

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

5 Attorneys for Plaintiffs - Devon Torrey-Love, S.L.,
6 Courtney Barrow, A.B., Margaret Sargent, M.S.,
W.S., and A Voice for Choice, Inc.
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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION**

11

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

15 Plaintiffs,

16 v.

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

26 Defendants.
27
28

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

**PLAINTIFFS’ REPLY IN SUPPORT
OF THEIR MOTION FOR A
PRELIMINARY INJUNCTION**

Date: January 13, 2017

Time: 10:00 a.m.

Judge: The Honorable Dolly M. Gee

Location: Courtroom 8C, 8th Floor

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INTRODUCTION

1
2 While Defendants have finally addressed the specifics of Plaintiffs’ case,
3 such arguments continue to lack nuance and specificity. Defendants make
4 arguments on timing that if taken to their logical conclusion, would preclude any
5 plaintiff from ever challenging any statute on constitutional grounds. Moreover,
6 Defendants discuss cases upholding vaccine requirements generally, but fail to
7 discuss the set of vaccine requirements that are subject of this litigation. A read of
8 all relevant precedent, some federal, some from California, indicates that Section
9 120325, et seq. (“Section 120325”) contains too many infringements to be
10 constitutional.¹ Additionally, Defendants seek to muddy the waters by comparing
11 this case (a clean and perhaps academic application of cherished constitutional
12 principles) to other, unrelated matters filed by other plaintiffs who focused on things
13 like science and disability, which are mentioned nowhere in Plaintiffs’ Complaint
14 or subsequent briefs. Finally, Defendants underestimate the significance of the
15 interplay of rights here. Indeed, in a key case they repeatedly cite, the court stated
16 its ruling would be different if public education was a fundamental right, something
17 it is here in California. The Court should not fall for Defendants’ mendacity.
18 Constitutional litigation is about line drawing, and this statute crosses the line. As
19 such, Plaintiffs respectfully request that this Court grant its Motion for a Preliminary
20 Injunction.

21 ///

22 ///

23 ///

24 ///

25
26 1 This, in part, refers to the doctrine of unconstitutional conditions. The doctrine of unconstitutional conditions
27 can be traced back to the late 1800’s through two United States Supreme Court decisions, namely *Home Ins. Co. of*
28 *New York v. Morse*, 87 U.S. 445 (1874) and *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1876), whereby the Court
restricted a state’s right to impose unconstitutional conditions through the enactment and enforcement of its laws.
This doctrine has been continuously upheld and enforced throughout the years.

ARGUMENT

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

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

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

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

15 Alternatively, assuming arguendo that the Plaintiffs cannot establish that they
16 are likely to succeed on the merits, they may still obtain an injunction if they show
17 that they have raised “serious questions going to the merits” and that the balance of
18 hardships “tips sharply” in its favor, so long as it shows that the other two *Winter*
19 factors are satisfied, i.e. that there is a likelihood of irreparable injury and that the
20 injunction is in the public interest. *Arcsoft, Inc. v. Cyberlink Corp.*, 153 F.Supp.3d
21 1057 (N.D. Cal. 2015); referencing *Winter v. Natural Res. Def. Council, Inc.*, 555
22 U.S. 7 (2008); See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-
23 35 (9th Cir. 2011); accord *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075,
24 1081 (9th Cir. 2015). As the court in the *Monterey* matter held, a constitutional
25 violation is always irreparable harm, and remedying a constitutional violation is
26 always in the public’s interest. (Emphasis added.) *Monterey* at 715.

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

4
5 **A. Defendants Cannot Make a Statute Constitutional by Classifying**
6 **It a “Vaccine Law.”**

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

18 The binding vaccine precedent allowed a state to mandate (a) one (or a small
19 handful of) shot(s) for (b) a highly contagious disease (c) during a crisis outbreak of
20 the same and (d) before the era of widespread travel that made such mandates less
21 meaningful. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905). That precedent is
22 clearly inapt here. Here, the question presented is whether the state can mandate (a)
23 25 shots required by the statute at issue; (b) some which are not for communicable
24 diseases at all (or require kindergarteners to be vaccinated for an STD); (c) during a
25 non-crisis; and (d) in an era where international travel and the loopholes in the
26 statute itself render its infringements pointless. If the Defendants’ positions is yes

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

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

4
5 **B. Section 120325 Is Not Narrowly Tailored to Meet Federal**
6 **Constitutional Requirements, and Is Further Subject to Strict**
7 **Scrutiny Under the California Constitution.**

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

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

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

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

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

15
16 **III. SECTION 120325 BURDENS CALIFORNIA’S FUNDAMENTAL**
17 **RIGHT TO AN EDUCATION AND CAUSES AN**
18 **UNCONSTITUTIONAL CONDITION.**

19 As a threshold matter, the Defendants in their opposition outright
20 misrepresent that California courts have stated vaccine laws do not burden
21 California’s fundamental right to education. Defendants’ logic appears to be:
22 California adopted its Constitution in the 1800s, and there were cases between 1890
23 and 1913 that discussed vaccination requirements. *See Defs.Oppo* at 6, 10.
24 Defendants purposefully ignore the well-known, oft-commented-on fact that
25 California only recognized public education as a fundamental right in the 1970s,
26 with the landmark decision in the *Serrano v. Priest* series of cases. *E.g., id.*, 18
27
28

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

3 Because of this interplay of rights, Plaintiffs have showed how Section
4 120325 creates an unconstitutional condition. Section 120325 requires citizens of
5 the state to surrender their rights to a public K-12 education unless citizens accept
6 the state’s infringement upon their right to refuse medical treatment. “If the state
7 may compel the surrender of one constitutional right as a condition of its favor,”
8 then the “guaranties embedded in the Constitution . . . may thus be manipulated out
9 of existence.” *Frost & Frost Trucking v. Railroad Comm’n of Calif.*, 271 U.S. 583,
10 594 (1926).

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

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

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

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

26
27 ³ *See Troxel v. Granville*, 530 U.S. 57 (2000). Inherent in the right for parents to direct the upbringing of
28 their children, of course, is the right of children to be raised by a parent, who uniquely cares about their needs and
knows their idiosyncrasies.

1 But even if the Court were to determine that there was no bodily autonomy
2 right here to refuse repeated medical treatments, and even if the Court were to hold
3 that parents do not have the right to choose what substances are injected into their
4 children, this law still must be struck down for the burdens it places on the California
5 fundamental right to education⁴. The significance of public K-12 education being a
6 fundamental right deserving of strict scrutiny cannot be overstated. In one of the
7 only modern school-vaccine cases Defendants themselves cite, *Boone v. Boozeman*,
8 the district court explicitly stated that its ruling would be different if public
9 education was a fundamental right. *See* 217 F. Supp.2d 938 at 957 (E.D. Ark. 2002).
10 Plaintiffs ask the Court to treat that as an admission.

11 And as shown in the Plaintiffs' opening brief, under strict scrutiny, a law that
12 is so broadly tailored to include things like sexually transmitted diseases at the
13 kindergarten level and non-communicable conditions (and 25 shots total) must fail
14 as too broad, under any reading of the precedent. Additionally, the due-process
15 phrase of "narrowly tailored to meet its end" implies that a law can meet its ends,
16 period. There is no essential tie between learning one's ABCs and making decisions
17 as intimate as what medications to inject in one's body. Defendants may try arguing
18 that the closeness of children in school mean that diseases can spread more easily,
19 under Section 120325, unvaccinated children can still congregate in weekend-
20 football-league locker rooms, in subways, and in private dance recitals. But Section
21 120325 contains an absolute exemption for foster children and those with
22 disabilities. Therefore, this law suffers from serious under-breadth, making any
23 "nexus" with school – and any reason to so seriously burden that fundamental right
24 – evaporate as baseless.

25 Defendants' foray into medical statistics proves this point. They cite one
26 2008 case of measles as the need for this law. *Def's.Oppo* at 15. They then detail

27 4 Courts have already distinguished that public education is not a mere benefit in California, but is actually a
28 fundamental right. *Serrano v. Priest*, 18 Cal.3d 778 (1976).

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

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

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

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

4
5 **A. Defendants Downplay the Plaintiffs’ Loss of Rights.**

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

15 As Plaintiffs have previously cited, Parents have a fundamental right to make
16 decisions on the care and upbringing of their children. *Troxel v. Granville*, 530 U.S.
17 57 (2000). The court in *Troxel* was definitive and expansive in defining the interests
18 of parents in the care, custody, and control of their children, stating that such
19 interests of a parent in the care of their children “is perhaps the oldest of the
20 fundamental liberty interests recognized... It cannot ... be doubted that the Due
21 Process Clause of the Fourteenth Amendment protects the fundamental right of
22 parents to make decisions concerning the care, custody, and control of their
23 children.” *Id.* at 65 (2000) (citations omitted).

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

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

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

15

16 **CONCLUSION**

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

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DATED: December 30, 2016

THE HAKALA LAW GROUP, P.C.

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

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