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9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION**

11

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

15 Plaintiffs,

16 v.

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

26 Defendants.  
27  
28

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 1<sup>st</sup> 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*<sup>1</sup> 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

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<sup>1</sup> Hereinafter, these sequential sections, namely §§120325, 120335, 120338, 120370, and 120375 will be referred to as simply, “Section 120325.”



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

3 Plaintiff Devon Torrey-Love, and her child, Plaintiff S.L. live in the State of  
4 California. Love Aff. ¶1. Neither Plaintiff Love nor S.L. desires to have S.L.  
5 vaccinated with any vaccines, and to date, S.L. has not been vaccinated. Love Aff.  
6 ¶4, 9, & 11. S.L., a child who loves school, learning, and being social with his peer  
7 group, has a strong desire to attend kindergarten in public school. Love Aff. ¶8.

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

21  
22 **ARGUMENT**

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

1 the injunction. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7  
2 (2008). As shown below, Plaintiffs are likely to prevail on the merits because  
3 Section 120325 so clearly creates an unconstitutional condition by forcing  
4 Californians to choose between exercising fundamental rights, and because no  
5 exception exists for a law as broad as Section 12035. A constitutional violation is,  
6 of course, always irreparable harm, and remedying such a harm is always in the  
7 public interest. *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir.  
8 1997). And beyond the perhaps intangible ideals of preserving their rights to make  
9 medical and parental decisions, Plaintiffs also suffer the very real harm of not being  
10 able to enjoy the benefits of a public education, a benefit that is well-established,  
11 and for which it is inequitable for the state to deny them.

12  
13 **I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF**  
14 **THEIR CONSTITUTIONAL CHALLENGE.**

15 When faced with laws forcing the public to relinquish one right to exercise  
16 another, courts have been particularly unequivocal. Such conditions are improper.  
17 The right to refuse medical treatment and the right for a parent to exercise judgment  
18 in the care of their children are well-established, so old that they pre-date the  
19 Constitution. In California, a public K-12 education is a fundamental right. Dated  
20 vaccine precedent does not create an exemption for a law as broad as Section  
21 120325, and must be synthesized with modern precedent. Thus, it created an  
22 unconstitutional condition, and Plaintiffs are likely to succeed in their challenge to  
23 it.

24  
25 **A. Section 120325 Creates An Unconstitutional Condition**

26 “If the state may compel the surrender of one constitutional right as a  
27 condition of its favor,” then the “guaranties embedded in the Constitution . . . may  
28

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

9  
10 **1. A Statute May Not Force Citizens to Choose Between**  
11 **Fundamental Rights**

12 The government cannot condition the exercise of one fundamental right on  
13 the relinquishing of another. *Simmons v. U.S.*, 390 U.S. 377, 393-94 (1968). When  
14 the government forces individuals “to forfeit one constitutionally protected right as  
15 the price for exercising another,” no balancing test is appropriate; such conditioning  
16 simply isn’t allowed. *See id.*; *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-808  
17 (1977). Courts must be “peculiarly sensitive” in such situations, as it is “intolerable  
18 that one constitutional right should have to be surrendered in order to assert  
19 another.” *Simmons* at 394.

20  
21 **a. Refusing Medical Treatment and Directing the**  
22 **Upbringing of One’s Children Are Fundamental**  
23 **Rights**

24 Individuals have a general right to bodily autonomy and the specific  
25 fundamental right to refuse medical treatments. *Cruzan v. Director*, 497 U.S. 261  
26 (1990). Parents have a fundamental right to make decisions on the care and  
27

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

3  
 4 “The liberty interest . . . of parents in the care, custody, and control of  
 5 their children is perhaps the oldest of the fundamental liberty interests  
 6 recognized. It is cardinal . . . that the custody, care, and nurture of the  
 7 child reside first in the parents, whose primary function and freedom  
 8 include preparation for obligations the state can neither supply nor  
 9 hinder. It cannot . . . be doubted that the Due Process Clause of the  
 10 Fourteenth Amendment protects the fundamental right of parents to  
 11 make decisions concerning the care, custody, and control of their  
 12 children.” *Id.* at 65 (2000) (citations omitted).

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

## 19 **b. Public K-12 Education Is a Fundamental Right in** 20 **California**

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

24  
 25 <sup>2</sup> The doctrine of Unconstitutional Condition is not limited to enumerated rights anyway. While many cases  
 26 involve First Amendment speech or religious rights, or the Fifth Amendment right against self-incrimination, it  
 27 is also clear that the doctrine applies to rights guaranteed by the Fourteenth Amendment. *See Nollan v. Calif.*  
 28 *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).

1 education in the federal constitution, a public K-12 education is a fundamental right  
 2 in California. *Hartzell v. Connell*, 35 Cal.3d 899 (1984); *Serrano v. Priest*, 18 Cal.  
 3 3d 778 (1976); *Slayton v. Pomona USD*, 161 Cal.App.3d 538, 548 (1984); *Steffes v.*  
 4 *Cal. Interscholastic Fed.*, 176 Cal.App.3d 739, 746 (1986); *Jones v. Cal.*  
 5 *Interscholastic Fed.*, 197 Cal.App.3d 751, 757 (1988); all construing Cal. Const.  
 6 Art. IX, §5. Public schools provide a sharpened mind, a path to future employment,  
 7 and a normative means to socialize. *See e.g., Phipps v. Saddleback Valley USD*,  
 8 204 Cal.App.3d 1110, 1114 (1988) (child with AIDS forced to homeschool suffered  
 9 “irreparable harm and damage by not being given the education and enjoying the  
 10 educational facilities uniquely available at his . . . school”). And for parents,  
 11 particularly single parents, school provides a form of child care, and thereby the  
 12 chance to be productive members of society.

13  
 14 **c. Section 120325 Improperly Conditions the Exercise of**  
 15 **Fundamental Rights on Relinquishing Fundamental**  
 16 **Rights**

17 Courts faced with laws conditioning the exercise of one fundamental right on  
 18 the relinquishing of another are unequivocal. *See Bourgeois v. Peters*, 387 F.3d  
 19 1303, 1324 (11th Cir. 2004) (“This case presents an especially malignant  
 20 unconstitutional condition because citizens are being required to surrender a  
 21 constitutional right . . . not merely to receive a discretionary benefit but to exercise  
 22 two other fundamental rights.”) That statement applies with equal force here.  
 23 Section 120325 places conditions on attending public K-12 school. For families to  
 24 access their right to education, children must relinquish their right to refuse medical  
 25 treatment, and parents must give up their right to guide the care of their children.<sup>3</sup>

26  
 27  
 28 <sup>3</sup> 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

1 The typical unconstitutional-condition analysis – of whether an essential nexus  
2 exists between the benefit (education) and the relinquished rights – is unnecessary  
3 here because a public K-12 education is a fundamental right in California. Section  
4 120325 creates a condition forcing Californians to surrender their federal  
5 constitutional rights as a precondition to exercising a state constitutional right.  
6 Under well-established principles, the court must strike down this law.

7  
8 **2. Precedent Does Not Provide an Exception for Section**  
9 **120325**

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

15  
16 **a. Vaccines Are Medications; Getting Vaccinated Is a**  
17 **Medical Procedure.**

18 As discussed *supra*, the “Supreme Court has recognized fundamental rights  
19 to determine one’s own medical treatment, and to refuse unwanted medical  
20 treatment, and has recognized a fundamental liberty interest in medical autonomy.”  
21 *Coons v. Lew*, 762 F.3d 891, 899 (9th Cir. 2014) (citations omitted).<sup>4</sup> It is well-  
22 decided that the decision as intimate as to what medications to put in a child’s body

23 \_\_\_\_\_  
24 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/>

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

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



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

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

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24 <sup>5</sup> Ariana Cha, *In new study, 100 percent of participants taking HIV prevention pill Truvada remained*  
25 *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/>

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

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**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.<sup>7</sup> 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.<sup>8</sup> The *Jacobson* line of cases articulated that (a) a relatively self-contained township; (b) could require an individual to be vaccinated against a highly

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<sup>7</sup> 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.

<sup>8</sup> 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.

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

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

10  
11 **i) The Court Must Not Defer to the Legislature’s**  
12 **Factual Findings, and Has Broad Power to**  
13 **Reform an Unconstitutional Statute**

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

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



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

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

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18 13 <http://www.webmd.com/hepatitis/hepatitis-and-sex-frequently-asked-questions#1> Hepatitis B can be  
 19 avoided by safe sex, disease screening, and/or abstinence. Unlike with smallpox, vaccination is just one way to treat  
 it.

20 14 <http://www.rightdiagnosis.com/c/chickenpox/stats.htm>; <http://www.lightningsafety.noaa.gov/odds.shtml>

21 15 To inoculate for the ten diseases and syndromes required by Section 120325, a child must receive at least  
 22 twenty-five different doses and twenty-five different pokes. See  
<http://www.cdc.gov/vaccines/schedules/hcp/imz/child-adolescent.html>

23 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.

24 16 Of course plaintiffs acknowledge that even under strict scrutiny, there are times where the government may  
 25 take otherwise draconian, infringing steps to protect the public, including even restriction of movement. Plaintiffs  
 26 note though, that even during the height of paranoia of the AIDS epidemic, or the real fear about Zika today, the  
 27 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  
 28 comprehensive infringements caused by twenty-five injections and countless doctors visits, overriding two  
 fundamental liberties, many times.

1 ‘urgency’ to prevent disease – including future STDs and cancers, is so ‘immediate’  
 2 that it justifies an infringing mandate” – is too illogical to survive strict scrutiny.

3  
 4 **iii) Section 120325 Is Not Tailored to Meet Its Ends**

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

18 Once more, *Jacobson* and *Zucht* are instructive and provide a stark contrast  
 19 to the present situation. In those cases, towns passed laws, before the era of  
 20 international travel – indeed before much travel at all. Therefore, the ordinances  
 21 there were credibly tailored to meet its ends. The folly of burdening California  
 22 schoolchildren and infringing their fundamental rights, while millions of  
 23

24 \_\_\_\_\_  
 17 See Cal. Health & Safety Code § 120341.

25 18 Visit California, *California Statistics and Trends*, <http://industry.visitcalifornia.com/Find-Research/California-Statistics-Trends/>  
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27 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](http://articles.latimes.com/1993-10-30/news/mn-51239_1_pacific-time)  
 28

1 unvaccinated foreign children alone visit the state each year, is manifest.<sup>20</sup> Absent  
2 quarantines at the border, Section 120325 is not reasonably tailored to meet its ends.

3  
4 **iv) Section 120325 Is not Narrowly Tailored**

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

17  
18 **v) There Are Less Intrusive Ways of Achieving the**  
19 **Government’s Purpose**

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

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20 Disneyland alone sees approximately 3.2 million foreign visitors annually.

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

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

12 Other less intrusive means exist too. The state should allow Assembly Bill  
 13 2109 (2012) to have an effect – a law that amended the same section of the Health  
 14 & Safety Code, and one that took effect just thirteen months before the legislation  
 15 that became the new Section 120325 was introduced. AB 2109 required doctors to  
 16 have in-person consultations with parents before granting a child a vaccine  
 17 exemption.<sup>23</sup> In other words, the state can educate; or it can make it difficult to get  
 18 an exemption, it can require a modest fee to incentivize vaccination; it can distribute  
 19 medication for free. These are just a few of many such examples of less intrusive  
 20

21 21 In 2012-2013, “Immunization coverage was above 92% for each vaccine for all schools.”  
 22 [https://www.cdph.ca.gov/programs/immunize/Documents/2012-\\_](https://www.cdph.ca.gov/programs/immunize/Documents/2012-_2013_CA_Kindergarten_Immunization_Assessment.pdf)  
 23 [\\_2013\\_CA\\_Kindergarten\\_Immunization\\_Assessment.pdf](https://www.cdph.ca.gov/programs/immunize/Documents/2012-_2013_CA_Kindergarten_Immunization_Assessment.pdf)

24 In 2013-2014, “Immunization coverage was above 92% for each vaccine for all schools.”  
 25 [https://www.cdph.ca.gov/programs/immunize/Documents/2013\\_14\\_KindergartenAssessmentSummary.pdf](https://www.cdph.ca.gov/programs/immunize/Documents/2013_14_KindergartenAssessmentSummary.pdf)

26 In 2014-2015, “Immunization coverage was above 92% for each vaccine for all schools.”  
 27 [https://www.cdph.ca.gov/programs/immunize/Documents/2014-](https://www.cdph.ca.gov/programs/immunize/Documents/2014-15%20CA%20Kindergarten%20Immunization%20Assessment.pdf)  
 28 [15%20CA%20Kindergarten%20Immunization%20Assessment.pdf](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-](https://www.cdph.ca.gov/programs/immunize/Documents/2015-16_CA_KindergartenSummaryReport.pdf)  
 27 [16\\_CA\\_KindergartenSummaryReport.pdf](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](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB2109)



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

6 After a careful analysis, it is clear the present circumstances are different from  
7 those presented in the early twentieth-century precedent. Those differences are  
8 constitutionally significant. Therefore, there is no automatic carve-out for Section  
9 120325 based on holding up certain totems. Based on the infringements caused by  
10 the law and the lack of exception, Section 120325 must be considered an  
11 unconstitutional condition.

12  
13 **3. Purported Alternatives Do Not Save Unconstitutional**  
14 **Conditions**

15 Section 120325 is not saved by the fact that an alleged alternative  
16 (homeschooling) exists for children who do not wish to be told what medicines to  
17 inject, and for mothers and fathers who do not wish the state to override their  
18 parental instincts. Under the doctrine of Unconstitutional Condition, it doesn't  
19 matter that alternatives are present. Plaintiffs need not articulate the obvious reasons  
20 why a child sitting in her living room does not compare with a public education. All  
21 that matters is that the state is denying a "valuable government benefit" to those who  
22 choose to exercise a constitutional right. *Perry v. Sinderman*, 408 U.S. 593, 597  
23 (1972). "Just homeschool your kid" is as deficient as the "just get another job" in  
24 *Perry*.

25 ///

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27 ///

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

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

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

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

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26  
 27 <sup>24</sup> Courts often use the term, “rational relationship,” or “rationally related,” but this is *not* a “rational-basis”  
 28 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).

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

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

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

21           So although this is a secondary issue, it presents a critical prism with which  
 22 to view this case. If such a broad (and indeed, unprecedented)<sup>26</sup> mandate would  
 23 offend our notions of constitutional liberty, then surely tying such a mandate to  
 24

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

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

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

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

14  
15 **II. PLAINTIFFS WILL BE IRREPARABLY HARMED IN THE ABSENCE**  
16 **OF A PRELIMINARY INJUNCTION.**

17 Plaintiffs are and continue to be irreparably harmed every day that Section  
18 120325 remains on the books. “[C]onstitutional violations cannot be adequately  
19 remedied through damages and therefore generally constitute irreparable harm.”  
20 *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008). Each minor school-aged  
21 Plaintiff desires to exercise their rights under the California Constitution and enroll  
22 in public-school in California, but has been informed that they will be denied such  
23 rights on the grounds that they have exercised their constitutional right to refuse  
24 medical treatment. *Love Aff.* ¶6 & 8; *Barrow Aff.* ¶6, 8, & 9; *Sargent Aff.* ¶7, 8, 9,  
25 & 10. Moreover, each Plaintiff parent seeks and desires to enroll their child in  
26 public-school grades K-12 all the while exercising their fundamental right to parent

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

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

14  
15 **III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST**  
16 **FAVOR A PRELIMINARY INJUNCTION.**

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

20 Requiring the State of California to allow all children, whether vaccinated or  
21 not, to enroll in and attend public-school in grades K-12 would not burden the  
22 Defendants' rights in any manner whatsoever. Indeed, up until July 2016, this was  
23 the status quo in California. And as noted above, there were no issues with that  
24 status quo. The balance of the equities is clearly tilted toward allowing healthy  
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26 <sup>28</sup> It should be noted that monetary damages are unavailable in this case because sovereign immunity bars the  
27 award of monetary relief against state officials sued in their official capacities. *See Edelman v. Jordan*, 415 U.S. 651,  
28 665 (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).

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

3 In this matter, a preliminary injunction would not burden the rights of third  
4 parties, but rather, would promote the public interest because “all citizens have a  
5 stake in upholding the Constitution” and have “concerns [that] are implicated when  
6 a constitutional right has been violated.” *Preminger v. Principi*, 422 F.3d 815, 826  
7 (9th Cir. 2005). A preliminary injunction vindicating both children’s and parental  
8 fundamental constitutional rights would undoubtedly progress the unified interest  
9 of all citizens in enforcing the guarantees afforded to all citizens through the  
10 Constitution and to reinforce this “Nation’s basic commitment...to foster the dignity  
11 and well-being of all persons within its borders.” *Goldberg v. Kelly*, 397 U.S. 254,  
12 264-65 (1970).

13  
14 **IV. CONCLUSION**

15 For the foregoing reasons, and on the basis that Section 120325 creates an  
16 unconstitutional condition, the Court should issue a preliminary injunction enjoining  
17 the Defendants from enforcing California Health and Safety Code, §§120325,  
18 120335, 120338, 120370, and 120375, insomuch as that provision limits children  
19 from attending public schools grades K-12 while they and their parents exercise  
20 their constitutional rights to refuse medical services and bodily autonomy.

21 DATED: December 8, 2016

**THE HAKALA LAW GROUP, P.C.**

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

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