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8  
9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
11 WESTERN DIVISION

13 **DEVON TORREY-LOVE; S.L.;**  
14 **COURTNEY BARROW; A.B.;**  
15 **MARGARET SARGENT; M.S.;**  
16 **W.S.; and A VOICE FOR CHOICE,**  
17 **INC. on behalf of its members,**  
18  
19 **STATE OF CALIFORNIA,**  
20 **DEPARTMENT OF EDUCATION;**  
21 **STATE OF CALIFORNIA, BOARD**  
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25 **of Education; STATE OF**  
26 **CALIFORNIA, DEPARTMENT OF**  
27 **PUBLIC HEALTH; DR. KAREN**  
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**Health; EDMUND G. BROWN JR.,**  
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**California; KAMALA HARRIS, in**  
**her official capacity as Attorney**  
**General of California,**

Defendants.

5:16-cv-2410 DMG (DTBx)

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

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

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Judge: The Honorable Dolly M.  
Gee  
Trial Date: None Set  
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**INTRODUCTION**

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

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

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

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

1 against constitutional challenge. History, in itself, does not compel  
2 the result in this case, *but the case law makes clear that States may*  
3 *impose mandatory vaccination requirements without providing for*  
*religious or conscientious objections.*

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

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

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

20  
21  
22 <sup>1</sup> Copies of the decisions in *Whitlow* and *Buck* are attached as Exhibits 4 and  
23 5 to Defendants' Request for Judicial Notice filed on December 15, 2016, in  
support of their Motion to Dismiss Plaintiffs' Complaint and this Opposition. *See*  
Defendants' Request for Judicial Notice (RJN), ECF No. 32.

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



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

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

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

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

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1 **II. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THEIR CLAIMS THAT SB**  
2 **277 IS UNCONSTITUTIONAL**

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

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

12 For over a century, the legitimate and compelling state interest in protecting  
13 the public health through mandatory vaccinations, especially for school children,  
14 has remained unquestioned, and is firmly embedded in our jurisprudence, since the  
15 U.S. Supreme Court’s holding in *Jacobson v. Commonwealth of Massachusetts*,  
16 197 U.S. 11 (1905) (*Jacobson*).

17 Courts have repeatedly upheld mandatory student vaccination laws over  
18 challenges predicated on the First Amendment, the Equal Protection Clause, the  
19 Due Process Clause, the Fourth Amendment, education rights, parental rights, and  
20 privacy rights, frequently citing *Jacobson*. *See, e.g., Zucht v. King*, 260 U.S. 174,  
21 175-177 (1922) (“it is within the police power of a state to provide for compulsory  
22 vaccination”); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (a parent “cannot  
23 claim freedom from compulsory vaccination for the child more than for himself on  
24 religious grounds. The right to practice religion freely does not include liberty to  
25 expose the community or the child to communicable disease or the latter to ill  
26 health or death.”); *Phillips v. City of New York*, 775 F.3d 538, 543 (2nd Cir. 2015)  
27 (holding that “mandatory vaccination as a condition for admission to school does  
28 not violate the Free Exercise Clause”); *Workman v. Mingo County Sch.*, 667 F.  
Supp.2d 679, 690-691 (S.D. W. Va. 2009) (“a requirement that a child must be

1 vaccinated and immunized before it can attend the local public schools violates  
2 neither due process nor . . . the equal protection clause of the Constitution”),  
3 *affirmed Workman v. Mingo County Bd. of Educ.*, 419 F. App’x 348, 353-54 (4th  
4 Cir. 2011) (unpublished); *Boone v. Boozman*, 217 F. Supp.2d 938, 956 (E.D. Ark.  
5 2002) (“the question presented by the facts of this case is whether the special  
6 protection of the Due Process Clause includes a parent’s right to refuse to have her  
7 child immunized before attending public or private school where immunization is a  
8 precondition to attending school. The Nation’s history, legal traditions, and  
9 practices answer with a resounding ‘no.’”).

10 California courts are in accord with this overwhelming and consistent  
11 precedent. *See Abeel v. Clark*, 84 Cal. 226, 230 (1890) (*Abeel*) (upholding the  
12 State’s school vaccination requirements, recognizing that “it was for the legislature  
13 to determine whether the scholars of the public schools should be subjected to  
14 [vaccination]”); *French v. Davidson*, 143 Cal. 658, 662 (1904) (upholding San  
15 Diego’s vaccination requirement, explaining that “the proper place to commence in  
16 the attempt to prevent the spread of a contagion was among the young, where they  
17 were kept together in considerable numbers in the same room for long hours each  
18 day . . . children attending school occupy a natural class by themselves, more liable  
19 to contagion, perhaps, than any other class that we can think of”); *Williams v.*  
20 *Wheeler*, 23 Cal. App. 619, 625 (1913) (the state legislature has the power to  
21 prescribe “the extent to which persons seeking entrance as students in educational  
22 institutions within the state must submit to its [vaccination] requirements as a  
23 condition of their admission”); *Love v. Superior Court*, 226 Cal.App.3d 736, 740  
24 (1990) (“[t]he adoption of measures for the protection of the public health is  
25 universally conceded to be a valid exercise of the police power of the state, as to  
26 which the legislature is necessarily vested with large discretion not only in  
27 determining what are contagious and infectious diseases, but also in adopting  
28 means for preventing the spread thereof”).

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

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

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

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

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

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

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

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

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

4 Prior to *Cruzan*, the Supreme Court emphasized that "a state is not without  
5 constitutional control over parental discretion in dealing with children when their  
6 physical or mental health is jeopardized." *Parham v. J. R.*, 442 U.S. 584, 603  
7 (1979). And, as explained in *Prince*, "neither the rights of religion nor rights of  
8 parenthood are beyond limitation[;] both can be interfered with when necessary to  
9 protect a child." *Prince*, 321 U.S. at 166.

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

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

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

25 Plaintiffs' assertion that SB 277 forces them to choose between the exercise of  
26 two purportedly fundamental constitutional rights, *i.e.*, the right to refuse medical  
27 treatment and California's right to an education, is unfounded.  
28

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

10 As confirmed by *Jacobson* and the century of jurisprudence following it,  
11 mandatory vaccination laws do not violate any fundamental right, whether framed  
12 in terms of due process (*Jacobson*), equal protection (*Zucht, Workman*), the free  
13 exercise of religion (*Prince, Phillips*), parental rights (*Prince*), or the right to refuse  
14 medical treatment (*Cruzan*).

15 Moreover, there is no fundamental right to an education under the U.S.  
16 Constitution. *See, e.g., San Antonio Independent School Dist. v. Rodriguez*, 411  
17 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit  
18 protection under our Federal Constitution. Nor do we find any basis for saying it is  
19 implicitly so protected.”); *Plyler v. Doe*, 457 U.S. 202, 216–18, 223 (1982) (“Nor is  
20 education a fundamental right; a State need not justify by compelling necessity  
21 every variation in the manner in which education is provided to its population”);  
22 *Hooks v. Clark County*, 228 F.3d 1036, 1041 (9th Cir. 2000), cert. denied, 532 U.S.  
23 971 (2001) (a parent’s liberty interest in directing their child’s education is subject  
24 to reasonable government regulation); *see also Whitlow*, Order 10, n.7, ECF No. 43.

25 Plaintiffs’ reliance on California’s right to an education is unavailing. As  
26 discussed in further detail in Defendants’ pending Motion to Dismiss Plaintiffs’  
27 Complaint, in *French v. Davidson*, which was decided 25 years after the adoption  
28 of California’s constitutional right to a free public education (*see Cal. Const., Art.*

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

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

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

1 3d at 740 (“the legislature is necessarily vested with large discretion not only in  
2 determining what are contagious and infectious diseases, but also in adopting  
3 means for preventing the spread thereof”).

4 Indeed, even if strict scrutiny were to apply, *Jacobson* and its progeny have  
5 unequivocally held that immunization laws are justified because they serve a  
6 compelling state interest in protecting public health and safety. *Jacobson*, 197 U.S.  
7 at 35 (“the legislature has the right to pass laws which, according to the common  
8 belief of the people, are adapted to prevent the spread of contagious diseases”); *see*  
9 *also Sherr v. Northport-East Northport Union Free School Dist.*, 672 F. Supp. 81,  
10 88 (E.D.N.Y. 1987) (holding there is a “compelling interest . . . in fighting the  
11 spread of contagious diseases through mandatory inoculation programs”).

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

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

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

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

10           Even so, Plaintiffs’ disregard of the threat of contagious diseases in recent  
11 years in California and the rest of the Nation is not only factually wrong, but  
12 betrays how far out of the mainstream Plaintiffs are in asserting their claims. Alarm  
13 by recognized public health authorities over the increasing spread of contagious and  
14 potentially deadly diseases was expressly recognized in the legislative history of SB  
15 277:

16           “According to the Centers for Disease Control and Prevention, there  
17 were more cases of measles in January 2015 in the United States than  
18 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.*”

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

22           Additionally, Defendants have submitted the declaration of Robert Schechter,  
23 M.D., (Schechter Decl.) in further support of this Opposition to Plaintiffs’ Motion.  
24 Dr. Schechter is a medical doctor licensed to practice in the State of California, a  
25 board-certified pediatrician, and a Fellow of the American Academy of Pediatrics.  
26 Schechter Decl., ¶ 1. He has been Chief of the Clinical and Policy Support Section  
27 of CDPH’s Immunization Branch since 2003. Schechter Decl., ¶¶ 1, 2.  
28

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

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

18 However, these statewide average rates of reported immunization mask lower  
19 levels of immunization at the county, locality or school level that can support local  
20 transmission of disease. Schechter Decl., ¶ 13. Of the 58 California counties, 34%  
21 reported that 5% or more of children entering kindergarten there in 2015-2016 had  
22 received a personal belief exemption (PBE) to one or more required immunizations,  
23 and 10% of counties reported PBE rates of at least 10%. *Id.* The range of  
24 immunization rates reported for kindergarten entrants in 2015-2016 is even broader  
25 at the level of individual schools, as 1,340 schools across the State reported the  
26 PBE rates of kindergarten entrants at 5% or higher, 568 schools had rates at 10% or  
27 higher, and 231 schools had rates at 20% or higher. *Id.* Reported rates of  
28

1 kindergarteners with PBEs in California were less than 1% from 1978 to 2000, but  
2 thereafter increased sharply to over 3% by 2013. Schechter Decl., ¶ 14.

3 Outbreaks of vaccine-preventable diseases have occurred in California since  
4 1961, when the PBE was included in the immunization requirements statute.  
5 Schechter Decl., ¶ 17. But, the multinational outbreak of measles beginning at  
6 Disneyland in December 2014 underscores the vulnerability of unimmunized  
7 individuals and their role in transmitting disease. Schechter Decl., ¶ 18. Among  
8 the first 110 California patients in the outbreak, 45% were known to be  
9 unvaccinated and 43% had unknown or undocumented vaccination status. *Id.*  
10 Twelve of the unvaccinated patients were infants too young to be vaccinated. *Id.*  
11 Among the 37 remaining vaccine-eligible patients, 76% were intentionally  
12 unvaccinated because of personal beliefs, and one was on an alternative plan for  
13 vaccination. *Id.* Among the 28 intentionally unvaccinated patients, 18 were  
14 children, and 10 were adults. Among the 84 patients with known hospitalization  
15 status, 20% were hospitalized. *Id.*

16 Another closely followed outbreak occurred on January 13, 2008, in San  
17 Diego, when an infected seven-year-old boy (index patient) transmitted the  
18 infection to his nine-year-old unvaccinated sister and three-year-old unvaccinated  
19 brother, and then, after two days of fever and conjunctivitis, attended his charter  
20 school. Schechter Decl., ¶ 19. Forty-one of the 377 students (11%) at the charter  
21 school were unvaccinated for measles based on personal belief exemptions, and two  
22 children became infected. *Id.* By February 1, 2008, four of the eight secondary  
23 case-patients were already infectious. *Id.* The index patient's sister infected two  
24 schoolmates and exposed an unknown number of children at a dance studio. *Id.*  
25 One infected classmate of the index patient infected his own younger brother and  
26 exposed 10 children at a pediatric clinic, 18 children and adults at a clinical  
27 laboratory, and an unknown number at two grocery stores and a circus. Another  
28 infected classmate of the index patient exposed an unknown number at an indoor

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

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

7 For all of these reasons, as well as those discussed in greater detail in  
8 Defendants' pending Motion to Dismiss Plaintiffs' Complaint, Plaintiffs are  
9 unlikely to prevail on their claims. Accordingly, their Motion for Preliminary  
10 Injunction should be denied.<sup>3</sup>

### 11 **III. THE BALANCE OF HARMS WEIGHS AGAINST PLAINTIFFS**

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

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

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

