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

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

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

Case No.: 5:16-cv-2410-DMG-DTB

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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

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INTRODUCTION

While Defendants have finally addressed the specifics of Plaintiffs' case, such arguments continue to lack nuance and specificity. Defendants make arguments on timing that if taken to their logical conclusion, would preclude any plaintiff from ever challenging any statute on constitutional grounds. Moreover, Defendants discuss cases upholding vaccine requirements generally, but fail to discuss the set of vaccine requirements that are subject of this litigation. A read of all relevant precedent, some federal, some from California, indicates that Section 120325, et seq. ("Section 120325") contains too many infringements to be constitutional.[1] Additionally, Defendants seek to muddy the waters by comparing this case (a clean and perhaps academic application of cherished constitutional principles) to other, unrelated matters filed by other plaintiffs who focused on things like science and disability, which are mentioned nowhere in Plaintiffs' Complaint or subsequent briefs. Finally, Defendants underestimate the significance of the interplay of rights here. Indeed, in a key case they repeatedly cite, the court stated its ruling would be different if public education was a fundamental right, something it is here in California. The Court should not fall for Defendants' mendacity. Constitutional litigation is about line drawing, and this statute crosses the line. As such, Plaintiffs respectfully request that this Court grant its Motion for a Preliminary Injunction.

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1 This, in part, refers to the doctrine of unconstitutional conditions. The doctrine of unconstitutional conditions can be traced back to the late 1800's through two United States Supreme Court decisions, namely *Home Ins. Co. of New York v. Morse*, 87 U.S. 445 (1874) and *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1876), whereby the Court restricted a state's right to impose unconstitutional conditions through the enactment and enforcement of its laws. This doctrine has been continuously upheld and enforced throughout the years.

ARGUMENT

I. DEFENDANTS' ARGUMENT THAT THE TIMING OF PLAINTIFFS' MOTION IS CAUSE FOR DENIAL IS FAULTY IN ITS REASONING AND HAS NO LEGAL BASIS FOR DENYING INJUNCTIVE RELIEF.

Defendants' arguments with respect to the timing of Plaintiffs' lawsuit are simply fatuous. The appropriate method and procedure for challenging an unconstitutional statute is to seek a declaratory judgment and injunction – this is simply how a plaintiff in such cases seeks relief. How long a challenged statute has been in force is irrelevant. *See, e.g., Brown v. Bd. of Ed.*, 347 U.S. 484 (1954) (challenging decades-old policy of segregation in classrooms). And contrary to the Defendants' claims, how long a statute has been in force isn't even dispositively factored into an injunction's "immediacy of harm" analysis. *See, e.g., Perry v. Brown*, 671 F.3d 1052 (2012) (successful challenge to years-old prohibition on same-sex marriage). If the Defendants' preposterous arguments were an accurate statement of the law, then no one could ever challenge a longstanding-yet-unconstitutional statute or policy. If the Defendants had their way, a government actor could prevail in any constitutional challenge by simply saying to citizens: too bad, you waited a few months (for example, even to interview attorneys and gather resources, etc.) before challenging a statute. *See Defs.Oppo* at 1.

There is something else about the Defendants' arguments on timing that is logically problematic to the point of being a misstatement. While Section 120325 was enacted when the Defendants say it was, it did not take effect until July of 2016. *See Cal. Health & Saf. Code* § 120335(g). The first/next school year began in September 2016. Plaintiffs brought this suit in December 2016, after waiting a scant eight weeks to see how the law was being enforced and implemented. So, Plaintiffs hardly sat on their hands or showed lack of exigency. Defendants' arguments on timing are disingenuous, and not based in fact or law.

As is well settled, a constitutional violation is, of course, always irreparable harm, and remedying such a harm is always in the public interest. *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). Thus, while Defendants' have attempted to argue that any delay by the Plaintiffs in bringing this action removes their right to remedy a constitutional violation, such an assertion simply is not true. In the matter of *KRBL Ltd. V. Overseas Food Dist., LLC*, the court concluded in that matter that a short delay (i.e., four months) in bringing plaintiffs' motion seeking injunctive relief did not negate the evidence that the plaintiff had *actually* suffered irreparable harm, and that the plaintiff in that matter was still able to meet its burden to show "that it is likely to suffer irreparable harm in the absence of preliminary relief," and that as a result, the balance of equities tips sharply in its favor and that an injunction is in the public interest. *KRBL Ltd. V. Overseas Food Dist., LLC*, 2016 WL 3748660 (C.D. Cal. 2016). The same holds true in this instance.

Alternatively, assuming arguendo that the Plaintiffs cannot establish that they are likely to succeed on the merits, they may still obtain an injunction if they show that they have raised "serious questions going to the merits" and that the balance of hardships "tips sharply" in its favor, so long as it shows that the other two *Winter* factors are satisfied, i.e. that there is a likelihood of irreparable injury and that the injunction is in the public interest. *Arcsoft, Inc. v. Cyberlink Corp.*, 153 F.Supp.3d 1057 (N.D. Cal. 2015); referencing *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7 (2008); See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011); accord *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1081 (9th Cir. 2015). As the court in the *Monterey* matter held, a constitutional violation is <u>always</u> irreparable harm, and remedying a constitutional violation is <u>always</u> in the public's interest. (Emphasis added.) *Monterey* at 715.

II. DEFENDANTS FAIL TO ADEQUATELY ANALYZE THE SPECIFIC LAW AT ISSUE IN THIS CASE, NAMELY SECTION 120325, EVIDENCING THE STRENGTH OF PLAINTIFFS' ALLEGATIONS.

A. Defendants Cannot Make a Statute Constitutional by Classifying It a "Vaccine Law."

Throughout all of Defendants' briefs is an important verbal tell. They discuss the validity of "immunization requirements" (writ large), but offer next to nothing about *this* immunization statute (specifically). Such statements are about as helpful as stating that courts have approved certain restrictions on speech. But such statements say nothing about the law at issue in *this* case. It's worth emphasizing that upon closer look, there are very few cases truly on point here. All reports on Section 120325 indicated that it was novel, and one of the strictest and most comprehensive vaccine bills in the nation.[2] The only cases that are binding precedent – from the Supreme Court or Ninth Circuit – focus on vaccine requirements that were much more narrowly tailored. That a law is "narrowly tailored" matters, of course, in a constitutional case.

The binding vaccine precedent allowed a state to mandate (a) one (or a small handful of) shot(s) for (b) a highly contagious disease (c) during a crisis outbreak of the same and (d) before the era of widespread travel that made such mandates less meaningful. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905). That precedent is clearly inapt here. Here, the question presented is whether the state can mandate (a) 25 shots required by the statute at issue; (b) some which are not for communicable diseases at all (or require kindergarteners to be vaccinated for an STD); (c) during a non-crisis; and (d) in an era where international travel and the loopholes in the statute itself render its infringements pointless. If the Defendants' positions is yes

2 *See, e.g., Fight against vaccination bill finds ally in ACLU,* available at http://www.latimes.com/local/abcarian/la-me-abcarian-vaccination-bill-20150424-column.html

– that a state, during a period of non-crisis, can mandate prophylactic medical treatment for, *inter alia,* non-communicable syndromes, then where does that power logically end? Surely, the constitutional line has been crossed with this statute.

B. Section 120325 Is Not Narrowly Tailored to Meet Federal Constitutional Requirements, and Is Further Subject to Strict Scrutiny Under the California Constitution.

Defendants mischaracterize the state of constitutional jurisprudence another way. They state that courts have repeatedly upheld vaccine requirements despite due-process challenges. *See Defs.Oppo* at 5. But the *Jacobson* line of cases originated decades before *United States v. Carolene Products*, 304 U.S. 144 (1938) first expatiated our modern due-process construct and before the landmark due-process-based bodily autonomy cases. Yet Plaintiffs do not contest the continuing vitality of *Jacobson*. Plaintiffs merely point out that its holding was narrow, must be limited to its unique fact pattern, and that all other relevant precedent since then must be applied as well. That other precedent, on due-process challenges, and on bodily autonomy and parental rights, indicates that Section 120325 is too broad to pass muster. Defendants appear to argue that the Court must refrain from applying the well-established, traditional due-process formula in this case, simply because Defendants characterize this statute as a "vaccine law." The Court should decline the Defendants' invitation to issue a ruling based on talismans.

Indeed, this talismanic theme in Defendants' brief appears to reflect the hope that if they repeat often enough that "vaccine laws" are special, the Court will decline to engage in any legal analysis at all. This type of absolutism can lead to absurd results, like statements that a statute requiring vaccination before voter registration would be constitutional. There is no magical quality about vaccines that exempt them from constitutional requirements.

And this case has another constitutional wrinkle that is dispositive. A K-12 education is a fundamental right in California – one inexorably tied with our other fundamental rights and political freedoms – because a public K-12 education:

- "prepares students for active involvement in political affairs"
- "provides the intellectual and practical tools necessary for political action"
- "supplies the practical training and experience . . . necessary for full participation in the . . . debate that is central to our democracy"
- "prepares individuals to participate in the institutional structures such as labor unions and business enterprises that distribute economic opportunities" and
- "serves as a unifying social force among our varied population"

Hartzell v. Connell, 35 Cal.3d 899, 907-08 (1984) (citations omitted). For these reasons, strict scrutiny **is** the appropriate test for laws burdening the public's right to a K-12 education in California. *Id.; see also id.* at 921 (C.J. Bird, *concurring*).

III. SECTION 120325 BURDENS CALIFORNIA'S FUNDAMENTAL RIGHT TO AN EDUCATION AND CAUSES AN UNCONSTITUTIONAL CONDITION.

As a threshold matter, the Defendants in their opposition outright misrepresent that California courts have stated vaccine laws do not burden California's fundamental right to education. Defendants' logic appears to be: California adopted its Constitution in the 1800s, and there were cases between 1890 and 1913 that discussed vaccination requirements. *See Defs.Oppo* at 6, 10. Defendants purposefully ignore the well-known, oft-commented-on fact that California only recognized public education as a fundamental right in the 1970s, with the landmark decision in the *Serrano v. Priest* series of cases. *E.g., id.,* 18

Cal.3d 778 (1976). Again, taking this sophistry to its logical conclusion would have all courts ignore any rights that were expounded by courts.

Because of this interplay of rights, Plaintiffs have showed how Section 120325 creates an unconstitutional condition. Section 120325 requires citizens of the state to surrender their rights to a public K-12 education unless citizens accept the state's infringement upon their right to refuse medical treatment. "If the state may compel the surrender of one constitutional right as a condition of its favor," then the "guaranties embedded in the Constitution . . . may thus be manipulated out of existence." *Frost & Frost Trucking v. Railroad Comm'n of Calif.*, 271 U.S. 583, 594 (1926).

Unconstitutional conditions are particularly reprehensible if featuring two fundamental rights, even though an unconstitutional condition can be created just through causing an individual to have to choose between the denial of a benefit versus foregoing a constitutionally enumerated right. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2594 (2013). As shown at length in Plaintiffs' opening brief, a vaccine is just a prophylactic medical treatment, and clearly the right to refuse medical treatment is broad enough to include the right to refuse prophylactic treatments. Were that not the case, states could and would pass laws criminalizing the failure for any citizen to be unvaccinated. Also, as discussed in Plaintiffs' opening brief, while certain types of vaccination laws can be exempted from the bodily-autonomy right to refuse medical treatment, the statute here is too broad to be constitutional. Thus, the law forces Californians to choose between two constitutional rights: the right to refuse medical treatment, and the right to a public K-12 education.

Regardless, long-standing precedent has established that the standard for creating or determining an unconstitutional condition need not be pitting one constitutional right against another. Rather, an unconstitutional condition need only

deny a "benefit" to an individual because that individual exercises a constitutional right. *Koontz* at 2594, citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983). See also, e.g. *Rumsfield v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006). The precedent is longstanding and exact, that there does not have to be one right of an individual being traded for another right to create a constitutional condition. Rather, the determination of whether a law creates a constitutional condition is much less onerous. Specifically, precedent only mandates that the government "may not deny a *benefit* to a person on a basis that infringes his constitutionality protected interest." (Emphasis added.) *Koontz* at 2595; *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). The Court in *Koontz* was explicit in stating "we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz* at 2595.

Moreover, as the language in *Hartzell*, *supra*, indicates, the right to a public K-12 education inures to families in California. First, it is a means for social mobility for a family. *See id.* Second, it is axiomatic that rights and benefits that flow to minors generally flow and can be enforced by their guardians. Third, in the modern world, a school provides a form of daycare that allows parents to be productive members of society. Because there is a well-established federal fundamental right to direct the upbringing of one's children,[3] Section 120325 thus also forces parents and families to surrender these rights or lose their right to a public education.

3 *See Troxel v. Granville,* 530 U.S. 57 (2000). Inherent in the right for parents to direct the upbringing of their children, of course, is the right of children to be raised by a parent, who uniquely cares about their needs and knows their idiosyncrasies.

But even if the Court were to determine that there was no bodily autonomy right here to refuse repeated medical treatments, and even if the Court were to hold that parents do not have the right to choose what substances are injected into their children, this law still must be struck down for the burdens it places on the California fundamental right to education[4]. The significance of public K-12 education being a fundamental right deserving of strict scrutiny cannot be overstated. In one of the only modern school-vaccine cases Defendants themselves cite, *Boone v. Boozeman*, the district court explicitly stated that its ruling would be different if public education was a fundamental right. *See* 217 F. Supp.2d 938 at 957 (E.D. Ark. 2002). Plaintiffs ask the Court to treat that as an admission.

And as shown in the Plaintiffs' opening brief, under strict scrutiny, a law that is so broadly tailored to include things like sexually transmitted diseases at the kindergarten level and non-communicable conditions (and 25 shots total) must fail as too broad, under any reading of the precedent. Additionally, the due-process phrase of "narrowly tailored to meet its end" implies that a law can meet its ends, period. There is no essential tie between learning one's ABCs and making decisions as intimate as what medications to inject in one's body. Defendants may try arguing that the closeness of children in school mean that diseases can spread more easily, under Section 120325, unvaccinated children can still congregate in weekend-football-league locker rooms, in subways, and in private dance recitals. But Section 120325 contains an absolute exemption for foster children and those with disabilities. Therefore, this law suffers from serious under-breadth, making any "nexus" with school – and any reason to so seriously burden that fundamental right – evaporate as baseless.

Defendants' foray into medical statistics proves this point. They cite one 2008 case of measles as the need for this law. *Defs.Oppo* at 15. They then detail

4 Courts have already distinguished that public education is not a mere benefit in California, but is actually a fundamental right. *Serrano v. Priest,* 18 Cal.3d 778 (1976).

how the patient exposed people at a dance studio, pediatric clinic, clinical laboratory, grocery store, and a circus. *Id*. (emphasis added). The irony is manifest. The home-schooled children and foster youth exempted by Section 120325 are free to move about the state, and to go to dance studios, pediatric clinics, clinical laboratories, grocery stores, and the circus. If Section 120325 does not (and cannot) prevent large swaths of the population from infecting people at other public places, then how can it be tailored to meet its ends at all?

Defendants further admit that the overall vaccination rate in California is extremely high, and would be near 100% except for certain pockets in certain counties. *Defs.Oppo* at 14. This further emphasizes how Section 120325 is not narrowly tailored. Absent a severe, immediate threat to large numbers of people, the government is free to educate, free to incentivize, free to distribute medication gratis, free to target those small pockets, but not free to infringe. If one person in one county is the lone objector, our courts must work even harder to protect that small minority's rights, instead of subjecting her to infringement, based on a low vaccination rate in some other county.

What is at stake here? If states may burden the exercise of fundamental rights, whether that right is education for children under California's constitution or abortion for women under the federal constitution, by tying exercise of that right to the loss of medical autonomy (25 injections here, or an invasive ultrasound elsewhere), then such rights are rendered meaningless. If the government can broadly infringe on medical freedoms by requiring 25 injections – medical procedures – then why did California not make Section 120325 a law of general applicability? If the answer is because a law so broad would be unconstitutional, then how is Section 120325 any better for tying itself to public education, a fundamental right in California?

IV. DEFENDANTS MISREPRESENT BOTH THE NATURE OF CONSTITUTIONAL RIGHTS AND WHETHER OTHER PRECEDENT IS BINDING.

A. Defendants Downplay the Plaintiffs' Loss of Rights.

Defendants' incredibly cavalier attitude that the "Plaintiffs' refusal to vaccinate their children is their own choice [and they should be punished for it]" is like saying that anyone who exercises any right makes a choice, and therefore the government can do as it wishes. Equally ludicrous is the Defendants' Orwellian assertion that "the statute provides Plaintiffs and their children with the alternative of home-schooling, thereby preserving their right to a public education." *Defs.Oppo* at 12. Defendants are apparently completely comfortable to ignore that both logically and as a matter of law, home-schooling is not public education. *See Phipps v. Saddleback Valley USD*, 204 Cal.App.3d 1110, 1114 (1988).

As Plaintiffs have previously cited, Parents have a fundamental right to make decisions on the care and upbringing of their children. *Troxel v. Granville,* 530 U.S. 57 (2000). The court in *Troxel* was definitive and expansive in defining the interests of parents in the care, custody, and control of their children, stating that such interests of a parent in the care of their children "is perhaps the oldest of the fundamental liberty interests recognized… It cannot … be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 65 (2000) (citations omitted).

While Defendants would have the Court believe that it is acceptable to deprive an individual of theirs or their child's fundamental rights, such assertion is inaccurate, and offends those rights which are Constitutionally protected.

B. The Arguments Before the Court Related to the *Whitlow* and *Buck* Matters, as Defendants So Heavily Rely, Are Both Different and Non-Authoritative, and Do Not Preclude Plaintiffs' Motion Currently Before This Court.

Defendants repeatedly argue that because a court in another district recently denied an injunction having to do with this statute, that this Court should also do so. They cite no law to support their contention, because none exists. But they also don't have facts on their side. As Defendants well know (the same attorneys defended that case), the plaintiffs in the other matters the Defendants cite argued, *inter alia* that the science did not support Section 120325, that there was an inconsistent applicability of the law to disabled children, and that the law violated federal disability claims. Nowhere does a discussion of those matters appear before this Court. This case is obviously substantively quite different, and Defendants know that. So, neither the law nor the facts is on the Defendants' side.

CONCLUSION

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

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DATED: December 30, 2016

THE HAKALA LAW GROUP, P.C.

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

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