No. 22-250

In the Supreme Court of the United States

MATTHEW BRACH, *et al.*,

Petitioners,

v.

GAVIN NEWSOM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In March 2020, at the onset of the COVID-19 pandemic, respondent Governor Gavin Newsom proclaimed a state of emergency. Invoking the authority that California law grants a governor during a state of emergency, the Governor then issued several orders to respond to the pandemic, including an order directing most residents to stay home. As a result, most institutions were closed, including schools. In July 2020, to implement another executive order, respondents adopted a framework for re-opening schools during the 2020-21 school year. Under that framework, in-person instruction could resume if local public-health conditions improved; once schools had re-opened, they could remain open even if conditions later worsened. Shortly thereafter, petitioners sued to challenge that framework. As this litigation progressed in the lower courts, public health conditions substantially improved. Petitioners have acknowledged that the challenged policies authorized in-person instruction to resume at all of their (or their children's) schools by April 2021. In June 2021, the Governor formally rescinded the original stay-at-home order and the follow-on orders restricting in-person gatherings and activities. And in July 2021, respondents replaced the challenged framework for schools with new guidance, which did not impose any restrictions on in-person schooling. More recently, the Governor announced that the state of emergency will end on February 28, 2023. The question presented is:

Whether the court of appeals correctly held that petitioners' claims challenging California's restrictions on in-person instruction for the 2020-21 school year are moot.

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STATEMENT

1. Petitioners are fourteen parents of students at California public or private schools, and one student at a public school. Pet. App. 8a; C.A. E.R. 495, 519-524. They filed this lawsuit on July 21, 2020, challenging California's now-expired framework governing in-person instruction during the 2020-21 school year, which was adopted as part of the State's response to the COVID-19 pandemic. Pet. App. 7a-9a; C.A. E.R. 568. They sought a declaration that the framework violated their or their children's right to receive a "basic minimum education" under the Due Process Clause of the Fourteenth Amendment, C.A. E.R. 545, as well as other constitutional and statutory rights, *id.* at 547-551. They also sought an injunction preventing the State from enforcing the restrictions on in-person instruction contained in that framework. *Id.* at 551-552.

a. At the outset of the pandemic, public health authorities knew relatively little about COVID-19 and had few tools to check its spread other than limiting contact between individuals. C.A. S.E.R. 9-13. On March 4, 2020, respondent Governor Gavin Newsom had proclaimed a state of emergency under California's Emergency Services Act. *See* Pet. App. 6a, 231a; Proclamation of a State of Emergency (Mar. 4, 2020) (citing Cal. Gov't Code § 8625).[1] A few weeks later, in a separate executive order issued under that proclamation of emergency, the Governor ordered most of the State's residents "to stay home or at their place of residence." Pet. App. 7a (quoting Cal. Exec. Order N-33-20 (March 19, 2020)).[2] As a result, "many public-

[1] https://bit.ly/3UlTGlH.

[2] https://bit.ly/3hSgmwJ.

facing institutions and businesses were closed," including schools. *Id.* California's "students finished out the remaining few months of the [2019-2020] school year with remote instruction." *Id.*

At the beginning of summer 2020, the Legislature enacted an emergency statute "allowing California's public school system to move online" for the 2020-21 school year. Pet. App. 15a (citing Cal. Educ. Code §§ 43500 *et seq.* (repealed Jan. 1, 2022)). That statute included a sunset provision directing that the statute automatically expired on June 30, 2021, as well as a "clause causing it to self-repeal on January 1, 2022." *Id.* (citing Cal. Educ. Code § 43511(b) (repealed Jan. 1, 2022)).

On July 17, 2020, the California Department of Public Health issued a detailed "COVID-19 and Re-Opening In-Person Learning Framework for K-12 Schools in California" for the 2020-21 school year. Pet. App. 238a-245a; *see also id.* at 231a-237a (Governor's May 4, 2020 executive order directing the State Public Health Officer to establish criteria for reopening across all sectors). Under that framework, "schools were permitted to permanently reopen once the rate of COVID-19 transmission in their local areas stabilized." *Id.* at 7a; *see also id.* at 239a; C.A. S.E.R. 150-169. "Importantly, once a school reopened under the 2020-21 Reopening Framework, it was not required to close again, even if local COVID-19 rates later rose." Pet. App. 7a; *see also* C.A. S.E.R. 533-538 (subsequent revision aligning the framework's criteria for resuming in-person instruction with the State's broader "blueprint" for resuming in-person activities, which assigned counties to different tiers based on caseloads and test positivity rates).

b. Petitioners filed their complaint four days after the Department released its re-opening framework for the 2020-21 school year. Pet. App. 8a-9a; C.A. E.R. 568. The complaint alleged that, by delaying the re-opening of schools "until local conditions improved," the framework "violated a 'fundamental right to a basic, minimum education' located in the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and also violated various federal civil rights statutes." Pet. App. 8a; *see also id.* at 172a-190a (district court's analysis of petitioners' claim); C.A. E.R. 515-552 (first amended complaint). Proceedings "moved swiftly before the district court, which denied the [petitioners'] motion for emergency injunctive relief on August 13, 2020, and granted summary judgment to the State on December 1, 2020." Pet. App. 9a; *see also id.* at 155a-190a (order granting summary judgment); 191a-217a (order denying request for temporary restraining order).

2. Petitioners appealed, and the court of appeals granted their unopposed motion for expedited briefing and argument. Pet. App. 9a.

a. While the appeal was pending, the public health situation and the government response to the pandemic evolved considerably. The federal government "authorized the first vaccine for the prevention of COVID-19" in mid-December 2020, with additional vaccines authorized soon thereafter. Pet. App. 8a. In California, the introduction of vaccines and the State's "continued implementation of the 2020-21 Reopening Framework allowed an ever-increasing number of schools to reopen." *Id.* Between December 2020 and March 2021, California refined "the benchmarks local areas were required to meet before schools were permitted to reopen." *Id.* at 7a n.1. Each of these changes

"relaxed the relevant criteria, allowing schools to reopen sooner"—and each time the State "made clear that no school would be required to close again after reopening." *Id.* By April 26, 2021—less than five months after the district court entered judgment, and before the appeal was argued—petitioners acknowledged in a court filing that "there was 'currently no longer any state-imposed barrier to reopening for in-person instruction'" at their schools. *Id.* at 8a.

By June 2021, more than half of California's population "had received a full course of COVID-19 vaccination treatments." Pet. App. 8a. In light of that progress, on June 11, 2021, the Governor formally rescinded the March 19, 2020 stay-at-home executive order. Cal. Exec. Order N-07-21.[3] On the same day, the Department rescinded its statewide blueprint guiding the resumption of in-person activities, as well as most of its COVID-19 restrictions. *See* Cal. Dep't of Public Health, *State Public Health Officer Order* (June 11, 2021); *see also id.* (ordering the rescission to take effect on June 15, 2021).[4]

The July 2020 framework that prompted petitioners' lawsuit remained in place for the last few weeks of the 2020-21 school year. *See id.* Because of low case counts, however, it did not preclude any schools from offering in-person instruction. *See* Cal. Dep't of Public Health, *Blueprint for a Safer Economy: California Blueprint Data Chart* (June 15, 2021).[5] On June 30, 2021, the statute that had authorized public schools to offer on-line instruction lapsed, *see supra* p. 2, and the

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[3] https://bit.ly/3ueeGjF.

[4] https://bit.ly/3EPFNX6.

[5] https://bit.ly/3FhSHig.

Legislature made "no effort[] to reenact" a similar provision, Pet. App. 15a.

On July 12, 2021, the Department issued new guidance for the 2021-22 school year. *See* Cal. Dep't of Public Health, *COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School Year*.[6] That guidance was "effective immediately" and replaced the framework governing re-opening for the 2020-21 school year. *Id.*[7] It was "designed to keep California K-12 schools open for in-person instruction safely during the COVID-19 pandemic" and recognized that "in-person schooling is critical to the mental and physical health of our students." Pet. App. 9a (quoting 2021-22 Guidance, *supra*) (brackets omitted). It imposed "no restrictions on school reopening." *Id.*

b. Shortly after the Department issued its guidance for the 2021-22 school year, a divided panel of the court of appeals issued its decision in this case. Pet. App. 70a-154a. The majority first held that the case was not moot. *Id.* at 87a-98a. In the majority's view, this Court's precedent foreclosed the argument that the case "became moot when the relevant counties were reclassified into lower tiers" and petitioners' schools were allowed to re-open. *Id.* at 92a (discussing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam)). The majority also concluded that there was a reasonable expectation that respondents would impose restrictions on in-person

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[6] https://bit.ly/3ipV35s (describing 2021-22 guidance as amended on April 6, 2022).

[7] *See also* June 11, 2021 State Public Health Officer Order (directing individuals to follow the requirements in the "*current* COVID-19 Public Health Guidance for K-12 Schools in California") (emphasis added).

instruction in the future, because respondents had "refus[ed] even to say" that they would not do so, *id.* at 93a, and had "tightened" and "loosened" COVID-related school closures during the course of the litigation, *id.* at 94a. Although the majority acknowledged that respondents had "released a new framework for the 2021-2022 school year that does not include reliance upon school closures," it reasoned that the controversy remained live because respondents "still retain the authority to alter the rules at a moment's notice should changing circumstances, in their view, warrant new restrictions." *Id.*

As to the merits, the majority agreed with the district court that there is no constitutional right to a "'basic minimum' level of instruction." Pet. App. 99a; *see also id.* at 99a-105a. But the majority accepted petitioners' "new argument on appeal that the Fourteenth Amendment's Due Process Clause guaranteed a fundamental right to in-person education" for parents who send their children to private school. *Id.* at 10a. It held that California's prior restrictions on in-person schooling had violated the "fundamental right" of some petitioners to "educate their children at in-person, *private* schools." *Id.* at 105a; *see also id.* at 105a-119a (discussing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925)). It remanded the new claim for the district court to apply strict scrutiny. *Id.* at 119a, 122a-125a.[8]

Judge Hurwitz dissented. Pet. App. 126a-154a. He would have held that the case was moot. *Id.* at 127a-

[8] Because petitioners abandoned their statutory claims on appeal, *see* Pet. App. 30a n.11, the three-judge panel did not address them.

139a. He explained that the voluntary cessation doctrine did not apply because respondents had "consistently adhered" to the challenged framework, under which petitioners' schools were allowed to re-open once "certain benchmarks [were] met." *Id.* at 134a. The framework thus "pose[d] absolutely no barrier to in-person instruction at [petitioners'] schools." *Id.* at 135a. And it was not "'reasonably' likely" that respondents would impose restrictions on in-person instruction in the future, *id.*, because respondents had "disclaimed any such intention" and released "guidance for the [2021-22] school year [that] provides for reopening schools with full in-person instruction," *id.* at 136a.

In the alternative, Judge Hurwitz would have held that the court should not have reached the issue of whether parents have a substantive due process right to private, in-person instruction for their children because petitioners expressly waived that claim in the district court. Pet. App. 140a-146a. And if he had reached the merits of that claim, he would have concluded that it failed. *Id.* at 146a-154a.

3. The court of appeals granted respondents' petition for rehearing en banc, Pet. App. 10a, and the en banc panel held that the case was moot, *id.* at 5a-20a.

The en banc majority viewed this as a "classic case in which, due to intervening events, there is no longer a live controversy necessary for Article III jurisdiction." Pet. App. 11a. Because the Governor had rescinded the executive orders that petitioners challenged and replaced the framework for re-opening that petitioners challenged with guidance that did not mandate school closures, there was "no longer any state order for the court to declare unconstitutional or to enjoin." *Id.*

The majority also rejected petitioners' argument that the voluntary cessation and capable-of-repetition exceptions saved this case from mootness. Pet. App. 12a-20a. The voluntary cessation doctrine did not apply because, under the framework petitioners challenged, the restrictions on in-person instruction at petitioners' schools "'expired by their own terms'" once "their local areas achieved certain COVID-19 benchmarks." *Id.* at 13a. And the circumstances established that those limits could not reasonably be expected to recur: respondents had "'unequivocally renounced' the use of school closure orders in the future," *id.* at 14a (brackets omitted); respondents had maintained their commitment to keeping schools open even when "case count[s] soared" during the surge caused by the Omicron variant in the winter of 2021-22, *id.* at 16a; and the Legislature had not restored the temporary authorization for on-line learning, *id.* at 15a-16a; *see also id.* at 19a-20a (similar reasoning with respect to capable-of-repetition doctrine).

Judge Paez dissented with respect to the majority's mootness conclusion, in an opinion joined by four other judges. Pet. App. 20a-28a. The dissent would have held that the capable-of-repetition exception applied here. *Id.* at 27a. Although the stay-at-home order had been revoked and the framework for school re-opening had been replaced with guidance that did not require schools to close, the dissent reasoned that the case remained live because the Governor "ha[d] not relinquished his emergency powers" and the Legislature had not stripped him of those powers. *Id.* It asserted, however, that "this case would be moot" if the Governor were to rescind his March 4, 2020, proclamation of emergency. *Id.* at 28a. For similar reasons, the dissent also would have held that the voluntary cessation doctrine applied. *Id.* at 28a n.9.

On the merits, the dissent would have affirmed the district court's judgment in its entirety. Pet. App. 29a-35a. It would have rejected petitioners' claim that the challenged framework violated their right to a "basic minimum education," reasoning that the "parents here have not shown that their children are being deprived of a minimally adequate education." *Id.* at 31a. And it would have held that petitioners failed to plead any claim that the framework violated a right to send their children to in-person instruction at private schools under *Meyer* and *Pierce*. *See id.* at 32a-35a.[9]

4. Three developments after the en banc court issued its decision are relevant to the issue petitioners seek to present in this Court. First, in June 2022, the Department released its "COVID-19 Public Health Guidance for K-12 Schools to Support Safe In-Person Learning, 2022-2023 School Year," which includes a set of recommendations that "support safe, in-person learning[.]"[10] Just like the guidance for the 2021-22 school year, no schools are required to close for in-person-instruction under the guidance for the 2022-23 school year. *Id.*

Second, in the same month, the Governor announced that he was rescinding additional executive orders. *See* Press Release, Office of Governor Gavin Newsom, *Governor Newsom Continues to Roll Back*

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[9] Although she agreed with Judge Paez "in full," Pet. App. 35a, Judge Berzon wrote separately to "dispel any suggestion that the waived issue could have possible merit were it to be raised in a later case," *id.* at 36a; *see also id.* at 35a-40a.

[10] https://bit.ly/3FifWbX (describing 2022-23 guidance as updated on September 30, 2022).

COVID-19 Executive Orders (June 17, 2022).[11] By the end of June 2022, "only 5 percent of the COVID-19 related executive order provisions issued throughout the pandemic . . . remain[ed] in place." *Id.*

Third, in October, Governor Newsom announced that "the COVID-19 State of Emergency will end on February 28, 2023[.]" Press Release, Office of Governor Gavin Newsom, *Governor Newsom to End the COVID-19 State of Emergency* (Oct. 17, 2022).[12] The Governor explained that the State now has the "tools needed to continue fighting COVID-19" without relying on the emergency declaration, including "vaccines and boosters, testing, treatments and other mitigation measures like masking and indoor ventilation." *Id.* He further indicated that a gradual wind-down is necessary to give "state and local partners the time needed to prepare for this phaseout[.]" *Id.* Retaining the state of emergency until February also allows the Governor to maintain the few remaining executive orders that could be needed to respond to "any potential surge that may occur" during the 2022-23 winter months. *Id.* Under that authority, for example, the Governor has allowed the Department to continue to waive certain licensing requirements at hospitals to ensure that they can "adequately implement COVID-19 related mitigation strategies[.]" Cal. Exec. Order N-11-22 (June 17, 2022).[13]

ARGUMENT

Petitioners argue that their challenge to a state framework that governed in-person instruction for

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[11] https://bit.ly/3VlfmPa.

[12] https://bit.ly/3VK9TlP.

[13] https://bit.ly/3GfO88t.

only the 2020-2021 school year presents a live case or controversy. That argument lacks merit. Petitioners' children were able to receive in-person instruction by no later than April 2021; the challenged framework was replaced in July 2021; and respondents have imposed no further restrictions on school re-opening since then—even at the height of the Omicron surge. Nor does petitioners' argument implicate any genuine circuit conflict: the cases invoked by petitioners have applied the same doctrinal principles and reached different results based on case-specific factual differences; and this Court recently denied a petition alleging a similar conflict, *see Resurrection Sch. v. Hertel*, 143 S. Ct. 372 (2022) (No. 22-181). Finally, this case would be an unusually poor vehicle for addressing the mootness question advanced by petitioners. The lynchpin of petitioners' argument on mootness is that Governor Newsom "*has not* relinquished his emergency powers," Pet. 13, but the Governor has already announced that the state of emergency will terminate in February 2023. As the en banc dissent recognized, moreover, petitioners expressly waived the only remaining claim in the case—which is meritless in any event.

1. Under Article III, an "'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013). Applying that principle, the court of appeals correctly held that this case is now moot. Pet. App. 5a-20a.

Petitioners challenged restrictions on in-person schooling set forth in a July 2020 framework that governed the 2020-21 academic year. Pet. App. 8a-9a. But that "controversy has evaporated." *Id.* at 11a. Petitioners have conceded that by April 2021—more

than 20 months ago—the challenged framework no longer imposed any "barrier to reopening for in-person instruction" at their schools. *Id.* And that framework was replaced entirely more than 17 months ago with new guidance for the 2021-22 academic year, "which declare[d] that all schools may reopen for in-person learning." *Id.* The guidance for the 2022-23 school year similarly does not restrict in-person instruction in any way; instead, it identifies strategies that schools can use to provide "safe, in-person learning." 2022-23 Guidance, *supra*; *see also id.* (recognizing that in-person instruction "is critical to student well-being and development"). As a result, "there is no longer any state order for [a] court to declare unconstitutional or enjoin." Pet. App. 11a.

The court of appeals also correctly determined that the "voluntary cessation" doctrine does not apply here. That doctrine is intended to prevent gamesmanship by defendants who "engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where [they] left off, repeating this cycle" until they achieve "all [their] unlawful ends." *Already*, 568 U.S. at 91. Here, the restrictions on in-person instruction at petitioners' schools "'expired by their own terms,'" rather than as a result of any response to litigation. Pet. App. 13a. Under the challenged framework, in-person instruction at petitioners' schools was permitted to resume by April 2021. *Id.* at 10a. And once those schools re-opened they were "not required to close again, even if local COVID-19 rates later rose." *Id.* at 7a; *see generally Trump v. Hawaii*, 138 S. Ct. 377 (2017) (challenge to provisions of executive order was moot because the provisions had "'expired by their own terms'") (quoting *Burke v. Barnes*, 479 U.S. 361, 363 (1987)) (brackets omitted).

In any event, respondents have established "that 'the challenged behavior cannot reasonably be expected to recur.'" Pet. App. 13a-14a (quoting *Already*, 568 U.S. at 96). "[T]he State has 'unequivocally renounced' the use of school closure orders in the future." *Id.* at 14a (brackets omitted). That commitment "is no mere statement of aspiration": the guidance documents for the 2021-22 and 2022-23 school years—which replaced the framework for the 2020-21 school year that petitioners challenge—are expressly "'designed to keep California K-12 schools open for in-person instruction safely during the COVID-19 pandemic.'" *Id.* at 14a-15a (quoting 2021-22 Guidance, *supra*). That change in policy reflected a fundamental shift in the public health circumstances resulting from the introduction and widespread availability of vaccines. *Id.* at 8a, 12a. Indeed, even during the surge caused by the Omicron variant in the winter of 2022, when case counts "soared well past numbers reached early in the pandemic," respondents did not impose any limits on in-person instruction. *Id.* at 16a. Nor has the Legislature reinstated the "emergency statute allowing California's public school system to move online," which expired by its own terms in June 2021. *Id.* at 15a; *see supra* p. 2. On the contrary, the Legislature has declared its intent that "'that local educational agencies offer in-person instruction to the greatest extent possible' going forward," Pet. App. 16a (quoting Cal. Educ. Code § 43520), and has enacted penalties for public schools that continue to operate remotely, *id.* (citing Cal. Educ. Code § 43521(c)).

For similar reasons, the court of appeals correctly held that the exception to mootness for controversies that are "capable of repetition yet evading review" does not apply here. Pet. App. 19a-20a. That doctrine applies only in "extraordinary cases," *id.* at 19a,

"where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again," *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016) (internal quotation marks and brackets omitted). Even assuming that the first condition is satisfied here, the second is not: there "is no 'reasonable expectation' that California will once again close [petitioners'] schools." Pet. App. 19a. The framework for the 2020-21 school year that petitioners challenge as unconstitutional has "long since been rescinded"; respondents are "committed to keeping schools open"; and the "trajectory of the pandemic has been altered by the introduction of vaccines, including for children, medical evidence of the effect of vaccines, and expanded treatment options." *Id.* at 20a.

Petitioners contend that the court of appeals "misinterpreted" the voluntary cessation doctrine and the capable-of-repetition exception, applying them in a manner that was "too demanding." Pet. 15. In their view, the case will not be moot "[u]ntil Governor Newsom rescinds the declaration of emergency[.]" *Id.* at 15; *see id.* at 16, 17. As the court of appeals explained, however, the fact that "'Governor Newsom retains the specific power to impose similar restrictions'" is a relevant "consideration in [the mootness] analysis, but it is by no means dispositive." Pet. App. 17a (citations omitted). It certainly does not establish a justiciable controversy here, where there is no "evidence indicating that the challenged policy likely will be reenacted." *Id.* (quoting *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 20008)) (brackets omitted); *see also supra* p. 10 (describing Governor Newsom's announcement that

the COVID-19 state of emergency will end on February 28, 2023).

Petitioners' argument also makes little sense on its own terms. Both the Governor's proclamation of a state of emergency and his executive order directing the Department to adopt the challenged framework were unilateral executive actions under California law. Petitioners contend that this case will be moot when the Governor (unilaterally) rescinds the proclamation. But they insist that his unilateral revocation of the specific executive order that caused their alleged injury, and the Department's resulting abandonment of the challenged policy, did *not* moot the case, on the theory that the policy might later be re-imposed. That is not a meaningful distinction. The theoretical possibility of reinstatement exists regardless of whether or not the underlying proclamation of emergency has been rescinded, because the Governor could theoretically re-impose the proclamation itself as well. But Article III jurisdiction does not exist merely because there is a theoretical possibility that a policy could be resurrected. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982). Rather, the jurisdictional question is a practical one about whether the specific policy that gave rise to petitioners' claims is likely to be re-imposed. Here, the answer is no.

Petitioners also warn that, absent further review, the court of appeals' decision will "serve as a blueprint for government actors to avoid judicial review." Pet. 14. They analogize this matter to past cases during the COVID-19 pandemic in which the Court determined that plaintiffs "remain[ed] under a constant threat that government officials will use their power to reinstate the challenged restrictions." *Id.* at 15 (quoting *Tandon v. Newsom*, 141 S. Ct. 1294, 1297

(2021)) (internal quotation marks omitted). But California's "steady and consistent" approach to school reopening over the course of several years makes this case fundamentally different from prior cases in which "restrictions were 'regularly changed' by the State, often multiple times in the same week." Pet. App. 18a (discussing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam) (brackets omitted)). Unlike the attendance restrictions on places of worship at issue in those cases, California's restrictions on in-person school attendance have steadily moved toward re-opening. Indeed, even under the challenged framework, "[n]o school [was] required to close again after reopening." *Id.* That is because California "allow[ed] schools to permanently reopen once their local areas achieve[d] the specified benchmark." *Id.*[14]

2. Petitioners further contend that the "decision below created a Circuit split" over whether "a challenge to a governor's emergency powers is not moot when the governor has not relinquished those powers." Pet. 10. But a closer look at the circuit decisions addressing mootness in this context demonstrates that there is no genuine conflict of the type that would warrant this Court's review.

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[14] Petitioners assert that respondents "repeatedly modified the school-closure orders during the course of this litigation." Pet. 16. All but one of those modifications "*relaxed* the relevant criteria, allowing schools to reopen *sooner*." Pet. App. 7a n.1 (emphasis added). The only other modification took place at the beginning of the 2020-21 school year, when respondents replaced the "county monitoring list," under which school closures were governed by an array of factors, with a statewide system of tiers, which relied exclusively on caseloads and test-positivity rates. *See supra* p. 2. That change did not necessarily make it more difficult for schools to re-open. *See supra* p. 2.

The bulk of circuit authority aligns with the decision below. In *Eden, LLC v. Justice*, 36 F.4th 166, 168 (4th Cir. 2022), for example, the Fourth Circuit held that challenges to restrictions on in-person schooling and other activities imposed by West Virginia's Governor at the outset of the pandemic had become moot. The challenged orders had terminated, and changed factual circumstances (including the availability of vaccines) established that there was no reasonable prospect that those policies would be reinstated. *See id.* at 170-171. The Fourth Circuit rejected the plaintiffs' argument "that because the Governor has not formally ended West Virginia's state of emergency, he retains the power to close schools and businesses at his discretion, leaving them . . . subject to a 'constant threat' of renewed constitutional violations." *Id.* at 171-172. It explained that "a governor's mere ability to reimpose challenged restrictions is not enough to show a reasonable chance of recurrence." *Id.* at 172; *see also Clark v. Governor of N.J.*, 53 F.4th 769, 779 n.15 (3d Cir. 2022) (challenge to COVID-19 restrictions was moot even though the Governor "continued to extend the state of emergency").

Several other circuits have similarly held that challenges to state COVID-19 restrictions were moot on the ground that the challenged policies had terminated and there was no reasonable prospect that they would be re-adopted. *See Resurrection Sch. v. Hertel*, 35 F.4th 524, 528-530 (6th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 372 (2022) (No. 22-181); *see also, e.g.*, *Hawse v. Page*, 7 F.4th 685, 692-694 (8th Cir. 2021); *Conn. Citizens Def. League, Inc. v. Lamont,* 6 F.4th 439, 446-447 (2d Cir. 2021); *Spell v. Edwards*, 962 F.3d 175, 177-180 (5th Cir. 2020). None of those circuits found it necessary to examine whether the

overarching declaration of emergency in the implementing State remained in effect, such that state officials could theoretically re-impose the challenged restrictions. Like the decision below, those circuits focused on whether there was a "reasonable possibility" that state officials would re-impose the challenged restrictions in light of the factual circumstances of each case. *E.g.*, *Resurrection Sch.*, 35 F.4th at 529.[15]

Petitioners principally rely on two cases out of the First and Seventh Circuits, which held that challenges to particular COVID-19 policies were not moot under the voluntary cessation doctrine. Pet. 10-14. Like the court of appeals below, *see* Pet. App. 17a, those courts recognized that a Governor's ongoing authority to impose similar restrictions can be relevant to the mootness analysis. But neither decision treated that consideration as dispositive, *cf. id.*, and both cases ultimately turned on particular circumstances that are not present here.

In *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 342-344 (7th Cir. 2020), the plaintiffs challenged state restrictions on in-person worship that had been rescinded before the appeal was argued. The new policies warned that "some things 'could

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[15] Petitioners attempt to distinguish *Spell* by noting that, at the time the Fifth Circuit issued its decision, the "emergency order there had a set expiration date." Pet. 17. But the Fifth Circuit did not mention that fact in holding that the case was moot. *See Spell*, 962 F.3d at 177-180. After the Fifth Circuit issued its decision, Louisiana's Governor extended the state of emergency for nearly two years. *See* Press Release, Office of Governor John Bel Edwards, *With Cases and Hospitalizations Declining and Vaccines Widely Available, Gov. Edwards Will Not Renew COVID Public Health Emergency Order* (Mar. 14, 2022), https://bit.ly/3ucAT1t.

cause [the State] to move back'" to the prior restrictions, *id.* at 344, and the State even maintained a list of criteria that would prompt it to "replac[e] the current rules with older ones," *id.* at 345. Given those specific caveats in the new policies, the Seventh Circuit could not find that it was "'absolutely clear'" that the prior policy would "never be restored." *Id.* Its decision does not embrace or apply any categorical rule that a challenge to a terminated COVID-19 policy is never moot so long as there is an ongoing state of emergency under which a State could theoretically reimpose that policy. And it certainly does not suggest that there is a continuing controversy where, as here, changed circumstances and the State's actions demonstrate that there is no realistic probability that the State will once again adopt the challenged restrictions.

Similarly, the First Circuit's decision in *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153 (1st Cir. 2021), did not turn on whether the Governor of Maine "retained [her] emergency powers and could reinstate the offending restrictions." Pet. 11. The plaintiffs in that case challenged a requirement that travelers to Maine quarantine for 14 days upon their arrival in the State. *Bayley's*, 985 F.3d at 155-156. The Governor rescinded that policy before the court of appeals issued its decision, replacing it with an "identical" 14-day self-quarantine requirement that contained "additional exceptions that restricted its scope." *Id.* at 156. Although the First Circuit held that the challenge to the prior policy was not moot, it did not rely on the ongoing state of emergency in reaching that conclusion. *Id.* at 157-158. Instead, it reasoned that the controversy remained live because the Governor had "not denied that a spike in the spread of virus could lead her

to impose a self-quarantine requirement just as strict" as the original. *Id.* at 157.

As petitioners note, *see* Pet. 13 n.2, when the First Circuit subsequently held that a separate challenge to a Massachusetts COVID-19 restriction was moot, it distinguished *Bayley's* by noting that the state of emergency in Massachusetts had ended. *See Boston Bit Labs, Inc. v. Baker*, 11 F.4th 3, 11 (1st Cir. 2021). But the subsequent decision once again recognized that the voluntary cessation doctrine "turns on the circumstances of the particular case[.]" *Id.* at 10. And the First Circuit identified several case-specific reasons why its prior decision in *Bayley's* did not control the mootness analysis in the case before it—including because Massachusetts's Governor had not "tried to reinstate an order like [the challenged order] at all despite upticks in COVID-19 cases after he jettisoned" it. *Id.* at 12; *see also Calvary Chapel of Bangor v. Mills*, 52 F.4th 40, 46-51 (1st Cir. 2022) (similar); *Glow In One Mini Golf, LLC v. Walz*, 37 F.4th 1365, 1371-1373 (8th Cir. 2022), *petition for cert. filed*, No. 22-438 (Nov. 7, 2022) (similar).

Finally, petitioners cite several cases that they characterize as holding that challenges to COVID-19 policies were "not capable of repetition where the governor had relinquished their emergency powers." Pet. 13 n.2; *see also id.* at 16-17. In the first of those cases, the Third Circuit noted that state statutory and constitutional amendments had stripped Pennsylvania's Governor of "his power to unilaterally act in connection with this pandemic," although it did not explicitly rely on those legal changes in holding that a challenge to various COVID-19 restrictions was moot. *County of Butler v. Governor of Pa.*, 8 F.4th 226, 230-231 (3d Cir. 2021), *cert. denied sub nom. County of Butler v. Wolf*,

142 S. Ct. 772 (2022) (No. 21-698); *see also id.* at 231 (noting that the Secretary of Health "still claim[ed] the power to issues orders of the sort" challenged). In the second case, the Fourth Circuit cited the end of Virginia's state of emergency in concluding that a challenge to restrictions on in-person worship was moot. *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 163-164 (4th Cir. 2021). Those facts certainly sufficed to demonstrate mootness, but neither court treated them as necessary preconditions for mootness. *See Lighthouse*, 20 F.4th at 162-166; *Butler*, 8 F.4th at 230-231. Here again, the decisions invoked by petitioner accord with the decision below, which observed that the "Governor's continuing authority to close schools is a consideration" in the mootness analysis, but is not determinative. Pet. App. 17a; *see also Eden*, 36 F.4th at 171-172 (subsequent Fourth Circuit decision rejecting the argument that a separate challenge to a COVID-19 restriction presented a live controversy "because the Governor ha[d] not formally ended [his State's] state of emergency"); *Clark*, 53 F.4th at 778 n.12 (subsequent Third Circuit decision recognizing that the change in law in *Butler* was "undoubtedly not a *necessary* condition for our holding").[16]

3. This case would also be an exceptionally poor vehicle for considering the question presented. Petitioners have framed that question as whether "a case [is] moot . . . when the governor rescinds the offending policy after it is challenged in court, but the declaration of emergency remains in place and the governor

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[16] Petitioners are not correct in characterizing *Spell* as a case "where the governor had relinquished [his] emergency powers." Pet. 13 n.2. The Governor in that case had not rescinded his emergency declaration when the Fifth Circuit issued its decision. *See supra* p. 18 n.14.

retains the authority to reinstate the policy." Pet. i; *see id.* at 10-11, 12-13, 15-17; *see also* Pet. App. 26a-27a (Paez, J., dissenting) (emphasizing that the on-going state of emergency was the "crucial factor" in the dissent's mootness analysis). But California's state of emergency will soon end, on February 28, 2023. *See supra* p. 10; Press Release, Office of Governor Gavin Newsom, *Governor Newsom to End the COVID-19 State of Emergency* (Oct. 17, 2022).[17] And even under the en banc dissent's understanding of mootness, once the state of emergency ends, "this case [will] be moot." Pet. App. 28a.

Moreover, this Court's resolution of the question presented would not ultimately affect the outcome of this case. The sole claim that petitioners are still pursuing is that California's now-expired restrictions on in-person schooling violated the "substantive due process rights of parents who wanted to send their children to in-person private schools." Pet. 9. As the en banc dissent explained, however, petitioners waived this claim. They "did not merely fail to raise this argument" in the district court, "they failed to *plead* this *claim*" in their complaint. Pet. App. 32a. The substantive due process right invoked by petitioners is one that must be "asserted by *parents*," *id.* at 33a, and the operative complaint "does not allege any violation of a *parental* right," *id.* at 34a; *see also id.* at 34a-35a; *id.* at 140a-146a (Hurwitz, J., dissenting); C.A. E.R. 515-552 (first amended complaint). Indeed, petitioners expressly disavowed any such claim in the district court, asserting that respondents had "mischaracterize[d] [petitioners] as advocating for a fundamental right to in-person school." D. Ct. Dkt. 40 at 11 (internal quotation marks omitted). They also "candidly conceded

[17] https://bit.ly/3VK9TlP.

at oral argument" before the court of appeals "that they cannot and do not fault the district court for not addressing that claim." Pet. App. 144a (Hurwitz, J., dissenting); *see* C.A. Oral Arg., at 39:10-39:40.[18]

Even setting aside the waiver, the claim lacks merit. Petitioners assert that *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925), afford them a substantive due process right that entitles them to insist on private, in-person instruction for their children during a pandemic. Pet. 9. In the century since this Court decided those cases, it has consistently emphasized their "limited scope." *Norwood v. Harrison*, 413 U.S. 455, 461 (1973). They afford parents a "constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction"—not the right to a "provide their children with private school education unfettered by reasonable government regulation." *Runyon v. McCrary*, 427 U.S. 160, 178 (1976). Petitioners do not identify any sound basis for holding that the novel right they seek to advance here is "'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty[.]'" *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997).

[18] https://bit.ly/3OXCMbV.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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