UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AVILES, Individually and as Parent and Natural Guardian of N.A., N.A. and A.A., **STEPHANIE DENARO**, Individually and as Parent and Natural Guardian of D.D. and H.D., **CHRISTINE KALIKAZAROS,** Individually and as Parent and Natural Guardian of Y.K., **GAETANO LA MAZZA**, Individually and as Parent and Natural Guardian of R.L., **CRYSTAL LIA**, Individually and as Parent and Natural Guardian of F.L., and **CHILDREN'S HEALTH DEFENSE**,

Plaintiffs,

Against

BILL de BLASIO, in his Official Capacity as Mayor of the City of New York, **DR. DAVID CHOKSHI**, in his Official Capacity of Health Commissioner of the City of New York, **NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD A. CARRANZA**, in his Official Capacity as Chancellor of the New York City Department of Education and **THE CITY OF NEW YORK**,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION

Civil No.: 1:20−cv−09829−PGG

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PRELIMINARY STATEMENT

> 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 v. Cuomo, 592 U.S. __, 208 L.Ed.2d 206 (2020) (Gorsuch J., concurring).

Plaintiffs are parents of children whose schools have shut them out. While acknowledging the challenges of the COVID-19 pandemic, these parents, like Justice Gorsuch, call for the Constitution to protect fundamental rights. These parents seek a preliminary injunction from this Court to restore their children's ability to return to full-time in-school instruction, K-12th grade, without the unethical and illegal requirement of coerced medical testing. Plaintiffs assert that Defendants' school shutdown of November 19, 2020 and partial reopening with compulsory medical interventions violate Constitutional rights under the Fourth, Fifth and Fourteenth Amendments, including fundamental rights to bodily integrity, informed consent, education and parenting. Plaintiffs' children are unquestionably suffering irreparable harm from these deprivations; Plaintiffs are likely to succeed on the merits, and will show that the balance of equities tips sharply in their favor.

STATEMENT OF FACTS

In this motion for preliminary injunction, Plaintiffs ask the Court to void Defendants' continued partial and full school closures of grades K-12 and to enjoin their forced medical testing of students. Their actions inflict irreparable harm on Plaintiffs and their children without serving any compelling state interest. Their actions have been erratic, unethical and illegal.

We ask the Court to rule in Plaintiffs' favor based on the following uncontested facts:

(1) The Centers for Disease Control and Prevention state that medical testing in schools must be voluntary;

(2) Without true consent, mandated testing is illegal;

(3) Defendants coerce parental consent for school attendance;

(4) Defendants' PCR testing scheme is a clinical study on child subjects;

(5) Parental consent, when coerced, fails to comply with New York State law, which is based on the Nuremberg Code;

(6) Defendants' PCR testing is not diagnostic (despite Defendants' representations to the contrary) and requires further testing for infection detection;

(7) Children are at extremely low risk from COVID-19;

(9) There is no acknowledged "gold standard" for COVID-19 testing;

(10) The short- and long-term academic, psychological and emotional burdens children suffer from school exclusion outweigh the risks of COVID-19;

(11) Low-income students, who are predominantly children of color and who make up the majority of New York City students, suffer disproportionately from school shutdowns; and

(12) The already gaping achievement chasm between rich and poor students will only grow more gaping with continued school closures.

Defendants' polymerase chain reaction (PCR) testing program is not diagnostic, and is subject to manipulation. Testing companies can easily change testing cycles, as described in the Lee and McKernan Declarations. They can change test results from "negative" to "positive" merely by changing the number of cycles. Defendants' program is thus irrational, coercive, unethical, and exorbitantly expensive.

This motion, the accompanying memorandum, Exhibits, Declarations of Dr. Sin Lee and Kevin McKernan, and the Request for Judicial Notice filed concurrently herewith are incorporated by reference as though fully set forth herein. They will prove that not even a rational basis for Defendants' flawed scheme exists, and that Defendants have violated myriad fundamental rights.

As 2020 comes to its long-awaited close, it is time to reflect on where we are, and, more importantly, how we got here. Surely fear of coronavirus disease (hereinafter "COVID-19") has been a driving factor.

Statistics can be terrifying. Terrifying indeed, until one takes the time to consider that according to the Centers for Disease Control and Prevention, (hereinafter "CDC"), only 6% of those who presumptively died from Covid-19, died from (and not with) Covid-19. That means 94% had serious, life-threatening co-morbid conditions at the time of death, such as heart disease, respiratory illness and cancer. "For 6% of the deaths, COVID-19 was the only cause mentioned. For deaths with conditions or causes in addition to COVID-19, on average, there were 2.9 additional conditions or causes per death." *Weekly Updates by Select Demographic and Geographic Characteristics*, CENTERS FOR DISEASE CONTROL AND PREVENTION (updated Dec. 16, 2020), https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm.

The Lee and McKernan Declarations explain that 97% of PCR positives tests may actually be false. Plaintiffs' expert declarations, testimony and exhibits will show why a Portuguese Appellate Court recently concluded that executive decisions to isolate and quarantine people on the basis of positive PCR tests, without further diagnosis, are unlawful. The science purporting to justify everything from school closures, masks, mandatory PCR tests and even lockdown measures are not "settled science," as some contend.

Given Defendants' decisions to close schools, it is astonishing to learn that the infection fatality rate for people aged 0-19 years is .00003, according to the CDC. (Appendix, First Amended Complaint ("App. FAC")[1], Exh. 12.) Given this extraordinarily low death rate among

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[1] All references to "App. FAC" refer to the Appendix of Exhibits to the First Amended Complaint."

children, it is virtually impossible that Defendants' actions could save lives. And exclusion from school and coerced testing hardly make their lives better.

The National Institutes of Health (hereinafter "NIH") has determined that PCR testing is not the "Gold Standard" of COVID-19 diagnosis as it is widely touted to be. NIH acknowledges that "This RT [reverse transcription] PCR may increase the positivity rate, depending on the number of repetitions of this test." In fact, "[f]or the moment, whenever possible, it is more useful in clinical practice to evaluate tests by several methods because there is no generally accepted reference standard nor is there a gold test for the diagnosis of COVID 19." (App. FAC, Exh. 20.)

According to the CDC:

> If a school is implementing a testing strategy, testing should be offered on a voluntary basis. It is unethical and illegal to test someone who does not want to be tested, including students whose parents or guardians do not want them to be tested.

(App. FAC, Exh. 18.)

Despite this guidance, of which Defendants must be aware, they choose to coerce testing. They confront parents with a Hobson's choice: put your child in isolated, inferior remote learning for at least ten more months (after ten months of remote and disrupted education already) or subject her to intrusive, unwanted medical procedures.

An infamous, fictional character in early 20th Century New York City uttered the words, "I am going to make him an offer he can't refuse." The offer was accompanied by a threat. New York City's Defendants also give parents an offer they can't refuse: turn your children into medical subjects or forsake school.

Just as in the popular film, there is nothing voluntary in Defendants' scenario: comply or your child is *persona non grata*. Indeed, Plaintiff Aviles describes exactly this: when she and her son arrived at his school without a signed "consent" form, they were branded "trespassers."

Informed refusal means the loss of the best education available to most children. That loss affects families differently. The poor do not have the wherewithal to hire private tutors, babysitters, have parents stay home, form learning pods, pay for high-speed internet, buy fancy computers and more to replicate school-based learning. Despite rhetoric to the contrary, Defendants' shutdowns and coercive medical measures impoverish and harm the lives of children, families, schools and New York City itself.

ARGUMENT

I. PLAINTIFFS MEET THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

To obtain a preliminary injunction, Plaintiffs must demonstrate: (1) they are likely to suffer irreparable harm in the absence of preliminary relief; (2) they are likely to succeed on the merits; (3) the balance of hardships tips decidedly in their favor; and (4) a preliminary injunction is in the public interest. *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011); *accord N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc*., 883 F.3d 32, 37 (2d Cir. 2018). "When, as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood of success standard." *Donohue v. Mangano*, 886 F. Supp. 2d 126, 149 (N.D.N.Y. 2012) (*quoting Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010)); *see also Ass'n of*

Jewish Camp Operators v. Cuomo, No. 1:20-CV-0687 (GTS/DJS), 2020 U.S. Dist. LEXIS 117765 (N.D.N.Y. July 6, 2020). Plaintiffs satisfy the four elements above.

II. PLAINTIFFS AND THEIR CHILDREN SUFFER IRREPARABLE HARM.

The Second Circuit has repeatedly found that irreparable harm "is the single most important prerequisite for the issuance of a preliminary injunction." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233-34 (2d Cir. 1999); *accord Yang v. Kosinski*, 960 F.3d 119, 128 (2d Cir. 2020). The court may presume irreparable injury where the plaintiff is suffering an alleged constitutional right violation. *See, e.g., Yang*, 960 F.3d at 128; *Beal v. Stern*, 184 F.3d 117, 123-24 (2d Cir. 1999) (presuming irreparable harm and proceeding directly to likelihood-of-success standard where constitutional right violations were alleged); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("it is the alleged violation of a constitutional right that triggers a finding of irreparable harm").

The Second Circuit has defined "irreparable harm" as "certain and imminent harm for which a monetary award does not adequately compensate." *Wisdom Import Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 113 (2d Cir. 2003). Irreparable harm exists "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999).

A. Exclusion from School Constitutes Irreparable Harm.

Exclusion from school, standing alone, unquestionably constitutes irreparable harm. Courts assume that a child prevented from attending school suffers irreparably. *Check ex rel. MC v. New York City Dep't of Educ.*, No. 13-cv-791, 2013 U.S. Dist. LEXIS 71223, at *16, 2013 WL 2181045, at *9 (E.D.N.Y. Mar. 22, 2013) *Citing Lewis v. Sobel*, 710 F.Supp. 506, 507 (S.D.N.Y.

1989). (Noting "it was clear that Plaintiff's daughter would suffer irreparable harm if barred from school"); *see also Caviezel v. Great Neck Public Schools*, 701 F.Supp.2d 414, 426 (N.D.N.Y. 2010) ("[The Court] is satisfied that there would be irreparable harm to the child not entering school in the beginning of the school year.").

A recent analysis of school shutdowns during COVID-19 nails it: "the hurt could last a lifetime." The McKinsey & Co. report projects staggering learning loss, high school dropouts, GDP loss twenty years out, and earnings loss in the billions of dollars from school shutdowns in 2020 alone. (App. FAC, Exh. 17 at 8.) Hard evidence makes crystal clear that in-person education is not a luxury; it is a necessity. If the country has essential workers, then it too has essential learners, and New York City children are among them. Parents want their children back in school despite the many hurdles that exist. Courts must rightly assume irreparable harm from school exclusion.

B. Involuntary Testing in School Constitutes Irreparable Harm.

Defendants compel intrusive medical interventions on children as young as six years old without parental supervision or true consent. They are doing this against the bright line guidance of the CDC, which calls such testing "unethical and illegal." (App. FAC, Exh. 18.) Plaintiffs must subject their children to medical procedures by strangers in masks outside their purview or commit them to ineffective, inferior education. Either way, Plaintiffs are forced to give up constitutional rights and suffer irreparable harm.

Plaintiffs have no adequate remedy at law unless Defendants are enjoined from unwarranted school closures and medical testing.

III. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

A. *Jacobson v. Massachusetts* is not a Blank Check for any Executive Action.

Defendants would have the Court believe that under the Supreme Court's 1905 precedent *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), just about any executive action under passes muster in a declared emergency. They would like the Court to believe that *Roman Catholic Diocese v. Cuomo*, 592 U.S. ___; 208 L.Ed.2d 206 (2020) relates only to religious worship. But neither of these premises is true.

Although it is fair to say that courts have interpreted *Jacobson* liberally, the landmark case itself warned against actions precisely like Defendants':

> [An order] might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.

Jacobson, 197 U.S. at 28.

Defendants' arbitrary and unreasonable school shutdowns call out for courts to "interfere" for children's protection.

Jacobson acknowledges that government actors may seek to exert police powers that simply go too far:

> There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will.

Jacobson, 197 U.S. at 29.

Invasive medical testing of children by masked strangers without their authentic parental consent is precisely the kind of government action that *Jacobson* held beyond the pale. Over one hundred years ago, the Supreme Court acknowledged that citizens must rightfully dispute

government authority when it tramples domains that must remain within the "supremacy of his own will." Surely testing inside one's body, or one's child's body, constitutes such a domain for "supremacy of his own will." Plaintiffs rightfully challenge Defendants' overreach.

B. Roman Catholic Diocese Signals a Clear Shift in Interpreting Jacobson.

Defendants quote at length from the Supreme Court's decision upholding emergency restrictions in early 2020. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). But the Supreme Court has moved on, even if Defendants have not. *Roman Catholic Diocese* signals a fresh, sharper scrutiny towards government actions that infringe constitutional rights during the pandemic.

The Court chose to enjoin Governor Cuomo's restrictions on houses of worship, even though the Governor argued the case was moot (because he rejiggered color-coded designations) and even though a Second Circuit oral argument was just weeks away. The Court sought to make a resounding point: "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese*, 208 L.Ed.2d at 210.

The Court found the matter not moot because the petitioners "remain under a constant threat that the area will be reclassified as red or orange." These are the same color-coded classifications Defendants apply to schools, largely based on PCR testing results.

Justice Gorsuch, concurring, went further: "*Jacobson* hardly supports cutting the Constitution loose during a pandemic." *Roman Catholic Diocese*, 208 L.Ed.2d at 212 (Gorsuch, J., concurring). And further still: "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so." *Id*. at 213. Justice Gorsuch explicitly rejects *South Bay*'s interpretation of *Jacobson*. *Roman Catholic Diocese*, 208 L.Ed.2d at 214.

He warns sternly: "[W]e may not shelter in place when the Constitution is under attack. Things never go well when we do." *Roman Catholic Diocese*, 208 L.Ed.2d at 214.

The Court in *Roman Catholic Diocese* makes clear that its future jurisprudence during this pandemic will be rooted in the Constitution, not in the expansive emergency powers in *Jacobson*. The Court did not limit its words to the First Amendment or to free exercise of religion. On the contrary, the Court spoke to the need for courts to vigilantly uphold all constitutional rights, even in emergency circumstances, and even when fear runs rampant.

C. Plaintiffs Meet the Bars of Strict Scrutiny and Rational Basis.

Through their arbitrary school closures and medical testing, Defendants have breached Plaintiffs' most fundamental rights: the right to give children a minimal education; the right to protect children from intrusive medical interventions; the right to protect children from unreasonable searches and seizures; the right to protect children's bodily integrity and privacy; the procedural right to challenge unlawful orders to isolate and quarantine children; and the right to authentic informed consent on behalf of children. Taken together, the harms Plaintiffs and their children suffer are profound and irreparable.

All of these abridged rights are 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. *Wash. v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotation marks omitted).

The Due Process Clause of the Fourteenth Amendment recognizes that certain interests are so substantial that no process is enough to allow the government to restrict them without a compelling state interest. *Wash. v. Glucksberg*, 521 U.S. at 719-21. When it does so, it must do so in a narrowly tailored manner that is the least restrictive way possible. *Yang v. Kosinski*, 960 F.3d 119, 129-30 (2d Cir. 2020).

The Constitution provides parents the right to direct the education and upbringing of their children. *Wash. v. Glucksberg*, 521 U.S.702, 720, *citing Meyer v. Nebraska*, 262 U.S. 390

(1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Defendants have deprived Plaintiffs and their children of the right to direct education in violation of the Fourteenth Amendment, by effectively precluding children from receiving education and literacy because (1) many students have no or limited access to the internet; (2) remote learning is demonstrably inferior; and (3) truancy demonstrably results in such circumstances. (*See McKinsey Report*, App. FAC, Exh. 17.)

While Defendants have a compelling interest in public health, the weight of the evidence shows that children's transmission and infection rates do not justify school closures. Defendants ignore that the evidence of mortality and adverse health outcome risk to children from COVID-19 is virtually non-existent. Nor does Defendants' interest in public health rationalize coerced medical testing on children. Evidence shows that PCR testing is unable to diagnose infection without further testing and subject to manipulation. (*See* Lee and McKernan Decls., filed concurrently and incorporated by reference as though fully incorporated herein.)

Defendants can manage the infection risk to teachers by offering them choices and providing them protection, as employers do for other essential workers. Defendants did this September through November 2020, before the November 19, 2020 shutdown, offering teachers remote options, fewer students per class, plastic barriers, masks, temperature taking and other protection measures. Teachers' risk mitigation cannot come at the expense of children's education.

Defendants' school closures and coerced testing are crude measures. While they may be well-intentioned efforts to advance public health, they fail to honor Plaintiffs' fundamental rights. They certainly fail to limit fundamental rights in the least restrictive means possible. These crude measures fail even to meet the test of rationality. School closures deprive children of the fundamental right to minimal education, and coerced testing defies many fundamental rights

simultaneously. Defendants should be enjoined from continuing to dig the graves for New York City's schools.

IV. THE BALANCE OF HARDSHIPS TIPS DECISIVELY IN PLAINTIFFS' FAVOR.

"A balance of equities tipping in favor of the party requesting a preliminary injunction" means balancing the requesting party's hardships against the defending party's benefits. *Ligon v. City of New York*, 925 F.Supp.2d 478, 539 (S.D.N.Y. 2013) (characterizing the balancing of "hardship imposed on one party" and "benefit to the other" as "balance[ing] [of] the equities"). "[T]he balance of hardships inquiry asks which of the two parties would suffer most grievously if the preliminary injunction motion were wrongly decided." *Goldman, Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 922 F.Supp.2d 435, 444 (S.D.N.Y. 2013).

Furthermore, when plaintiffs seek an injunction to stay enforcement of a law or order that purportedly protects the public interest, the hardship to the government should be measured by the extent to which the law or order serves such protection. *See Ass'n of Jewish Camp Operators v. Cuomo*, No. 1:20-CV-0687 (GTS/DJS), 2020 U.S. Dist. LEXIS 117765.

Without an injunction, Plaintiffs' fundamental right to a minimum education will continue to be honored in the breach, whether in school with forced testing or in inferior remote learning. Defendants cannot argue credibly that the threat to public health from open schools without forced testing is great.

"[A]ctions which are irrational, arbitrary or capricious do not bear a rational relationship to any end." *Cty. of Butler v. Wolf*, Civil Action No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 167544 at *26 (W.D. Pa. Sep. 14, 2020). In *Wolf*, a federal district court found that a governor's emergency restrictions to limit attendance at public gatherings violated constitutional rights. *Cty. of Butler v. Wolf*, 2020 U.S. Dist. LEXIS 167544. The restrictions on which businesses could

remain open were similarly unconstitutional Plaintiffs challenge the open ended uncertainty, the district court recognized the harm that would result to businesses: “A total shutdown of high schools with no end-date and with the specter of additional, future shutdowns can cause critical damage…and adds a government-induced cloud of uncertainty to the usual unpredictability of nature and life.” *Id.* at *26.

The Due Process Clause of the Fourteenth Amendment includes a substantive component that bars arbitrary, wrongful, government action "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). The “core of the concept” of substantive due process is the protection against arbitrary government action. *Hurtado v. California*, 110 U.S. 516, 527 (1884). Indeed, “the touchstone of due process is protection of the individual against arbitrary actions of government ....” *Id.*

Under the APA, courts are to hold unlawful and set aside agency action that is arbitrary and capricious. 5 U.S.C.S. § 706(2)(A). Although a court reviewing such action cannot substitute its judgment for that of the agency, its inquiry is to be searching and careful. The court must determine if the agency examined the relevant data and articulated a satisfactory explanation for its action. The agency must identify a rational connection between the facts found and the choices made. *New York v United States HHS*, 414 F Supp 3d 475 (SDNY 2019).

A. Defendants’ Actions Violate Parental Rights.

Parents have a fundamental right to direct the care and upbringing of their children, and medical decisions fall squarely within that liberty interest. *Troxel v. Granville*, 530 U.S. 57, 58 (2000) (“There is normally no reason for the State to inject itself into the private realm of the family to further question fit parents’ ability to make the best decisions regarding their children.”); *see also Parham v. J.R.*, 442 U.S. 584, 604 (1979) (“Simply because the decision of the parent…involves risks does not automatically transfer the power to make that decision from

the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure.… Parents can and must make those judgments.")

These rights adhere not only to the parent but to the child as well. "The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." *Wallis ex. rel. Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000). Allowing unknown persons with unknown qualifications, at unspecified intervals, to give children intrusive medical tests is a cause of great concern to parents.

The state cannot interfere in or usurp parental rights to make medical decisions if the parents work with a licensed physician of their choosing: "While this right is not absolute inasmuch as the State, as *parens patriae*, may intervene to ensure that a child's health or welfare is not being seriously jeopardized by a parent's fault or omission, great deference must be accorded a parent's choice as to the mode of medical treatment to be undertaken and the physician selected to administer the same." *In re Hofbauer*, 47 N.Y.2d 648, 655–56, (1979) (*citing Doe v. Bolton*, 410 U.S. 179 (1973) for the constitutional principle that parents must be able to make medical decisions for their children without interference from the state so long as they are supported by a state licensed physician even if the decision is controversial).

Parents also have a fundamental right to direct the education of their children and choose the type of education that they think is best. *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534–35 (1925) (state cannot bar parents from choosing to send their children to private school). "In addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause, U.S. Const. amend. XIV, includes the rights to marry, to

have children, to direct the education and upbringing of one's children . . . ." *Wash. v. Glucksberg*, 521 U.S. at 705.

B. Defendants' Actions Violate the Unconstitutional Conditions Doctrine.

The Supreme Court expressly clarified that *Doe v. Bolton* prohibits state interference in the doctor-patient relationship in all medical decision-making. *Whalen v. Roe*, 429 U.S. 589 (1977).

The doctrine of unconstitutional conditions prohibits the state from indirectly burdening fundamental rights, such as bodily integrity and privacy, by conditioning a benefit on the waiver of those fundamental rights. Defendants may not condition in-person schooling on the waiver of the rights to informed consent and medical privacy.

New York City children are suffering deeply, whether they have been continuously excluded or face the threat of imminent exclusion because of unwillingness to submit to coerced medical interventions. Each day without relief causes them to fall further behind and suffer more trauma. Deprivation of school is so universally recognized to cause lasting harm that courts routinely presume irreparable harm, even for short periods of exclusion, let alone for the many months of exclusion children have already endured and may endure going forward.

C. Defendants' Actions violate Plaintiffs' rights to equal protection of the law.

For purposes of equal protection claims, the rational basis test does not allow a party to probe the decision-making processes of the government because the Constitution "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). While the rational basis test is forgiving, the government action must still bear at least a rational relationship to some legitimate end. *Romer v. Evans*, 517 U.S. 620, 631 (1996). Rational basis

review is a gentle standard for government acts, but it "is not a toothless one ...." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Defendants have not proven the rationality of school exclusions and forced medical testing. The evidence of irreparable harm and unlawfulness is overwhelming and irrational.

D. Defendants' Actions Violate Defendants' due process rights under the Fourteenth Amendment.

The Due Process Clause especially 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. *Glucksberg*, 521 U.S. at 720-21 (internal citations and quotation marks omitted). Plaintiffs and their children have a fundamental right to a basic, minimum education. There could be no greater oxymoron than a government official and a Department of Education claiming that education isn't a fundamental right.

Access to a foundational level of literacy provided through public education has an extensive historical legacy and is so central to our political and social system as to be "implicit in the concept of ordered liberty." *Id.*

Defendants have deprived Plaintiffs and their children of this fundamental right in violation of the Fourteenth Amendment by effectively precluding children from receiving a basic minimum education and their fundamental right to literacy.

V. PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST.

Protecting Plaintiffs' constitutional rights serves the public interest. *Jolly v. Coughlin*, 907 F. Supp. 63, 65 (S.D.N.Y. 1995) ("defendants have failed to demonstrate that their epidemiological concerns outweigh the strong public interest in following the law…"); *Roberts*

v. Neace, 958 F.3d 409, 416 (6th Cir. 2020). It serves the public interest for children to be in school and free of coerced medical intrusions. As the Supreme Court observed nearly seventy-five years ago, "Education is perhaps the most important function of state and local faint print governments." *Brown v. Board of Ed.*, 347 U.S. 483, 493 (1954). The vast learning differential between in-school and remote learning for elementary school children is indisputable. While Defendants seem to concur that in-school learning is best for the most students, they continue to place significant hurdles in the way. They continue to shutter middle and high schools and to require unethical and illegal tests when the schools are open.

A preliminary injunction is the best — and only — way to reopen schools to all children and to end Defendants' illegal medical testing regime. Granting Plaintiffs' preliminary injunction protects not just Plaintiffs and their children, but also serves the broader public interest in education and the rule of law.

* * * * * *

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully ask this Honorable Court issue a preliminary injunction to enjoin Defendants from keeping schools closed and from barring children whose parents do not consent to coerced medical testing.

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Respectfully submitted,

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