Case No. C086030

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

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

Plaintiffs and Appellants,

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,

Defendants and Respondents.

On Appeal from the Superior Court of California
County of Placer
Case No. SCV0039311
Honorable Charles D. Wachob

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

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APPELLANT/ PETITIONER: Love, et al. RESPONDENT/ REAL PARTY IN INTEREST: State of California, Department of Education, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
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Date: 3/27/2018

Brad A. Hakala, Esq.
(TYPE OR PRINT NAME)

/s/ Brad A. Hakala
(SIGNATURE OF APPELLANT OR ATTORNEY)

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STATEMENT OF THE CASE

On April 4, 2017, Appellants filed suit in Placer County Superior Court challenging the constitutionality of Health and Safety Code section 120325 *et seq.* On August 14, 2017, the court granted the Respondents' Demurrer. Notice of entry of judgment occurred on November 2, 2017. Appellants filed notice of appeal on November 15, 2017.

STATEMENT OF APPEALABILITY

Appellants submit this appeal from the order of dismissal made following the order sustaining the Demurrer, pursuant to Code of Civil Procedure section 904.1.

STATEMENT OF FACTS

In 2015 California passed the nation's strictest vaccination requirement, now codified at Health and Safety Code section 120325 *et seq.* To vaccinate for the ten illnesses and infections the California Vaccine Law ("CVL") requires, a child must receive at least twenty-seven different doses of medication and fifteen different shots, just to enter kindergarten. Not only can this cost money, but it can take significant time and effort. The CVL requires, among other things, 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 requires vaccination for Tetanus, while occasionally serious to an individual, is not communicable. It requires the vaccination for Varicella (chicken pox), the risk of perishing from which has always been about equivalent to the proverbial "being struck by lightning." Volume 1 of the Clerk's Transcript (CT) 217:20-28.[1]

1 Citations to the two-volume Clerk's Transcript are designated as "[Volume Number] CT [Page Number]:[Line Numbers]."

Aside from adding to the list of vaccines required, the CVL removed the ability for individuals to decline a vaccine based on their religious beliefs – commonly called a "personal belief exemption." Thus, the only way for a student to enter public or private school without getting these fifteen shots is to obtain a medical exemption and disclose that to the school. A medical exemption is only granted if a child has a debilitating condition, or on the basis of genetic susceptibility, *i.e.*, if that child's older sibling was injured or perished after getting a vaccine. And the state has since taken steps to crack down on doctors granting medical exemptions.

Appellants include several families and a non-profit. The families wish to access California's constitutionally guaranteed, free, public K-12 schools, but cannot, due to their child's or children's vaccination status. The appellants:

- Wish to keep their medical conditions and medical records private, and do not want to reveal to their schools or government certain conditions that could subject them to stigma. 1 CT 6:8-9, 6:17-18, 6:24-25, 7:2-4, 7:10-11, 7:19-21, 8:1-2, 8:10-12, 8:20-22, 9:2-3, 11:25-27, 12:1-8, 15:5-6, 17:17-12, and 23:10-14.
- Wish to make decisions as intimate as what they inject in their body, and which medical procedures to undergo, without governmental interference. 1 CT 5:25-27, 6:11-13, 7:13-15, 7:19-21, 8:4-6, 8:10-12, and 18:25-19:1-3.
- Wish to raise their children as they believe best, a right that is older than the constitution itself. 1 CT 5:22-23, 6:11-13, 7:13-16, 8:4-7, 12:16-19, and 19:16-19.
- Have deeply held beliefs that prevent them from vaccinating; some vaccines contain human fetal cells, and some contain porcine cells. 1 CT 7:15-16 and 8:6-7.

Appellant families have suffered as a result of the CVL. They have had to forego:

- The normative socialization with their peers that comes from a public education. 1 CT 17:12-15, 18:25-19:1-3.
- Income, since California law requires parents to homeschool their children if the children are unvaccinated. 1 CT 5:28-6:2, 6:5-6, 6:14-15, 6:22, 6:28-7:1, 7:7-8, 7:17-19, 7:25-26, 8:9-10, 8:18-19, 8:27-28, 17:17-12, 20:24-27, and 23:10-14.
- And most importantly, their right to a free, public, K-12 education – because they choose to exercise their rights to privacy, or to direct the upbringing of their children, or to act based on their religious beliefs. 1 CT 6:6-9, 6:22-25, 7:1-4, 7:8:11, 7:26-8:2, 8:19-22, 8:28-9:3, 11:20-24, and 17:7-15.

Appellant A Voice for Choice Inc. represents thousands of families affected by the CVL, including *inter alia*, families with a history of congenital diseases and/or elder siblings who reacted adversely to vaccines. 1 CT 9:4-6.

ARGUMENT

I. STANDARD OF REVIEW

The granting of a demurrer is entitled to *de novo* review. *Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672. Additionally, a case raising constitutional issues is entitled to *de novo* review. *City of Santa Cruz v. Patel* (2007) 155 Cal.App.4th 234, 243.

II. QUESTIONS PRESENTED ON APPEAL

Can the state condition the exercise of a student's right to a free, public K-12 education on the relinquishing of other fundamental rights, namely, the rights to bodily autonomy, to privacy, and to due process? Can the state, during a period of non-crisis, override the right to refuse

discretionary medical treatments for non-communicable diseases, at penalty of a student losing the fundamental right to a free, public K-12 education?

Does California's Constitution, which confers a right to privacy, allow the state to force students to disclose which medical treatments and/or conditions they have had, before exercising their fundamental right to a free, public K-12 education?

Can the state mandate prophylactic medication for an entire class of people?

Does California's Constitution, which confers a right to religious freedom, allow the state to inquire into the validity of an individual's spiritual creed, before allowing that individual to reject a medical treatment and exercise his or her right to a free, public K-12 education?

III. SUMMARY OF ERRORS

California's Constitution differs from the federal one by offering additional enumerated rights. One of those is the right to a free, public K-12 education. Like much in modern constitutional jurisprudence, it took several decisions by the Supreme Court to clarify and expound this right. Since the 1970s and 1980s, California courts have struck down laws that infringe on the right to a free, public K-12 education. Requiring students to relinquish other fundamental rights – for example, their rights to bodily autonomy, due process, privacy, and free exercise – unreasonably infringes on the right to a free, public K-12 education. By forcing students to choose between their right to an education (even when viewed as just a government benefit) and various other rights, the CVL violates the California Constitution.

California's Constitution contains a right to privacy that is strong, unique, and specifically enumerated. California's express right is broader than the implied federal right to privacy. The right confers on Californians the ability to keep confidential intimate details, like medical history. The

government cannot demand medical records at the schoolhouse door, any more than it could demand medical records at the courthouse filing window.

California's Constitution also requires due process and allows people to refuse medical treatment and to be free from government-mandated bodily intrusions. This right stems from both the right to privacy and other rights that protect the sanctity of the human body. A government can mandate medical treatments during a crisis or a public-health emergency, or in certain circumstances to protect the imminent loss of a patient's life. However, it cannot mandate purely prophylactic medical procedures as a pre-condition for an individual exercising his or her fundamental right to a public education.

Californians enjoy a right to religious freedom. California is home to many different peoples who ascribe to diverse religions and creeds. Religious observation in California is also increasingly egalitarian, instead of being top-down or organized. The Supreme Court of the only other state to consider this issue, assumed that a personal-belief waiver is <u>always</u> engrafted on a medical mandate, because to decide otherwise would violate the right to religious freedom. Similarly, there must be such a right read into California law. It would be improper for schools or government to become the inquisitor, looking into the validity of religious beliefs.

IV. APPELLANTS' CASE SHOULD HAVE PROCEEDED TO TRIAL

A complaint is invulnerable to a general demurrer if on any theory, regardless of the title under which the factual basis for relief is stated, the complaint states a cause of action. *Johnson v. Clark* (1936) 7 Cal.2d 529, 536; *Quelimane Co., Inc. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 38. A general demurrer may be upheld "only if the complaint fails to state a cause of action under any possible legal theory." *Sheehan v. San Francisco 49ers* (2009) 45 Cal.4th 992, 998. All that is required to survive

a demurrer is that the pleadings have stated facts showing that a plaintiff may be entitled to some relief. *Richard H. v. Larry D.* (1988) 198 Cal.App.3d 591.

The CVL on its face, along with the extensive details in the Appellants' Complaint, created issues that should have proceeded to trial. If, in California, a right to privacy, a right to due process, a right to parent one's children, a right of religious freedom, and right to a free, public K-12 education exist, then the state cannot condition those rights on relinquishing another. In every other case where jurisdictions have considered dilemmas like the ones involved here, the laws have been struck down. *See, e.g.*, *Bourgeois v. Peters* (2004) 387 F.3d 1303, 1324 (striking down law conditioning the right to peaceably protest, on individuals relinquishing their right to be free from unreasonable searches. As in *Bourgeois:*

> "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."

If public education is a fundamental right – or even a government benefit – the state cannot force citizens to give it up, if those citizens refuse to give up other rights.

The CVL further infringes on California students right to privacy, by forcing those with a medical exemption to reveal to government bureaucrats intimate details of their medical histories. It violates others' free-exercise rights by conditioning an important government benefit, a public education, on students whose creeds oppose, subjecting themselves to injections of material that go against their religions' longstanding prohibitions. The CVL also infringes on parents' rights to direct the upbringing of their children. The trial court erred by granting the demurrer.

A. The CVL Infringes on Students' Rights to a Public K-12 Education.

A public K-12 education is a fundamental right in California, and laws and policies infringing on this right are subject to strict scrutiny. *Hartzell v. Connell* (1984) 35 Cal.3d 899; *Serrano v. Priest* (1976) 18 Cal.3d 778; *Slayton v. Pomona USD* (1984) 161 Cal.App.3d 538, 548. A public education develops the mind, provides a path to future employment and an irreplaceable way for children to socialize with their peers. See *Phipps v. Saddleback Valley Unified School Dist.* (1988) 204 Cal.App.3d 1110, 1114 (child with AIDS forced to homeschool suffered "irreparable harm and damage by not being given the education and enjoying the educational facilities uniquely available at his . . . school"). And for parents, school provides daytime supervision to their children, and thereby the chance for the parents to be productive members of society. A synthesis of the precedent makes clear: public education is an irreplaceable fundamental right, and one that cannot be infringed without the government showing that it has precisely tailored a law to accomplish its ends, with the least restrictive means. Conditioning a public education on relinquishing other rights is never permissible.

Slayton is particularly insightful. There, the court considered whether making parents swear a loyalty oath to a school district, as a condition of their children enrolling, impermissibly burdened the families' fundamental rights to an education. After the parents prevailed at trial, the Court of Appeal approved the ruling, and further authorized attorneys' fees for the parents, holding that the trial court had properly determined that the school district's requirements improperly infringed on the significant and fundamental right to a public K-12 education. See *id., passim*. Mandating the loyalty oath, required parents to give up their rights to free speech and

free political association, which impermissibly burdened another fundamental right – to access the California educational system.

The interplay of rights is key to evaluating the CVL's constitutionality. California's prohibition on this kind of conditioning is particularly strict – even when the government merely makes the provision of a government benefit dependent on the relinquishing of a right. "When receipt of a public benefit is conditioned upon the waiver of a constitutional right, the government bears a heavy burden of demonstrating the practical necessity for the limitation. The [government] . . . must establish that there are no available alternative means." *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213 (citations omitted). Therefore, even if education was not a fundamental right and was merely just a "public benefit," (like accessing a park, or receiving food-purchase assistance), the CVL would still be unconstitutional because the state cannot satisfy the *Robbins* test.

This is because there are several "available alternative means" to accomplishing the state's goal of higher vaccination rights without using the public benefit of free K-12 education as the chokepoint. For example, the government could have tried a massive education effort on why it believes vaccines are helpful, targeting its efforts on the few counties where vaccination rates were lowest. The state could have distributed free medication, in an effort to eliminate the co-pays for needy families. It could have incentivized vaccination in other ways. It was permissible for the government to try any of these alternative means, or others, but instead the government chose the most burdensome and infringing option. Because there were and are available alternative means of accomplishing its goals – without infringing on a long list of constitutional rights – the CVL cannot stand.

Moreover, the CVL has doubtlessly harmed Appellants. For example, the Gates family wants their children to attend Placer County's

acclaimed public schools, which is their right under the Constitution. *See* 1 CT 6:10-7:11. But for the family to do so, they would have to relinquish other rights – their right to privacy, their right to direct their children's upbringing, and their right to medical autonomy. Like the loyalty-oath requirement in *Slayton*, this situation conditions their right to a public, K-12 education on the Gates family losing other rights.

The trial court inexplicably failed to synthesize modern precedent with century-old. As many California history books detail, the right to a public education (and the jurisprudential rules that apply to the same) was only fully recognized in California with the landmark *Serrano* cases of the 1970s – cases that were so significant, they caused the state to overhaul its century-old methodology of funding public schools. Yet the state relies on a 1904 case that was decided before the *Serrano* trilogy. The 1904 case contains a circular, conclusory statement that would be laughed out of a first-year law-school class: requiring vaccination "in no way interferes with the right of the child to attend school, provided the child complies with its provisions." *French v. Davidson* (1904) 143 Cal. 658, 662.

While this Court is indeed bound by a singular Supreme Court precedent like that, it is also bound by each of the countless other decisions since, which explain the nature of fundamental rights. The only possible logical view is to read the statement in *French* as dicta, from a pre-modern judge attempting to explain his holding – because that statement contains no principle of logic or law that a modern court would recognize. Imagine reading: "A poll tax in no way interferes with the right of someone to vote, as long as the voter complies with its provisions." "A demand to turn over the contents of a briefcase in no way interferes with the right of someone to be free from unreasonable searches, as long as the citizen complies with the demand." "A requirement to allow the government to pre-clear a message in no way interferes with freedom of speech, as long as a speaker complies

with the provisions." Such statements are so illogical, conclusory, and circular, that they cannot be considered anything but dicta.

Serrano, *Hartzell*, *Slayton*, and *Phipps* all stand for the principle that the right to a public education cannot be burdened the way it is here: families must incur substantial costs for the multitude of doctors' visits the CVL requires. Students must relinquish certain rights: their right to determine what goes into their bodies and their rights to bodily autonomy. If their religion objects to the use of certain cells in vaccines – too bad. A fundamental right cannot be conditioned on giving up another. *See Bourgeois*. The CVL impermissibly does precisely that. And even if this Court engrafts an exception to the fundamental right to a public education, there can be no doubt that a public education is a substantial government benefit. When receipt of a public benefit is conditioned upon the waiver of a constitutional right (and there are at least four such rights required to be waived here), the government bears a heavy burden of demonstrating that there are no available alternative means. *See Robbins*. The government cannot meet that standard.

Other courts have explicitly noted that in states where public education is a fundamental right, a vaccine-based bar to access could not stand. In *Boone v. Boozeman* (E.D. Ark. 2002) 217 F.Supp.2d 938, a modern case on which the state heavily relies, and which involved a challenge to Arkansas' vaccine laws, the court explicitly stated its ruling would be different if public education was a fundamental right in the Arkansas or federal constitutions. *See id*. at 957. Public education is a fundamental right in California, and therefore the CVL cannot stand.

B. The CVL violates the California Constitution's Right to Privacy, and the Lower Court Erred by Applying a Rational Basis Standard to this Right.

The right to privacy in California is strong, unique, and specifically enumerated. "The California Constitution provides that all individuals have a right of privacy. (Cal. Const., art. I, §1.) "This express right is broader than the implied federal right to privacy." *Williams v. Sup. Ct.* (2015) 236 Cal.App.4th 1151 [187 Cal.Rptr.3d 321, 327].[2] The right to privacy applies to minors too. "There can be no question but that minors, as well as adults, possess a constitutional right of privacy under the California Constitution." *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 334. The California Constitution therefore guarantees minors the right to privacy.

This right also covers medical history and medical records. "It is settled that a person's medical history, including . . . records, falls within the zone of informational privacy protected" by the California Constitution. *People v. Martinez* (2001) 88 Cal.App.4th 465, 474–75. This right applies in matters concerning "the preservation of . . . personal health" and matters involving "retaining personal control over the integrity of [one's] own body." *Am. Acad. of Pediatrics*, at 332–33. With respect to medical information, this right is special. The "right to control circulation" of personal medical information is "fundamental" and "reaches beyond the interests protected by the common law right of privacy." *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440 (citations omitted). This higher degree of protection exists because "[a] person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." *Bd. of Med. Quality*

2 Superseded on other grounds, *Williams v. Sup. Ct.* (2015) 191 Cal.Rptr.3d 497.

Assurance v. Gherardini (1979) 93 Cal.App.3d 669, 678. California affords a person's medical history the highest degree of privacy protections.

The CVL is unconstitutional because it requires a child to reveal intimate medical-history details before attending school (which is itself a protected fundamental right.) The applicable standard is stated in *Willard v. AT & T Commc'ns of Cal., Inc.* (2012) 204 Cal.App.4th 53, 62. "[A] plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." *Id.* (citations omitted).

Here, as for prong one, there can be no doubt that a minor's intimate health records are legally protected. With respect to prong two, it is reasonable that a perfectly healthy student, during a period of non-crisis, could expect to keep his or her medical records private. The opposite premise offends our concepts of freedom. Key, although not necessarily essential to this conclusion, is the additional fact that attending public K-12 schools is also a fundamental right in California. <u>It would be unreasonable to expect a student seeking to exercise the simple and fundamental right</u> to attend school, to reveal medical history as a condition thereof.

It is also unreasonable (and potentially humiliating) for a student, seeking to attend school, to have to reveal that he or she has a medical exemption – a revelation that is telling, because such exemptions are only granted for certain conditions, diseases, dire familial histories, or congenital syndromes – and must state the precise reason. So with respect to prong three, it cannot be doubted that it constitutes a serious invasion of privacy for a small-town family being forced to reveal to some gossiping school clerk, that the family's child has a debilitating condition, which are often cause for serious stigma.

Appellants stated sufficient facts to articulate a valid cause of action. For example, the Sargent family Appellants, a military family, do not wish to forego their privacy rights by being forced to disclose their family's personal, medical information to government officials, preferring their intimate decisions to remain private. Like any family, they do not wish to disclose certain details of their medical history. *See* 1 CT 8:3-9:3. They have been clearly harmed, not just economically, by the state's "give up your right to privacy or homeschool your children" policy. *Id*. And furthermore, Appellant A Voice for Choice Inc. represents thousands of families affected by this law, including *inter alia*, families with a history of congenital diseases and/or elder siblings who reacted adversely to vaccines.

The lower court cited just one court of appeal case, *Wilson v. Cal. Health Facilities Com.* (1980) 110 Cal.App.3d 317, for the extreme premise that <u>any</u> time the state simply <u>asserts</u> that a law was passed to safeguard public health, that no matter what constitutional issues are raised, that there is a presumption of validity and that rational basis review is <u>automatic</u>. The law cannot possibly be that broad. Such a rule would give the state unlimited power to infringe on constitutional rights as long as it merely asserted that a law concerned public health. The better view is to read that one case in the context of the dozens of others conferring a strong right of privacy to medical records, for example, *Gherardini* and *American Academy of Pediatrics*. Otherwise, this "rational basis lite" standard would eviscerate the entire concept of a right to privacy in the field of medicine in California.

Could a city hall require citizens to disclose their vaccination status before citizens may petition their government? As a busy public building, a city hall has many of the same features as a school – including many people in close proximity. Just as it is unreasonable to expect a person to reveal his or her intimate medical history before exercising other protected rights,

it is unreasonable to expect the same before someone exercises the right to attend school.

C. The CVL Violates the Appellants' Rights to Due Process, Bodily Autonomy, and to Refuse Medical Treatment, and the Lower Court Erred by Ignoring the Application and Interplay of these Rights.

A second strand of precedent dictates that California's right of privacy also protects individuals from unwanted intrusions into their body. The state's "constitutional right of privacy [also] guarantees to the individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity." *Bartling v. Sup. Ct.* (1984) 163 Cal.App.3d 186, 195. Here, to vaccinate for the CVL's ten diseases and syndromes, a child must receive at least twenty-seven different doses of medication and fifteen different injections – just to enter kindergarten. Thus, the CVL violates students' privacy rights by subjecting a student to dozens of bodily intrusions.

But whether viewed as a privacy right, or under the construct of due process, or simply as a natural right older than the Constitution, it's certain that this right generally protects citizens from the government passing a dictate to determine what they inject in their bodies. As noted above, the CVL requires kindergartners to be vaccinated for diseases and syndromes that aren't communicable at all, like tetanus, and ones that are sexually transmitted, like Hepatitis B. If the government, during a period of non-crisis, can mandate discretionary medical treatments for non-communicable diseases, then where does this power logically end? If the state is correct in its formulation of the law, then the government could also mandate high-school students, upon penalty of expulsion, use condoms or other forms of birth control, and it could refuse admission to students who associate with an HIV-positive relative.

Could the government mandate a vaccine that doesn't work, if for example, powerful lobbies simply asked the Legislature to? Could the government mandate vaccination against an exceedingly rare and never deadly disease? Could it mandate other prophylactic medical treatments if it simply called the other prophylactic a "vaccine?" Could it mandate that someone must be vaccinated before attending a church service (where, like schools, people congregate in close quarters)? The answers are clearly "no," and that is because the vaccine precedent is narrower than the state represents it to be, and because it must be read together with decades of intervening precedent that has balanced related rights. The trial court erred by not rigorously synthesizing the precedent.

Other precedent on vaccine mandates can further be distinguished, because the CVL is so broad, and the state's position on it has been so extreme. It first must be noted that federal precedent, of course, is not binding in this case. This case involves California-specific rights and the California Constitution only. Yet the trial court relied heavily on cases from the *Jacobson v. Massachusetts* (1905) 197 U.S. 11 line of precedent. Those cases stand for the unremarkable premise that before states had declared public education to be a fundamental right, a state or self-contained township could mandate one (or a small handful of) shot(s), for a highly contagious disease, during a serious crisis outbreak of the same, in an era pre-dating widespread travel, which makes such mandates less efficacious. All of this is constitutionally significant, as is the scope of intrusiveness, which here is far greater than what has been deemed a permissible *de minimis* infringement. In the lead-up to the *Jacobson* decision, an average of one in 350 people in Boston were infected with smallpox, and hundreds died. Exigent circumstances clearly existed.

In other words, the federal cases, which are not binding, are not even very instructive, since they featured vastly different facts. Here, the

question presented is whether the state can mandate (a) 25 shots required by the statute at issue; (b) some which are not for communicable diseases at all (or require kindergarteners to be vaccinated for an STD); (c) during a non-crisis; and (d) in an era where international travel and the inescapable natural loopholes in the statute (unvaccinated children can still play in weekend sports leagues, attend dance recitals, and squirm in pews together in houses of worship) itself render its infringements pointless. If the Respondents' position is yes – that a state, during a period of non-crisis, can mandate prophylactic medical treatment for, *inter alia*, non-communicable syndromes, then where does that power logically end? Surely, the constitutional line has been crossed here.

Also noteworthy is that the *Jacobson* line of cases originated decades before *United States v. Carolene Products* (1938) 304 U.S. 144 first expatiated the modern due-process construct and before the landmark due-process-based bodily autonomy cases. Clearly, the federal precedent that the Placer Superior Court oddly relied on must be viewed through the prism of that precedent's narrow facts – and other relevant precedent subsequently handed down must be considered too. That other precedent, on privacy and bodily autonomy indicates that the CVL is too broad to pass muster.

D. The CVL Impermissibly Infringes on Students' Rights to Free Exercise.

In *In re LePage* (Wyo. 2001) 18 P.3d 1177, the Wyoming Supreme Court reformed a broad vaccine mandate to engraft on it a personal-beliefs waiver. Construing the statute in the most generous manner possible to preserve it on the books, the court stated it did "not believe that the legislature, through its adoption of [its vaccine mandate] . . . authorized a broad investigation into an individual's belief system in an effort to discern the merit of a request for exemption" (*id.* at 1181) – and the court read into

the law the ability for families to quietly state their objections with no penalty, even though the legislature had not explicitly provided this ability in the statute.

This was the status quo in California for over one-hundred years, and it was wisely so. A hallmark of the free-exercise clause is that government does not become an arbiter of religious beliefs. Californians are diverse, as are their creeds. Certain California families might contain a husband who was raised fundamentalist Christian, and a wife who ascribes to Buddhism. And definitely, members of many religious faiths, from orthodox Christians to orthodox Jews, would object to the injection of aborted fetal or porcine cells into their bodies. This is why the law previously allowed certain families, which always are small in number, to state that their beliefs required them to reject certain vaccines. It was written as a "personal-beliefs" exception because of the undesirability and the impracticality of government inquiring into whether a religious belief was part of an "organized" religion, and thereby tacitly endorsing certain faiths while rejecting others. Many of the Appellants have genuine, deeply held beliefs about what goes into their bodies and how certain vaccines were made, and Appellant A Voice for Choice represents hundreds of religious families. (1 CT 9:4-11.) Appellants argued that the lower court had to read the CVL as including an unwritten exception for personal beliefs – just as the Wyoming Supreme Court did in *In re LePage*. The lower court erred by not doing so.

E. The CVL Infringes on the Rights of Parent Appellants to Direct the Upbringing of Their Children.

California recognizes the right for parents to direct the upbringing of their children. Again, California's scope of this right is expansive and requires the government meet a tough evidentiary standard. "[W]here particularly important individual interests or rights are at stake," and after

considering the "gravity of the consequences resulting from an erroneous determination," "any infringement on a custodial parent's right to direct her child's upbringing" is generally unconstitutional "absent clear and convincing evidence." *Ian J. v. Peter M.* (2013) 213 Cal.App.4th 189, 206.

The lower court's ruling didn't address this precedent or argument at all. Here, it is manifest that important individual rights are at stake, such as the right to determine what goes in one's own body. Some vaccines are made from fetal cells, and it is reasonable that certain parents might wish to decline medications made therefrom, consistent with how those parents raise their children. The gravity of the consequences are of course, substantial. For those with certain undiagnosed or unknown congenital diseases, compromised immune systems, or certain genetics, the reaction to a vaccine can mean brain damage or death.

It is therefore appropriate that parents, not the state, make these determinations. Of course, the state can try to show with clear and convincing evidence that its mandates are constitutional – but it hasn't done that here. This case should be remanded for the trial court to consider this subject.

CONCLUSION

For the foregoing reasons, the Court should strike down or reform the CVL, or vacate the lower court's Demurrer so that these issues can be fully briefed at trial.

Dated: March 27, 2018

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CERTIFICATE OF WORD COUNT

I, Brad A. Hakala, Esq., counsel of record for Appellants, certify that pursuant to California Rules of Court, Rule 8.204(c)(1), the word count for Appellants' Opening Brief, including footnotes, is 5332 words. In making this certification, I have relied on the word count of Microsoft Word 2016, used to prepare this brief.

Dated: March 27, 2018

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PROOF OF SERVICE

I, Amber L. DeKruyf, declare:

I am employed in Los Angeles County, California. I am over the age of eighteen years and am not a party to the within-entitled action. My business address is One World Trade Center, Suite 1870, Long Beach, CA 90831. On March 27, 2018, I served a copy of the within document:

APPELLANTS' OPENING BRIEF

(1) by placing the document listed above in a sealed envelope and affixing a pre-paid overnight shipping label. Following ordinary business practices, the envelope was placed for collection by the United States Postal Service on this date, and would, in the ordinary course of business, be delivered on the next business day to those addressed below:

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(2) by electronic service, as a single computer file in text-searchable PDF format to the electronic service address of the Supreme Court of California and the State of California Court of Appeal, Third Appellate District.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 27, 2018, at Long Beach, California.

/s/ Amber L. DeKruyf
Amber L. DeKruyf