UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 21-721

Caption [use short title]: Aviles et al. v. de Blasio et al.

Motion for: Emergency Injunction Pending Appeal

Set forth below precise, complete statement of relief sought:

Plaintiffs-Appellants jointly move for an injunction to enjoin Defendants-Appellees from demanding that students submit to a Nasal-Swab PCR test as a condition of in-person attendence.

MOVING PARTY: Adriana Aviles et al.

☑ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Bill de Blasio et al.

MOVING ATTORNEY: Ray L. Flores II

OPPOSING ATTORNEY: Philip W. Young

[name of attorney, with firm, address, phone number and e-mail]

Moving Attorney	Opposing Attorney
Ray L. Flores II	New York City Law Department Appeals Division
11622 El Camino Real Suite 100 San Diego, CA 92130	100 Church Street, New York, NY 10007
(858) 367-0397 rayfloreslaw@gmail.com	(212) 356-2375 phyoung@law.nyc.gov

Court- Judge/ Agency appealed from: New York Southern District Judge Paul G. Gardephe

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☑ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency:
Plaintiffs-Appellants request this relief be granted as soon as possible as each day the children are subjected to Defendants'-Appellees program causes further irreparable harm.

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s Ray L. Flores II **Date:** 4.01.21 Service by: ☐ CM/ECF ☑ Other [Attach proof of service]

21-721

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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-Appellants,

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-Appellees

On appeal from Opinion and Order of the United States District Court for the Southern District of New York, Case No. 1:20–cv–09829–PGG, United States District Judge Paul G. Gardephe, Presiding

EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

ORAL ARGUMENT REQUESTED

Ray L. Flores II
Law Offices of Ray L. Flores II
11622 El Camino Real Suite 100
San Diego, CA 92130
Tel: 858-367-0397
Email: Rayfloreslaw@gmail.com

Attorney for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT, RULE 26.1

Appellant Children's Health Defense ("CHD") is a non-profit corporation. It has no parent corporation and, as it has no stock, no publicly held company owns 10% or more of its stock.

Dated: April 2, 2021

/s/ Mary Holland
Mary Holland
President, Children's Health Defense

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I. STATEMENT OF THE ISSUE PRESENTED

New York City officials require all public school children aged six and up to submit to random medical testing with an unapproved, emergency medical device, i.e. nasal swabs for polymerase chain reaction (PCR) COVID-19 testing. If parents do not consent, the children are expelled and relegated to "remote learning." Even during a pandemic, federal and state law require that emergency medical products, including PCR tests, be completely voluntary, i.e., without threat, coercion or duress. Did the District Court err in failing to enjoin New York City's mandatory PCR testing program?

II. JURISDICTION

Plaintiffs (sometimes "Parents") allege Defendants (sometimes "DOE") continue to violate their rights (1) to procedural and substantive due process and equal protection under the Fourteenth Amendment and (2) to be free from unreasonable searches and seizures and to privacy under the Fourth Amendment. See Appendix (hereinafter "App.") submitted concurrently with this motion, App., A-26 to A-28 (¶¶ 66-76 A-26 to 28 (First Claim for Relief); App., A-28 to A-29 ¶¶ 77-82 (Second Claim for Relief); App., A-29 to A-30 ¶¶ 83-92 (Third Claim for Relief); App., A-33 to A-34 ¶¶ 104-110 (Sixth Claim for Relief); App., A-34 to A-35 ¶¶ 111-116 (Seventh Claim for Relief); App., A-35 ¶¶ 117-120 (Eighth Claim for Relief). The district court had jurisdiction over supplemental state court claims under 28 U.S.C. § 1367 for alleged violations of the NEW YORK CONSTITUTION, Article XI, Section I, New York Public Health Law § 2240 et seq., and New York

City Parents' Bill of Rights. App., A-32 ¶¶ 99-103 (Fifth Claim for Relief); App., A-36 ¶¶ 121-125 (Ninth Claim for Relief); App., A-36 to A-38 ¶¶ 126-137 (Tenth Claim for Relief).) Finally, Plaintiffs allege that Defendants continue to violate their right to direct their children's education. App., A-31 ¶¶ 93-98 (Fourth Claim for Relief).

Parents' constitutional claims arise under 42 U.S.C. § 1983. *See Annis v. County of Westchester*, 36 F.3d 251, 254 (2d Cir. 1994) (holding that § 1983 "furnishes a cause of action for the violation of federal rights created by the Constitution"); *Rosa R. v. Connelly*, 889 F.2d 435, 440 (2d Cir. 1989). The District Court had original jurisdiction to adjudicate Plaintiffs' § 1983 suit pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343(a)(3) (civil rights jurisdiction).

The District Court had authority to award the requested declaratory relief under 28 U.S.C. § 2201 as well as the requested injunctive relief and damages under 28 U.S.C. § 1343(a) and 42 U.S.C. § 1983.

Venue was proper in the Southern District of New York under 28 U.S.C. § 1391(b) in that most events giving rise to Plaintiffs' claims occurred in this district.

On March 2, 2021, the District Court denied Plaintiffs' motion for Preliminary Injunction. Under the Second Circuit's (hereinafter "this court") exception to the final judgment rule, orders granting or denying preliminary

injunctions are immediately appealable under 28 U.S.C. § 1292. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011).

Plaintiffs/Appellants have filed a Notice of Motion (App., A-178 [Dkt. 51]) and Motion for Emergency Injunction pending Appeal (App., A-180 {Dkt. 52]) on April 1, 2021.

This court has appellate jurisdiction under 28 U.S.C. § 1291.

III. CONCISE STATEMENT OF THE CASE

Parents sought an injunction to prohibit DOE from coercing random COVID-19 PCR testing as a condition to reopen all New York City public schools *See* Proposed Order for Preliminary Injunction (App., A-89 [Dkt. No. 32 at 2]) and for any in-person schooling. (*See, e.g.*, App., A-52, A-55, A-56, A-58, A-59 [Pltf. Br., Dkt. 12 at 7, 10-11, 13-14].)

The named Defendants are Richard A. Carranza, in his Official Capacity as Chancellor of the New York City Department of Education (since replaced by Meisha Porter), who "is responsible for enforcing education law and regulations in the City of New York" (App., A-24 ¶ 56), Defendant David Chokshi, Commissioner for the New York City Department of Health, who "provide[s] recommendations and consultation[s] to [Mayor] de Blasio and Defendant Carranza." (App., A-24 ¶ 57), Defendant Department of Education "has issued directives, updates and supplemental guidance on instruction for the 2020-21 school year with recommendations from the Department of Health" (App., A-24 ¶ 56), and Defendant Bill de Blasio, as Mayor, "has issued a series of executive

orders since the COVID-19 pandemic began, including the shutdown of New York City public schools" (App., A-24 ¶ 55) and has endorsed mandatory PCR testing as a condition of school attendance.

Parents/Appellants initially filed this case in response Mayor Bill de Blasio's November 19, 2020 announcement to suspend all in-person classes due to COVID-19. Just ten days later, he announced that elementary and special needs schools would reopen December 7, 2020. There was a catch, however: in-person schooling would require mandatory nasal swab PCR testing of all children. (App., A-15 ¶¶ 2-3, A-16, A-17 [Am. Cmplt., Dkt. 11].) If Parents did not consent to this medical procedure, DOE placed their children in "remote learning," with different teachers and no access to in-person school activities whatsoever. Parents filed the First-Amended Complaint against DOE's coerced nasal swab PCR testing and the continued shutdown of middle and high schools.

As alleged, Parents filed an accompanying order to show cause, seeking an injunction to end coerced testing and to reopen all public schools. After the hearing on the preliminary injunction motion on January 14, 2021, middle schools reopened on February 25, 2021 with mandatory PCR testing.

On March 2, 2021, the District Court ruled that "Plaintiffs have not demonstrated a likelihood of success on any of their claims" and denied Plaintiffs' application for a preliminary injunction. (App., A-176 [Dkt. 46].) The case citation is *Aviles v. De Blasio*, 2021 U.S. Dist. LEXIS 38930, *67 (S.D.N.Y. 2021).

IV. FACTS

DOE conditions in-school learning for children aged six and up on coerced, random, nasal swab PCR testing. (*See* App., A-108 [Jan. 14, 2021 Tr., Dkt. 34 at 19].) Without signed parental consent to the testing, DOE forces children into virtual "remote learning." (App., A-81 ¶ 49 [Dkt. 19, Varma Decl.] (footnote omitted).) Even though DOE only tests 20% of students each week on a random basis, it insists on 100% compliance for all parents and children with the narrowest of exceptions.

PCR testing for COVID is investigational and not approved by the Food and Drug Administration (FDA); FDA has authorized it in the COVID emergency, subject to voluntary use. As such, DOE's compulsory testing regime violates the federal and state rights of both children and Parents. (*See, e.g.*, App., A-16 ¶¶ 5; A-18 ¶¶ 15-17, 21; A-19 ¶¶ 23 & 28; A-26 ¶¶ 62-65.)

DOE claims its EUA testing program is lawful.

V. SUMMARY OF ARGUMENT

Federal law preempts DOE's PCR testing program as it requires that EUA medical product and device use, such as DOE's PCR nasal swabs be voluntary. 21 U.S.C. § 360bbb-3 et seq. New York Public Health Law further defines, clarifies, and codifies voluntary consent. N.Y. PUB. HEALTH LAW § 2240 et seq. DOE's coercive medical program violates both federal and state law as its testing is not voluntary. Federal law vests the Secretary of Health and Human Services with the permissive authority to grant Emergency Use Authorizations ("EUAs").

21 U.S.C. § 360bbb-3(III). Individuals to whom the product is administered are informed **of the option to accept or refuse administration of the product**, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available, and of their benefits and risks.

The Centers for Disease Control and Prevention (CDC) has specifically opined on COVID-19 testing in schools, following 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(I)-(III). It states: "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." (Emphasis added.) (App., A-32 ¶ 103.)

After the preliminary injunction hearing but before the District Court's judgment, the New York State Education Department sent a letter to all school superintendents and administrators, declaring "that parent/guardian consent for COVID-19 testing of students may not be a condition of in person learning or other school activities." (App., A-123 [Dkt. 42 p. 3] (emphasis in original).) The following day, the New York State Education Department backtracked, adding the words, "unless local health authorities direct schools otherwise." (App., A-128 [Dkt. 44-1 p. 1].) Thus, it initially got it right: testing cannot be a condition for in-person learning or school activities, but then retreated to justify its illegal program.

The District Court began, and ended, its discussion on Parents' right to injunctive relief by stating, "Because Plaintiffs have not demonstrated a likelihood of success on any of their claims, their application for a preliminary injunction will

be denied." (App., A-176 [Dkt. 46, p. 47].) By failing to properly apply federal and state law, the District Court erroneously denied the preliminary injunction.

The District Court abused its discretion when it failed to discuss the other factors necessary to evaluate an injunction, namely (1) irreparable harm to students, and (2) the public interest in stopping an illegal program. Since it failed to consider the elements required for a preliminary injunction, the District Court's denial of the preliminary injunction is erroneous.

VI. ARGUMENT

A. Mandatory participation in an Emergency Use Authorization program is illegal.

1. The District Court erred in ignoring the federal preemption doctrine.

The Supremacy Clause of the U.S. Constitution can nullify both state legislative requirements and state common law duties. U.S. CONST. Art. VI. *Medtronic v. Lohr*, 518 U.S. 470, 503 (1996) (Breyer, J., concurring in part and concurring in the judgment); *id.* at 510 (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Thomas, J., concurring in part and dissenting in part); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion); id. at 548-49 (Scalia, J., joined by Thomas, J., concurring in judgment in part and dissenting in part). Federal law and precedent are explicit that consent to EUA products must be voluntary. 21 U.S.C. § 360bbb-3(III).

Federal law explicitly preempts state and local law regarding medical devices. No state may have requirements different from or in addition to federal requirements. 21 U.S.C. § 360k. Federal law states:

> § 360k. State and local requirements respecting devices
>
> (a) General rule. Except as provided in subsection (b), no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
>
> (1) which is different from, or in addition to, any requirement applicable under this Act [21 USCS § 301 et seq.] to the device, and
>
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this Act [21 USCS § 301 et seq.].

As federal law is explicit that EUA use of medical products must be voluntary, and state law may not differ from, or add to federal law, there is little question that DOE's testing program violates federal law.

The duress that DOE is imposing also makes Parents' consent invalid. Under New York law, duress is "when the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will." *Shire Realty Corp. v. Schorr*, 55 A.D.2d 356, 365 (App., Div. 2nd Dept. 1977), quoting *Austin Instrument v. Loral Corp.*, 29 N.Y.2d 124, 130 (1971). DOE makes wrongful threats precluding Parents' free will; it is duress.

2. Regulatory background

During public health emergencies, the Food and Drug Administration (FDA) regulates medical countermeasures like PCR diagnostic tests for newly emergent infectious diseases, such as COVID-19. The FDA merely authorizes, rather than approves, such products. Federal Food, Drug, and Cosmetic Act ("FFDCA") § 564. The FDA has not approved PCR tests for COVID; it has only granted them EUA status. These diagnostic tests remain experimental with no assurance of efficacy.

3. EUA background

Congress vests the HHS Secretary with the power to "authorize the introduction into interstate commerce, during the effective period of a declaration of emergency…a drug, device, or biological product intended for use in an actual or potential emergency. . . ." 21 U.S.C. § 360bbb-3(a)(1) of the FFDCA. The statute provides for the FDA to authorize both unapproved products and uses. *See* 21 U.S.C. § 360bbb-3(a)(2).

4. DOE freely admits its program is based on EUA, non-FDA approved PCR products.

DOE states that it has "two laboratories that provide trained teams to collect the specimens at DOE schools and analyze the specimens using an RT-PCR test" (App., A-79 ¶ 43 [Dkt. 19, Varma Decl.]) and that "[e]ach laboratory has obtained an **Emergency Use Authorization** from the FDA to perform RT-PCR testing for

COVID-19." (footnotes omitted). (App., A-152 [opn. p. 23] (emphasis added).) Thus, the tests that DOE requires are EUA only; they are tests that the FDA has neither approved nor licensed.

5. Federal precedent establishes that even members of the U.S. military may not be coerced to accept EUA products.

In *Doe #1 v. Rumsfeld*, 297 F. Supp. 2d 119 (D.D.C. 2003), a district court found that the FDA had not properly licensed the anthrax vaccine that the Department of Defense was mandating and granted the plaintiffs' preliminary injunction to stop use of the experimental product.

The judge concluded:

> [T]he United States cannot demand that members of the armed forces also serve as guinea pigs for experimental drugs….

Id. at 135. This case serves as the closest available precedent for the DOE program.

In a subsequent case, *Doe v. Rumsfeld*, Judge Emmet G. Sullivan ordered:

> . . . until FDA properly classifies AVA [anthrax vaccine] as a safe and effective drug for its intended use, an injunction shall remain in effect prohibiting defendants' use of AVA on the basis that the vaccine is either a drug unapproved for its intended use or an investigational new drug within the meaning of 10 U.S.C. § 1107. Accordingly, the involuntary anthrax vaccination program, as applied to all persons, is rendered illegal absent informed consent or a Presidential waiver….

Doe v. Rumsfeld, 341 F. Supp. 2d 1, 19 (2004).

6. Federal law specifically prohibits mandatory use of EUA products for civilians.

Individuals must be informed under 21 U.S.C. § 360bbb-3(e)(1)(a)(ii)(III) "to accept or refuse" an unapproved medical product. While the statutory language references "consequences of refusing administration of the product," the only logical reading of that phrase regards medical consequences for refusing, such as a greater or lesser risk of infection. The notion that a child may be expelled from school for her parents' refusing that she be subject to an experimental, invasive medical test flies in the face of statutory interpretation.

7. New York Law incorporates Nuremberg Code provisions on informed consent.

New York law substantially incorporates the Nuremberg Code's seminal language: a subject must be able to "exercise free power of choice without any element of force, fraud, deceit, duress or other form of constraint or coercion." N.Y. PUBLIC HEALTH LAW § 2441.

Interpreting the Nuremberg Code regarding the right to informed consent, the Second Circuit acknowledged that "[t]he universal and fundamental rights of human beings identified by Nuremberg — rights against genocide, enslavement, and other inhumane acts … — are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*," meaning that a state may not derogate from such rights under any circumstances. (internal citations omitted) *Abdullahi v. Pfizer, Inc*., 562 F.3d 163, 179 (2d Cir. 2009). The Second Circuit placed free, informed consent on par with other *jus cogens* human rights norms.

EUA products are by definition experimental, authorized only for emergency use, subject to voluntary consent.

DOE acknowledges that its tests are merely FDA-authorized, not FDA-approved. In fact, DOE's Dr. Varma himself acknowledges that PCR tests **do not** measure infection. (*See* App., A-85 ¶ 65 [Dkt. 19, Varma Decl.].) Thus, even if PCR tests may be DOE's best alternative for controlling COVID, DOE may not mandate them. Full stop. The District Court erred by ignoring the federal and state law requirements for voluntary consent, based on a universal human rights norms.

B. The District Court's confusion between a valid vaccine mandate under *Jacobson v. Massachusetts* and an EUA mandate is reversible error.

The District Court further erred when its parallels to *Jacobson v. Commonwealth of Massachusetts* 197 U.S. 11 (1905) ran askew, to wit: "While Defendants' random COVID-19 testing program is (1) not a vaccination, and (2) is administered pursuant to an Emergency Use Authorization, there are significant parallels between the testing and vaccination programs." (App., A-174 [Dkt. 46 at 45].) No court has **ever** authorized the mandate of an EUA product, in school or otherwise.

Furthermore, the District Court misconstrued *Jacobson*'s progeny to apply to EUA products, citing *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015). The District Court further confused the mandate question by citing *Whitlow v. Cal. Dep't of Educ.*, 203 F. Supp. 3d 1079, 1083 (S.D. Cal. 2016), a decision that upheld school vaccine mandates for federally licensed and approved vaccines. The

District Court conflated unlawful coercion of EUA products with a state's lawful police powers to mandate FDA-licensed and approved vaccines that the CDC has recommended for use. (App., A-174 – A-175 [Opn., Dkt 46].)

Recent Supreme Court jurisprudence suggests a narrow reading of *Jacobson*. *Roman Catholic Diocese v. Cuomo*, 208 L. Ed. 2d 206, 210 (2020). In his concurrence, Justice Gorsuch questioned *Jacobson*'s relevance in a pandemic. *Id.* at 214 (Gorsuch, J., concurring). The Supreme Court would be unlikely to find compelling the District Court's comparison of a mandate for an approved, licensed, and recommended vaccine with a mandate for an EUA test that does not detect infection and which requires only 20% of students, randomly tested, at any given time.

C. Standard of Review

1. The applicable standard for questions of law is de novo review.

Appellate courts review questions of law de novo. Because they are concerned primarily with enunciating the law, they do not defer to a trial court's legal assessments. In applying the de novo standard of review, a "finding is 'clearly erroneous' when, although there is evidence to support it, the court reviewing all of the evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948). The appellate court "must

assess de novo whether the court proceeded on the basis of an erroneous view of the applicable law." *Id.* (internal quotation marks omitted). *Agudath Israel of America v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020).

2. The District Court misunderstood the facts and misapplied the requirements for the issuance of a Preliminary Injunction, thereby abusing its discretion.

The District Court abused its discretion when it failed to follow the enumerated three-part test for the preliminary injunction.

The Second Circuit recently held:

> When a preliminary injunction will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction.

Agudath Isr. v. Cuomo, 983 F.3d at 631. It is this complete three-part test that Parents ask this court to apply.

a. Parents and their children suffer irreparable harm since remote learning does not equal in-person schooling.

DOE's policy sadly echoes the era of “separate but equal” that the Supreme Court attempted to end in 1954. As stated in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and referenced in the First Amended Complaint (App., A-63):

> **We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.**

Brown v. Bd. of Educ., 347 U.S. at 493-95 (emphasis added). The vast learning differential between in-school and remote learning for elementary and middle school children is indisputable.

b. The District Court failed to apply the Second Circuit's preliminary injunction review standard.

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). Exclusion from school, standing alone, unquestionably constitutes irreparable harm. Courts assume that a child prevented from attending school suffers irreparably. *Lewis v. Sobel*, 710 F.Supp. 506, 507 (S.D.N.Y. 1989). (App., A-52 & A-53 [Inj. pp. 7-8].)

c. DOE's Program undermines the public interest.

As a society, the illegality of an EUA mandate, unlawful searches, and the denial of the best available education for all children impact us the society. DOE's program forces parents to make a choice between isolating children at home, thereby stunting their educational and social development, or acceding to illegal testing.

d. The District Court failed to balance the harms to the parties.

Some parents, perhaps most, may prefer that their children be tested in school. Appellants do not object to truly voluntary testing. Testing of the willing

can continue, providing DOE with approximately the same data it unlawfully demands through 100% compliance. Nonetheless, the illegal, coercive mandate must cease. If Parents refuse PCR testing for their children, their children may not be threatened with removal or actually removed.

When plaintiffs seek an injunction to stay enforcement of a law or order that purportedly protects the public interest, a court must measure the hardship to the government by the extent to which the law or order actually 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 (2020). Here, DOE's program violates law and fails to serve the public interest of upholding the right to informed consent to EUA products.

e. The District Court abused its discretion when it applied only the success on the merits test for a preliminary injunction.

The District Court's denial of Parents' injunction was solely based on its interpretation of the likely success on the merits. A grant of injunctive relief pending appeal does not depend solely or even primarily on the merits, however. *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994). Rather, injunctive relief depends on all the preliminary injunction factors, with special emphasis on irreparable harm.

i. DOE's Procedural Due Process infringements require the issuance of an injunction.

The District Court erred when it found no due process violation because students retained limited access to education. (App., A-166 [Dkt. 46 p. 37].) Requiring online participation while denying an in-person education violates due process. While this court should apply strict scrutiny, DOE's program is unlawful even under a rational basis test.

ii. DOE's program violates Equal Protection because some children are allowed to attend schools while others not.

An unlawful school program that segregates children violates *Brown*. The lower courts in *Brown* ruled that inferior school premises were acceptable because African-American students had "separate but equal" access to education. *Brown* overruled that legal fiction. Here, DOE defends its actions by arguing that remote learning is indeed "separate but equal." This court should waste no time to dispel this newer, but no less insidious, legal fiction.

The District Court erred when it avoided the issue of consent; it should have issued declaratory relief pursuant to 42 U.S.C. § 1983. Further, it erred when it concluded that since children can participate remotely via computer, no child "'is excluded from the entire educational process.'" *D.C. by Conley v. Copiague Union Free Sch. Dist.*, No. 16-cv-4546 (SJF) (AYS), 2017 WL 3017189, at *9 (E.D.N.Y. July 11, 2017). (App., A-166, n.11 [Opn., Dkt. 46].)

iii. DOE clearly conducts an unlawful search and violates student rights to privacy and bodily integrity.

The District Court justifies DOE's unlawful search based on *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995). That case is distinguishable since student football players were engaged in illegal and dangerous drug use, whereas here it is DOE that is engaged in illegal activity. In *Vernonia*, the school district used a lawful test, unanimously approved by parents, to detect an unlawful and dangerous activity. In the matter before this court, it is DOE that is flagrantly violating Parents' and children's rights.

iv. DOE's program violates the Unconstitutional Conditions Doctrine.

The government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance. *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 231 (2d Cir. 2011), *aff'd sub. nom. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013). (App., A-35 [Pltf. Complaint, Dkt. 11 p. 21].) While arguably attempting to protect students, DOE has conditioned access to school on submission to an illegal government program.

VII. CONCLUSION

DOE's mandatory testing program is illegal. The District Court incorrectly concluded that DOE's EUA testing scheme is somehow made legal through duress.

Forcing parents to have their children submit to EUA testing on penalty of school removal renders the consent invalid. Federal law preempts DOE's EUA testing policy. 21 U.S.C. § 360bbb-3. Further, the District Court failed to fully analyze the requirements for a preliminary injunction. Parents ask this court to examine the issues de novo and to grant the preliminary injunction.

Dated: April 2, 2021

Respectfully submitted,

/s/ Ray L. Flores

Ray L. Flores II
(CA State Bar No.: 233643)
Law Offices of Ray L. Flores II
11622 El Camino Real Suite 100
San Diego, CA 92130
(858) 367-0397
(888) 336-4037

Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and contains 4,264 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: April 2, 2021

/s/ Ray L. Flores

Ray L. Flores II
(CA State Bar No.: 233643)
Law Offices of Ray L. Flores II
11622 El Camino Real Suite 100
San Diego, CA 92130
(858) 367-0397
(888) 336-4037

Attorney for Plaintiffs-Appellants

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPTION:

Adriana Aviles, et al.

v.

Bill de Blasio, et al.

CERTIFICATE OF SERVICE*

Docket Number: 21-721

I, Ray L. Flores II, hereby certify under penalty of perjury that
(print name)

on 4/2/21, I served a copy of Emergency Motion for Injunction Pending Appeal
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Appendix to Motion for Injunction Pending Appeal
(list all documents)

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