

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

5 Attorneys for Plaintiffs - Devon Torrey-Love, S.L.,
6 Courtney Barrow, A.B., Margaret Sargent, M.S.,
W.S., and A Voice for Choice, Inc.
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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION**
11

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

15 Plaintiffs,

16 v.

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

26 Defendants.
27
28

Case No.: 5:16-cv-2410

**PLAINTIFFS’ OPPOSITION TO
DEFENDANTS’ MOTION TO
DISMISS AND, IN THE
ALTERNATIVE, REQUEST FOR
LEAVE TO FILE A FIRST
AMENDED COMPLAINT**

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

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INTRODUCTION

Despite Plaintiffs’ exhortation that the savvy legal minds involved in this matter eschew facile overstatements of vaccine precedent, Defendants have filed a 12(b)(6) motion consisting of nothing but the same. Defendant’s motion cited cases that are not binding here, cut and pasted language from unrelated lawsuits, and exaggerated the applicability of relevant precedent. It was as if the (doubtlessly busy) state attorneys working on this case didn’t even read Plaintiffs’ Memorandum of Points and Authorities. Had they done so, they would have seen that this case is not the same as preceding matters, that the statute at issue in this case and a careful synthesis of relevant precedent raise serious constitutional issues that cannot be easily dismissed. Just as those issues cannot be dismissed, neither can the Plaintiffs’ claims. For the reasons set forth below, the Court should deny Defendants’ Motion.

ARGUMENT

When reviewing a motion to dismiss a complaint under Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) 12(b)(6), the complaint is construed in the light most favorable to plaintiffs; the allegations of the complaint are taken as true, and all reasonable inferences that can be drawing from the complaint are drawn in favor of plaintiff. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2007); *National Audubon Soc., Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002). When reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the law of the regional circuit in which the motion arises is controlling. See *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2009). Moreover, a court may not dismiss a complaint in which the plaintiff has alleged “enough facts to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 697, (citations omitted). Fed. R. Civ. P. 8 requires a “short and plain statement” of the claim that is sufficient to demonstrate that the pleader is entitled to relief and to give the defendant notice of the claim against him.

1 “It is axiomatic that ‘the motion to dismiss for failure to state a claim is viewed with
2 disfavor and is rarely granted.’” *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274
3 (9th Cir. 1986) (citations omitted). Moreover, as the Ninth Circuit recently noted,
4 “a district court acts ‘prematurely’ and ‘erroneously’ when it dismisses a well-
5 pleaded complaint, thereby ‘preclud[ing] any opportunity for the plaintiffs’ to
6 establish their case ‘by subsequent proof.’” *Mohamed v. Jeppesen Dataplan, Inc.*,
7 614 F.3d 1070, 1100 (9th Cir. 2010) (citations omitted); See also *Bell Atl. v. Twombly*,
8 550 U.S. 544, 555 (“[A] well pleaded complaint may proceed even if it appears that
9 a recovery is very remote and unlikely”).

10 Furthermore, since constitutional rights are at stake, the Court may not defer
11 to the California legislature’s unsupported or illogical factual findings, which the
12 Defendants cite as gospel throughout their filing. On the contrary, the Court has an
13 “independent constitutional duty to review factual findings where constitutional
14 rights are at stake.” *Gonzalez v. Carhart*, 550 U.S. 124, 165 (2007). This
15 independent duty includes allowing for a healthy skepticism when legislatively
16 proffered findings appear untrue or even illogical. *Id.*

17 Defendants’ 12(b)(6) motion is full of unsupported allegations of fact, which
18 must either be ignored, or construed in a light most favorable to the plaintiffs. As
19 just one example, their use of the phrase, “health emergency”¹ to discuss the status
20 of vaccinated children in California in 2016 is so exaggerated that it calls into doubt
21 the credibility of their entire filing. But even regardless of such baldly exaggerated
22 statements, based on the governing law here, the Court has a duty to construe the
23 facts as the Plaintiffs have, and to thoroughly and independently review facts of
24 constitutional significance.

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27 1 (Defendants’ Memorandum of Points and Authorities in Support of its Motion to Dismiss “Defs’ Motion
28 to Dismiss”, Pg. 5:1-7)

1 **I. DEFENDANTS’ MOTION TO DISMISS SHOULD BE DENIED**

2 Plaintiffs’ Memorandum of Points and Authorities in Support of its Motion
 3 for Preliminary Injunction details clearly why Sections 120325, *et seq.*² of
 4 California’s Health & Safety Code, as enacted by California Senate Bill No. 277,
 5 creates an unconstitutional condition. In California, a public K-12 education is a
 6 fundamental right. *Hartzell v. Connell*, 35 Cal.3d 899 (1984); *Serrano v. Priest*, 18
 7 Cal.3d 778 (1976); *Slayton v. Pomona USD*, 161 Cal.App.3d 538, 548 (1984);
 8 *Steffes v. Cal. Interscholastic Fed.*, 176 Cal.App.3d 739, 746 (1986); *Jones v. Cal.*
 9 *Interscholastic Fed.*, 197 Cal.App.3d 751, 757 (1988). Courts faced with laws
 10 conditioning the exercise of one fundamental right on the relinquishing of another
 11 are unequivocal. *See Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004)
 12 (“This case presents an especially malignant unconstitutional condition because
 13 citizens are being required to surrender a constitutional right . . . not merely to
 14 receive a discretionary benefit but to exercise two other fundamental rights.”)
 15 Section 120325 places conditions on attending public K-12 school. For families to
 16 access their right to education, children must relinquish their right to refuse medical
 17 treatment, and parents must give up their right to guide the care of their children.

18 Although they don’t state it in any coherent fashion, Defendants appear to be
 19 arguing that those federal rights simply do not exist here, or perhaps they are arguing
 20 (and again it’s not clear from Defendants’ somewhat canned briefs) that a
 21 manufacturer calling a drug a “vaccine” provides an absolute, categorical exception
 22 to all federal constitutional rights, no matter how many vaccines, and for what
 23 condition, the state mandates.

24 Defendants’ broad-brush language is telling – and shocking. Note how
 25 Defendants repeatedly assert that courts have approved “vaccine mandates,” but
 26 they don’t discuss much, if at all, *this* vaccine mandate, that is the subject of this

27 ² Hereinafter, these sequential sections, namely §§120325, 120335, 120338, 120370, and 120375 will be
 28 referred to as simply, “Section 120325.”

1 litigation. Repeating that “courts have approved [singular] vaccine mandates” (like
2 getting vaccinated for one disease, during a bona fide crisis where one (1) in 350
3 was infected) is about as informative as making the equally accurate statement that
4 courts have approved certain restrictions on speech over time. Such statements are
5 worthless when evaluating the constitutionality of the statute in the case at bar.³

6 Clearly, despite Defendants’ absolute statements (and equally because of
7 them), this case presents important questions, which cannot be disposed of with a
8 12(b)(6) motion. For example, should the Court oversimplify dated precedent,
9 issued before there even was a concept of substantive due process – precedent that
10 has been relied upon to justify forced sterilizations – or should the Court synthesize
11 and apply *all* relevant precedent? We know the answer. The Court must of course
12 evaluate the case in light of all relevant precedent. That precedent is way more
13 nuanced than Defendants assert. And, it requires that the state justify this law
14 through the prism of cherished due-process principles.

15 And contrary to Defendants’ assertions, that “every other federal and state
16 court that has addressed the issue” has upheld vaccine mandates, the opposite is true.
17 As mandates have gotten more and more broad and complex, and in a modern world
18 where constitutional protections have been more broadly recognized, tested, and
19 refined, courts have re-formed vaccine mandates like the one at issue here, to make
20 them constitutional. *See e.g., In re LePage*, 18 P.3d 1177 (Wyo. 2001) (re-forming
21 unconstitutional vaccine mandate to engraft on personal-beliefs waiver). There, the
22 Wyoming Supreme Court asked whether what California calls “personal beliefs”
23 exemptions (and what existed here, without any problems, prior to the passage of
24 this law) should be engrafted onto a new vaccine mandate that the state argued

25
26 ³ It is worth noting again, that the vaccine mandate at issue here requires 26 different medical procedures and
27 includes some very odd requirements. As just a few examples, it requires the vaccination of kindergarteners for
28 Hepatitis B, a disease that is almost always sexually transmitted, and one whose primary risk is liver cancer decades
later. It further requires the vaccination for tetanus, that while very rarely serious to an individual, is not even
communicable.

1 prohibited such exemptions. The court asked, “Can parents have beliefs that are
2 both *philosophical* and religious without disqualifying their exemption request?” *Id.*
3 at 1191 (emphasis added). Then, partly because such requests represented a tiny
4 percentage of the children in the state, the court decided not to infringe on that tiny
5 minority’s constitutional rights, which gained little anyway from a public-health
6 perspective. *Id.*⁴

7 Another issue in this case is whether there is some special quality about
8 vaccines, in other words, prophylactic medications, that overrides the right to refuse
9 medical treatment, which is extremely broad in the Ninth Circuit? Defendants cited
10 cases from jurisdictions like the Eastern District of Arkansas, arguing that they
11 govern here. But the Ninth Circuit characterizes as “fundamental rights to determine
12 one’s own medical treatment, and to refuse unwanted medical treatment, and . . . a
13 fundamental liberty interest in medical autonomy.” *Coons v. Lew*, 762 F.3d 891,
14 899 (9th Cir. 2014) (citations omitted). Vaccines, whether inhaled, injected,
15 administered orally or anally, or as eyedrops– are medical treatments. And the
16 parameters of constitutional rights are for the courts, not the FDA to define. The
17 mere quality of being prophylactic, or being part of a named category of drugs (*i.e.*,
18 “biologics”), cannot confer legal status. Nothing in Defendants’ brief articulated
19 anything to the contrary.

20 Allowing the type of drug to determine the constitutionality of mandating
21 them has real problems. For example, the FDA has recently approved a new drug,
22 Truvada, that, when taken before exposure, is remarkably effective at stopping the
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4 This balancing can and must be done here too. And it buttresses the point about evaluating the law as to
whether it is narrowly tailored to fit constitutional muster. Plaintiffs are aware that perhaps their beliefs represent
those of a small minority. But that militates in favor of greater vigilance toward protecting their rights, lest the
opinions of the majority drown out the minority. Remember, vaccination rates have remained rock-solid constant in
California. If the state is concerned about falling rates in certain “pockets” of the state it must first try a massive
educational effort about the safety and efficacy of vaccines in those targeted communities. But the state may not ban
the 0.2% of Colusa County residents – a small minority – from exercising their right to refuse medical treatment, just
because vaccination rates have fallen in, say, Del Norte County.

1 spread of HIV.⁵ In other words, like vaccines, the medication is one prophylactic
2 measure against an infectious disease. Yet it would be difficult to assert that these
3 qualities confer a special legal status on this medication.⁶ The right to refuse medical
4 treatment, fully recognized and elaborated within the last generation, is broad
5 enough to cover prophylactic medications too. And even if the term “vaccine”
6 conferred a special status to certain prophylactic drugs, it is nevertheless impossible
7 to deny that the act of getting vaccinated requires a medical procedure – and the
8 inherent right to refuse medical procedures is quite broad.

9 Furthermore, if the century-year-old vaccine precedent allowed a state to
10 mandate (a) one shot for (b) a highly contagious disease (c) during a crisis outbreak
11 of the same and (d) before the era of widespread travel that made such mandates
12 less meaningful, then that precedent is clearly inapt here. Here, the question
13 presented is whether the state can mandate (a) 26 shots required by the statute at
14 issue; (b) some which are not for communicable diseases at all; (c) during a non-
15 crisis; and (d) in an era where international travel and the loopholes in the statute
16 itself render its infringements pointless. If the answer is yes, that the state, during a
17 period of non-crisis, can mandate prophylactic medical treatment for a non-
18 communicable disease, then where does this logically end? Plaintiffs do not wish
19 to exaggerate, but could sending grandpa to jail for not taking an aspirin to prevent
20 heart disease be far behind? What about fining a parent for allowing a child to play
21 with a friend infected with HIV?

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

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

1 Lastly, none of the binding precedent the Defendants cite comes from modern
2 California, where public education is now recognized as a fundamental
3 constitutional right. The applicable federal precedent on which the Defendants rely
4 were decided years before states, led by California in 1976, recognized such a right.
5 Forcing citizens to choose between exercising two constitutional rights (for
6 example, giving up the Fourth Amendment right to be free from unreasonable
7 searches, in exchange for exercising one’s First Amendment right to protest) is
8 always unconstitutional. Parents have a fundamental right to make parenting
9 decisions for their children under the federal constitution. Individuals have a right
10 to medical autonomy. Families in California have a fundamental right to a public
11 K-12 education. Forcing citizens to choose between these rights is improper.

12 Another way of examining a law that attempts to condition behavior is by
13 inquiring whether the government could pass the same law absent the condition.
14 Can a state issue a *de facto* ban on medical decision-making discretion for a certain
15 class of citizens? Can a state directly mandate that all children be vaccinated?
16 Plaintiffs contend, based on an analysis and synthesis of modern precedent, that a
17 state would be restricted from such conduct.

18 Modern due-process concepts suggest that a thinly disguised mandate that all
19 parents put certain medicines into their children would offend our constitutional
20 sensibilities, and that is certainly the answer to the question as to why the California
21 legislature didn’t simply do that here. Such a statute of general applicability – a
22 law infringing on both the child’s fundamental right to make medical decisions and
23 the parents’ fundamental right to raise their child – would be subject to the strictest
24 scrutiny under a substantive-due-process analysis, and would almost certainly fail
25 except under the most dire emergencies. If such a broad (and indeed,
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1 unprecedented)⁷ mandate would offend our notions of constitutional liberty, then
2 surely tying such a mandate to public K-12 education, a fundamental right in
3 California, can't be proper either.

4 There is no special quality about schools that confers a special constitutional
5 right to infringe. Indeed, the opposite is true in California, because public education
6 is a fundamental right.⁸ In one of the only modern cases Defendants cite, *Boone v.*
7 *Boozeman*, the district court explicitly stated that its ruling would be different if
8 public education was a fundamental right. See 217 F.Supp.2d 938 at 957 (E.D. Ark.
9 2002). Plaintiffs ask the Court to treat that as an admission.

10 On this state fundamental-right issue, Defendants' bizarre foray into verbal
11 gymnastics illustrates just how weak their position is. Incredibly, defendants state:

12 “The appropriate level of scrutiny in this case is rational basis. Even
13 though the right to an education is a fundamental right under the state
14 constitution, the alleged claim here is under the Equal Protection
15 Clause of the Fourteenth Amendment. Because there is no fundamental
16 right to an education under the U.S. Constitution, SB 277 need only be
17 justified by a legitimate state interest.”

18
19 Plaintiffs take Defendants at their word and agree that the corollary must also
20 be true. Because there is a fundamental right to an education under the California
21 Constitution, and because Section 120325 so clearly infringes that, then strict
22 scrutiny applies in this matter. A federal court can of course apply state law and
23 construe state constitutional rights.
24

25 ⁷ Plaintiffs are aware of no state in the nation and no country in the world that directly/outright mandates
26 vaccination for the public at large. Yet this is the stated goal of Section 120325(a). Tying it to a fundamental right
is an improper way to accomplish it.

27 ⁸ *Zucht* must be read as authorizing certain limited infringements only in states where public education is not
28 a fundamental right.

1 One last point is worth expressing. The Defendants cite a variety of recent or
2 pending cases, featuring different plaintiffs, different attorneys, different
3 circumstances, and different arguments. With due respect to the plaintiffs and
4 attorneys in those cases, the arguments in this case have not been made anywhere
5 else. Those cases are not binding precedent, and are quite different from the case at
6 bar. As such, Plaintiffs respectfully request that this Court deny Defendants' Motion
7 to Dismiss.

8
9 **II. ALL DEFENDANTS ARE NOT ENTITLED TO SOVEREIGN**
10 **IMMUNITY PROTECTION THROUGH THE 11TH AMENDMENT,**
11 **AS SOVEREIGN IMMUNITY IS NOT EXTENDED TO INDIVIDUAL**
12 **OFFICIALS ACTING IN THEIR OFFICIAL CAPACITY**

13 Courts have continuously held that through the *Young* doctrine, a Plaintiff is
14 allowed to bring a case before them against individual State representatives acting
15 in their individual capacity where there are federal law claims. *Ex Parte Young*, 209
16 U.S. 123, 28 S.Ct. 441, (1908). The doctrine within *Young* “is premised on the
17 notion that a state cannot authorize a state officer to violate the Constitution and
18 laws of the United States. Thus, an action by a state officer that violates federal law
19 is not considered an action of the state and, therefore, is not shielded from suit by
20 the state's sovereign immunity.” *Natural Resources Defense Council v. Cal. Dep't*
21 *of Transp.*, 96 F.3d 420, 422 (9th Cir. 1996) (citing *Pennhurst State School &*
22 *Hospital v. Halderman*, 465 U.S. 89, 102 (1984); *Ex Parte Young*, 209 U.S. at 159-
23 60).

24 While Defendants argue that all Defendants are immune from this instant
25 action on the basis of sovereign immunity, an exception under *Ex Parte Young*,
26 allows citizens to sue state officers in their official capacities “for prospective
27 declaratory or injunctive relief ... for their alleged violations of federal law.” *Coal.*

1 to *Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir.2012).
2 Additionally, under the *Ex Parte Young* doctrine, immunity does not apply when the
3 plaintiff chooses to sue a state official in his or her official capacity for prospective
4 injunctive relief. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73, 116 S.Ct. 1114,
5 (1996).

6 In the matter at hand, Plaintiffs are seeking to enjoin the Defendants from any
7 further enforcement of Section 120325, a California State law that violates
8 fundamental rights and provisions enumerated both within the Constitution of the
9 United States and/or subsequent case precedent. There is no protection or shield
10 under the state's sovereign immunity for individual state actors that have a
11 connection with and that are attempting to enforce the state law, namely Section
12 120325.

13 Section 120325(d) of California's Health & Safety Code specifically states
14 that one of its purposes is "For the keeping of adequate records of immunization so
15 that *health departments...*will be able to ascertain that a child is fully or only
16 partially immunized, and so that appropriate public agencies will be able to ascertain
17 the immunization of groups of children in schools or other institutions." (emphasis
18 added). Defendant Dr. Karen Smith ("Smith"), in her official capacity as Director
19 of the California Department of Public Health has a direct connection with the
20 facilitation of record keeping habits that the local health departments are required to
21 keep of immunizations, and in her official capacity, has authority over and therefore
22 the responsibility to ensure that the State of California, Department of Public Health
23 is in full compliance with the enforcement of Section 120325 et. sec. See *National*
24 *Audubon Society, Inc. v. Davis*, 307 F.3d 835 at 837 (2002). See also *Association*
25 *des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (2013) (9th
26 Cir.).

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1 Additionally, Defendant Tom Torlakson (“Torlakson”), in his official
2 capacity as Superintendent of California’s Board of Education has more than a
3 “fairly direct” connection with the enforcement of Section 120325, as under these
4 laws, California schools K-12 are required to deny admission to any student who
5 has not been vaccinated in accordance with the schedule mandated by Section
6 120325. In Section 120335, it is stated that the “governing authority” is defined as
7 the governing board or authority of either a private or public institutions. Torlakson,
8 in his official capacity, has authority over and therefore the responsibility to ensure
9 that the “governing authority” of each school district is in full compliance with
10 Section 120325 et. sec. and therefore the enforcement of Section 120325 et. sec. It
11 is without questions that both Defendants Smith and Torlakson, as the Director of
12 the Department of Public Health and the Superintendent of California’s Board of
13 Education, respectively, have a direct, integral, and ongoing role in the enforcement
14 and oversight of all facets of Section 120325, and as such, cannot eschew liability
15 under claims of 11th Amendment sovereignty.

16 Quite noteworthy, Defendants acknowledge in their brief that “Plaintiffs
17 allege a violation of federal law and a request for injunctive relief...” (Defs’ Motion
18 to Dismiss, Pg. 22:Ln. 5) “Although sovereign immunity bars money damages
19 ...against a state or instrumentality of a state, **it does not bar claims** seeking
20 prospective injunctive relief against state officials to remedy a state’s ongoing
21 violation of federal law.” (*Emphasis Added.*) *Arizona Students’ Association v.*
22 *Arizona Board of Regents*, 824 F.3d 858, 865 (9th Cir. 2016), (quoting *Ex Parte*
23 *Young*, 209 U.S. 123, 149-56, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). See also *Quern*
24 *v. Jordan*, 440 U.S. 332, 337, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979); *Agua Caliente*
25 *Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000). Here,
26 Plaintiffs are seeking declaratory and injunctive relief, not monetary damages,
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1 which in no manner precludes Defendant Smith and Defendant Torlakson from
2 being sued as proper Defendants in this matter.⁹

3 Thus, Defendants Torlakson and Smith are rightfully and properly named as
4 Defendants in this action and in no manner can either of these two Defendants be
5 dismissed on the basis of sovereign immunity under the 11th Amendment. As such,
6 Plaintiffs respectfully request that all efforts to dismiss Defendant Torlakson and/or
7 Defendant Smith be denied.

8
9 **III. ASSOCIATION PLAINTIFF, A VOICE FOR CHOICE, INC., HAS**
10 **STANDING TO BRING THIS MATTER AGAINST THE**
11 **DEFENDANTS.**

12 Defendants have attempted to attack the standing of Plaintiff, A Voice For
13 Choice, Inc. (“AVFC”), who was included as a Plaintiff in this instant action on
14 behalf of its members (Plaintiffs’ Complaint ¶18). In an attempt to attack AVFC’s
15 standing, Defendants cite the matter of *Hunt v. Wash. State Apple Advertising*
16 *Comm’n*, 432 U.S. 333 (1977); however, ironically, this is the very precedent that
17 supports the inclusion of AVFC within the present action.

18 In *Hunt*, the Court recognizes a well-established three-prong test to determine
19 whether an association has standing on behalf of its membership. Specifically, an
20 association will have standing to bring suit when: (i) its members would otherwise
21 have standing to sue in their own right; (ii) the interests it seeks to protect are
22 germane to the organization’s purpose; and (iii) neither the claim asserted nor the
23 relief requested requires the participation of individual members in the lawsuit.
24 *Hunt* at 344.

25 9 Plaintiffs acquiesce to Defendants’ claims of sovereign immunity under the 11th Amendment solely as to
26 the following Defendants: (i) the Department of Education; (ii) the Department of Public Health; (iii) California
27 Governor, Edmund Brown; and (iv) California Attorney General, Kamala Harris. As such, as to these
28 aforementioned Defendants only, Plaintiffs will not contest the dismissal of such entities and/or individuals, but in
no manner do Plaintiffs acquiesce to the dismissal of any other Defendants not specifically set forth in this list,
herein.

1 Analyzing the first prong of this analysis, namely whether AVFC’s members
2 would otherwise have standing to sue in their own right in this matter due to the
3 unconstitutionality of Section 120325 and its mandate that requires individuals to
4 forego one fundamental right for another, we can essentially look at each of the first
5 two prongs of the *Hunt* analysis together. This is to say that since the fundamental
6 purpose of AVFC is “*protecting the rights of individuals and ensuring that people*
7 *have a choice in what medications are put into the bodies of their children and*
8 *themselves,*” (Plaintiffs’ Complaint ¶9. Hildebrand Aff., ¶3), the crux of AVFC’s
9 membership are individuals who also question the constitutionality of the decree
10 that is Section 120325 and what right any governmental body has to mandate that
11 an individual forego one fundamental right for another. (Hildebrand Aff., ¶5). The
12 membership of AVFC is comprised of individuals that are California citizens who
13 have school aged children that are not fully vaccinated in accord with the
14 requirements of Section 120325, and desire to exercise their fundamental right to
15 parent, as well as their right to bodily autonomy, to refuse medical treatments, and
16 for their children to receive a public-school education, as specifically afforded by
17 and through California’s Constitution. (Hildebrand Aff. ¶5). As such, the members
18 of AVFC are individuals who are and continue to be equally aggrieved in this
19 instance and would otherwise have standing to sue the Defendants in their own right
20 in this matter.

21 Secondly, as was clearly pled in Paragraph No. 9 of the Plaintiff’s Complaint,
22 the interests that AVFC seeks to protect of its members by being a Plaintiff in this
23 matter are germane to and specifically in line with the exact purpose of AVFC.
24 AVFC seeks to give its members a voice in the community at-large with regard to
25 the exercising of its memberships’ Constitutional rights. This includes promoting
26 and protecting the rights of its members to have the ability to make conscious and
27 informed decisions as relates to what medications are put into the bodies of
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1 themselves and one another. (Hildebrand Aff., ¶¶ 3, 5, & 7) It also includes the
2 ability to not have to forego any fundamental right in order to enjoy any other
3 fundamental right. (Hildebrand Aff., ¶¶3, 5, &6) It is without dispute that the
4 interests AVFC seeks to protect are germane to the purpose of the organization.
5 (Hildebrand Aff., ¶8)

6 The third and final prong set forth by the court in *Hunt* requires that “neither
7 the claim asserted nor the relief requested requires the participation of individual
8 members in the lawsuit.” *Hunt* at 344. It has long been recognized by the Court
9 that an association may have standing to assert the claims of its members even where
10 it has suffered no injury from the challenged activity. *Hunt* at 342, (citing *Warth v.*
11 *Seldin*, 422 U.S. 490, 511, 95 S.Ct 2197, 2211 (1975)). Specifically, the Court in
12 *Warth* stated “Even in the absence of injury to itself, an association must allege that
13 its members, or any one of them, are suffering immediate or threatened injury as a
14 result of the challenged action of the sort that would make out a justiciable case had
15 the members themselves brought suit...So long as this can be established, and so
16 long as the nature of the claim and of the relief sought does not make the individual
17 participation of each injured party indispensable to proper resolution of the cause,
18 the association may be an appropriate representative of its members, entitled to
19 invoke the court’s jurisdiction.” *Warth* at 511. See also *Simon v. Eastern K. Welfare*
20 *Rights Org.*, 426 U.S. 26, 39-40 (1976); *Meek v. Pittenger*, 421 U.S. 349, 355-356
21 n. 5, 95 S.Ct. 1753, 1758 (1975); *Sierra Club v. Morton* 405 U.S. 727, 739, 92 S.Ct.
22 1361, 1368 (1972).

23 Here, the Plaintiffs are challenging the constitutionality of Section 120325, et
24 seq., have asserted and alleged that its members are suffering injury through the
25 enforcement of Section 120325, and are seeking declaratory and injunctive relief by
26 way of requesting that Section 120325 no longer be allowed to be enforced.
27 (Complaint ¶¶ 9, 18, 35, 40, 41, 42, 46, 48, & 54). This remedy is not of the type
28

1 that necessitates individualized participation, but rather can be brought by an
2 association on behalf of its membership. “Whether an association has standing to
3 invoke the court’s remedial powers on behalf of its members depends in substantial
4 measure on the nature of the relief sought. If in a proper case the association seeks
5 a declaration, injunction, or some other form of prospective relief, it can reasonably
6 be supposed that the remedy, if granted, will inure to the benefit of those members
7 of the association actually injured. Indeed, in all cases in which we have expressly
8 recognized standing in associations to represent their members, the relief should have
9 been of this kind.” *Warth* at 515.

10 In light of the constitutional issues and alleged violations presently at hand,
11 albeit there are individual plaintiffs in this matter, Plaintiffs’ request for declaratory
12 and injunctive relief does not require individual proof and can properly be resolved
13 in a group context. As such, AVFC’s position as a Plaintiff in this matter satisfies
14 all three prongs of the *Hunt* test and AVFC has standing in a representative capacity
15 to bring claims against the Defendants in this matter.

16
17 **IV. IN THE ALTERNATIVE, PLAINTIFFS SEEK LEAVE TO AMEND**
18 **THEIR COMPLAINT.**

19 Should this Court decide, for any basis whatsoever, to grant Defendants’
20 Motion to Dismiss, Plaintiffs respectfully request leave to amend their complaint.
21 When justice requires, a district court should “freely give leave” to amend a
22 complaint. Fed. R. Civ. P. 15(a)(2).

23
24 **CONCLUSION**

25 Thus, for the foregoing reasons, Plaintiffs respectfully requests that
26 Defendants’ Motion to Dismiss be denied.

27 In the alternative, Plaintiffs seek leave to amend their Complaint.

1 DATED: December 22, 2016

THE HAKALA LAW GROUP, P.C.

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By: /s/ Brad A. Hakala

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Brad A. Hakala

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

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