" if "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (cleaned up). As with voluntary cessation, for this doctrine to apply, there must be a "reasonable expectation or a demonstrated probability," not just a theoretical possibility, that the same controversy will recur. *Id.* (cleaned up).

I agree with the majority that Plaintiffs here moved with dispatch but were nonetheless unable to secure final appellate review before mootness occurred. *See Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855–56 (9th Cir. 1999). But, for the reasons explained above, I part ways with the conclusion that it is reasonable to expect this issue will recur. The State has consistently provided that once schools reopen—as all of the relevant schools can—they need not close again even if case rates rise. And given the presence of vaccines, their demonstrated utility in reducing the spread of COVID-19, and the State's guidance for the coming school year, I cannot conclude that its response in the event new restrictions are necessary will be to impose even more severe restrictions than the challenged orders.

3

Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam), upon which the majority relies, does not compel a contrary conclusion. To be sure, the facts of that case have some superficial similarity to this one. Religious institutions challenged New York's system of COVID-19 restrictions, which used a multi-tiered "zone" system to impose capacity limits for religious services. *Id.* at 65–66. Although the zones containing the plaintiff institutions had been reclassified and no longer imposed the challenged restrictions, the Court—citing but not discussing cases that involve both the voluntary cessation and "capable of repetition" doctrines—declined to find the dispute moot. *Id.* at 68.

But *Diocese of Brooklyn* is critically different than this case. When the Court heard the case, the religious institutions "remain[ed] under a constant threat that the area in question will be reclassified." *Id.* Indeed, New York "regularly" changed the classification of particular areas without prior notice, with eight recent changes within a period of little over a month. *Id.* Given the frequency of changes and the brief time available to seek relief before religious services in a given week, the Court found "no reason why [the plaintiffs] should bear the risk of suffering further irreparable harm in the event of another reclassification." *Id.* at 68–69.

California's relatively steady and infrequent changes to its reopening plans are a far cry from the New York regulations that changed several times a week. And there is no risk of "irreparable harm"—Plaintiffs' schools can reopen (and, to the

extent the schools are identified, have already done so) and need not close even if case rates rise again. Plaintiffs, in short, simply do not remain under a "constant threat" that the challenged restrictions will be reimposed. In contrast to this case, New York did not dispute that the plaintiffs faced irreparable harm and it was "likely" the relevant zones would be reclassified. *See id.* at 74 (Kavanaugh, J., concurring). Here, under the orders challenged by Plaintiffs, there is no chance that the schools at issue will be prevented from opening to in-person instruction.

III

The majority's mootness analysis, although in my view incorrect, does little damage on its own. What makes its opinion truly problematic is the conclusion that the challenged orders violate the substantive Due Process Clause as applied to parents of children who attend private schools under the "*Meyer-Pierce*" doctrine. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). In arriving at that conclusion, the majority routinely sets aside governing precedent, beginning with the basic principle that "an appellate court will not consider issues not properly raised before the district court." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

A

The majority's forfeiture analysis begins with an incorrect premise: that whether Plaintiffs actually raised their claim below "must be understood against the

backdrop of the relevant caselaw." Op. at 38. We of course consider relevant caselaw when analyzing the *merits* of a claim. But whether a claim was properly raised before the district court is a record-based inquiry that turns on what Plaintiffs *actually said*, not what they might have said. The record makes plain that plaintiffs raised no *Meyer-Pierce* argument below.

I begin with a review of Plaintiffs' carefully drafted complaint. The complaint does not "generally allege[]" the denial of Due Process *rights*. Op. at 38. Rather, it explicitly and repeatedly asserts a violation of but one purported Due Process right—a right to a basic minimum education:

- "Plaintiffs and their children *have a fundamental right to a basic, minimum education*. Defendants have deprived Plaintiffs and their children *of this right* in violation of the Fourteenth Amendment to the U.S. Constitution, by effectively precluding children from receiving a basic minimum education[.]" (emphasis added).

- "Defendants lack any compelling, or even rational, interest for burdening Plaintiffs' children of their *fundamental right to a basic minimum education*." (emphasis added).

- "In Defendants' rush to enact these new restrictions, they have placed special interests ahead of the wellbeing of the children, and children's *fundamental right to receive a basic minimum education*." (emphasis added).

- "[T]he Court should not hesitate to ensure that Plaintiffs' fundamental rights *in securing a basic minimum education* for their children are preserved and protected from Defendants' arbitrary actions." (emphasis added).

The complaint nowhere differentiates between public- and private-school children with respect to the Due Process claim, nor does it assert that California has abridged

or interfered with the right of parents to select their children's educational forum.

Plaintiffs' district court briefing is no different. Their briefs allege a single due process violation predicated on a claimed right to a basic minimum education. In claiming that their briefing raised a *Meyer-Pierce* claim, Plaintiffs identify only a citation to *Meyer* in a portion of a brief arguing for the right to a basic minimum education. A review of the full context of that citation demonstrates that it did not raise a separate *Meyer-Pierce* claim:

> A. The Order Violates the Fourteenth Amendment Because it Infringes Fundamental Rights and Is Not Narrowly Tailored to Advance the Government's Interest in Combatting the Spread of COVID-19
>
> **Education is a Fundamental Right**. State-provided education is "deeply rooted in this Nation's history and tradition" and is "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Any infringement of the right to basic minimum education—or discrimination that deprives certain groups of that right—is thus subject to a "heightened level of scrutiny." *United States v. Harding*, 971 F.2d 410, 412. n.1 (9th Cir. 1992).
>
> And while Defendants contend that "no court has recognized a fundamental right to a basic education" (Resp. 14), *Plyer* and *Rodriguez* demonstrate that any infringement on the right to basic minimum education must be met with at least heightened scrutiny. *Plyer v. Doe*, 457 U.S. 202, 221 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973). Moreover, the "identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2016).
>
> In all events, education is at least a "quasi-fundamental right" under settled precedent. *Harding*, 971 F.2d at 412 n.1. Courts have long held that pupils have a "right to be taught," *Farrington v. Tokushige*, 11 F.2d 710, 714 (9th Cir. 1926), *aff'd*, 273 U.S. 284 (1927), **and that parents have a right "to control the education of their" children. *Meyer v. Nebraska*, 262 U.S.**

> **390, 401 (1923).** The very concept of "liberty," "[w]ithout doubt, [ ] denotes . . . the right of the individual . . . to acquire useful knowledge." *Id.* at 399. Any burden on the right to education thus raises heightened scrutiny. *See* Carmen Green, *Educational Empowerment: A Child's Right to Attend Public School*, 103 Geo. L. J. 1089, 1127–28 (the test utilized in *Meyer* is "most similar to today's intermediate standard of review").

(second emphasis added). Not convinced? Take Plaintiffs' word for it:

> Defendants mischaracterize Plaintiffs as advocating for a "fundamental right to in-person school." Resp. 17. Plaintiffs' actual argument is that "the Fourteenth Amendment of the United States Constitution [ ] protects Californians' fundamental right to a basic minimum education," TRO at 2, and that the Order infringes that right because distance learning has proved woefully inadequate. *See id.* 7-9.

Indeed, despite the district court's invitation for supplemental filings when it was considering whether to grant summary judgment, Plaintiffs did not present any distinct argument that a *Meyer-Pierce* right was being asserted, again merely citing these cases in passing. When the court granted summary judgment without mentioning a *Meyer-Pierce* claim, Plaintiffs did not request reconsideration. *See Young v. Hawaii*, 992 F.3d 765, 779-–80 (9th Cir. 2021) (en banc). And Plaintiffs candidly conceded at oral argument that they cannot and do not fault the district court for not addressing that claim.

However charitably read, Plaintiffs' filings below simply did not offer the argument that the school closure orders infringed the parents' substantive Due Process right to control their children's upbringing. The only argument raised by Plaintiffs' quite able counsel was that *all* children—those attending public and

private schools alike—were being denied a right to a basic minimum education.

Unhappy with the record, the majority creatively reimagines Plaintiffs' district court filings, concluding that because some of the children had opted out of a state-provided education, they "necessarily" raised a *Meyer-Pierce* claim. Op. at 38-42. That is neither logically nor actually the case. The complaint and briefing assert only that the State was preventing Plaintiffs' children—both those who attended public school and those who did not—from receiving a constitutionally sufficient level of education. The private-school Plaintiffs would plainly have benefited from succeeding on that claim: the COVID-19 restrictions would have been lifted in the schools in which their children were enrolled. The fact that Plaintiffs asserted a broad losing argument below doesn't mean that they implicitly preserved a different one.

B

Perhaps recognizing that the *Meyer-Pierce* argument was never raised below, the majority alternatively concludes that we should exercise our discretion to hear it. But, although we can forgive forfeiture under certain circumstances, *see AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213–14 (9th Cir. 2020), there is a fundamental reason not to do so here. The "cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc. v. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J.,

concurring in part and in the judgment). That principle applies in force here.

We might exercise our discretion to reach this forfeited issue if it would impact Plaintiffs' ability to attend school today or tomorrow. But it will not. Their schools can reopen and need not close again even if case rates rise. I might also understand the need to forgive forfeiture if this were a recurring question. But it is not. The restrictions here were the product of exceptional circumstances, and, largely for the reasons detailed above, are unlikely to recur. The majority's ruling is therefore tantamount to an advisory opinion. And because the issue decided is one of constitutional importance, we should leave it for another day.

IV

Having ignored all stop signs, the majority speeds on to the merits of the *Meyer-Pierce* claims. That is its biggest mistake. The majority errs in both (1) finding that the narrow *Meyer-Pierce* right protects a parent's choice of a particular mode of education and (2) concluding that any law impacting the *Meyer-Pierce* right is subject to strict scrutiny.

A

Because the majority's analysis of the *Meyer-Pierce* claims rests largely on out-of-context quotations from Supreme Court decisions, it is useful to begin with a review of what the relevant cases actually hold.

Meyer involved a teacher's challenge to his conviction under state law for

unlawfully teaching German to children at a parochial school. 262 U.S. at 396–97. In reversing that conviction, the Court explained that the Fourteenth Amendment "liberty" interest included parents' rights to "bring up children," including "the right of parents to engage [Meyer] so to instruct their children." *Id.* at 400. The Court, however, stressed that "[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned." *Id.* at 402.

Pierce considered a challenge by an Oregon corporation that operated private schools to a law requiring attendance of all students at public schools. 268 U.S. at 531–32. The Court reiterated that "[n]o question is raised concerning the power of the state reasonably to regulate all schools" or "to inspect, supervise and examine them, their teachers and pupils." *Id.* at 534. But the Court found that the Oregon law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534–35. Because children are not "merely" creatures of the state, "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535.

Wisconsin v. Yoder considered a challenge by three Amish parents to convictions for refusing to send their children to public school in violation of state law. 406 U.S. 205, 207–09 (1972). Although affirming the Wisconsin Supreme

Court's reversal of the convictions, the Court once again emphasized that "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." *Id.* at 213.

Runyon v. McCrary considered whether 42 U.S.C. § 1981 was constitutional as applied to schools with a history of discriminatory admissions. 427 U.S. 160, 168–69 (1976). In answering the question "yes," the Court rejected the notion that the *Meyer-Pierce* right was implicated, reading those cases and their progeny narrowly:

> [T]he present application of § 1981 infringes no parental right recognized in *Meyer*, *Pierce*, *Yoder*, or *Norwood*. No challenge is made to the petitioner schools' right to operate or the right of parents to send their children to a particular private school rather than a public school. Nor do these cases involve a challenge to the subject matter which is taught at any private school. Thus, the [schools] remain presumptively free to inculcate whatever values and standards they deem desirable. *Meyer* and its progeny entitle them to no more.

Id. at 177. The Court later reiterated this narrow reading and again emphasized that the right does not prevent states from reasonably regulating schools:

> The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. Indeed, the Court in *Pierce* expressly acknowledged "the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils . . . ."

Id. at 178.

Fields v. Palmdale School District, 427 F.3d 1197 (9th Cir. 2005), re-affirms these well-established principles. The plaintiffs sued a school district for teaching sexual topics, asserting their right to control their children's upbringing. *Id.* at 1204–05. We recognized the *Meyer-Pierce* right to direct one's child's upbringing but emphasized that it is "not without limitations." *Id.* at 1204. We affirmed the holdings, repeated in each of the above cases, that the State may subject this right to "reasonable regulation." *See id.* Indeed, we further held that "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished." *Id.* at 1206. In short, we stressed that "what *Meyer–Pierce* establishes is the right of parents to be free from state interference with their choice of the educational forum itself, a choice that ordinarily determines the type of education one's child will receive." *Id.* at 1207.

B

The majority nonetheless reads the *Meyer-Pierce* right as protecting a parent's right to choose a specific *mode* of education. But, as one of our colleagues has aptly noted, *Meyer* and *Pierce* were products of "complex forces." Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 CAP. U. L. REV. 887, 891 (1996). The Supreme Court has instructed us to read those decisions narrowly, explaining that *Meyer*

protects a parent's right to choose a child's curriculum, and that *Pierce* protects a parent's right to choose a school for the child. *Runyon*, 427 U.S. at 176–77; *see also Norwood v. Harrison*, 413 U.S. 455, 461 (1973) (stressing "the limited scope of *Pierce*"); *see also, e.g.*, *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419 (6th Cir. 1996) ("The Supreme Court has held that parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction."). Neither right is at stake here: Plaintiffs freely chose the private school of their choice and do not complain about state interference in the substance of what those schools teach.

The majority justifies its expansion of the *Meyer-Pierce* right by claiming that it must "necessarily" have included a right to select in-person education. *See* Op. at 47. But the Supreme Court has told us the contours of the right, and they do not encompass a given mode of instruction. Their reliance on isolated language in prior decisions fares no better. To be sure, in *Fields*, we explained that the *Meyer-Pierce* right protects the "choice of the educational forum." Op. at 48 (quoting *Fields*, 427 F.3d at 1207). But that statement simply reaffirmed the principle that parents were free to choose the school their children will attend, and did not even indirectly suggest that the mode of delivery of instruction was a matter of constitutional magnitude. The same applies to our prior quoting of Justice Harlan's dissent in *Berea College v. Kentucky*, 211 U.S. 45 (1908), in *Farrington v. Tokushige*, 11 F.2d

710 (9th Cir. 1926), for the following proposition:

> If pupils, of whatever race . . . choose with the consent of their parents or voluntarily to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether federal or state, can legally forbid their coming together, or being together temporarily for such an innocent purpose.

See Op. at 48-49 (quoting *Tokushige*, 11 F.2d at 713-14). The decision plainly involves the decision to operate a private school, not whether that school is then subject to generally applicable non-discriminatory health regulations.

In rejecting the public-school Plaintiffs' claims, the majority ironically notes the Supreme Court's admonition that we "exercise the utmost care whenever we are asked to break new ground" in the field of substantive due process, *see Glucksberg*, 521 U.S. at 720 (cleaned up), and its narrow reading of its own cases on which the plaintiffs relied, *see Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459 (1988), to support the conclusion that "we have no license to recognize such a novel right here," Op. at 35. But it then goes on to recognize precisely such a novel right.

C

Even assuming the *Meyer-Pierce* right protects in some fashion a parent's right to select in-person education during a pandemic, the majority errs in concluding that all laws impacting that interest must survive strict scrutiny. The Supreme Court has repeatedly emphasized that the *Meyer-Pierce* right remains subject to "reasonable" state regulation. *Meyer*, 262 U.S. at 403; *Pierce*, 268 U.S. at 534–35;

Yoder, 406 U.S. at 215; *Runyon*, 427 U.S. at 178. We have said the same. *Fields*, 427 F.3d at 1204–05; *Hooks v. Clark Cnty. Sch. Dist.*, 228 F.3d 1036, 1042 (9th Cir. 2000). Applying strict scrutiny whenever a *Meyer-Pierce* interest is at stake vitiates this controlling precedent. If every regulation touching on a *Meyer-Pierce* interest must survive that heightened review, a host of "reasonable" regulations would not survive, as there might be a less drastic means of achieving the state's purpose.

In finding that strict scrutiny applies, the majority again elevates isolated language of opinions over their actual holdings. That the Supreme Court has described the right as "fundamental" does not allow us to disregard its repeated injunctions that the right remains subject to "reasonable regulation." Indeed, even when presented with an opportunity to broadly apply strict scrutiny to laws infringing the *Meyer-Pierce* right, only one justice indicated that he would do so. *See Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring); *see also, e.g.*, *Ohio Ass'n*, 92 F.3d at 423 ("[N]o federal court has similarly suggested that wholly secular limitations on private school education implicate a fundamental right warranting strict scrutiny.").

The correct question to ask in reviewing the challenged orders is simply whether they are "reasonable." That they are is a point the majority does not—and cannot—dispute; indeed, it implicitly accepts that conclusion in rejecting the claims of the public-school Plaintiffs. *See* Op. at 57. We must be particularly deferential

in the context of the COVID-19 pandemic, as we "are not public health experts and . . . should respect the judgment of those with special expertise" in this area. *Diocese of Brooklyn*, 141 S. Ct. at 68 (2020). California imposed the challenged orders to protect its citizens from a pandemic. Relying on established scientific consensus about how the virus spreads, California temporarily restricted in-person schooling alongside a host of other activities. These restrictions have now largely been lifted as the threat of the pandemic has waned. The challenged orders can thus hardly be said to be unreasonable, and, as a result, should be upheld.

V

I respectfully but emphatically dissent.[5]

[5] Although I would not reach the claims of the public-school Plaintiffs, I agree with the majority that they fail on the merits. But here, too, the majority overreaches. It is not necessary to resolve this case to hold that there is no right to a minimum level of education, an issue the Supreme Court has left open. *See* Op. at 31-35; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973); *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (noting that as "*Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled . . . whether a minimally adequate education is a fundamental right"). Rather, it is enough to conclude that the district court correctly granted summary judgment to the State Defendants because any supposed right to a minimum level of education had not been denied simply because instruction was temporarily being provided remotely.