

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

**En Banc 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**

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
Cody L. Reaves
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 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. This case directly applies to *amici*'s mission to provide a high quality education, including religious practice and instruction, in an environment consistent with *amici*'s and their students' families' religious observances and obligations. This includes providing in-person religious instruction and observance.

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

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.

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, 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 in this case. *Amici* contended *inter alia* that the order unconstitutionally infringed parents' rights to direct the education of their children, including selecting in-person religious education. *Amici* dismissed their case after California agreed to interpret its closure orders and guidance to allow *amici* to continue operating in person.

Amici fear that, particularly given the current trajectory of the COVID-19 pandemic, 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 *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (mem.) (statement of Gorsuch, J.)).

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly 100 years, the Supreme Court has recognized 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). California’s “extended prohibition on in-person schooling” clearly infringes the core of this fundamental right. Panel Op. 6. Indeed, it is difficult to imagine a graver interference with education than forcing private 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 and religious missions. *Amici* cannot effectively transmit religious values and traditions, surround students with a supportive religious community, or conduct immersive language and special education remotely. Indeed, each of *amici* presented evidence of religious practices that *require* in-person practice. 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 order does not survive strict scrutiny because, among other things, the State allowed other, similar and relatively riskier activities to take place in person while simultaneously prohibiting private schools from opening, regardless of the safety measures in place. The State's argument that strict scrutiny does not apply because private schools "remain subject to reasonable regulation" is erroneous. Pet. 2 (citing *Meyer*, 262 U.S. at 402). The school closure order infringes upon parents' fundamental right to direct children's education, and "[g]overnmental actions that infringe upon a fundamental right receive strict scrutiny." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005), *amended on denial of reh'g*, 447 F.3d 1187 (9th Cir. 2006).

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 same reasoning applies to the school closure order. The en banc court should apply the Supreme Court’s well-established precedent regarding fundamental rights and hold that the State’s forced closure of private schools violates “the right of parents to control their children’s education and to choose their children’s educational forum.” Panel Op. 7.

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* religious schools dedicated to teaching the Jewish, Catholic, and Evangelical Christian faiths, and to the parents who entrust their

children to them. *See* Einhorn Decl. ¶ 6; Heintschel Decl. ¶ 2; Krause Decl. ¶ 5; Petz Decl. ¶ 2; Wilk Decl. ¶¶ 4–5, 10.²

Amici take different approaches to religious education, but none of them can be replicated through a video chat. 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

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 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.

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.” *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) (quoting *Berea Coll. v. Kentucky*, 211 U.S. 45, 68 (1908) (Harlan, J., dissenting)). It cannot be pursued if the state prohibits students from “sit[ting] together in a private institution of learning while receiving instruction.” *Id.* (quoting *Berea Coll.*, 211 U.S. at 68 (Harlan, J., dissenting)). 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. See Brull Decl. ¶ 7. 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 virtually, 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 sacraments and the liturgy, or the immediate and direct proclamation of the gospel.” Pontifical Council for Soc. Commc’ns, *The Church and Internet* § 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*, 427 F.3d at 1207. 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 Ambuul 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; Brull Decl. ¶ 8. 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 Decl. ¶ 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.

These experiences of *amici*’s students are mirrored in numerous studies demonstrating that school closures severely harmed the mental and emotional health of America’s children. *See, e.g.*, Angela L. Duckworth et al., *Students Attending School Remotely Suffer Socially, Emotionally, and Academically*, 50 *Educ. Researcher* 479, 480–81 & fig.1 (2021) (conducting a controlled study and finding that students who attended school remotely during the pandemic experienced significantly lower levels of well-being than their in-person peers); Shweta Singh et al., *Impact of COVID-19 and Lockdown on Mental Health of Children and Adolescents: A Narrative Review with Recommendations*, 293 *Psychiatry Rsch.*, at 2 (2020) (conducting a metaanalysis and finding that “[t]he home

confinement of children and adolescents is associated with uncertainty and anxiety which is attributable to disruption in their education”). A wealth of data likewise demonstrates that “distance learning” is far less effective and has caused steep declines in students’ academic progress. *See, e.g.,* Emma Dorn et al., McKinsey & Co., *COVID-19 and Learning Loss—Disparities Grow and Students Need Help* 2–3 (Dec. 8, 2020), <https://mck.co/34zu54l> (comparing a sample of student assessments between fall 2019 and fall 2020 and finding that students “learned only 67 percent of the math and 87 percent of the reading that grade-level peers would typically have learned”); Brian R. Fitzpatrick et al., *Virtual Illusion: Comparing Student Achievement and Teacher and Classroom Characteristics in Online and Brick-and-Mortar Charter Schools*, 49 *Educ. Researcher* 161 (2020) (finding that students who switched to virtual schools experienced large, negative effects on mathematics and literacy achievement).

Further, the costs of school closures fall most severely on those who are already marginalized.³ Some children “fell behind” simply because

³ *See, e.g.,* UNESCO, *Adverse Consequences of School Closures*, <https://bit.ly/3kUh2in> (last visited Jan. 12, 2022); Paloma Esquivel &

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.” Am-buul Decls. ¶ 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 Decls. ¶¶ 8, 11.

In short, the experiences of *amici*’s own students and numerous studies show that the closure of in-person schools is severely disruptive to children’s education, and that the ability to gather in person is a critical part of an educational forum.

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>; Editorial Bd., *The School Kids Are Not Alright*, N.Y. Times (Aug. 21, 2021), <https://nyti.ms/3HTA8iz> (pandemic learning setbacks “range from grave for all groups of students to catastrophic for poor children.”); Hannah Natanson et al., *How America Failed Students with Disabilities During the Pandemic*, Wash. Post (May 20, 2021), <https://wapo.st/3GgEAYr>; Faith Hill, *The Pandemic Is a Crisis for Students with Special Needs*, The Atlantic (Apr. 18, 2020), <https://bit.ly/3te7Vin>.

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

When the 2020-2021 school year began, California orders required schools to remain closed for in-person instruction, including *amici* schools. See Panel 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.” The State's guidance stated plainly that its “intent [is not] to allow for in person instruction for all students.”⁵ Rather, it established special rules

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>.

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

making in-person schooling available for students needing “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. *Id.* For these groups, the guidance provided that students could meet in small “cohorts” of up to 14, with up to two teachers. Panel Op. 13–14. However, the guidance also provided that “the number of students on a given school site should generally not 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.” *Id.*

After the District Court held a hearing on *amici*’s motion for a preliminary injunction, the State agreed to construe the cohort guidance as allowing “[s]chools that provide religious instruction . . . to provide in-person education services,” and also agreed 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. *Amici* and the State agreed to a stipulated dismissal memorializing 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 agreement, *amici* schools reopened and provided instruction safely for the remainder of the school year, ensuring that their students thrived academically, emotionally, and mentally.

This agreed resolution recognized implicitly the significant constitutional deficiencies in the State’s school closure order. But despite allowing *amici* schools to operate in person, the State continued to apply its orders and guidance to prohibit similarly situated private schools from opening. And now, the State similarly seeks to avert a ruling on the merits. *See* Pet. 15; *see also* FRAP 28(j) Letter, ECF No. 82 (arguing in a Rule 28(j) letter that “this case is moot”).

While California has not yet reimplemented its ban on in-person private 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* Panel Op. 19. Indeed, due to the “ultra-contagious” Omicron variant, the number of COVID-19 cases in California has risen dramatically in recent weeks and the levels of new cases exceed those last summer when California ordered schools to close. Currently, Los Angeles County’s coronavirus

transmission rate has hit its highest point since the early months of the pandemic,⁶ and Southern California’s hospitalization rate has surged to its highest rate in months.⁷ The State has not expressly foresworn again ordering private schools to close, and could force *amici* to shut down at any time with little notice, and with devastating consequences to *amici* and their students. *See supra* Section I.A; Petz Decl. ¶ 10 (school-closure order would likely force *amicus* Montebello to close permanently).

II. California’s Restrictions On In-Person, Private Education Are 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). They do not.

⁶ *See* Rong-Gong Lin II, *L.A. County Coronavirus Transmission Rate at Highest Point Since Early Months of Pandemic*, L.A. Times (Jan. 3, 2022), <https://lat.ms/3ETlJB9>.

⁷ *See* Luke Money, Rong-Gong Lin II & Emily Alpert Reyes, *Hospitals See Big Jumps in COVID-19 Patients, but This Surge Is Different from Last Winter*, L.A. Times (Jan. 4, 2022), <https://lat.ms/3FW8ssZ>.

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

The *Meyer-Pierce* right is fundamental and squarely covers parents’ choice of a private, in-person education. 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).

The Court has held time and again that this liberty interest includes the fundamental right to direct the education of one’s children. *See id.* (collecting cases); *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 401; *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents”); *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”).⁸ The *Meyer-Pierce* right allows parents to prepare their children “for obligations the state can[not] supply,” *Troxel*, 530 U.S. at 65–66 (plurality opinion); see also *Pierce*, 268 U.S. at 535 (“[T]hose who nurture [children] and direct [their] destiny have the right, coupled with the high duty, to recognize and prepare [them] for additional obligations.”), and stands as a “charter of the rights of parents to direct” how their children are raised, *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

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. This choice of educational forum is paramount—it ensures that a student is not taken “away from their community, physically and emotionally, during the crucial and formative adolescent period of life.” *Yoder*, 406

⁸ 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, 1041–42 (9th Cir. 2000).

U.S. at 211. This Court has acknowledged that the choice of forum is critical to the parent’s liberty interest, because it “ordinarily determines the type of education one’s child will receive.” *Fields*, 427 F.3d at 1207.

California’s “extended prohibition on in-person schooling,” Panel 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. In addition to being far more effective academically, *see supra* Section I.A, in-person education gives students a “community, physically and emotionally” throughout their “crucial and formative” adolescent years. *Yoder*, 406 U.S. at 211. It also 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. With its prohibition on in-person schooling, California banned private schools from providing children this community.

As described in-depth above, in-person teaching is a core component of religious education. 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 State urges this Court to construe the *Meyer-Pierce* fundamental right far more narrowly, contending that the Constitution protects only parents' right "to choose private-school education" and direct private school curricula, 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. By imposing "standardize[d]" obligations, *Pierce*, 268 U.S. at 535, that forced private schools to "educat[e] and train[]" children in the manner the State deemed best, *Meyer*, 262 U.S.

at 402, California deprived parents of their right to direct their children's upbringing via private schooling.

The cases the State relies on are readily distinguishable. The notion that children learn best in-person is hardly an "idiosyncratic view." *Cf. Yoder*, 406 U.S. at 239 (White, J., concurring). It is clear that in-person classrooms provide benefits that virtual rooms do not. *See* note 3, *supra*.⁹ And unlike in the cases the State cites, Plaintiffs and *amici* did not seek resources from the State, *cf. Norwood v. Harrison*, 413 U.S. 455, 461–62 (1973); did not seek to impose restrictions on public school curricula, *cf. Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995), *abrogated on other grounds by Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998), *as recognized in Martinez v. Cui*, 608 F.3d 54, 63–64 (1st Cir. 2010); and did not seek to provide private education below state-imposed minimums, *cf. Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998). To the contrary, Plaintiffs and *amici* sought to provide private education *above* what the State was

⁹ *See also* Jessica Dickler, *Virtual School Resulted in 'Significant' Academic Learning Loss, Study Finds*, CNBC (published Mar. 30, 2021; updated Oct. 12, 2021), <https://cnb.cx/32K7zWd>.

willing to provide by keeping their schools open for in-person learning. The right to choose in-person private schooling falls well within the longstanding precedent establishing parents' right to direct children's education.

Because the right to choose in-person education falls squarely within the *Meyer-Pierce* liberty interest, the en banc court should apply strict scrutiny to California's school closure order. *See United States v. Juv. Male*, 670 F.3d 999, 1012 (9th Cir. 2012) (quoting *Reno*, 507 U.S. at 302); *see also Fields*, 427 F.3d at 1208 ("Governmental actions that infringe upon a fundamental right receive strict scrutiny."); *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in judgment) (concluding that strict scrutiny is the appropriate standard of review to apply to infringements of fundamental rights).

California seeks to avoid this conclusion by raising a parade of horrors, asserting among other things that affirming 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. But applying strict scrutiny here would not remotely imply that "every regulation touching on a *Meyer-Pierce* interest must

survive . . . heightened review.” See Panel Op. 78 (Hurwitz, J., dissenting). Rather, it is clear that states may “impose reasonable regulations for the control and duration of basic education,” and prohibiting private in-person schooling altogether is far afield from applying general regulations such as fire codes to private schools. See Panel Op. 48 n.23 (quoting *Yoder*, 406 U.S. at 213). Just as in *Meyer* and *Pierce* themselves, the Court should impose heightened scrutiny here because the State has infringed the core of the right by prohibiting parents from selecting an educational forum for their children. See Resp. 9–11.

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

Under strict scrutiny, California’s school closure order “is invalid[] unless it is ‘narrowly tailored to serve a compelling state interest.’” *Juv. Male*, 670 F.3d at 1012 (quoting *Reno*, 507 U.S. at 302). 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). The school closure order cannot satisfy this standard.

To the contrary, as in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam), while “[s]temming the

spread of COVID–19 is unquestionably a compelling interest, . . . it is hard to see how the challenged regulations can be regarded as ‘narrowly tailored.’” Rather, there were other, less restrictive means the State could have employed to combat COVID-19 without closing down private schools.

For example, California could have required schools to meet the same standards the State applied to camps, daycares, and supervised remote-learning centers.¹⁰ *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?”). 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

¹⁰ *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>.

of infection. *See* note 10, *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.

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.

CONCLUSION

For the foregoing reasons, the Court should hold that the State's restrictions on in-person, private schooling violate the fundamental right of parents to control their children's education and to choose their children's educational forum.

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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
Cody L. Reaves
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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/s/ Gordon D. Todd
Gordon D. Todd

Certificate of Service

Today, January 12, 2022, 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.

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Gordon D. Todd