

1 AANNESTAD ANDELIN & CORN LLP
2 160 Chesterfield Drive, Suite 201
3 Cardiff-by-the-Sea, California 92007
4 Telephone (760) 944-9006
5 Facsimile (760) 454-1886
6 Lee M. Andelin (Cal. Bar No. 324234)
lee@aac.law
7 Arie L. Spangler (Cal. Bar No. 229603)
arie@aac.law

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9 Attorneys for Plaintiffs
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

LET THEM BREATHE; REOPEN
CALIFORNIA SCHOOLS,

Plaintiffs,

v.

GAVIN NEWSOM, in his official
capacity as Governor of the State of
California; DEPARTMENT OF PUBLIC
HEALTH OF THE STATE OF
CALIFORNIA; DR. TOMÁS ARAGÓN,
in his official capacity as Director and
State Public Health Officer of the
Department of Public Health of the State
of California; DR. MARK GHALY, in
his official capacity as Secretary of the
Department of Health and Human
Services of the State of California; DR.
NAOMI BARDACH, in her official
capacity as Successful Schools Team
Lead and Safe Schools for All Team
Lead for the Department of Health and
Human Services of the State of
California; and DOES 1–50, inclusive,

Defendants.

Case No.

**COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF AND
PETITION FOR WRIT OF MANDATE**

Department:

Judge:

Action filed:

Trial date: None set

1 Plaintiffs LET THEM BREATHE and REOPEN CALIFORNIA SCHOOLS complain
2 of Defendants GAVIN NEWSOM, in his official capacity as Governor of the State of
3 California; DEPARTMENT OF PUBLIC HEALTH OF THE STATE OF CALIFORNIA; DR.
4 TOMÁS ARAGÓN, in his official capacity as Director and State Public Health Officer of the
5 Department of Public Health of the State of California; DR. MARK GHALY, in his official
6 capacity as Secretary of the Department of Health and Human Services of the State of
7 California; DR. NAOMI BARDACH, in her official capacity as Successful Schools Team Lead
8 for the Department of Health and Human Services of the State of California; and DOES 1–50,
9 inclusive, as follows:

10 **I. PARTIES**

11 **A. Plaintiffs**

12 1. Plaintiff LET THEM BREATHE is an advocacy organization and an
13 incorporated entity based in Carlsbad, California, comprised of over 13,000 individuals who
14 reside throughout the state and nation. Many members of LTB are parents of California
15 schoolchildren of all ages in grades TK-12. LTB was founded by parents in response to
16 California's K-12 student mask mandates. Its goal is to advocate for mask choice for all
17 students regardless of vaccination status. LTB believes that masking students is unnecessary,
18 ineffective, and harmful to their mental, physical, social, and emotional wellbeing. LTB is
19 concerned that masks prevent children from engaging in a quality in-person education.

20 2. Plaintiff REOPEN CALIFORNIA SCHOOLS is an advocacy organization based
21 in the state of California, comprised of more than 15,800 parents of children who reside in
22 California and whose children currently attend or recently attended California public schools
23 throughout the state. RCS was founded by parents in response to California's widespread failure
24 to reopen its public schools for children to receive in-person instruction following mandatory
25 school closures in March 2020 in response to the COVID-19 pandemic. Its goal is to advocate
26 for a full, normal, return to school for all students throughout California. RCS believes that
27 students need and deserve access to in-person education five days per week in order to achieve
28 academic success and emotional wellness.

B. Defendants

3. Defendant Gavin Newsom (“Gov. Newsom”) is Governor of the State of California and is sued in his official capacity as such.

4. The Department of Public Health of the State of California (“CDPH”) is an agency of the State of California.

5. Dr. Tomás Aragón (“Dr. Aragón”) is State Public Health Officer and Director of CDPH and is sued in his official capacity as such.

6. Dr. Mark Ghaly (“Dr. Ghaly”) is Secretary of the Department of Health and Human Services of the State of California and is sued in his official capacity as such.

7. Dr. Naomi Bardach (“Dr. Bardach”) is Successful Schools Team Lead for the Department of Health and Human Services of the State of California and is sued in her official capacity as such.

III. GENERAL ALLEGATIONS

A. Gov. Newsom Declares State of Emergency to Address COVID-19

8. On March 4, 2020, Gov. Newsom declared a state of emergency in response to the COVID-19 pandemic.

9. On March 13, 2020, Gov. Newsom signed Executive Order N-26-20, which permitted school districts throughout the state to initiate school closures.

10. On March 19, 2020, via Executive Order N-33-20, Gov. Newsom ordered all Californians to stay home.

11. In the proceeding days, Californians experienced widespread government mandated closures of schools, many businesses and recreational spaces. Governor Newsom announced on April 1, 2020 that schools statewide would remain closed through the end of the school year.

12. A large majority of public schools in California remained closed for in-person instruction throughout 2020. While some California schools reopened for abbreviated in person learning opportunities in the fall of 2020 or the spring of 2021, many schoolchildren were forced to remain in small cohorts, and were thus prevented from playing and enjoying lunch

1 with their friends at school. All students, teachers, administrators, parents and visitors were
2 required to wear facial coverings at all times while on a school campus, even outdoors.

3 13. As the 2020-21 school year came to a close, on June 11, 2021, Gov. Newsom
4 signed Executive Order N-07-21 and announced that California would “fully reopen” with
5 capacity limitation and physical distancing restrictions officially ending on June 15, 2021.

6 14. The same day, Dr. Aragon issued a new public health order, effective June 15,
7 2021, providing, in relevant portion: “All individuals must continue to follow the requirements
8 in the current COVID-19 Public Health Guidance for K-12 Schools in California. [...] I will
9 continue to monitor the scientific evidence and epidemiological data and will amend this
10 guidance as needed by the evolving public health conditions and recommendations issued by
11 the CDC and other public health authorities.” The order continues: “The California Department
12 of Public Health will continue to offer public health recommendations and guidance related to
13 COVID-19.” However, aside from mandatory guidance applicable to face coverings, “mega
14 events” and schools, “all other public health guidance related to COVID-19, issued by the
15 California Department of Public Health, will not be mandatory.”¹

16 15. On June 24, 2021, Dr. Aragon issued a memorandum to “All Californians”
17 entitled “Guidance for Use of Face Coverings – Effective June 15, 2021.” That guidance
18 provides, in relevant portion: It notes, “[a]bout 15% of our population remains without the
19 option for vaccination (children under 12 years old are not yet eligible) and risk for COVID-19
20 exposure and infection will remain until we reach full community immunity.”

21 16. The guidance further provides that masks are not required for fully vaccinated
22 individuals, except in the following settings where masks are required for everyone, regardless
23 of vaccination status: (1) public transit; (2) indoors in K-12 schools, childcare and “other youth
24 settings”; (3) healthcare settings; (4) correctional facilities and detention centers; and (5)

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¹ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Beyond-Blueprint.aspx>

1 homeless shelters, emergency shelters and cooling centers. In settings where masks are required
2 only for unvaccinated individuals, the guidance provides businesses with an option to: (1) notify
3 individuals of vaccination requirements and allow vaccinated individuals to self-attest that they
4 are fully vaccinated or meet an approved masking exemption prior to entry; (2) implement a
5 vaccination verification system; or (3) require all individuals to wear masks.

6 17. Since its issuance, the majority of business throughout the state – and even
7 government buildings – have chosen to implement Dr. Aragon’s June 15, 2021 guidance by
8 posting notices that masks are required for unvaccinated individuals. At most businesses and
9 government buildings, individuals may “self-attest” that they are vaccinated through the action
10 of not wearing a mask. Thus, the state’s “mask mandate” is selectively and rarely enforced.

11 18. While children under the age of 12 cannot receive a COVID-19 vaccine, since
12 June 15, 2021, most places have not required anyone to wear a mask indoors, including in
13 crowded venues such as Disneyland, trampoline parks, movie theaters, malls, stores, and
14 sporting events.

15 **B. CDC Issues July 2021 Guidance for K-12 Schools**

16 19. More than a year after school closures began, the CDC acknowledges that “the
17 limited in-person instruction during the pandemic may have had a negative effect on learning
18 for children and on the mental and emotional well-being of children.”² Moreover, “[s]tudents
19 benefit from in-person learning, and safely returning to in-person instruction in the fall 2021 is a
20 priority.”

21 20. The CDC issued updated guidance for COVID-19 prevention in K-12 schools on
22 July 9, 2021, which provides, in relevant portion, as follows:

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- 24 • Masks should be worn indoors by all individuals (age 2 and older) who are not
fully vaccinated.

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² CDC Science Brief: Transmission of SARS-CoV-2 in K-12 Schools and Early Care and Education Programs -
28 Updated

1 • CDC recommends schools maintain at least 3 feet of physical distance between
2 students within classrooms, combined with indoor mask wearing by people who
3 are not fully vaccinated.³

4 **C. CDPH Issues Ongoing Mask Requirement for K-12 Schools**

5 21. On July 12, 2021, CDPH issued updated guidance for K-12 schools in California
6 that is stricter than CDC guidance and provides, in relevant portion, as follows:

7 • “K-12 students are required to mask indoors, with exemptions per CDPH face
8 mask guidance. Adults in K-12 school settings are required to mask when
9 sharing indoor spaces with students.”

10 • “Consistent with guidance from the 2020-21 school year, schools must develop
11 and implement local protocols to enforce the mask requirements. Additionally,
12 schools should offer alternative educational opportunities for students who are
13 excluded from campus because they will not wear a face covering. Note: Public
14 schools should be aware of the requirements in AB 130 to offer independent
15 study programs for the 2021-22 school year.”

16 22. CDPH defended its universal mask requirement, including the mandatory
17 exclusion of students who do not wear a mask, regardless of whether they can demonstrate
18 naturally acquired immunity (i.e., from a prior infection) or full vaccination, as the more
19 equitable and less operationally difficult way to implement CDC guidance. CDPH’s guidance
20 provides, as follows:

21 Masks are one of the most effective and simplest safety mitigation layers
22 to prevent in-school transmission of COVID-19 infections and to support full
23 time in-person instruction in K-12 schools. SARS-CoV-2, the virus that causes
24 COVID-19, is transmitted primarily by aerosols (airborne transmission), and less
25 frequently by droplets. Physical distancing is generally used to reduce only

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³ Centers for Disease Control and Prevention, Guidance for COVID-19 Prevention in Kindergarten (K)-12 Schools,
28 updated July 9, 2021.

droplet transmission, whereas masks are one of the most effective measures for source control of both aerosols and droplets. Therefore, masks best promote both safety and in-person learning by reducing the need for physical distancing. Additionally, under the new guidance from the CDC, universal masking also permits modified quarantine practices under certain conditions in K-12 settings, further promoting more instructional time for students.

Finally, this approach takes into account a number of key considerations: current unknowns associated with variants and in particular the Delta Variant, which is more transmissible; operational barriers of tracking vaccination status in order to monitor and enforce mask wearing; and potential detrimental effects on students of differential mask policies. Detrimental effects of differential mask policies include: potential stigma, bullying, isolation of vaccinated OR unvaccinated students, depending on the culture and attitudes in the school or surrounding community.⁴

15 23. In a July 13, 2021 California School Board Association blog post, Defendant Dr.
16 Bardach emphasized the perceived complications of differentiating between students who are
17 vaccinated or not, and the social stigma that may come with such differentiation and
18 categorization. “If there’s an allowance for differentiation between two classes of students in a
19 school — masked and unmasked, vaccinated and unvaccinated — that’s going to be very hard,”
20 Bardach said. “It’s hard to monitor, it’s hard to enforce, it’s hard to figure out who is and isn’t
21 vaccinated — and it can become very detrimental if it becomes contentious, where some kids
22 are masked and others aren’t and there is bullying or stigma.”

23 24. A few hours after publishing its updated guidance, CDPH announced via its
24 official Twitter account: “UPDATE: California’s school guidance will be clarified regarding
25 masking enforcement, recognizing local schools’ experience in keeping students and educators
26 safe while ensuring schools fully reopen for in-person instruction.”

⁴ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/K-12-Guidance-2021-22-School-Year.aspx>

1 25. To date, CDPH has not formally updated its guidance to reflect this position.

2 26. CDPH's abrupt update to shift enforcement of the mask mandate to school
3 administrators and school district leaders tacitly acknowledges both the impact of local
4 conditions on virus transmission and community immunity (and thus the necessity of universal
5 mask mandates and other restrictions based) and the illegality of the state's attempt to require
6 that children who refuse to or cannot wear a mask indoors to be excluded from a school campus
7 and denied an opportunity for in-person learning.

8 **D. CDPH Issues Updated Quarantine Protocols for K-12 Schools**

9 27. CDPH's July 12, 2021 guidance also provides updated quarantine protocols for
10 individuals who are considered "close contacts" of another individual who tests positive for
11 COVID-19. CDPH's quarantine rules distinguish between individuals who are vaccinated and
12 those who are not. Vaccinated individuals can refrain from quarantine and testing following a
13 known exposure if they are asymptomatic.⁵

14 28. For unvaccinated close contacts, if both the COVID-19 positive individual and
15 the unvaccinated close contact are wearing a mask in an indoor classroom setting, unvaccinated
16 close contacts (i.e., an individual who spent more than 15 minutes over a 24-hour period within
17 6 feet of a COVID-19 positive individual) can undergo a "modified 10-day quarantine" and may
18 continue to attend school for in-person instruction as long as they are asymptomatic, continue to
19 wear a mask and undergo at least twice weekly testing during the 10-day quarantine, and
20 continue to quarantine for (i.e., avoid) all extracurricular activities, including sports and
21 activities within the community.

22 29. Unvaccinated close contacts who were not wearing a mask during an indoor
23 exposure who remain asymptomatic may also undergo a "modified 10-day quarantine." These
24 individuals may discontinue self-quarantine 10 days after the last exposure date or 7 days after
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26 ⁵ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-Public-Health-Recommendations-for-Fully-Vaccinated-People.aspx>

1 the last exposure date if the individual tests negative for COVID-19 after Day 5 after the last
2 exposure.

3 **E. CDPH Continues to Recommend COVID-19 Testing in Schools**

4 30. Finally, CDPH's July 12, 2021 guidance recommends that local educational
5 agencies (LEA's) "prepare for the 2021-22 school year by signing up for school-based testing." CDPH
6 encourages schools to utilize CDPH's free K-12 testing program which is available to
7 any school (public, private and charter) and provides both PCR and rapid testing options.
8 According to CDPH, schools could implement "periodic testing of a portion of unvaccinated
9 asymptomatic staff and students to understand school rates of COVID-19"; testing unvaccinated
10 close contacts in a school outbreak; testing students and staff with symptoms; and/or universal
11 "pre-entry testing."

12 31. CDPH recommends that schools implement a testing program even when
13 community case rates are low "to reassure and support members of the school community"
14 and/or "to track case rates in schools for decision making."

15 32. CDPH explains, "Although vaccines are now widely available and vaccinated
16 peoples are less likely to be infected with or transmit COVID-19, vaccines are not yet available
17 for students 11 years old and younger. In addition, not all students and staff who are eligible for
18 vaccination have been vaccinated. This highlights the continued need for proven COVID-19
19 prevention strategies, including testing unvaccinated peoples in school communities. Therefore,
20 COVID-19 testing in K-12 schools remains a powerful tool for preventing transmission of
21 COVID-19."

22 33. While stating that both the California and Federal Government have invested
23 substantially in testing infrastructure, CDPH has arranged for California schools to partner with
24 the Valencia Branch Lab (VBL) for free COVID-19 test kits, processing, and management.
25 Alternatively, schools may choose to partner with a commercial laboratory for PCR testing, or
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1 may work with the State of California to implement a rapid antigen testing program. As noted
2 by CDPH, antigen tests are approved by the FDA for use on symptomatic individuals only.⁶

3 **F. The COVID-19 State of Emergency Continues**

4 34. As of the date of this filing, Gov. Newsom has not yet declared an end to the
5 COVID-19 state of emergency. Notably, on June 4, 2021, Gov. Newsom stated that he did not
6 plan to lift the state of emergency even while declaring California “fully reopen.” Thus, Gov.
7 Newsom continues to wield significant power, authority and control over the lives and
8 livelihoods of Californians.

9 35. The rules surrounding state of emergency declarations are described in the
10 California Emergency Services Act. A state of emergency can be declared when “conditions of
11 disaster or of extreme peril” exist that are “likely beyond the control of any single county, city
12 and county or city.” (Gov. Code § 8558.)

13 36. Section 8629 of the Act states that the Governor should proclaim the termination
14 of a state of emergency at “the earliest possible date that conditions warrant.” (Gov. Code §
15 8629.)

16 **G. COVID-19 Cases, Deaths and Hospitalizations in California Have**
17 **Drastically Decreased As More Californians Acquire Immunity**

18 37. According to CDPH’s own data, as of July 2021, more than 3,748,365
19 Californians (or 9.49 percent of the state’s population) have tested positive for COVID-19 since
20 March 2020.

21 38. In 2020, a total of 32,026 Californians (0.08 percent of the population) had died
22 with a COVID-19 diagnosis.⁷ For perspective, in 2017, an estimated 62,797 Californians died
23 from heart disease and 59,516 died from cancer.

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26 ⁶ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CDPH-Guidance-on-the-Use-of-Antigen-Tests-for-Diagnosis-of-Acute-COVID-19.aspx>

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28 ⁷ <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>

1 39. The rate of daily or weekly hospitalizations and deaths in a community speak to
2 the virility and severity of the disease locally.

3 40. On January 15, 2021, before vaccinations were widely available, an average of
4 22,265 Californians were hospitalized with COVID-19 over a 14-day period and 1.7
5 Californians per 100,000 died with COVID-19 over a seven-day period.

6 41. In the spring of 2021, vaccinations became widely available to all Californians
7 over the age of 12.

8 42. As of July 14, 2021, 60.9% of Californians over the age of 12 have been fully
9 vaccinated, and an additional 9.2% percent of Californians have received at least one dose of a
10 two-dose vaccine.

11 43. According to Defendant Dr. Aragón, “COVID-19 vaccines are effective in
12 preventing infection, disease, and spread.”

13 44. By mid-November 2020, an estimated 14.3% of the US population had been
14 infected by SARS-CoV-2.⁸

15 45. According to CDPH’s own data, 85.9% of Californians have antibodies for the
16 virus that causes SARS-CoV-2. People who have antibodies were either infected with COVID-
17 19 at some point in the past or may have received a COVID-19 vaccine and are fully or partially
18 immune to COVID-19, meaning they are highly unlikely to be hospitalized or die from a
19 COVID-19 infection.⁹ While antibodies wane over time, T cells, which trigger a robust antibody
20 response to prevent morbidity from infection, remain. T cell responses are largely unaffected by
21 the variants. While circulating memory T cells may not prevent SARS-CoV-2 infection, they
22 may reduce COVID-19 severity.¹⁰

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⁸ Angulo FJ, Finelli L, Swerdlow DL. Estimation of US SARS-CoV-2 Infections, Symptomatic Infections,
24 Hospitalizations, and Deaths Using Seroprevalence Surveys. *JAMA Netw Open*. 2021;4(1):e2033706.
doi:10.1001/jamanetworkopen.2020.33706.
(<https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774584>)

25 ⁹ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Sero-prevalence-COVID-19-Data.aspx>

26 ¹⁰ Negligible impact of SARS-CoV-2 variants on CD4⁺ and CD8⁺ T cell reactivity in COVID-19 exposed donors
27 and vaccinees, Alison Tarke, et al., bioRxiv 2021.02.27.433180; doi: <https://doi.org/10.1101/2021.02.27.433180>
(<https://www.biorxiv.org/content/10.1101/2021.02.27.433180v1.full>)

1 46. Well-respected pediatrician and infectious disease, virology and immunology
2 expert Dr. Paul Offit of Children's Hospital of Philadelphia recently stated that he believes it is
3 reasonable for an individual who was previously infected with COVID-19 to assume they have
4 immunity and to forgo vaccination for COVID-19 if they so choose.

5 47. A large majority of Californians are now immune to COVID-19. This
6 widespread immunity throughout the population helps to reduce the spread of COVID-19
7 throughout the state and helps to protect children and vulnerable populations from infection.

8 48. Indeed, as of July 14, 2021, the 14-day average for COVID-19 hospitalizations
9 throughout the state had decreased to 1,616, with .01 deaths from COVID-19 per 100,000
10 residents over a seven-day period.

11 **H. Children Have Very Low Risk of Mortality and Morbidity from**
12 **COVID-19**

13 49. According to the CDC, children with COVID-19 typically have mild symptoms
14 or no symptoms at all.

15 50. The estimated infection fatality rate for children ages 0-17 is 0.00002%.¹¹ Put
16 another way, children have a one in a million risk of dying from COVID-19. Moreover, a recent
17 review found that the mortality risk for children without serious pre-existing conditions is
18 effectively zero.¹²

19 51. For all children, the mortality risk from a COVID-19 infection is lower than from
20 seasonal influenza.¹³ The risk of severe disease or hospitalization is about the same. There is
21 currently no evidence of any increased mortality risk from any variant of COVID-19, including
22 the Delta variant.

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¹¹ <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>

26 ¹² <https://www.medpagetoday.com/opinion/marty-makary/93029>

27 ¹³ <https://www.cdc.gov/flu/spotlights/2019-2020/2019-20-pediatric-flu-deaths.htm?web=1&wdLOR=cFF98CDC7-76A9-482E-995F-4BF669C8B244>

1 52. Over the course of the pandemic, 49,000 Americans under the age of 18 have
2 died of all causes, according to the CDC.¹⁴ Only 335 of those deaths have been from COVID-19
3 — less than half as many as have died of pneumonia. Of those deaths, 116 were between the
4 ages of 5 and 14. In 2019, more than 2,000 American children died in car crashes; each year,
5 approximately 1,000 children die from drowning.¹⁵

6 53. Importantly, the risk of COVID-19 mortality is significantly higher for older
7 adults. Indeed, 80 percent of American COVID-19 deaths have been among those 65 and above.
8 However, according to the White House, 90 percent of American seniors are now fully
9 vaccinated.

10 **I. Children Need to Return to Normalcy**

11 54. During a June 7, 2021 press conference, Defendant Gov. Newsom remarked that
12 he was hopeful for the future for California’s children, stating: “A restorative summer filled
13 with reconnection, enrichment and joy, followed by a return to full in-person instruction, is
14 what’s best for our students.” Similarly, Defendant Dr. Bardach previously commented that the
15 risk of in-school transmission needs to be weighed against the growing number of children
16 suffering learning loss and mental health issues.¹⁶

17 55. In a May 26, 2021 *Washington Post* article, physicians Tracy Beth Høeg, Lucy
18 McBride, Allison Krug and Monica Gandhi opined, “Children should return to their normal lives
19 this summer and in the upcoming school year, without masks and regardless of their vaccination
20 status.”

21 **J. Children Rarely Spread COVID-19**

22 56. As Defendant Dr. Bardach said, “Our mental model of kids being viral vectors,
23 viral cesspools, needs to change.”¹⁷

24 ¹⁴ <https://data.cdc.gov/NCHS/Provisional-COVID-19-Deaths-by-Sex-and-Age/9bhg-hcku>

25 ¹⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6637963/>

26 ¹⁶ <https://www.kqed.org/news/11857118/can-rapid-COVID-19-testing-for-kids-help-reopen-schools-some-california-districts-bet-yes>

27 ¹⁷ <https://www.kqed.org/science/1967577/COVID-19-risk-in-schools-what-you-should-know>

1 57. The CDC reports, “staff-to-student and student-to-student transmission are not
2 the primary means of exposure to SARS-CoV-2 among infected children.” Additionally,
3 “students are not the primary sources of exposure to SARS-CoV-2 among adults in school
4 setting.”

5 58. As Dr. Bardach explained in an opinion piece published in the *New York Times*,
6 “[c]hildren and adolescents do not seem to get sick with COVID-19 as frequently as adults. And
7 children, especially elementary school-age children, do not seem to transmit it effectively to one
8 another, nor to adults.”¹⁸

9 59. Recent data from more than 1.5 million students and staff at K-12 schools –
10 *before adult vaccination* – proves that mask mandates do not impact student or teacher infection
11 rates when adjusted for spread within the community.¹⁹

12 60. Based on a CDC report of data from November and December 2020 – prior to
13 vaccine availability and during higher case prevalence – **“lower incidence in schools that**
14 **required mask use among students was not statistically significant compared with schools**
15 **where mask use was optional.”**²⁰

16 61. Considering current vaccination, disease prevalence, hospitalization and death
17 rates, there is insufficient evidence that continued mask mandates for California’s
18 schoolchildren would provide a benefit that outweighs the potential harm.²¹

19 62. A study of Norwegian children that tested all contacts of children who had tested
20 positive for COVID-19 concluded that "transmission of SARS-CoV-2 from children under 14
21 years of age was minimal in primary schools in Oslo and Viken, the two counties with the

23 ¹⁸ <https://www.nytimes.com/2020/08/12/opinion/coronavirus-schools-children.html>

24 ¹⁹ COVID-19 Mitigation Practices and COVID-19 Rates in Schools: Report on Data from Florida, New York and
25 Massachusetts, Emily Oster, Rebecca Jack, Clare Halloran, John Schoof, Diana McLeod,
medRxiv 2021.05.19.21257467; doi: <https://doi.org/10.1101/2021.05.19.21257467>

26 ²⁰ <https://www.cdc.gov/mmwr/volumes/70/wr/mm7021e1.htm>

27 ²¹ <https://ackerman-jill99.medium.com/save-our-schools-a-health-initiative-830dcd02863>, citing
<https://www.cdc.gov/mmwr/volumes/70/wr/mm7021e1.htm>

1 highest COVID-19 incidence.”²² Notably, Norway has never required children under the age of
2 13 to wear a mask.

3 63. Additionally, a report in the *New England Journal of Medicine* summarizing data
4 from Sweden in Spring of 2020 – when schools for children ages 16 and under remained open
5 without requiring masks and vaccinations were not yet available – only saw 15 children
6 hospitalized in the ICU out of 1,951,905 children (0.77 per 100,000) with zero deaths, and only
7 30 teachers were hospitalized in the ICU (19 per 100,000) – a rate similar to other
8 occupations.²³

9 64. The COVID-19 School Dashboard developed by Brown University tracks over
10 5,000 schools, 4 million students, and 1.3 million staff, and has consistently found student and
11 staff infection rates of 0.1% to 0.2% since it began publishing in September.

12 65. A September 2020 report from Insights for Education of data from 191 countries
13 found no link between schools being open for in-person instruction and COVID-19 infection
14 rates.

15 66. In an article published in the medical journal *Pediatrics* on January 8, 2021,
16 researchers reported that in a study of 90,000 students across 56 school districts in North
17 Carolina during the first nine weeks of the school year – also prior to widely available
18 vaccinations – there were only a few dozen instances of secondary spread in schools, and *no*
19 *cases were found of in-school child-to-adult spread*, even with community infection rates of up
20 to 29 per 100,000.

21 67. In Florida during the fall of 2020, 45% of the state’s 2.8 million students received
22 in-person instruction. Only 2% fell ill with COVID-19. Of those, only 0.5% required
23 hospitalization. None died.

24 **K. Mask Mandates Harm Children**

25 ²² See <https://www.eurosurveillance.org/content/10.2807/1560-7917.ES.2020.26.1.2002011>

26 ²³ <https://www.nejm.org/doi/full/10.1056/NEJMc2026670?query=TOC&fbclid=IwAR3fY8mbKoRontMlt-PNhZ7QK1h0SXxJ6Hoq7AOe4wn2TTIK6OPHAp7ISA>

1 68. Children are at risk of harm from continued mask mandates.

2 69. Repeated exposure to mandatory mask wearing over longer periods of time –
3 especially in schools, where children are expected to learn – can be extremely harmful for
4 children.²⁴

5 70. Mask use is not benign. A review of 44 studies revealed a “statistically
6 significant correlation in the quantitative analysis between the negative side effects of blood-
7 oxygen depletion and fatigue in mask wearers with $p = 0.0454$.²⁵

8 71. While CDPH has consistently required everyone, including children over the age
9 of 2 to wear masks since early in the pandemic, the World Health Organization (“WHO”) and
10 UNICEF both state that children 5 years and under should not be required to wear masks to
11 protect others from COVID-19. This advice is based on the safety and overall interest of the
12 child and the capacity to appropriately use a mask with minimal assistance. Further, the WHO
13 and UNICEF advise that decisions whether to impose a mask requirement upon children ages 6-
14 11 should be made only after weighing the harms and benefits, including the impact of wearing
15 a mask on a child’s psychosocial development.²⁶

16 72. Defendants have not engaged in any such risk/benefit analysis, instead choosing
17 to proceed with a one size fits all policy. Defendants’ policy also completely disregards any age
18 based stratification of risk and benefit, and instead mandates that all children must serve as
19 shields for adults.

20 73. The benefits of mask wearing for children are questionable, at best, especially
21 when more than 70 percent of California adults have either natural or vaccine induced immunity
22 to COVID-19.²⁷ Reduced community spread caused by a powerful combination of adult

23 ²⁴ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8072811/>

24 ²⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8072811/>

25 ²⁶ [https://www.who.int/publications-detail-redirect/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-\(2019-ncov\)-outbreak](https://www.who.int/publications-detail-redirect/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-(2019-ncov)-outbreak); and
26 <https://www.who.int/news-room/q-a-detail/q-a-children-and-masks-related-to-COVID-19>

27 ²⁷ <https://www.latimes.com/california/story/2021-06-01/70-percent-adult-californians-partially-vaccinated-COVID-19>

1 vaccination and natural immunity dramatically reduces the incidence of infection for children
2 throughout California. This is because adult immunity protects children and further reduces the
3 already low risk that children will suffer harm from a COVID-19 infection.²⁸

4 74. On the other hand, the harms of forced mask wearing in the school setting are
5 significant and long-term.

6 75. The ability to see, appreciate and communicate through facial expressions –
7 which are hidden behind a mask – is crucial to a child’s social and emotional development.

8 76. Children need to see their peers’ outward emotional display on their faces to
9 properly engage in social interaction. Facial expressions help both children and their teachers
10 modify their behavior to align with social communication and behavioral norms.

11 77. When facial expressions are inhibited by face masks, a child’s ability to
12 communicate effectively is reduced and they are primarily left with mimicking negative
13 emotions.²⁹

14 78. Masks frequently cause anxiety and psycho-vegetative stress reactions in
15 children. Children who are required to wear masks frequently and for extended period often
16 experience an increase in psychosomatic and stress-related illnesses. They also tend to exhibit
17 depressive self-experience, reduced participation, social withdrawal and lowered health-related
18 self-care.³⁰

19 79. Masks also inhibit a child’s ability to effectively communicate with their peers
20 and teachers, which, in turn, negatively impacts a child’s ability to learn.

21 ///

22 ///

23 ///

24 ²⁸ <https://www.medrxiv.org/content/10.1101/2021.03.26.21254394v2.full-text>;
25 <https://www.timesofisrael.com/hope-for-herd-immunity-vaccines-shown-to-protect-israelis-who-dont-get-them/>;
26 and. <https://services.aap.org/en/pages/2019-novel-coronavirus-COVID-19-infections/children-and-COVID-19-state-level-data-report/>

27 ²⁹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7417296/>

28 ³⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8072811/>

1 80. More than 50% of mask wearers experience mild depressive feelings.³¹ Mild
2 depressive feelings can lead to more significant depression which can then lead to suicidal
3 ideation.

4 81. Suicidal ideation is indisputably far more harmful to children than COVID-19.

5 82. Indeed, all COVID-19 mitigation measures – which have now been imposed
6 upon Californians for more than a year – have had a profound effect on children.

7 83. According to a study published by the United States Centers for Disease Control,
8 commencing in April 2020, the proportion of children's mental health–related emergency
9 department visits among all pediatric emergency visits increased and remained elevated through
10 October. Compared with 2019, the proportion of mental health related visits for children aged
11 5–11 and 12–17 years increased approximately 24% and 31%, respectively.³²

12 84. Sadly, suicidal ideation among pediatric patients was 1.60 and 1.45 times higher
13 in March and July 2020, respectively, than in March and July 2019. Odds of a child engaging in
14 a recent suicide attempt were 1.58, 2.34, 1.75 and 1.77 times higher in February, March, April,
15 and July 2020 as compared with the same months in 2019.³³

16 85. Communication while wearing a mask is even more difficult for English
17 language learners and English-speaking children who are learning a language other than
18 English.

19 86. Mask wearing disproportionately impacts children who are attempting to learn
20 English as a second language, as it impedes their ability to process their non-native language.
21 “Non-native speakers watch the mouth than native speakers, regardless of their level of second
22 language expertise.”

23
24 ³¹ *Ibid.*

25 ³² Leeb RT, Bitsko RH, Radhakrishnan L, Martinez P, Njai R, Holland KM. Mental Health–Related Emergency
26 Department Visits Among Children Aged <18 Years During the COVID-19 Pandemic — United States, January 1–
27 October 17, 2020. *MMWR Morb Mortal Wkly Rep* 2020;69:1675–1680. DOI:
28 <http://dx.doi.org/10.15585/mmwr/mm6945a3>external icon.

³³ <https://www.aappublications.org/news/2020/12/16/pediatricssuicidestudy121620>

1 87. Attention to a speaker’s mouth increases whenever speech-processing becomes
2 more challenging, even when an individual is highly competent in that language.³⁴ Further,
3 facial expressions often help to convey the meaning and/or intent of a speaker’s words.

4 88. Masks also cause adverse physical changes, including significant increases in
5 heart rate, decreased oxygen saturation, headaches, increased skin temperature, difficulty
6 breathing, dizziness, listlessness, impaired thinking, and concentration problems. Masks
7 interfere with temperature regulation and impair the field of vision and of non-verbal and verbal
8 communication.³⁵

9 **L. CDPH’s Quarantining Rules are Unnecessary, Burdensome and**
10 **Discriminatory**

11 89. California children are entitled to a public education.

12 90. Quarantining only students who have not been vaccinated that are identified as
13 “close contacts” of an individual who tests positive for COVID-19 leads to the categorization of
14 those students who are vaccinated and will not be excluded from school based on a known
15 exposure to a COVID-19 positive individual and those students who have not been vaccinated –
16 including students who have previously been infected with COVID-19 and therefore have
17 natural immunity – who will be excluded from school based on a known exposure to a COVID-
18 19 positive individual. There is no evidence that quarantine procedures during the 2020-21
19 school year reduced the number of in-school transmission events.

20 91. This policy will lead to large groups of students – and especially students under
21 the age of 12 – being kept at home with instructions to engage in “independent study” for nearly
22 two weeks at a time. Quarantines may occur on multiple occasions throughout the school year.

24

25 ³⁴ Joan Birulés, Laura Bosch, Ferran Pons & David J. Lewkowicz (2020) Highly proficient L2 speakers still need to
26 attend to a talker’s mouth when processing L2 speech, *Language, Cognition and Neuroscience*, 35:10, 1314-1325,
DOI: 10.1080/23273798.2020.1762905

27 ³⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8072811/>

92. Since “independent study” is not an effective substitute for in-person learning, quarantined students will have no way to make up for lost in-person learning time.

93. CDPH's quarantine policy will result in children not meeting the mandatory attendance requirements to advance to the next grade level.

94. Keeping healthy children out of the classroom for days at a time contrary to the law is not in anyone's best interest.

95. Children deserve more time in the classroom, not less, especially since many California schoolchildren have not had an opportunity to receive in-person education since March 2020.

96. Under California law, which requires informed consent prior to any medical procedure, parents and children are the sole decision makers whether a child receives a COVID-19 vaccine. Many parents are still waiting for full, official FDA authorization of the vaccine before making this decision.

97. Healthy children who have natural immunity to COVID-19 and healthy children who have not received the COVID-19 vaccine should not be discriminated against and forced to quarantine at home when they do not have any symptoms after being exposed to an individual who tests positive for COVID-19, while vaccinated children are allowed to forgo quarantine and can continue to attend school in-person.

IV. CAUSES OF ACTION

FIRST CAUSE OF ACTION
**VIOLATION OF ARTICLE III, SECTION 3 OF THE CALIFORNIA CONSTITUTION
AGAINST DEFENDANTS NEWSOM, GHALY, BARDACH, AND ARAGÓN**

98. Plaintiffs hereby incorporate each of the foregoing paragraphs as though fully set forth herein.

99. The Separation of Powers Clause of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.)

1 100. On March 4, 2020, Governor Newsom declared a state of emergency under the
2 Emergency Services Act, sections 8550 through 8667.7 of the Government Code, in response to
3 COVID-19.

4 101. Gov. Newsom's March 13, 2020 order and subsequent orders have delegated to
5 CDPH (including Dr. Bardach, who was unilaterally appointed without any legislative authority
6 or constituent oversight) complete and unfettered discretion to decide core issues of education
7 policy, including decisions related to mitigation protocols that all K-12 schools in California
8 must implement in order to provide students with in-person learning, based solely on the
9 purported prevention of the spread of COVID-19 and without regard to the academic, mental,
10 and social-emotional harm caused by mandatory masking and quarantine requirements and
11 testing protocols. Thus, both the governor and state health officials are exercising a
12 quintessentially legislative function in violation of the California Constitution.

13 102. The "temporary" delegation of legislative power to the executive branch is not
14 justified by the alleged public health emergency. The state became aware of the potential impact
15 of COVID-19 in January 2020 and shut down schools on March 13, 2020. State officials have
16 now had more than a year to figure out how to reopen schools in a reasonably safe manner, as
17 has been done successfully in nearly every other state and many countries throughout the world.
18 At this point, "it is too late for the State to defend extreme measures with claims of temporary
19 exigency, if it ever could." (*South Bay United Pentecostal Church v. Newsom* (Feb. 5, 2021, No.
20 20A136 (20-746)) 592 U.S. ___, slip opn., p. 6 (conc. opn. of Gorsuch, J.).)

21 103. Furthermore, the Emergency Services Act itself, as applied here, violates the
22 California Constitution to the extent it purports to vest in the governor for an indefinite period
23 of time and without limitation, upon his own declaration of a state of emergency, "complete
24 authority over all agencies of the state government and the right to exercise within the area
25 designated all police power vested in the state by the Constitution and laws of the State of
26 California" to "promulgate, issue, and enforce such orders and regulations as he deems
27 necessary" (Gov. Code, § 8627.)

28 ///

104. California schoolchildren and their families are suffering irreparable harm each day that children are required to wear masks in school, quarantine after exposure to a COVID-19 positive individual and/or submit to COVID-19 testing before being permitted to participate in-person instruction.

105. Plaintiffs have no administrative remedy and have no adequate remedy at law.

SECOND CAUSE OF ACTION
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
AGAINST DEFENDANTS NEWSOM, GHALY, BARDACH, AND ARAGÓN

106. Plaintiffs hereby incorporate each of the foregoing paragraphs as though fully set forth herein.

107. The Administrative Procedure Act (“APA”) provides: “No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].” (Gov. Code, § 11340.5, subd. (a).)

108. Compliance with the APA, which requires among other things public notice and comment for proposed regulations, is not a mere technicality. The procedures required by the APA ensure that regulations are clear and understandable to the public, are based on accurate data and sound scientific principles, and are consistent with the law.

109. Defendants' orders and directives described herein, including but not limited to the ad hoc creation of the Safe Schools for All Team to oversee the closure, reopening, and operation of public and private schools state-wide, the appointment of Dr. Bardach as the Team Lead for the Safe Schools for All Team, and the drafting and implementation of the July 2021 guidance, are acts and regulations that can only be adopted and enforced pursuant to the requirements of the APA.

110. Defendants have not complied with any of the requirements of the APA. They have simply announced new teams, leaders, and “guidelines” for schools while schools are in

1 the process of implementing plans to reopen that have been created under existing statutes and
2 state directives. Defendants’ “guidelines” are poorly thought out, confusing, ever-changing,
3 discriminatory, and overly conservative, and it is unclear whether they are mandatory
4 prescriptions or simply aspirational standards. It is also unclear whether and to what extent
5 Defendants expect local schools to implement the guidelines. Defendants’ continual issuance of
6 new and alternate rules is evidence of the haphazard nature of Defendants’ practice of
7 “emergency” rulemaking. This combination of factors has created a moving and uncertain target
8 that has greatly frustrated those who are trying to comply these directives including school
9 boards, school administrators, teachers, parents, and students. This is the definition of an illegal
10 “underground regulation,” the epitome of bad government, and exactly the kind of chaos that
11 the Legislature sought to eliminate by enacting the APA.

12 111. Defendants’ failure to follow the APA is not justified by the declared state of
13 emergency. Again, Defendants have now had more than a year to figure out how to reopen
14 schools in a reasonably safe manner and cannot credibly claim that exigency has prevented
15 them from going through the processes required by law.

16 112. Indeed, the California State Legislature has been convening and enacting laws –
17 including amendments to the existing Education Code – since July 2020.

18 113. Many schools — both elementary and secondary in other states and around the
19 world — have remained open and/or have reopened safely for in-person learning without
20 requiring children to wear masks, quarantine and/or continually submit to COVID-19 testing
21 when they are not showing any symptoms.

22 114. In addition to its violations of the procedural requirements of the APA,
23 Defendants’ guidelines are substantively flawed. They are not based on accurate data and sound
24 scientific principles. They ignore data showing that a vast majority of Californians over the age
25 of 12 have now been vaccinated, hospitalizations and deaths are down, hospitals have not been
26 overwhelmed with COVID-19 patients for several months, and children do not suffer the same
27 level of morbidity or mortality as adults when they are infected with COVID-19. Nor do
28 children spread COVID-19 with the same virulence as adults.

1 115. Defendants ignore data showing dramatic increases in mental health issues,
2 social and emotional issues, academic delays, and other related problems in school-aged
3 children caused by overly restrictive mitigation measures. Defendants also ignore authoritative
4 pronouncements by the CDC and World Health Organization stating that public health
5 authorities should engage in a nuanced approach when considering whether to impose mask
6 requirements for schoolchildren.

7 116. Defendants conceded that there were flaws in their latest mask requirements. Just
8 hours after announcing the mandate, Defendants announced that changes will be made and, yet
9 they refuse to modify their rules into true “guidance” that can be tailored by LEA’s and/or
10 county health departments based on local conditions.

11 117. Defendants' mandates are not authorized by statute. Indeed, despite having
12 ample opportunity and the authority to do so, the Legislature has shied away from enacting any
13 detailed rules that LEAs must follow to return to full-time, in-person instruction in the fall.

14 118. California schoolchildren and their families are suffering irreparable harm each
15 day that Defendants impose additional barriers for their children to return to full-time, in-person
16 instruction in school.

17 119. Plaintiffs have no administrative remedy and have no adequate remedy at law.

THIRD CAUSE OF ACTION
VIOLATION OF EDUCATION CODE SECTION 49000

20 120. Plaintiffs hereby incorporate each of the foregoing paragraphs as though fully set
21 forth herein.

121. Education Code Section 49000 provides, in relevant portion, as follows: "A pupil
22 shall not be suspended from school or recommended for expulsion, unless the superintendent of
23 the school district or the principal of the school in which the pupil is enrolled determines that
24 the pupil has committed an act as defined pursuant to any of subdivisions (a) to (r), inclusive:
25 [...]
26 (k) (1) Disrupted school activities or otherwise willfully defied the valid authority of
27 supervisors, teachers, administrators, school officials, or other school personnel engaged in the
28 performance of their duties. [...]
29 (3) Except as provided in Section 48910, commencing July 1,

1 2020, a pupil enrolled in kindergarten or any of grades 1 to 5, inclusive, shall not be suspended
2 for any of the acts specified in paragraph (1), and those acts shall not constitute grounds for a
3 pupil enrolled in kindergarten or any of grades 1 to 12, inclusive, to be recommended for
4 expulsion.(4) Except as provided in Section 48910, commencing July 1, 2020, a pupil enrolled
5 in any of grades 6 to 8, inclusive, shall not be suspended for any of the acts specified in
6 paragraph (1). This paragraph is inoperative on July 1, 2025.” (Ed. Code § 49000.)

7 122. Defendants’ policy of mandating healthy children – including those with natural
8 or vaccine induced immunity to COVID-19 – who do not wear a face mask indoors while at
9 school will be excluded from school and denied all opportunities for in-person instruction is
10 akin to a policy of suspension and/or expulsion that violates Section 49000, as stated above.

11 123. Defendants’ policy of mandatory exclusion for any student who refuses to wear a
12 mask indoors at any K-12 school fails to satisfy the stringent requirements of the California
13 Education Code and U.S. Constitution that permit an LEA to exclude a student from school.
14 (See generally Educ. Code, §§ 49451, 48213, 76020; *Arline v. School Board of Nassau County*
15 (1987) 107 S.Ct. 1123, 1129-1130 [“Such exclusion would mean that those accused of being
16 contagious would never have the opportunity to have their condition evaluated in light of
17 medical evidence and a determination made as to whether they were ‘otherwise qualified.’
18 Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the
19 type of injury Congress sought to prevent.”].)

20 124. California schoolchildren and their families are suffering irreparable harm each
21 day that their schools require healthy schoolchildren to wear masks while indoors and to
22 quarantine at home, while not being provided with a reasonable alternative to in-person
23 instruction.

24 125. Plaintiffs have no administrative remedy and have no adequate remedy at law.

25 **FOURTH CAUSE OF ACTION**
26 **VIOLATION OF EDUCATION CODE SECTION 49050**

27 126. Plaintiffs hereby incorporate each of the foregoing paragraphs as though fully set
28 forth herein.

127. Education Code Section 49050 provides, in relevant portion: "No school employee shall conduct a search that involves: (a) Conducting a body cavity search of a pupil manually or with an instrument." (Ed. Code § 49050.)

128. Defendants' guidelines, which encourage schools to implement a program to test healthy schoolchildren for COVID-19, violate Section 49050, as stated above, to the extent that the guidelines would cause school employees to perform COVID-19 testing on children through use of a nasopharyngeal swab, which is an instrument that assists the user with obtaining a sample from the nasal cavity.

129. California schoolchildren and their families will suffer irreparable harm each day that their schools require healthy schoolchildren to submit to COVID-19 testing as a condition that must be satisfied before children are permitted to attend school in-person.

130. Plaintiffs have no administrative remedy and have no adequate remedy at law.

FIFTH CAUSE OF ACTION
VIOLATION OF CONSTITUTIONAL RIGHT TO PRIVACY
(CAL. CONST., ART. I, SEC. 1)

131. Plaintiffs incorporate by reference all allegations contained in the preceding paragraphs as though fully set forth herein.

132. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

133. Medical information is confidential and private pursuant to Cal Const Art I § 1.

134. The right to privacy was added to the California Constitution by the voters in 1972. The ballot pamphlet, which was distributed to the voters prior to the election, stated that the constitutional right to privacy encompassed a variety of rights involving private choice in personal affairs. "The right to privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose . . . [para.] . . . The right of privacy is an important American heritage

1 and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth, and
2 Ninth Amendments to the U.S. Constitution. This right should be abridged only when there is
3 compelling public need.” (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to
4 voters, Gen. Elec. (Nov. 7, 1972) p. 27, as cited by *Robbins v. Superior Court* (1985) 38 Cal.3d
5 199, 212.)

6 135. The right to refuse medical treatment is a constitutionally guaranteed right which
7 must not be abridged. (*Bartling v. Superior Court* (1984) 163 Cal.App. 3d 186, 195.) This right
8 is specifically guaranteed by the California Constitution (art. I, § 1) and has been found to exist
9 in the “penumbra” of rights guaranteed by the Fifth and Ninth Amendments to the United States
10 Constitution. (*Griswold v. Connecticut* (1965) 381 U.S. 479, 484.) “In short, the law recognizes
11 the individual interest in preserving ‘the inviolability of the person.’” (*Superintendent of*
12 *Belchertown v. Saikewicz, supra*, 370 N.E.2d 417, 424.) CA(3a) (3a) The constitutional right of
13 privacy guarantees to the individual the freedom to choose to reject, or refuse to consent to,
14 intrusions of his bodily integrity. (*Id.*, at p. 427.)

15 136. “When receipt of a public benefit is conditioned upon the waiver of a
16 constitutional right, the government bears a heavy burden of demonstrating the practical
17 necessity for the limitation.” (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213.)

18 137. Defendants’ guidelines, which encourage schools to implement a program to test
19 healthy schoolchildren for COVID-19, violate the constitutionally guaranteed right to privacy,
20 as stated above, to the extent that the guidelines would cause schools to require students to
21 submit to COVID-19 as a condition that must be satisfied before they are permitted to attend
22 school in-person.

23 138. California schoolchildren and their families will suffer irreparable harm each day
24 that their schools require healthy schoolchildren to submit to COVID-19 testing as a condition
25 that must be satisfied before children are permitted to attend school in-person.

26 139. Plaintiffs have no administrative remedy and have no adequate remedy at law.

27 ///

28 ///

1

SIXTH CAUSE OF ACTION

2

VIOLATION OF ARTICLE IX OF THE CALIFORNIA CONSTITUTION

3

140. Plaintiffs hereby incorporate each of the foregoing paragraphs as though fully set forth herein.

4

141. Article IX, section 1 of the California Constitution provides: “A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.”

5

142. Article IX, section 5 of the California Constitution provides: “The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year”

6

143. By implementing stringent and discriminatory rules, Defendants, through their decisions and other actions recited herein, have denied California schoolchildren their fundamental right to an education that provides a “general diffusion of knowledge and intelligence essential to the preservation of the rights and liberties of the people,” ensures the opportunity to become proficient according to the state of California’s standards, develop the skills and capacities necessary to achieve economic and social success in our competitive society, and participate meaningfully in political and community life.

7

144. By preventing all students from returning to school for in-person instruction unless they wear a mask at all times while indoors and unless they submit to COVID-19 testing, Defendants, through their decisions and actions recited herein, have interfered, to the detriment of California schoolchildren and their families, with the state’s “system of common schools by which a free school shall be kept up and supported in each district at least six months in every year”

8

145. The alleged government interest in slowing the spread of the virus that causes COVID-19 does not justify this infringement on California’s students’ constitutional right to a quality education.

28

146. Defendants’ decisions and other actions recited herein are significantly broader

1 than necessary to serve the alleged government interest in slowing the spread of the virus that
2 causes COVID-19.

3 147. Defendants' decisions and other actions recited herein are not narrowly tailored
4 to minimize infringements on students' educational rights.

5 148. California students and their families are suffering irreparable harm each day that
6 their schools are required to implement Defendants' unreasonable and overly broad mandates.

7 149. Plaintiffs have no administrative remedy and have no adequate remedy at law.

8 **SEVENTH CAUSE OF ACTION**
9 **VIOLATION OF EQUAL PROTECTION CLAUSE**
10 **OF CALIFORNIA CONSTITUTION**

11 150. Plaintiffs hereby incorporate each of the foregoing paragraphs as though fully set
forth herein.

12 151. Under the Equal Protection Clause of the California Constitution, “[a] person
13 may not be ... denied equal protection of the laws.” (Cal. Const., art. I, § 7, subd. (a).) Further,
14 “[a] citizen or class of citizens may not be granted privileges or immunities not granted on the
15 same terms to all citizens.” (Cal. Const., Art. I, § 7(b).)

16 152. Equal protection of the laws ensures that people who are similarly situated for
17 purposes of a law are generally treated similarly by the law. This means that a government actor
18 may not adopt a rule that affects two or more similarly situated groups in an unequal manner.

19 153. “The first prerequisite to a meritorious claim under the equal protection clause is
20 a showing that the state has adopted a classification that affects two or more similarly situated
21 groups in an unequal manner. This initial inquiry is not whether persons are similarly situated
22 for all purposes, but whether they are similarly situated for purposes of the law challenged.”
23 (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 [citations omitted]; see also *DiMartile v.*
24 *Cuomo* (N.D.N.Y. 2020), No. 1:20-CV-0859 (GTS/CFH), 2020 WL 4558711, at *10 [pandemic
25 restrictions violated equal protection guarantees]; *Deese v. City of Lodi* (1937) 21 Cal.App.2d
26 631, 635 [health restrictions applicable only to certain industries violated equal protection
27 guarantees].)

1 154. The government's exercise of police power "cannot be so used as to arbitrarily
2 limit the rights of one class of people, and allow those same rights and privileges to a different
3 class, where the public welfare does not demand or justify such a classification." (*Id.*)

4 155. Defendants' restrictions violate the Equal Protection Clause of the California
5 Constitution, because (1) Defendants' mask mandate applies only to K-12 school settings,
6 whereas California has mandated that fully vaccinated individuals, both adults and children, are
7 not required to wear a mask at any time; however, for all practical purposes, the mandate is
8 rarely (if ever) enforced, and therefore all Californians and visitors are free to choose whether to
9 wear a mask in the vast majority of indoor settings; and (2) Defendants' rules wholly ignore the
10 efficacy of naturally acquired immunity, while only recognizing vaccinated immunity and
11 sanctioning preferential treatment for vaccinated individuals.

12 156. Defendants' mask mandate disproportionately impacts English language
13 learners, as a mask inhibits their ability to effectively communicate with their teachers and
14 peers.

15 157. Where a rule results in infringement of a fundamental right, such rule is subject
16 to strict scrutiny. Education is a fundamental right under the California Constitution. Thus, any
17 rule that deprives a person or group of equal access to education is subject to strict scrutiny.

18 158. Strict scrutiny demands that the government actor establish (1) it has a
19 compelling interest that justifies the challenged rule; (2) the rule is necessary to further that
20 interest; and (3) the rule is narrowly drawn to achieve that end.

21 159. The alleged government interest in slowing the spread of the virus that causes
22 COVID-19 does not justify Defendants' rules.

23 160. Defendants' rules are significantly broader than necessary to further the alleged
24 government interest in slowing the spread of the virus that causes COVID-19.

25 161. Defendants' rules are not narrowly drawn to minimize infringements on the
26 fundamental rights of California's schoolchildren.

27 162. Experience and science have demonstrated that schools do not drive community
28 transmission of the virus and that schools can reopen safely with basic precautions that are

1 much less harmful to students than the overbroad measures Defendants have imposed.

2 163. The distinction made by Defendants between vaccinated and unvaccinated
3 children cannot survive strict scrutiny. In the alternative, this distinction cannot survive even
4 rational basis scrutiny. Individuals who have been vaccinated for COVID-19 can and do still get
5 infected with the COVID-19 virus. Defendants' preferential treatment of vaccinated individuals
6 in the application of their quarantine and testing protocols discriminates against unvaccinated
7 individuals, including those with natural immunity who have recovered from COVID-19. It also
8 creates two classes of children: those who have been vaccinated for COVID-19 and those who
9 have not.

10 164. Defendants' guidelines treat children who have not been vaccinated (regardless
11 of their actual immunity) as an inferior class, in that those children must follow separate
12 quarantine and testing procedures than the children who have been vaccinated.

13 165. The COVID-19 testing that Defendants are recommending that schools
14 implement for unvaccinated students cannot withstand strict scrutiny. In the alternative, it
15 cannot survive even rational basis scrutiny. A COVID-19 test is similar to a snapshot in time, in
16 that it detects the possible presence of the SARS-CoV2 virus in an individual as of the exact
17 time that the test is administered. Mandatory testing of asymptomatic individuals — and
18 especially children — is nonsensical and unjustified where most teachers and school staff will
19 be vaccinated, and studies have revealed that children are unlikely to spread COVID-19 to
20 adults and others. *All teachers and staff have now had the opportunity to receive both doses of
21 the vaccine.* Moreover, and importantly, a COVID-19 test does not determine whether an
22 individual is contagious and therefore at risk of infecting others. Defendants' guidance,
23 recommending that schools test all unvaccinated students, does not guarantee or even suggest
24 that all students (including those who are vaccinated) will be free of COVID-19 when they are
25 physically present at school such that the safety of other students, teachers and staff and their
26 families will be insured or even nominally aided. Indeed, COVID-19 testing of asymptomatic,
27 unvaccinated students is nothing more than theatrics, designed to make students, teachers, staff,
28 and their families "feel safe" while ensuring that a government sponsored and funded laboratory

1 is utilized. Moreover, PCR testing of asymptomatic individuals may cause unnecessary harm
2 based on test's the propensity for false positive results. Public school districts in other states are
3 not requiring COVID-19 testing of asymptomatic, unvaccinated students.

4 166. California schoolchildren and their families will suffer irreparable harm each day
5 that their schools are required to follow Defendants' guidelines and rules for testing and
6 quarantining.

7 167. Plaintiffs have no administrative remedy and have no adequate remedy at law.

8 WHEREFORE, Plaintiffs pray for relief as follows:

- 9 1. A temporary restraining order and preliminary and permanent injunction
10 restraining and preventing Defendants Governor Newsom, Dr. Ghaly, Dr.
11 Bardach, and Dr. Aragón from applying and enforcing the July 2021 guidance
12 related to mandatory masking, quarantines and COVID-19 testing, and from
13 issuing any new order, directive, guidance, rules or "framework" aimed at
14 preventing the spread of COVID-19 that would inhibit learning, cause harm, and
15 prevent any student from reasonably enjoying the benefits of full-time, in-person
16 instruction;
- 17 2. A declaration that the July 2021 guidance related to mandatory masking,
18 quarantines and COVID-19 testing is invalid and unlawful to the extent
19 Defendants treat it as mandatory for all students and schools;
- 20 3. A declaration that Defendants cannot require schools to exclude a student from
21 school based upon a refusal to wear a face mask indoors;
- 22 4. Attorneys' fees pursuant to section 1021.5 of the Code of Civil Procedure and
23 any other applicable provision of law;
- 24 5. Costs of suit; and
- 25 6. Such other and further relief as the court may deem just and proper

26 Dated: June 22, 2021

27 AANNESTAD ANDELIN & CORN LLP

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Lee M. Andelin
Arie L. Spangler
Attorneys for Plaintiffs