

No. 20-56291

IN THE

**United States Court of Appeals
for the Ninth Circuit**

MATTHEW BRACH, ET AL.,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, ET AL.,

Defendants-Appellees.

**On Appeal from the United States District Court
for the Central District of California**

No. 2:20-cv-06472-SVW

Hon. Stephen V. Wilson

**Brief for *Amici Curiae* Samuel A. Fryer Yavneh Hebrew
Academy, Montebello Christian School, Gindi Maimonides
Academy, and Saint Joseph Academy in Support of Plaintiffs-
Appellants' Opposition to Rehearing En Banc**

Michael H. Porrazzo
THE PORRAZZO LAW FIRM
30212 Tomas, Suite 365
Rancho Santa Margarita, CA 92688
Tel: (949) 348-7778
Fax: (949) 209-3514
mhporrazzo@porrazzolaw.com

*Counsel for Amicus Montebello
Christian School*

Gordon D. Todd
Erika L. Maley
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
Tel.: (202) 736-8000
Fax: (202) 736-8711
gtodd@sidley.com

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* Samuel A. Fryer Yavneh Hebrew Academy, Montebello Christian School, Gindi Maimonides Academy, and Saint Joseph Academy respectfully submit this Disclosure Statement. All *amici* are all nonprofit organizations. No *amicus* has a parent corporation and no publicly held corporation has a 10% or greater ownership interest in any *amicus*.

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INTEREST OF *AMICI CURIAE*¹

Amici are private religious schools located in California. The panel opinion directly applies to *amici*'s mission to ensure parents are able to choose in-person religious education for their children.

Samuel A. Fryer Yavneh Hebrew Academy is located in Los Angeles, California. It is devoted to Orthodox Jewish education, and strives for a high level of religious observance, while recognizing education as part of the development of the whole person in a contemporary society.

Montebello Christian School is located in Montebello, California, and is devoted to providing its students with a Christian education. Montebello was founded 50 years ago and serves a primarily Hispanic population. It focuses on the academic, social, and spiritual development of each student, with a mission to impact the young lives studying at Montebello in order for those students to become Gospel ministers.

Gindi Maimonides Academy is located in Los Angeles, California, and is a school devoted to Orthodox Judaism. It focuses on Judaic studies,

¹ All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel affirms that no counsel for a party authored this brief in whole or in part, and no party or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

teaching its students to learn to speak and read Hebrew, study Judaic texts, and partake in religious services.

Saint Joseph Academy is located in San Marcos, California, and is devoted to Catholic education. Prayer and devotion to the Catholic faith are central to every part of the day at Saint Joseph, and parents specifically choose Saint Joseph because of the centrality of Catholicism to the school's mission.

In August 2020, *amici*, along with parents, students, and educators at their schools, filed an action challenging the same California school closure order at issue here. Like Appellants here, *amici* contended among other things that the order unconstitutionally infringed parents' rights to direct the education of their children. That case ultimately reached a settlement, after California agreed that it would not interpret its then-current guidance as prohibiting *amici* from operating in person.

However, particularly given the current trajectory of the COVID-19 pandemic, *amici* fear that California may again force them to close, because "officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (quoting *South Bay*

United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720 (2021) (mem.) (statement of Gorsuch, J.).

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel correctly held that “California’s forced closure of [plaintiffs] private schools” violates “the right of parents to control their children’s education and to choose their children’s educational forum.” Op. 7. This decision did not “break[] new constitutional ground,” much less constitute a “sweeping” break from precedent. *See* Pet. for Reh’g En Banc (“Pet.”), at 1. Instead, the panel simply applied a right the Supreme Court has recognized for nearly 100 years—the “fundamental right” of parents to direct the education of their children. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion); *see Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

As the panel held, California’s “extended prohibition on in-person schooling” clearly infringes the core of this fundamental right. Op. 6. Indeed, it is difficult to imagine a graver interference with education than forcing schools to close their doors to students. In their related suit, *amici* presented extensive evidence that the so-called “distance learning”

California required made it impossible for them to achieve their educational mission. *Amici* cannot effectively transmit religious values and traditions, surround students with a supportive religious community, or conduct immersive language and special education remotely. The school closure order frustrated parents' ability to provide their children these critical educational experiences, and caused the children to suffer skyrocketing depression and anxiety.

The panel also correctly held the order did not survive strict scrutiny because, among other things, the State allowed other, similar (and more dangerous) activities to take place in-person while simultaneously prohibiting private schools from opening, regardless of the safety measures in place. The State's parade of horrors of private schools refusing to follow fire codes or wheelchair access regulations could not be farther afield from this case, and the panel opinion will not impact the Court's ability to consider such unlikely issues if and when they actually arise.

The Supreme Court has repeatedly held that "California's COVID restrictions on religious exercise" violate its citizens' fundamental rights, which are "not watered down" in a pandemic. *Tandon*, 141 S. Ct. at 1297–

98. The panel correctly applied the Supreme Court’s well-established precedent regarding fundamental rights here. The State’s petition for rehearing en banc should be denied.

ARGUMENT

I. **Ordering Schools To Close Frustrates Parents’ Right To Direct Children’s Education.**

A. **In-Person Instruction Is Core To *Amici*’s Educational Mission And To Parents’ Choice Of An Educational Forum.**

As the Supreme Court recently held, “[r]eligious education is vital to many faiths practiced in the United States,” and “[t]he religious education and formation of students is the very reason for the existence of most private religious schools.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055, 2064 (2020). That observation applies fully to *amici*, who are religious schools dedicated to teaching the Jewish, Catholic, and Evangelical Christian faiths, and to the parents who choose *amici* as the educational forum for their children. See Einhorn Decl. ¶ 6; Heintschel Decl. ¶ 2; Krause Decl. ¶ 5; Petz Decl. ¶ 2; Wilk Decl. ¶¶ 4–5, 10.²

² The declarations cited in this brief were filed in support of *amici*’s motion for a preliminary injunction in the case *amici* brought against

Amici take different approaches to religious education, but none of them can be replicated through a video call. For instance, according to Yavneh’s Dean, “the ability of students to study the Torah in the physical presence of their teachers” has been a defining feature of “Judaism’s survival throughout its tumultuous history.” Einhorn Decl. ¶ 8. “At Yavneh, we believe that religious education is the very essence of what the Jewish people represent.” *Id.* A Yavneh teacher described Jewish education in terms of *mesorah*, the “links in a chain” that connect generations of Jewish teachers and pupils over an unbroken span of 3,500 years. McKenney Decl. ¶ 7. Distance learning severs that chain, by separating teachers from their students. *See id.* ¶ 8.

Saint Joseph, similarly, makes “[p]rayer and devotion to the Catholic faith . . . central to every part of the school day.” Heintschel Decl. ¶ 2. When Saint Joseph’s students are “prevented from joining together as the Body of Christ, which is an essential aspect of the Catholic faith,” “students [are] unable to live out the teachings of their faith, and teachers [are] unable to cultivate the virtues of Catholicism in their students.”

California’s school closure order. *See Samuel A. Fryer Yavneh Acad. v. Newsom*, No. 2:20-cv-7408 (C.D. Cal. Aug. 27, 2020), ECF No. 29.

Id. ¶ 5. And at Montebello, “students and faculty believe that the Bible mandates that we must gather together with our fellow Christians in order to practice the faith,” and “teach our students and model the transforming power of the gospel.” Petz Decl. ¶ 5.

The inherently communal nature of *amici*’s educational mission depends upon students “coming together, or being together.” *Farrington v. Tokushige*, 11 F.2d 710, 713–14 (9th Cir. 1926), *aff’d*, 273 U.S. 284 (1927). It cannot be pursued if the state prohibits students from “sit[ting] together in a private institution of learning while receiving instruction.” *Id.* For instance, traditional Judaic study is an inherently communal experience that requires partnered dialogue, communal prayer, and a tangible, sensory experience of holidays and celebrations, particularly for young children. A critical component of Jewish education is the study of shared texts in small groups. “[D]ialogue” fostered through *chavrutah* (“friendship” or “companionship”) is “fundamental” to this type of “religious education.” Katz Decl. ¶ 5. *Chavrutah* cannot be developed “over a video call.” *Id.*

Language immersion is another “inherently communal” type of learning that cannot occur outside an in-person setting. A key reason that

parents send their children to Yavneh Academy and other Orthodox schools is so that their children learn Hebrew through deeply immersive lessons. Many students' parents do not speak Hebrew at home, and thus there is no substitute for the immersive learning made possible by in-person instruction. *See, e.g.,* Tsfira Decl. ¶¶ 4, 6.

Many religious rituals also cannot be taught remotely. For instance, at Saint Joseph, students attend Mass, receive the Eucharist, and take confession as part of their spiritual education and growth. *See, e.g.,* Am- buul Decls. ¶ 5. Neither the Eucharist nor confession can be given virtu- ally, and thus students are denied “essential elements of their religious upbringing and education” when prohibited from attending school. *Id.* ¶ 7; *see also* Aust Decl. ¶ 8 (stressing that, for some students, “the only time that they are able to receive sacraments, such as confession, chapel time, and receiving the Eucharist, is while they are at school”). As the Vatican explains, “the virtual reality of cyberspace cannot substitute for real interpersonal community, the incarnational reality of the sacra- ments and the liturgy, or the immediate and direct proclamation of the gospel.” Pontifical Council for Soc. Commc'ns, *The Church and the Inter- net* § II.5 (2002), <https://bit.ly/2WRTpzc>.

Likewise, under Jewish law, some prayers cannot be conducted unless there is a *minyan*, a quorum of ten males over the age of 13, and that quorum cannot be met via Zoom. See Peretz Decl. ¶ 9. Distance learning also does not allow for the traditional communal celebration of religious milestones, such as the *upsherin* (an Orthodox Jewish boy’s first haircut), and observances, such as *siyum* (a celebratory meal to mark a student’s completion of a section of central Jewish religious texts such as the Talmud or the Mishnah). See Einhorn Decl. ¶ 12.

These communal and experiential aspects of *amici*’s teaching are central to parents’ choice of *amici* as the “educational forum” for their children. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005), *amended on denial of reh’g*, 447 F.3d 1187 (9th Cir. 2006). Parents choose *amici* so that their children will be “surrounded by teachers and students who share the same values,” thus “strengthen[ing] and encourag[ing] the[ir] spiritual development.” Sandoval Decl. ¶ 8; see Ambul Decls. ¶ 4; Mann Decl. ¶ 9. Parents want their children to form supportive relationships with peers, mentors, educators, and spiritual leaders. See Mann Decl. ¶ 8. For example, in some *amici* schools, students “receive[] weekly spiritual direction through in-person meetings with a

priest,” during which students are able to discuss matters related to their “spiritual life and any other issues they [are] facing at the time.” Ambuul Decls. ¶ 5; *see also* Zarazua Decl. ¶ 6.

The informal, daily interactions that can only occur in-person are key to the educational environment that parents seek. For instance, one father stressed how important it was that his children “learn by example—from their teachers, religious figures and older children—how to properly conduct themselves as Orthodox Jews, including respecting elders, resolving interpersonal disputes consistently with Jewish ethics, and practicing lovingkindness in all aspects of life.” Peretz Decl. ¶ 7; *see also* Krause Decl. ¶ 12. Other parents explained the importance of having people physically present who can model Christ’s teachings for their children, allowing their children to experience a brotherhood and sisterhood in Christ. *See* Zarazua Decl. ¶ 6; Rodriguez Decl. ¶ 6.

California’s forced closure of *amici* schools last year further demonstrated that they cannot conduct their core educational mission remotely. Extended school closures caused significant mental, emotional, and physical harm to *amici*’s students. Among other things, parents and teachers explained that children suffered from “depression,” Ambuul Decls. ¶ 9,

“anxiety issues,” Rodriguez Decl. ¶ 7; Sandoval Decl. ¶¶ 10–13, “extreme stress,” and thoughts of suicide, Aust Decl. ¶ 13, as a result of school closures separating them from their teachers and peers.

The costs of school closures fell most severely on those who were already marginalized.³ Some children “fell behind” simply because they lacked the “requisite tools to adequately attend school on Zoom.” Aust Decl. ¶ 10. Children with learning disabilities also suffered. For example, parents of a dyslexic student found that he was “unable to understand the information conveyed to him through remote instruction.” Ambuul Decl. ¶ 10. In contrast, when school took place in-person, teachers were able to sit down with him and read the material directly to him. *Id.* Parents of a student with Down Syndrome likewise found that he could not focus on a computer screen, and that his ability to learn and grow through social interaction was greatly harmed. Graves Decl. ¶¶ 8, 11.

³ See, e.g., UNESCO, *Adverse Consequences of School Closures*, <https://bit.ly/3kUh2in> (last visited Sept. 3, 2021); Paloma Esquivel & Howard Blume, *L.A. Latino, Black Students Suffered Deep Disparities in Online Learning, Records Show*, L.A. Times (July 16, 2020), <https://lat.ms/3g7D25i>.

B. *Amici*'s Related Case Raised The Same Issues Decided Here.

As described in the panel's opinion, when the 2020-2021 school year began, California orders required schools to remain closed, including *amici* schools. *See* Op. 14–15; Cal. Dep't of Pub. Health, *Statewide Public Health Officer Order* (Aug. 28, 2020), <https://bit.ly/3BGmA6Y>.⁴ In August 2020, *amici*, along with parents, teachers, and students at their schools, brought suit challenging California's school closure order. *See* Compl. for Declaratory and Injunctive Relief, *Samuel A. Fryer Yavneh Acad. v. Newsom*, No. 2:20-cv-7408 (C.D. Cal. Aug. 17, 2020), ECF No. 1. Like Appellants here, *amici* alleged that California's restrictions violated parents' fundamental right to direct the education of children under their control.

Shortly after *amici* filed their complaint, California issued revised regulations for the 2020-2021 school year, including its "cohort guidance." This guidance provided that students could meet in small "cohorts" of up to 14, with up to two teachers. Op. 13–14. However, it also provided that "the number of students on a given school site should generally not

⁴ *See also* Cal. Dep't of Pub. Health, *COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year* (July 17, 2020), <https://bit.ly/3yKJ2Kp>.

exceed 25% of the school’s enrollment size or available building capacity,” and that “the intent [is not] to allow for in person instruction for all students.”⁵ Rather, California stated that its intent was to make schools available for “specialized services, targeted services and support,” such as speech and language services, for certain populations of students such as English learners and students with disabilities.⁶

During the litigation of *amici*’s case, the State took the position that the cohort guidance allowed “[s]chools that provide religious instruction . . . to provide in-person education services,” and that the 25% figure was discretionary. Stipulated Order of Dismissal, *Samuel A. Fryer Yavneh Acad. v. Newsom*, No. 2:20-cv-7408 (C.D. Cal. Oct. 28, 2020), ECF No. 63. Accordingly, *amici* agreed to a settlement of the case on the basis that the State’s order “does not impose a percentage or numerical cap on the number of students who may be on a religious school campus at any given time” and that *amici* could provide in-person instruction and religious activities. *Id.* Pursuant to this settlement, *amici* schools reopened

⁵ Cal. Dep’t of Pub. Health, *Providing Targeted, Specialized Support and Services at School 2*, 5 (updated Sept. 4, 2020), <https://bit.ly/2ZRotNQ>.

⁶ *Id.* at 2.

and provided instruction safely for the remainder of the school year, ensuring that their students thrived academically, emotionally, and mentally.

The settlement of *amici*'s case suggests that the State recognized the significant constitutional issues with its school closure order, and preferred to avoid a ruling on the merits. But despite allowing *amici* schools to operate in person pursuant to the settlement, the State continued to interpret its cohort guidance to prohibit similarly situated private schools, like Appellants', from opening. And now, the State similarly seeks to avert a ruling on the merits by seeking en banc review to declare Appellants' case moot.

As Appellants describe, the number of COVID-19 cases in California is rising dramatically due to the highly infectious Delta variant, and the current levels of new cases exceed those last summer when California ordered schools to close. Resp. 18–19. Though California has not yet re-implemented its ban on in-person schooling, *amici* remain concerned that “officials with a track record of ‘moving the goalposts’ retain authority to reinstate those heightened restrictions at any time.” *Tandon*, 141 S. Ct. at 1297; see Op. 19.

II. The Panel Correctly Held California’s Restrictions On In-Person, Private Education Unconstitutional.

Parents have a fundamental right “to control the education of their own,” *Meyer*, 262 U.S. at 401, by choosing their children’s “educational forum,” *Fields*, 427 F.3d at 1207. Because California’s sweeping restrictions on in-person schooling infringe that right, those restrictions cannot stand unless they satisfy strict scrutiny. *See Reno v. Flores*, 507 U.S. 292, 301–02 (1993). The panel correctly held that they do not.

A. Parents’ Fundamental Right To Direct The Education Of Their Children Includes The Right To Choose Their Children’s Educational Setting.

The Due Process Clause of the Fourteenth Amendment “specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted). “[P]erhaps the oldest of the fundamental liberty interests recognized by” the Supreme Court is “the interest of parents in the care, custody, and control of their children.” *Troxel*, 530 U.S. at 65 (plurality opinion). That liberty interest gives parents the right to “direct the upbringing and education of children under their control”

free from “unreasonabl[e] interfere[nce]” by the state. *Pierce*, 268 U.S. at 534–35; *see also Meyer*, 262 U.S. at 401; *Glucksberg*, 521 U.S. at 719–20 (citing the *Meyer-Pierce* right as one of the “fundamental rights and liberty interests” protected “against government interference”).⁷

Under Supreme Court and this Court’s precedent, there is no question that a parent’s right to “direct the upbringing and education of [their] children” includes the right to “be free from state interference with their choice of the educational forum itself.” *Fields*, 427 F.3d at 1203, 1207. The choice of educational forum is critical because it ensures that a student is not taken “away from their community, physically and emotionally, during the crucial and formative adolescent period of life.” *Wisconsin v. Yoder*, 406 U.S. 205, 211 (1972). That enables children to “grow” in their “relationship to [their] community,” and, “through example,” learn “the values promoted” and “impart[ed]” by their community. *Id.* at 211–12.

⁷ Though *Meyer* and *Pierce* issues often arise under both the Due Process and Free Exercise clauses, they are not limited to such “hybrid rights” cases, and also protect parents’ rights in the context of secular education. *E.g.*, *Runyon v. McCrary*, 427 U.S. 160, 176–77 (1976); *Fields*, 427 F.3d at 1203–07; *Hooks v. Clark Cnty. Sch. Dist.*, 228 F.3d 1036, 1041 (9th Cir. 2000).

The State’s argument that its school closure order did not infringe this fundamental right lacks merit. California’s “extended prohibition on in-person schooling,” Op. 6, denied parents the core of their right to choose an “educational forum” for their children, *Fields*, 427 F.3d at 1207. Indeed, it is difficult to imagine a greater state interference with parents’ choice of educational forum than an order that requires private schools to close.

The State contends that the Constitution protects only parents’ right “to choose private-school education,” Pet. 1–2, and that its order did not impact that right because it permitted private schools to operate remotely. But permitting “distance learning” is simply no substitute for allowing schools to open—just as the state could not vindicate citizens’ right to assemble by permitting them to protest only online. Indeed, as described in-depth above, the “communal prayer and experiential learning” that can only occur when students and teachers physically gather together is central to *amici*’s educational mission, and central to parents’ choice of *amici* as the educational forum for their children. Peretz Decl. ¶ 4. Children cannot “effectively partake in the communal experience of religious learning and prayer through remote meetings,” and cannot

engage in critical traditions and ceremonies. *Id.* ¶ 9; *see supra* Section I.A. Without the ability to attend school in-person, students are denied the opportunity to “learn[] through example” in a “social environment” conducive to “impart[ing] the values promoted by [their] society.” *See Yoder*, 406 U.S. at 211–12. The panel ruling applying strict scrutiny to California’s school closure order is an unremarkable application of settled law, and provides no basis for rehearing en banc.

California seeks to avoid this conclusion by raising a parade of horrors, asserting among other things that the panel’s affirmation of a “right to in-person private school instruction . . . threatens to subject any number of generally applicable laws, from disability access to building safety, to strict scrutiny.” Pet. 11. To the contrary, the panel expressly recognized that states may “impose reasonable regulations for the control and duration of basic education.” Op. 48 n.23 (quoting *Yoder*, 406 U.S. at 213). The panel opinion does not remotely imply that “every regulation touching on a *Meyer-Pierce* interest must survive . . . heightened review.” *See id.* at 78 (dissent). Rather, just as in *Meyer* and *Pierce* themselves, the panel opinion imposed heightened scrutiny where a state law infringed the core of the right by prohibiting parents from selecting an

educational forum for their children. *See* Resp. 9–11. The Court can address the appropriate level of scrutiny for “generally applicable laws” such as “disability access” or fire codes if a case arises that involves such issues. Pet. 11. The panel opinion does not address such questions, and would not be an appropriate vehicle for the en banc court to consider them.

B. California’s Restrictions On In-Person, Private Education Were Not Narrowly Tailored To Serve A Compelling State Interest.

State action that infringes a fundamental right is “subject to strict scrutiny and is invalid[] unless it is ‘narrowly tailored to serve a compelling state interest.’” *United States v. Juv. Male*, 670 F.3d 999, 1012 (9th Cir. 2012) (quoting *Reno*, 507 U.S. at 301–02); *see also Fields*, 427 F.3d at 1208 (“Governmental actions that infringe upon a fundamental right receive strict scrutiny.”). A regulation is narrowly tailored if it is the “least restrictive means” of achieving the state’s desired ends. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981).

California’s school closure order was not narrowly tailored because there were other, less restrictive means the State could have employed to combat COVID-19 without closing down private schools. *See, e.g., Roberts*

v. Neace, 958 F.3d 409, 415 (6th Cir. 2020) (per curiam) (“There are plenty of less restrictive ways to address these public-health issues. Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities?”).

For example, California could have required schools to meet the same standards the State applied to camps, daycares, and supervised remote-learning centers.⁸ These standards included safety measures such as social distancing, facial coverings, frequently disinfecting shared surfaces, and requiring students to be separated into distinct small “cohorts” to prevent the spread of infection. *See* note 8, *supra*. Under these standards, the State permitted in-person instruction to continue at tutoring and enrichment centers, education and athletic camps, childcare facilities, and other extracurricular activity providers—but it prohibited in-person instruction at private schools.

⁸ *See, e.g.*, Cal. Dep’t of Pub. Health, Cal. Dep’t of Soc. Servs., & Cal. Dep’t of Indus. Rels., *COVID-19 Update Guidance: Child Care Programs and Providers* (July 17, 2020), <https://bit.ly/3jFJtkQ>; Cal. Dep’t of Pub. Health, *COVID-19 Interim Guidance: Day Camps* (July 29, 2020), <https://bit.ly/3BD5gjl>.

That the State could have applied the same standards to private schools (but did not) demonstrates that there was a less restrictive alternative available. Accordingly, preventing schools from conducting in-person learning was not narrowly tailored to achieving the State's interest. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (striking down state action where government's "interests could be achieved by narrower ordinances that burdened religion to a far lesser degree"). Indeed, following the settlement, *amici* schools successfully and safely operated with these measures in place during much of the 2020-2021 school year, despite widespread COVID-19 transmission in their surrounding communities. Because California's order closing private schools was not the least restrictive means of achieving the State's interest in abating the pandemic, it does not survive strict scrutiny. The panel correctly held it unconstitutional, and en banc review is unwarranted.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

September 7, 2021

Michael H. Porrazzo
THE PORRAZZO LAW FIRM
30212 Tomas, Suite 365
Rancho Santa Margarita, CA
92688
Tel: (949) 348-7778
Fax: (949) 209-3514
mhporrazzo@porrazzolaw.com

Respectfully submitted,

/s/ Gordon D. Todd

Gordon D. Todd
Erika L. Maley
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
Tel.: (202) 736-8000
Fax: (202) 736-8711
gtodd@sidley.com

Counsel for Amici Curiae

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1. This brief complies with Federal Rule of Appellate Procedure 29(b)(4)'s and Ninth Circuit Rule 29-2(c)(2)'s type-volume limitation because it contains 4,170 words, excluding the material exempted by Rule 32(f).

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September 7, 2021

/s/ Gordon D. Todd
Gordon D. Todd

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Today, September 7, 2021, I caused this brief to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notice of this filing to all registered CM/ECF users.

/s/ Gordon D. Todd
Gordon D. Todd