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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF SAN FRANCISCO

15 UNLIMITED JURISDICTION

16 CITY AND COUNTY OF SAN FRANCISCO,

17 *Plaintiff and Petitioner,*

18 vs.

19 SAN FRANCISCO BOARD OF EDUCATION;  
20 SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT; VINCENT MATTHEWS in his  
official capacity as San Francisco  
21 Superintendent of Schools,

22 *Defendants and Respondents.*  
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Case No. CPF-21-517352

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
CITY AND COUNTY OF SAN FRANCISCO'S  
EX PARTE APPLICATION  
FOR ORDER TO SHOW CAUSE RE:  
PRELIMINARY INJUNCTION**

Ex Parte:

Hearing Date: February 11, 2021  
Hearing Judge: Hon. Ethan P. Schulman  
Time: 1:30 p.m.  
Place: Dept. 302

Preliminary Injunction:

Hearing Date: [TBD]  
Hearing Judge: Hon. Ethan P. Schulman  
Time: [TBD]  
Place: Dept. 302

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9 Cal. State Assembly, Assembly Daily Journal, 2019-2020 Reg. Sess (June 26, 2020). .....15

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 11 *Transmission* (Dec. 20, 2020) .....13

12 Elizabeth Swedo, MD et al., *Trends in U.S. Emergency Department Visits Related to Suspected or*  
 13 *Confirmed Child Abuse and Neglect Among Children and Adolescents Aged <18 Years*  
 14 *Before and During the COVID-19 Pandemic — United States, January 2019–September 2020,*  
 15 *69 Morbidity & Mortality Wkly. Rep. 1841 (2020), [http://dx.doi.org/10.15585/](http://dx.doi.org/10.15585/mmwr.mm6949a1)*  
 16 *mmwr.mm6949a1* .....19

17 Jill Tucker, *Deal to bring S.F. students back to classroom leaves many questions unanswered,*  
 18 *S.F. Chronicle* (Feb. 8, 2021).....6

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1 Plaintiff and Petitioner City and County of San Francisco (“City” or “San Francisco”) brings  
2 this *Ex Parte* Application under C.C.P. § 527 and California Rules of Court 3.1150 and 3.1200 *et seq.*  
3 for an Order to Show Cause re: Preliminary Injunction against Defendants and Respondents the San  
4 Francisco Board of Education (“Board”), the San Francisco Unified School District (SFUSD), and  
5 Superintendent Matthews in his official capacity (collectively, the “School District”) to enjoin them  
6 from continuing to violate California statutory and constitutional law by refusing to offer in-person  
7 school to public school students to the greatest extent possible.

### 8 INTRODUCTION

9 Public schools in San Francisco have been closed for 334 days.

10 Private schools in the City are open. Parochial schools are open too. Public schools are open  
11 in neighboring San Mateo. And Santa Clara. And Alameda. And Marin. All without any significant  
12 COVID-19 outbreaks. State, local, and federal public health authorities all agree that schools can  
13 reopen safely as long as basic precautions are taken. Mental health experts report that children of all  
14 ages are experiencing severe mental health issues: depression, anxiety, self-harming behavior, suicidal  
15 ideation. And yet, public schools in San Francisco remain shut.

16 The School District’s failure to reopen for in-person instruction in these circumstances—even  
17 for the most vulnerable San Francisco children—is unconscionable and unlawful. It violates the  
18 fundamental right to attend school enshrined in the California Constitution. And it violates the state  
19 Education Code, which provides that “[a] local educational agency *shall* offer in-person instruction *to*  
20 *the greatest extent possible.*” Educ. Code § 43504(b) (emphasis added).

21 The School District’s recent agreement with its labor partners is not enough to remedy this  
22 violation. It does not allow any schools to open if the City remains in the state’s “purple tier,” even  
23 though state and local law allow elementary schools and specialized services for vulnerable children of  
24 all ages to resume at this level. Nor does it address what in-person instruction will look like: How  
25 many days per week? Hours per day? For how many months or even years? The School District told  
26 the press that, after 334 days, they are just now “ramping up to . . . nail down the[se] details.”<sup>1</sup>

27 \_\_\_\_\_  
28 <sup>1</sup> Jill Tucker, *Deal to bring S.F. students back to classroom leaves many questions unanswered*,  
S.F. Chronicle (Feb. 8, 2021).



1 students in transitional kindergarten (TK) through 6th grade—could open for in-person instruction as  
2 long as they received approval (at that time, a waiver) from the Health Officer and followed specific  
3 health and safety precautions. Philip Decl. ¶ 7.

4 And on September 1, 2020, consistent with state authorization, the Health Officer revised the  
5 Stay-Safer-at-Home Order to allow schools to open, *without any prior approval*, to provide specialized  
6 and targeted support services to vulnerable children and youth, as long as certain health and safety  
7 protocols were followed. *Id.* ¶ 8. This revised Order allowed schools to immediately begin providing  
8 in-person instruction and services to children and youth with disabilities, children at risk of abuse or  
9 neglect, children experiencing homelessness, foster children, children of domestic violence survivors,  
10 English learners, and children from families experiencing housing or food insecurity. *Id.*

11 **B. Private, Parochial, And Charter Schools In San Francisco Have Reopened Safely.**

12 In early September 2020, SFDPH devised a school reopening application process, giving  
13 schools a path to resume in-person instruction. Validzic Decl. ¶¶ 7-8. SFDPH provided schools  
14 significant support and guidance to navigate this process by giving clear instructions, tips on how to  
15 comply with the above steps, and transparency about the status of applications. *Id.* ¶¶ 9-11.

16 Following SFDPH’s guidance, many schools have successfully reopened. As of February  
17 10, 2021, 114 private, parochial and charter schools have reopened, with 15,831 students and 2,396  
18 staff participating in in-person instruction. *Id.* ¶ 12. And there have been fewer than five cases of  
19 suspected in-school transmission.<sup>2</sup> Philip Decl. ¶ 9. Public schools have also reopened in neighboring  
20 counties such as San Mateo, Santa Clara, Alameda, and Marin. Validzic Decl. ¶ 13. In Marin, schools  
21 have been partially open and providing in-person education since September 2020. RJN ISO Mtn for  
22 PI Exhs. A & B. In fact, 98% of their elementary schools, 96% of K-8 schools, 89% of middle  
23 schools, and 29% of high schools have offered in-person instruction. As of early February 2021, 87%  
24 of Marin’s schools had students receiving in-person instruction on their campuses ranging from two  
25 days per week to five days per week. *Id.* And there have been just 10 cases of in-school transmission  
26 of COVID-19. *Id.* Not one of these in-school transmissions has been from student to teacher. *Id.*

27 \_\_\_\_\_  
28 <sup>2</sup> For privacy reasons, SFDPH does not disclose cases in numbers under 5. It has therefore not  
disclosed whether there was one, two, three, or four cases of in-school transmission. Philip Decl. ¶ 9.

1 In stark contrast, as of the date of this filing, not a single San Francisco public school is open or  
2 prepared to reopen for in-person instruction for even a single student. Validzic Decl. ¶ 15.

### 3 ARGUMENT

4 When deciding whether to grant a preliminary injunction, a court must consider two  
5 interrelated factors: (1) the likelihood that the plaintiff will succeed on the merits, and (2) the relative  
6 interim harm from granting versus denying the injunction. *See, e.g., Butt v. State of California*, 4 Cal.  
7 4th 668, 677-78 (1992). Both factors counsel toward granting this motion.

8 San Francisco’s petition and complaint assert several theories concerning the School District’s  
9 failure to reopen public schools. But to obtain a preliminary injunction, San Francisco only needs to  
10 show a likelihood of success on a single theory that would support the requested injunctive relief. *See*  
11 *Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 408 (2007). Although the City is confident it will  
12 ultimately prevail on all its theories, the City brings this motion on its claims that SFUSD’s failure to  
13 reopen schools violates (1) the constitutional right to attend school and (2) the California Education  
14 Code. Each of these violations independently warrants the interim relief that San Francisco seeks.

#### 15 **I. Failing To Provide In-Person Instruction When It Is Safe To Do So Violates The** 16 **California Constitution And State Law.**

##### 17 **A. Failing To Provide In-Person Instruction Violates The California Constitution.**

##### 18 **1. The Failure To Provide In Person Instruction Is A Significant Infringement** 19 **On Children’s Fundamental Right To Attend School.**

20 San Francisco children have a fundamental constitutional right to attend school. This right was  
21 enshrined in California’s 1879 Constitution, and the text and right have remained unchanged for over  
22 140 years. Article IX, section 5 of the California Constitution provides:

23 The Legislature shall provide for *a system of common schools by which a free*  
24 *school shall be kept up and supported* in each district at least six months in every  
year, after the first year in which a school has been established. (Cal. Const. art.  
IX, § 5 (emphasis added).)

25 Section 1 provides insight into the reason for this command, explaining that a “general diffusion of  
26 knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people,”  
27 and directing the legislature to “encourage by all suitable means the promotion of intellectual,  
28 scientific, moral, and agricultural improvement.”

1 Since the 1800s, California courts have recognized that these provisions create a constitutional  
2 right to attend school. In *Ward v. Flood*, 48 Cal. 36 (1874), the Court considered a federal equal  
3 protection challenge—whether an African American child could force a White school to admit her or  
4 whether the “separate-but-equal” Black school was sufficient. The Court recognized and affirmed that  
5 the California Constitution creates a right to attend school:

6 The opportunity of instruction at public schools is afforded the youth of the State  
7 by the statute of the State, enacted in obedience to the special command of the  
8 Constitution of the State, directing that the Legislature shall provide for a system  
9 of common schools, by which a school shall be kept up and supported in each  
10 district, at least three months in every year, etc. (Art. 19, Sec. 3.) The advantage  
11 or benefit thereby vouchsafed to each child, *of attending a public school* is,  
therefore, one derived and secured to it under the highest sanction of positive law.  
It is, therefore, a right—a legal right—as distinctively so as the vested right in  
property owned is a legal right, and as such it is protected, and entitled to be  
protected by all the guarantees by which other legal rights are protected and  
secured to the possessor. (*Ward*, 48 Cal. at 50 (emphasis added).)

12 The Court went on to restate the right in plain terms: “[u]nder the laws of California children or  
13 persons between the ages of five and twenty-one years are entitled to receive instruction *at the public*  
14 *schools.*” *Id.* at 51 (emphasis added).

15 Fifty years later, in *Piper v. Big Pine School Dist. of Inyo County*, 193 Cal. 664 (1924), our  
16 Supreme Court considered another equal protection challenge, this time brought by a Native American  
17 girl who sought to attend a California public school instead of a federal, native school. Once again,  
18 the Court affirmed the right to attend a public school:

19 [T]he common schools are doorways opening into chambers of science, art, and the  
20 learned professions, as well as into fields of industrial and commercial activities.  
21 Opportunities for securing employment are often more or less dependent upon the  
rating which a youth, as a pupil of our public institutions, has received in his school  
work. *These are rights and privileges that cannot be denied.* (*Id.* at 673.)

22 Countless other cases have affirmed this fundamental constitutional right. *See, e.g.,*  
23 *Serrano v. Priest*, 5 Cal. 3d 584, 589 (1971) (“[T]he right to an education in our public schools is a  
24 fundamental interest.”); *Manjares v. Newton* 64 Cal. 2d 365, 375 (1966) (“We indulge in no hyperbole  
25 to assert that society has a compelling interest in affording children an opportunity to attend school.”);  
26 *Brown v. Smith*, 24 Cal. App. 5th 1135, 1145 (2018) (“While education is not a fundamental right  
27 under the federal Constitution, our Supreme Court has held that education is a ‘fundamental  
28 interest.’”); *Levi v. O’Connell*, 144 Cal. App. 4th 700, 707 (2006) (“California children have an

1 enforceable right to attend [a common] school”); *Butt*, 4 Cal.4th at 679 (holding school districts are  
2 obligated “to provide the minimum six-month school term set forth in the ‘free school’ clause.”).

3 More than a century of legislation has reinforced the right, and helped to establish its scope and  
4 contours. The legislature enacted the earliest law establishing the State’s public education system in  
5 1851: Chapter 126 “An Act concerning Common Schools and Public Instruction.” In 1880, a  
6 provision of the Political Code provided, “Every school, unless otherwise provided by law, must be  
7 open for the admission of all children between six and twenty-one years of age residing in the district.”  
8 *Tape v. Hurley*, 66 Cal. 473, 473-474 (1885) (quoting Pol. Code § 1667). Today, the Education Code  
9 provides that “[i]t is the policy of the State of California to afford all persons in public schools, . . .  
10 opportunities in the educational institutions of the state.” Educ. Code § 200. It also requires the  
11 governing board of a “school district [to] maintain schools and classes as provided by law”—*i.e.*, for a  
12 “total of no fewer than 175 days during the academic year” with specified amounts of instructional  
13 minutes. Educ. Code §§ 35290, 37620, 46117, 46112.

14 Providing instruction to students exclusively by “distance learning” while classrooms are  
15 shuttered is emphatically not “school.” By offering students instruction via distance learning—and  
16 nothing more—the School District violates the constitutional right of San Francisco students to attend  
17 school. That right is not limited to academic subjects, but instead extends to “the practical training and  
18 experience—from communicative skills to experience in group activities—necessary for full  
19 participation in the ‘uninhibited, robust, and wide-open’ debate that is central to our democracy.”  
20 *Hartzell v. Connell*, 35 Cal. 3d 899, 908 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S.  
21 254, 270 (1964)). It extends to learning to share, to socialize, and to work collaboratively with others.  
22 It includes the right to learn the lessons of “justice, fair play, and good citizenship” that children can  
23 only learn through in-person, social interactions with others. *Hartzell*, 35 Cal. 3d at 910. Put simply,  
24 it includes the right to attend school in person with teachers and other students. That right cannot be  
25 fulfilled with distance learning.

26 California’s prior, limited experiments with distance and online learning emphasize the  
27 distinction between such forms of instruction and school. Nearly 30 years ago, the legislature  
28 established California’s first “distance learning policy.” 1991 Cal. Legis. Serv. ch. 1011 (S.B. 918).

1 This policy, and subsequent iterations and pilot programs, highlights the gulf between distance  
2 learning and attending school. In fact, the comparison is a category error. The legislature properly  
3 understood and defined “distance learning” as a form of instruction—“instruction in which the pupil  
4 and instructor are in different locations and interact through the use of computer and communications  
5 technology”—not a form of school. Educ. Code § 51865(a).

6 More than a decade after establishing the “distance learning policy,” in 2002, the legislature  
7 formally authorized “online” classes in specific and limited circumstances. Stats. 2002, ch. 801 (A.B.  
8 885). There could be no more than 40 schools offering such classes statewide, no more than five  
9 schools in any one district, and they could only be offered to high school students. Educ. Code  
10 § 46300.8(f), (i) (since repealed). High school students could only take such classes voluntarily, with  
11 written consent from a parent or guardian, and only if the student was “concurrently enrolled in  
12 traditional in-classroom courses.” *Id.* § 46300.8(j), (k) (since repealed). Following expiration of the  
13 pilot program in 2007, the legislature reestablished the program in 2012, only to see it expire, once  
14 again, in 2019. 2012 Cal. Legis. Serv. ch. 579 (A.B. 644).

15 In stark contrast to “distance learning” (a form of instruction), “[t]he word ‘school’ is variously  
16 defined as an institution or place for instruction or education; a place for learned intercourse and  
17 instruction; a place for acquiring knowledge and mental training; a place for the instruction of  
18 children; a place where instruction is imparted to the young; an educational establishment.” *Board of*  
19 *Sup’rs of Merced County v. Cothran*, 84 Cal. App. 2d 679, 682 (1948).

20 The School District is undoubtedly attempting to educate students via distance learning and  
21 teachers and students are doing their best. But distance learning is a form of instruction; it is not  
22 school. And each of San Francisco’s more than 50,000 students has been prevented from attending  
23 school—from having in-person instruction with teachers and peers in a common space—for nearly a  
24 full year. This constitutes a substantial violation of their constitutional rights.

25 **2. There Is No Compelling Justification For Failing To Provide In-Person**  
26 **Instruction To The Extent Deemed Safe By Health Authorities.**

27 Where—as here—a governmental action substantially infringes on a fundamental right, the  
28 action is subject to strict scrutiny (*see Fair Political Practices Comm’n. v. Super. Ct.*, 25 Cal. 3d 33,

1 47 (1979)), and is permitted only if it is supported by a compelling state interest and is narrowly  
2 tailored to meet that end. *See, e.g., Serrano*, 5 Cal. 3d at 610. At one point, the closure of schools met  
3 this high bar to protect the community from the threat the COVID-19 pandemic posed. But those days  
4 have long past.

5 Government entities certainly have a compelling interest in preventing the spread of  
6 communicable disease. *See Brown*, 24 Cal. App. 5th at 1145. And in the early days of the  
7 pandemic—when little was known about the characteristics or transmission of the virus—cancelling  
8 all in-person instruction in favor of a purely distance learning model was a reasonable step to  
9 accomplish this goal. Since then, however, scientific understanding and knowledge has evolved. We  
10 have learned that children get COVID-19 less frequently than adults. Philip Decl. ¶ 11; *see also*  
11 California Department of Public Health, *Evidence Summary TK-6 Schools and COVID-19*  
12 *Transmission* (Dec. 20, 2020) (“CDPH Evidence Summary”), [https://www.cdph.ca.gov/](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Safe-Schools-for-All-Plan-Science.aspx)  
13 [Programs/CID/DCDC/Pages/ COVID-19/Safe-Schools-for-All-Plan-Science.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Safe-Schools-for-All-Plan-Science.aspx) (outlining the “two  
14 general explanations for why children get COVID-19 less frequently”). We have learned that in-  
15 person instruction does not disproportionately increase COVID-19 transmission. Philip Decl. ¶ 11.  
16 And we have learned that face masks, small groups, symptom screening, hand hygiene, improving  
17 ventilation, and maintaining physical distance are highly efficient at mitigating in-school COVID-19  
18 transmission. *Id.*; *see also* CDPH Evidence Summary (section on “Core Mitigation Strategies”).  
19 Indeed, the evidence indicates that these core mitigation measures are sufficient to prevent in-school  
20 transmission in elementary schools regardless of vaccination status. Philip Decl. ¶ 11.

21 For example, a recent study by researchers with the CDC found that “the type of rapid spread  
22 that was frequently observed in congregate living facilities or high-density worksites has not been  
23 reported in education settings in schools.” Philip Decl. ¶¶ 12-13. In another study, researchers at  
24 Duke University examined students in 11 school districts in North Carolina with fall in-person classes  
25 to see if they could trace incidents of COVID-19 to in-school transmissions. The study concluded that  
26 “[i]n the first 9 weeks of in-person instruction in NC schools, we found extremely limited within-  
27 school secondary transmission of SARS-CoV-2, as determined by contact tracing.” *Id.* ¶ 15.

28 These transmission findings appear to be consistent globally. *Id.* ¶ 16. And these transmission

1 findings hold true locally. As of February 10, 2021, there were 15,831 students and 2,396 staff  
2 participating in in-person instruction in San Francisco’s private, parochial, and charter schools—and  
3 fewer than five cases of suspected in-school transmission. Validzic Decl. ¶ 12; Philip Decl. ¶ 9; *see*  
4 *also n. 2, supra*. Similarly, Marin County schools have provided a combined one million days of in-  
5 person instruction, and there have been just 10 cases of in-school transmission of COVID-19. Not one  
6 of these in-school transmissions has been from student to teacher. RJN Exhs. A & B.

7 In keeping with these findings and scientific understanding of the virus, state and local health  
8 authorities allow schools to reopen to provide specialized and targeted support services to vulnerable  
9 children and youth of any age *without any prior approvals*, as long as certain health and safety  
10 protocols are followed. Philip Decl. ¶¶ 8, 18. They allow schools to open TK-6th grade when a  
11 county is in the state’s “purple tier” (*i.e.*, has an adjusted case rate between 7 and 25 per 100,000  
12 population). *Id.* ¶ 18. And they allow schools to open for all grades when a county has been in the  
13 “red tier” (*i.e.*, with an adjusted case rate between 4 and 7) or lower for five days. *Id.*<sup>3</sup>

14 In short, the scientific consensus—borne out in schools around the world and right here in the  
15 Bay Area and San Francisco—is that schools can reopen safely and without causing significant  
16 increases in community infections when community transmission is within acceptable ranges and  
17 basic mitigation strategies, such as masks, physical distancing, hand hygiene and ventilation are  
18 employed.<sup>4</sup> Adherence to the state’s tiered reopening framework and basic mitigation strategies  
19 accomplishes the compelling goal of preventing the spread of COVID-19 without burdening children’s  
20 fundamental rights. Accordingly, the School District’s hatchet approach of offering no in-person  
21 instruction at all is not narrowly tailored, cannot survive strict scrutiny, and must be enjoined.

22 **B. By Continuing To Rely Exclusively Upon Distance Learning, The School District**  
23 **Is Violating Its Statutory Obligation To Provide In-Person Instruction.**

24 In addition to violating the California Constitution, the School District’s failure to provide any  
25 in-person instruction when it is safe to do so violates recently-enacted state legislation. To ensure the

26 <sup>3</sup> San Francisco’s adjusted case rate is currently 11.4. Philip Decl. ¶ 19.

27 <sup>4</sup> As the CEO of the Chicago public schools pithily put it: “At this point, finding a public health  
28 expert who opposes in-person learning is like finding a scientist who doesn’t believe in climate  
change.” Janice K. Jackson (@janicejackson), Twitter (Feb. 4, 2021, 8:31 AM).

1 continuity of education during the COVID-19 pandemic following the end of the 2019-2020 school  
2 year, the California Legislature passed Senate Bill 98 (“SB 98”). SB 98 amended and added various  
3 provisions to the California Education Code to clarify the obligations of Local Educational Agencies  
4 (LEAs), such as public-school districts, during the COVID-19 pandemic.

5 It provides, “[a] local educational agency *shall* offer in-person instruction *to the greatest extent*  
6 *possible*.” Educ. Code § 43504(b) (emphasis added); *see also* Cal. State Assembly, Assembly Daily  
7 Journal, 2019-2020 Reg. Sess., at 4979 (June 26, 2020) (it was “the intent of the Legislature that LEAs  
8 offer in-person instruction in 2020–21 to the greatest extent possible”). The Legislature specified that  
9 distance learning may be offered in two circumstances: “(A) On a local educational agency or  
10 schoolwide level as a result of an order or guidance from a state public health officer or a local public  
11 health officer;” or “(B) For pupils who are medically fragile or would be put at risk by in-person  
12 instruction, or who are self-quarantining because of exposure to COVID-19.” Educ. Code  
13 § 43503(a)(2). Based on these statutes, because it is now “possible” to offer in-person instruction, the  
14 School District must do so.<sup>5</sup>

15 When, to what extent, and under what conditions in-person instruction is “possible” during a  
16 pandemic is a decision that rests with state and local public health officials, not with individual school  
17 districts or their workforce. The overwhelming scientific consensus is that schools can reopen safely  
18 with proper precautions. Accordingly, state and local public health officials have authorized schools  
19 to reopen under a tiered framework with basic mitigation strategies. Moreover, thousands of children  
20 and staff have returned to local schools with minimal in-school transmission. *See* pp. 13-14, *supra*. If  
21 school districts can simply decide—in disregard of this data, science, and medical consensus—that it  
22 is not possible to offer in-person instruction, the provisions of the Education Code would become a  
23 nullity. That result “is obviously to be avoided.” *Hernandez v. D.M.V.*, 49 Cal. App. 5th 928, 935  
24 (2020) (“It is a maxim of statutory interpretation that courts should give meaning to every word of a  
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26 <sup>5</sup> To be clear, San Francisco does not contend that these provisions prevent the School District  
27 from offering distance learning to students. To the contrary, SFDPH directs schools to offer distance  
28 learning for students for whom in-person attendance would pose a health risk to the student or their  
household and for other families who chose not to partake in in-person instruction. Validzic Decl.  
¶ 16. But schools have a duty to also offer in-person instruction “to the greatest extent possible.”

1 statute and should avoid constructions that would render any word or provision surplusage. An  
2 interpretation that renders statutory language a nullity is obviously to be avoided.”) (internal quotation  
3 marks and citation omitted).

4 Accordingly, the School District has a clear, present, and ministerial duty to offer in-person  
5 instruction “to the greatest extent possible” (Educ. Code § 43504(b))—*i.e.*, to the maximum extent  
6 authorized by public health officials. *See, e.g., Carrancho v. California Air Resources Board*, 111  
7 Cal. App. 4th 1255, 1267 (2003) (A “ministerial act” is “an act that a public officer is required to  
8 perform in a prescribed manner in obedience to the mandate of legal authority and without regard to  
9 his own judgment or opinion concerning such act’s propriety or impropriety, when a given state of  
10 facts exists.”) (emphasis omitted).

11 *Doe v. Albany Unified School District*, 190 Cal. App. 4th 668 (2010) is instructive. In *Doe*, a  
12 student and parent filed a complaint against the Albany Unified School District alleging that the  
13 district was violating a section of the Education Code providing that school districts shall include  
14 physical education instruction for not less than 200 minutes every ten school days for pupils in  
15 elementary school. The Court of Appeal concluded that the statute created a ministerial duty that  
16 could be enforced by writ of mandate, even though the Education Code also “call[ed] for discretion  
17 due to ‘economic, geographic, physical, political and social diversity.’” *Id.* at 676 (quoting Educ.  
18 Code § 51002). Here, too, the School District is violating a ministerial duty by failing to provide  
19 instruction required by state law. San Francisco is therefore likely to prevail on its claim for a writ of  
20 mandate under Code of Civil Procedure section 1085.

21 **II. The Harm From Denying The Injunction Greatly Exceeds Any Potential Harm That**  
22 **Would Result From Granting It.**

23 Overwhelming evidence submitted in support of this Motion—from medical doctors, public  
24 health experts, educators, and parents—demonstrates that the lack of in-person instruction in schools is  
25 causing—and in the absence of injunctive relief, will continue to cause—significant harm to  
26 San Francisco and the students and families who live here.

27 ***Mental health consequences for children:*** According to the Director of COVID Response for  
28 the UCSF Emergency Department, “[t]he medical evidence is clear that keeping public schools closed

1 is catalyzing a mental health crisis among school-aged children in San Francisco.” Declaration of  
2 Dr. Jeanne A. Noble ISO Mtn for PI (“Noble Decl.”) ¶ 7. Local emergency physicians, pediatricians,  
3 and pediatric psychiatrists report—consistent with national data—a significant increase in children of  
4 all ages presenting with anxiety, depression, eating disorders, social withdrawal, and suicidal ideation.  
5 *Id.* ¶¶ 7-10; Declaration of Dr. Eva Ihle ISO Mtn for PI (“Ihle Decl.”) ¶¶ 7-12; Declaration of  
6 Dr. Amy Beck ISO Mtn for PI (“Beck Decl.”) ¶ 11. UCSF Benioff Children’s Hospital of Oakland  
7 has seen a 66% increase in the number of suicidal children in the ER, a doubling of adolescents  
8 hospitalized for eating disorders, and a 75% increase in youth seeking mental health services who  
9 required immediate hospitalization. Noble Decl. ¶ 9. In January 2021, UCSF Children’s Emergency  
10 Department at Mission Bay reported the highest number of suicidal children seen and treated in the  
11 Emergency Department on record. *Id.* ¶ 11. These shocking statistics are reflected in the lived  
12 experiences of children and families.

13 Liz Cong’s five-year-old son, who has a diagnosis of autism spectrum disorder (ASD), “has  
14 become extremely anxious and withdrawn.” He has “regressed to hitting” and “avoids any new  
15 activities.” Declaration of Liz Cong ISO Mtn for PI ¶¶ 3-8. Elizabeth Kelly’s 6-year-old child J.K.  
16 also has an ASD diagnosis and “has had increasingly difficult behaviors in class.” Declaration of  
17 Elizabeth Kelly ISO Mtn for PI ¶ 12. J.K. has started “speak[ing] in a high squeaky voice ‘through’  
18 one of his stuffed animals [Stuffy], as if it were an animate, sentient being.” *Id.*<sup>6</sup> Allison Arieff  
19 recently found her 15-year-old daughter “curled up in a fetal position, crying, next to her laptop at  
20 11am.” Declaration of Allison Arieff ISO Mtn for PI ¶ 8. Her daughter often cries in the middle of  
21 the day out of frustration and “is losing faith not just in SFUSD but in the world.” *Id.* ¶¶ 8, 11.  
22 Lindsay Sink has seen a “major regression” in her 7-year-old son—he has “uncontrollable meltdowns  
23 that turn [the] whole house upside down.” Declaration of Lindsay Sink ISO Mtn for PI ¶ 8. Lindsay’s  
24 10-year-old daughter is experiencing “depression and anger” and Lindsay fears her daughter’s “mental  
25 health will continue to suffer” until in-person learning resumes. *Id.* ¶¶ 13-17. Glen Edwards has  
26 noticed “anxiety, distress, anger, depression and the loss of the love of learning” in his 8- and 9- year

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28 <sup>6</sup> Distance learning has also had a significant negative impact on Elizabeth’s mental health.  
Her anxiety and depression have “significantly worsened” and she is “constantly” worried about J.K.’s  
social-emotional development. Kelly Decl. ¶ 16.

1 old sons. Declaration of Glen Edwards ISO Mtn for PI ¶ 5. Before moving in order to access in-  
2 person public schools, Renee Gonsalves’s 11-year-old son “sank into a major depression,” often  
3 saying he “hated his life.” Declaration of Renee Gonsalves ISO Mtn for PI ¶¶ 6-8. Now that he is  
4 attending school again (in Corte Madera), he is “thriving and happy.” *Id.* ¶ 8; *see also generally*  
5 Declarations of Kevin Robinson and Junko Tanaka ISO Mtn for PI (SFUSD teachers and parents).

6 This “dire increase[] in depression, anxiety, and behavioral dysregulation among children who  
7 have been unable to return to in-person school” (Ihle Decl. ¶ 7) is an unacceptable, but inevitable,  
8 consequence of continuing to keep schools closed contrary to the law and public health consensus.  
9 The harm is severe. And in the absence of injunctive relief, it will only get worse.

10 ***Physical health consequences for children:*** In addition to mental health consequences, the  
11 failure to reopen schools is causing significant physical health issues for children that will impact them  
12 for years to come. Children—particularly those who are younger, lower income, or English-  
13 learners—are experiencing learning loss from prolonged school closure. Beck Decl. ¶¶ 7-9. And  
14 medical research has established that educational outcomes are strongly correlated with long-term  
15 health impacts including cardiovascular disease, diabetes, and mortality. *Id.* Accordingly, the  
16 learning loss that results from prolonged school closures may ultimately lead to future disease and  
17 premature mortality. *Id.* More immediately, the lack of physical activity, and increase in sedentary  
18 time associated with distance learning is leading to significant weight gain in many children. *Id.* ¶ 13.  
19 The Children’s Health Center and the Healthy Lifestyles Clinic at Zuckerberg San Francisco General  
20 Hospital have both seen an increase in children with obesity and obesity comorbidities, including high  
21 blood pressure, pre-diabetes, type II diabetes, and fatty liver disease. *Id.* ¶¶ 12-13.

22 Also, with schools closed, the daily, protective eyes of teachers, childcare professionals,  
23 coaches, and other school staff are no longer on San Francisco’s most vulnerable children. This  
24 creates a greater risk that abuse and neglect will not be identified or reported to child welfare  
25 authorities. Since schools closed in March 2020, calls to the Family and Children’s Services (FCS)  
26 abuse and neglect hotline have dropped to nearly half the normal rate. Declaration of Joan Miller ISO  
27 Mtn for PI (“Miller Decl.”) ¶¶ 4-6; *see also* Declaration of Alison Lustbader ISO Mtn for PI  
28 (“Lustbader Decl.”) ¶ 6. Given the added stress that many families are under due to the COVID-19

1 pandemic, it is unlikely that this decrease in calls reflects a reduction in child maltreatment.<sup>7</sup> To the  
2 contrary, child welfare experts believe the decrease in FCS hotline calls shows that abuse and neglect  
3 of children in San Francisco is simply going unaddressed—and will continue to go unaddressed—  
4 without school-based adults to identify and report it. Miller Decl. ¶ 7.

5 ***San Francisco’s Efforts to Support Children and Families:*** As the safety net for its most  
6 vulnerable residents, San Francisco has stepped in to try to mitigate some of the harmful impacts of  
7 school closures. Although they are no substitute for in-person school, since September 2020,  
8 San Francisco has set up 81 Community Hubs to provide support for students in grades K-12 who are  
9 utilizing SFUSD’s Distance Learning Curriculum. Su Decl. ¶ 5. The City prioritizes enrollment in  
10 these hubs for families who are residents of low-income housing, public housing, RVs and Single  
11 Room Occupancy Hotels; families experiencing homelessness; children in the foster care system;  
12 English language learners; and low-income families. *Id.* The City has spent tens of millions of dollars  
13 on these Community Hubs to, among other things, pay for staffing at the sites. Also, the City  
14 redeployed Recreation & Parks Department personnel to support hubs, and the Department of  
15 Technology set up WiFi to enable distance learning in dozens of locations. *Id.* ¶ 6. The Hubs now  
16 serve around 2,000 children at a cost to the City of tens of thousands of dollars per student. *Id.* ¶ 6.

17 In addition, when it became clear that SFUSD school buildings would remain closed  
18 indefinitely, SFDPH became acutely concerned—for all the reasons discussed above—about at-risk  
19 and hard-to-reach youth. Lustbader Decl. ¶ 7. In response to this crisis, SFDPH expanded the Mobile  
20 Response Team (MRT). *Id.* ¶¶ 7, 9-11. MRT is a collaboration between SFDPH and a provider of  
21 trauma-informed mental health services for young people experiencing acute distress. *Id.* ¶ 8. In  
22 January 2021, at a cost of nearly half a million dollars, the City expanded MRT to allow social  
23 workers to refer any SFUSD student to MRT. *Id.* ¶¶ 11-12. MRT serves as a resource for assessment,  
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25 <sup>7</sup> Indeed, the CDC has concluded that “[h]eightedened stress, school closures, loss of income, and  
26 social isolation resulting from the coronavirus disease 2019 (COVID-19) pandemic have increased the  
27 risk for child abuse and neglect.” Elizabeth Swedo, MD et al., *Trends in U.S. Emergency Department*  
28 *Visits Related to Suspected or Confirmed Child Abuse and Neglect Among Children and Adolescents*  
*Aged <18 Years Before and During the COVID-19 Pandemic — United States, January 2019–*  
*September 2020*, 69 *Morbidity & Mortality Wkly. Rep.* 1841 (2020),  
<http://dx.doi.org/10.15585/mmwr.mm6949a1>; *see also* Miller Decl. ¶ 7.

1 triage, stabilization, and linkage for SFUSD youth experiencing a mental health, behavioral, or  
2 placement crisis. *Id.* ¶¶ 13-15. The expansion will enable MRT to serve many more SFUSD students  
3 in need. Unfortunately, though, “as long as school buildings remain closed, it will remain difficult for  
4 us to identify and care for at-risk and hard-to-reach youth.” *Id.* ¶ 15. Until schools reopen, the City  
5 will have to continue expending resources on programs like these to try to blunt the worst impacts of  
6 school closure for at least some of our most vulnerable children.

7 San Francisco also has an independent interest in ensuring its residents have the opportunity to  
8 attend school. “[E]ducation is a unique influence on a child’s development as a citizen and his  
9 participation in political and community life.” *Serrano v. Priest*, 5 Cal. 3d 584, 605 (1971). And “[i]n  
10 addition to the political and economic contributions of education, there is also a social dimension to  
11 the state’s interest in education.” *Jonathan L. v. Super. Ct.*, 165 Cal. App. 4th 1074, 1089-90 (2008).

[E]ducation serves as a unifying social force among our varied population, promoting cohesion based upon democratic values. The public schools bring together members of different racial and cultural groups and, hopefully, help them to live together in harmony and mutual respect. In addition to the particular skills taught, group activities encourage active participation in community affairs, promote the development of leadership qualities, and instill a spirit of collective endeavor. These results are directly linked to the constitutional role of education in preserving democracy.” (*Id.* (internal quotation marks and citations omitted).)

17 On the flip side, the School District will suffer no grave or irreparable harm by being  
18 prohibited from violating the law. *See, e.g., People ex rel. Reisig v. Acuna*, 182 Cal. App. 4th 866,  
19 882 (2010) (no harm from restrictions on activities that constitute a public nuisance). But even if that  
20 were not the case, given the scientific consensus that schools can open safely for students, teachers and  
21 staff—even without staff vaccinations—any harm the School District could potentially incur from  
22 being required to fulfill its constitutional and statutory obligation to reopen schools pales in  
23 comparison to the acute harms San Francisco and its children and families will continue to suffer in  
24 the absence of injunctive relief. The Court of Appeal recently agreed that “equity demands that courts  
25 take into account the public interest when assessing the propriety of injunctive relief.” *People v. Uber*  
26 *Technologies, Inc.*, 56 Cal. App. 5th 266, 308 (2020) (internal quotation marks omitted). Here, the  
27 public interest strongly favors compelling the School District to stop violating the law and reopen  
28 public schools to the maximum extent public health officials allow.

**CONCLUSION**

San Francisco’s motion for a preliminary injunction should be granted.

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