IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CLARISSA AND ROBERT HERNANDEZ, SHANNON WOODWORTH, AND DAVID GALLEGOS,
Plaintiffs-Appellants,

v.

MICHELLE LUJAN GRISHAM, RYAN STEWARD, AND THE STATE OF NEW MEXICO,
Defendants-Appellees.

Appeal from the United States District Court
For the District of New Mexico
No. 20-cv-00942-JB-GBW

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF PRIOR RELATED APPEALS

There are no prior related appeals.

II. JURISDICTIONAL STATEMENT

The United States District Court for the District of New Mexico had subject matter jurisdiction and personal jurisdiction of the underlying case pursuant to 28 U.S.C. §§ 1331 and 1343.

This Court has jurisdiction over the appeal per 28 U.S.C. § 1291. The District Court entered its *Memorandum Opinion and Order* (Aplt App Vol 5 at 1161-1328) and its *Final Judgment* (Aplt App Vol 5 at 1329-1331) on December 18, 2020. Appellants timely noticed their appeal on December 22, 2020.

III. STATEMENT OF THE ISSUES

1. Did the lower court err in denying Plaintiffs' Motion for Preliminary Injunction?
2. Did the lower court err in granting Defendants' Motion to Dismiss for failure to state a claim and eleventh amendment immunity under 42 U.S.C. 1983?

IV. STANDARD OF REVIEW

The Tenth Circuit reviews a district court's denial of a preliminary injunction under an abuse of discretion standard. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1252 (10th Cir.2006). The Tenth Circuit "review[s] a Rule 12(b)(6) dismissal de

novo." *Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1368 (10th Cir. 2015) (internal quotation marks omitted). In doing so, the appellate court must "accept all the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the non-movant," *id.* (ellipsis and internal quotation marks omitted). To withstand dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Tenth Circuit also reviews *de novo* the legal question of whether a constitutional right is clearly established. *Pyle v. Woods*, 874 F.3d 1257, 1263 (10th Cir. 2017).

V. STATEMENT OF THE CASE

What started out as some children in New Mexico being denied an education has now largely deteriorated to most children in New Mexico not receiving their due and owing education. The district court's decision to deny injunctive relief and to dismiss the underlying case will most certainly exacerbate that harm by emboldening the Appellees to increase and continue that deprivation of education across the board. This district court's decision to deny injunctive relief and to grant dismissal finding that the actions of Appellees had a rational basis (despite acknowledging that

Appellees had presented no science upon which the court could rely)(Aplt App Vol 5 at 1132-1138) and determining that students protected by the Individuals with Disabilities Education Act (IDEA) could receive their *mainstreaming* general classroom education via remote learning (despite the presentation of clear evidence over a two and a half day trial[1] that it was not possible for most if not all students with disabilities to learn via remote means) is profoundly troubling. The extent of the damage to New Mexico's children's education is so great that it warrants reversal by this Court to save in some cases the very lives of these children. (Aplt App Vol 1 at 020-021, 034-038, 242-243, Vol 2 at 389, 396-397, 400-401, 410, 421-431, Vol 3 at 791, 885-886, 890, Vol 4 at 1065). Equally troubling is the sentiment from the district court that the concept what a basic education is (if there is one protected by the Constitution) equates to essentially no more than a 3rd grade education. (Aplt App Vol 5 at 1283).

The district court was presented and considered Exhibits that were attached to the Complaint A – M (Aplt App Vol 1 at 034-Vol 2 at 394) The district court was presented and considered Exhibits A – Z to the Motion for Preliminary Injunction which are attached to various filings. Included in the appendix for reference are exhibits A - Q and X - Z. (Aplt App Vol 2 at 416-558, Vol 3 at 559-82, Vol 4 at

[1] The district court's MOO contains no findings of fact despite conducting an over 2-day long evidentiary hearing.

1003-1032; 1046-1113, Vol 5 at 1146-1138, Vol 6 at 1139-1229 which are filed under seal).

VI. STATEMENT OF THE RELEVANT FACTS

Appellants brought the case before the district court under Section 1983 to address the fact that children were being denied an education because virtual learning had proven to be disastrous and an unmitigated educational failure for almost all students that lived in counties where the Respondents orders made virtual learning the only option. (Aplt App Vol 1 at 016-033, Vol 2 at 395-415). Additionally, Applicants alleged that the deprivation of in-person learning which was generally prohibited by the Respondents' orders deprived children protected by the IDEA from receiving a FAPE in the least restrictive learning environment. (Aplt App Vol 2 at 396, 399-403; 407, 411, 414). After a two and a half day evidentiary hearing, resulting in no findings of fact from the district court, the district court denied the request for preliminary injunction and granted dismissal. (Aplt App Vol 5 at 1161-1328).

On August 27, 2020, the Governor of New Mexico pursuant to her authorities under the Public Health Emergency Response Act, her Secretary of Health's authorities under the Public Health Act and the authorities vested in her Secretary of Education issued a school reentry plan that ostensibly only delayed, but in reality, fully denied the return of in-person schooling for the children of 8 of the 33 counties

in New Mexico, primarily in the southeast portion of the state. (Aplt App Vol 1 at 018-020, Vol 2 at 397-400, 407, Vol 3 at 791-792, 800-829).

The map was later updated and has since seen several iterations that deny education, but instead of reflecting a recognition that school children of New Mexico are entitled to an equal education of an equal opportunity for in-person instruction the map has reflected that children of many of the 33 counties are prohibited from schools providing in-person learning:

No pre-deprivation due process was provided to the children, parents, teachers or administrators of the affected counties, nor was any post-deprivation due process yet provided to the children, parents, teachers or administrators of the affected counties to address the propriety of depriving the school children of the equal education protected by the New Mexico Constitution pursuant to the plan of the State of New Mexico from her Governor.

Under the IDEA, a local education agency ("LEA"), such as the school boards and schools in in the affected counties, would be the initial educational agency that would address a modification to a child's IEP, provide a due process hearing and fashion an administrative remedy. (Aplt App Vol 1 at 019, Vol 2 at 399) However, under the current COVID mandates in effect from the Governor and the Secretary of Health not even the state educational agency ("SEA"), in this instance the NM Public Education Department acting under the supervision of the Secretary of

Education) under IDEA could fashion a remedy that provides that children with special needs, in the affected counties, could be provided the opportunity for the requisite full benefits of a free and appropriate education in an integrated, least restrictive educational environment. (Aplt App Vol 1 at 020, Vol 2 at 400). Thus, it is impossible and therefore completely futile for parents of these children to avail themselves of an administrative process that is barred by the operation of the public health orders issued under the color of law by the Governor and her Secretary of Health. And not even the SEA has the authority to grant the wholesale remedy required to ensure that a FAPE is provided to these children in order to avoid violating the IDEA. (Aplt App Vol 1 at 020, 029 Vol 2 at 400, Vol 3 850-851).

The loss of a young life has already resulted due to the denial of in-person instruction, evidence of the same was provided to the district court and to this Court previously. (Aplt App Vol 1 at 034-037). Moreover, the State of New Mexico has admitted via its Secretary of Human Services Department that depriving children of an in-person education is not directed at stopping the spread of COVID-19 via school children:

> "One of the nuances that we're learning from doing the reading is that what actually increases spread is not the kids going to school," explained Dr. David Scrase, Secretary for the state's Human Services Department. "It's that the parents are now free with their kids in school to go out and about, have more contacts, go to stores, you know go back to work for example in person, rather than working from home."

See *https://www.krqe.com/news/education/new-mexico-health-officials-educators-struggling-to-determine-school-re-entry-plans/* . (Aplt App Vol 1 at 020, vol 2 at 400, Vol 3 at 857). In addition to the admission by the State of New Mexico that the casual link between denying an in-person education and the spread of COVID-19 is attenuated at best, numerous public health experts have gone on record with their opinions which were provided to the district court that denying in-person school presents little to no advantage in stopping the spread of the disease, making the decision to deny the children their in-person education and/or a FAPE arbitrary and capricious. (Aplt App Vol 1 at 039-258, Vol 2 at 325-394, 432-558, Vol 3 at 559-563).

Importantly, with regard to the irreparable harm that this is doing to New Mexico's children the district court was presented with evidence of Dr. Mark McDonald's declaration in *Brach et al., v Newsome.,* that:

> Keeping schools closed contributes to a substantial known risk to children's health and safety. Psychological, social, and emotional development requires children to both spend time away from parents and with their peers, in structured settings, such as school. Robbing them of this critical experience places them at high risk of stunted growth and developmental arrest. In addition, extended periods of confinement provoke numerous mental and emotional illnesses such as depression, anxiety, phobias, self-harming behaviors and suicide. In vulnerable populations, physical and sexual abuse at home will worsen. I have seen a substantial increase in illness among existing pediatric patients in my clinical practice, all of whom have been confined at home for over three months. For patients with cognitive developmental delays like autism, most have regressed in years, and many have become violent toward themselves and their parents. No child in my

> practice has maintained or improved in his emotional condition since school closures began in March 2020.

Brach et al. v. Newsome, Federal Court for the Central District of California, Case 2:20-cv-06472-SVW-AFM. (Aplt App Vol 1 at 021, 382-384, 401).

The continued denial of in-person instruction to some of New Mexico's children deprives them of any sort of meaningful education, deprives them of critical if not life-saving socialization, increases the exposure of those children to physical, emotional and sexual abuse, and has caused extreme damage to children with special needs, based upon the unrefuted evidence presented to the district court.

Based irrefutably on the evidence presented to the district court in live testimony and voluminous exhibits, Appellants' children and the children of other similarly situated parents were and are being denied a free and uniform education because of the denial of participation of in-person instruction. Likewise, denying children in-person instruction denies Applicant's Woodworth's daughter (as well as the son of Ronnie Williams who was denied entry into the case by the denial of amendment) and other children protected by the IDEA of the necessary social interaction in a mainstream classroom that is integral to receiving a FAPE and modifies her individual education plan (IEP) in a way that cannot be remedied through a due process hearing making exhaustion of that administrative process futile.

The district court was presented voluminous (over 1900 pages) exhibits which

were taken into consideration and presented to the Tenth Circuit as an attachment to the Emergency Motion for a Stay Pending Appeal.

VII. SUMMARY OF THE ARGUMENT

The district court erred in denying the Appellant's an injection and granting the Appellee's Motion to Dismiss. The Appellant's made sufficient showing to the district court of (a) the likelihood of success on upon the merits; (b) the threat of irreparable harm if the stay or injunction is not granted; (c) the absence of harm to opposing parties if the stay or injunction is granted; and (d) any risk of harm to the public interest. In ruling on such a request, this court makes the same inquiry as it would when reviewing a district court's grant or denial of a preliminary injunction. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001).[2]

Without question, the district court's acknowledgement of no actual science supporting withholding education from New Mexico's children cannot be equated to forming a rational basis for that action. This is even putting aside that the denial of education is at the very least a denial of a quasi-fundamental liberty warranting at least intermediate scrutiny of the government's actions. Likewise, the district court was presented with almost completely unrefuted evidence that children with

[2] Plaintiffs satisfied Rule 8(a)(1)'s requirement to "move first in the district court for . . . an order . . . granting an injunction," by first requesting this very preliminary injunction from that court.

disabilities cannot *learn* in a virtual setting and yet found that children with disabilities can attend a virtual classroom with non-disabled students to achieve the *mainstream learning* that the IDEA requires must be afforded to them.

VIII. ARGUMENT

I. Appellants Were Likely to Prevail On The Merits Because The School Reentry Guidelines Cannot Satisfy Even a Rational Basis Scrutiny and Generally Deny Children Protected by the IDEA From Receiving a Free and Appropriate Public Education

A. Appellees' Ban on In-Person Instruction at Every School Not Meeting the Opening Criteria Violates the Fourteenth Amendment's Due Process and Equal Protection Clauses.

To determine whether a government act violates the substantive component of the Due Process Clause or the Equal Protection Clause, courts begin by determining the proper level of scrutiny to apply for review. "Even though citizens of statutory counties are not a suspect class, we will still apply strict scrutiny if the state's classification burdens the exercise of a fundamental right guaranteed by the U.S. Constitution. *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002). An act passes strict scrutiny only if it "narrowly tailored to further a compelling government interest." *Id.* "If no heightened scrutiny applies, the statute need only be rationally related to a legitimate government purpose." *Id*. "In deciding whether to recognize additional classifications as suspect, courts traditionally look to see if the classification is 'based on characteristics beyond an individual's control,'[] and whether the class is 'saddled with such disabilities, or subjected to

such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Id.* (citations omitted).

1. The Appellees Actions to Close Some Schools But Not Others Unlawfully Infringes New Mexicans' Fundamental (Or, At Least, Quasi-Fundamental) Right to Education.

The Fourteenth Amendment protects substantive rights not expressly enumerated within the Bill of Rights. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2587 (2015); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). In particular, "the Due Process Clause 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) (internal citations and quotation marks omitted). Courts must "exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect"; "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries." *Obergefell*, 135 S. Ct. at 2598 (citation omitted).

Historical analysis confirms that, although the Supreme Court has not (yet) so held, the right to a basic education is "deeply rooted in this Nation's history and tradition," stretching back at least as far as ratification of the Fourteenth Amendment and is therefore a fundamental right. More than three-quarters of States recognized

an affirmative right to public school education in 1868, the year that the Fourteenth Amendment was ratified. Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 Mich. St. L. Rev. 429, 449–63 (cataloging State constitutional provisions as of 1868). In particular, 30 states (*i.e.*, 81% of the states at the time) had a constitution that "said explicitly that the state legislature 'shall' (*i.e.*, it has the 'duty' and therefore it 'must') establish a system of free public schools." Calabresi & Perl, 2014 Mich. St. L. Rev. at 451–54 (listing these 30 states and quoting their constitutional provisions). Another three states' constitutions "arguably conferred a right to a free public education," whereas only four "states' constitutions in 1868 did not specifically mention education or the establishment of a system of free public schools." *Id.* at 455–60. Likewise, the New Mexico Constitution, since adoption at statehood has provided "A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained." N.M. Const. art. XII, § 1.

State-provided or -permitted education is "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720–21 (internal quotation marks omitted). To begin with, the foundation of American liberty is our *written* Constitution, under which laws must be published in *writing* before they may be executed to constrain liberty. Thus, texts lie at the heart of our ordered liberty. Basic learning is also a prerequisite for

the activities that form the basis of citizenship in our republic, including "knowledgeable and informed voting," comprehending ballot initiatives, and engaging in political speech and discourse. *See also Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010); *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) ("[T]he Constitution protects the right to receive information and ideas." (internal quotation marks omitted)). And lack of basic reading and writing skills precludes individuals from constitutionally protected access to the justice system. *Id.*; *see also, e.g.*, *Griffin v. Illinois*, 351 U.S. 12, 19–20 (1956); *Boddie v. Connecticut*, 401 U.S. 371, 382–83 (1971).

Finally, even if education is not a "fundamental" right, it is at least a "quasi" fundamental right subject to intermediate scrutiny. It is well settled that, under *Plyler v. Doe,* "infringements on certain 'quasi-fundamental' rights, *like access to public education*, also mandate a heightened level of scrutiny." *United States v. Harding*, 971 F.2d 410, 412 n.1 (9th Cir. 1992) (emphasis added).

The Appellees' actions undoubtedly infringe the fundamental or quasi-fundamental right to a basic education. Even assuming that the state has a compelling interest in preventing the spread of COVID-19, the Governor's school reentry plan as limited by the public health orders of her Secretary of Health and implemented by her Secretary of Education is not narrowly tailored to advance that interest. Like Texas in *Plyer v. Doe,* 457 U.S. 202 (1982), Appellees' actions are the functional

equivalent of excluding Appellants' children—including minority children and families of limited economic means—from the opportunity to attain a uniform education as protected by the New Mexico Constitution. But unlike in *Plyer*, the schoolhouse doors are not even really open contrary to Appellees' belief that digital learning will provide an equivalent and uniform basic minimum education, which is at best a fantasy. The evidence shows that distance learning will effectively preclude children from receiving a basic minimum education because (1) many students in the affected rural counties have no access to the internet, (2) even those who do will receive a significantly impaired education, and (3) truancy will run rampant. (Aplt App Vol II at 432 through Vol III at 563) (describing evidence showing extreme hardship from online learning that excludes children from an education); *see* Keech Decl. ¶ 14 ("[A]ny model of live daily virtual remote instruction … is so lacking" that it "largely fails to meet [students'] basic educational needs."). (Aplt App Vol II at 435).

Thus, taking away the quasi-fundamental liberty of the New Mexico promise of a free and uniform public education has both substantive and procedural due process implications. By imposing these COVID-19 conditions to deny in-person learning and therefore a uniform education without requiring any heightened showing, Appellees violate Plaintiffs' right to procedural due process. "Due process is flexible and calls for such procedural protections as the particular situation

demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). More specifically, due process requires balancing the liberty interest at stake—here, the traditional right to a free and uniform education, — against "the risk of an erroneous deprivation ... through the procedures used" and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail," *Mathews*, 424 U.S. at 335.

Although that balancing may be complicated in some circumstances, it is straightforward here. Appellees' orders and administrative actions impose severe deprivations on innocent school children without any consideration for their parents of other alternatives that allow for in-person instruction in order to receive the adequate and uniform education they are entitle to or the FAPE that others are entitled to receive while providing alternative protections that would aid in the reduction of the spread of COVID-19. *See Medina v. California*, 505 U.S. 437, 446 (1992) ("Historical practice is probative of whether a procedural rule can be characterized as fundamental" for purposes of procedural due process). Moreover, Appellees imposes these severe impositions without requiring any heightened showing from the state. Imposing these conditions without any heightened showing or any consideration of other alternatives to allow uniform in-person instructions flunks both the *Mathews* and *Medina* tests for due process.

Most importantly, a long running emergency with no end in sight is no excuse

for imposing severe restrictions with no due process on the children of some counties without either a heightened showing or even considering other in-person instruction options that combat the spread of COVID. Indeed, in virtually all *Mathews* cases, the challenger receives *some* process. The relevant question is whether the government is justified in withholding additional process under the rubric of *Jacobson* month after the emergent and crisis phase of a pandemic has passes. Denying all due process of law simply cannot be a result the Due Process Clause tolerates, nor does it appear that *Jacobson* provides that type of blank check instead requiring that Appellees here are bound to offer some amount of procedural due process that affords the parents of these affected children some process that allows them to address whether or not the deprivations of their children's uniform education is justifiable or if it is as arbitrary and capricious as appears on its face. This, of course gets to the heart of Justice Alito's dissent (joined by Justices Thomas and Kavanaugh) to the Supreme Court's denial of emergency injunctive relief in *Calvary Chapel Dayton Valley v. Sisolak,* _ U.S. _, 2020WL 4251360 (Jul. 24, 2020) (Alito, J., dissenting), on whether *Jacobson* can, consistent with modem jurisprudence, be applied to establish a diminished, overly deferential, level of constitutional review of emergency health measures. In arguing that the Supreme Court should have granted the requested injunction, Justice Alito stated: "[w]e have a duty to defend the Constitution, and even a public health emergency does not absolve us of that

responsibility." *Id.* at * 1. Justice Alito pointed out:

> Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic. But a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.

Id. at *2.[3]

Justice Gorsuch's recent concurrence admonishing the infringement on the First Amendment by the Governor of New York, should be persuasive to this Court in the context of the right to an education and the protections of our IDEA for disabled students when he states unequivocally that:

> It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques.

Roman Catholic Diocese of Brooklyn v. Cuomo, 2020 WL 6948354, at *7 (U.S. Nov. 25, 2020). Moreover, allowing the government to ignore data to continue to justify depriving children of education is inconsistent with *Jacobson*

[3] Judge Stickman in *County of Butler* noted and discussed at length a law review article that may also be helpful and persuasive to the Court in examining this case against *Jacobson - Lindsay F. Wiley & Stephen I. Vladeck, Coronavirus, Civil Liberties, and the Courts: the Case Against "Suspending" Judicial Review, 133 HARV. L. REV. F. 179 (2020)*

and is the epitome of arbitrary and capricious actions. In evaluating whether the actions of the government are lawful under the United States Constitution we are now well into the realm that the *Jacobson* Court cautioned of, stating:

> Before closing this opinion we deem it appropriate, in order to prevent misapprehension [of] our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.

Id. at 38, 25 S.Ct. 358. Here again, despite "no science being presented in the courtroom," the district court made a *Jacobson* based ruling reached in reliance on a lack of data, based upon facts about the dangerousness of the pandemic from the beginning of the pandemic, to justify ignoring scientific data collected in New Mexico nine months after the pandemic began to afford the Appellees a find of a rational basis.

2. The Appellees' Actions Violate the Fourteenth Amendment, Even Under Rational Basis Review

The Governor's school reentry plan prohibits in-person learning in some counties—those on the state's monitoring list that have a higher per capita infection rate that the unexplained and largely unjustified level set by the Defendants — while allowing schools in other counties to return to the classroom. Thus, while students in some counties could resume in-person learning this Fall, similarly situated students in several other counties cannot. This unequal treatment, which will only

become more pronounced as some counties manage to get off the state's list denying in-person learning, is not even "rationally related" to the state's interest in combatting COVID-19. *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976)

To begin, whether a county is on the monitoring list has *nothing* to do with the prevalence of COVID-19 at schools, or even among children. Instead, a county is placed on the monitoring list based on a per capita percentage positive test rates. The Governor's plan simply assumed that it is more dangerous to conduct in-person classes in counties where COVID-19 continues to spread among the general population than in other counties. But that assumption could not "*reasonably* be conceived to be true by the [Governor]" for several reasons. *Vance v. Bradley,* 440 U.S. 93, 111 (1979). *First*, as Appellants have explained and demonstrated to the district court, the scientific evidence confirms that children are not at even a moderate risk of being sickened or killed by COVID-19. Children in areas that currently have a higher that desired by the DOH per capita testing rate such as Lea County are thus just as unaffected by the virus as children in other largely rural parts of the state. And because children do not play a significant role in transmitting the virus to adults, it is only logical that teachers in the affected counties are just as safe as teachers in a county where in-person learning is permitted. Indeed, they are significantly safer than essential workers in many other professions who have daily contact with large numbers of adults.

Simply put, the Appellees could not justify treating children differently (in some cases this does in fact represent an outright denial of education because in all of the affected counties there are households that lack access to the broadband internet coverage necessary for remote learning)(Aplt App Vol 3 at 574-801), in order to prevent the spread of COVID-19. Stopping the spread of disease that poses little to no graver threat on a statistical basis than a variety of other diseases or causes of injury, illness or death simply cannot justify the deprivations of liberty even when weighed against a rational basis standard. This was succinctly described by Judge Stickman when he stated:

> Courts are generally willing to give temporary deference to temporary measures aimed at remedying a fleeting crisis. Wiley & Vladeck, *supra* p. 16, at 183. Examples include natural disasters, civil unrest, or other man-made emergencies.11 There is no question, as Justice Alito reasoned in *Calvary Chapel,* that courts may provide state and local officials greater deference when making time-sensitive decisions in the maelstrom of an emergency. But that deference cannot go on forever. It is no longer March. It is now September and the record makes clear that Defendants have no anticipated end-date to their emergency interventions. Courts surely may be willing to give in a fleeting crisis. But here, the duration of the crisis-in which days have turned into weeks and weeks into months-already exceeds natural disasters or other episodic emergencies and its length remains uncertain. Wiley & Vladeck, *supra* page 16, at 184. Faced with ongoing interventions of indeterminate length,[] "suspension" of normal constitutional levels of scrutiny may ultimately lead to the suspension of constitutional liberties themselves.

County of Butler, et al, v. Wolf, et al, Wolf, 2020 WL 5510690, at *9 (W.D. Pa.

Sept. 14, 2020). Treating something as an emergent crisis where no evidence exists that there is still a threat is definitionally irrational. As a general matter, the rational basis test requires only that the governmental action "bear[] a rational relationship to some legitimate end." *Romer v. Evans,* 517 U.S. 620, 631 (1996). Conversely, actions which are irrational, arbitrary or capricious do not bear a rational relationship to any end. *Cty. Concrete Corp. v. Town of Roxbury,* 442 F.3d 159, 169 (3d. Cir. 2006) (quoting *Pace Resources, Inc., v. Shrewsbury Twp.,* 808 F.2d 1023, 1035 (3d Cir. 1987)) ("Thus, for appellants' facial substantive due process challenge to the Ordinance to be successful, they must 'allege facts that would support a finding of arbitrary or irrational legislative action by the Township."')

Here the simple statistics of COVID-19 show that Appellees' actions were detached from not only rationality but also reality. The idea that because there is a fractionally greater occurrence of COVID-19 in the affected counties, that children who pose an extremely low risk of creating additional spread or harm to themselves and others create a risk in an already extremely low risk situation that outweighs allowing them the liberties that they are being deprived of is definitionally irrational.

At the onset of Covid-19 the general idea was that closures were necessary to ensure that the health care system would not be overrun, and to ensure enough

medical supplies were in stock to prepare for the influx of cases. The examination of the numbers as they relate to children should have been telling for the district court, though despite volumes of pages of data the Appellees produced no correlation of scientific, medical or logistical evidence that public schools in the affected counties are any more dangerous for students, teachers or the public at large than public schools in other counties, or daycare centers in the same affected counties. The Bloomberg School of Public Health at Johns Hopkins University's *Public Health Principles for a Phased Reopening During COVID-19: Guidance for Governors*[4] (Aplt App Vol III at 798) in the section named Schools and Childcare Facilities, does rely upon scientific data and it addresses children who attend childcare facilities and school-aged children in the same manner.

> Schools and childcare facilities play many important roles in communities. Schools provide necessary education to prepare children for adulthood. Online education from K-12 is not a substitute for in-person learning and socialization in a school setting. Long-term shutdowns will likely lead to education gaps and other consequences for many children. In addition to the critical function of educating children, schools and childcare facilities also enable parents to work outside the home. They also serve as key resources in that they offer meals, safe environments, and other services, particularly to vulnerable families.

[4] https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/200417-reopening-guidance-governors.pdf at 12-13.

(Aplt App Vol III 795). It also addresses the risks associated with childcare centers and schools, and the reasons supporting their reopening, as a group without drawing distinctions. Unlike businesses and sectors that primarily serve adults, the consequences of increased transmission are potentially different for settings and activities that primarily serve kids. Children are less vulnerable to severe illness from COVID-19 than adults. A report provided to the district court found that fewer than 2% of cases of COVID-19 in the United States were diagnosed in children, and of those (for whom data were available), between 5.7% and 20% required hospitalization. Most children requiring hospitalization were under 1 year of age. These considerations favor the reopening of schools and childcare facilities. *Id*. Moreover, the Johns Hopkins Report also does not differentiate schools in areas with a higher rate of occurrence on a per capita basis from childcare centers or public schools in an area with lower positive per capita test rate. Rather, it appropriately refers to "schools" without singling out any specific school populations.

Here of course, Appellees made no legitimate attempt to explain the discrimination despite the fact that the school districts in the affected counties have instituted plans that comply with same requirements deemed to be the appropriate mitigation of risk in non-affected counties. *See, e.g.*, *Calvary Chapel*, 2020 WL 4251360, at *1 (Alito, J., dissenting) (noting that "the State has made no effort to

show that conducting services in accordance with Calvary Chapel's [safety] plan would pose any greater risk to public health than many other activities that the directive allows").

In short, the school reentry guidance requirements fail rational basis because in the name of stopping the spread of COVID-19 and preventing hospitals from being overwhelmed, it prohibits gatherings by the one population cohort that does not spread virus and is hardly ever hospitalized by it. Although the state undoubtedly has broad police powers with which to address public health concerns, it cannot enact a discriminatory regulation that lacks any rational connection to the stated goal—as it has done here, with devastating effect, even more so when achieving the state goal is no longer tied to a reasonable belief that health care system will be overwhelmed if drastic and in the case of at least one youth life threatening measures are not undertaken.

3. Appellees' Actions Violate Federal Laws Requiring Equal Educational Access for Disabled Students

The Individuals with Disabilities Education Act (IDEA) requires States to provide disabled students with programming to meet their many needs. A State that receives federal funding under the IDEA "must provide a free appropriate public education—a FAPE, for short—to all eligible children." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017)for (citing 20 U.S.C. § 1412(a)(1)). "A FAPE, as the Act defines it, includes both 'special education' and

'related services.'" *Id.* at 994 (citing 20 U.S.C. § 1401(9)). "'Special education' is 'specially designed instruction … to meet the unique needs of a child with a disability'; 'related services' are the support services 'required to assist a child … to benefit from' that instruction." *Id.* (citing 20 U.S.C. §§ 1401(26), (29)). The instruction and services provided by school districts must meet each student's "academic, social, health, emotional, communicative, physical and vocational needs." *Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 1185 (9th Cir. 2009). To meet these needs, a school district's services include "'developmental, corrective, and other supportive services,' such as 'psychological services, physical and occupational therapy, recreation ... [and] social work services.'" *Id.* (citing 20 U.S.C. § 1401(26)).

Providing the IDEA's mandatory "special education" and "related services" requires in-person education for nearly all disabled students. To begin, students with disabilities suffer "significant[ly]" from the lack of in-person instruction. *See AAP Guidance*, *supra.* Additionally, disabled students require more services than simply in-person instruction, including services from specialists such as occupational therapists, behavior specialists, and counselors. *See* 20 U.S.C. § 1401(26); *e.g.*, *Price v. Commonwealth Charter Academy – Cyber School*, 2019 WL 4346014, at *3, *5 (E.D. Penn. Sept 12, 2019); *K.B. on behalf of S.B. v. Katonah Lewisboro Union Free Sch. Dist.*, 2019 WL 5553292, at *2 (S.D.N.Y. Oct. 28, 2019). Indeed, "[e]ducation

for [ ] students with disabilities often differs dramatically from 'conventional' [ ] education." *E.R.K. ex rel. R.K. v. Hawaii Dep't of Educ.*, 728 F.3d 982, 990 (9th Cir. 2013) (citation omitted). To meet these needs, and the requirements of the IDEA, school districts must be able to provide at least some in-person services and more than likely in-order to provide appropriate socialization must allow more than just children with special needs to be present for in-person schooling.

In addition to these general requirements, "[a] State covered by the IDEA must provide [each] disabled child with [ ] special education and related services 'in conformity with the [child's] individualized education program,' or IEP." *Endrew F.*, 137 S. Ct. at 994 (citing 20 U.S.C. § 1401(9)(D)). An IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances[.]" *Id.* at 999–1000 (citation omitted). And "a material failure" by the school "to implement an IEP violates the IDEA." *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (emphasis omitted). "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Id.* This complete failure to provide services to students with disabilities violates the IDEA. Moreover, failure to provide any in-person services will cause uncounted "material failure[s]" to implement the IEPs of disabled students. *See Van Duyn*, 502 F.3d at 822.

Thus, upon presentation of substantial evidence that almost uniformly that children with disabilities cannot be educated in a remote setting such a virtual classroom it is clear that is not possible for Appellant Woodworth's daughter and other children similarly situated to receive a FAPE via a mainstream virtual classroom and thus a violation of the IDEA has generally occurred. Judge Katzman clearly articulated this standard for the Second Circuit stating:

> The IDEA's LRE requirement is laid out in 20 U.S.C. § 1412(a)(5)(A), titled "Least restrictive environment." Under that provision, a state receiving federal special education funding must ensure that:
>
> > To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
>
> 20 U.S.C. § 1412(a)(5)(A). This requirement "expresses a strong preference for children with disabilities to be **educated**, to the maximum extent appropriate, together with their non-disabled peers." *Walczak,* 142 F.3d at 122 (internal quotation marks omitted).

T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 161 (2d Cir. 2014) (emphasis added). The operative word is, of course, educated - if the student can't, because of their disabilities be educated in a mainstream classroom that is conducted virtually, then the requirements of the law are not being met when the only mainstream classroom offered is a virtual classroom. And to be clear this isn't

something that can be remedy by an administrative process because the only solution is to have non-disabled student be allowed in-person learning which is generally prohibited by the order of the Appellees.

IX. CONCLUSION

The Court should reverse the decision of the District Court.

X. ORAL ARGUMENT STATEMENT

Pursuant to 10th Cir. L.R.28.2(C)(f), Appellants request oral argument in this matter. Such argument is necessary because the issues involve important questions of law. Appellants respectfully suggest that the Court may benefit from the interactive conversation that oral argument would provide on these issues.

Respectfully submitted this 22nd day of February 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLAINCE

Undersigned counsel certifies that Appellants' Opening Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,818 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii). This opening brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing via the appellate CM/ECF system on February 22, 2021 causing all parties of record to be served electronically.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the Tenth Circuit ECF User's Manual, Section II.J, I hereby certify, with respect to the foregoing document, that:

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