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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

5:16-cv-2410 DMG (DTBx)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

[Filed Concurrently with Declaration of Robert Schechter, M.D.]

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Judge: The Honorable Dolly M. Gee
Trial Date: None Set
Action Filed: November 21, 2016

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INTRODUCTION

Plaintiffs delayed filing their motion to enjoin the enforcement of California's mandatory school and child care vaccination statute, California Senate Bill No. 277 (SB 277), until more than one and a half years after the enactment of the statute, and three months after commencement of the current school year. Over this period of time, millions of school-age children have been enrolled in California's schools and child care centers. Enjoining enforcement of this critical public health legislation would immediately expose millions of California school children and other at-risk individuals to an increased threat of contracting potentially fatal communicable diseases. For this reason, alone, Plaintiffs' motion should be denied.

In addition to their inexplicable delay in seeking the extraordinary remedy of a preliminary injunction, Plaintiffs are unlikely to prevail on their claims. As detailed in Defendants' pending Motion to Dismiss Plaintiffs' Complaint, filed on December 16, 2016 (*see* ECF Nos. 31, 31-1, 32), Plaintiffs' claims are unsupported as a matter of federal and state constitutional law, which for decades has consistently held that (1) a state's exercise of its police powers in protecting the public from communicable diseases is rationally based; and (2) states have a legitimate, if not compelling, interest in requiring children to be vaccinated before entering school.

Indeed, Plaintiffs commenced this action and filed their motion knowing that two other courts in California have already rejected essentially identical claims against SB 277. On August 26, 2016, in *Whitlow, et al. v. Department of Education et al.*, S.D. Cal. Case No. 3:16-cv-01715-DMS-BGS (*Whitlow*), the Southern District denied a motion for preliminary injunction against enforcement of SB 277, holding that the plaintiffs' claims were unlikely to succeed because of the weight of legal authority:

> State Legislatures have a long history of requiring children to be vaccinated as a condition to school enrollment, and for as many years, both state and federal courts have upheld those requirements

> against constitutional challenge. History, in itself, does not compel 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*.

Whitlow, Order 17-18, ECF No. 43 (italics added). On August 31, 2016, the *Whitlow* plaintiffs filed their request for voluntary dismissal of their lawsuit, and thus extinguished any possible appeal of the federal court's Order. *Whitlow*, Pls.' Notice, ECF No. 44.

And, on October 21, 2006, in *Buck v. State of California*, Los Angeles County Superior Court Case No. BC617766, the state superior court sustained the State's demurrer to the plaintiffs' complaint, without leave to amend. *Buck* was brought by yet another group of parents challenging SB 277 on federal and state constitutional grounds, including alleged violations of due process and equal protection. In dismissing the case, the superior court in *Buck* adopted by reference the arguments raised by the State in *Whitlow*. Plaintiffs in *Buck* served their notice of appeal on December 6, 2016.[1]

Plaintiffs were aware of *Whitlow* and *Buck* when they commenced this action and filed their motion for preliminary injunction, but, in a transparent attempt at forum-shopping, have insisted on burdening this Court and Defendants with identical claims.[2]

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[1] Copies of the decisions in *Whitlow* and *Buck* are attached as Exhibits 4 and 5 to Defendants' Request for Judicial Notice filed on December 15, 2016, in support of their Motion to Dismiss Plaintiffs' Complaint and this Opposition. *See* Defs. Request for Judicial Notice (RJN), ECF No. 32.

[2] On December 15, 2016, in the third case brought by a separate group of plaintiffs challenging SB 277, *Middleton et al. v. Pan et al.*, U.S.D.C., Central District of California Case No. 2:16-cv-05224-SVW-AGR, the Magistrate Judge recommended dismissal of the first amended complaint with prejudice, albeit with leave to amend because the plaintiffs are appearing *pro se*. *Middleton*, Report and Recommendation, ECF No. 123. In so doing, the Magistrate Judge found the reasoning in *Whitlow* "persuasive," and adopted *Whitlow's* rejection of the various constitutional challenges to SB 277 that are substantially similar to those raised by Plaintiffs here. *Id*. at 10-15.

The public health and welfare must not be allowed to be jeopardized by the subjective beliefs and unfounded conspiracy theories of a small minority of individuals who, against all recognized scientific and legal authority, stubbornly disregard the long-recognized safety and effectiveness of vaccines, and who fail to accept – as the California State Legislature found in enacting SB 277 – the public health threat that their unsupported opinions have on the lives of others around them.

Respectfully, Plaintiffs' motion for preliminary injunction should be denied.

ARGUMENT

A preliminary injunction is an "extraordinary and drastic remedy . . . never awarded as of right." *Munaf v. Geren*, 553 U.S. 674 (2008) (internal citations omitted). "[P]laintiff[s] seeking a preliminary injunction must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). And, even if these four elements are met, a preliminary injunction is only appropriate when a plaintiff can demonstrate that there are "serious questions going to the merits and a hardship balance [] tips sharply toward the plaintiff." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). If the probability of success on the merits is low, preliminary injunctive relief should be denied. *Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995)

I. PLAINTIFFS ARE NOT SEEKING TO PRESERVE THE STATUS QUO, AND UNDULY DELAYED BRINGING THEIR MOTION FOR A PRELIMINARY INJUNCTION

SB 277 was enacted over one year ago, on June 30, 2015. *See* Stats 2015 Ch. 35. The statute has been in effect since January 1, 2016. Personal belief exemptions have been prohibited since that date. Cal. Health & Saf. Code, § 120335(g)(1). And, since July 1, 2016, school authorities have been prohibited

from unconditionally admitting for the first time any child to preschool, kindergarten through sixth grade, or admitting or advancing any pupil to seventh grade, unless the pupil either has been properly immunized, or qualifies for other exemptions recognized by statute. Cal. Health & Saf. Code, § 120335(g)(3).

The purpose of a preliminary injunction "is to preserve the status quo ante litem pending a determination of the action on the merits." *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). In this regard, a "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Id.*, at 1377; *accord Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (holding that the district court did not abuse its discretion in denying a preliminary injunction when plaintiff waited months before filing her motion); *Whittier College v. ABA*, Case No: CV 07-1817 PA (FMOx), 2007 U.S. Dist. LEXIS 43707, *16 (C.D. May 7, 2007) ("[d]elay in requesting injunctive relief may rebut an allegation of irreparable harm," citing *Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993).

Plaintiffs waited until December 8, 2016, to bring their motion for preliminary injunction, which is *more than one and a half years* after SB 277 was enacted, *eleven months* after the statute became effective, and *three months* after the commencement of the current school year.

Hence, the status quo as of the filing of Plaintiffs' motion for preliminary injunction is that SB 277 has been in force for nearly one year. Plaintiffs now improperly seek to disturb the status quo by attempting to enjoin the operation of the statute and have their children admitted to school without being properly vaccinated, placing not only their children but other students and school personnel at risk of exposure to potentially fatal diseases.

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II. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THEIR CLAIMS THAT SB 277 IS UNCONSTITUTIONAL

A. Immunization Laws Are Long-Recognized Constitutional Public Health Measures

The provisions of SB 277, its legislative purpose and the weight of legal authority over the last 100 years affirming the State's legitimate and compelling interest in protecting the public health through mandatory vaccinations of school age children, are detailed in Defendants' pending Motion to Dismiss, supporting Memorandum of Points and Authorities, and Request for Judicial Notice, all of which are incorporated herein by reference. *See* Defs. Mot., Memorandum, and RJN, ECF Nos. 31, 31-1, 32. Those points are summarized here.

For over a century, the legitimate and compelling state interest in protecting the public health through mandatory vaccinations, especially for school children, has remained unquestioned, and is firmly embedded in our jurisprudence, since the U.S. Supreme Court's holding in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) (*Jacobson*).

Courts have repeatedly upheld mandatory student vaccination laws over challenges predicated on the First Amendment, the Equal Protection Clause, the Due Process Clause, the Fourth Amendment, education rights, parental rights, and privacy rights, frequently citing *Jacobson*. *See, e.g., Zucht v. King*, 260 U.S. 174, 175-177 (1922) ("it is within the police power of a state to provide for compulsory vaccination"); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."); *Phillips v. City of New York,* 775 F.3d 538, 543 (2nd Cir. 2015) (holding that "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause"); *Workman v. Mingo County Sch.,* 667 F. Supp.2d 679, 690-691 (S.D. W. Va. 2009) ("a requirement that a child must be

1 vaccinated and immunized before it can attend the local public schools violates
2 neither due process nor . . . the equal protection clause of the Constitution"),
3 *affirmed Workman v. Mingo County Bd. of Educ.,* 419 F. App'x 348, 353-54 (4th
4 Cir. 2011) (unpublished); *Boone v. Boozman*, 217 F. Supp.2d 938, 956 (E.D. Ark.
5 2002) ("the question presented by the facts of this case is whether the special
6 protection of the Due Process Clause includes a parent's right to refuse to have her
7 child immunized before attending public or private school where immunization is a
8 precondition to attending school. The Nation's history, legal traditions, and
9 practices answer with a resounding 'no.'").
10 California courts are in accord with this overwhelming and consistent
11 precedent. *See Abeel v. Clark*, 84 Cal. 226, 230 (1890) (*Abeel*) (upholding the
12 State's school vaccination requirements, recognizing that "it was for the legislature
13 to determine whether the scholars of the public schools should be subjected to
14 [vaccination]"); *French v. Davidson*, 143 Cal. 658, 662 (1904) (upholding San
15 Diego's vaccination requirement, explaining that "the proper place to commence in
16 the attempt to prevent the spread of a contagion was among the young, where they
17 were kept together in considerable numbers in the same room for long hours each
18 day . . . children attending school occupy a natural class by themselves, more liable
19 to contagion, perhaps, than any other class that we can think of"); *Williams v.*
20 *Wheeler*, 23 Cal. App. 619, 625 (1913) (the state legislature has the power to
21 prescribe "the extent to which persons seeking entrance as students in educational
22 institutions within the state must submit to its [vaccination] requirements as a
23 condition of their admission"); *Love v. Superior Court*, 226 Cal.App.3d 736, 740
24 (1990) ("[t]he adoption of measures for the protection of the public health is
25 universally conceded to be a valid exercise of the police power of the state, as to
26 which the legislature is necessarily vested with large discretion not only in
27 determining what are contagious and infectious diseases, but also in adopting
28 means for preventing the spread thereof").

1 Defendants know of no case in which a court has struck down a state's
2 mandatory school immunization law. Because the extensive precedent
3 *unanimously* supports the constitutionality of SB 277, Plaintiffs' claims are without
4 merit and, therefore, unlikely to prevail under either the United States or California
5 constitutions.

6 **B. The Authority Cited by Plaintiffs in their Motion Is Inapposite**
7 **and Does Not Contradict the Weight of Authority Supporting Mandatory School Vaccination Statutes**

8 The authority relied on by Plaintiffs consists of over-generalized citations to
9 cases discussing constitutional rights in only the broadest terms. *See* Pls. Mot. 13-
10 19, ECF No. 29. None of the authorities relied on by Plaintiffs balances these
11 constitutional rights against the State's legitimate and compelling interest in
12 enacting mandatory vaccination statutes for school-age children. Instead, Plaintiffs
13 simply attempt to mischaracterize *Jacobson* as outdated or inapplicable, or because
14 it addressed only the smallpox vaccine, without regard for the binding nature of
15 Supreme Court precedent. *See* Pls. Mot. 18, ECF No. 29.

16 Contrary to Plaintiffs' assertions, the legitimate and compelling interest
17 recognized in *Jacobson* has been unanimously affirmed by federal and state courts
18 across the country throughout the 20th and 21st centuries, which have also
19 consistently applied *Jacobson* well beyond the smallpox vaccine and the other
20 specific circumstances from which *Jacobson* arose. *See, e.g.*, *Phillips* (New York
21 law required school children to be vaccinated for poliomyelitis, mumps, measles,
22 diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis,
23 tetanus, pneumococcal disease, and hepatitis B); *Workman* (West Virginia law
24 required school child vaccination against chickenpox, hepatitis-b, measles,
25 meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough); *Boone*
26 (Arkansas law required school child vacation against poliomyelitis, diphtheria,
27 tetanus, pertussis, red (rubeola) measles, rubella, and other diseases as designated
28 by the State Board of Health); *Sherr v. Northport-East Northport Union Free*

1 *School Dist.,* 672 F. Supp. 81 (E.D.N.Y. 1987) (New York law at that time required
2 school child vaccination against poliomyelitis, mumps, measles, diphtheria, and
3 rubella); *Hanzel v. Arter,* 625 F. Supp. 1259 (S.D. Ohio 1985) (Ohio law required
4 school children to be vaccinated against mumps, poliomyelitis, diphtheria,
5 pertussis, tetanus, rubeola, and rubella); *see also Vernonia School District 47J v.*
6 *Acton* 515 U.S. 646 (1995) ("[f]or their own good and that of their classmates,
7 public school children are routinely required to submit to various physical
8 examinations, and to be vaccinated against various diseases").

9 And, discussed above, the Southern District in *Whitlow* and the Los Angeles
10 County Superior Court in *Buck* recently confirmed the unquestioned authority of
11 *Jacobson* and its progeny by rejecting similar challenges to SB 277.

12 In the only case relied on by Plaintiffs that considered a state's mandatory
13 vaccination law, *LePage v. State of Wyoming*, 18 P. 3d (Wyo., 2001), the court
14 simply held that Wyoming's Department of Public Health exceeded its authority
15 under the statute in denying certain personal belief exemptions. The court
16 expressly declined to rule on the constitutional challenges to the statute, holding
17 instead that, "if problems regarding the health of Wyoming's schoolchildren
18 develop because this self-executing statutory exemption is being abused, it is the
19 *legislature's* responsibility to act within the constraints of the Wyoming and United
20 States Constitutions." *Id.*, at 1181 (italics added). In so doing, the court expressly
21 recognized the continued viability of *Jacobson* as authority "that the state has the
22 authority to enact a mandatory immunization program through the exercise of its
23 police power." *Id.*, at 1179.

24 Disregarding this unquestioned precedent, Plaintiffs instead hinge their claims
25 on an inapposite line of cases affirming the right to refuse medical treatment. *See*
26 Pls. Motion 13, 16, ECF No. 29. These cases are unavailing. Indeed, in *Cruzan v.*
27 *Director, Missouri Department of Health,* 497 U.S. 261, 279 (1990), cited by
28 Plaintiffs in their Motion (at 13), specifically with regard to a person's right to

refuse certain medical treatment, the Supreme Court cited to *Jacobson,* and recognized mandatory vaccination as an example where state interests outweigh a plaintiff's liberty interest in declining a vaccine. *Id.*, at 279.

Prior to *Cruzan*, the Supreme Court emphasized that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J. R.*, 442 U.S. 584, 603 (1979). And, as explained in *Prince*, "neither the rights of religion nor rights of parenthood are beyond limitation[;] both can be interfered with when necessary to protect a child." *Prince*, 321 U.S. at 166.

Plaintiffs' reliance on *Coons v. Lew*, 762 F.3d 891, 899 (9th Cir. 2014), for the unremarkable proposition that the Supreme Court has recognized a right to determine one's own medical treatment, is misleading. *See* Pls. Mot. 16, ECF No. 29. In *Coons*, the Ninth Circuit rejected the plaintiff's claim that his right to decide his own medical care outweighed the mandatory health insurance requirements of the federal Affordable Care Act. *Id*. *Coons* does not, therefore, "represent an accurate synthesis of the current state of these constitutional rights," as asserted by Plaintiffs. Pls. Mot. 16, n.4, ECF No. 29.

To the contrary, in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), decided the same year as *Coons*, the Ninth Circuit reaffirmed that parents' right to make decisions regarding the care, custody, and control of their children "is not without limitations," citing specifically to "the health arena, [where] states may require the compulsory vaccination of children." *Id.* at 1235, citing *Prince*.

C. SB 277 Does Not Unreasonably Compel Plaintiffs to Choose Between Competing Constitutional Rights

Plaintiffs' assertion that SB 277 forces them to choose between the exercise of two purportedly fundamental constitutional rights, *i.e.*, the right to refuse medical treatment and California's right to an education, is unfounded.

1 "To determine whether the government has violated the unconstitutional
2 conditions doctrine, the court must look to whether the condition placed upon the
3 receipt of a benefit 'further[s] the end advanced as the justification for the
4 prohibition.'" *Palmer v. Valdez*, 560 F.3d 965, 972 (9th Cir. 2009) (quoting *Nollan*
5 *v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987). Therefore, "the 'government
6 cannot impose a condition for a reason not germane to one that would have justified
7 denial' of the benefit." *Palmer*, 560 F.3d at 972. However, "*such limitations only*
8 *arise when the condition attached infringes on a constitutionally protected*
9 *interest*." *Parks v. Watson*, 716 F.2d 646, 651 (9th Cir. 1983) (italics added).
10 As confirmed by *Jacobson* and the century of jurisprudence following it,
11 mandatory vaccination laws do not violate any fundamental right, whether framed
12 in terms of due process (*Jacobson*), equal protection (*Zucht*, *Workman*), the free
13 exercise of religion (*Prince, Phillips*), parental rights (*Prince*), or the right to refuse
14 medical treatment (*Cruzan*).
15 Moreover, there is no fundamental right to an education under the U.S.
16 Constitution. *See, e.g., San Antonio Independent School Dist. v. Rodriguez*, 411
17 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit
18 protection under our Federal Constitution. Nor do we find any basis for saying it is
19 implicitly so protected."); *Plyler v. Doe,* 457 U.S. 202, 216–18, 223 (1982) ("Nor is
20 education a fundamental right; a State need not justify by compelling necessity
21 every variation in the manner in which education is provided to its population");
22 *Hooks v. Clark County*, 228 F.3d 1036, 1041 (9th Cir. 2000), cert. denied, 532 U.S.
23 971 (2001) (a parent's liberty interest in directing their child's education is subject
24 to reasonable government regulation); *see also Whitlow*, Order 10, n.7, ECF No. 43.
25 Plaintiffs' reliance on California's right to an education is unavailing. As
26 discussed in further detail in Defendants' pending Motion to Dismiss Plaintiffs'
27 Complaint, in *French v. Davidson*, which was decided 25 years after the adoption
28 of California's constitutional right to a free public education (*see* Cal. Const., Art.

1 IX, § 5), the California Supreme Court expressly held that the State's mandatory
2 school vaccination statute "in no way interferes with the right of the child to attend
3 school, provided the child complies with its provisions." *French*, 143 Cal. at 662.
4 Similarly, in a case cited extensively in *Jacobson*, the New York Court of Appeal in
5 *Viemeister v. White,* 179 N.Y. 235, 72 N.E. 97 (1904), expressly held that New
6 York's mandatory school vaccination statute did not violate that state's
7 constitutional right to a free public education, which is virtually identical to that
8 contained in California's constitution. *Id.*, 179 N.Y. at 238 ("[t]he right to attend
9 the public schools of this state is necessarily subject to some restrictions and
10 limitations in the interest of the public health").

11 Therefore, in the absence of any recognized fundamental right, the so-called
12 "unconstitutional conditions doctrine" advanced by Plaintiffs in their Motion
13 cannot apply here. But even if it did, the doctrine permits a condition placed upon
14 the receipt of a government benefit if the condition "further[s] the end advanced as
15 the justification for the prohibition." *Palmer*, 560 F.2d at 972. In this regard, the
16 analysis under the unconstitutional conditions doctrine is conceptually
17 indistinguishable from the balancing of states' legitimate and compelling interests
18 in mandatory vaccinations with various competing personal rights exhaustively
19 considered by *Jacobson* and its progeny.

20 Here, there can be no question that the condition of vaccination furthers the
21 end advanced by prohibiting unvaccinated children from attending schools or day
22 care centers. Excluding unvaccinated children who are not otherwise exempt under
23 SB 277 is rationally related to the State's interest in protecting public health and
24 safety. *See, e.g.*, *French*, 143 Cal. at 662 ("the proper place to commence in the
25 attempt to prevent the spread of a contagion was among the young, where they were
26 kept together in considerable numbers in the same room for long hours each day . . .
27 children attending school occupy a natural class by themselves, more liable to
28 contagion, perhaps, than any other class that we can think of"); *Love*, 226 Cal. App.

3d at 740 ("the legislature is necessarily vested with large discretion not only in determining what are contagious and infectious diseases, but also in adopting means for preventing the spread thereof").

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

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

Plaintiffs' refusal to vaccinate their children is their own choice, for which they alone are responsible. SB 277 places no unconstitutional conditions on that choice. To the contrary, the statute provides Plaintiffs and their children with the alternative of home-schooling, thereby preserving their right to a public education under the state constitution.

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D. Plaintiffs' Assertions of Alternative Means To Protect the Public Health Are Legally Baseless, Factually Wrong, and Irrelevant.

Plaintiffs' assertions that there are alternative means to protect the public health from contagious diseases are baseless and, in any event, beside the point. *See* Pls. Mot. 23-25, ECF No. 29. *Jacobson* held long ago that "[i]t is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain." *Jacobson*, 197 U.S. at 30.

Even so, Plaintiffs' disregard of the threat of contagious diseases in recent years in California and the rest of the Nation is not only factually wrong, but betrays how far out of the mainstream Plaintiffs are in asserting their claims. Alarm by recognized public health authorities over the increasing spread of contagious and potentially deadly diseases was expressly recognized in the legislative history of SB 277:

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

See Defendants' Request for Judicial Notice filed in support of their Motion to Dismiss (RJN), ECF No. 32, Exh. 1, Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at 5. (italics added).

Additionally, Defendants have submitted the declaration of Robert Schechter, M.D., (Schechter Decl.) in further support of this Opposition to Plaintiffs' Motion. Dr. Schechter is a medical doctor licensed to practice in the State of California, a board-certified pediatrician, and a Fellow of the American Academy of Pediatrics. Schechter Decl., ¶ 1. He has been Chief of the Clinical and Policy Support Section of CDPH's Immunization Branch since 2003. Schechter Decl., ¶¶ 1, 2.

Dr. Schechter informs that the "herd immunity threshold," or the level of immunity required to inhibit sustained transmission among a population, varies for each disease depending on its contagiousness. Schechter Decl., ¶ 7. For measles, which is highly contagious, the level of immunity in a population necessary to halt transmission is estimated to be between 92 - 94%. *Id.* As no vaccine is effective for all recipients, immunization rates need to reach even higher levels. *Id*. For example, the recommended regimen of two doses of measles mumps and rubella (MMR) vaccine is estimated to be effective for 97% of recipients. *Id.*

Vaccination coverage above 95% in California has not been achieved for all required vaccines. Schechter Decl., ¶ 12. Many school children remain unimmunized, and rates in many settings are still below levels needed to assure community (or herd) immunity. *Id*. When taking into account all categories of unimmunized children, the rate of receipt of all required immunizations reported for kindergarten entrants for the 2015-2016 school year was 92.9%. *Id*. In contrast to a 97% rate for two doses of MMR vaccine that is consistent with herd immunity statewide if attained uniformly, the reported rate of two doses of MMR for children entering kindergarten in 2015-2016 was 94.5%. *Id.*

However, these statewide average rates of reported immunization mask lower levels of immunization at the county, locality or school level that can support local transmission of disease. Schechter Decl., ¶ 13. Of the 58 California counties, 34% reported that 5% or more of children entering kindergarten there in 2015-2016 had received a personal belief exemption (PBE) to one or more required immunizations, and 10% of counties reported PBE rates of at least 10%. *Id*. The range of immunization rates reported for kindergarten entrants in 2015-2016 is even broader at the level of individual schools, as 1,340 schools across the State reported the PBE rates of kindergarten entrants at 5% or higher, 568 schools had rates at 10% or higher, and 231 schools had rates at 20% or higher. *Id*. Reported rates of

1 kindergarteners with PBEs in California were less than 1% from 1978 to 2000, but
2 thereafter increased sharply to over 3% by 2013. Schechter Decl., ¶ 14.
3 Outbreaks of vaccine-preventable diseases have occurred in California since
4 1961, when the PBE was included in the immunization requirements statute.
5 Schechter Decl., ¶ 17. But, the multinational outbreak of measles beginning at
6 Disneyland in December 2014 underscores the vulnerability of unimmunized
7 individuals and their role in transmitting disease. Schechter Decl., ¶ 18. Among
8 the first 110 California patients in the outbreak, 45% were known to be
9 unvaccinated and 43% had unknown or undocumented vaccination status. *Id.*
10 Twelve of the unvaccinated patients were infants too young to be vaccinated. *Id.*
11 Among the 37 remaining vaccine-eligible patients, 76% were intentionally
12 unvaccinated because of personal beliefs, and one was on an alternative plan for
13 vaccination. *Id.* Among the 28 intentionally unvaccinated patients, 18 were
14 children, and 10 were adults. Among the 84 patients with known hospitalization
15 status, 20% were hospitalized. *Id.*
16 Another closely followed outbreak occurred on January 13, 2008, in San
17 Diego, when an infected seven-year-old boy (index patient) transmitted the
18 infection to his nine-year-old unvaccinated sister and three-year-old unvaccinated
19 brother, and then, after two days of fever and conjunctivitis, attended his charter
20 school. Schechter Decl., ¶ 19. Forty-one of the 377 students (11%) at the charter
21 school were unvaccinated for measles based on personal belief exemptions, and two
22 children became infected. *Id.* By February 1, 2008, four of the eight secondary
23 case-patients were already infectious. *Id.* The index patient's sister infected two
24 schoolmates and exposed an unknown number of children at a dance studio. *Id.*
25 One infected classmate of the index patient infected his own younger brother and
26 exposed 10 children at a pediatric clinic, 18 children and adults at a clinical
27 laboratory, and an unknown number at two grocery stores and a circus. Another
28 infected classmate of the index patient exposed an unknown number at an indoor

amusement facility. *Id.* As these case studies make clear, the lack of vaccination has undeniable and real-world consequences.

Mandatory vaccination of school children to prevent the spread of dangerous and potentially deadly contagious diseases is therefore not only well-grounded in over a century of our jurisprudence, but recognized as the most effective means to protect the public from this re-emerging public health crisis.

For all of these reasons, as well as those discussed in greater detail in Defendants' pending Motion to Dismiss Plaintiffs' Complaint, Plaintiffs are unlikely to prevail on their claims. Accordingly, their Motion for Preliminary Injunction should be denied.[3]

III. THE BALANCE OF HARMS WEIGHS AGAINST PLAINTIFFS

Plaintiffs' alleged harms, in being compelled to vaccinate their children in order to attend school with other children, are decidedly outweighed by the public health interest in ensuring that school children in California are properly vaccinated in high enough numbers to protect against the transmission of potentially fatal communicable diseases. Indeed, despite Plaintiffs' protests to the contrary, the overwhelming weight of scientific, medical and legal authority confirms that, if the injunction were to issue, Plaintiffs would likely expose their school children (and others) to harm.

As discussed above, Plaintiffs had ample opportunity over the last year and a half since the enactment of SB 277 to litigate their alleged rights and/or to otherwise make suitable alternate arrangements for their children, rather than by way of a preliminary injunction. That they declined to do so until three months after the commencement of the current school year was their tactical error, and

[3] As discussed in greater detail in Defendants' Motion to Dismiss Plaintiffs' Complaint, ECF Nos. 31, 31-1, Plaintiffs are barred under the Eleventh Amendment and the doctrine of sovereign immunity from seeking injunctive relief under federal and state law against the defendant state agencies, the Governor and the Attorney General; and are similarly barred from seeking injunctive relief under state law against all of the defendant state officials.

1 should not be grounds to now preliminarily enjoin the enforcement of SB 277
2 throughout California.
3 Significantly, Plaintiffs' assertion of irreparable harm has the argument
4 backward. There can be no greater harm than risking the public health and safety,
5 particularly against foreseeable and preventable harm. If a preliminary injunction is
6 granted, children and other members of the public who rely on mandatory
7 vaccination of children in school and child care centers will be left vulnerable and
8 subject to infection by potentially fatal and preventable diseases. It is these
9 children and the public in general, not Plaintiffs, who will be irreparably harmed by
10 the issuance of a preliminary injunction.

11 **CONCLUSION**

12 For the foregoing reasons, Plaintiffs' motion for preliminary injunction should
13 be denied.

14 Dated: December 22, 2016

Respectfully submitted,

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