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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
08/10/2020 at 03:54:18 PM
Clerk of the Superior Court
By Taylor Crandall, Deputy Clerk

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO—CENTRAL DIVISION

UNLIMITED JURISDICTION

SAINT AUGUSTINE HIGH SCHOOL OF SAN DIEGO; TIMOTHY CABAÑA, an individual; JUAN ENCISO, an individual; GABRIELLA ENCISO, an individual; CESAR GONZALEZ, an individual; BLANCA GONZALEZ, an individual; MARTHA HERNANDEZ, an individual; THELMA VILLASEÑOR, an individual; TOMASA WHITE, an individual; and ANTONIO ZAZUETA, an individual.

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California; SONIA Y.

Case No. 37-2020-00028020-CU-MC-CTL

UNVERIFIED COMPLAINT FOR:

1: Violation of California Constitution's Equal Protection Guarantees on the Basis of Wealth (Cal. Const., art. I, § 7; art. IV, § 16);

2: Violation of California Constitution's Equal Protection Guarantees on the Basis of Geography (Cal. Const., art. I, § 7; art. IV, § 16); and

3: Violation of California Constitution's Equal Protection Guarantees on the Basis of Race (Cal. Const., art. I, § 7; art. IV, § 16)

ANGELL, in her official capacity as the State Public Health Officer and Department of Public Health Director; TONY THURMOND, in his official capacity as State Superintendent of Public Instruction and Director of Education; the COUNTY OF SAN DIEGO; and DOES 1–25, inclusive,

Defendants.

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Plaintiffs Saint Augustine High School of San Diego ("St. Augustine" or "the school"), Timothy Cabaña, Juan Enciso, Gabriella Enciso, Cesar Gonzalez, Blanca Gonzalez, Martha Hernandez, Thelma Villasenor, Tomasa White, and Antonio Zazueta, individually, all of whom are parents of students at St. Augustine, by their attorneys, Troutman Pepper Hamilton Sanders LLP, bring this action against Defendants Gavin Newsom, in his official capacity as the Governor of California; Xavier Becerra, in his official capacity as the Attorney General of California; Sonia Y. Angell, in her official capacity as the State Public Health Officer and Department of Public Health Director; Tony Thurmond, in his official capacity as State Superintendent of Public Instruction and Director of Education; and the County of San Diego, and allege and show the Court as follows ("Complaint").

NATURE OF ACTION

1. In shutting down all in-person secondary schooling in significant portions of the State, including San Diego County, Governor Newsom made California an extreme outlier: the *only* State to order such a broad-based school shutdown. While children in other portions of the State, as well as the children of wealthy parents who can afford "education pods," can benefit from in-person schooling, low-income San Diego families like the individual Plaintiffs here will be left with inadequate "Zoom" learning for the foreseeable future. Given the broad protection that the California Constitution provides against *educational disparities* based on geography and wealth, this is plainly unconstitutional under *Butt v. State of California* (1992) 4 Cal.4th 668.

2. As a result of the Governor's Order, lower-income and minority students must shoulder more of the burden to combat the spread of COVID-19 than the rest of society, sacrificing their right to in-person education while others freely patronize a wide range of open businesses that are wholly unrelated to fundamental rights such as education.

3. Given the unique protection that that the California Constitution provides against educational disparities, that is plainly forbidden and requires a swift remedy.

4. Plaintiffs now seek measured, reasonable relief, respectfully requesting that this Court prohibit enforcement of the Governor's discriminatory Order, and allow St. Augustine and its students' parents to make their own, well-informed decisions about safely returning to in-

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person instruction for the beginning of this fall term, on August 25.

JURISDICTION AND VENUE

5. The transactions and events which are the subject matter of this Complaint mostly occurred within the County of San Diego, State of California.

6. This Court has jurisdiction over the instant controversy under California Code of Civil Procedure, section 88.

7. Venue is proper in San Diego County pursuant to Code of Civil Procedure section 393, as this lawsuit is against the public-officer defendants in their official capacities and "the cause, or some part of the cause, arose" in San Diego County. (Code Civ. Proc., § 393, subd. (b).)

8. Venue is also proper here, as this is an action against the County of San Diego, which "may be tried in the county . . . in which it is located." (Code Civ. Proc., § 394, subd. (a).)

PARTIES

9. Plaintiff St. Augustine is a private, all-male high school operating in San Diego, California, since 1922. St. Augustine maintains standing to sue both on its own behalf, *TracFone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1364, and on behalf of its lower income students, *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 61.

10. Plaintiff Timothy Cabaña is a parent of a minor child attending St. Augustine, in San Diego, California.

11. Plaintiffs Juan Enciso and Gabriella Enciso are parents of a minor child attending St. Augustine, in San Diego, California.

12. Plaintiffs Cesar Gonzalez and Blanca Gonzalez are parents of a minor child attending St. Augustine, in San Diego, California.

13. Plaintiff Martha Hernandez is a parent of a minor child attending St. Augustine, in San Diego, California.

14. Plaintiff Thelma Villaseñor is a parent of a minor child attending St. Augustine, in San Diego, California.

15. Plaintiff Tomasa White is a parent of a minor child attending St. Augustine, in San Diego, California.

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16. Plaintiff Antonio Zazueta is a parent of a minor child attending St. Augustine, in San Diego, California.

17. Defendant Gavin Newsom is made a party to this Action in his official capacity as the Governor of California. The California Constitution vests the "supreme executive power of the State" in the Governor, who "shall see that the law is faithfully executed." (Cal. Const., art. V, § 1.)

18. Defendant Xavier Becerra is made a party to this Action in his official capacity as the Attorney General of California. Under California law, Becerra is the chief law enforcement officer in the State. (Cal. Const., art. V, § 13.)

19. Defendant Sonia Y. Angell, MD, MPH, is made a party to this Action in her official capacity as the Director and State Public Health Officer. Dr. Angell is sued herein in her official capacity to the extent that she is responsible for providing official government guidance to the various industries that are allowed to operate.

20. Defendant Tony Thurmond is made a party to this Action in his official capacity as State Superintendent of Public Instruction and Director of Education. Thurmond is responsible for enforcing education law and regulations in California.

21. Defendant County of San Diego is a political subdivision of the State of California, which may be sued under California Government Code section 945.

22. Plaintiffs presently do not know the names or capacities of other defendants responsible for the wrongs described in this Complaint, and, pursuant to California Code of Civil Procedure section 474, sue such defendants under the fictitious names Does 1 through 25 inclusive.

FACTUAL ALLEGATIONS

St. Augustine School

23. St. Augustine is an all-male high school in San Diego, dedicated to maintaining and strengthening the Catholic, Augustinian identity of both the school and its students, while facilitating growth among students and faculty through continual improvement of teaching, learning, and instructional support programs.

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24. St. Augustine believes in the uniqueness of a high school experience in a fraternal atmosphere, and uses uniquely tailored, in-person instruction to ensure each of its students becomes a well-rounded, well-educated Christian gentleman.

25. The School prides itself on offering superlative educational, religious, and interpersonal development to all its students.

26. St. Augustine is committed to providing educational opportunities to those in need and to a diverse student body. To that end, St. Augustine regularly provides scholarships, both need-based and merit-based, as well as grants to allow those who need assistance affording "the Saints Experience" to enjoy the exceptional educational and religious opportunities offered by St. Augustine. Over 53% of all families at St. Augustine qualify for some type of tuition assistance, and the school has given over $3.1 million in aid and scholarships in each of the last two years. Furthermore, 20% of St. Augustine's students live in economically challenged areas (that is, within the boundaries of a Title I school), and 23 of its families fall below the financial threshold set by the government to receive free or reduced lunch.

27. St. Augustine's commitment to diversity is reflected in its student body. Of the roughly 700 young men attending, 4% are African American, 12% are Asian and Pacific Islander, 32% are Hispanic or Latino, and 3% are multiracial.

28. All of St. Augustine's students benefit from the excellent education and development that they receive. The school's success is evident from its students' college admissions—recent 2020 graduates of St. Augustine will be attending college at all nine University of California campuses, in 26 different States, and at schools as far away as Duke University, Boston College, the United States Military Academy, and the United States Naval Academy.

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COVID-19 In California

29. On March 4, 2020, the Governor declared a state of emergency across California in light of the spread of the COVID-19 pandemic. (Gov. Gavin Newsom, Executive Dep't, State of Cal., Proclamation of a State of Emergency (Mar. 4, 2020).[1])

30. Shortly thereafter, on March 19, Governor Newsom issued an executive order requiring that "all residents . . . immediately heed the current State public health directives," Governor Gavin Newsom, Executive Order N-33-20 (Mar. 19, 2020),[2] and he has since extended the timeframe for this requirement through the present with additional orders, *see, e.g.*, Governor Gavin Newsom, Executive Order N-60-20 (May 4, 2020).[3]

31. At present, the State's public-health guidance allows numerous businesses to remain open, statewide. (CA.gov, *Stay Home Q&A* (Aug. 5, 2020).[4]) The State now allows "childcare" facilities, "day camps," "grocery stores," "convenience stores," "toy stores," and "libraries" to open across the state, although with "require[d] modifications to support social distancing" for some of these businesses. (*Ibid.*; *see also COVID-19 Update Guidance: Child Care Programs and Providers*, Cal. Dep't of Pub. Health (July 17, 2020).[5])

32. Universities are omitted from the statewide orders and have the option of opening for in-person schooling. (*See* CA.Gov, *Education* (July 17, 2020)[6];)

33. In the State's own words, there are "a wide range of circumstances" in which individuals may leave their homes and "patronize local businesses." (*Stay Home Q&A*, *supra*.)

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[1] Available at <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/> (as of Aug. 5, 2020).

[2] Available at <https://www.gov.ca.gov/wp-content/uploads/2020/03/N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-008.pdf> (as of Aug. 5, 2020).

[3] Available at <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.4.20-EO-N-60-20.pdf> (as of Aug. 5, 2020).

[4] Available at <https://covid19.ca.gov/stay-home-except-for-essential-needs/> (as of Aug. 5, 2020).

[5] Available at < https://files.covid19.ca.gov/pdf/guidance-childcare--en.pdf> as of Aug. 5, 2020).

[6] Available at <https://covid19.ca.gov/education/> (as of Aug. 5, 2020).

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The Governor's School Shutdown Order

34. On July 17, Governor Newsom issued guidance prohibiting primary and secondary schools—public or private—in the State from reopening for in-person instruction if their "community" failed to meet certain public-health criteria. (Governor Newsom, COVID-19 Industry Guidance: Schools and School-Based Programs (July 17, 2020) at 2.[7])

35. This guidance applies to all schools in a "community," regardless of willingness or preparedness to comply with all public-health guidelines applicable to other businesses and facilities that are presently allowed to open and operate for in-person services. (*Ibid.*)

36. On the same day, the California Department of Public Health issued a "framework" for reopening for in-person learning, which clarifies which schools may reopen for in-person instruction and which must remain closed under the guidance: schools "may reopen for in-person instruction" only if "they are located in a local health jurisdiction (LHJ)"—e.g., a county—"that has not been on the county monitoring list within the prior 14 days." (Cal. Dep't of Public Health, *COVID-19 and Reopening In-Person Learning Framework for K–12 Schools in California, 2020–2021 School Year* (July 17, 2020).[8])

37. State officials can place a county on this list if it meets any one of six criteria related to the number of COVID-19 tests conducted or the positivity rate, the number of cases and the growth in cases, the growth in hospitalizations, or the inadequacy of hospital ICU or ventilator capacity, even though none of these criteria are related to risks to children or teachers that arise from reopening schools for in-person teaching.

38. The Governor's Office explicitly acknowledged how the Order discriminates against schools by geography, because only schools "in counties that are on the Monitoring List must not physically open for in-person instruction," while all other schools "may begin in-person

[7] Available at <https://files.covid19.ca.gov/pdf/guidance-schools.pdf/> (as of Aug. 5, 2020).

[8] Available at <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Schools%20Reopening%20Recommendations.pdf> (as of Aug. 5, 2020).

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instruction." (Governor Gavin Newsom, *Governor Gavin Newsom Lays Out Pandemic Plan For Learning and Safe Schools* (July 17, 2020).[9])

39. California is the only State with such broad-based closure of both public and private school for the Fall.

The County Of San Diego Issues An Order Implementing The Governor's Order

40. The County of San Diego's Health and Human Services Agency issued an order effective July 30, 2020, implementing the Governor's Order. (County of San Diego, Health & Human Services Agency, Order of the Health Officer and Emergency Regulations ¶ 4 (July 29, 2020).[10])

41. Among other things, the County's order implements the Governor's order by prohibiting "[a]ll public, charter and private schools" from "hold[ing] classes on the school campus," and requiring that all schools "shall conduct distance learning only" consistent with the Governor's Order. (*Ibid.*)

Medical And Scientific Consensus Holds That School-Aged Children Are Not At A High Risk From COVID-19, And California's Experience With The Virus Is Consistent With That Consensus

42. There is a medical consensus that younger, healthier people, such as high school students, have minimal risk of either developing serious illness from COVID-19 or dying from an infection. (*See, e.g.*, Centers for Disease Control & Prevention, *Weekly Updates by Select Demographic and Geographic Characteristics* (Aug. 5, 2020)[11]; NYC.gov, *Covid-19: Data* (Aug. 6, 2020).[12])

43. In California, there has not been a single death from COVID-19 among individuals 0–17 years old. And in San Diego County, no child 19 years old or younger has ever died from

[9] Available at <https://www.gov.ca.gov/2020/07/17/governor-gavin-newsom-lays-out-pandemic-plan-for-learning-and-safe-schools/> (as of Aug. 5, 2020).

[10] Available at < https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/HealthOfficerOrderCOVID19.pdf> (as of Aug. 7, 2020).

[11] Available at <https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm> (as of Aug. 5, 2020).

[12] Available at <https://www1.nyc.gov/site/doh/covid/covid-19-data.page#download> (as of Aug. 6, 2020).

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COVID-19. (SanDiegoCounty.gov, *Summary of County of San Diego COVID-19 Deaths By Demographics* (updated Aug. 5, 2020).[13])

44. Hospitalizations of school-aged children are similarly rare in San Diego County, with only 64 people under 20 years old requiring hospitalization for COVID-19. (SanDiegoCounty.gov, *Summary of County of San Diego COVID-19 Hospitalizations By Demographics* (updated Aug. 5, 2020).[14])

45. Scientific data suggests that the possibility of transmission from school-aged children to adults, such as a teacher or administrator, is small or negligible, meaning that family and friends of students would not face a serious risk of infection because of in-person schooling.

Remote Learning Is No Replacement For In-Person Schooling, Leaving Most Families In San Diego With No Good Education Options, While Wealthy Families Can Use Their Means To Circumvent The Negative Effects Of The Governor's Order

46. Remote learning has severe negative effects on students' educational attainment.

47. One study found that due to school closures this past Spring, students likely would achieve only "63–68% of the learning gains in reading relative to a typical school year," and only "37–50% of the learning gains in math." (Kuhfeld et al., *Projecting the Potential Impacts of COVID-19 School Closures on Academic Achievement*, Brown University EdWorkingPaper No. 20-226, at pp. 2, 23 (May 2020).[15])

48. Another study concluded that even those students receiving online learning of average quality for the upcoming fall will lose "three to four months of learning" by the start of 2021, as compared to their peers receiving in-person education. (Dorn et al., *COVID-19 And Student Learning In The United States: The Hurt Could Last A Lifetime*, McKinsey & Company (June 1, 2020);[16] *see also* World Health Organization, *Considerations For School-Related Public*

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[13] Available at <https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/COVID-19%20Deaths%20by%20Demographics.pdf> (as of Aug. 5, 2020).

[14] Available at <https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/COVID-19%20Hospitalizations%20Summary_ALL.pdf> (as of Aug. 5, 2020).

[15] Available at <https://www.edworkingpapers.com/sites/default/files/ai20-226-v2.pdf> (as of Aug. 5, 2020).

[16] Available at <https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime> (as of Aug. 5, 2020).

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Health Measures in The Context Of COVID-19 (May 10, 2020) [warning of "non-return to school" and "widening disparity in educational attainment" if schools "partially close"].[17])

49. These findings are consistent with past research on remote learning, which "could have long-term effects on these children's long-term economic well-being and on the US economy as a whole." (Dorn, *supra*.)

50. Beyond academic and intellectual harm, remote learning also negatively affects students' emotional and social well-being.

51. "Schools play a critical role in supporting the whole child," including their developing "social and emotional skills." As a result, decreasing opportunities for in-person interaction between peers harms student development in these crucial areas. (Centers for Disease Control & Prevention, *The Importance of Reopening America's Schools This Fall* (July 23, 2020).[18])

52. Schools often provide students supportive services that help to identify and address learning deficits, child and adolescent physical or sexual abuse, substance use, depression, or suicidal ideation, which services likely cannot operate effectively with remote-learning programs.

53. California's recent experiences with remote learning track these findings.

54. Shortly after the Los Angeles School District shut down in March 2020, the district reported that "[a]bout 15,000 . . . high school students are absent online and have failed to do any school work," while "more than 40,000 have not been in daily contact with their teachers." (Blume, *15,000 L.A. High School Students Are AWOL Online, 40,000 Fail to Check In Daily Amid Coronavirus Closures*, L.A. Times (March 30, 2020).[19])

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[17] Available at <https://www.who.int/docs/default-source/coronaviruse/who-2019-ncov-adjusting-ph-measures-schools-2020-1-eng.pdf?sfvrsn=e8a4f4cf_1&download=true> (as of Aug. 5, 2020).

[18] Available at <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html> (as of Aug. 5, 2020).

[19] Available at <https://www.latimes.com/california/story/2020-03-30/coronavirus-los-angeles-schools-15000-high-school-students-absent> (as of Aug. 5, 2020).

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55. A study from the Los Angeles Unified School District found that, on an average day between mid-March and late-May 2020, "only about 36% of middle and high school students participated online," about 25% only "logged on or viewed work," and "about 40% were absent." (*Report Reveals Disparities Among Black, Latino LAUSD Students in Online Learning Amid COVID-19 Pandemic*, ABC 7 Eyewitness News (July 17, 2020).[20])

56. Data shows that low-income and minority students are the ones most injured from these remote-learning harms. These students often suffer from the "digital divide," a lack of reliable access to computers and internet connections, and so cannot reliably access remote learning programs. (*See* Fairlie, *Race And The Digital Divide* (2014) at 2, UC Santa Cruz: Department of Economics, UCSC.[21]) Recent findings show that only 60% of low-income students and 60–70% of black and Hispanic students who were forced into remote learning were "logging in regularly." (Dorn, *supra*.) Data also shows that "only 41.3 percent of blacks and 38.8 percent of Latinos have access to a home computer," as compared to "70.4 percent of whites." (Fairlie, *supra*, at 3; *see*, NAACP, *Coronavirus Impact on Students and Education Systems*.[22]) These differences in access to home computers, the internet, and other technology "translate directly into greater learning loss," which "exacerbate[s] existing achievement gaps." (Dorn, *supra*.) And these negative effects are "likely to cause social and emotional disruption by increasing social isolation," thereby rippling beyond academic-achievement harms. (*Ibid.*)

57. Forced remote learning at St. Augustine cannot provide the educational quality that the school's "relational teaching" approach to education was designed to provide.

58. Multiple St. Augustine parents, including Plaintiffs here, have expressed their concerns that continued remote learning will exacerbate the already serious harm that school shutdowns have caused to their children's academic achievement. Parents complain of stagnating

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[20] Available at <https://abc7.com/lausd-los-angeles-unified-school-district-race-disparity-racial-divide/6321930/> (as of Aug. 5, 2020).

[21] Available at <https://escholarship.org/uc/item/48h8h99w> (as of Aug. 5, 2020).

[22] Available at <https://naacp.org/coronavirus/coronavirus-impact-on-students-and-education-systems/> (as of Aug. 5, 2020).

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academic performance, students' loss of interest in classes, and their students' need to return to campus to regain their sense of purpose and get back on a positive academic track.

59. Remote learning has also affected Plaintiffs' social development and psychological wellbeing. Students miss interacting with their peers and feel isolated as a result of the Governor's Order. Their parents have noted that on-campus learning is critical to their sons' socialization, education, and well-being.

60. Because of the inadequate nature of distance learning, the Governor's Order will create grave financial and geographic disparity in terms of education across the State of California.

61. For example, children living in counties where Governor Newsom permits in-person education will not suffer any of the previously mentioned harms.

62. Wealthy parents, regardless of geographic location, can provide their children with in-person instruction. They can transfer their children to private schools in nearby counties that are not presently affected by the Governor's Order. Or they can use their means to pay for in-person private instruction in their own homes, or even as part of an "educational pod," which group anywhere from three to ten students together in homes to receive schooling from a private, hired teacher. (*See* Moyer, *Pods, Microschools and Tutors: Can Parents Solve the Education Crisis on Their Own?* N.Y. Times (July 22, 2020).[23])

63. These options are cost prohibitive and not available to most families, including Plaintiffs. For example, most private instructors cost anywhere from $25 to $60 per hour, Rogers, *Wealthy Parents Are Paying to Have Their Kids Homeschooled By Professionals For Up to 5 Hours A Day*, Business Insider (May 27, 2020),[24] coming to roughly $80,000 to $120,000 per year, Berman, MarketWatch.com, *From Nanny Services to 'Private Educators,' Wealthy Parents are Paying up to $100 per hour for Teaching Pods* (July 28, 2020).[25] For these reasons,

[23] Available at <https://www.nytimes.com/2020/07/22/parenting/school-pods-coronavirus.html> (as of Aug. 5, 2020).

[24] Available at <https://www.businessinsider.com/coronavirus-school-shutdowns-wealthy-parents-hire-private-educators-2020-5> (as of Aug. 5, 2020).

[25] Available at <https://www.marketwatch.com/story/affluent-parents-are-setting-up-their-own-schools-as-remote-learning-continues-its-the-failure-of-our-institutions-to-adequately-provide-for-our-students-11595450980> (as of

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"pandemic pods" are "likely to be most popular among families of privilege . . . and may worsen educational inequality." (Moyer, *supra*.)

St. Augustine Is Prepared To Open Safely

64. These harms and disparate results need not befall St. Augustine's students. St. Augustine is fully prepared to offer safe, in-person instruction in the upcoming Fall term.

65. The school has implemented a thorough and comprehensive plan for reopening.

66. All parents must do initial screening of their sons each morning for COVID-19 symptoms. Similarly, teachers will receive routine COVID-19 testing, consistent with recent updates to public-health guidance.

67. Any person experiencing COVID-19 symptoms must stay home (or leave school as soon as possible) and cannot return to school without a doctor's note stating that it is safe for them to rejoin the campus community.

68. Students and staff must wear face masks or face shields at all times, and they must practice social distancing, which the school will facilitate by limiting the number of occupants in classrooms and other spaces.

69. St. Augustine has also purchased all necessary personal-protective equipment and sanitation supplies for all of its staff, including face masks or face shields, gloves, hand sanitizer, and disinfecting wipes.

70. The school has upgraded its HVAC system with an ultraviolet-light system that sterilizes the air in the school, and the school will implement frequent cleaning and sterilizing procedures for frequently touched surfaces.

71. The school has also installed touchless toilets, sinks, soap dispensers, and hand-towel dispensers, and has installed plexiglass dividers in the rare spaces on campus where 6-foot social distancing is not practicable.

Aug. 5, 2020).

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72. Furthermore, upon reopening, individual parents and students can choose to opt out of in-person schooling if they do not feel comfortable with it, continuing present online-education options until they see fit to return to campus.

73. St. Augustine just finished a six-week, in-person summer school session, with both academic offerings and athletic programs that served over 400 students. Those programs offered in-person education to 214 students, along with athletic training for 192 additional individuals.

74. The in-person academic sessions lasted from 1.5 to 4.5 hours a day, five days a week, for the entire six-week course.

75. These programs were a resounding success, with no reported COVID-19 cases resulting from them. St. Augustine ensured the safety of the summer programs by implementing the rigorous safety measures described above, and which the school is ready to implement this fall.

Absent Court Intervention, Plaintiffs Will Suffer Grave, Irreparable, Interim Harm

76. All Plaintiffs are suffering, and will continue to suffer, grave interim harm from the Governor's Order.

77. All individual Plaintiffs and their families will suffer irreparable harm due to their sons' deficient education as a result of the Governor's Order.

78. As a result of the Governor's Order, individual Plaintiffs' sons will have no opportunity for in-person education in the fall term. Individual Plaintiffs' sons will thus experience psychological harm, including depression, malaise, and loss of sense of purpose, because they will be barred from their school and classmates. They will also experience a decline in their academic well-being as a result of attending only online remote learning, which is gravely inferior to in-person learning.

79. St. Augustine will suffer grave harm because the Governor's Order precludes and hampers it from continuing its nearly 100-year mission of educating and developing young men through its fraternal, face-to-face teaching methods.

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80. The Governor's Order precludes St. Augustine, its administration, and its faculty from furthering the school's mission, which poses a continuing harm each day after the school's scheduled August 25 reopening.

CLAIMS

FIRST CLAIM FOR RELIEF

Wealth Discrimination With Regard To Education, In Violation Of The Equal Protection Guarantees In The California Constitution

(By All Plaintiffs Against All Defendants)

81. St. Augustine incorporates by reference each of the preceding allegations as though fully set forth herein.

82. The California Constitution's equal-protection guarantees prohibit the State from discriminating in education on the basis of wealth in a manner that deprives students of a "basically equivalent" quality of education. (*See* Cal. Const., art. I, § 7; art. IV, § 16; *Butt v. State of California* (1992) 4 Cal.4th 668, 685.)

83. Government action discriminates on the basis of wealth if it does so explicitly, or if, "regardless of how [it is] implemented," it "inevitably cause[s]" students "to be provided with an education that is not 'basically equivalent' to their . . . peers" in other parts of the State. (*Vergara v. State of California* (2016) 246 Cal.App.4th 619, 649.)

84. A child's education is not "basically equivalent" in quality when "the actual quality of the [school's] program, viewed as a whole, falls fundamentally below prevailing statewide standards." (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 898, citing *Butt v. State of California*, *supra*, 4 Cal.4th at pp. 686-687.)

85. The Governor's Order discriminates on the basis of wealth because "regardless of how [it is] implemented," it will "inevitably cause" students "to be provided with an education that is not basically equivalent to their more affluent . . . peers." (*Vergara v. State of California*, *supra*, 246 Cal.App.4th at p. 649.)

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86. Specifically, more affluent families are able to provide in-person education for their children that complies with the Governor's Order, such as through small groups of "pods" or by sending their children to private schools in areas not closed by that Order.

87. By prohibiting individual Plaintiffs and their families from receiving in-person education, including from St. Augustine, while allowing more affluent families to seek in-person education through other means, "the actual quality" of St. Augustine's students' education, "viewed as a whole, [will] fall[ ] fundamentally below prevailing statewide standards." (*Collins v. Thurmond*, *supra*, 41 Cal.App.5th at p. 898.)

88. That is, the "actual quality" of remote learning, "viewed as a whole, falls fundamentally below" the quality of in-person education. (*Ibid.*)

89. Therefore, the Governor's Order deprives Plaintiffs and their families of a basically equivalent education on the basis of wealth, in violation of the California Constitution.

90. The State cannot justify its discriminatory conduct by satisfying strict scrutiny, including because the Governor's Order is not narrowly tailored given that it permits childcare facilities, day camps, and colleges/universities to open, but does not permit in-person secondary schooling.

91. The Governor's Order is also not narrowly tailored because it does not permit any exceptions for school, like St. Augustine, which have demonstrated that they can reopen safely.

92. The Governor's Order also fails strict scrutiny because it forces poor children to disproportionately bear the burden of the State's efforts to curb COVID-19 transmission.

93. Defendants cannot absolve themselves of liability by relying on the County of San Diego's Order, which identically violates the Constitution by implementing the Governor's Order. (*Butt*, 4 Cal.4th at 681; *Serrano v. Priest* (1971) 5 Cal.3d 584, 613.)

94. Absent interim relief, all Plaintiffs will continue to suffer grave and irreparable harm.

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SECOND CLAIM FOR RELIEF

Geographic Discrimination With Regard To Education, In Violation Of The Equal Protection Guarantees In The California Constitution

(By All Plaintiffs Against All Defendants)

95. St. Augustine incorporates by reference each of the preceding allegations as though fully set forth herein.

96. The California Constitution's equal-protection guarantees prohibit the State from discriminating in education on the basis of geography in a manner that deprives students of a "basically equivalent" quality of education. (*See* Cal. Const., art. I, § 7; art. IV, § 16; *Butt v. State of California*, *supra*, 4 Cal.4th at p. 685.)

97. Government action discriminates on the basis of geography if it does so explicitly, or if, "regardless of how [it is] implemented," it "inevitably cause[s]" students "to be provided with an education that is not basically equivalent to their . . . peers" in other parts of the State. (*Vergara v. State of California*, *supra*, 246 Cal.App.4th at p. 649.)

98. A child's education is not "basically equivalent" in quality when "the actual quality of the [school's] program, viewed as a whole, falls fundamentally below prevailing statewide standards." (*Collins v. Thurmond*, *supra*, 41 Cal.App.5th at p. 898, citing *Butt v. State of California*, *supra*, 4 Cal.4th at pp. 686-87.)

99. The Governor's Order explicitly discriminates on the basis of geography by preventing schools in certain counties only from reopening for in-person instruction.

100. By prohibiting schools like St. Augustine from offering in-person education, requiring these schools to instead provide remote learning, "the actual quality of [St. Augustine's] program, viewed as a whole, [will] fall[ ] fundamentally below prevailing statewide standards." (*Collins v. Thurmond*, 41 Cal.App.5th at p. 898.)

101. The Governor's Order explicitly discriminates on the basis of geography by allowing schools in some counties to operate in person, while relegating other schools like St. Augustine to online-only schooling.

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102. Even if the Governor's Order did not so explicitly discriminate, it will "inevitably cause" students in San Diego County, like Plaintiffs' sons, "to be provided with an education that is not basically equivalent to their . . . peers" in counties that are not shut down to in-person schooling. (*Vergara v. State of California*, *supra*, 246 Cal App. 4th at p. 649.)

103. And "the actual quality" of remote learning, when "viewed as a whole, falls fundamentally below" the quality of in-person education offered and allowed elsewhere in the State. (*Collins v. Thurmond*, *supra*, 41 Cal.App.5th at p. 898.)

104. Therefore, the Governor's Order deprives Plaintiffs and their families of a basically equivalent education on the basis of geography, in violation of the California Constitution. The State cannot justify its discriminatory conduct by satisfying strict scrutiny, including because the Governor's Order is not narrowly tailored, given that it permits childcare facilities, day camps, and colleges/universities to open, but does not permit in-person secondary schooling.

105. The Governor's Order is also not narrowly tailored because it does not permit any exceptions for school, like St. Augustine, which have demonstrated that they can reopen safely.

106. The Governor's Order also fails strict scrutiny because it forces poor children to disproportionately bear the burden of the State's efforts to curb COVID-19 transmission.

107. Defendants cannot absolve themselves of liability by relying on the County of San Diego's Order, which identically violates the Constitution by implementing the Governor's Order. (*Butt*, 4 Cal.4th at 681; *Serrano*, 5 Cal.3d at 613.)

108. Absent interim relief, all Plaintiffs will continue to suffer grave and irreparable harm.

THIRD CLAIM FOR RELIEF

Disparate Racial Discrimination, In Violation Of The Equal Protection Guarantees In The California Constitution

(By All Plaintiffs Against All Defendants)

109. St. Augustine incorporates by reference each of the preceding allegations as though fully set forth herein.

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110. The California Constitution's equal-protection guarantees prohibit the State from adopting policies or taking other actions that disproportionately impact minority students with respect to education opportunities. (*See* Cal. Const., art. I, § 7; art. IV, § 16; *Butt v. State of California*, *supra*, 4 Cal.4th at p. 685.)

111. Such a disparate-impact "claim is stated when [1] a policy adopted in California has a substantial disparate impact on the minority children of its schools, causing de facto segregation of the schools and [2] an appreciable impact to a district's educational quality, and [3] no action is taken to correct that policy when its impacts are identified." (*Collins v. Thurmond*, *supra*, 41 Cal.App.5th at pp. 896–897.)

112. The Governor's Order is "a policy adopted in California [that] has a substantial disparate impact on the minority children of its schools, causing de facto segregation of the schools," as it requires St. Augustine to provide remote learning only, although minority students, who are more likely to suffer from the "digital divide," will face disparate harms as a result of this policy. (*Ibid.*)

113. The County's Order merely implements the Governor's Order, imposing a disparate racial impact on students within the County of San Diego.

114. This de facto segregation causes "an appreciable impact to a district's educational quality," because minority students are without sufficient access to the resources necessary to take part in distance learning. (*Ibid.*)

115. The State has taken "no action . . . to correct th[is] policy when its impacts [were] identified"—indeed, the very enactment of this policy is itself a failure to correct such impacts. A federal lawsuit has already been filed against Defendants because of this policy, *Brach v. Newsom*, No. 2:20-cv-06472-DDP (N.D. Cal. July 29. 2020), Dkt. 9 (Amended Complaint), and yet Defendants have taken no action to remedy the policy's obvious constitutional infirmities.

116. Here, many of St. Augustine's minority students (including Plaintiffs' children), who comprise 51% of its student body, are directly and disproportionately impacted by Governor Newsom's Order, receiving an inadequate education, compared to their peers.

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117. Students are required to suffer through remote "Zoom" learning over the internet, and many do not have adequate electronic resources or internet services to comply with course requirements. Indeed, many minority students suffer from the "digital divide" and so lack reliable access to the computers and internet connections necessary to access this remote learning, causing a "substantial disparate impact," *Collins v. Thurmond*, *supra*, 41 Cal.App.5th at p. 896, on those students.

118. This disparate impact causes appreciable damage to St. Augustine's minority students, including Plaintiffs' children. Remote learning is already an exceedingly poor form of education, especially as compared to the gold standard of in-person education, and the "digital divide" that afflicts minority students makes that already intolerable education medium even worse, as these students will struggle to predictably login to, and participate with, St. Augustine's remote learning.

119. Such students and their families are not able to remedy these problems independently, because their families do not have the financial means to join a "pandemic pod" or transfer to an out-of-district school, and thereby escape that digital divide by other methods.

120. Therefore, the Governor's Order has a disparate impact on minority students, including Plaintiffs' children, negatively affecting their schooling disproportionately to other students, resulting in de facto segregation, in violation of the California Constitution.

121. The State cannot justify its discriminatory conduct by satisfying strict scrutiny, including because the Governor's Order is not narrowly tailored, given that it permits childcare facilities, day camps, and colleges/universities to open, but does not permit in-person secondary schooling.

122. The Governor's Order is also not narrowly tailored because it does not permit any exceptions for school, like St. Augustine, which have demonstrated that they can reopen safely.

123. The Governor's Order also fails strict scrutiny because it forces poor children to disproportionately bear the burden of the State's efforts to curb COVID-19 transmission.

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124. Defendants cannot absolve themselves of liability by relying on the County of San Diego's Order, which identically violates the Constitution by implementing the Governor's Order. (*Butt*, 4 Cal.4th at 681; *Serrano*, 5 Cal.3d at 613.)

125. Absent interim relief, all Plaintiffs will continue to suffer grave and irreparable harm.

PRAYERS FOR RELIEF

WHEREFORE, St. Augustine respectfully requests that this Court enter judgment against Defendants as follows:

- An order and judgment declaring that the Governor's Order and the associated guidance, as well as the County of San Diego's Order, facially and as-applied to St. Augustine, violates the California Constitution's equal-protection guarantees.
- An order temporarily, preliminarily, and permanently enjoining and prohibiting Defendants from enforcing these orders against St. Augustine or otherwise interfering with Plaintiffs' constitutional rights and federal guarantees;
- For attorneys' fees and costs;

Such other and further relief as the Court deems appropriate and just.

Dated: August 10, 2020

TROUTMAN PEPPER HAMILTON SANDERS LLP

By: _____

Michael J. Whitton
Misha Tseytlin (*pro hac vice* pending)
Elizabeth Holt Andrews

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