IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

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

Plaintiffs-Appellants,

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,

Defendants-Respondent.

Case No. C086030

Placer County Superior Court, Case No. SCV0039311

RESPONDENTS' BRIEF

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION - SPRING STREET

Case Name: *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 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*

Court of Appeal No.: C086030

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

(Check One) **INITIAL CERTIFICATE** ☐ **SUPPLEMENTAL CERTIFICATE** ☐

Please check the applicable box:

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d).

☐ Interested entities or persons are listed below:

The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

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April 25, 2018
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Respondents California Department of Education, State Board of Education, Tom Torlakson, in his official capacity as Superintendent of Public Instruction, California Department of Public Health, and Karen Smith, M.D., in her official capacity as Director of the California Department of Public Health (collectively, respondents), respectfully submit this respondents' brief in opposition to appellants' opening brief.

INTRODUCTION

Appellants' complaint in Placer County Superior Court is their second attempt to seek declaratory and injunctive relief from the enforcement of Senate Bill 277 (Cal. Stats 2015 ch. 35) (SB 277) (to which appellants refer in their opening brief as California Vaccine Law, or CVL). SB 277 is a public health and safety measure for mandatory school immunization enacted nearly three years ago. After the United States District Court for the Central District of California (Central District) dismissed appellants' initial complaint in January 2017, they joined a Placer County parent and her children to this action, and filed a nearly identical complaint in the superior court, asserting substantially similar causes of action. As detailed below, the superior court properly sustained respondents' demurrer to appellants' complaint without leave to amend. It correctly held that, as in their federal case, appellants fail to state a claim on which relief may be granted.

Appellants' claims are unsupported as a matter of California and federal 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; (2) states have a legitimate and compelling interest in requiring children to be vaccinated before they enter school; and (3) personal belief exemptions in mandatory vaccination statutes, which were created by statute, are not constitutionally protected and, as such, may be eliminated by the Legislature.

In enacting SB 277 on June 30, 2015, the Legislature expressed its intent to accomplish the total immunization of school children against a number of deadly, but highly preventable, childhood diseases. Appellants' claims are predicated on the misguided supposition that their subjective, personal beliefs against childhood vaccinations can outweigh the health and safety of the millions of children enrolled in California schools, the health and safety of the general public, and the considered judgment of the California Legislature in addressing a significant public health issue that embodies a core function of government: to protect the health and safety of its citizens against preventable harm.

This is the fifth case filed in California courts attempting to enjoin the enforcement of SB 277, with this latest attempt filed by appellants almost two years after the effective date of the law. All four of the prior cases – filed in the Central District, the United States District Court for the Southern District of California (Southern District), and the Los Angeles County Superior Court – have been dismissed.

By seeking to enjoin the enforcement of SB 277 years after its enactment, appellants are asking this Court to disregard decades of state and federal jurisprudence, and even the considered judgment of California federal and state courts that have evaluated these very claims with regard to SB 277. Indeed, the State's legitimate and compelling interest in protecting public health and safety by mandating vaccinations for school children has been *unanimously* recognized by the U.S. Supreme Court, the California Supreme Court, and every other federal and state court that has addressed the issue. This case is no different.

Respectfully, the superior court's order sustaining respondents' demurrer without leave to amend should be affirmed.

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RELEVANT FACTS AND PROCEDURAL HISTORY

I. THE STATE'S CHILD IMMUNIZATION STATUTES

SB 277 was enacted nearly three years ago, on June 30, 2015. (See Stats 2015 Ch. 35.) In relevant part, SB 277 eliminated the personal belief exemption from the statutory requirement that children receive vaccines for certain infectious diseases prior to being admitted to any public or private elementary or secondary school, or day care center. (*Ibid*.) In so doing, SB 277 revised the Health and Safety Code by amending sections 120325, 120335, 120370, and 120375, adding section 120338, and repealing Health and Safety Code section 120365. (*Ibid*.; see Complaint, p. 2 [amendments that appellants collectively refer to as "Section 120325" in their Complaint].)

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

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[1] The inherent dangers of these diseases are chronicled by the World Health Organization (WHO) and the Centers for Disease Control (CDC). Diphtheria is caused by a bacterium that produces a toxin that can harm or destroy human body tissues and organs. (http://www.who.int/immunization/topics/diphtheria/en/.) "Diphtheria affects people of all ages, but most often it strikes unimmunized children." (*Ibid*.) Hepatitis B causes liver infection which "can lead to serious health issues, like cirrhosis or liver cancer." (http://www.cdc.gov/hepatitis/hbv/index.htm.) Haemophilus influenzae, which is not to be confused with influenza (the "flu") causes

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SB 277 has been in effect since January 1, 2016. Personal belief exemptions have been prohibited since that date. (Health & Saf. Code, § 120335, subd. (g)(1).) And, since July 1, 2016, school authorities may not unconditionally admit for the first time any child to private or public elementary or secondary school, child day care center, day nursery, nursery school, family day care home, or development center, or advance any pupil to seventh grade, unless the pupil either has been properly immunized, or qualifies for other exemptions recognized by statute. (*Id*., § 120335, subd. (g)(3).)

There are exemptions to the immunization requirements under SB 277. Vaccinations are not required for any student in a home-based private school or independent study program who does not receive classroom-based instruction. (Health & Saf. Code, § 120335, subd. (f).) Moreover, a child may be medically exempt from the immunizations specified in the statute if a licensed physician states in writing that "the physical condition

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severe infection "occurring mostly in infants and children younger than five years of age . . . and can cause lifelong disability and be deadly." (http://www.cdc.gov/hi-disease/index.html.) Measles can cause, among other things, pneumonia, brain damage, and death. (http://www.cdc.gov/vaccinesafety/vaccines/mmrv-vaccine.html.) Mumps can cause deafness, inflammation of the brain and/or tissue covering the brain and spinal cord, and death. (*Ibid*.) Rubella could cause spontaneous miscarriages in pregnant women or serious birth defects. (*Ibid*.) Varicella (chickenpox) can lead to brain damage or death. (*Ibid*.) Tetanus causes painful muscle contractions, and can lead to death. (http://www.cdc.gov/tetanus/index.html.) Pertussis, also known as whooping cough, is a highly contagious respiratory disease "known for uncontrollable, violent coughing which often makes it hard to breathe," and can be deadly.(http://www.cdc.gov/pertussis/.) Polio is an incurable, "crippling and potentially fatal infectious disease," which spreads by "invading the brain and spinal cord and causing paralysis." (http://www.cdc.gov/polio/.)

of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe." (*Id*., § 120370, subd. (a).) Any other immunizations may only be mandated "if exemptions are allowed for both medical reasons and personal beliefs." (*Id*., § 120338.) SB 277 also provides an exception relating to children in individualized education programs. (*Id*., § 120335, subd. (h).) SB 277 further provides that personal belief exemptions on file with a school or child care center prior to January 1, 2016, will continue to be honored through each of the designated grade spans (birth to preschool; kindergarten and grades one to six inclusive; and grades seven to twelve, inclusive), until the unvaccinated pupil advances to the next grade span. (*Id*., § 120335, subd. (g).)

SB 277 was enacted in response to, among other things, a health emergency beginning in December 2014, when California "became the epicenter of a measles outbreak which was the result of unvaccinated individuals infecting vulnerable individuals including children who are unable to receive vaccinations due to health conditions or age requirements." (See Clerk's Transcript (CT), at p. 50 [Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.)].)

> "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*."

(*Ibid*. (italics added).)

As further noted in SB 277's legislative history, "[a]ll of the diseases for which California requires school vaccinations are very serious conditions that pose very real health risks to children." (CT, at p. 60 [Ass. Com. on Health, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.)].) "For example, measles in children has a mortality rate as high as about one

in 500 among healthy children, higher if there are complicating health factors." (*Id*., at p. 59.) "Most of the diseases can be spread by contact with other infected children." (*Id*., at p. 60.)

The legislative history confirms that SB 277 was enacted with the support of recognized medical, educational and child-advocacy organizations in California, including, among others, the California Medical Association, the California Chapter of the American College of Emergency Physicians, the California Association for Nurse Practitioners, the California Primary Care Association, the California School Boards Association, the California School Nurses Organization, and the Children's Defense Fund-California. (CT, at p. 55 [Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.)].)

II. APPELLANTS' CLAIMS

On November 21, 2016, appellants Devon Torrey-Love, S.L., Courtney Barrow, A.B., Margaret Sargent, M.S., W.S., and A Voice for Choice (AVFC) filed a complaint in the Central District against various state entities and officials, seeking to challenge the constitutionality of SB 277, alleging violations of substantive due process, equal protection of California's right to education, and 42 U.S.C. § 1983. (See *Torrey-Love, et al. v. State of California Department of Education et al*., Case No. CV 16-2410-DMG (DTBx) (*Torrey-Love I*), Complaint, ECF No. 1.) The federal district court granted the defendants' motion to dismiss. (*Ibid*., Order, ECF No. 51; see also CT, at p. 170.) Although the district court permitted leave to amend, appellants voluntarily dismissed their action in its entirety on February 1, 2017. (*Torrey Love I*, Notice, ECF No. 52.)

On April 4, 2017, the same plaintiffs from *Torrey-Love I*, joined by one adult Placer County resident and her three children, filed a nearly identical complaint in the Placer County Superior Court, alleging substantially identical causes of actions and re-labeling their federal claims

under the state Constitution. (CT, at p. 4.) The complaint in appellants' state action seeks a declaration that SB 277 violates their rights to due process, a public education and to privacy under the California Constitution. (*Ibid*.)

III. THE SUPERIOR COURT'S RULING

Respondents filed their demurrer to the complaint on May 3, 2017, seeking dismissal without leave to amend. (CT, at p. 179.)

On August 15, 2017, the superior court sustained respondents' demurrer without leave to amend. (CT, at p. 270.) In so doing, the superior court found that, "courts have repeatedly rejected constitutional challenges to mandatory vaccination laws based on the right to due process, free exercise, and equal protection" and that, accordingly, "[t]he State's legitimate and compelling interest in protecting health and safety by mandating immunization of school children has been repeatedly recognized by the courts." (CT, at pp. 271-272.)

Specifically, with regard to appellants' claims, the superior court held that the State's interests in enacting SB 277, to protect the health and safety of children and the general public, outweigh appellants' claims to due process, privacy and to a public education. (CT, at pp. 272-273.) Although the superior court held that, as a public health statute, SB 277 should be reviewed under the rational basis standard, it held in the alternative that, under the strict scrutiny standard advocated by appellants, "the result would be the same," and that, even under that standard, SB 277 outweighed the interests asserted by appellants. (CT, at p. 272.)

The superior court concluded that "the right to refuse immunization before attending public or private school [as asserted in the Complaint], "does not exist as a fundamental constitutional right." (CT, at p. 273.)

Finding that appellants "articulated no basis on which the claims could be amended to change their legal effect," the superior court sustained respondents' demurrer without leave to amend. (CT, at p. 273.)

On November 2, 2017, on appellants' unopposed ex parte application, the superior court entered its final order of dismissal. (CT, at p. 315.) Appellants filed their notice of appeal on November 16, 2017. (CT, at p. 319.)

STANDARD OF REVIEW

An appellate court employs two standards of review when a demurrer is sustained without leave to amend. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) The complaint is first reviewed de novo to determine whether it contains sufficient facts to state a cause of action. (*Ibid*; Code Civ. Proc., § 430.10, subd. (e).) The court deems as true all material facts properly pled, and those facts that may be implied or inferred from those expressly alleged. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591; *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) However, the court will not assume the truth of contentions, deductions or conclusions of fact or law, and the court may disregard allegations that are contrary to law, or are contrary to a fact of which judicial notice may be taken. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Where an allegation "is contrary to law or to a fact of which a court may take judicial notice, it is to be treated as a nullity." (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955.) The court "will not close [its] eyes to situations where a complaint contains . . . allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

Consistent with the fundamental principle of truthful pleading, a complaint otherwise good on its face can be rendered defective by judicially noticed facts. (*Watson v. Los Altos School Dist.* (1957) 149

Cal.App.2d 768, 771-772; see Code Civ. Proc., § 430.30, subd. (a).) Thus, a demurrer may be sustained on the ground that matters properly subject to judicial notice show that the complaint fails to state facts sufficient to constitute a cause of action. (See *Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5.)

In the event the demurrer is sustained on appeal, the appellate court then determines whether the trial court abused its discretion in doing so without leave to amend. (*Hernandez v. City of Pomona, supra,* 49 Cal.App.4th at p. 1497, citing *Kilgore v. Younger* (1982) 30 Cal.3d 770, 781; *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636.) On appeal of the lower court's refusal to grant leave to amend, an appellate court "will only reverse for abuse of discretion if [it] determine[s] there is a reasonable possibility the pleading can be cured by amendment. Otherwise, the trial court's decision will be affirmed for lack of abuse." (*Hernandez v. City of Pomona, supra,* 49 Cal.App.4th at p. 1497, citing *Hendy v. Losse* (1991) 54 Cal.3d 723, 742; *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662.)

ARGUMENT

As a matter of long-settled case law described below, appellants cannot a state a cause of action in this case. Thus, the judgment of the superior court should be affirmed.

I. MANDATORY IMMUNIZATION LAWS ARE LONG-RECOGNIZED CONSTITUTIONAL PUBLIC HEALTH MEASURES

The Legislature's authority to require students to be vaccinated in order to protect the health and safety of other students and the public at large, irrespective of their parents' personal beliefs, is firmly embedded in our jurisprudence, and embodies a quintessential function of an organized government to protect its people from preventable harm. The State's legitimate and compelling interest in protecting public health and safety by

mandating vaccinations for school children has been consistently recognized by federal and state courts for the past two centuries.

In *Jacobson v. Commonwealth of Massachusetts* (1905) 197 U.S. 11, 32 (hereafter *Jacobson*), the U.S. Supreme Court held that a state's mandatory vaccination statute was a lawful exercise of the state's police power to protect the public health and safety. Recognizing that "the principle of vaccination as a means to prevent the spread of smallpox has been enforced in many States by statutes making the vaccination of children a condition of their right to enter or remain in public schools," *Jacobson* relied in part on the California Supreme Court's decision in *Abeel v. Clark* (1890) 84 Cal. 226 (hereafter *Abeel*). (See *Jacobson, supra,* 197 U.S., at pp. 32-33.) In *Abeel*, the court upheld the State's school vaccination requirements, recognizing that "it was for the legislature to determine whether the scholars of the public schools should be subjected to [vaccination]." (*Abeel*, at p. 230.)

Appellants' attempt to mischaracterize *Jacobson* as outdated or inapplicable is misguided, and ignores the binding nature of Supreme Court precedent. (See Opening Br., at pp. ¬¬22-23.) Contrary to appellants' assertions, the legitimate and compelling interest recognized in *Jacobson* has been unanimously affirmed by federal and state courts across the country throughout the 20th and 21st centuries. Since *Jacobson*, the legitimate and compelling state interest in protecting the public health through mandatory vaccinations, especially for school children, has remained unquestioned and been re-affirmed. Courts have repeatedly upheld mandatory 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* (1922) 260 U.S. 174, 175-177 ["it is within the police power of a state to provide for compulsory

vaccination"]; *Prince v. Massachusetts* (1944) 321 U.S. 158 (hereafter *Prince*) [a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds"]; *Vernonia School District 47J v. Acton* (1995) 515 U.S. 646 (hereafter *Vernonia*) ["[f]or their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases"]; *Phillips v. City of New York* (2nd Cir. 2015) 775 F.3d 538, 543 (hereafter *Phillips*) [holding that "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause"]; *Workman v. Mingo County Sch.* (S.D. W. Va. 2009) 667 F.Supp.2d 679, 690-691 ["a requirement that a child must be vaccinated and immunized before it can attend the local public schools violates neither due process nor . . . the equal protection clause of the Constitution"], *affd. Workman v. Mingo County Bd. of Educ.* (4th Cir. 2011) 419 F.App'x 348, 353-354; *Boone v. Boozman* (E.D. Ark. 2002) 217 F.Supp.2d 938, 956 ["the question presented by the facts of this case is whether the special protection of the Due Process Clause includes a parent's right to refuse to have her child immunized before attending public or private school where immunization is a precondition to attending school. The Nation's history, legal traditions, and practices answer with a resounding 'no'"].)

Jacobson also has been consistently applied beyond the smallpox vaccine from which that seminal case arose. (See, e.g., *Phillips, supra,* 775 F.3d 538 [New York law required school children to be vaccinated for poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B]; *Workman v. Mingo County Sch., supra,* 667 F.Supp.2d 679 [West Virginia law required school child vaccination against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough]; *Boone v. Boozman, supra,* 217 F.Supp.2d 938

[Arkansas law required school child vacation against poliomyelitis, diphtheria, tetanus, pertussis, red (rubeola) measles, rubella, and other diseases as designated by the State Board of Health]; *Sherr v. Northport-East Northport Union Free School Dist.* (E.D.N.Y. 1987) 672 F.Supp. 81 [New York law at that time required school child vaccination against poliomyelitis, mumps, measles, diphtheria, and rubella]; *Hanzel v. Arter* (S.D. Ohio 1985) 625 F.Supp. 1259 [Ohio law required school children to be vaccinated against mumps, poliomyelitis, diphtheria, pertussis, tetanus, rubeola, and rubella].)

Since *Abeel* and *Jacobson*, California courts have consistently recognized the constitutionality of the State's mandatory vaccination statutes. In *French v. Davidson* (1904) 143 Cal. 658, 662 (hereafter *French*) the California Supreme Court reaffirmed *Abeel* and further held that California's mandatory vaccination law "in no way interferes with the right of the child to attend school, provided the child complies with its provisions." And in *Williams v. Wheeler* (1913) 23 Cal.App. 619, 625, the court observed that the state legislature has the power to prescribe "the extent to which persons seeking entrance as students in educational institutions within the state must submit to its [vaccination] requirements as a condition of their admission." (See also *Love v. Superior Court* (1990) 226 Cal.App.3d 736, 740 ["[t]he adoption of measures for the protection of the public health is universally conceded to be a valid exercise of the police power of the state, as to which 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"]; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 140 ["parents have no right to free exercise of religion at the price of a child's life, regardless of the prohibitive or compulsive nature of the governmental infringement"].)

The continued viability of *Jacobson* was recognized by the California Supreme Court in *Thor v. Superior Court* (1993) 5 Cal.4th 725 (*Thor*). In *Thor*, the Court, citing *Jacobson*, found that the State's interest *does* prevail over individual health decisions in certain circumstances, such as "*simple vaccination permissible to protect public health*." (*Id*., at p. 740 (italics added).)

Respondents are unaware of any case in which a court has struck down a state's mandatory school immunization law.

II. THE CONSTITUTIONALITY OF SB 277 HAS BEEN AFFIRMED IN CALIFORNIA STATE AND FEDERAL COURTS

Four prior actions have been filed in California state and federal courts challenging SB 277 since its enactment. On August 26, 2016, in *Whitlow v. California*, the Southern District denied a motion for preliminary injunction against enforcement of SB 277. (*Whitlow v. California* (S.D. Cal. 2016) 203 F.Supp.3d 1079.) The court held that the plaintiffs' claims were unlikely to succeed in part because "[t]he right of education, fundamental as it may be, is no more sacred than any of the other fundamental rights that have readily given way to a State's interest in protecting the health and safety of its citizens, and particularly, school children." (*Id*., at p. 1091; see also CT, at p. 99.)

In so holding, the *Whitlow* court observed that "[c]onditioning school enrollment on vaccination has long been accepted by the courts as a permissible way for States to innoculate large numbers of young people and prevent the spread of contagious diseases." (*Whitlow, supra,* 203 F.Supp.3d at p. 1091 (citing *Vernonia Sch. Dist. 475 v. Acton,* 515 U.S. 646, 656 (1995)). 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. (See *Whitlow v. California*, Case No. 3:16-cv-01715, Notice ECF No. 44.)

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. (See CT, at p. 118.) *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 the right to public education under the California Constitution. (*Ibid*.) In dismissing the case, the superior court in *Buck* adopted by reference the arguments raised by the State in *Whitlow*. (*Ibid*.) Plaintiffs in *Buck* served their notice of appeal on December 6, 2016. (See *Brown et al. v. The State of California*, California Court of Appeal, Second Appellate District, Case No. B279936.)

And, 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.,* United States District Court, 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 appeared *pro se*. (See CT, at p. 150.) In so doing, the court 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 pp. 159-164.) Plaintiffs' second amended complaint in *Middleton* was dismissed with prejudice on similar grounds on January 25, 2017. (See *Middleton et al. v. Pan et al.,* U.S.D.C., Central District of California Case No. 2:16-cv-05224-SVW-AGR, Order, ECF No. 159.) The plaintiffs in *Middleton* filed their notice of appeal to the Ninth Circuit on February 21, 2018. (See *Middleton et al. v. Pan et al.,* Ninth Circuit Case No. 18-55268.)

In the fourth case, *Torrey Love I, supra,* brought in federal court by all but one of the adult appellants herein, the federal district court granted respondents' motion to dismiss, holding in relevant part as follows:

> Here, contrary to Plaintiffs' allegations, the issue is not simply one of whether children have a fundamental right to refuse medical treatment or whether parents have a "fundamental right to control what types of medications are put into [their] child's body." . . . Rather, the linchpin of Plaintiffs' due process claim is whether the right to refuse immunization before attending a public school that requires immunization is a fundamental right subject to heightened protection. "The Nation's history, legal traditions, and practices answer with a resounding 'no.'" (internal citations omitted). The Supreme Court long ago declared that a state can require children to be vaccinated as a precondition for school attendance without running afoul of the Due Process Clause in the interests of maintaining the public health and safety. (Citing *Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27–29 (1905).) Though Plaintiffs assail these cases for their age, they have not been overturned and are still good law and binding upon this Court.

(*Torrey Love I,* CT, at pp. 175-177.)

III. SB 277 DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS

In their first cause of action, appellants assert a violation of the Due Process Clause in article I, section 7 of the California Constitution. (CT, at p. 18.) Appellants' reformulation of their federal claims into state claims is unavailing, because the analysis under state law is substantially identical to that which was applied to their previously dismissed federal claims.

Due process claims under California and federal law are analyzed under the same principles. (See, e.g., *Patel v. City of Gilroy* (2002) 97 Cal.App.4th 483, 486.) The Supreme Court's "established method of substantive-due-process analysis has two primary features: [f]irst, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' [and] [s]econd, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." (*Id*. at pp. 720-721.)

Appellants' due process claims were rejected by the federal court in *Torrey-Love I*. (See *Torrey Love I,* CT, at pp. 175-176.) Appellants' claims in this case are indistinguishable. Their assertion that they have a fundamental right to refuse mandatory vaccinations for their school age children is contrary to this Nation's history and tradition of requiring that school age children be vaccinated before attending school, as confirmed by *Jacobson* and its progeny. Specifically, with regard to a person's right to bodily autonomy and right to refuse certain medical treatment, the U.S. Supreme Court has cited to *Jacobson* and recognized mandatory vaccination as an example where state interests outweigh a plaintiff's liberty interest in declining a vaccine. (*Cruzan v. Director*, *Missouri Department of Health* (1990) 497 U.S. 261, 279; see also *Boone v. Boozman, supra,* 217 F.Supp.2d at p. 956 ["the question … is whether the special protection of the Due Process Clause includes a parent's right to refuse to have her child immunized before attending public or private school where immunization is a precondition to attending school. The Nation's history, legal traditions, and practices answer with a resounding 'no'"].)

Indeed, the Supreme Court has 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.* (1979) 442 U.S. 584, 603.) 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, supra,* 321 U.S. at p. 166; see also *Pickup v. Brown (*9th Cir. 2014) 740 F.3d 1208, 1235 [citing *Prince* and holding that parents' right to make decisions regarding the care, custody, and control of their children, "is not without limitations" in "the health arena, [where] states may require the compulsory vaccination of children"].)

The California Supreme Court has also recognized,

> that the liberty interest of a minor is not coextensive with that of an adult. Even where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . As against the state, this parental duty and right [to direct the upbringing of one's children] is subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."

(*In re Roger S.* (1977) 19 Cal.3d 921, 928 [citing *Ginsberg v. New York* (1968) 390 U.S. 629, 638, *Prince, supra,* 321 U.S. at p. 170, and *Wisconsin v. Yoder* (1972) 406 U.S. 205, 234] (internal quotation marks omitted).)

"Unquestionably, [SB 277's act of] imposing a mandatory vaccine requirement on school children as a condition of enrollment does not violate substantive due process." (*Whitlow, supra,* 203 F.Supp.3d at p. 1089.)

Here, SB 277 promotes the rights of children to healthy lives, and by extension all of their other rights protected by the Due Process Clause, by ensuring that they are properly vaccinated against dangerous, and in some cases potentially deadly, diseases.

IV. SB 277 DOES NOT VIOLATE THE RIGHT TO AN EDUCATION

Appellants wrongly assert in their second cause of action that SB 277 violates the right to an education under article IX, section 5 of the California Constitution. (CT, at p. 20.) To the contrary, the statute operates to protect children's access to education by ensuring that such access is not impaired by the proliferation of preventable diseases.

A. Mandatory Vaccinations Do Not Infringe on the Right to a Free Public Education

The California Constitution provides that the "Legislature shall provide for a system of common schools by which a free school shall be

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

Appellants' argument that the California Supreme Court's holding in *French* is somehow outdated (see Opening Br., at pp. 16-17) ignores not only the binding Supreme Court precedent in *French*, but also the overwhelming body of subsequent federal and state case law, including decisions in this State, upholding mandatory vaccination statutes. As stated above, the continued viability of these cases was recognized by the California Supreme Court in *Thor v. Superior Court, supra,* in which the Court found that the State's interest *does prevail* over individual health decisions in certain circumstances, such as "*simple vaccination permissible to protect public health*," citing *Jacobson*. (*Thor*, 5 Cal.4th at p. 740, italics added.)

Appellants' argument is particularly unavailing when the *Whitlow* court clearly held that "[t]he right of education, fundamental as it may be, is no more sacred than any of the other fundamental rights that have readily given way to a State's interest in protecting the health and safety of its

citizens, and particularly, school children." (*Whitlow, supra,* 203 F.Supp.3d at p. 1091.) [2]

In bringing their claims, appellants fail to acknowledge the rights of the millions of school children and their parents who rely on mandatory vaccinations to ensure that their right to an education is not threatened by the spread of potentially fatal diseases. Indeed, the U.S. Supreme Court has long recognized that the institutional interest of schools, as well as the rights of the student body at large, often hold sway over the rights of individual students. "For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases." (*Vernonia*, *supra*, 515 U.S. 646 [noting with approval that "all 50 States required public school students to be vaccinated against diphtheria, measles, rubella, and polio," and that "[p]articularly with regard to medical examinations and procedures, therefore, 'students within the school environment have a lesser expectation of privacy than members of the population generally'"].)[3]

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[2] Appellants' assertion that "the federal district court [in *Boone, supra*] explicitly stated that its ruling would be different if public education was a fundamental right in that jurisdiction," (Opening Br., at p. 17), is wrong. The court in *Boone* made no such statement. Instead, it merely observed correctly that there is no fundamental right to an education recognized in the U.S. Constitution. (*Boone, supra*, 217 F. Supp. 2d at 957 ["[T]o the extent plaintiff asserts that [she] … has a fundamental constitutional right to a free and appropriate public education which outweighs the State's interest in immunizing school children, plaintiff is incorrect. While the Court does not minimize the importance of education, it is firmly established that the right to an education is not provided explicit or implicit protection under the Constitution and is not a fundamental right or liberty."].)

[3] This case also is demonstrably distinguishable from *Phipps v. Saddleback Valley USD*, (1988) 204 Cal. App. 3d 1110, cited by appellants in their opening brief. (Opening Br., at pp. 14, 17.) In that case, the court

(continued…)

Because mandatory vaccinations promote, rather than infringe on, the right to a free public education, the analysis of appellants' second cause of action stops here, and respondents' demurrer should be sustained.

B. Even if SB 277 Arguably Infringes on Children's Right to a Free Public Education, the Statute Survives Appellants' Constitutional Challenge Because it is Rationally Related to the State's Legitimate Interest in Protecting Public Health

In holding that "education is a fundamental interest," the California Supreme Court in *Serrano v. Priest* (1976) 18 Cal.3d 728, 766 applied strict scrutiny review to laws affecting the right to an education. However, the constitutional challenge in *Serrano* was not to a health and safety provision. After *Serrano*, the California Supreme Court held that the infringement of a constitutional right by a *health and safety* statute is held to the less restrictive rational basis standard of review. (*People v. Privitera* (1979) 23 Cal.3d 697, 703.) Appellants disregard *Privitera* in their Opening Brief.

As discussed in detail above, *Jacobson* and its progeny have unequivocally held that immunization laws are justified because they serve a legitimate state interest in protecting public health and safety. SB 277 is rationally related to the State's legitimate interest in protecting the health and safety of its citizens, including children. In enacting SB 277, the Legislature recognized that "[s]afe schools are a precondition to education." (CT at p. 142.) SB 277 does not violate the right to an education; to the

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(…continued)
enjoined a school district's decision to preclude a child exposed to the AIDS virus from attending school. The court predicated its holding in part on there being insufficient evidence that the child was infectious to other school children, and the lack of any articulable policy by the school district. Here, the Legislature enacted SB 277 in furtherance of its long-recognized authority under its police powers to protect all school children from highly communicable diseases as to which, unlike AIDs, there are preventative vaccines.

contrary, it benefits and supports safe access to education for all school children by ensuring that the exercise of the right to education is not impaired by the transmission of serious or potentially fatal diseases. (See also Cal. Const., art. I, § 28(7) ["the People find and declare that the right to public safety extends to public and private primary, elementary, junior high, and senior high school, . . . where students and staff have the right to be safe and secure in their persons"].)

Appellants have not stated a valid cause of action because SB 277 serves a legitimate interest of the State in protecting the health and well-being of children, and in promoting a safe environment in California's schools.

C. SB 277 Also Withstands a Strict Scrutiny Analysis

Although rational basis is the appropriate level of scrutiny here under California law, mandatory vaccination statutes, *including SB 277*, have also withstood scrutiny under the compelling state interest standard. (See *Whitlow, supra,* 203 F.Supp.3d at p. 1090 ["the State's interest in protecting the public health and safety, particularly the health and safety of children, does not depend on or need to correlate with the existence of a public health emergency . . . That interest exists regardless of the circumstances of the day, and is equally compelling whether it is being used to prevent outbreaks or eradicate diseases."]; *Workman v. Mingo County Sch., supra,* 419 F.App'x at pp. 353-54 ["the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest"]; *Sherr v. Northport-East Northport Union Free School Dist.* (E.D.N.Y. 1987) 672 F.Supp. 81, 88 [holding there is a "compelling interest . . . in fighting the spread of contagious diseases through mandatory inoculation programs"].) Appellants are unable to cite to even a single case where a court has held that there is no compelling state interest in protecting the public from the spread of communicable diseases through vaccination.

SB 277 is narrowly tailored to serve the State's legitimate and compelling interest in protecting public health. It does not mandate vaccination for all diseases, but only those that the Legislature determined are "very serious" and that "pose very real health risks to children." (CT at p. 60 [Assem. Com. on Health, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.)].) SB 277 only eliminates the personal belief exemption as to the ten specific vaccines presently enumerated in the statute. (Health & Saf. Code, § 120338.) It also contains appropriate but limited exemptions for children with medical conditions for whom vaccinations were medically determined to be unsafe, and children who are homeschooled or enrolled in independent study programs. (*Id*., § 120335, subd. (f).) SB 277 also provides an exception related to students who attend individualized education programs. (*Id*., at subd. (h).)

Therefore, even if, as appellants assert, SB 277 must be reviewed under strict scrutiny, appellants fail to state a claim for a violation of the right to a free public education because SB 277 is narrowly tailored to meet the State's compelling interest in protecting the health of school children and the public at large.

V. SB 277 DOES NOT VIOLATE THE RIGHT TO PRIVACY

Appellants allege two violations of their right to privacy: (1) the right to control the integrity of their bodies and the bodies of their children; and (2) the right to maintain the confidentiality of medical records. (CT, at p. 21.)

Appellants' bodily autonomy claim, previously framed by them as a substantive due process claim, was rejected by the federal court in *Torrey-Love I*. (See Ct, at pp. 175-176.) Appellants' re-formulation of their claim under the California right to privacy should not alter the outcome. SB 277's effect on these fundamental rights is subject to rational basis review because SB 277 concerns the State's police powers of safeguarding public

health. (*Wilson v. California Health Facilities Com.*, (1980) 110 Cal.App.3d 317, 324.) Indeed, even under strict scrutiny review, SB 277 does not violate these fundamental rights, for the reasons articulated above.

The California Supreme Court has cautioned that "[p]rivacy concerns are not absolute; they must be balanced against other important interests. [N]ot every act which has some impact on personal privacy invokes the protections of [our Constitution]. . . . [A] court should not play the trump card of unconstitutionality to protect absolutely every assertion of individual privacy." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 37.) "The court must weigh the justification for the conduct in question against the intrusion on privacy resulting from the conduct . . . Central to that evaluation is a recognition of the context in which the allegedly invasive conduct occurs." (*In re Carmen M.* (2006) 141 Cal.App.4th 478, 492 [citing *Vernonia, supra,* 515 U.S. at p. 665 ["The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care"].)

As detailed above, *Jacobson* and its progeny unequivocally underscore the State's legitimate and compelling interest in protecting public health and safety from the spread of dangerous diseases, particularly within the context and setting of school, by mandating that schoolchildren be immunized. Thus, a student's privacy interest is limited in a public school environment, where the school is responsible for students' health and safety, and students are routinely subject to vaccinations. (*Bd. of Ed. of Indep. Sch. Dist. No. 92 v. Earls* (2002) 536 U.S. 822, 830-831 (*Earls*); see also *Redding v. Safford Unified Sch. Dist. No. 1* (9th Cir. 2008) 531 F.3d 1071, 1094 [citing *Earls*.])

As with bodily autonomy, an individual's medical privacy right "may be outweighed by supervening public concerns." (*Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 679.) Thus, where "intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged." (*Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 371; see also *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 712 ["[i]n the area of health and health care legislation, there is a presumption both of constitutional validity and that no violation of privacy has occurred"]; *Mathews v. Harris* (2017) 7 Cal.App.5th 334, 368 ["The privacy claim fails if there is a reasonable exercise of California's broad police powers enacted to address 'problems of vital local concern.'"].)

Here, the only medical information that SB 277 seeks is whether and when a child has been vaccinated against the ten diseases enumerated in the statute. Health and Safety Code section 120440 permits health care providers, schools and child care facilities to disclose medical information such as the types and dates of immunizations a child has received to local health departments. (Health & Saf. Code, § 120440, subd. (c).) Local health departments and the California Department of Public Health may then disclose such information to each other. (*Ibid*.) The Legislature similarly recognized such a need for disclosure under the California Confidentiality of Medical Information Act, which provides that health providers may disclose medical information to a local health department to prevent or control disease, and for other public health-related reasons. (Civ. Code, § 56.10, subd. (c)(18).)

For these reasons, appellants fail to state a claim under the state constitutional right to privacy, whether couched in terms of bodily integrity or medical privacy.

VI. APPELLANTS' RELIANCE ON THE UNCONSTITUTIONAL CONDITIONS DOCTRINE IS UNAVAILING TO THEIR FACIALLY DEFECTIVE CLAIMS

Appellants' assertion that SB 277 forces them to choose between the exercise of their fundamental constitutional rights, *i.e*., the right to privacy, the right to an education, and the right to direct the upbringing of one's children, is unfounded. (Opening Br., at p. 13.) This identical argument was expressly and correctly rejected by the Central District in appellants' federal action (CT, at pp. 174-177), and the superior court in this case. (CT, at p. 4.)

"To determine whether the government has violated the unconstitutional conditions doctrine, the court must look to whether the condition placed upon the receipt of a benefit 'further[s] the end advanced as the justification for the prohibition.'" (*Palmer v. Valdez* (9th Cir. 2009) 560 F.3d 965, 972 [quoting *Nollan v. Cal. Coastal Comm'n* (1987) 483 U.S. 825, 837].) Therefore, "the 'government cannot impose a condition for a reason not germane to one that would have justified denial' of the benefit." (*Ibid*., at p. 972.) However, "*such limitations only arise when the condition attached infringes on a constitutionally protected interest*." (*Parks v. Watson* (9th Cir. 1983) 716 F.2d 646, 651(italics added).)

The fatal flaw in appellants' argument is their assumption that the rights they assert are absolute. As discussed in detail in this brief, although these rights may be fundamental, they are not absolute, but are balanced against competing interests of the State. In this instance, every federal and state court that has balanced these rights against mandatory vaccination statutes such as SB 277 has firmly held that the state's interests in protecting the health and safety of the public through mandatory school vaccinations are legitimate and compelling, and outweigh even these fundamental rights.

In short, no court has ever held that parents have a recognized constitutionally protected interest in demanding that their children attend school or childcare without their children first being vaccinated against serious but preventable diseases.

Thus, in the absence of an infringement of a constitutionally protected right, the so-called unconstitutional conditions doctrine advanced by appellants cannot apply here.

A. SB 277 Furthers Legitimate and Compelling State Interests

Even if the unconstitutional conditions doctrine applied to appellants' claims, and it does not, the doctrine permits a condition placed upon the receipt of a government benefit if the condition "further[s] the end advanced as the justification for the prohibition." (*Palmer, supra*, 560 F.2d at p. 972.) In this regard, the analysis under the unconstitutional conditions doctrine is conceptually indistinguishable from the balancing of states' legitimate and compelling interests in mandatory vaccinations with various competing personal rights. Here, applying either the rational basis test or strict scrutiny, there can be no question that the condition of vaccination furthers the end advanced by prohibiting unvaccinated children from attending schools or day care centers.

Furthermore, SB 277 is narrowly tailored to serve its interest in protecting children from the spread of dangerous communicable and potentially fatal diseases. SB 277 mandates vaccination only for those diseases that the Legislature determined are "very serious" and that "pose very real health risks to children." (See CT, at p. 60.) The statute 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. (Health & Saf. Code, § 120335, subd. (f) (West 2016).)

Appellants' assertions that a "massive education effort" or "incentivized vaccination" are alternative means to protect the public health from contagious diseases are not only baseless, but also beside the point. (See Opening Br., at p. 15.) *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, supra,* 197 U.S. at p. 30.)

Appellants also assert in their opening brief that vaccinations "cost money" and "can take large amounts of time and effort." (Opening Br., at p. 8.) But plaintiffs' claims are predicated on their personal beliefs against vaccinations, not on their ability to pay to immunize their children. Even so, the California Department of Public Health Immunization Branch administers the California Vaccines for Children Program, which provides "vaccines at no cost to . . . children from birth through 18 years of age." (http://eziz.org/vfc/overview/.)

Appellants' refusal to vaccinate their children was their decision, for which they alone are responsible. SB 277 provides appellants and their children with the alternative of home-schooling, thereby preserving their right to a public education under the state Constitution, while at the same time preserving the rights of the other children at school, particularly those children who cannot be vaccinated for medical reasons.

VII. SB 277 DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE CALIFORNIA CONSTITUTION

For the first time in this case, appellants assert on appeal that SB 277 violates the right to free exercise of religion. (Opening Br., at p. 23.) No such allegation is made in the Complaint (CT, at pp. 4-24), nor did appellants raise the issue in their opposition to respondents' demurrer (CT,

at pp. 213-227). Any such argument should therefore be deemed to have been waived. (See e.g., *Jones v. Wagoner* (2001) 90 Cal.App.4th 466, 481-482 ["as a general rule issues not raised in the trial court cannot be raised for the first time on appeal"].)

Nevertheless, appellants' claim is without merit. Appellants do not claim to be asserting their own religious beliefs, but rather their characterizations of the possible religious beliefs of other unidentified persons who are not parties to this action. (Opening Br., at p. 24.)

Moreover, the cases cited by appellants are inapposite. Contrary to appellants' arguments, the decision in *Slayton v. Pomona Unified School District* (1984) 161 Cal.App.3d 538] is *not* "particularly insightful." (Opening Br., at p. 14.) Plaintiffs fail to explain how the "loyalty oath to a school district" in *Slayton* is in any way comparable to the State's interest in mandating vaccination to protect public health and safety. (See Pls. Opp., at pp. 6-7.) In any event, as expressly stated in that opinion, "the only issue presented by [*Slayton*] . . . is whether the trial court abused its discretion in failing to award attorney fees under the private attorney general doctrine codified in Code of Civil Procedure section 1021.5." (*Slayton, supra,* 161 Cal.App.3d at p. 544.)

Appellants' citation to *Ian J. v. Peter M.* (2013) 213 Cal.App.4th 189 (*Ian J.*) is equally erroneous. (Opening Br., at p. 25.) The court in *Ian J.* did not articulate, much less apply, a "test and standard" of clear and convincing evidence to the State's legitimate and compelling interest in protecting public health and safety. (Opening Br., at p. 25.) *Ian J.* concerned a family court's visitation order under Family Code section 3102; the appellate court simply held that, "a clear and convincing evidence standard of proof must be applied *in determining whether grandparent visitation should be ordered over the objection of a child's custodial parent.*" (*Ian J.*, 213 Cal.App.4th at pp. 191, 207 (italics added).)

Even if appellants' characterizations of others' possible religious beliefs were valid, and appellants were proper parties to assert such beliefs, appellants' suggestion that strict scrutiny is the applicable standard of review for their claims is wrong. California courts review challenges "under the free exercise clause of the California Constitution in the same way we might have reviewed a similar challenge under the federal Constitution." (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 562.) "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 531.)

SB 277 is neutral and of general applicability; it applies to all children in day care, public schools and private schools. (See Health & Saf. Code, § 120325 et seq.) And, as repeatedly stated in this brief, SB 277 is rationally related to a legitimate state interest of protecting the public from the spread of debilitating, and potentially fatal, diseases, and therefore does not violate the Free Exercise Clause.

Appellants also argue that SB 277 should be invalidated because it conflicts with "genuine, deeply held beliefs about what goes into their bodies and how certain vaccines are made." (Opening Br. at p. 24.) However, the Free Exercise Clause protects religious beliefs, not personal beliefs. (*Wisconsin v. Yoder* (1972) 406 U.S. 205 (hereafter *Yoder*) ["philosophical and personal . . . belief[s] [do] not rise to the demands of the Religion Clauses"].) (*Yoder, supra,* 406 U.S. at p. 216.)

Similar to the appellants here, the plaintiffs in *Hanzel v. Arter* (S.D. Ohio 1985) 625 F.Supp. 1259 (hereafter *Hanzel*), objected to the immunization of their children on the basis of their belief in "a body of thought which teaches that injection of foreign substances into the body is

of no benefit and can only be harmful." (*Id*., at p. 1260.) The *Hanzel* court disagreed, stating "[a]s made clear by the Supreme Court in *Wisconsin v. Yoder*, philosophical beliefs do not receive the same deference in our legal system as do religious beliefs, even when the aspirations flowing from each such set of beliefs coincide." (*Id*., at p. 1265; see also *Friedman v. Southern California Permanente Medical Group* (2002) 102 Cal.App.4th 39 ["While veganism compels plaintiff to live in accord with strict dictates of behavior, it reflects a moral and secular, rather than religious, philosophy"]; *Syska v. Montgomery County Bd. of Ed.* (Md. Ct. Spec. App. 1980) 45 Md.App. 626, 632 ["[A]ppellant's objections to the immunization program . . . are based on her own subjective evaluation of and rejection of the benefits to the public safety and to her children derived therefrom. Her beliefs . . . are philosophical and personal rather than religious."].)

Appellants also mischaracterize the ruling in *LePage v. State of Wyoming* (Wyo., 2001) 18 P.3d 1177. (See Opening Br., at pp. 23-24.) The *LePage* court did not "reform[] a broad vaccine mandate to engraft on it a personal-beliefs waiver," as appellants claim. (*Ibid*.) Rather, the *LePage* court simply held that Wyoming's Department of Public Health exceeded its authority under the Wyoming statute in denying certain exemptions for personal beliefs. Indeed, the *LePage* court *expressly declined* to rule on the constitutional challenges to the statute, holding instead that, "if problems regarding the health of Wyoming's schoolchildren develop because this self-executing statutory exemption is being abused, it is the *legislature's* responsibility to act within the constraints of the Wyoming and United States Constitutions." (*Id*., at p. 1181 (italics added).) In so doing, the court expressly recognized the continued viability of *Jacobson* as authority "that the state has the authority to enact a mandatory immunization program through the exercise of its police power." (*Id*., at p. 1179.)

That appellants are entitled to their personal beliefs is without question. But, as a matter of law, these personal beliefs are not protected under the Free Exercise Clause. "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief." (*Yoder, supra*, 406 U.S. at p. 215.) Nor are these personal beliefs a legitimate restraint on the State's authority to protect the public from the spread of communicable diseases.

VIII. RESPONDENTS' DEMURRER WAS PROPERLY SUSTAINED WITHOUT LEAVE TO AMEND

In sum, respondents' demurrer should be sustained on appeal because all of the causes of action in appellants' complaint fail to state a claim as a matter of law. Each of appellants' claims runs counter to over a century of jurisprudence in the U.S. and California Supreme Courts, and the rest of the Nation – jurisprudence that (1) has consistently affirmed the states' legitimate and compelling interest to require school children to be vaccinated to protect their health; (2) rests upon the overwhelming weight of scientific evidence confirming the transformative public health benefits of vaccination; and (3) ensures children's right to a safe and healthy environment for their education.

Because appellants' claims, as advanced in two separate actions in federal and state court, conflict so markedly with established precedent, there is no reasonable possibility that the complaint can be cured by amendment. Therefore, the superior court's decision to sustain respondents' demurrer without leave to amend was not an abuse of discretion and should be affirmed.

CONCLUSION

For the foregoing reasons, respondents respectfully request that this Court affirm the superior court's ruling sustaining respondents' demurrer to appellants' complaint without leave to amend.

Dated: April 25, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENTS' BRIEF uses a 13 point Times New Roman font and contains 9,535 words.

Dated: April 25, 2018

XAVIER BECERRA
Attorney General of California

/s/ Jonathan E. Rich
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DECLARATION OF SERVICE

Case Name: Torrey Love et al v. State of California, et al.

Case No.: C086030

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service.

On April 25, 2018, I caused to be served **RESPONDENTS' BRIEF** in the following manner:

- **Via electronic service through the Court's Electronic Filing System (True Filing) to the following:**

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- **To the California Supreme Court by sending the copy to the Supreme Court's electronic service address pursuant to Rule 8.212(c).**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 25, 2018, at Los Angeles, California.

/s/ *Jonathan E. Rich*
Declarant