THE HAKALA LAW GROUP, P.C.
Brad A. Hakala, CA Bar No. 236709
Jeffrey B. Compangano, CA Bar No. 214580
6700 E. Pacific Coast Highway, Suite 290
Long Beach, California 90803
Telephone: 562.493.9417
Facsimile: 562.786.8606
Email: bhakala@hakala-law.com

Attorneys for Plaintiffs - Devon Torrey-Love, S.L., Courtney Barrow, A.B., Margaret Sargent, M.S., W.S., and A Voice for Choice, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

DEVON TORREY-LOVE; S.L.; COURTNEY BARROW; A.B.; MARGARET SARGENT; M.S.; W.S.; and A VOICE FOR CHOICE, INC. on behalf of its members,

Plaintiffs,

v.

STATE OF CALIFORNIA, DEPARTMENT OF EDUCATION; STATE OF CALIFORNIA, BOARD OF EDUCATION; TOM TORLAKSON, in his official capacity as Superintendent of the Department of Education; STATE OF CALIFORNIA, DEPARTMENT OF PUBLIC HEALTH; DR. KAREN SMITH, in her official capacity as Director of the Department of Public Health; EDMUND G. BROWN JR., in his official capacity as Governor of California; KAMALA HARRIS, in her official capacity as Attorney General of California,

Defendants.

Case No.: 5:16-cv-2410

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Date: January 13, 2017
Time: 10:00 a.m.
Judge: The Honorable Dolly M. Gee
Location: Courtroom 8C, 8th Floor

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TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 13, 2017, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Dolly M. Gee, United States District Court, Central District of California, 350 West 1st Street, Los Angeles, CA 90012, Courtroom 8C, 8th Floor, Plaintiffs will move for a preliminary injunction pursuant to Fed. R. Civ. P. 65.

Plaintiffs respectfully request a preliminary injunction enjoining Defendants from any further enforcement of Sections 120325, *et seq*[1] of California's Health and Safety Code, as enacted by California Senate Bill No. 277. Plaintiffs make this motion on the grounds that Section 120325 creates an unconstitutional condition, and that an irreparable injury will result to the Plaintiffs unless Section 120325 is enjoined.

INTRODUCTION

While the concept of Scylla and Charybdis has a long literary tradition, it is not so welcome in the realm of fundamental rights. California Health & Safety Code Section 120325 *et seq.* conditions the exercise of Californians' constitutional rights to a public K-12 education on the relinquishing of two federal constitutional rights, the rights to refuse medical treatment and direct the upbringing of one's children. The Supreme Court has never equivocated: such laws conditioning fundamental rights on other fundamental rights are improper.

But because of often sweeping and facile characterizations about the clarity of vaccine precedent, this case presents difficult questions that can only be answered after a careful reading of the cases. Nevertheless, after a thorough analysis, it becomes manifest that there is no talismanic exception for statutes

1 Hereinafter, these sequential sections, namely §§120325, 120335, 120338, 120370, and 120375 will be referred to as simply, "Section 120325."

pertaining to vaccines that gives them a constitutional pass. On the contrary: statutes must of course be appraised based on all relevant precedent. That precedent, when properly and comprehensively applied, reveals that Section 120325 creates an unconstitutional condition. And the facts and statutes in the old vaccine-related cases are readily distinguished from Section 120325, and those distinctions mean that no exception exists for it.

Additionally, this is a case where phrasing the secondary issue provides an important and helpful prism with which to evaluate the entire matter. Could the state pass a broad law of general applicability overriding all parents' rights to refuse medical treatment on behalf of their children, with respect to certain classes of drugs? Considering the relevant precedent – and our traditions that pre-date the Constitution – such a law would almost certainly fail under strict scrutiny. Then how can a law, infringing on those same rights but tied to another fundamental right (education) fare any better? The answer is that it cannot.

FACTS

Before the enactment of Section 120325, California allowed children to receive a public-school education without the need for medical treatments if their parents sought an exemption. Such exemptions allowed children to attend school without being vaccinated. On July 1, 2016, Section 120325 went into effect.

Plaintiffs are school-aged children who have not been vaccinated in full accord with California's mandated vaccine schedule, and their parents. Each of the minor Plaintiffs desire to exercise their right to attend public school, and receive all of the benefits of the same, which are guaranteed by the California Constitution, without giving up their constitutional rights to refuse medical treatments. Plaintiff parents wish to exercise their fundamental right to make medical decisions on behalf

of their children, without having to forego, on behalf of their children, their child's fundamental right to a public-school education.

Plaintiff Devon Torrey-Love, and her child, Plaintiff S.L. live in the State of California. Love Aff. ¶1. Neither Plaintiff Love nor S.L. desires to have S.L. vaccinated with any vaccines, and to date, S.L. has not been vaccinated. Love Aff. ¶4, 9, & 11. S.L., a child who loves school, learning, and being social with his peer group, has a strong desire to attend kindergarten in public school. Love Aff. ¶8.

Since the enactment of Section 120325, S.L. has been absolutely prohibited from attending public-school and has since been homeschooled by his mother, Plaintiff Love. Love Aff. ¶6 & 8. Before the enactment of Section 120325, Plaintiff Love was anticipating that she would be able to seek an exemption, and have her child attend public school, so that S.L. would not have to forego his constitutional right to refuse medical treatments. Love Aff. ¶9. At this time, the options that would have previously allowed Plaintiff S.L. to his constitutionally afforded right to an education have been stripped away, unless Plaintiffs forego their constitutionally afforded rights to refuse medical treatments and to make parental decisions. Love Aff. ¶9 & 11. Section 120325 has caused an extreme hardship on Plaintiff Love's family. Love Aff. ¶7, 12, 13, & 14. The experiences of other plaintiffs in this matter are substantially similar to those of Plaintiff Love and Plaintiff S.L. *See* Barrow Aff. and Sargent Aff.

ARGUMENT

The standards for a preliminary injunction are well-established. A plaintiff who seeks a preliminary injunction must prove that his case is likely to succeed on its own merits, that if preliminary relief is not granted he will probably suffer irreparable harm, that if the fairness and policy of the case are taken into account the balance will tilt towards his side, and that the public interest is served by granting

the injunction. *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7 (2008). As shown below, Plaintiffs are likely to prevail on the merits because Section 120325 so clearly creates an unconstitutional condition by forcing Californians to choose between exercising fundamental rights, and because no exception exists for a law as broad as Section 12035. A constitutional violation is, of course, always irreparable harm, and remedying such a harm is always in the public interest. *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). And beyond the perhaps intangible ideals of preserving their rights to make medical and parental decisions, Plaintiffs also suffer the very real harm of not being able to enjoy the benefits of a public education, a benefit that is well-established, and for which it is inequitable for the state to deny them.

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CONSTITUTIONAL CHALLENGE.

When faced with laws forcing the public to relinquish one right to exercise another, courts have been particularly unequivocal. Such conditions are improper. The right to refuse medical treatment and the right for a parent to exercise judgment in the care of their children are well-established, so old that they pre-date the Constitution. In California, a public K-12 education is a fundamental right. Dated vaccine precedent does not create an exemption for a law as broad as Section 120325, and must be synthesized with modern precedent. Thus, it created an unconstitutional condition, and Plaintiffs are likely to succeed in their challenge to it.

A. Section 120325 Creates An Unconstitutional Condition

"If the state may compel the surrender of one constitutional right as a condition of its favor," then the "guaranties embedded in the Constitution . . . may

thus be manipulated out of existence." *Frost v. Railroad Comm'n of Calif.*, 271 U.S. 583, 594 (1926). This straightforward principle explains the doctrine of "unconstitutional conditions." The state may not condition the provision of a benefit (or the exercise of a right) on the relinquishing of a right. Section 120325 conditions Californians' rights to access public K-12 education on the relinquishing of the fundamental rights to refuse medical treatment and to direct the upbringing of their children. As an unconstitutional condition, the court must strike it down and enjoin all Defendants from any further enforcement of Section 120325.

1. A Statute May Not Force Citizens to Choose Between Fundamental Rights

The government cannot condition the exercise of one fundamental right on the relinquishing of another. *Simmons v. U.S.,* 390 U.S. 377, 393-94 (1968). When the government forces individuals "to forfeit one constitutionally protected right as the price for exercising another," no balancing test is appropriate; such conditioning simply isn't allowed. *See id.; Lefkowitz v. Cunningham*, 431 U.S. 801, 807-808 (1977). Courts must be "peculiarly sensitive" in such situations, as it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons* at 394.

a. Refusing Medical Treatment and Directing the Upbringing of One's Children Are Fundamental Rights

Individuals have a general right to bodily autonomy and the specific fundamental right to refuse medical treatments. *Cruzan v. Director*, 497 U.S. 261 (1990). Parents have a fundamental right to make decisions on the care and

upbringing of their children. *Troxel v. Granville,* 530 U.S. 57 (2000). This right is quite expansive:

> "The liberty interest . . . of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized. It is cardinal … that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. It cannot … be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 65 (2000) (citations omitted).

Synthesizing the precedent, a parent can generally refuse medical treatment on behalf of a child. While not absolute, this right has been upheld time and time again, even when a child is terminally ill. *See, e.g., Newmark v. Williams,* 588 A.2d 1108 (Del. 1991). And certain such rights are so ancient and fundamental that our Supreme Court has observed that they were not enumerated because they could not seriously be doubted and therefore did not need to be enumerated. *See Griswold v. Conn.,* 381 U.S. 479, 486 (1965).[2]

b. Public K-12 Education Is a Fundamental Right in California

States are free in their constitutions to provide additional rights to their citizens that exceed those provided by the federal constitution. *See generally, In re Conklin*, 946 F.2d 306, 323 (4th Cir. 1991). While there is no right to a public

2 The doctrine of Unconstitutional Condition is not limited to enumerated rights anyway. While many cases involve First Amendment speech or religious rights, or the Fifth Amendment right against self-incrimination, it is also clear that the doctrine applies to rights guaranteed by the Fourteenth Amendment. *See Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987); *Planned Parenthood of Mid-Mo. & E. Kan v. Dempsey*, 167 F.3d 458 (8th Cir. 1999) (Unconstitutional Condition doctrine can apply to non-enumerated rights like abortion). And while not discussing the doctrine directly, at least one case has considered these concepts with two un-enumerated rights. *See Pruitt v. Nova Health Systems*, 292 P.3d 28 (OK, 2012), *cert. denied,* 2013 (striking down law forcing invasive ultrasound for women choosing to exercise their right to terminate a pregnancy).

education in the federal constitution, a public K-12 education is a fundamental right in California. *Hartzell v. Connell,* 35 Cal.3d 899 (1984); *Serrano v. Priest*, 18 Cal. 3d 778 (1976); *Slayton v. Pomona USD*, 161 Cal.App.3d 538, 548 (1984); *Steffes v. Cal. Interscholastic Fed.,* 176 Cal.App.3d 739, 746 (1986); *Jones v. Cal. Interscholastic Fed*., 197 Cal.App.3d 751, 757 (1988); all construing Cal. Const. Art. IX, §5. Public schools provide a sharpened mind, a path to future employment, and a normative means to socialize. *See e.g., Phipps v. Saddleback Valley USD,* 204 Cal.App.3d 1110, 1114 (1988) (child with AIDS forced to homeschool suffered "irreparable harm and damage by not being given the education and enjoying the educational facilities uniquely available at his . . . school"). And for parents, particularly single parents, school provides a form of child care, and thereby the chance to be productive members of society.

c. Section 120325 Improperly Conditions the Exercise of Fundamental Rights on Relinquishing Fundamental Rights

Courts faced with laws conditioning the exercise of one fundamental right on the relinquishing of another are unequivocal. *See Bourgeois v. Peters,* 387 F.3d 1303, 1324 (11th Cir. 2004) ("This case presents an especially malignant unconstitutional condition because citizens are being required to surrender a constitutional right . . . not merely to receive a discretionary benefit but to exercise two other fundamental rights.") That statement applies with equal force here. Section 120325 places conditions on attending public K-12 school. For families to access their right to education, children must relinquish their right to refuse medical treatment, and parents must give up their right to guide the care of their children.[3]

3 It does not matter that Section 120370(a) contains a limited exception for those who can get a doctor to say that getting vaccinated would be extremely detrimental to a patient's health. The right to refuse medical treatment lies with the individual, not the doctor, of course. *See Cruzan, passim*. And the exception in Section 120370(a) has proven illusory in practice, with doctors threatened with the loss of their license and prosecution if they issue the

The typical unconstitutional-condition analysis – of whether an essential nexus exists between the benefit (education) and the relinquished rights – is unnecessary here because a public K-12 education is a fundamental right in California. Section 120325 creates a condition forcing Californians to surrender their federal constitutional rights as a precondition to exercising a state constitutional right. Under well-established principles, the court must strike down this law.

2. Precedent Does Not Provide an Exception for Section 120325

Attorneys sometimes pretend that "vaccines" represent an airtight doctrinal category, while in fact the case law is far more nuanced. It should be self-evident that Section 120325 must be analyzed by applying synthesized rules from all precedent. Such an analysis shows there is no special, talismanic quality about vaccines that provides an automatic exception to constitutional liberties.

a. Vaccines Are Medications; Getting Vaccinated Is a Medical Procedure.

As discussed *supra*, the "Supreme Court has recognized fundamental rights to determine one's own medical treatment, and to refuse unwanted medical treatment, and has recognized a fundamental liberty interest in medical autonomy." *Coons v. Lew*, 762 F.3d 891, 899 (9th Cir. 2014) (citations omitted).[4] It is well-decided that the decision as intimate as to what medications to put in a child's body

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medical exceptions specifically authorized by the law. *See* http://ktla.com/2016/09/12/o-c-doctor-critic-of-vaccine-laws-could-lose-license-after-excusing-2-year-old-from-shots/

For the sake of thoroughness, plaintiffs also point out that the right to parent one's children contains, of course, the lesser included right for minors to enjoy an upbringing directed by their parents, and not outsiders. *See Troxel* at 64.

4 The Ninth Circuit's very broad formulation, in precedent just two years old, represents an accurate synthesis of the current state of these constitutional rights, and of course, is binding here.

is a fundamental right vested with parents. *See e.g., Newmark, supra.* It is equally indisputable that vaccines, whether inhaled, injected, administered orally, or as eyedrops or suppositories – are just medications. And the parameters of constitutional rights are for the courts, not the FDA to define. The mere quality of being prophylactic, or being part of a named category of drugs (i.e., "biologics"), cannot confer legal status. Many other drugs are prophylactic or can be placed in named categories.

For example, in response to the HIV epidemic, which continues to cut lives tragically short, Gilead has developed and the FDA has approved a new drug, Truvada, that, when taken before exposure, is remarkably effective at stopping the spread of HIV, a contagious disease.[5] In other words, like vaccines, the medication is one prophylactic measure against an infectious disease, which can spread to unwitting sexual partners, the children of the infected, and people having contact with infected bodily fluids. Moreover, certain demographic groups – including ones that are not protected classes – remain particularly at-risk for HIV transmission. Yet it would be difficult to assert that these qualities confer a special legal status on this medication.[6] The right to refuse medical treatment, fully recognized and elaborated within the last generation, is broad enough to cover prophylactic medications too. And it is furthermore impossible to deny that the act of getting vaccinated requires a medical procedure.

5 Ariana Cha, *In new study, 100 percent of participants taking HIV prevention pill Truvada remained infection-free*, Washington Post (Sep. 4, 2015), https://www.washingtonpost.com/news/to-your-health/wp/2015/09/04/in-new-study-hiv-prevention-pill-truvada-is-startlingly-100-percent-effective/

6 If drugs like Truvada enjoy a special constitutional status because they are prophylactic, minimally intrusive, and prevent serious communicable diseases, then could the state require high-risk groups, for example, single people or nurses, to take Truvada? Could the state require all blood donors to take Truvada? All adults? Such notions offend our constitutional sensibilities.

b. Dated Contrary Precedent Must Be Synthesized with Modern Concepts.

Defendants may assert that *Jacobson v. Massachusetts,* 197 U.S. 11 (1905) and its progeny pre-emptively created a carve-out from the later-recognized medical-refusal right, or the right to direct the upbringing of one's children. However, to the extent that older cases conflict with modern precedent, modern precedent must prevail.[7] Dire analogies about the propriety of relying solely on the *Jacobson* line of cases are unnecessary to make here, because the Supreme Court has already made the point itself, in a case upholding forced sterilization:

> [S]ociety can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts,* 197 U. S. 11. Three generations of imbeciles are enough. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (citation in the original).

Considering this language, few would contest that these cases must be carefully synthesized with modern precedent. The proper view recognizes *Jacobson* and its progeny as narrow, limited, and distinguishable, consistent with modern precedent.[8] The Jacobson line of cases articulated that (a) a relatively self-contained township; (b) could require an individual to be vaccinated against a highly

7 The *Jacobson* line of cases originated decades before *United States v. Carolene Products*, 304 U.S. 144 (1938) first expatiated our modern constitutional construct and before the landmark bodily autonomy cases.

8 Plaintiffs emphasize they are not asking this district court to rule on the continued vitality of *Jacobson,* even given its manifest conflicts with decades of subsequent contrary precedent. Plaintiffs merely assert what is self-evident to any law student: that all relevant precedent must be synthesized in such a manner as to give effect to each case in a consistent manner. The only way to give weight and deference to *all* relevant precedent in this subject area is as articulated above.

contagious, airborne disease; (c) or pay a fine; (d) during a serious outbreak of the same disease; (e) before the era of widespread travel made such mandates less meaningful. *See id.; Zucht v. King,* 260 U.S. 174 (1922).[9]

Section 120325 creates an unconstitutional condition, but it may be instructive to engage in a substantive-due-process-like analysis to demonstrate that the infringement caused by Section 120325 does not fall within the narrow exceptions to the Supreme Court's modern conceptions of fundamental rights. Indeed, the following analysis best synthesizes what is allowed by the *Jacobson* line of cases and the Court's subsequently exposited balancing tests.

i) The Court Must Not Defer to the Legislature's Factual Findings, and Has Broad Power to Reform an Unconstitutional Statute

Throughout this exercise, it must be emphasized that whether in the unconstitutional-conditions or traditional due-process realms, the Court should not defer to the California legislature when it makes unsupported or illogical factual findings. Instead, the Court has an "independent constitutional duty to review factual findings where constitutional rights are at stake." *Gonzalez v. Carhart*, 550 U.S. 124, 165 (2007). This independent duty includes allowing for a healthy skepticism when legislatively proffered findings appear illogical or unsupported by verisimilitude. *Id.* And, of course, the Court has inherent power to re-formulate an unconstitutional statute. *See e.g., In re LePage*, 18 P.3d 1177 (Wyo. 2001) (reforming unconstitutional vaccine mandate to engraft on personal-beliefs waiver).

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9 The *Jacobson* line must be read *to impose limitations* on the state's police power in these situations, including requirements of necessity, reasonableness, proportionality, and clear harm avoidance.

ii) The Situation in Modern California Is not Compelling Enough to Justify Infringement

Clearly the mandates in Section 120325 infringe fundamental rights. Thus, whether an exception can exist would first require analyzing whether the government interest is compelling. While the proffered reason for Section 120325 (ending communicable diseases) is laudatory, defendants cannot credibly claim that all of the ten diseases covered by Section 120325 are on the rise and pose urgent public emergencies to justify changing the century-old *status quo ante* of California law. To wit, aside from a much-hyped outbreak of measles at Disneyland,[10] it would be difficult to argue that much changed in California's infectious-disease landscape between 2015 and 2016, when Section 120325's much more severe rules took effect.

Contrast the modern situation with the compelling circumstances of previous cases. Then, the defendant communities had suffered hundreds of fatalities from a deadly communicable disease. For example, in the lead-up to the *Jacobson* decision, an average of one in 350 people in Boston were infected with smallpox, and hundreds died.[11] Exigent circumstances existed, ones that even the most dire Cassandras cannot claim are present here.[12]

Additionally, the infectious diseases at issue in the older cases provided a compelling reason justifying the infringement of rights, because the diseases were both deadly and immediately so. The proponents of Section 120325 clearly did not formulate the list of diseases contained therein with any consideration for the genuineness of the threat. As just a few examples, it requires the vaccination of

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10 A place drawing millions of foreign visitors annually; a place unrelated to education.

11 Based on 1596 cases in a population of 560,892 at the time. *See* https://en.wikipedia.org/wiki/History_of_smallpox and http://www.infoplease.com/ipa/A0922422.html. Based on current population numbers, this would be like 110,000 Californians getting a disease.

12 *See* https://www.cdph.ca.gov/HealthInfo/discond/Documents/Measles_update_4-17-2015_public.pdf (discussing Disneyland cases).

kindergarteners for Hepatitis B, a disease that is almost always sexually transmitted, and one whose primary risk is liver cancer decades later.[13] Section 120325 further requires the vaccination for tetanus, that while very rarely serious to an individual, is not even communicable. It requires vaccination for chicken pox, which has always been about equal to the proverbial "getting struck by lightning" as a cause for concern.[14] There is simply not the immediate, serious threat for exposure, spread, magnitude, and serious harm required by *Jacobson* and *Zucht.* All of this is constitutionally significant, as is the scope of intrusiveness, which here is far greater than what has been deemed a permissible *de minimis* infringement.[15]

Simply put, the exigence here is insufficient to meet the "compelling" threshold under strict scrutiny. Absent a severe, immediate threat to large numbers of people, the government is free to educate, free to incentivize, free to distribute medication *gratis*, but not free to infringe.[16] Any such rule to the contrary is too circular to qualify as the unimpeachable logic required to meet strict scrutiny when a law infringes fundamental rights. To wit, the government's position – that "certain diseases have been nearly eradicated because of voluntary programs, but the

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13 http://www.webmd.com/hepatitis/hepatitis-and-sex-frequently-asked-questions#1 Hepatitis B can be avoided by safe sex, disease screening, and/or abstinence. Unlike with smallpox, vaccination is just one way to treat it.

14 http://www.rightdiagnosis.com/c/chickenpox/stats.htm; http://www.lightningsafety.noaa.gov/odds.shtml

15 To inoculate for the ten diseases and syndromes required by Section 120325, a child must receive at least twenty-five different doses and twenty-five different pokes. *See* http://www.cdc.gov/vaccines/schedules/hcp/imz/child-adolescent.html

If that many intrusions is not too burdensome, how many are? 50? 100? The constitution requires such intrusions to be *de minimis* when infringing on a right.

16 Of course plaintiffs acknowledge that even under strict scrutiny, there are times where the government may take otherwise draconian, infringing steps to protect the public, including even restriction of movement. Plaintiffs note though, that even during the height of paranoia of the AIDS epidemic, or the real fear about Zika today, the government did not take those steps. What situation is so compelling that it justifies such clear infringements? Plaintiffs need not draw that line. Here, it is manifest that the current status quo cannot justify the unmistakable and comprehensive infringements caused by twenty-five injections and countless doctors visits, overriding two fundamental liberties, many times.

'urgency' to prevent disease – including future STDs and cancers, is so 'immediate' that it justifies an infringing mandate" – is too illogical to survive strict scrutiny.

iii) Section 120325 Is Not Tailored to Meet Its Ends

The next step involves examining how the law is tailored to achieve its purpose. In strict-scrutiny analysis, a necessary syllogism is whether a law can logically accomplish its ends at all. Section 120325 is so under-broad that it cannot possibly achieve its objectives. It does not cover homeschooled children and categorically exempts foster children.[17] Those unvaccinated kids are still free to sweat in weekend sports leagues together, to sit on tightly packed subways for hours at a time, and to squirm through hours of services at churches and synagogues, each of which are configured similarly to schools. Moreover, California is a vast state generating 263 million tourist visits a year, many from countries with no vaccination requirements.[18] People who live along the Oregon, Nevada, Arizona, and Mexico borders regularly fraternize with those just across.[19] Again, these details are constitutionally significant because a law that so clearly infringes constitutional rights, if spurious, cannot satisfy the exacting constitutional standard.

Once more, *Jacobson* and *Zucht* are instructive and provide a stark contrast to the present situation. In those cases, towns passed laws, before the era of international travel – indeed before much travel at all. Therefore, the ordinances there were credibly tailored to meet its ends. The folly of burdening California schoolchildren and infringing their fundamental rights, while millions of

17 *See* Cal. Health & Safety Code § 120341.

18 Visit California, *California Statistics and Trends,* http://industry.visitcalifornia.com/Find-Research/California-Statistics-Trends/

19 *See, e.g.,* Maria LaGanga, *In Needles, It's Spring Ahead, Fall Apart*, Los Angeles Times (Oct. 30, 1993), available at http://articles.latimes.com/1993-10-30/news/mn-51239_1_pacific-time

unvaccinated foreign children alone visit the state each year, is manifest.[20] Absent quarantines at the border, Section 120325 is not reasonably tailored to meet its ends.

iv) Section 120325 Is not Narrowly Tailored

Section 120325 also suffers from several other "narrowly tailored" problems. Whereas the ordinance in *Jacobson* covered one discreet and immediately dangerous disease, Section 120325, in addition to the ten different diseases mentioned above, incredibly also requires treatment for, "Any other disease deemed appropriate by the [health] department..." Under no circumstances can a statute purporting to infringe so broadly be considered narrowly tailored. Moreover, even *Jacobson* authorized compulsory vaccination only when "necessary for *public* health or the *public* safety." *Id*. at 27 (emphasis added). Section 120325 contains mandates for diseases that are very much matters of *personal* health. If the line is drawn there, and infringing rights is allowed for non-public-health emergencies, it opens the door to a large variety of mandatory medication or mandatory treatments, as mere tools for forcing personal preventative health on the public.

v) There Are Less Intrusive Ways of Achieving the Government's Purpose

Lastly, there are also less intrusive means of achieving the government's purpose. Recall that the ordinance at issue in *Jacobson* allowed objectors to pay a fine if they wanted to avoid intrusion. *Id*. at 21, 25. Section 120325 does not allow such an option; there is no *de minimis* "out" other than completely relinquishing one's constitutional right to attend school. Presumably, allowing such a modest fine (and even using the money to subsidize vaccines or spread the word about them) would still allow the government to accomplish its stated purposes of widespread

20 Disneyland alone sees approximately 3.2 million foreign visitors annually.

vaccination, but allow those with concerns to exercise their parental and medical rights. Such a *de minimis* fine would not impermissibly burden those rights, especially as compared to the outright prohibition of exercising those rights contained in Section 120325.

But equally significantly, vaccination rates have remained rock-solid constant in California.[21] If the state is concerned about falling rates in certain "pockets" of the state it must first try a massive educational effort about the safety and efficacy of vaccines in those targeted communities. In other words, the state may not ban the 0.2% of Colusa County residents – a small minority – from exercising their right to refuse medical treatment, just because vaccination rates have fallen in, say, Del Norte County.[22]

Other less intrusive means exist too. The state should allow Assembly Bill 2109 (2012) to have an effect – a law that amended the same section of the Health & Safety Code, and one that took effect just thirteen months before the legislation that became the new Section 120325 was introduced. AB 2109 required doctors to have in-person consultations with parents before granting a child a vaccine exemption.[23] In other words, the state can educate; or it can make it difficult to get an exemption, it can require a modest fee to incentivize vaccination; it can distribute medication for free. These are just a few of many such examples of less intrusive

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21 In 2012-2013, "Immunization coverage was above 92% for each vaccine for all schools." https://www.cdph.ca.gov/programs/immunize/Documents/2012_-_2013_CA_Kindergarten_Immunization_Assessment.pdf

In 2013-2014, "Immunization coverage was above 92% for each vaccine for all schools." https://www.cdph.ca.gov/programs/immunize/Documents/2013_14_KindergartenAssessmentSummary.pdf

In 2014-2015, "Immunization coverage was above 92% for each vaccine for all schools." https://www.cdph.ca.gov/programs/immunize/Documents/2014-15%20CA%20Kindergarten%20Immunization%20Assessment.pdf

22 *See* https://www.cdph.ca.gov/programs/immunize/Documents/2015-16_CA_KindergartenSummaryReport.pdf at page 11 (county statistics).

23 Available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB2109

measures for raising the vaccination rate. Instead the state chose to burden fundamental rights. The Constitution allows the government latitude to respond in times of public-health crises or emergencies, but it does not allow infringing on civil rights in the name of public health, when so many other effective methods present themselves.

After a careful analysis, it is clear the present circumstances are different from those presented in the early twentieth-century precedent. Those differences are constitutionally significant. Therefore, there is no automatic carve-out for Section 120325 based on holding up certain totems. Based on the infringements caused by the law and the lack of exception, Section 120325 must be considered an unconstitutional condition.

3. Purported Alternatives Do Not Save Unconstitutional Conditions

Section 120325 is not saved by the fact that an alleged alternative (homeschooling) exists for children who do not wish to be told what medicines to inject, and for mothers and fathers who do not wish the state to override their parental instincts. Under the doctrine of Unconstitutional Condition, it doesn't matter that alternatives are present. Plaintiffs need not articulate the obvious reasons why a child sitting in her living room does not compare with a public education. All that matters is that the state is denying a "valuable government benefit" to those who choose to exercise a constitutional right. *Perry v. Sinderman,* 408 U.S. 593, 597 (1972). "Just homeschool your kid" is as deficient as the "just get another job" in *Perry.*

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4. Even If Public Education Was Not a Fundamental Right in California, Section 120325 Would Still Fail for Lack of Nexus

In the rare instances where courts have upheld laws conditioning a government benefit on the relinquishing of a fundamental right, the government has shown convincingly an essential nexus between the benefit conferred and the condition imposed. *See Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983). Even if this was not an example of conditioning one fundamental right on the relinquishing of another, Section 120325 would still fail because there is no essential nexus between education and medical decisions. The Supreme Court takes a very conservative view of what conditions are sufficiently related to a relinquished right to save a law tying the two. For example, the Court has repeatedly struck down laws conditioning a property-right permit on the relinquishing of the property right to be free from uncompensated takings, for not being sufficiently related. *See e.g., Parks*.[24]

There is no essential tie between learning one's ABCs and making decisions as intimate as what medications to inject in one's body. Defendants may try arguing that the closeness of children in school mean that diseases can spread more easily, but as discussed above, under Section 120325, unvaccinated children can still congregate in weekend-football-league locker rooms, in subways, and in private dance recitals. Therefore, the state must reply that it indeed has the power to suspend the right to refuse medical treatment for entire classes of people, or it must acknowledge that this law suffers from serious under-breadth, making any "nexus" with school evaporate as irrational.

Under any metric, the court must enjoin all of the Defendants from any further enforcement of Section 120325, as it creates an unconstitutional condition.

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24 Courts often use the term, "rational relationship," or "rationally related," but this is *not* a "rational-basis" test. There is no deference to the legislature, and pretextual reasons are not allowed (unlike under rational-basis review). *See id.* (refusing to give deference to city's proffered reasons for condemning certain property rights).

B. SECTION 120325 MUST ALSO FAIL FOR BEING AN UNCONSTITUTIONAL GENERAL MANDATE

Another way of examining a law that attempts to condition behavior is by inquiring whether the government could pass the same law absent the condition. "The government cannot do indirectly what [it] is forbidden from doing directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). A secondary issue is therefore whether California can essentially backdoor parental medical-decisionmaking rights out of existence, by requiring 97% of children[25] – the percentage of students not currently homeschooled – to get the twenty-five medical treatments required by Section 120325. In other words, can a state issue a *de facto* ban on medical decision-making discretion for a certain class of citizens? Can a state directly mandate that all children be vaccinated? Can California simply use school as pretext to backdoor a mandate of general applicability?

And if the answer is yes, why didn't the state do so here? Modern due-process concepts suggest that a thinly disguised mandate that all parents put certain medicines into their children would offend our constitutional sensibilities. Such a statute of general applicability – a law infringing on both the child's fundamental right to make medical decisions and the parents' fundamental right to raise their child – would be subject to the strictest scrutiny under a substantive-due-process analysis, and would almost certainly fail except under the most dire emergencies.

So although this is a secondary issue, it presents a critical prism with which to view this case. If such a broad (and indeed, unprecedented)[26] mandate would offend our notions of constitutional liberty, then surely tying such a mandate to

25 National Center for Education Statistics, *Fast Facts: Homeschooling*, https://nces.ed.gov/fastfacts/display.asp?id=91

26 Plaintiffs are aware of no state in the nation and no country in the world that directly/outright mandates vaccination for the public at large. Yet this is the stated goal of Section 120325(a). Tying it to a fundamental right is an improper way to accomplish it.

public K-12 education, a fundamental right in California, can't be proper either. There is no special quality about schools (as opposed to weekend football leagues or public buses) that confers a special constitutional right to infringe. Indeed, the opposite is true in California.[27]

So instead of burdening one class and the right to public education, the state must be prepared to pass and justify a widespread vaccine law and test its luck with courts of appeal. Such a mandate would surely be too burdensome, unenforceable, and pointless, absent quarantines and other draconian measures. Similar impracticalities (for example, enforcing birth-control laws in the privacy of private homes) have been cited by our Supreme Court as buttressing the conclusion that a law was so unworkable as to be unconstitutional. *See Griswold* at 486. Here, the fact that the state picked on public education, a fundamental right, can't somehow make its mandate more proper.

II. PLAINTIFFS WILL BE IRREPABLY HARMED IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

Plaintiffs are and continue to be irreparably harmed every day that Section 120325 remains on the books. "[C]onstitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008). Each minor school-aged Plaintiff desires to exercise their rights under the California Constitution and enroll in public-school in California, but has been informed that they will be denied such rights on the grounds that they have exercised their constitutional right to refuse medical treatment. Love Aff. ¶6 & 8; Barrow Aff. ¶6, 8, & 9; Sargent Aff. ¶7, 8, 9, & 10. Moreover, each Plaintiff parent seeks and desires to enroll their child in public-school grades K-12 all the while exercising their fundamental right to parent

27 *Zucht* must be read as authorizing certain limited infringements only in states where public education is not a fundamental right.

their child, including their fundamental and constitutional right to refuse medical treatments on behalf of their children. Love Aff. ¶8, 9, & 11; Barrow Aff. ¶6 & 8; Sargent Aff. ¶9 & 10. Each Plaintiff parent has been made well aware that under the new guidelines set forth by Section 120325, that they are absolutely barred and may not enroll their children in any public-school unless they each give up their specific fundamental right to forego medical treatments on their child's behalf. Love Aff. ¶8, 9, & 10; Barrow Aff. ¶6 & 8; Sargent Aff. ¶9& 10. Thus, in addition to the constitutional injury, as long as Section 120325 remains in effect, Plaintiffs and those similarly situated will be denied the very real benefits of a normative public education. *See Phipps*. Of course, monetary damages would be completely inadequate for the types of injuries the Plaintiffs have suffered and continue to suffer. [28] Love Aff. ¶7, 8, 9, 10, 11, 12, 13, & 14; Barrow Aff. ¶7, 8, 10, 11, 12, 13, & 14; Sargent Aff. ¶7, 8, 9, 10, 11, 12, & 13.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR A PRELIMINARY INJUNCTION.

Lastly, a preliminary injunction is proper because an order enjoining the enforcement of Section 120325 would not burden the rights of Defendants or third parties, and would promote fairness.

Requiring the State of California to allow all children, whether vaccinated or not, to enroll in and attend public-school in grades K-12 would not burden the Defendants' rights in any manner whatsoever. Indeed, up until July 2016, this was the status quo in California. And as noted above, there were no issues with that status quo. The balance of the equities is clearly tilted toward allowing healthy

28 It should be noted that monetary damages are unavailable in this case because sovereign immunity bars the award of monetary relief against state officials sued in their official capacities. *See Edelman v. Jordan*, 415 U.S. 651, 665 (1974). Similarly, qualified immunity would likely bar any subsequent suit seeking monetary relief from these Defendants in their personal capacities. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

children – children with nothing wrong with them – to attend school in California, which is their right under the California Constitution.

In this matter, a preliminary injunction would not burden the rights of third parties, but rather, would promote the public interest because "all citizens have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). A preliminary injunction vindicating both children's and parental fundamental constitutional rights would undoubtedly progress the unified interest of all citizens in enforcing the guarantees afforded to all citizens through the Constitution and to reinforce this "Nation's basic commitment…to foster the dignity and well-being of all persons within its borders." *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).

IV. CONCLUSION

For the foregoing reasons, and on the basis that Section 120325 creates an unconstitutional condition, the Court should issue a preliminary injunction enjoining the Defendants from enforcing California Health and Safety Code, §§120325, 120335, 120338, 120370, and 120375, insomuch as that provision limits children from attending public schools grades K-12 while they and their parents exercise their constitutional rights to refuse medical services and bodily autonomy.

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THE HAKALA LAW GROUP, P.C.

By: /s/ Brad A. Hakala
Brad A. Hakala

Attorneys for Plaintiffs, Devon Torrey-Love, S.L., Courtney Barrow, A.B., Margaret Sargent, M.S., W.S., and A Voice for Choice, Inc.