KAMALA D. HARRIS
Attorney General of California
RICHARD T. WALDOW
Supervising Deputy Attorney General
JONATHAN E. RICH (SBN 187386)
JACQUELYN Y. YOUNG (SBN 306094)
Deputy Attorneys General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2439
Fax: (213) 897-2805
E-mail: Jonathan.Rich@doj.ca.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

5:16-cv-2410 DMG (DTBx)

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

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

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs' Complaint fails to state a claim on which relief may be granted because their claims are unsupported as a matter of federal and state constitutional law, which for decades has consistently held that (1) a state's exercise of its police powers in protecting the public from communicable diseases is rationally based; (2) states have a legitimate and compelling interest in requiring children to be vaccinated before entering 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 Senate Bill 277 (Cal. Stats 2015 Ch. 35) (SB 277) (to which Plaintiffs refer in their Complaint as §120325 *et seq*.), 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. Plaintiffs' 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 fourth case filed in California courts attempting to enjoin the enforcement of SB 277, with this latest attempt coming well over a year after the effective date of the law. Two of the prior cases – in the Southern District of California and the Los Angeles County Superior Court – have been dismissed. In both of these cases, the federal and state courts recognized that the authority of the Legislature 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. Mandatory vaccination

of school children embodies a quintessential function of an organized government to protect its people from preventable harm. 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. A motion to dismiss predicated in part on this indisputable precedent is already under submission in the third case challenging SB 277, in the Central District of California.

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

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

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

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

RELEVANT FACTS

I. THE STATE'S CHILD IMMUNIZATION STATUTES

Senate Bill 277 (SB 277) was enacted over one year ago, on June 30, 2015. *See* Cal. Stats 2015 Ch. 35. In relevant part, SB 277 eliminates 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. *Id.* In so doing, SB 277 revised the California Health and Safety Code by amending sections 120325, 120335, 120370, and 120375, added section 120338, and repealed California Health and Safety Code section 120365. *Id.*

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. Cal. Health & Saf. Code, § 120325(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)]." *Id.*[1]

[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." *Id.* ***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 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. *Id.* ***Rubella*** could cause spontaneous miscarriages in pregnant women or serious birth defects. *Id.* ***Varicella (chickenpox)*** can lead to brain damage or death. *Id.* ***Tetanus*** causes painful muscle contractions, and can lead to death. http://www.cdc.gov/tetanus/index.html. ***Pertussis***, also known as whooping cough, is a highly contagious (continued…)

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

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. Cal. Health & Saf. Code, § 120335(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 of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe." Cal. Health & Saf. Code, § 120370(a). Any other immunizations may only be mandated "if exemptions are allowed for both medical reasons and personal beliefs." Cal. Health & Saf. Code, § 120338. SB 277 also provides an exception relating to children in individualized education programs. Cal. Health & Saf. Code, § 120335 (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. Cal. Health & Saf. Code, § 120335(g).

(…continued)
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/.

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* Defendants' concurrently-filed Request for Judicial Notice (RJN), Exh. 1, Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at 5.

> "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.*"

Id. (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." RJN, Exh. 2, Ass. Com. on Health, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at 4. "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 3. "Most of the diseases can be spread by contact with other infected children." *Id*., at 4.

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. RJN, Exh. 1, Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.), at 10.

STANDARD OF REVIEW

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

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

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

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

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

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

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

Iqbal, 556 U.S. at 685.

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

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

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

///

///

///

---

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

ARGUMENT

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

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

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

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

In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Supreme Court again affirmed the State's overriding interest in the matter of public health, stating by way of example that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id*. at 166-167. *See also Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) ("[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").

Since *Jacobson, Zucht,* and *Prince,* federal 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*. In *Workman v. Mingo County Sch.*, 667 F. Supp.2d 679, 690-691 (S.D. W. Va. 2009), *affirmed Workman v. Mingo County Bd. of Educ*., 419 F. App'x 348, 353-54 (4th Cir. 2011) (unpublished), the court rejected the argument that the plaintiff's rights to free exercise, equal protection and substantive due process were violated when her daughter was not permitted to attend public school without the immunizations required by state law. The court noted that "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." *Id*.

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

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

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

Recognizing that mandatory vaccination laws are a proper exercise of the State's police powers, the California Supreme Court in *Abeel v. Clark*, 84 Cal. 226 (1890) 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]." *Id*., at 230. The California Supreme Court revisited the issue in *French v. Davidson*, 143 Cal. 658 (1904), in which the Court upheld San Diego's vaccination requirement, explaining that "the proper place to commence in the attempt to prevent the spread of a contagion was among the young, where they were kept together in considerable numbers in the same room for long hours each day . . . children attending school occupy a natural class by themselves, more liable to contagion, perhaps, than any other class that we can think of." *Id*. at 662, italics added; *see also Williams v. Wheeler*, 23 Cal. App. 619, 625 (1913) (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"); *Love v. Superior Court*, 226 Cal.App.3d 736, 740 (1990) ("[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").

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

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

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

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

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

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

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

Thus, the State's 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. [3]

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

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

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

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). 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 720-721. Where a fundamental right is not implicated, the state law need only be rationally related to a legitimate government interest. *Id*. at 728.

Plaintiffs' 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 unequivocally by *Jacobson* and its progeny. Specifically with regard to a person's right to refuse certain medical treatment, the 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,* 497 U.S. 261, 279 (1990); *see also Boone v. Boozman*, 217 F. Supp.2d at 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.'").

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.*, 442 U.S. 584, 603 (1979). As explained in *Prince*, "neither the rights of religion nor rights of parenthood are beyond limitation[;]" both can be interfered with when necessary to

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

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

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, communicable diseases. This legitimate and compelling exercise of the State's police powers is a bedrock of this Nation's history and jurisprudence. For this reason, Plaintiffs fail to assert plausible due process claims against Defendants.

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

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

In *French v. Davidson*, 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*, 143 Cal. at 662. Similarly, in a case cited extensively in *Jacobson*, the New York Court of Appeal in *Viemeister v. White,* 179 N.Y. 235, 72 N.E. 97 (1904), 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 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").

In drafting SB 277, the California Legislature recognized that "[s]afe schools are a precondition to education." RJN, Exh. 3, at 6. SB 277 does not violate the right to education; to the contrary, it benefits and supports safe access to education for all school children by ensuring that the exercise of a right to education is not impaired by the transmission of serious or potentially fatal disease. *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").

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

Indeed, the U.S. Supreme Court has long recognized that the institutional interest of schools, as well 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 School District 47J v. Acton*, 515 U.S. 646 (1995) (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'").

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

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

E. Plaintiffs' Equal Protection Claims Are Contrary to the Weight of Authority that Mandatory Vaccination Laws Do Not Unlawfully Discriminate

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

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

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

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

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

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

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

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

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

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

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

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

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

---

[4] This case is demonstrably distinguishable from *Phipps v. Saddleback Valley USD*, 204 Cal. App. 3d 1110 (1988), cited by Plaintiffs in their Complaint. *See* Complaint 15, ¶ 49, ECF No. 1. In that case, the court 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.

II. DEFENDANTS ARE IMMUNE FROM SUIT IN THIS CASE

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

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

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

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

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98-99 (1984), (quoting *Ex parte State of New York*, 256 U.S. 490, 497 (1921).)[5]

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

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

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

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

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

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

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

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

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

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

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

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

Therefore, the state agencies, the Governor and the Attorney General are immune from Plaintiffs' claims.

B. The Individual Defendants Are Immune from Plaintiffs' State Law Claims

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

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

III. PLAINTIFF A VOICE FOR CHOICE DOES NOT HAVE STANDING

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

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

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

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

CONCLUSION

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

Dated: December 15, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
RICHARD T. WALDOW
Supervising Deputy Attorney General
JACQUELYN Y. YOUNG
Deputy Attorney General

/s/ Jonathan E. Rich
JONATHAN E. RICH
Deputy Attorney General

Attorneys for Defendants

LA2016602791
52324895.doc