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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

Case No.: 5:16-cv-2410

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

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

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INTRODUCTION

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

ARGUMENT

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

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

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

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

1 (Defendants' Memorandum of Points and Authorities in Support of its Motion to Dismiss "Defs' Motion to Dismiss", Pg. 5:1-7)

I. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED

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

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

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

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

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

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

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

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

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

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

Allowing the type of drug to determine the constitutionality of mandating them has real problems. For example, the FDA has recently approved a new drug, Truvada, that, when taken before exposure, is remarkably effective at stopping the

4 This balancing can and must be done here too. And it buttresses the point about evaluating the law as to whether it is narrowly tailored to fit constitutional muster. Plaintiffs are aware that perhaps their beliefs represent those of a small minority. But that militates in favor of greater vigilance toward protecting their rights, lest the opinions of the majority drown out the minority. Remember, vaccination rates have remained rock-solid constant in California. If the state is concerned about falling rates in certain "pockets" of the state it must first try a massive educational effort about the safety and efficacy of vaccines in those targeted communities. But the state may not ban the 0.2% of Colusa County residents – a small minority – from exercising their right to refuse medical treatment, just because vaccination rates have fallen in, say, Del Norte County.

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

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

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

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

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

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

Modern due-process concepts suggest that a thinly disguised mandate that all parents put certain medicines into their children would offend our constitutional sensibilities, and that is certainly the answer to the question as to why the California legislature didn't simply do that here. Such a statute of general applicability – a law infringing on both the child's fundamental right to make medical decisions and the parents' fundamental right to raise their child – would be subject to the strictest scrutiny under a substantive-due-process analysis, and would almost certainly fail except under the most dire emergencies. If such a broad (and indeed,

unprecedented)[7] mandate would offend our notions of constitutional liberty, then surely tying such a mandate to public K-12 education, a fundamental right in California, can't be proper either.

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

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

> "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."

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

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

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

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

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

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

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

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

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

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

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

Quite noteworthy, Defendants acknowledge in their brief that "Plaintiffs allege a violation of federal law and a request for injunctive relief…" (Defs' Motion to Dismiss, Pg. 22:Ln. 5) "Although sovereign immunity bars money damages …against a state or instrumentality of a state, **it does not bar claims** seeking prospective injunctive relief against state officials to remedy a state's ongoing violation of federal law." (*Emphasis Added.*) *Arizona Students' Association v. Arizona Board of Regents,* 824 F.3d 858, 865 (9th Cir. 2016), (quoting *Ex Parte Young,* 209 U.S. 123, 149-56, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). See also *Quern v. Jordan*, 440 U.S. 332, 337, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000). Here, Plaintiffs are seeking declaratory and injunctive relief, not monetary damages,

which in no manner precludes Defendant Smith and Defendant Torlakson from being sued as proper Defendants in this matter.[9]

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

III. ASSOCIATION PLAINTIFF, A VOICE FOR CHOICE, INC., HAS STANDING TO BRING THIS MATTER AGAINST THE DEFENDANTS.

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

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

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

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

Secondly, as was clearly pled in Paragraph No. 9 of the Plaintiff's Complaint, the interests that AVFC seeks to protect of its members by being a Plaintiff in this matter are germane to and specifically in line with the exact purpose of AVFC. AVFC seeks to give its members a voice in the community at-large with regard to the exercising of its memberships' Constitutional rights. This includes promoting and protecting the rights of its members to have the ability to make conscious and informed decisions as relates to what medications are put into the bodies of

themselves and one another. (Hildebrand Aff., ¶¶ 3, 5, & 7) It also includes the ability to not have to forego any fundamental right in order to enjoy any other fundamental right. (Hildebrand Aff., ¶¶3, 5, &6) It is without dispute that the interests AVFC seeks to protect are germane to the purpose of the organization. (Hildebrand Aff., ¶8)

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

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

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

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

IV. IN THE ALTERNATIVE, PLAINTIFFS SEEK LEAVE TO AMEND THEIR COMPLAINT.

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

CONCLUSION

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

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

DATED: December 22, 2016

THE HAKALA LAW GROUP, P.C.

By: /s/ Brad A. Hakala
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