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Court of Appeal, Third Appellate District
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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' REPLY BRIEF

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Respondents command this Court to "*move along,*" suggesting there is "*nothing to see here.*" Yet like the cinematic officer shuffling onlookers past a plane crash, the Respondents have grossly and intentionally oversimplified things. Let's start with the challenged law. Based on the Respondents' own statements, the California Vaccine Law ("CVL") is *sui generis*, the broadest vaccine mandate ever imposed in all fifty states – a law that tests the limits of how far the nanny state may intrude into personal and familial decision-making. Respondents also mislead the Court about the nature of Appellants' claims. Appellants challenge the CVL on narrow and specific grounds, based on the California Constitution only. Finally, Respondents cite and misapply ancient precedent – not binding on this Court, issued before modern due-process decisions, and were decided before California's key education cases – precedent that involved far more lenient vaccine laws.

There *is* something to see here. Surely the state leviathan has not grown so large that it can mandate prophylactic medical treatments with no off-ramps for bodily autonomy, privacy, religious beliefs, or parental decision-making. If the CVL stands, can government mandates for senior citizens to take aspirin or for high-schoolers to use condoms be far away?

I. RESPONDENTS HAVE NOT REBUTTED APPELLANTS' SHOWING THAT THE CVL IMPERMISSIBLY BURDENS THE RIGHT TO A FREE, PUBLIC K-12 EDUCATION

The issues here are whether the state can 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. And 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?

In response, the Respondents catalogue prior cases that involved vastly different facts, laws, and theories, in an attempt to distract the Court from the issues in the instant matter. (Respondents' Brief at pp.13, 21-26)[1]. In these eight pages, the state's message appears to be "all statutes and cases involving vaccines are the same." But that is not a legal argument – any more than the statements, "all abortion cases are the same" or "all voting rights cases are the same."

Respondents also recite dated federal precedent that cannot be stretched to the unique facts here. California's right to a public education is distinctive. One modern decision, applying the federal and Arkansas constitutions, considered the interplay of vaccine mandates when education is a fundamental right. That court, mulling the constitutionality of Arkansas's vaccine mandate, explicitly clarified its decision by noting that in Arkansas and federally – unlike in California:

> it is firmly established that the right to an education is not provided explicit or implicit protection under the Constitution and is not a fundamental right or liberty.

(*Boone v. Boozman* (E.D. Ark. 2002) 217 F.Supp.2d 938, 957.)

Of course, this is in diametric contrast to California, where:

> the Supreme Court [has] determined that 'education is a fundamental interest' [and] must be examined under . . . strict and searching scrutiny. Respondents urge that education may be a 'fundamental interest,' but it is not a fundamental or important right. Respondents' argument lacks substance and merit. California has extended the *right* to an education by virtue of two constitutional provisions"

(*Slayton v. Pomona Unified School Dist.* (1984) 161 Cal.App.3d 538, 547 (citations omitted).)

[1] Citations to Respondents' Brief are hereinafter designated as "RB:[Page Number(s)]"

When public education is a fundamental right in a jurisdiction, then laws affecting that right are subject to strict scrutiny. And requiring bodily intrusions before accessing that right *would* impermissibly burden it. (*See Boone* at 957.)

Again, the best prism with which to view this case is to consider other rights that California's Constitution (or courts interpreting it) deem fundamental – and whether the state could similarly burden them. Could the state require twenty-seven different doses and fifteen different pokes before allowing someone to petition their government or attend church? (Volume 1 of the Clerk's Transcript (CT) 14:16-18)[2] Of course not – even though the exact logic (crowds of people in cramped public spaces) applies.

Changing the setting to "school" does not somehow save the CVL. It makes it worse. To apply a different standard to K-12 education is to hold it is *not really* a fundamental right – and that the California Supreme Court was *just kidding* in *Hartzell v. Connell* (1984) 35 Cal.3d 899 and *Serrano v. Priest* (1976) 18 Cal.3d 778 when it deemed it such. Such a holding would also disregard cases like *Slayton*, *supra*, where the court disapproved requiring a loyalty oath before a student could attend school. There is scarcely a difference between the CVL's requirements and the burden in *Slayton* when it comes to infringing access to education.

II. RESPONDENTS DECEPTIVELY CITE CASES THAT APPROVED PREVIOUS VACCINE LAWS WHICH ALL FEATURED PERSONAL-BELIEFS OPT-OUT CLAUSES

Respondents cite another California decision, *French v. Davidson* (1904) 143 Cal. 658 to argue that vaccine mandates have already been rubber-stamped by California courts. Respondents' omission of the facts is

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

so substantial that it borders on misrepresentation. The "vaccine law" the court approved in *French* – indeed almost all vaccine laws that have ever been approved by any court anywhere – were statutes that contained personal-beliefs exemptions. Under such exemptions, a tiny percentage of the population could opt out of a statewide vaccine mandate, without having to offer a dissertation on their religious beliefs, or reveal to officials why a child's medical history made it dangerous to get a vaccine. 47 other states offer such off-ramps.[3] California's vaccine law contained a personal-beliefs exemption until the CVL was passed in 2015. (1 CT 14:6-8). This is not in dispute. The Wyoming Supreme Court recently read such an exemption into its vaccine law. (*See In re LePage* (Wyo. 2001) 18 P.3d 1177.) Appellants ask this Court to do the same. *French* (and much of the other precedent the Respondents cite) has no value, as the courts there approved vastly different laws.

III. RESPONDENTS FAIL TO SYNTHESIZE DATED PRECEDENT

The line of cases, on which Respondents rely, issued before *United States v. Carolene Products* (1938) 304 U.S. 144 first expatiated our modern due-process construct and before the landmark due-process-based bodily autonomy cases. The line of cases on which Respondents rely contain statements like the following:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, **society can prevent those who are manifestly**

[3] http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_277_cfa_20150617_162055_asm_floor.html (Official analysis of CVL, stating that California would join Mississippi and West Virginia as the only states without a personal-beliefs exemption for vaccine laws). *See also* http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx.

> **unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.** *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765. **Three generations of imbeciles are enough.**

(*Buck v. Bell* (1927) 274 U.S. 200, 207 (emphasis added).)

And:

> [the vaccination mandate] in no way interferes with the right of the child to attend school, provided the child complies with its provisions.

(*French, supra*, at 662.)

Assuming that forced sterilizations are no longer permissible under our modern bodily-autonomy precedents – and assuming that most first-year law students would recognize the second statement, in *French*, to be as circular as "A poll tax in no way interferes with the right of someone to vote, as long as the voter complies with its provisions," then where does that leave those 110-year-old precedents? Appellants do not contest the continuing vitality of the *narrow* holding in *Jacobson*. However, it must be limited to its unique fact pattern, and all other relevant precedent must be synthesized with it. That other precedent, on due-process challenges and on bodily autonomy and parental rights, indicates that the CVL is just too broad. Respondents appear to argue that the Court must refrain from applying the well-established, traditional due-process formula in this case, simply because Respondents characterize this statute as a "vaccine law." The Court should decline the Respondents' invitation to issue a ruling based on such simplistic arguments.

Respondents' oversimplification is further on display in their discussion of *Abeel v. Clark* (1890) 84 Cal. 226. Respondents again quote circular and conclusory language, that doesn't even come close to modern standards of due process, to wit:

> it was for the Legislature to determine whether the scholars of the public schools should be subjected to [vaccination.]

(*Id*. at 230 (RB:21).)

That absolute statement is wholly inconsistent with modern constitutional tests, and therefore must be synthesized or augmented with the proper such tests. Furthermore, *Abeel* involved one shot for one "highly contagious and much dreaded disease." The CVL is vastly broader.

Other cases have dialed back the over-broad *Abeel* holding. In *Potts v. Breen* (1897) 167 Ill. 67, 78 [47 N.E. 81, 85], the court noted:

> [t]he record wholly fails to show that there were any grounds upon which the [policymakers] could have any reasonable belief that the public health was in any danger whatever.

That statement and logic applies with equal force here, notably for several of the diseases or syndromes (like tetanus and Hepatitis B, a sexually transmitted disease) for which the CVL requires shots. (1 CT 217:20-22).

Finally, *Abeel* was decided almost a century before California's modern compulsory-education laws were enacted in 1976. (*See* Ed. Code, § 48200.) These laws transformed the K-12 education dynamic from a privilege to a mandate and a right. And of course, *Abeel* was also decided before the *Serrano* series of decisions, *supra*, confirmed that public education was a fundamental right in California. Thus, *Abeel* cannot be held up blindly as precedent, as it simply is not instructive.

Respondents' inapt citations don't stop there. *Zucht v. King* (1922) 260 U.S. 174 merely stated that states can pass vaccine laws; it did not delineate the parameters, and its decision was under the federal constitution and federal precedent current to 1922. States are, of course, free to provide *more* rights to their citizens than those in the federal constitution, and it is well-established that California's Constitution does just that. (*See Williams v. Sup. Ct.* (2015) 236 Cal.App.4th 115 (superseded on other grounds,

Williams v. Sup. Ct. (2015) 191 Cal.Rptr.3d 497).) This case is brought under the California Constitution, and it's therefore disingenuous to argue that *Zucht* applies.

Respondents cite mere dicta in *Vernonia School District v. Acton* (1995) 515 U.S. 646, to a statement that was more of an observation than an approval. (RB:22). They also cite New York and Ohio precedent, not binding here, and not even that instructive given the differences between the state constitutions. (RB:22-23). They cite cases involving direct, known, imminent threats to a child's life – like when a parent refuses surgery after a car accident – for the incredible premise that parental rights don't exist when health decisions are being made (RB:23) – a line of argument that would eviscerate *all* parental authority, since most intimate, personal decisions within a household, including matters of sexuality and substance abuse, could be couched as life-and-death health decisions for which the Respondents would substitute the authority of the state leviathan for that of parents. Surely, Respondents have overstated the extent which precedent supports or even applies to a law as broad as the CVL.

Even the case the Respondents cite as an example of a modern California case on the alleged "continued viability" of the *Jacobson* line of cases actually limits it – and quite severely. In *Thor v. Superior Court* (1993) 5 Cal.4th 725, 740 the high court engaged in the precise synthesis of precedent that Appellants encourage here. *Thor* restated and confined the surviving holding of *Jacobson* and its progeny to permit "**<u>simple</u>**" vaccination (*i.e.* the one shot required in *Jacobson* for one highly contagious disease that was then in pandemic) and stated such mandates were only permissible when necessary "to protect the public health." This brings us back to the essence of this case. When any constitutional rights are involved, the court system does not simply take the word of the Legislature when it holds up a "public health" banner.

IV. RESPONDENTS' DUE PROCESS ANALYSIS IS DEFICIENT

Since the CVL so clearly affects and constricts the right to attend school, the Court must apply strict scrutiny to it. (*See Slayton*, *supra.*) To overcome strict scrutiny, the concern must be real, imminent, and widespread – and the law must be narrowly tailored to meet its end. A necessary syllogism is whether a law is precisely tailored to accomplish its ends logically at all. The CVL is so under-broad that it cannot achieve its objectives. It does not cover homeschooled children and categorically exempts foster children. (*See* Health & Saf. Code, § 120341.) Those unvaccinated kids are still free to sweat in weekend sports leagues together, to sit on tightly packed subways for hours at a time, and to squirm through hours of services at churches and synagogues, each of which are configured similarly to schools. Moreover, California generates 263 million tourist visits a year, many from countries with no vaccination requirements.[4] People who live along the Oregon, Nevada, Arizona, and Mexico borders regularly fraternize with those just across. These details are constitutionally significant because a law that so clearly infringes constitutional rights, if spurious, cannot satisfy the exacting constitutional standard. In light of these logical deficiencies, the question remains why the state chose to burden the right to attend school.

Once more, *Jacobson* and *Zucht* are instructive and provide a stark contrast to the present situation. In those cases, towns passed laws, before the era of international travel – indeed before much travel at all. Therefore, the ordinances there were credibly tailored to meet its ends. The folly of burdening California schoolchildren and infringing their fundamental rights,

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[4] Visit California, *California Statistics and Trends,* http://industry.visitcalifornia.com/Find-Research/California-Statistics-Trends/ (official state website providing these statistics).

while millions of unvaccinated foreign children alone visit the state each year, is manifest. Absent quarantines at the border, the CVL is not tailored to meet its ends. The CVL further contains mandates for diseases that are very much matters of *personal* health. If the line is drawn there, and infringements are allowed during non-public-health emergencies, it opens the door to a large variety of mandatory medication or mandatory treatments, to force personal preventative health on the public.

When discussing due process, Respondents again overplay the hand that precedent has dealt them. They note that the California due-process analysis mirrors the federal, and they recite the unremarkable proposition that it protects fundamental rights and liberties "deeply rooted in this Nation's history and tradition." (RB:26). In that they are correct. But this case has always been about the tension between rights, and the role of the court system in telling a paternalistic legislature it has crossed the line. Put simply, Respondents hold up a century of simple vaccine precedent for the incredible notion that vaccines themselves are somehow a part of this nation's history and tradition.

Against that, Appellants hold up rights like the right to parent one's children, the right to bodily autonomy, the right to privacy, and the right to "be let alone"[5] – freedoms far older than even the Constitution. As the Supreme Court noted:

> The liberty interest . . . of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized. It is cardinal ... that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. It cannot ... be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of

[5] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy* (1890) 4 Harv. L.Rev. 193.

> parents to make decisions concerning the care, custody, and control of their children.

(*Troxel v. Granville* (2000) 530 U.S. 57, 65 (citations omitted).)

California's Constitution also allows people to refuse medical treatment and to be generally 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. (*See Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 334.)

A government can mandate medical treatments during a crisis during 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. 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. 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 due process (and our national and societal traditions) mean nothing.

V. THE PROCESSES THE CVL ESTABLISHED DO VIOLATE THE CALIFORNIA CONSTITUTIONAL RIGHT TO PRIVACY

Moreover, Respondents are incorrect when they state that no right to privacy is violated by the CVL's facial provisions. Those provisions require a student to notify a school district whether he or she has been vaccinated or not. If not, those provisions require a doctors' opinion (a "medical

exemption") submitted to the school. (*See* Health & Saf. Code § 120370(a).) Doctors may only grant such an opinion if the child suffers from a debilitating disease, like HIV or leukemia, or if the child's family contains a history of bad reactions to vaccines due to pre-existing conditions or their genetic makeup. Indeed, the CVL requires very specific revelations, including, (1) The specific nature of the physical condition or medical circumstance for which the licensed physician does not recommend immunization; (2) That the physical condition or medical circumstance is permanent. (*See* Cal. Code Regs., tit. 17, § 6050, codifying existing practices.) Perhaps in the anonymous big-city schools with which Respondents are familiar, releasing this information to a school employee is not a significant revelation. But in many small towns, a family likely knows all the school employees – it may attend church with them, plays in bowling leagues with them, etc. "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 Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 678.) Forcing these families to reveal their intimate details to government officials is precisely what the right of privacy protects. It is certainly a privacy violation as significant as the ones recognized in California case law. (*See id*. (state board had no right to citizens' medical records or any information contained therein).)

VI. THE RESPONDENTS' ASSERTION THAT PUBLIC HEALTH STATUES ARE ENTITLED TO RATIONAL BASIS REVIEW IS WRONG

Respondents mislead the Court too on the applicable standard of review. They cite *People v. Privitera* (1979) 23 Cal.3d 697 for the false premise that "the infringement of a constitutional right by a health and safety statute is held to the less restrictive rational basis standard of review."

(RB:31). This is a bald-faced and patently false misstatement of federal and state constitutional law, and a shocking overreach. Government may not simply couch constitutional infringements as health-and-safety laws to be entitled to rational-basis review. The Court should upbraid Respondents for such a statement; *Privitera* did *not* hold that.

First, it should go without saying that dozens of "health and safety" laws have been reviewed under strict scrutiny and struck down by courts. (*See, e.g., Bd. of Med. Quality Assurance* and *Am. Acad. of Pediatrics*.) Were that not the case, states would be free to violate all sorts of constitutional proprieties by simply couching a law as "health and safety" related. Secondly, all *Privitera* did was catalogue the status of due-process cases at the time, noting that the kinds of important decisions recognized by the high court at that time as falling within the right of privacy involved matters relating to "marriage, procreation, contraception, family relationships, and child rearing and education." (*Id*. at 702.) Eleven years after the *Privitera* decision, the United State Supreme Court recognized (or affirmed) that individuals have a general right to bodily autonomy and the specific fundamental right to refuse medical treatments. (*Cruzan v. Director* (1990) 497 U.S. 261.)

Under the Respondents' incorrect, unlimited-government take on the law, the right to refuse medical treatment articulated by the United States Supreme Court in *Cruzan* would be destroyed – since the Respondents assert that any statute or governmental act implicating health and safety (RB:31) (which decisions about medical treatment necessarily do) would be entitled to rational-basis review and therefore likely upheld. The Respondents are wrong.

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VII. THE RELIGIOUS FREEDOM ARGUMENT IS PROPERLY BEFORE THE COURT

Respondents claim that Appellants' religious-freedom argument is not properly before the court (RB:38-39). This too, is inaccurate. Appellants raised the issue of their creeds in their Complaint (1 CT 14:1-5) and argued the religious-freedom issue and relevant case law in their Opposition to Respondents' Demurrer (RB:10). Thus, the issue was raised below.

Moreover, two legal rules protect this argument regardless, and place it squarely before the Court for resolution. "A party may raise a constitutional issue, like preemption, for the first time on appeal." (*ReadyLink HealthCare, Inc. v. Jones* (2012) 210 Cal.App.4th 1166, 1175.) An appellate court may consider constitutional issues raised for the first time on appeal "especially when…the asserted error fundamentally affects the validity of the judgment…or important issues of public policy are at issue…" (*County of Orange v. Ivansco* (1998) 67 Cal.App.4th 328,331, fn.2.) An issue of religious freedom and a child's education are constitutional issues and clearly "important issues of public policy." Thus, the Court should resolve this issue.

Moreover, as shown above, Appellants have not changed their theory. But even if Appellants had raised the issue here for the first time, "it is settled that a change in theory is permitted on appeal when a question of law only is presented on the facts appearing in the record." (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) This case, resolved on demurrer, contains no facts in dispute. This case involves statutory construction and constitutional issues only. Therefore, the Court can and should resolve this important question of law; no new facts have been introduced; and the record is sufficient for the Court to make its ruling.

///

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Dated: May 14, 2018

THE HAKALA LAW GROUP, P.C.

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

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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' Reply Brief, including footnotes, is 3825 words. In making this certification, I have relied on the word count of Microsoft Word 2016, used to prepare this brief.

Dated: May 14, 2018

THE HAKALA LAW GROUP, P.C.

By: /s/ Brad A. Hakala
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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 May 14, 2018, I served a copy of the within document:

APPELLANTS' REPLY 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 May 14, 2018, at Long Beach, California.

/s/ Amber L. DeKruyf
Amber L. DeKruyf