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8  
9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
11 WESTERN DIVISION

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

17 Plaintiffs,

18 v.

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

27 Defendants.  
28

5:16-cv-2410 DMG (DTBx)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION TO  
DISMISS PLAINTIFFS'  
COMPLAINT**

**[Fed. R. Civ. P. 12(b)(1), (6)]**

**[Filed Concurrently with  
Defendants' Notice of Motion and  
Motion to Dismiss; Request for  
Judicial Notice; and Proposed  
Order]**

Date: January 13, 2017  
Time: 9:30 a.m.  
Courtroom: 8C, 8th Floor  
Judge: The Honorable Dolly M.  
Gee  
Trial Date: None Set  
Action Filed: November 21, 2016

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**INTRODUCTION**

1  
2 Plaintiffs’ Complaint fails to state a claim on which relief may be granted  
3 because their claims are unsupported as a matter of federal and state constitutional  
4 law, which for decades has consistently held that (1) a state’s exercise of its police  
5 powers in protecting the public from communicable diseases is rationally based; (2)  
6 states have a legitimate and compelling interest in requiring children to be  
7 vaccinated before entering school; and (3) personal belief exemptions in mandatory  
8 vaccination statutes, which were created by statute, are not constitutionally  
9 protected and, as such, may be eliminated by the Legislature.

10 In enacting Senate Bill 277 (Cal. Stats 2015 Ch. 35) (SB 277) (to which  
11 Plaintiffs refer in their Complaint as §120325 *et seq.*), on June 30, 2015, the  
12 Legislature expressed its intent to accomplish the total immunization of school  
13 children against a number of deadly, but highly preventable, childhood diseases.  
14 Plaintiffs’ claims are predicated on the misguided supposition that their subjective,  
15 personal beliefs against childhood vaccinations can outweigh the health and safety  
16 of the millions of children enrolled in California schools, the health and safety of  
17 the general public, and the considered judgment of the California Legislature in  
18 addressing a significant public health issue that embodies a core function of  
19 government: to protect the health and safety of its citizens against preventable  
20 harm.

21 This is the fourth case filed in California courts attempting to enjoin the  
22 enforcement of SB 277, with this latest attempt coming well over a year after the  
23 effective date of the law. Two of the prior cases – in the Southern District of  
24 California and the Los Angeles County Superior Court – have been dismissed. In  
25 both of these cases, the federal and state courts recognized that the authority of the  
26 Legislature to require students to be vaccinated in order to protect the health and  
27 safety of other students and the public at large, irrespective of their parents’  
28 personal beliefs, is firmly embedded in our jurisprudence. Mandatory vaccination

1 of school children embodies a quintessential function of an organized government  
2 to protect its people from preventable harm. Indeed, the State's legitimate and  
3 compelling interest in protecting public health and safety by mandating  
4 vaccinations for school children has been *unanimously* recognized by the U.S.  
5 Supreme Court, the California Supreme Court, and every other federal and state  
6 court that has addressed the issue. A motion to dismiss predicated in part on this  
7 indisputable precedent is already under submission in the third case challenging SB  
8 277, in the Central District of California.

9 By seeking to enjoin the enforcement of SB 277 over one year after its  
10 enactment, Plaintiffs are asking this Court to disregard decades of federal and state  
11 jurisprudence, and even the considered judgment of California federal and state  
12 courts that have evaluated these very claims with regard to SB 277. Indeed, these  
13 courts, as have courts from around the Nation, consistently recognized that the  
14 public health and welfare must not be jeopardized by the subjective beliefs of a  
15 small minority of individuals who, against all recognized scientific and legal  
16 authority, stubbornly disregard the long-recognized safety and effectiveness of  
17 vaccines, and who fail to recognize the public health threat that their unsupported  
18 opinions have on the lives of others around them.

19 Compounding the deficiencies of Plaintiffs' claims is their decision to assert  
20 their claims in federal court against state agencies and officers in their official  
21 capacities. Under the Eleventh Amendment and the doctrine of sovereign  
22 immunity, the state agencies, the Governor and the Attorney General are immune  
23 from Plaintiffs' federal and state law claims, and the other state officers are immune  
24 from Plaintiffs' state law claims.

25 Moreover, the Complaint fails to plausibly assert that Plaintiff A Voice for  
26 Choice has standing to bring its claims in this case.

27 Respectfully, Defendants' Motion to Dismiss should be granted without leave  
28 to amend.

1 **RELEVANT FACTS**

2 **I. THE STATE’S CHILD IMMUNIZATION STATUTES**

3 Senate Bill 277 (SB 277) was enacted over one year ago, on June 30, 2015.  
4 See Cal. Stats 2015 Ch. 35. In relevant part, SB 277 eliminates the personal belief  
5 exemption from the statutory requirement that children receive vaccines for certain  
6 infectious diseases prior to being admitted to any public or private elementary or  
7 secondary school, or day care center. *Id.* In so doing, SB 277 revised the  
8 California Health and Safety Code by amending sections 120325, 120335, 120370,  
9 and 120375, added section 120338, and repealed California Health and Safety Code  
10 section 120365. *Id.*

11 In enacting SB 277, the Legislature reaffirmed its intent “to provide . . . [a]  
12 means for the eventual achievement of total immunization of appropriate age  
13 groups” against these childhood diseases. Cal. Health & Saf. Code, § 120325(a).  
14 SB 277 requires children to be immunized against (1) diphtheria, (2) hepatitis B, (3)  
15 haemophilus influenzae type b, (4) measles, (5) mumps, (6) pertussis (whooping  
16 cough), (7) poliomyelitis, (8) rubella, (9) tetanus, (10) varicella (chickenpox), and  
17 (11) “[a]ny other disease deemed appropriate by the [California Department of  
18 Public Health (Department)].” *Id.*<sup>1</sup>

19 <sup>1</sup> The inherent dangers of these diseases are chronicled by the World Health  
20 Organization (WHO) and the Centers for Disease Control (CDC). *Diphtheria* is  
21 caused by a bacterium that produces a toxin that can harm or destroy human body  
22 tissues and organs. <http://www.who.int/immunization/topics/diphtheria/en/>.  
23 “Diphtheria affects people of all ages, but most often it strikes unimmunized  
24 children.” *Id.* *Hepatitis B* causes liver infection which “can lead to serious health  
25 issues, like cirrhosis or liver cancer.” <http://www.cdc.gov/hepatitis/hbv/index.htm>.  
26 *Haemophilus influenzae*, which is not to be confused with influenza (the “flu”) causes severe infection “occurring mostly in infants and children younger than five  
27 years of age . . . and can cause lifelong disability and be deadly.” <http://www.cdc.gov/hi-disease/index.html>. *Measles* can cause, among other things,  
28 pneumonia, brain damage, and death. <http://www.cdc.gov/vaccinesafety/vaccines/mmr-vaccine.html>. *Mumps* can cause deafness, inflammation of the brain and/or  
tissue covering the brain and spinal cord, and death. *Id.* *Rubella* could cause  
spontaneous miscarriages in pregnant women or serious birth defects. *Id.*  
*Varicella (chickenpox)* can lead to brain damage or death. *Id.* *Tetanus* causes  
painful muscle contractions, and can lead to death. <http://www.cdc.gov/tetanus/index.html>. *Pertussis*, also known as whooping cough, is a highly contagious  
(continued...)

1 SB 277 has been in effect since January 1, 2016. Personal belief exemptions  
2 have been prohibited since that date. Cal. Health & Saf. Code, § 120335(g)(1).  
3 And, since July 1, 2016, school authorities have been prohibited from  
4 unconditionally and initially admitting any child to preschool, kindergarten through  
5 sixth grade, or admitting or advancing any pupil to seventh grade, unless the pupil  
6 either has been properly immunized, or qualifies for other exemptions recognized  
7 by statute. Cal. Health & Saf. Code, § 120335(g)(3).

8 There are exemptions to the immunization requirements under SB 277.  
9 Vaccinations are not required for any student in a home-based private school or  
10 independent study program who does not receive classroom-based instruction. Cal.  
11 Health & Saf. Code, § 120335(f). Moreover, a child may be medically exempt  
12 from the immunizations specified in the statute if a licensed physician states in  
13 writing that “the physical condition of the child is such, or medical circumstances  
14 relating to the child are such, that immunization is not considered safe.” Cal.  
15 Health & Saf. Code, § 120370(a). Any other immunizations may only be mandated  
16 “if exemptions are allowed for both medical reasons and personal beliefs.” Cal.  
17 Health & Saf. Code, § 120338. SB 277 also provides an exception relating to  
18 children in individualized education programs. Cal. Health & Saf. Code, § 120335  
19 (h).

20 SB 277 further provides that personal belief exemptions on file with a school  
21 or child care center prior to January 1, 2016, will continue to be honored through  
22 each of the designated grade spans (birth to preschool; kindergarten and grades one  
23 to six inclusive; and grades seven to twelve, inclusive), until the unvaccinated pupil  
24 advances to the next grade span. Cal. Health & Saf. Code, § 120335(g).

25 

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*(...continued)*

26 respiratory disease “known for uncontrollable, violent coughing which often makes  
27 it hard to breathe,” and can be deadly. <http://www.cdc.gov/pertussis/>. **Polio** is an  
28 incurable, “crippling and potentially fatal infectious disease,” which spreads by  
“invading the brain and spinal cord and causing paralysis.” <http://www.cdc.gov/olio/>.

1 SB 277 was enacted in response to, among other things, a health emergency  
2 beginning in December 2014, when California “became the epicenter of a measles  
3 outbreak which was the result of unvaccinated individuals infecting vulnerable  
4 individuals including children who are unable to receive vaccinations due to health  
5 conditions or age requirements.” *See* Defendants’ concurrently-filed Request for  
6 Judicial Notice (RJN), Exh. 1, Sen. Com. on Education, Analysis of Sen. Bill No.  
7 277 (2014-15 Reg. Sess.), at 5.

8 “According to the Centers for Disease Control and Prevention, there  
9 were more cases of measles in January 2015 in the United States than  
10 in any one month in the past 20 years,” and “[m]easles has spread  
11 through California and the United States, in large part, because of  
12 communities with large numbers of unvaccinated people.”

11 *Id.* (italics added). As further noted in SB 277’s legislative history, “[a]ll of the  
12 diseases for which California requires school vaccinations are very serious  
13 conditions that pose very real health risks to children.” RJN, Exh. 2, Ass. Com. on  
14 Health, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at 4. “For example,  
15 measles in children has a mortality rate as high as about one in 500 among healthy  
16 children, higher if there are complicating health factors.” *Id.*, at 3. “Most of the  
17 diseases can be spread by contact with other infected children.” *Id.*, at 4.

18 The legislative history confirms that SB 277 was enacted with the support of  
19 recognized medical, educational and child-advocacy organizations in California,  
20 including, among others, the California Medical Association, the California Chapter  
21 of the American College of Emergency Physicians, the California Association for  
22 Nurse Practitioners, the California Primary Care Association, the California School  
23 Boards Association, the California School Nurses Organization, and the Children’s  
24 Defense Fund-California. RJN, Exh. 1, Sen. Com. on Education, Analysis of Sen.  
25 Bill No. 277 (2014-15 Reg. Sess.), at 10.

## 26 STANDARD OF REVIEW

27 To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6)  
28 of the Federal Rules of Civil Procedure (Rule 12(b)(6)), the complaint must allege

1 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic*  
2 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

3 The “plausibility” requirement serves to ensure that the “plain statement”  
4 required under Rule 8 of the Federal Rules of Civil Procedure (Rule 8) has “enough  
5 heft to ‘sho[w] that the pleader is entitled to relief.’” *Twombly*, 550 U.S. at 557.  
6 Purely conclusory allegations will not suffice; “a plaintiff’s obligation to provide  
7 the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and  
8 conclusions . . . .” *Id.* at 555-556. Plaintiffs may not rely on wholly conclusory  
9 allegations in the complaint and then simply hope that, through the discovery  
10 process, the necessary facts will arise to support their claim. *Id.* at 557-558.

11 Moreover, the complaint must be dismissed if there could be an alternative,  
12 non-nefarious explanation for defendants’ conduct, and that plaintiffs have failed to  
13 plead specific facts to rebut it. *Twombly*, 550 U.S. at 567-567.

14 In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court clarified that the  
15 standards of Rule 8 it articulated in *Twombly*, *supra*, apply to all civil actions. The  
16 Supreme Court re-affirmed that, “[w]here a complaint pleads facts that are ‘merely  
17 consistent with’ a defendant’s liability, it ‘stops short of the line between possibility  
18 and plausibility of ‘entitlement to relief.’” *Id.*, at 678 (quoting from *Twombly*).

19 Adherence to the pleading requirements in Rule 8 is critical to ensuring that  
20 government officials are not forced into litigation unnecessarily. As recognized in  
21 *Ashcroft v. Iqbal*:

22 If a Government official is to devote time to his or her duties, and to  
23 the formulation of sound and responsible policies, it is  
24 counterproductive to require the substantial diversion that is attendant  
to participating in litigation and making informed decisions as to how  
it should proceed.

25 *Iqbal*, 556 U.S. at 685.

26 Dismissal under Rule 12(b)(6) may be based on either: (1) lack of a cognizable  
27 legal theory, or (2) insufficient facts under a cognizable legal theory. *Conservation*  
28 *Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011). On a Rule 12(b)(6) motion

1 to dismiss, all allegations of material fact are taken as true and construed in the light  
2 most favorable to the nonmoving party. *Federation of African American*  
3 *Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996). However, the  
4 Court is not required to accept as true allegations that are merely conclusory,  
5 unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden*  
6 *State Warriors*, 266 F.3d 979, 988, as amended by 275 F.3d 1187 (9th Cir. 2001).

7 In evaluating a complaint under Rule 12(b)(6), the court may consider not  
8 only the allegations contained in the complaint, but also matters properly subject to  
9 judicial notice. *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas*  
10 *Storage*, 524 F.3d 1090, 1096 (9th Cir. 2008). Additionally, the court need not  
11 accept as true allegations that contradict matters properly subject to judicial notice.  
12 *Sprewell*, 266 F.3d at 988.<sup>2</sup>

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18 <sup>2</sup> There is some question as to whether dismissal based on Eleventh  
19 Amendment immunity should be analyzed under Rule 12(b)(6) or as a jurisdictional  
20 issue under Rule 12(b)(1). *Elwood v. Drescher*, 456 F.3d 943, 949 (9th  
21 Cir.2006)(12(b)(6)); *but see Savage v. Glendale Union High Sch.*, 343 F.3d 1036,  
22 1040–44 (9th Cir.2003) (jurisdictional issue under Rule 12(b)(1)). The Ninth  
23 Circuit has since attempted to reconcile these cases by calling Eleventh Amendment  
24 immunity “quasi-jurisdictional.” *Bliemeister v. Bliemeister (In re Bliemeister)*, 296  
25 F.3d 858, 861 (9th Cir. 2002). Since this motion is a facial challenge to the  
26 Complaint, the analysis is the same under both rules. *See, e.g., Hardesty v. Barcus*,  
27 Case No. CV 11-103-M-DWM-JCL, 2012 U.S. Dist. LEXIS 28902, \*\*8-9 (D.  
28 Montana, January 20, 2012) (“[t]here is some confusion in the Ninth Circuit as to  
which of these two rules [Rules 12(b)(1) and 12(b)(6)] provides the proper vehicle  
for seeking dismissal based on Eleventh Amendment immunity. But because the  
legal standards under both rules are essentially the same, the Court would reach the  
same conclusion under either rule”).



1 **ARGUMENT**

2 **I. PLAINTIFFS HAVE FAILED TO PLEAD A VIOLATION OF THEIR**  
3 **CONSTITUTIONAL RIGHTS BECAUSE LAWS REQUIRING MANDATORY**  
4 **IMMUNIZATION HAVE UNEQUIVOCALLY BEEN UPHELD AS**  
5 **CONSTITUTIONAL FOR OVER A CENTURY**

6 **A. The U.S. Supreme Court, California Supreme Court, and State**  
7 **and Federal Courts Have Consistently Upheld the**  
8 **Constitutionality of Mandatory Vaccination Laws**

9 For more than 100 years, the United States Supreme Court has upheld the right  
10 of the States to enact and enforce laws requiring citizens to be vaccinated. *Jacobson*  
11 *v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905). After facing criminal  
12 charges for failing to comply with a regulation that called for immunization against  
13 smallpox, the plaintiff in *Jacobson* argued that a compulsory vaccination law  
14 infringed on his personal constitutional rights. The Supreme Court disagreed,  
15 noting that “a community has the right to protect itself against an epidemic of  
16 disease which threatens the safety of its members[.]” *Id.* at 27. The Court further  
17 noted that “it was the duty of the constituted authorities primarily to keep in view  
18 the welfare, comfort, and safety of the many, and not permit the interests of the  
19 many to be subordinated to the wishes or convenience of the few.” *Id.* at 29. The  
20 Court concluded that the statute was a proper exercise of the legislative prerogative  
21 and that it did not deprive the plaintiff of his constitutional guarantees of personal  
22 and religious liberty.

23 The Supreme Court again addressed the issue of compulsory vaccination, this  
24 time in the context of schoolchildren, in the case of *Zucht v. King*, 260 U.S. 174  
25 (1922). In *Zucht*, the plaintiff’s children were excluded from a Texas public school  
26 because they were not vaccinated. The plaintiff in *Zucht* argued that the vaccination  
27 laws violated her rights to due process and equal protection under the United States  
28 Constitution, but the Court rejected those arguments. Relying on *Jacobson*, the  
Court stated it was long-ago “settled that it is within the police power of a State to  
provide for compulsory vaccination.” *Id.* at 176.

1           In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Supreme Court again  
2 affirmed the State’s overriding interest in the matter of public health, stating by way  
3 of example that a parent “cannot claim freedom from compulsory vaccination for  
4 the child more than for himself on religious grounds. The right to practice religion  
5 freely does not include liberty to expose the community or the child to  
6 communicable disease or the latter to ill health or death.” *Id.* at 166-167. *See also*  
7 *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) (“[f]or their own good  
8 and that of their classmates, public school children are routinely required to submit  
9 to various physical examinations, and to be vaccinated against various diseases”).

10           Since *Jacobson*, *Zucht*, and *Prince*, federal courts have repeatedly upheld  
11 mandatory vaccination laws over challenges predicated on the First Amendment,  
12 the Equal Protection Clause, the Due Process Clause, the Fourth Amendment,  
13 education rights, parental rights, and privacy rights, frequently citing *Jacobson*. In  
14 *Workman v. Mingo County Sch.*, 667 F. Supp.2d 679, 690-691 (S.D. W. Va. 2009),  
15 *affirmed Workman v. Mingo County Bd. of Educ.*, 419 F. App’x 348, 353-54 (4th  
16 Cir. 2011) (unpublished), the court rejected the argument that the plaintiff’s rights  
17 to free exercise, equal protection and substantive due process were violated when  
18 her daughter was not permitted to attend public school without the immunizations  
19 required by state law. The court noted that “a requirement that a child must be  
20 vaccinated and immunized before it can attend the local public schools violates  
21 neither due process nor . . . the equal protection clause of the Constitution.” *Id.*

22           Recently, in *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015), *cert.*  
23 *denied*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 104 (2015), citing *Jacobson*, the Second Circuit  
24 rejected the plaintiffs’ claims there that New York’s mandatory vaccination law  
25 violated their rights to due process, free exercise of religion and equal protection,  
26 holding that “mandatory vaccination as a condition for admission to school does not  
27 violate the Free Exercise Clause.” *Id.*

28           *Workman* and *Phillips* are the most recent in an extended line of cases from

1 various jurisdictions that have upheld state mandatory vaccination statutes. *See,*  
2 *e.g., Sherr v. Northport-East Northport Union Free School Dist.* 672 F. Supp. 81  
3 (E.D.N.Y. 1987) (recognizing that New York had a compelling state interest in  
4 enacting its mandatory vaccination statute); *Hanzel v. Arter*, 625 F. Supp. 1259  
5 (S.D. Ohio 1985) (holding parents’ objections to vaccination based on “chiropractic  
6 ethics” did not fall under the protection of the Establishment Clause); *Maricopa*  
7 *County Health Dept. v. Harmon*, 750 P.2d 1364 (Ariz. 1987) (holding that the  
8 state’s health department did not violate the right to public education in Arizona’s  
9 Constitution when it excluded unvaccinated children from school); *Boone v.*  
10 *Boozman*, 217 F. Supp.2d 938, 957 (E.D. Ark. 2002) (holding that mandatory  
11 school vaccination did not violate the Due Process Clause because “requiring  
12 school children to be immunized rationally furthers the public health and safety”).

13 Recognizing that mandatory vaccination laws are a proper exercise of the  
14 State’s police powers, the California Supreme Court in *Abeel v. Clark*, 84 Cal. 226  
15 (1890) upheld the State’s school vaccination requirements, recognizing that “it was  
16 for the legislature to determine whether the scholars of the public schools should be  
17 subjected to [vaccination].” *Id.*, at 230. The California Supreme Court revisited the  
18 issue in *French v. Davidson*, 143 Cal. 658 (1904), in which the Court upheld San  
19 Diego’s vaccination requirement, explaining that “the proper place to commence in  
20 the attempt to prevent the spread of a contagion was among the young, where they  
21 were kept together in considerable numbers in the same room for long hours each  
22 day . . . children attending school occupy a natural class by themselves, more liable  
23 to contagion, perhaps, than any other class that we can think of.” *Id.* at 662, italics  
24 added; *see also Williams v. Wheeler*, 23 Cal. App. 619, 625 (1913) (the state  
25 legislature has the power to prescribe “the extent to which persons seeking entrance  
26 as students in educational institutions within the state must submit to its  
27 [vaccination] requirements as a condition of their admission”); *Love v. Superior*  
28 *Court*, 226 Cal.App.3d 736, 740 (1990) (“[t]he adoption of measures for the

1 protection of the public health is universally conceded to be a valid exercise of the  
2 police power of the state, as to which the legislature is necessarily vested with large  
3 discretion not only in determining what are contagious and infectious diseases, but  
4 also in adopting means for preventing the spread thereof”).

5 **B. SB 277 Has Been Upheld In Federal and State Courts**

6 The federal district court in San Diego recently confirmed the unquestioned  
7 authority of *Jacobson* and its progeny and rejected a similar challenge to SB 277 by  
8 a separate group of plaintiffs, in *Whitlow, et al. v. Department of Education et al.*,  
9 S.D. Cal. Case No. 3:16-cv-01715-DMS-BGS (*Whitlow*). Like the plaintiffs here,  
10 the *Whitlow* plaintiffs alleged violations of various constitutional rights arising from  
11 the enactment of SB 277. *Id.* On July 15, 2016, the *Whitlow* plaintiffs filed their  
12 motion for preliminary injunction, in which they sought to enjoin the enforcement  
13 of SB 277. *See Whitlow, Pls.’ Mot.*, ECF Nos. 13, 14. However, on August 26,  
14 2016, the *Whitlow* court denied the plaintiffs’ motion, holding that the plaintiffs’  
15 claims were unlikely to succeed because of the weight of authority represented by  
16 *Jacobson* and its progeny:

17 State Legislatures have a long history of requiring children to be  
18 vaccinated as a condition to school enrollment, and for as many  
19 years, both state and federal courts have upheld those requirements  
20 against constitutional challenge. History, in itself, does not compel  
21 the result in this case, *but the case law makes clear that States may impose mandatory vaccination requirements without providing for religious or conscientious objections.*

22 *Whitlow*, Order 17-18, ECF No. 43 (italics added); see also RJN, Exh. 4.

23 The court in *Whitlow* further stated that, in light of such precedent, “this Court,  
24 ‘is not prepared to hold that a minority, residing or remaining in any city or town  
25 where [disease] is prevalent, may thus defy the will of its constituted authorities,  
26 acting in good faith for all, under the legislative sanction of the State.’” *Whitlow*,  
27 Order 17-18, ECF No. 43 (quoting *Jacobson*, 197 U.S. at 37-38). On August 31,  
28 2016, the *Whitlow* plaintiffs filed their request for voluntary dismissal of their

1 lawsuit, and thus extinguished any possible appeal of the federal court's Order.  
2 *Whitlow*, Pls.' Notice, ECF No. 44.

3 In addition, in *Buck v. State of California*, Los Angeles County Superior Court  
4 Case No. BC617766, the state superior court recently sustained the state  
5 defendant's demurrer to the plaintiffs' complaint, without leave to amend. *Buck*  
6 was brought by yet another group of parents challenging SB 277 on federal and  
7 state constitutional grounds, including alleged violations of due process and equal  
8 protection. In dismissing the case, the superior court in *Buck* adopted by reference  
9 the arguments raised by the state defendants in *Whitlow*. RJN, Ex. 5. Plaintiffs in  
10 *Buck* served their notice of appeal on December 6, 2016.

11 Thus, the State's compelling interest in protecting public health and safety by  
12 mandating vaccinations for school children has been unanimously recognized by  
13 the U.S. Supreme Court, the California Supreme Court, and every other federal and  
14 state court that has addressed the issue.<sup>3</sup>

15 **C. Plaintiffs' Due Process Claims Are Outweighed by the State's**  
16 **Legitimate and Compelling Interests**

17 The constitutional basis for Plaintiffs' due process claim is unclear. Although  
18 Plaintiffs assert generically that SB 277 "infringes on both state and federal  
19 constitutional rights," (see Complaint 13, ¶ 45, ECF No. 1), they seek relief solely  
20 under the Fourteenth Amendment. Complaint 16-17, ECF No. 1. For purposes of  
21 this Motion, Defendants will assume that Plaintiffs are asserting due process  
22 violations under the federal and state constitutions. That said, due process claims  
23 under California and federal law are analyzed under the same principles. *See, e.g.,*  
24 *Patel v. City of Gilroy*, 97 Cal. App. 4th 483, 486 (2002).

25 <sup>3</sup> A third case, *Middleton et al. v. Pan et al.*, U.S.D.C., Central District of  
26 California Case No. 2:16-cv-05224-SVW-AGR, is an action brought by 26 *pro se*  
27 plaintiffs, also challenging SB 277 in part on constitutional grounds. The  
28 defendants' motion to dismiss the complaint in that case is under submission before  
the Honorable Alicia G. Rosenberg, Magistrate Judge. *See Middleton*, ECF Nos.  
105, 105-1.

1           The Due Process Clause “provides heightened protection against government  
2 interference with certain fundamental rights and liberty interests.” *Washington v.*  
3 *Glucksberg*, 521 U.S. 702, 720 (1997). The Supreme Court’s “established method  
4 of substantive-due-process analysis has two primary features: [f]irst, we have  
5 regularly observed that the Due Process Clause specially protects those  
6 fundamental rights and liberties which are, objectively, ‘deeply rooted in this  
7 Nation’s history and tradition,’ [and] [s]econd, we have required in substantive-  
8 due-process cases a ‘careful description’ of the asserted fundamental liberty  
9 interest.” *Id.* at 720-721. Where a fundamental right is not implicated, the state law  
10 need only be rationally related to a legitimate government interest. *Id.* at 728.

11           Plaintiffs’ assertion that they have a fundamental right to refuse mandatory  
12 vaccinations for their school age children is contrary to this Nation’s history and  
13 tradition of requiring that school age children be vaccinated before attending  
14 school, as confirmed unequivocally by *Jacobson* and its progeny. Specifically with  
15 regard to a person’s right to refuse certain medical treatment, the Supreme Court  
16 has cited to *Jacobson*, and recognized mandatory vaccination as an example where  
17 state interests outweigh a plaintiff’s liberty interest in declining a vaccine. *Cruzan*  
18 *v. Director, Missouri Department of Health*, 497 U.S. 261, 279 (1990); *see also*  
19 *Boone v. Boozman*, 217 F. Supp.2d at 956 (“the question presented by the facts of  
20 this case is whether the special protection of the Due Process Clause includes a  
21 parent’s right to refuse to have her child immunized before attending public or  
22 private school where immunization is a precondition to attending school. The  
23 Nation’s history, legal traditions, and practices answer with a resounding ‘no.’”).

24           Indeed, the Supreme Court has emphasized that “a state is not without  
25 constitutional control over parental discretion in dealing with children when their  
26 physical or mental health is jeopardized.” *Parham v. J. R.*, 442 U.S. 584, 603  
27 (1979). As explained in *Prince*, “neither the rights of religion nor rights of  
28 parenthood are beyond limitation[;]” both can be interfered with when necessary to

1 protect a child.” *Prince*, 321 U.S. at 166. A parent’s liberty interest in directing  
2 their child’s education is subject to reasonable government regulation. *Hooks v.*  
3 *Clark County*, 228 F.3d 1036, 1041 (9th Cir. 2000), cert. denied, 532 U.S. 971  
4 (2001).

5 And, in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), the Ninth Circuit  
6 recently re-affirmed that parents’ right to make decisions regarding the care,  
7 custody, and control of their children, “is not without limitations,” citing  
8 specifically to “the health arena, [where] states may require the compulsory  
9 vaccination of children.” *Id.* at 1235, citing *Prince*.

10 Here, SB 277 promotes the rights of children to healthy lives, and by  
11 extension all of their other rights protected by the Due Process Clause, by ensuring  
12 that they are properly vaccinated against dangerous, and in some cases potentially  
13 deadly, communicable diseases. This legitimate and compelling exercise of the  
14 State’s police powers is a bedrock of this Nation’s history and jurisprudence. For  
15 this reason, Plaintiffs fail to assert plausible due process claims against Defendants.

16 **D. SB 277 Does Not Violate the Right to a Public Education**

17 Plaintiffs wrongly assert that SB 277 violates their right to education under  
18 Article IX of the California Constitution. Complaint 15, ¶ 49, 177, ECF No. 1. To  
19 the contrary, the statute operates to *protect* access to education by ensuring that it is  
20 not impaired by the proliferation of otherwise preventable diseases.

21 In *French v. Davidson*, the California Supreme Court expressly held that the  
22 State’s mandatory school vaccination statute “in no way interferes with the right of  
23 the child to attend school, provided the child complies with its provisions.” *French*,  
24 143 Cal. at 662. Similarly, in a case cited extensively in *Jacobson*, the New York  
25 Court of Appeal in *Viemeister v. White*, 179 N.Y. 235, 72 N.E. 97 (1904), expressly  
26 held that New York’s mandatory school vaccination statute did not violate that  
27 state’s constitutional right to a free public education, which is virtually identical to  
28 that contained in California’s constitution. *Id.*, 179 N.Y. at 238 (“[t]he right to

1 attend the public schools of this state is necessarily subject to some restrictions and  
2 limitations in the interest of the public health”).

3 In drafting SB 277, the California Legislature recognized that “[s]afe schools  
4 are a precondition to education.” RJN, Exh. 3, at 6. SB 277 does not violate the  
5 right to education; to the contrary, it benefits and supports safe access to education  
6 for all school children by ensuring that the exercise of a right to education is not  
7 impaired by the transmission of serious or potentially fatal disease. *See also* Cal.  
8 Const., Art. I, § 28(7) (“the People find and declare that the right to public safety  
9 extends to public and private primary, elementary, junior high, and senior high  
10 school, . . . where students and staff have the right to be safe and secure in their  
11 persons”).

12 Plaintiffs’ claims that their four children are being denied the right to a public  
13 school education is made without consideration of the rights of the millions of  
14 school children and their parents – particularly those children who are medically  
15 unable to be vaccinated – who rely on mandatory vaccinations to ensure that their  
16 right to an education is not threatened by the spread of potentially fatal  
17 communicable diseases. “If there is a single place that children must be kept safe  
18 as humanly possible it is at school.” RJN, Exh. 3, at 7. “[S]tudents have a right to  
19 education in California, but also that their schools be clean, safe, and functional. A  
20 safe school for many children is a school with a high level of community immunity  
21 which would protect them from known diseases. [SB 277] provides the most  
22 comprehensive measure to ensure high vaccination rates.” RJN, Exh. 3, at 15.

23 Indeed, the U.S. Supreme Court has long recognized that the institutional  
24 interest of schools, as well the rights of the student body at large, often hold sway  
25 over the rights of individual students. “For their own good and that of their  
26 classmates, public school children are routinely required to submit to various  
27 physical examinations, and to be vaccinated against various diseases.” *Vernonia*  
28 *School District 47J v. Acton*, 515 U.S. 646 (1995) (noting with approval that “all 50



1 States required public school students to be vaccinated against diphtheria, measles,  
2 rubella, and polio,” and that “[p]articularly with regard to medical examinations and  
3 procedures, therefore, ‘students within the school environment have a lesser  
4 expectation of privacy than members of the population generally’”).

5 Moreover, as stated above, SB 277 expressly provides exemptions for students  
6 enrolled in home schooling and independent study programs, thus ensuring the right  
7 to an education for unvaccinated children. *See* Cal. Health & Saf. Code, §  
8 120335(f).

9 SB 277 does not violate the right to education, but instead promotes it.

10 **E. Plaintiffs’ Equal Protection Claims Are Contrary to the Weight**  
11 **of Authority that Mandatory Vaccination Laws Do Not**  
12 **Unlawfully Discriminate**

13 Plaintiffs allege that SB 277 violates the Equal Protection Clause under the  
14 Fourteenth Amendment by compelling Plaintiffs to home-school their children.  
15 Complaint 15, ¶¶ 49-50, ECF No. 1. In so doing, Plaintiffs disregard the fact that  
16 the choice to home-school their children is their own, predicated on their choice to  
17 refuse to comply with California’s mandatory vaccination laws. Plaintiffs thus  
18 attempt to create their own protected class by contending that SB 277 places their  
19 children “at an educational disadvantage,” which, in reality, is one that is of  
20 Plaintiffs’ choosing. Complaint 15, ¶ 50, ECF No. 1.

21 The simple fact is that SB 277, on its face and as applied, does not  
22 discriminate on the basis of race, national origin, wealth or age. Even if this Court  
23 entertains Plaintiffs’ attempt to create new a classification based on vaccination  
24 status, which has never been accepted by any federal or state court that has  
25 considered the issue, SB 277 survives both rational basis and strict scrutiny review.

26 The rational basis standard of review is applied to claims of discrimination  
27 “caused by economic and social welfare legislation.” *Safeway Inc. v. City &*  
28 *County of San Francisco*, 797 F. Supp. 2d 964, 972 (N.D. Cal. 2011). “To pass

1 rational basis scrutiny, the equal protection clause requires only that the  
2 classification rationally furthers a legitimate state interest.” *Id.* The strict scrutiny  
3 standard of review is employed only “when the classification impermissibly  
4 interferes with the exercise of a fundamental right,” or where the law at issue draws  
5 a distinction based on suspect classifications. *See Massachusetts Bd. of Retirement*  
6 *v. Murgia*, 427 U.S. 307, 312 (1976). Even in those cases when strict scrutiny  
7 applies, however, the state law is deemed justified if it is “narrowly tailored to serve  
8 a compelling state interest.” *See, e.g., Washington v. Glucksberg*, 521 U.S. 702,  
9 721 (1997).

10 The appropriate level of scrutiny in this case is rational basis. Even though the  
11 right to an education is a fundamental right under the state constitution, the alleged  
12 claim here is under the Equal Protection Clause of the Fourteenth Amendment.  
13 Because there is no fundamental right to an education under the U.S. Constitution,  
14 SB 277 need only be justified by a legitimate state interest. *See, e.g., San Antonio*  
15 *Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of  
16 course, is not among the rights afforded explicit protection under our Federal  
17 Constitution. Nor do we find any basis for saying it is implicitly so protected.”);  
18 *Plyler v. Doe* (1982) 457 U.S. 202, 216–18, 223 (“Nor is education a fundamental  
19 right; a State need not justify by compelling necessity every variation in the manner  
20 in which education is provided to its population”); *see also Whitlow*, Order 10, n.7,  
21 ECF No. 43.

22 Here, there is a rational basis for treating Plaintiffs’ children differently from  
23 other children. Excluding unvaccinated children who are not otherwise exempt  
24 under SB 277 is rationally related to the State’s interest in protecting public health  
25 and safety. *See, e.g., Love*, 226 Cal.App.3d at 740 (“the legislature is necessarily  
26 vested with large discretion not only in determining what are contagious and  
27 infectious diseases, but also in adopting means for preventing the spread thereof”).  
28

1 But even if strict scrutiny were to apply, *Jacobson* and its progeny have  
2 unequivocally held that immunization laws are justified because they serve a  
3 compelling state interest in protecting public health and safety. *Jacobson*, 197 U.S.  
4 at 35 (“the legislature has the right to pass laws which, according to the common  
5 belief of the people, are adapted to prevent the spread of contagious diseases”); *see*  
6 *also Sherr v. Northport-East Northport Union Free School Dist.*, 672 F. Supp. 81,  
7 88 (E.D.N.Y. 1987) (holding there is a “compelling interest . . . in fighting the  
8 spread of contagious diseases through mandatory inoculation programs”).

9 In enacting SB 277, the Legislature expressed its intent “to provide . . . [a]  
10 means for the eventual achievement of total immunization of appropriate age  
11 groups” against these childhood diseases. Cal. Health & Saf. Code, § 120325(a).  
12 In so doing, the Legislature understood that “[p]rotecting the individual and the  
13 community from communicable diseases . . . is a core function of public health.”  
14 RJN, Exh. 3, at 7. Moreover, the enactment of SB 277 was a reasoned response to  
15 escalating numbers of unvaccinated children and further outbreaks of dangerous  
16 communicable diseases. *Id.*, at 5-7.

17 It is for these reasons that the Supreme Court and every other court that has  
18 considered the issue has rejected attacks on mandatory vaccination laws predicated  
19 on the Equal Protection Clause. *See, e.g. Zucht*, 260 U.S. at 177 (“A long line of  
20 decisions by this Court had also settled that in the exercise of the police power,  
21 reasonable classification may be freely applied and that regulation is not violative  
22 of the equal protection clause merely because it is not all-embracing”); *Workman*,  
23 667 F. Supp.2d at 690-691, affirmed, 419 F. App’x at 353-54 (rejecting facial and  
24 as-applied challenges to mandatory vaccination statute under the Equal Protection  
25 Clause); *Phillips*, 775 F.3d at 544 (holding that plaintiffs “fail adequately to allege  
26 an equal protection violation” of New York’s mandatory vaccination statute); *see*  
27 *also Whitlow*, Order 10, ECF No. 43 (holding that “none of the disputed  
28

1 classifications [asserted in a claim against SB 277] supports an equal protection  
2 claim”).

3 Plaintiffs are unable to cite a single case in which a court has held there is no  
4 legitimate or compelling interest in protecting the public from the spread of  
5 communicable diseases through vaccination. To the contrary, “[t]he fundamental  
6 and paramount purpose [of school immunization statutes] . . . [is] to afford  
7 protection for school children against crippling and deadly diseases by  
8 immunization. That this can be done effectively and safely has been  
9 incontrovertibly demonstrated over a period of a good many years and is a matter of  
10 common knowledge of which [courts] take[] judicial notice.” *Brown v. Stone*, 378  
11 So.2d 218, 220-21 (Miss. 1979).

12 Furthermore, SB 277 is narrowly tailored to serve its interest in protecting  
13 children from the spread of dangerous communicable diseases. It does not mandate  
14 vaccination for all contagious diseases, but only for those that the Legislature  
15 determined are “very serious” and that “pose very real health risks to children.” *See*  
16 *RJN*, Exh. 2 at 4. It contains appropriate but limited exemptions for children with  
17 medical conditions that would make vaccination unsafe, and children who would  
18 otherwise be homeschooled or enrolled in independent study programs. Cal. Health  
19 & Saf. Code, § 120335(f). SB 277 also provides an exception related to students  
20 who attend individualized education programs. *Id.*, at (h).<sup>4</sup>

21 Plaintiffs therefore fail to state a plausible claim under the Equal Protection  
22 Clause of the Fourteenth Amendment.

23 \_\_\_\_\_  
24 <sup>4</sup> This case is demonstrably distinguishable from *Phipps v. Saddleback Valley*  
25 *USD*, 204 Cal. App. 3d 1110 (1988), cited by Plaintiffs in their Complaint. *See*  
26 *Complaint* 15, ¶ 49, ECF No. 1. In that case, the court enjoined a school district’s  
27 decision to preclude a child exposed to the AIDS virus from attending school. The  
28 court predicated its holding in part on there being insufficient evidence that the  
child was infectious to other school children, and the lack of any articulable policy  
by the school district. Here, the Legislature enacted SB 277 in furtherance of its  
long-recognized authority under its police powers to protect all school children  
from highly communicable diseases.

1 **II. DEFENDANTS ARE IMMUNE FROM SUIT IN THIS CASE**

2 **A. The State Agency Defendants, Governor Brown and Attorney**  
3 **General Harris Are Immune from All Claims in this Case**

4 Plaintiffs' claims against the Defendant state agencies, the Governor and the  
5 Attorney General are barred by the Eleventh Amendment and the doctrine of  
6 sovereign immunity.

7 Sovereign immunity is a constitutional limitation on the federal judicial power  
8 established in Article III of the United States Constitution. The doctrine is  
9 recognized as:

10 [A] fundamental rule of jurisprudence having so important a bearing  
11 upon the construction of the Constitution of the United States that it  
12 has become established by repeated decisions of this court that the  
13 entire judicial power granted by the Constitution does not embrace  
14 authority to entertain a suit brought by private parties against a State  
without consent given: not one brought by citizens of another State, or  
by citizens or subjects of a foreign State, because of the Eleventh  
Amendment; and not even one brought by its own citizens, because of  
the fundamental rule of which the Amendment is but an  
exemplification.

15 *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98-99 (1984),  
16 (quoting *Ex parte State of New York*, 256 U.S. 490, 497 (1921).)<sup>5</sup>

17 A suit is against the State, and barred by the doctrine of sovereign immunity, if  
18 “the judgment sought would expend itself on the public treasury or domain, or  
19 interfere with the public administration, or if the effect of the judgment would be to  
20 restrain the Government from acting, or to compel it to act.” *Pennhurst*, 465 U.S.  
21 at 102.

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23 <sup>5</sup> The Eleventh Amendment makes explicit reference only to the States’  
24 immunity from suits “commenced or prosecuted against one of the United States by  
25 Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S.  
26 Const., amend. XI. The Supreme Court nevertheless has long recognized the  
27 doctrine to apply to any suits by private parties against a State. *Alden v. Maine*, 527  
28 U.S. 706, 712-713 (1999) (“The phrase [Eleventh Amendment immunity] is  
convenient shorthand but something of a misnomer, for the sovereign immunity of  
the States neither derives from nor is limited by the terms of the Eleventh  
Amendment . . . but is a fundamental aspect of the sovereignty which the States  
enjoyed before the ratification of the Constitution, and which they retain today.”)

1 A suit by an individual against a State “is the very evil at which the Eleventh  
2 Amendment is directed.” *College Savings Bank v. Florida Prepaidpostsecondary*  
3 *Education Expense Board*, 527 U.S. 666, 685 (1999).

4 The Ninth Circuit also has unequivocally held that “[t]here is no doubt that  
5 suit under either §§ 1981 or 1983 against [a state agency is] barred by the Eleventh  
6 Amendment”). *See Peters v. Lieuallen*, 693 F.2d 966, 970 (9th Cir.1982).

7 Defendants California Department of Education, State Board of Education,  
8 and California Department of Public Health are state agencies against which any  
9 suit for injunctive relief is barred by the Eleventh Amendment. *See Hydrick v.*  
10 *Hunter*, 500 F.3d 978, 987 (9th Cir. 2007) (*Hydrick I*), vacated and remanded on  
11 other grounds, 556 U.S. 1256, 129 S. Ct. 2431, 174 L. Ed. 2d 226 (2009); *accord*  
12 *North v. Price*, Case No. CV 14-847 VBF (AJW)2016 U.S. Dist. LEXIS 102907,  
13 \*\*6-8 (E.D. Cal. March 28, 2016); *Koch v. Coalinga State Hosp.*, Case No. 1:14-  
14 cv-01861-BAM , 2015 U.S. Dist. LEXIS 12760, \*2 (E.D. Cal. February 2, 2015);  
15 *Cranford v. California*, Case No. 1:14-cv-00749 DLB PC, 2014 U.S. Dist. LEXIS  
16 158086, \*\*4-5 (E.D. Cal. November 7, 2014).

17 Plaintiffs’ claims against the Governor and the Attorney General also are  
18 barred under the Eleventh Amendment. Under the doctrine established by *Ex Parte*  
19 *Young*, 209 U.S. 123 (1908), the Eleventh Amendment in general does not bar suits  
20 to enjoin state officials from enforcing unconstitutional statutes. *Id.* at 159-160.  
21 However, the *Ex Parte Young* exception does not apply when the state is the “real,  
22 substantial party in interest,” as when the “judgment sought would expend itself on  
23 the public treasury . . . or interfere with public administration.” *Va. Office for*  
24 *Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011 (quoting  
25 *Pennhurst*, 465 U.S. at 101, n. 11). Thus, the exception only allows suit under  
26 federal law to be brought against a state officer in federal court if the following  
27 criteria are met: (1) the state official named is responsible for enforcing the law at  
28 issue in that person's official capacity; (2) the plaintiff has alleged an ongoing

1 violation of federal law; and (3) the plaintiff has requested the proper relief, that is,  
2 prospective, injunctive relief, or relief that is ancillary to prospective relief. *See*  
3 *Walker v. Livingston*, 381 F. App'x 477,478 (5th Cir. 2010) (per curiam) (citing  
4 *Seminole Tribe of Fla.*, 517 U.S. 44, 73 (1996).

5 While in this instance Plaintiffs allege a violation of federal law and a request  
6 for injunctive relief, neither the Governor nor the Attorney General is the official  
7 responsible for enforcing SB 277. An official named in an *Ex Parte Young* suit  
8 “must have some connection with the enforcement of the act. That connection must  
9 be fairly direct; a generalized duty to enforce state law or general supervisory  
10 power over the persons responsible for enforcing the challenged provision will not  
11 subject an official to suit.” *Assn. des Eleveurs de Canards et d'Oies du Quebec v.*  
12 *Harris*, 729 F.3d 937, 943 (9th Cir. 2013) (quoting *National Audubon Society v.*  
13 *Davis*, 307 F.3d 835, 846-847 (9th Cir.2002)) (Governor entitled to Eleventh  
14 Amendment immunity because only connection to statute at issue is general duty to  
15 enforce California law).

16 It is well established that “a generalized duty to enforce state law or  
17 general supervisory power over the persons responsible for enforcing the  
18 challenged provision will not subject an official to suit.” *Snoeck v.*  
19 *Brussa*, 153 F.3d 984, 986 (9th Cir.1998); *see also Los Angeles Branch*  
20 *NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946, 953 (9th  
21 Cir.1983) (governor’s “general duty to enforce California law . . . does  
22 not establish the requisite connection between him and the  
23 unconstitutional acts” alleged in suit claiming de jure segregation of city  
24 school system); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir.1979)  
25 (“The mere fact that a governor is under a general duty to enforce state  
26 laws does not make him a proper defendant in every action attacking the  
27 constitutionality of a state statute”). Additionally, “[w]here the  
28 enforcement of a statute is the responsibility of parties other than the  
governor . . . the governor’s general executive power [to enforce laws] is  
insufficient to confer jurisdiction”). *Women's Emergency Network v.*  
*Bush*, 323 F.3d 937, 949-50 (11th Cir. 2003).

*Nichols v. Brown*, 859 F.Supp.2d 1118, 1131-32 (C.D. Cal. 2012).

Further, the fact that Governor Brown signed the law at issue is not enough to  
establish that he is responsible for the enforcement of it. “A governor is entitled to  
absolute immunity for the act of signing a bill into law.” *Nichols*, 859 F.Supp.2d at

1 1132. *See also Torres–Rivera v. Calderon–Serra*, 412 F.3d 205, 213 (1st Cir. 2005)  
2 (governor who signs into law legislation passed by the legislature is entitled to  
3 absolute immunity for that act); *Women’s Emergency Network*, 323 F.3d at 950  
4 (“Under the doctrine of absolute legislative immunity, a governor cannot be sued  
5 for signing a bill into law”) (citing *Supreme Ct. of Va. v. Consumers Union of*  
6 *United States, Inc.*, 446 U.S. 719, 731–34 (1980)). As such, the Governor cannot  
7 be named in a federal court action on the basis that he signed the law that is the  
8 subject of the suit.

9 Therefore, the state agencies, the Governor and the Attorney General are  
10 immune from Plaintiffs’ claims.

11 **B. The Individual Defendants Are Immune from Plaintiffs’ State**  
12 **Law Claims**

13 The *Ex Parte Young* exception to Eleventh Amendment immunity, permitting  
14 suits for prospective injunctive relief under federal law against individual state  
15 officers, does not apply to state law claims, even if the state law claim arises out of  
16 the same facts as a permissible federal law claim. *See Pennhurst*, 465 U.S. at 100,  
17 121 (holding that the Eleventh Amendment “applies as well to state law claims  
18 brought into federal court under pendant [now, supplemental] jurisdiction”); *accord*  
19 *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997); *Dittman*  
20 *v. California*, 191 F.3d 1020, 1026 (9th Cir. 1999).

21 Therefore, to the extent Plaintiffs’ claims are asserted under state law, those  
22 claims are barred against all of the Defendants, including the individual state  
23 officers sued in their official capacities.

24 **III. PLAINTIFF A VOICE FOR CHOICE DOES NOT HAVE STANDING**

25 Even if Plaintiffs had asserted plausible claims against any of the Defendants,  
26 and they have not, the Complaint fails to plausibly assert that Plaintiff A Voice for  
27 Choice (AVFC) has standing in this case.  
28



1 An association has standing to sue on behalf of its members only if (1) the  
2 association would have standing to sue in its own right; (2) the interests it seeks to  
3 protect are germane to the organization's purpose; and (3) participation by the  
4 individual members is not necessary to resolve the claims. *See, e.g., Hunt v. Wash.*  
5 *State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

6 Here, the Complaint alleges in only a conclusory manner that AVFC is a non-  
7 profit corporation whose members have been "unconstitutionally impacted" by SB  
8 277. Complaint 8, ¶18, ECF No. 1. The Complaint fails to assert whether AVFC  
9 would have standing in its own right, what the purpose is of the organization, or  
10 why participation by its alleged members is not necessary to resolve the claims.  
11 Indeed, the Complaint does not even assert how many members belong to AVFC,  
12 or who they are, but merely suggests that it has members.

13 Plaintiffs have failed to adequately allege that AVFC has standing to bring its  
14 claims in a representative capacity in this action.

### 15 CONCLUSION

16 For the foregoing reasons, Plaintiffs' Complaint should be dismissed with  
17 prejudice.

18 Dated: December 15, 2016

Respectfully submitted,

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