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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF PLACER

11
12 **DEVON TORREY LOVE; S.L.; ALISON
HEATHER GRACE GATES; M.M.; K.M.;
13 A.M.; COURTNEY BARROW; A.B.;
MARGARET SARGENT; T.S.; W.S.; and
14 A VOICE FOR CHOICE, INC. on behalf of
its members,**

15 Plaintiffs,

16 v.

17
18 **STATE OF CALIFORNIA,
DEPARTMENT OF EDUCATION; STATE
19 OF CALIFORNIA, BOARD OF
EDUCATION; TOM TORLAKSON, in his
20 official capacity as Superintendent of the
Department of Education; STATE OF
21 CALIFORNIA, DEPARTMENT OF
PUBLIC HEALTH; DR. KAREN SMITH,
22 in her official capacity as Director of the
Department of Public Health,**

23 Defendants.
24

Case No. SCV0039311

**DEFENDANTS' NOTICE OF
DEMURRER AND DEMURRER TO
PLAINTIFFS' COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
JONATHAN E. RICH**

[Code Civ. Proc., § 430.10]

[Filed Concurrently with Request for
Judicial Notice]

Date: June 20, 2017
Time: 8:30 a.m.
Dept: 40
Judge: TBD¹
Action Filed: April 4, 2017

25
26 ¹ Plaintiffs and defendants do not stipulate to this demurrer being heard by Commissioner
Michael Jacques, to whom this matter has been assigned, or to any other commissioner, and
27 hereby request a reassignment of this matter to a judge of the Placer County Superior Court. The
parties will shortly file their written notice indicating they do not stipulate to the Commissioner,
28 pursuant to the Superior Court of Placer County Local Rules, rule 20.2(B).

1 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 20, 2017, at 8:30 a.m., or as soon thereafter as the
3 matter may be heard, in Department 40 of the above-entitled Court, located at 10820 Justice
4 Center Drive, Roseville, California 95678, defendants California Department of Education, State
5 Board of Education, Tom Torlakson, in his official capacity as Superintendent of Public
6 Instruction, California Department of Public Health, and Karen Smith, M.D., in her official
7 capacity as Director of the California Department of Public Health (collectively, defendants),
8 demur to plaintiffs' Complaint For Declaratory, Injunctive, or Other Relief (Complaint), without
9 leave to amend.

10 Defendants' demurrer to the Complaint is made on the following grounds:

11 1. Plaintiffs' First Cause of Action, asserting a violation of plaintiffs' purported right to
12 due process under article I, section 7 of the California Constitution, on the grounds that SB 277
13 allegedly infringes upon plaintiffs' right to bodily autonomy, right to refuse medical treatments,
14 and right to direct the parenting of one's children, fails to state facts sufficient to constitute a
15 cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

16 2. Plaintiffs' Second Cause of Action, asserting a violation of plaintiffs' purported right
17 to a public education under article IX, section 5 of the California Constitution, fails to state facts
18 sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

19 3. Plaintiffs' Third Cause of Action, asserting a violation of plaintiffs' purported right to
20 privacy under article I, section 1 of the California Constitution, on the grounds that SB 277
21 allegedly causes plaintiffs to forgo the right to control the integrity of their own body or that of
22 their children and to disclose private and confidential medical records, fails to state facts
23 sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

24 4. The Complaint taken as a whole fails to state facts sufficient to constitute a cause of
25 action. (Code Civ. Proc., § 430.10, subd. (e).)

26 Pursuant to Code of Civil Procedure section 430.41, on April 19, 2017, the parties met and
27 conferred by telephone concerning defendants' objections raised in this demurrer. The parties
28 were unable to reach an agreement on defendants' objections. (See Declaration of Jonathan E.

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Rich, ¶ 2.)

This demurrer is based on the pleadings, on this notice and its attached memorandum of points and authorities and the request for judicial notice filed herein; on the documents, pleadings and records on file herein; and on the arguments to be made at the hearing.

Dated: May 2, 2017

Respectfully Submitted,
XAVIER BECERRA
Attorney General of California
JENNIFER M. KIM
Supervising Deputy Attorney General
JACQUELYN Y. YOUNG
Deputy Attorney General



JONATHAN E. RICH
Deputy Attorney General
Attorneys for Defendants

1 **DEMURRER**

2 Defendants demur to each of the causes of action in plaintiffs' Complaint, and to the
3 Complaint taken as a whole, on the following grounds:

4 **FIRST GROUND**

5 **First Cause of Action**
6 **Failure to State Facts Sufficient to Constitute a Cause of Action**
7 **(Code Civ. Proc., § 430.10, subd. (e))**

8 1. Plaintiffs' First Cause of Action, asserting a violation of plaintiffs' purported right to
9 due process under article I, section 7 of the California Constitution, on the grounds that SB 277
10 allegedly infringes upon plaintiffs' right to bodily autonomy, right to refuse medical treatments,
11 and right to direct the parenting of one's children, fails to state facts sufficient to constitute a
12 cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

13 **SECOND GROUND**

14 **Second Cause of Action**
15 **Failure to State Facts Sufficient to Constitute a Cause of Action**
16 **(Code Civ. Proc., § 430.10, subd. (e))**

17 2. Plaintiffs' Second Cause of Action, asserting a violation of plaintiffs' purported right
18 to public education under article IX, section 5 of the California Constitution, fails to state facts
19 sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

20 **THIRD GROUND**

21 **Third Cause of Action**
22 **Failure to State Facts Sufficient to Constitute a Cause of Action**
23 **(Code Civ. Proc., § 430.10, subd. (e))**

24 3. Plaintiffs' Third Cause of Action, asserting a violation of plaintiffs' purported right to
25 privacy under article I, section 1 of the California Constitution, on the grounds that SB 277
26 allegedly causes plaintiffs to forgo the right to control the integrity of their own body or that of
27 their children and to disclose private and confidential medical records, fails to state facts
28 sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

1 **FOURTH GROUND**

2 **Complaint Taken as a Whole**
3 **Failure to State Facts Sufficient to Constitute a Cause of Action**
4 **(Code Civ. Proc., § 430.10, subd. (e))**

5 4. The complaint taken as a whole fails to state facts sufficient to constitute a cause of
6 action. (Code Civ. Proc., § 430.10, subd. (e).)

7 Defendants therefore respectfully request that their demurrer to the Complaint be sustained
8 without leave to amend.

9 Dated: May 2, 2017

Respectfully Submitted,

10 XAVIER BECERRA
11 Attorney General of California
12 JENNIFER M. KIM
13 Supervising Deputy Attorney General
14 JACQUELYN Y. YOUNG
15 Deputy Attorney General



16 JONATHAN E. RICH
17 Deputy Attorney General
18 *Attorneys for Defendants*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 This is plaintiffs’ second attempt to seek declaratory and injunctive relief from the
4 enforcement of Senate Bill 277 (Cal. Stats 2015 ch. 35) (SB 277) (to which plaintiffs refer in their
5 Complaint as “Section 120325”), a mandatory school immunization public health and safety
6 measure enacted nearly two years ago. After the United States District Court for the Central
7 District of California dismissed their complaint in January 2017, plaintiffs, having joined a Placer
8 County parent and her children to this action, have now filed a nearly identical complaint in this
9 Court, asserting substantially similar causes of action. Despite this ill-conceived forum-shopping,
10 plaintiffs’ Complaint fails to state a claim on which relief may be granted. Plaintiffs’ claims are
11 unsupported as a matter of California and federal constitutional law, which for decades has
12 consistently held that (1) a state’s exercise of its police powers in protecting the public from
13 communicable diseases is rationally based; (2) states have a legitimate and compelling interest in
14 requiring children to be vaccinated before entering school; and (3) personal belief exemptions in
15 mandatory vaccination statutes, which were created by statute, are not constitutionally protected
16 and as such, may be eliminated by the Legislature.

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

25 This is the fifth case filed in California courts attempting to enjoin the enforcement of SB
26 277, with this latest attempt by plaintiffs herein coming almost two years after the effective date
27 of the law. Three of the prior cases – filed in the Central and the Southern Districts of California,
28 and the Los Angeles County Superior Court – have been dismissed (including plaintiffs’ previous

1 federal case). In the fourth case challenging SB 277, in the Central District of California, the
2 magistrate judge submitted her report and recommendation granting the State’s motion to dismiss
3 the operative complaint.

4 By seeking to enjoin the enforcement of SB 277 nearly two years after its enactment,
5 plaintiffs are asking this Court to disregard decades of state and federal jurisprudence, and even
6 the considered judgment of California federal and state courts that have evaluated these very
7 claims with regard to SB 277. In all of these cases, the federal and state courts recognized that
8 the authority of the Legislature to require students to be vaccinated in order to protect the health
9 and safety of other students and the public at large, irrespective of their parents’ personal beliefs,
10 is firmly embedded in our jurisprudence. Indeed, the State’s legitimate and compelling interest in
11 protecting public health and safety by mandating vaccinations for school children has been
12 *unanimously* recognized by the U.S. Supreme Court, the California Supreme Court, and every
13 other federal and state court that has addressed the issue. This case is no different.

14 Respectfully, defendants’ demurrer should be sustained without leave to amend.

15 RELEVANT FACTS

16 I. THE STATE’S CHILD IMMUNIZATION STATUTES

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

24 In enacting SB 277, the Legislature reaffirmed its intent “to provide . . . [a] means for the
25 eventual achievement of total immunization of appropriate age groups” against these childhood
26 diseases. (Health & Saf. Code, § 120325, subd. (a).) SB 277 requires children to be immunized
27 against (1) diphtheria, (2) hepatitis B, (3) haemophilus influenzae type b, (4) measles, (5) mumps,
28 (6) pertussis (whooping cough), (7) poliomyelitis, (8) rubella, (9) tetanus, (10) varicella

1 (chickenpox), and (11) “[a]ny other disease deemed appropriate by the [California Department of
2 Public Health (Department)].” (*Ibid.*)²

3 SB 277 has been in effect since January 1, 2016. Personal belief exemptions have been
4 prohibited since that date. (Health & Saf. Code, § 120335, subd. (g)(1).) And, since July 1, 2016,
5 school authorities may not unconditionally admit for the first time any child to preschool,
6 kindergarten through sixth grade, or admit any pupil to seventh grade, unless the pupil either has
7 been properly immunized, or qualifies for other exemptions recognized by statute. (*Id.*, § 120335,
8 subd. (g)(3).)

9 There are exemptions to the immunization requirements under SB 277. Vaccinations are
10 not required for any student in a home-based private school or independent study program who
11 does not receive classroom-based instruction. (Health & Saf. Code, § 120335, subd. (f).)
12 Moreover, a child may be medically exempt from the immunizations specified in the statute if a
13 licensed physician states in writing that “the physical condition of the child is such, or medical
14 circumstances relating to the child are such, that immunization is not considered safe.” (*Id.*, §
15 120370, subd. (a).) Any other immunizations may only be mandated “if exemptions are allowed
16 for both medical reasons and personal beliefs.” (*Id.*, § 120338.) SB 277 also provides an
17 exception relating to children in individualized education programs. (*Id.*, § 120335, subd. (h).)

18 ² The inherent dangers of these diseases are chronicled by the World Health Organization
19 (WHO) and the Centers for Disease Control (CDC). **Diphtheria** is caused by a bacterium that
20 produces a toxin that can harm or destroy human body tissues and organs. (<http://www.who.int/immunization/topics/diphtheria/en/>.) “Diphtheria affects people of all ages, but most often it
21 strikes unimmunized children.” (*Ibid.*) **Hepatitis B** causes liver infection which “can lead to
22 serious health issues, like cirrhosis or liver cancer.” (<http://www.cdc.gov/hepatitis/hbv/index.htm>.) **Haemophilus influenzae**, which is not to be confused with influenza (the “flu”) causes severe infection “occurring mostly in infants and children younger than five years of age . . . and can cause lifelong disability and be deadly.” (<http://www.cdc.gov/hi-disease/index.html>.) **Measles** can cause, among other things, pneumonia, brain damage, and death. <http://www.cdc.gov/vaccinesafety/vaccines/mmr-vaccine.html>. **Mumps** can cause deafness, inflammation of the brain and/or tissue covering the brain and spinal cord, and death. (*Ibid.*) **Rubella** could cause spontaneous miscarriages in pregnant women or serious birth defects. (*Ibid.*) **Varicella (chickenpox)** can lead to brain damage or death. (*Ibid.*) **Tetanus** causes painful muscle contractions, and can lead to death. <http://www.cdc.gov/tetanus/index.html>. **Pertussis**, also known as whooping cough, is a highly contagious respiratory disease “known for uncontrollable, violent coughing which often makes it hard to breathe,” and can be deadly. (<http://www.cdc.gov/pertussis/>.) **Polio** is an incurable, “crippling and potentially fatal infectious disease,” which spreads by “invading the brain and spinal cord and causing paralysis.” (<http://www.cdc.gov/polio/>.)

1 SB 277 further provides that personal belief exemptions on file with a school or child care center
2 prior to January 1, 2016, will continue to be honored through each of the designated grade spans
3 (birth to preschool; kindergarten and grades one to six inclusive; and grades seven to twelve,
4 inclusive), until the unvaccinated pupil advances to the next grade span. (*Id.*, § 120335, subd.
5 (g).)

6 SB 277 was enacted in response to, among other things, a health emergency beginning in
7 December 2014, when California “became the epicenter of a measles outbreak which was the
8 result of unvaccinated individuals infecting vulnerable individuals including children who are
9 unable to receive vaccinations due to health conditions or age requirements.” (See defendant’s
10 concurrently-filed Request for Judicial Notice (RJN), Exh. 1, Sen. Com. on Education, Analysis
11 of Sen. Bill No. 277 (2014-15 Reg. Sess.), at p. 5.)

12 “According to the Centers for Disease Control and Prevention, there were more
13 cases of measles in January 2015 in the United States than in any one month in the
14 past 20 years,” and “[m]easles has spread through California and the United
15 States, in large part, because of communities with large numbers of unvaccinated
16 people.”

15 (*Ibid.* (italics added).)

16 As further noted in SB 277’s legislative history, “[a]ll of the diseases for which California
17 requires school vaccinations are very serious conditions that pose very real health risks to
18 children.” (RJN, Exh. 2, Ass. Com. on Health, Analysis of Sen. Bill No. 277 (2014-15 Reg.
19 Sess.), at p. 4.) “For example, measles in children has a mortality rate as high as about one in 500
20 among healthy children, higher if there are complicating health factors.” (*Id.*, at p. 3.) “Most of
21 the diseases can be spread by contact with other infected children.” (*Id.*, at p. 4.)

22 The legislative history confirms that SB 277 was enacted with the support of recognized
23 medical, educational and child-advocacy organizations in California, including, among others, the
24 California Medical Association, the California Chapter of the American College of Emergency
25 Physicians, the California Association for Nurse Practitioners, the California Primary Care
26 Association, the California School Boards Association, the California School Nurses
27 Organization, and the Children’s Defense Fund-California. (RJN, Exh. 1, Sen. Com. on
28

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

2 **II. REVIEW OF SB 277 IN CALIFORNIA STATE AND FEDERAL COURTS**

3 Since the enactment of SB 277, four prior actions have been filed in California state and
4 federal courts. On August 26, 2016, in *Whitlow v. California*, the Southern District of California
5 denied a motion for preliminary injunction against enforcement of SB 277, holding that the
6 plaintiffs' claims were unlikely to succeed in part because "[t]he right of education, fundamental
7 as it may be, is no more sacred than any of the other fundamental rights that have readily given
8 way to a State's interest in protecting the health and safety of its citizens, and particularly, school
9 children." (*Whitlow v. California* (S.D. Cal. 2016) 203 F.Supp.3d 1079, 1091 (*Whitlow*); RJN,
10 Exh. 4.)

11 In so holding, the *Whitlow* court observed that "[c]onditioning school enrollment on
12 vaccination has long been accepted by the courts as a permissible way for States to inoculate
13 large numbers of young people and prevent the spread of contagious diseases." (*Whitlow, supra*,
14 203 F.Supp.3d at p. 1091 (citing *Vernonia Sch. Dist. 475 v. Acton*, 515 U.S. 646, 656 (1995)).
15 On August 31, 2016, the *Whitlow* plaintiffs filed their request for voluntary dismissal of their
16 lawsuit, and thus extinguished any possible appeal of the federal court's Order.

17 On October 21, 2006, in *Buck v. State of California*, Los Angeles County Superior Court
18 Case No. BC617766, the state superior court sustained the State's demurrer to the plaintiffs'
19 complaint, without leave to amend. (See RJN, Exh. 5.) *Buck* was brought by yet another group
20 of parents challenging SB 277 on federal and state constitutional grounds, including alleged
21 violations of due process and the right to public education under the California Constitution.
22 (*Ibid.*) In dismissing the case, the superior court in *Buck* adopted by reference the arguments
23 raised by the State in *Whitlow*. (*Ibid.*) Plaintiffs in *Buck* served their notice of appeal on
24 December 6, 2016.

25 And, on December 15, 2016, in the third case brought by a separate group of plaintiffs
26 challenging SB 277, *Middleton et al. v. Pan et al.*, U.S.D.C., Central District of California Case
27 No. 2:16-cv-05224-SVW-AGR, the Magistrate Judge recommended dismissal of the first
28 amended complaint with prejudice, albeit with leave to amend because the plaintiffs are

1 appearing *pro se*. (See RJN, Exh. 6.) In so doing, the Magistrate Judge found the reasoning in
2 *Whitlow* “persuasive,” and adopted *Whitlow*’s rejection of the various constitutional challenges to
3 SB 277 that are substantially similar to those raised by plaintiffs here. (*Id.*, at pp. 10-15.)

4 The fourth case, discussed below, was brought in federal court by all but one of the adult
5 plaintiffs herein.

6 **III. PLAINTIFFS’ CLAIMS**

7 On November 21, 2016, plaintiffs Devon Torrey-Love, S.L., Courtney Barrow, A.B.,
8 Margaret Sargent, M.S., W.S., and A Voice for Choice. (“AVFC”) filed a complaint in the
9 Central District of California against various state entities and officials, seeking to challenge the
10 constitutionality of SB 277, alleging violations of substantive due process, equal protection of
11 California’s right to education, and 42 U.S.C. § 1983. (*Torrey-Love, et al. v. State of California*
12 *Department of Education et al.*, Case No. ED CV 16-2410-DMG (DTBx) (*Torrey-Love I*.) The
13 federal district court granted the defendants’ motion to dismiss, holding in relevant part as
14 follows:

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

(*Torrey Love I*, RJN, Exh. 8, at pp. (6-8).)

23 Although the district court permitted leave to amend, plaintiffs voluntarily dismissed their
24 action in its entirety on February 1, 2017.

25 Now, the same plaintiffs from *Torrey-Love I*, joined by one adult Placer County resident
26 and her three children, have filed a nearly identical complaint in this Court, alleging substantially
27 identical causes of actions and re-labeling their federal claims under the state constitution. As
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1 discussed below, plaintiffs' reformulation of their federal claims into state claims is unavailing,
2 because the analysis under state law is substantially identical to that which was applied to their
3 previously dismissed federal claims.

4 STANDARD OF REVIEW

5 A demurrer is proper when "[t]he pleading does not state facts sufficient to constitute a
6 cause of action." (Code Civ. Proc., § 430.10, subd. (e)). A demurrer tests the legal sufficiency of
7 the complaint. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) The court
8 deems as true all material facts properly pled, and those facts that may be implied or inferred
9 from those expressly alleged. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591; *Marshall v. Gibson,*
10 *Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

11 However, the court will not assume the truth of contentions, deductions or conclusions of
12 fact or law, and the court may disregard allegations that are contrary to law, or are contrary to a
13 fact of which judicial notice may be taken. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th
14 1112, 1126.) Thus, a demurrer may be sustained on the ground that matters properly subject to
15 judicial notice show that the complaint fails to state facts sufficient to constitute a cause of action.
16 (See *Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5.)

17 ARGUMENT

18 I. THE COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF BECAUSE IMMUNIZATION 19 LAWS ARE LONG-RECOGNIZED CONSTITUTIONAL PUBLIC HEALTH MEASURES.

20 The authority of the California Legislature to require students to be vaccinated in order to
21 protect the health and safety of other students and the public at large, irrespective of their parents'
22 personal beliefs, is firmly embedded in our jurisprudence, and embodies a quintessential function
23 of an organized government to protect its people from preventable harm. The State has an
24 unquestionably legitimate, as well as a compelling interest in protecting public health and safety
25 through mandatory vaccinations, as recognized by the U.S. Supreme Court in *Jacobson v.*
26 *Commonwealth of Massachusetts* (1905) 197 U.S. 11, 32 (*Jacobson*), holding that a state's
27 mandatory vaccination statute was a lawful exercise of the state's police power to protect the
28

1 public health and safety.

2 The Supreme Court's holding in *Jacobson* remains good law. (See, e.g., *Cruzan v.*
3 *Director, Missouri Department of Health* (1990) 497 U.S. 261, 278.) Indeed, since *Jacobson*, the
4 legitimate and compelling state interest in protecting the public health through mandatory
5 vaccinations, especially for school children, has remained unquestioned and been re-affirmed.
6 Courts have repeatedly upheld mandatory vaccination laws over challenges predicated on the
7 First Amendment, the Equal Protection Clause, the Due Process Clause, the Fourth Amendment,
8 education rights, parental rights, and privacy rights, frequently citing *Jacobson*. (See, e.g., *Zucht*
9 *v. King* (1922) 260 U.S. 174, 175-177 ["it is within the police power of a state to provide for
10 compulsory vaccination"]; *Prince v. Massachusetts* (1944) 321 U.S. 158 (1944) [a parent "cannot
11 claim freedom from compulsory vaccination for the child more than for himself on religious
12 grounds"]; *Vernonia School District 47J v. Acton* (1995) 515 U.S. 646 (*Vernonia*) ["[f]or their
13 own good and that of their classmates, public school children are routinely required to submit to
14 various physical examinations, and to be vaccinated against various diseases"]; *Phillips v. City of*
15 *New York* (2nd Cir. 2015) 775 F.3d 538, 543 (*Phillips*) [holding that "mandatory vaccination as a
16 condition for admission to school does not violate the Free Exercise Clause"]; *Workman v. Mingo*
17 *County Sch.* (S.D. W. Va. 2009) 667 F.Supp.2d 679, 690-691 (*Workman*) ["a requirement that a
18 child must be vaccinated and immunized before it can attend the local public schools violates
19 neither due process nor . . . the equal protection clause of the Constitution"], *affirmed Workman v.*
20 *Mingo County Bd. of Educ.* (4th Cir. 2011) 419 F.App'x 348, 353-54; *Boone v. Boozman* (E.D.
21 Ark. 2002) 217 F.Supp.2d 938, 956 ["the question presented by the facts of this case is whether
22 the special protection of the Due Process Clause includes a parent's right to refuse to have her
23 child immunized before attending public or private school where immunization is a precondition
24 to attending school. The Nation's history, legal traditions, and practices answer with a resounding
25 'no.'"]; *Whitlow, supra*, 203 F.Supp.3d at p. 1092 ["State Legislatures have a long history of
26 requiring children to be vaccinated as a condition to school enrollment, and for as many years,
27 both state and federal courts have upheld those requirements against constitutional challenge".])
28

1 California state courts are in accord. (See *Walker v. Superior Court* (1988) 47 Cal.3d 112,
2 140 [“parents have no right to free exercise of religion at the price of a child’s life, regardless of
3 the prohibitive or compulsive nature of the governmental infringement”], citing *Jacobson* and
4 *Prince; Abeel v. Clark* (1890) 84 Cal. 226, 230 (*Abeel*) [upholding the State’s school vaccination
5 requirements, recognizing that “it was for the legislature to determine whether the scholars of the
6 public schools should be subjected to [vaccination]”]; *French v. Davidson* (1904) 143 Cal. 658,
7 662 (*French*) [California’s mandatory vaccination state “in no way interferes with the right of the
8 child to attend school, provided the child complies with its provisions”]; *Williams v. Wheeler*
9 (1913) 23 Cal.App. 619, 625 [the Legislature has the power to prescribe “the extent to which
10 persons seeking entrance as students in educational institutions within the state must submit to its
11 [vaccination] requirements as a condition of their admission”]; *Love v. Superior Court* (1990) 226
12 Cal.App.3d 736, 740 [“[t]he adoption of measures for the protection of the public health is
13 universally conceded to be a valid exercise of the police power of the state, as to which the
14 legislature is necessarily vested with large discretion not only in determining what are contagious
15 and infectious diseases, but also in adopting means for preventing the spread thereof”].)

16 In fact, defendants are unaware of any case in which a court has struck down a state’s
17 mandatory school immunization law.³

18 The unanimous holdings of *Jacobson* and the cases following it – including federal and
19 state courts in California affirming the constitutionality of SB 277 in four separate cases –
20 constitute settled law recognizing the states’ legitimate and compelling interests to enact
21 mandatory vaccination laws. As such, this unequivocal precedent completely disposes of

22
23 ³ In the only case relied on by plaintiffs that considered a state’s mandatory vaccination
24 law, *LePage v. State of Wyoming*, (Wyo., 2001) 18 P.3d 1177 (see Complaint, at p. 21:7-9), the
25 court simply held that Wyoming’s Department of Public Health exceeded its authority under the
26 Wyoming statute in denying certain personal belief exemptions. The court expressly declined to
27 rule on the constitutional challenges to the statute, holding instead that, “if problems regarding the
28 health of Wyoming’s schoolchildren develop because this self-executing statutory exemption is
being abused, it is the legislature’s responsibility to act within the constraints of the Wyoming
and United States Constitutions.” (*Id.*, at p. 1181 (italics added).) In so doing, the court expressly
recognized the continued viability of *Jacobson* as authority “that the state has the authority to
enact a mandatory immunization program through the exercise of its police power.” (*Id.*, at p.
1179.)

1 plaintiffs' claims.

2 **II. RATIONAL BASIS IS THE APPROPRIATE LEVEL OF REVIEW IN THIS CASE**

3 Contrary to plaintiffs' allegations, SB 277's constitutionality is subject to rational basis
4 review, not strict scrutiny. Even though plaintiffs' claims are now brought exclusively under
5 state constitutional rights of education, due process and privacy, the California Supreme Court
6 has held that, "when danger to health exists . . . state regulation shall be tested under the *rational*
7 *basis* standard." (*People v. Privitera* (1979) 23 Cal.3d 697, 703 (original emphasis).) Even when
8 a state "statute *restricts a fundamental right*, when the state asserts important interests in
9 safeguarding health, review is under the rational basis standard." (*Wilson v. California Health*
10 *Facilities Com.* (1980) 110 Cal.App.3d 317, 324 (italics added).)

11 Particularly, "[i]n the area of health and health care legislation, there is a presumption both
12 of constitutional validity and that no violation of privacy has occurred." (*Coshov v. City of*
13 *Escondido* (2005) 132 Cal.App.4th 687, 712; see also *Mathews v. Harris* (2017) 7 Cal.App.5th
14 334, 368 ["The privacy claim fails if there is a reasonable exercise of California's broad police
15 powers enacted to address 'problems of vital local concern.'"].)

16 It is undisputed that SB 277 primarily concerns public health and safety and is rationally
17 related to the state's legitimate and compelling interest. Because extensive precedent
18 *unanimously* supports the constitutionality of SB 277, defendant's demurrer should be sustained
19 without leave to amend.

20 **III. SB 277 DOES NOT VIOLATE THE RIGHT TO AN EDUCATION.**

21 Plaintiffs wrongly assert that SB 277 violates the right to education under article IX, section
22 5 of the California Constitution. (Complaint, at pp. 17-18.) To the contrary, the statute operates
23 to *protect* children's access to education by ensuring that it is not impaired by the proliferation of
24 otherwise preventable diseases.

25 The California Constitution provides that the "Legislature shall provide for a system of
26 common schools by which a free school shall be kept up and supported." (Cal. Const., art. IX, §
27 5.) In *French, supra*, the California Supreme Court expressly held that the State's mandatory
28 school vaccination statute "in no way interferes with the right of the child to attend school,

1 provided the child complies with its provisions.” (*French, supra*, 143 Cal. at p. 662.) Similarly,
2 in a case cited extensively in *Jacobson*, the New York Court of Appeal in *Viemeister v. White*
3 (1904) 179 N.Y. 235, 72 N.E. 97, expressly held that New York’s mandatory school vaccination
4 statute did not violate that state’s constitutional right to a free public education, which is virtually
5 identical to that contained in California’s Constitution. (*Id.*, 179 N.Y. at p. 238 [“[t]he right to
6 attend the public schools of this state is necessarily subject to some restrictions and limitations in
7 the interest of the public health”].)

8 Even if SB 277 arguably infringes on children’s right to an education (and it does not), the
9 statute survives plaintiffs’ constitutional challenge. In holding that “education is a fundamental
10 interest,” the California Supreme Court applied strict scrutiny review to laws affecting the right to
11 education. (*Serrano v. Priest*, (1976)18 Cal.3d 728, 766, supplemented (1977) 20 Cal.3d 25.)
12 However, the constitutional challenge in *Serrano* was not to a health and safety provision. As
13 discussed, above, after *Serrano* the California Supreme Court held that the imposition of a
14 constitutional right by a health and safety statute is held to the less restrictive rational basis
15 standard of review. (*People v. Privitera, supra*, 23 Cal.3d 697 at p. 70.)

16 As discussed in detail above, *Jacobson* and its progeny have unequivocally held that
17 immunization laws are justified because they serve a legitimate state interest in protecting public
18 health and safety. Indeed, such statutes, *including SB 277*, have also withstood scrutiny under the
19 compelling state interest standard. (See *Whitlow, supra*, 203 F.Supp.3d at p. 1090 [“the State’s
20 interest in protecting the public health and safety, particularly the health and safety of children,
21 does not depend on or need to correlate with the existence of a public health emergency . . . That
22 interest exists regardless of the circumstances of the day, and is equally compelling whether it is
23 being used to prevent outbreaks or eradicate diseases.”]; see also *Workman v. Mingo County Sch.*,
24 *supra*, 419 F.App’x at pp. 353-54 (“the state’s wish to prevent the spread of communicable
25 diseases clearly constitutes a compelling interest”]; *Sherr v. Northport-East Northport Union*
26 *Free School Dist.* (E.D.N.Y. 1987) 672 F.Supp. 81, 88 [holding there is a “compelling interest . . .
27 in fighting the spread of contagious diseases through mandatory inoculation programs”].)

1 Plaintiffs are unable to cite to a single case where a court has held that there is no compelling
2 interest in protecting the public from the spread of communicable diseases through vaccination.

3 SB 277 is rationally related to the State's legitimate interest in protecting the health and
4 safety of its citizens, including children. In enacting SB 277, the Legislature recognized that
5 "[s]afe schools are a precondition to education." (RJN, Exh. 3 at 6.) SB 277 does not violate the
6 right to education; to the contrary, it benefits and supports safe access to education for all school
7 children by ensuring that the exercise of the right to education is not impaired by the transmission
8 of serious or potentially fatal diseases. (See also Cal. Const., art. I, § 28(7) ["the People find and
9 declare that the right to public safety extends to public and private primary, elementary, junior
10 high, and senior high school, . . . where students and staff have the right to be safe and secure in
11 their persons"].)

12 Even under a strict scrutiny analysis, SB 277 is narrowly tailored to serve the State's
13 legitimate and compelling interest in protecting public health. It does not mandate vaccination for
14 all diseases, but only those that the Legislature determined are "very serious" and that "pose very
15 real health risks to children." (See RJN, Exh. 2 at p. 4.) SB 277 only eliminates the personal
16 belief exemption as to the ten specific vaccines presently enumerated in the statute. (Health &
17 Saf. Code, § 120338.) It also contains appropriate but limited exemptions for children with
18 medical conditions for whom vaccinations were medically determined to be unsafe, and children
19 who are homeschooled or enrolled in independent study programs. (Health & Saf. Code, §
20 120335, subd. (f).) SB 277 also provides an exception related to students who attend
21 individualized education programs. (*Id.*, at subd. (h).)⁴

22 In bringing their claims, plaintiffs fail to acknowledge the rights of the millions of school
23 children and their parents who rely on mandatory vaccinations to ensure that their right to an
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25 ⁴ Plaintiffs' allegation that "homeschooling is an insufficient alternative" to attending
26 public school with other students, is contrary to settled law. (Complaint, at p. 11:23-25.).
27 "[S]tatutory and regulatory provisions . . . recognize the existence of home schools as private
28 schools." (See *Jonathan L. v. Superior Court* (2008) 165 Cal.App.4th 1074, 1083, 1099 ["[I]t is
not for . . . [courts] to consider, as a matter of policy, whether home schooling should be permitted
in California. That job is for the Legislature."].) In fact, homeschools are subject to strict state
oversight and multiple criteria under the Education Code. (See *id.*, at pp. 1096-1100.)

1 education is not threatened by the spread of potentially fatal diseases. Indeed, the U.S. Supreme
2 Court has long recognized that the institutional interest of schools, as well the rights of the student
3 body at large, often hold sway over the rights of individual students. “For their own good and
4 that of their classmates, public school children are routinely required to submit to various physical
5 examinations, and to be vaccinated against various diseases.” (*Vernonia, supra*, 515 U.S. 646
6 [noting with approval that “all 50 States required public school students to be vaccinated against
7 diphtheria, measles, rubella, and polio,” and that “[p]articularly with regard to medical
8 examinations and procedures, therefore, ‘students within the school environment have a lesser
9 expectation of privacy than members of the population generally’”].)

10 **IV. SB 277 DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS**

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

18 Plaintiffs’ due process claims were rejected by the federal court in *Torrey-Love I.* (See
19 RJN, Exh. 7, at pp. 7-8.) Plaintiffs’ claims in this case are indistinguishable. Their assertion that
20 they have a fundamental right to refuse mandatory vaccinations for their school age children is
21 contrary to this Nation’s history and tradition of requiring that school age children be vaccinated
22 before attending school, as confirmed by *Jacobson* and its progeny. Specifically with regard to a
23 person’s right to bodily autonomy and right to refuse certain medical treatment, the Supreme
24 Court has cited to *Jacobson*, and recognized mandatory vaccination as an example where state
25 interests outweigh a plaintiff’s liberty interest in declining a vaccine. (*Cruzan v. Director,*
26 *Missouri Department of Health* (1990) 497 U.S. 261, 279; see also *Boone v. Boozman, supra*, 217
27 F.Supp.2d at p. 956 [“the question ... is whether the special protection of the Due Process Clause
28 includes a parent’s right to refuse to have her child immunized before attending public or private

1 school where immunization is a precondition to attending school. The Nation’s history, legal
2 traditions, and practices answer with a resounding ‘no’[.]’.)

3 Indeed, the Supreme Court has emphasized that “a state is not without constitutional control
4 over parental discretion in dealing with children when their physical or mental health is
5 jeopardized.” (*Parham v. J. R.* (1979) 442 U.S. 584, 603.) As explained in *Prince*, “neither the
6 rights of religion nor rights of parenthood are beyond limitation[;]” both can be interfered with
7 when necessary to protect a child.” (*Prince, supra*, 321 U.S. at p. 166; see also *Pickup v. Brown*
8 (9th Cir. 2014) 740 F.3d 1208, 1235 [citing *Prince* and holding that parents’ right to make
9 decisions regarding the care, custody, and control of their children, “is not without limitations” in
10 “the health arena, [where] states may require the compulsory vaccination of children”].)

11 The California Supreme Court has also recognized “that the liberty interest of a minor is not
12 coextensive with that of an adult. Even where there is an invasion of protected freedoms the
13 power of the state to control the conduct of children reaches beyond the scope of its authority
14 over adults . . . As against the state, this parental duty and right [to direct the upbringing of one’s
15 children] is subject to limitation . . . if it appears that parental decisions will jeopardize the health
16 or safety of the child, or have a potential for significant social burdens.” (*In re Roger S.* (1977) 19
17 Cal.3d 921, 928 [citing *Ginsberg v. New York* (1968) 390 U.S. 629, 638, *Prince, supra*, 321 U.S.
18 at p. 170, and *Wisconsin v. Yoder* (1972) 406 U.S. 205, 234] (internal quotation marks omitted).)

19 “Unquestionably, [SB 277’s act of] imposing a mandatory vaccine requirement on school
20 children as a condition of enrollment does not violate substantive due process.” (*Whitlow, supra*,
21 203 F.Supp.3d at p. 1089.)

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

25 **V. SB 277 DOES NOT VIOLATE THE RIGHT TO PRIVACY**

26 Plaintiffs allege two violations of their right to privacy: (1) the right to control the integrity
27 of their bodies and the bodies of their children; and (2) the right to maintain the confidentiality of
28 medical records. (Complaint, at ¶81.)

1 Plaintiffs' bodily autonomy claim, previously framed by them as a substantive due process
2 claim, was rejected by the federal court in *Torrey-Love I.* (See RJN, Exh. 7, at pp. 6-7.)
3 Plaintiffs' re-formulation of their claim under the California right to privacy should not alter the
4 outcome. SB 277's effect on these fundamental rights is subject to rational basis review because
5 SB 277 concerns the State's police powers of safeguarding public health. (*Wilson, supra*, 110
6 Cal.App.3d at p. 324.) Indeed, even under strict scrutiny review, SB 277 does not violate these
7 fundamental rights for the reasons articulated above.

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

19 As articulated above, *Jacobson* and its progeny unequivocally underscore the State's
20 legitimate and compelling interest in protecting public health and safety from the spread of
21 dangerous diseases, particularly within the context and setting of school, by mandating that
22 schoolchildren be immunized. Thus, a student's privacy interest is limited in a public school
23 environment where the school is responsible for students' health and safety, and students are
24 routinely subject to vaccinations. (*Bd. of Ed. of Indep. Sch. Dist. No. 92 v. Earls* (2002) 536 U.S.
25 822, 830-831 (*Earls*); see also *Redding v. Safford Unified Sch. Dist. No. 1* (9th Cir. 2008) 531
26 F.3d 1071, 1094 [citing *Earls*.])

27 As with bodily autonomy, an individual's medical privacy right "may be outweighed by
28 supervening public concerns." (*Board of Medical Quality Assurance v. Gherardini* (1979) 93

1 Cal.App.3d 669, 679.) One important consideration is whether “intrusion is limited and
2 confidential information is carefully shielded from disclosure except to those who have a
3 legitimate need to know, privacy concerns are assuaged.” (*Pioneer Electronics (USA), Inc. v.*
4 *Superior Court* (2007) 40 Cal.4th 360, 371.) Here, the only medical information that SB 277
5 seeks is whether and when a child has been vaccinated against ten diseases enumerated in the
6 statute.

7 The Legislature, recognizing the significance of a patient’s personal privacy rights, has
8 confirmed that such disclosure of a student’s immunization history does not infringe upon that
9 student’s right to privacy. Health and Safety Code section 120440 permits health care providers,
10 schools and child care facilities to disclose medical information such as the types and dates of
11 immunizations a child has received to local health departments. (Health & Saf. Code, § 120440,
12 subd. (c).) Local health departments and the California Department of Public Health may then
13 disclose such information to each other. (*Ibid.*) The Legislature similarly recognized such a need
14 for disclosure under the California Confidentiality of Medical Information Act, which provides
15 that health providers may disclose medical information to a local health department to prevent or
16 control disease, and for other public health-related reasons. (Civ. Code, § 56.10, subd. (c)(18).)

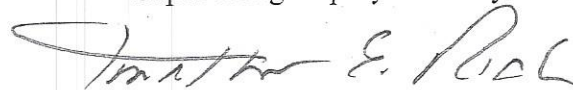
17 For these reasons, plaintiffs fail to state a claim under the state constitutional right to
18 privacy, whether couched in terms of bodily integrity or medical privacy.

19 CONCLUSION

20 For the foregoing reasons, defendants respectfully request that the Court sustain its
21 demurrer to plaintiffs’ Complaint without leave to amend.

22 Dated: May 2, 2017

23 Respectfully Submitted,
24 XAVIER BECERRA
25 Attorney General of California
26 Jennifer M. Kim
27 Supervising Deputy Attorney General



28 JONATHAN E. RICH
Deputy Attorney General
Attorneys for Defendants

**DECLARATION OF
JONATHAN E. RICH**

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DECLARATION OF JONATHAN E. RICH

I, Jonathan E. Rich, declare the following:

1. I am an attorney licensed to practice law in the State of California and am admitted to practice before this Court. I am a Deputy Attorney General with the Office of the Attorney General, counsel for defendants in this case. As such, I have personal knowledge of the facts stated herein:

2. Pursuant to Code of Civil Procedure section 430.41, on April 19, 2017, the parties met and conferred by telephone concerning defendants' objections raised in this demurrer. The parties were unable to reach an agreement on defendant's objections.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed in Los Angeles, California on the below date.

Dated: May 2, 2017



JONATHAN E. RICH, Declarant

DECLARATION OF SERVICE BY OVERNIGHT COURIER

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

Case No.: **SCV0039311**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On May 2, 2017, I served the attached **DEFENDANTS' NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFFS' COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JONATHAN E. RICH** by placing a true copy thereof enclosed in a sealed envelope with the **GOLDEN STATE OVERNIGHT**, addressed as follows:

Brad A. Hakala, Esq.
Jeffrey B. Compangano, Esq.
Ryan N. Ostrowski, Esq.
The Hakala Law Group, P.C.
One World Trade Center, Suite 1870
Long Beach, California 90831

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 2, 2017, at Los Angeles, California.

Yesenia Caro

Declarant



Signature