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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

AMY DOESCHER, STEVE DOESCHER, DANIELLE JONES, KAMRON JONES, RENEE PATTERSON, and DR. SEAN PATTERSON, individually and on behalf of their minor children,

Plaintiffs,

v.

TOMÁS ARAGÓN, in his official capacity as Department of Public Health Director and as the State Public Health Officer; ROB BONTA, in his official capacity as Attorney General of California.

Defendants.

Case No.: 2:23-cv-02995-KJM-JDP

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: September 13, 2024
Time: 10:00 a.m.
Place: Courtroom 3

Complaint Filed: December 22, 2023
Trial Date: None Set

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28

TABLE OF CONTENTS

I. Introduction……………………..…………..………………..…………………………1

II. Legal Standard……………………………………………...…………………………..1

III. Argument………………………………….…………………………………..…..2

A. Plaintiffs Allege Sufficient Standing………………………………………………3

B. The 11th Amendment Does Not Bar This Suit Because the Complaint Seeks Prospective Injunctive Relief Against an Official Directly Responsible for Unconstitutional and Unlawful Activity ……………………………..………………5

C. Plaintiffs State A Claim For Relief Under The First Amendment……………………6

1. Recent Supreme Court Precedent Conclusively Establishes Plaintiffs' First Amendment Claim……………………………………………………………6

2. Plaintiffs Have Alleged Sufficient Burdens On Their Religion Beliefs As a Result of SB 277……………………………………………………………..11

3. SB 277 Is Neither Neutral Nor Generally Applicable…………….……….13

4. SB 277 Fails Strict Scrutiny……………………………….….….………17

D. Plaintiffs Allege Sufficient Standing……………………………...…………19

E. To Clarify Any Issues, If Necessary, Leave to Amend Should Be Granted…..……..20

IV. Conclusion…………………………………………...……………………………..20

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 *Bacon v. Woodward*, No. 22-35611 (9th Cir. June 18, 2024) 19

4 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)..2

5 *Boone v. Boozman*, 217 F.Supp.2d 938 (E.D. Ark. 2002)..10

6 *Bosarge v. Edney*, No. 1:22CV233-HSO-BWR (S.D. Miss. August 29, 2023).......................15, 18

7 *Brown v. Smith*, 24 Cal.App.5th 1135 (2018)...11

8 *Calvary Chapel Dayton Valley v. Sisolak,* 982 F.3d 1288 (9th Cir. 2021).......................................7

9 *Cantwell v. Connecticut*, 310 U.S. 296 (1940) 6, 8

10 *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) 14, 17, 18

11 *City of Lakewood v. Plain Dealer Publ'n Co.*, 486 U.S. 750 (1988) 4

12 *Coal. to Defend Affirmative Action v. Brown* (9th Cir. 2012) 674 F.3d 1128 6

13 *Dahl v. Bd. of Trustees of Western Michigan Univ.*, 15 F.4th 728 (6th Cir. 2021) 15

14 *Doe v. United States*, 419 F.3d 1058 (9th Cir. 2005) 2

15 *Does v. Board of Regents of the University of Colorado*, Nos. 21-1414 & 22-1027 (10th Cir. May

16 7, 2024) 3, 12

17 *East Brooks Books, Inc. v. Shelby Cnty. Tenn.*, 588 F.3d 360 (6th Cir. 2009) 4

18 *Ex parte Young*, 209 U.S. 123 (1908)...5

19 *Faith Baptist Church v. Waterford Twp.*, 522 Fed. Appx. 322 (6th Cir. 2013) 4

20 *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664 (9th

21 Cir. 2023) 13

22 *Fleming v. Pickard*, 581 F.3d 922 (9th Cir. 2009)...2

23 *Fox v. Makin*, No. 2:22-CV-00251-GZS, 2023 WL 5279518 (D. Me. Aug. 16, 2023)................16

24 *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999) 14

25 *French v. Davidson*, 143 Cal. 658 (1904)...10

26 *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021)...13

27 *Hanzel v. Arter*, 625 F.Supp. 1259 (S.D. Ohio 1985)...10

28 *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020)...7

1 *Harvest Rock Church, Inc. v. Newsom*, 985 F.3d. 711 (9th Cir. 2020) 8
2 *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680 (1989) 4, 13
3 *High Plains Harvest Church v. Polis,* 141 S. Ct. 527 (2021) 7
4 *Holt v. Hobbs*, 574 U.S. 352, 368 (2015) 19
5 *In Health Freedom Defense Fund Inc. v. Carvalho*, No. 22-55908 (9th Cir. June 7, 2024) 9
6 *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) 8, 9, 10, 11
7 *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022) 3, 13
8 *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* (1993) 507 U.S. 163
9 .... 1, 5, 11, 20
10 *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) 20
11 *Luck v. Landmark Medical of Michigan*, No. 23-2030 (6th Cir. June 12, 2024) 4, 13
12 *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) 11
13 *Maricopa County Health Dept. v. Harmon*, 750 P.2d 1364 (Ariz. 1987) 10
14 *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1099 (9th Cir. 2004) 20
15 *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) 15
16 *Mitchell County v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012) 15
17 *Monclova Christian Academy v. 10 Toledo-Lucas Health Dept.*, 984 F.3d 477 (6th Cir. 2020) ... 15
18 *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1 (1st Cir. 2011) 2
19 *Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) 7
20 *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015) 10
21 *Prince v. Massachusetts*, 321 U.S. 158 (1944) 9
22 *Robinson v. Murphy*, 141 S. Ct. 972 (2020) 7
23 *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) 6
24 *So. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128 (9th Cir. 2021) 8
25 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) 3
26 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) 2
27 *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) 7, 14, 17, 19
28 *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981) 4, 11, 17

Thoms v. Maricopa Cnty. Cmty. Coll. Dist., No. CV-21-01781-PHX-SPL, 2021 WL 5162538 (D. Ariz. Nov. 5, 2021) 16

Transamerica Leasing, Inc v. Compania Anonima Venezolana de Navegacion, 93 F.3d 675 (9th Cir. 1996) 10

U.S. Navy Seals 1-26 v. Biden, 27 F.4th 336 (5th Cir. 2022) 15

UnifySCC v. Cody, No. 22-CV-01019-BLF, 2022 WL 2357068 (N.D. Cal. June 30, 2022) 15

United States v. Lee, 455 U.S. 252 (1982) 17

United States v. Ritchie, 342 F.3d 903 (9th Cir. 2003) 20

Walker v. Superior Court, 47 Cal.3d 112 (1988) 9

We The Patriots USA, Inc. v. Connecticut Off. of Early Childhood Dev., 76 F.4th 130 (2d Cir. 2023) 16

Whitlow v. California, F.Supp.3d 1070 (S.D. Cal. 2016) 10

Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) 3

Wong v. U.S., 373 F.3d 952 (9th Cir. 2004) 2

Workman v. Mingo County Sch., 667 F.Supp.2d 679 (S.D. W.Va. 2009) 10

Zimmerman v. City of Oakland, 255 F.3d 734 (9th Cir. 2001) 2

Zucht v. King, 260 U.S. 174 (1922) 9

CONSTITUTIONAL PROVISIONS

First Amendment 6

Eleventh Amendment 5, 6

OTHER AUTHORITIES

Cal. Rules Prof. Conduct, Rule 5-200(B) 10

Senate Bill 277 .... *passim*

I. INTRODUCTION

Plaintiffs Amy Doescher and Steve Doescher (“Doeschers”), Danielle and Kamron Jones (“Joneses”), and Dr. Sean and Renee Patterson (“Pattersons”) (collectively “Plaintiffs”) hereby oppose Defendants Tomás Aragón (“Aragón”) and Rob Bonta’s (“Bonta”) (collectively “Defendants”) Motion to Dismiss (“Motion”). The Motion should be denied for the following reasons:

First, Plaintiffs adequately allege standing. They maintain devout, sincere religious beliefs that prohibit them from vaccinating themselves or their children such that their children cannot attend school in California free from SB 277’s religious discrimination.

Second, there is no Eleventh Amendment bar to the Court granting relief because the First Amended Complaint (“Complaint”) seeks only prospective injunctive relief to remedy ongoing constitutional and statutory violations.

Third, Plaintiffs state a claim for relief under the First Amendment. Recent and historic Supreme Court precedent conclusively establishes Plaintiffs’ Free Exercise Clause claim, as they allege sufficient burdens on their religious beliefs resulting from SB 277. The challenged law is neither neutral nor generally applicable and ultimately fails to meet the requirements of strict scrutiny.

Fourth, Defendants attempt to support their Motion with evidence outside the pleadings, but the proffered materials do not fall within the strict guidelines for judicial notice, and so should be rejected by the Court.

Finally, if the Court determines that Plaintiffs’ claims require any clarification, then leave to amend should be granted, consistent with the liberal federal policy regarding the same.

The Court should deny the Motion.

II. LEGAL STANDARD

When deciding 12(b) motions, the Court “must accept as true all the factual allegations in the complaint.” *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993). At the 12(b) stage, federal courts may not dismiss a complaint unless “it is clear that no relief could be granted under any set of facts that could be proved consistent

with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (citation and internal quotation marks omitted). This standard is especially liberal when applied to the constitutional claims alleged in this action, which are governed by Rule 8; all that is required is a "short and plain statement" of the plaintiff's claims. *Wong v. U.S.*, 373 F.3d 952, 957 (9th Cir. 2004) (citing Fed.R.Civ.P. 8(a)(2)). The Court "must consider whether, construing the allegations of the complaint in the light most favorable to the plaintiff, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

The district court must "assume the truthfulness of the material facts alleged in the complaint" and must construe "all inferences reasonably drawn from these facts . . . in favor of the responding party." *See Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009); *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). Rule 12(b)(6) does not countenance "dismissals based on a judge's disbelief of a complaint's factual allegations." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Thus, no matter how improbable the facts alleged are, they must be accepted as true for purposes of the motion. *See id.* at 556; *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 12-13 (1st Cir. 2011) (court may not "attempt to forecast a plaintiff's likelihood of success on the merits").

Applying these 12(b) standards, *i.e.*, accepting the pleaded facts as true, and construing all reasonable inferences for Plaintiffs, the Court should deny the Motion, as the facts and inferences show that Plaintiffs can prove facts in support of their claim thus entitling them to relief.

III. ARGUMENT

The Motion should be denied. Plaintiffs possess standing based on their sincere religious beliefs against vaccination, which SB 277 violates by preventing their children from attending school. The Eleventh Amendment does not prevent the Court from granting relief against Bonta as Plaintiffs seek prospective injunctive relief for ongoing constitutional violations. SB 277 burdens Plaintiffs' religious beliefs, violating the First Amendment, and failing strict scrutiny. Defendants improperly rely on evidence outside of the pleadings. Finally, if needed, Plaintiffs

request the opportunity to amend their claims.

A. Plaintiffs Allege Sufficient Standing.

The Complaint establishes Plaintiffs' standing to sue for relief under the Free Exercise Clause.

To have standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). An injury in fact is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 339 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Free Exercise Clause authorities provide further insight about standing in such cases. The Free Exercise Clause "protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (*or abstention from*) physical acts." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 516 (2022) (emphasis added). In *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), members of the Old Order Amish and Conservative Amish Mennonite Church were convicted under Wisconsin law for refusing to send their children to public school past the eighth grade. The Supreme Court ruled that the parents had standing to assert Free Exercise Clause claims because the compulsory school attendance law directly conflicted with their religious beliefs and practices. The Court held that the law substantially burdened the parents' free exercise of religion, establishing a precedent for religious exemptions from generally applicable laws.

Recent Court of Appeals decisions from just a few months ago emphasize that a court cannot substitute its judgment for the validity of a plaintiff's religious beliefs. *See Does v. Board of Regents of the University of Colorado*, Nos. 21-1414 & 22-1027 (10th Cir. May 7, 2024) (inquiries into the sincerity of a plaintiff's religious beliefs were precisely the sort of "trolling through a person's religious beliefs" that courts disallow); *Ringhofer v Mayo Clinic*, No. 23-2995 (8th Cir. May 24, 2024 (in context of employer judging an employee's religious objections,

1 "[r]eligious beliefs do not need to be 'acceptable, logical, consistent, or comprehensible to
2 others'" quoting *Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 714 (1981)); *Luck*
3 *v. Landmark Medical of Michigan*, No. 23-2030 (6th Cir. June 12, 2024) (district courts lack any
4 basis to demand that a plaintiff explain its religious beliefs because "[i]t is not within the judicial
5 ken to question the centrality of particular beliefs or practices to a faith, or the validity of
6 particular litigants' interpretations of those creeds" quoting *Hernandez v. Comm'r of Internal*
7 *Revenue*, 490 U.S. 680, 699 (1989)).[1]

8 Further, where, as here, a government policy with exemptions vests "unbridled discretion
9 in a government official over whether to permit or deny" First Amendment protected activity, one
10 who is subject to the law or policy may challenge it facially without the necessity of first applying
11 for, and being denied that same exemption. *City of Lakewood v. Plain Dealer Publ'n Co.*, 486
12 U.S. 750, 755-56 (1988); *see also East Brooks Books, Inc. v. Shelby Cnty. Tenn.*, 588 F.3d 360,
13 369 (6th Cir. 2009) (finding that plaintiff had standing based on the suppression of his future
14 protected speech even where his license was not actually revoked); *Faith Baptist Church v.*
15 *Waterford Twp.*, 522 Fed. Appx. 322 (6th Cir. 2013) (mere threat of potential prosecution was
16 sufficient to establish that the claim was ripe and standing existed).

17 The facts pleaded in the Complaint are sufficient on their face to satisfy the requirement of
18 an injury in fact. Plaintiffs plead that SB 277 creates a substantial burden on their ability to
19 engage in their religious practices. Specifically, Plaintiffs aver that their "unwavering sincere
20 religious beliefs… prohibit them from vaccinating themselves or their children, and this
21 commitment has come at a considerable cost. California's [vaccine] mandate…places Plaintiffs'
22 children at a disadvantage, depriving them of educational access enjoyed by their secular
23 counterparts." Complaint, ¶ 4. "SB 277 encroaches upon and deprives Plaintiffs' First
24 Amendment rights under the United States Constitution." Complaint, ¶ 5. All Plaintiffs wish for
25 their children to attend school in California free from SB 277's religious discrimination.

26 [1] Similarly, a recent Title VII opinion from the Seventh Circuit emphasizes that: "The fact that an
27 accommodation request also invokes or, as here, even turns upon secular considerations, does not negate its religious nature" and that "a religious objection to a workplace requirement may
28 incorporate both religious and secular reasons." *Dottenwhy v. Aspirus, Inc.*, No. 23-1661 (7th Cir. July 29, 2024)

Complaint, ¶¶ 21, 34, 41. Plaintiffs further plead that their sincerely held religious beliefs prohibit them from vaccinating their minor children. Complaint, ¶ 90. SB 277 unconstitutionally burdens Plaintiffs because it forces them to forego their religious beliefs in order for their children to receive a public or private education. Complaint, ¶ 90. Under SB 277, Plaintiffs would be compelled to do something prohibited by their religion – a concrete and particularized injury to their legally protected interests. Plaintiffs' substantial burden arose when SB 277 went into effect, and continues to this day.

Furthermore, the allegations contained in the Complaint are sufficient on their face to establish traceability and redressability. By seeking injunctive and declaratory relief against Defendants – the original enforcement authorities of SB 277 – Plaintiffs' injuries are traceable to Defendants and a favorable outcome in this case would redress Plaintiffs' harm.

Defendants' Motion on the basis of lack of standing should be denied.

B. The 11th Amendment Does Not Bar This Suit Because the Complaint Seeks Prospective Injunctive Relief Against an Official Directly Responsible for Unconstitutional and Unlawful Activity.

The Eleventh Amendment permits suits for prospective declaratory or injunctive relief against state officials. *Ex parte Young*, 209 U.S. 123 (1908). On a 12(b) motion, the Court "must accept as true all the factual allegations in the complaint." *Leatherman*, *supra*, 507 U.S. at 164.

Here, Bonta first remonstrates that the Complaint should be dismissed based on a truism – that a state official must have a "fairly direct" "connection" to unconstitutional conduct. (Motion at p. 6). Bonta argues that Plaintiffs failed to plead that Bonta has a direct connection to the unconstitutional conduct. But Plaintiffs did plead precisely that at paragraph 44 of the Complaint:

> Defendant Rob Bonta is made party to this Action in his official capacity as the Attorney General of California. Under California law, Attorney General Bonta is the state's chief legal officer and is responsible for enforcing, and does enforce, the mandatory immunization requirements of SB 277 for school-aged children. Attorney General Bonta is charged with implementing and enforcing, and does implement and enforce, SB 277 through, among other things, threatening to bring criminal charges against anyone who violates SB 277.

Bonta likely disagrees with Plaintiff's allegations, but these are factual disputes that cannot be resolved by a 12(b) motion.

Furthermore, Bonta strangely cites one case that dooms his arguments on this topic anyway. In *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012), the plaintiffs, like here, sued the executive officer of a state agency. With almost exactly analogous facts, the Ninth Circuit determined the official:

> has a "fairly direct" connection, to say the least, to the enforcement of [the policies in question]. As the head of the [state agency], he does more than just 'live with' [the policy in question]. He enforces it. He is duty-bound to ensure that his employees follow it and refrain from [violating the law]. [Defendant]'s argument that he is merely 'implementing,' not 'enforcing' [the challenged policy] minimizes his role as President.

Id. at 1134. Additionally, this Ninth Circuit precedent supersedes Bonta's *district* court level citations (Motion at p. 7, lines 9-11), neither of which is even from the Eastern District.

So, both as a matter of pleading and as a matter of law, Bonta, an agency head charged with enforcing the law and ensuring that others do too, has a direct connection with (and/or is personally responsible for) the challenged unconstitutional acts. The Complaint sufficiently pleads Bonta's connection with the alleged unconstitutional conduct for purposes of the Eleventh Amendment.

C. Plaintiffs State A Claim For Relief Under The First Amendment.

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion.]" U.S. CONST. amend. I. The Free Exercise Clause applies equally to the federal government and to the states. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

1. Recent Supreme Court Precedent Conclusively Establishes Plaintiffs' First Amendment Claim.

Defendants cite to a handful of cases from 2016 and 2018 that address and uphold SB 277. (Motion, pp. 9-10). But after those decisions came a watershed Supreme Court opinion in 2020, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) ("*Brooklyn*"), which changed the rules for cases like these, and which makes clear that Plaintiffs state a valid claim for relief under the First Amendment.

In *Brooklyn*, the Supreme Court analyzed whether the First Amendment's guarantee of free exercise of religion was violated by New York Governor Andrew Cuomo's COVID-19

pandemic executive order imposing capacity limits on attendance at religious services in areas with high infection rates. *Id*. at 64. The Roman Catholic Diocese of Brooklyn and two synagogues challenged the order, arguing that the restrictions violated the Free Exercise Clause and discriminated against houses of worship by imposing more stringent restrictions on religious services than those imposed on other secular gatherings, such as for businesses deemed "essential." *Id*. at 66-67.

The Supreme Court ultimately granted an injunction blocking the enforcement of the restrictions against the Diocese and the synagogues. The Court held Cuomo's order was *not* neutral and generally applicable because it treated churches harsher than secular entities like acupuncture facilities, bike shops, and liquor stores. *Id*. at 66-67. The opinion emphasized that the order's restrictions treated religious institutions less favorably than comparable secular activities, thereby imposing an undue burden on the free exercise of religion. *Id*. at 66-67.

The concurring opinion explained that the majority had rejected Cuomo's argument that the executive order did not discriminate against religion because some secular businesses like movie theaters were treated equally or more harshly:

> "[U]nder this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions …. Rather, once a State creates a favored class of business, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class."

Id. at 73 (emphasis in original).

The Supreme Court has consistently applied *Brooklyn* since its publication, reversing all lower court orders denying injunctive relief to religious persons and entities during the COVID-19 pandemic. *See, e.g., Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020); *Robinson v. Murphy*, 141 S. Ct. 972 (2020); *High Plains Harvest Church v. Polis,* 141 S. Ct. 527 (2021); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

The *Brooklyn* decision fundamentally altered Free Exercise Clause jurisprudence across America. The Ninth Circuit even described *Brooklyn* a "seismic shift in Free Exercise law." *Calvary Chapel Dayton Valley v. Sisolak,* 982 F.3d 1288, 1233 (9th Cir. 2021). It has since

1 applied *Brooklyn* and its new Free Exercise Clause framework. On January 22, 2021, the Ninth
2 Circuit granted an injunction against California's COVID-19 restrictions on indoor religious
3 gatherings. *So. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1151-52 (9th Cir.
4 2021). The Ninth Circuit also granted a similar injunction in *Harvest Rock Church, Inc. v.*
5 *Newsom*, 985 F.3d. 711 (9th Cir. 2020).

6 Setting aside for a moment the profound weight of *Brooklyn*, and its support of Plaintiffs'
7 claims, the other authorities cited by Defendants do not support dismissal. Plaintiffs address each
8 decision in the order they appear in the Motion, but they all pre-date *Brooklyn*:

9 - *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905): Defendants
10 cite *Jacobson* for the proposition that mandatory vaccination does not violate the First
11 Amendment. (Motion, p. 8, line 25 to p. 9, line 3). But *Jacobson* was not a First Amendment
12 case. *Jacobson* did not address the free exercise of religion because, at the time it was decided,
13 the Free Exercise Clause of the First Amendment had not yet been held to bind the states. *See*
14 *Cantwell v. Connecticut*, 310 U.S. 296, 303, (1940).

15 Notably, the Supreme Court refused to apply *Jacobson* in *Brooklyn*. *See Brooklyn*, *supra*,
16 141 S. Ct. at 66-67. Justice Gorsuch went so far as to address and dispatch of *Jacobson's*
17 applicability in the First Amendment context: "Even if judges may impose emergency
18 restrictions on rights that some have found hiding in the Constitution's penumbras, it does not
19 follow that the same fate should befall the textually explicit right to religious exercise." *Id*. at 70-
20 71.

21 Moreover, SB 277 is far more extreme than the vaccine law challenged in *Jacobson*. In
22 *Jacobson*, individuals were required to receive one vaccination during an active and deadly
23 outbreak, pay a fine, or identify a basis for exemption. *Jacobson*, *supra*, 197 U.S. at 14. That law
24 was attacked yet sustained on Fourteenth Amendment substantive due process grounds,
25 specifically given the minimal fine and opt-outs available to objectors. *Id*. at 36, 38–39.

26 As to SB 277, by contrast, the State has mandated 16 vaccination doses for school
27 attendance, thereby banning religious objectors from entering California public and private
28 schools indefinitely, while at the same time permitting secular objectors to remain in school.

1 "Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting
2 intrusions into settled constitutional rights." *Brooklyn*, *supra*, 141 S. Ct. at 70–71. The *Jacobson*
3 decision, by its own substance and by way of *Brooklyn's* critique, does not support dismissal.
4 A Ninth Circuit opinion from June further limits *Jacobson*. *In Health Freedom Defense*
5 *Fund Inc. v. Carvalho*, No. 22-55908 (9th Cir. June 7, 2024), the Court vacated a district court's
6 order dismissing plaintiffs' action alleging that the COVID-19 vaccination policy of the Los
7 Angeles Unified School District ("LAUSD")—which required employees to get the COVID-19
8 vaccination or lose their jobs—interfered with their fundamental right to refuse medical
9 treatment. The Ninth Circuit concluded that the district court had stretched *Jacobson* beyond its
10 public-health rationale when it found that LAUSD's policy passed the rational-basis test set forth
11 in 1905. The Ninth Circuit noted too that *Jacobson* was decided before modern due process
12 jurisprudence and thus does not apply broadly to every vaccine claim.
13 • *Zucht v. King*, 260 U.S. 174 (1922) and *Prince v. Massachusetts*, 321 U.S. 158
14 (1944): Defendants cite these cases as examples of the Supreme Court following the *Jacobson*
15 decision to uphold compulsory vaccination. (Motion, p. 9, lines 4-11). Again, these were not
16 First Amendment challenges, and *Prince* was actually a child labor law matter. Further, these
17 cases arose when minimal vaccines were required during deadly outbreaks – far different from
18 the panel of vaccines required under SB 277. To the extent that Defendants will argue these cases
19 stand for more than their narrowed holdings, Defendants are wrong. These cases too have been
20 narrowed by subsequent precedent, and must of course be harmonized with it.
21 • *Walker v. Superior Court*, 47 Cal.3d 112 (1988): Defendants rely on this decision
22 to claim that parents have "no right to free exercise of religion at the price of a child's life…"
23 (Motion, p. 9, lines 12-15). *Walker* involved a child who died from untreated meningitis as a
24 result of her mother's reliance on spiritual means in treating the child's illness. *Walker*, *supra*, 47
25 Cal.3d at 119. The mother sought a dismissal of her *criminal* prosecution for voluntary
26 manslaughter and felony child abuse, arguing that because a child support statute provided an
27 exemption from prosecution for prayer in lieu of treatment, she was also exempt from prosecution
28 for felony child abuse. *Id*. at 124. The Supreme Court rejected the defendant's contention,

concluding that the two statutory schemes could not be construed together because the fiscal objectives of the child support statute were manifestly different from the specific purpose of the felony child abuse statute, i.e., to protect children from harm. *Id*.

Defendants have not alleged, and cannot prove (at this phase or ever) that the illnesses targeted by SB 277 risk children's lives in the same way that a child who already has meningitis and needs treatment. Moreover, the *Walker* decision should not apply to this matter given *Walker* involved a creative but unsuccessful criminal defense. Further, *Walker* is narrowly limited to interpreting two specific penal code statutes and should not be expanded to this civil arena.[2]

Phillips v. City of New York, 775 F.3d 538 (2d Cir. 2015), *Workman*, and *Boone* are the only cases cited in the Motion that involve challenges to school-mandated vaccination under the Free Exercise Clause. *Phillips v. City of New York*, F.3d 538, 543-44 (2nd Cir. 2015); *Workman*, *supra*, 667 F.Supp.2d at 690-91; *Boone*, *supra*, 217 F.Supp.2d at 956. Notwithstanding, the meager analysis in these decisions is inapposite because they rely on *Zucht*, *Prince*, and *Jacobson* – cases that did not involve the First Amendment.

And ALL SB 277 cases cited by Defendants pre-date *Brooklyn*, which is telling. (Motion, p. 9, line 27 to p. 10, line 19.) Attorneys are under an affirmative duty to apprise the Court of all valid, modern precedent, a principle that defense counsel violates. *See, e.g., Transamerica Leasing, Inc v. Compania Anonima Venezolana de Navegacion*, 93 F.3d 675, 675-76 (9th Cir. 1996) (the duty "is an important one, especially in the district courts, where its faithful observance by attorneys assures that judges are not the victims of lawyers hiding the legal ball"); Cal. Rules Prof. Conduct, Rule 5-200(B) (counsel shall not mislead the court regarding the law). Both *Whitlow v. California*, F.Supp.3d 1070, 1085-86 (S.D. Cal. 2016) and *Brown v. Smith*, 24

[2] Other decisions cited in the Motion should not apply here because they were not decided on Free Exercise grounds. *See French v. Davidson*, 143 Cal. 658 (1904) (mandatory vaccinations for school children challenged on Fourteenth Amendment grounds); *Workman v. Mingo County Sch.*, 667 F.Supp.2d 679 (S.D. W.Va. 2009) (mandatory vaccination challenged on due process, equal protection, and Free Exercise grounds); *Boone v. Boozman*, 217 F.Supp.2d 938 (E.D. Ark. 2002) (mandatory vaccinations challenged under the Establishment Clause, Due Process Clause, and Free Exercise Clause); *Hanzel v. Arter*, 625 F.Supp. 1259 (S.D. Ohio 1985) (holding that mandatory vaccination does not fall under the protection of the Establishment Clause); *Maricopa County Health Dept. v. Harmon*, 750 P.2d 1364 (Ariz. 1987) (holding that the state's health department did not violate the right to public education in Arizona's Constitution).

Cal.App.5th 1135, 1144-45 (2018) rely primarily on *Prince*, *Workman*, *Phillips*, and *Jacobson* when analyzing SB 277 under the Free Exercise Clause. Again, those decisions did not create or interpret any First Amendment law. In light of the subsequent *Brooklyn* decision applying a new constitutional framework, all of these SB 277 opinions are without import, and this Court must apply *Brooklyn* to conclude that Plaintiffs have stated a Free Exercise Clause claim under the First Amendment.

2. Plaintiffs Have Alleged Sufficient Burdens On Their Religion Beliefs As a Result of SB 277.

Defendants contend that Plaintiffs fail to identify *any* religious belief burdened by SB 277. (Motion, p. 11). Instead of a religious belief, Defendants claim that Plaintiffs only allege "anti-vaccination *personal* beliefs" which do not fall under First Amendment protection. (Motion, p. 11, line 14 (emphasis in original)). But any belief that is "sincerely held" and "rooted in religious belief" is entitled to protection under the Free Exercise Clause. *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994). "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). It bears repeating the standard that the Court "must" follow when deciding the Motion: all factual allegations in the Complaint are to be accepted as true. *Leatherman*, *supra*, 507 U.S. at 164. With that lens engaged, a review of the Complaint's pertinent religious belief allegations confirms that Plaintiffs satisfy their burden of showing how SB 277 offends their religious beliefs.

The Doeschers attend District Church in El Dorado Hills, California where they tithe monthly. Both of the Doeschers have gone on medical mission trips. Steve Doescher leads a junior high ministry youth group at Church of the Foothills in Cameron Park, California. The Doeschers prayed extensively and consulted the Bible when deciding whether or not to vaccinate their children, and they arrived at the firm religious conviction that vaccinations violate their creed. Complaint, ¶¶ 16-21.

Fifteen years ago, the Joneses started their own church due to God's calling. After starting their church, the pastor of The Rock Worship Center suggested that the two churches

merge, which they did. Soon after merging, the pastor of The Rock Worship Center retired, and the Joneses took over as lead pastors. The Joneses have been lead pastors for ten years and they tithe every month. The Joneses seek the Holy Spirit regarding all aspects of health for their family, and trust in His leading when making decisions regarding what will be placed in their children's bodies. The Joneses prayed extensively and consulted the Bible when deciding whether or not to vaccinate their children, and they arrived at the firm religious conviction that vaccinations violate their creed. Complaint, ¶¶ 28-34.

The Pattersons' religious beliefs about vaccination date to 1999, after hearing a man preach about vaccines being antithetical to the Bible and the Book of Revelation. That sermon referenced blood pressed from grapes, likened the human cardiovascular system to rivers, and pronounced that vaccines were evil. In 2003 and 2004 in Sacramento, California, the Pattersons and their fellow church members protested legislation seeking to discriminate against religious rights in the vaccine context. This protest arose from God telling Dr. Patterson that this is *his* fight. The Pattersons prayed extensively and consulted the Bible when deciding whether or not to vaccinate their children, and they arrived at the firm religious conviction that they must not vaccinate. Complaint, ¶¶ 37-39.

Defendants claim that these allegations do not establish Plaintiffs' "actual beliefs…or why those beliefs are religious rather than personal…" Motion, p. 11, ln. 24. To the contrary, the foregoing allegations more than adequately set forth Plaintiffs' sincerely held religious beliefs, which prohibit Plaintiffs from vaccinating their minor children under SB 277. The recent Court of Appeals decisions from this year confirm that the Court cannot substitute its own judgment about a plaintiff's religious beliefs by proving the "validity" of such beliefs. *See Does v. Board of Regents of the University of Colorado*, Nos. 21-1414 & 22-1027 (10th Cir. May 7, 2024) (inquiries into the sincerity of a plaintiff's religious beliefs were precisely the sort of "trolling through a person's religious beliefs" that courts disallow); *Ringhofer v Mayo Clinic*, No. 23-2995 (8th Cir. May 24, 2024 (in context of employer judging an employee's religious objections, "[r]eligious beliefs do not need to be 'acceptable, logical, consistent, or comprehensible to others'" quoting *Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 714 (1981)); *Luck*

1 *v. Landmark Medical of Michigan*, No. 23-2030 (6th Cir. June 12, 2024) (district courts lack any
2 basis to demand that a plaintiff explain its religious beliefs because "[i]t is not within the judicial
3 ken to question the centrality of particular beliefs or practices to a faith, or the validity of
4 particular litigants' interpretations of those creeds" quoting *Hernandez v. Comm'r of Internal*
5 *Revenue*, 490 U.S. 680, 699 (1989)). Plaintiffs' allegations are not mere "labels," "conclusions,"
6 or a "formulaic recitation" of elements; instead, the detailed allegations state the religious sources
7 of Plaintiffs' particular religious beliefs about what goes into their children's bodies, and why SB
8 277 is unconstitutional. As this pleading stage, such detail meets Plaintiffs' burden.

9 **3. SB 277 Is Neither Neutral Nor Generally Applicable.**

10 Defendants erroneously claim that rational-basis review is the appropriate level of scrutiny
11 because SB 277 is a neutral law of general applicability. Motion, p. 12. SB 277 is neither neutral
12 nor generally applicable for the following reasons.

13 *First*, SB 277 is not generally applicable because it invites "the government to consider
14 the particular reasons for a persons' conduct by providing a mechanism for individualized
15 exemptions." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). SB 277 is not
16 generally applicable under *Fulton* and related authorities because SB 277 permits discretionary
17 medical exemptions but prohibits the assessment of religious exemptions. Complaint, ¶¶ 103-
18 106. The "mere existence of a discretionary mechanism" for exemptions can trigger strict
19 scrutiny, "regardless of the actual exercise." *Fellowship of Christian Athletes v. San Jose Unified*
20 *Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 687–88 (9th Cir. 2023) (en banc) (quoting *Lukumi*, *supra*,
21 508 U.S. at 546). The Free Exercise Clause "protects not only the right to harbor religious beliefs
22 inwardly and secretly. It does perhaps its most important work by protecting the ability of those
23 who hold religious beliefs of all kinds to live out their faiths in daily life through the performance
24 of (*or abstention from*) physical acts." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 516
25 (2022); 2022 WL 2295034; 2022 U.S. LEXIS 3218 (emphasis added). In other words, California
26 has determined that religious objections are not worthy of "solicitude," but that secular medical
27 exemptions are.

28 *Second*, a law is not neutral when it is intolerant of religious beliefs or when it restricts

practices because of their religious nature. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) ("*Lukumi*"). "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* at 534. "Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements by members of the decision-making body." *Id.* at 540 (internal citations omitted). California passed SB 277 even though the Senate Judiciary Committee was openly aware that SB 277 raised Free Exercise concerns. Complaint, ¶ 69. SB 277 also undermines its stated purpose of reducing transmission because it broadened protections for individuals requesting medical exemptions while preventing religious exemptions – even though personal belief exemption ("PBE") were declining prior to SB 277's enforcement. Complaint, ¶ 51. Considering the events and circumstantial evidence surrounding SB 277's creation as alleged in the Complaint, Plaintiffs have demonstrated SB 277 is not neutral under *Lukumi.*

Third, SB 277 fails both the neutrality and general applicability tests under *Brooklyn* and *Tandon*. A regulation is not neutral and generally applicable where it "treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon*, *supra*, 593 U.S. at 62 (emphasis in original) (citing *Brooklyn*, *supra*, 141 S. Ct. at 67-68). And "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon,* 593 U.S. at 62 (citing *Brooklyn*, *supra*, 141 S. Ct. at 67). Moreover, a law lacks general applicability when "it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, *supra*, 141 S. Ct. at 1877.

The Third, Sixth, and Eleventh Circuits have held that laws that provided secular, but not religious, exemptions for conduct that undermined the law's objectives in similar ways were not generally applicable. *See Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-67 (3rd Cir. 1999) (holding that a police department's no-beard policy was not generally applicable because it provided medical exemptions and prohibited religious exemptions); *Monclova*

1 *Christian Academy v. 10 Toledo-Lucas Health Dept.*, 984 F.3d 477, 482 (6th Cir. 2020) (holding
2 that a county public health order closing all schools, including religious schools, was not
3 generally applicable because it permitted various secular businesses to remain open); *Midrash*
4 *Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232-35 (11th Cir. 2004) (finding a zoning
5 ordinance lacking in general applicability for permitting nightclubs, but not synagogues, in a
6 business district). The Iowa Supreme Court employed the same approach. *See Mitchell County*
7 *v. Zimmerman*, 810 N.W.2d 1, 15-18 (Iowa 2012) (holding a law prohibiting the use of tire studs
8 on highways lacked general applicability because it permitted school buses to use them but
9 prohibited a Mennonite farmer from using them for religious reasons).
10 In *U.S. Navy Seals 1-26 v. Biden*, the Fifth Circuit Court of Appeals concluded that the
11 processing and granting of medical exceptions and refusal to accept religious exceptions to the
12 COVID-19 vaccine rendered the policy invalid under both the Religious Freedom Restoration
13 Act of 1993 and the First Amendment. *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 350-53 (5th
14 Cir. 2022). In June 2022, the Northern District of California held that prioritizing employees with
15 medical exemptions over religious exemptions to the COVID-19 vaccine for consideration for
16 vacant positions was not neutral. *UnifySCC v. Cody*, No. 22-CV-01019-BLF, 2022 WL 2357068,
17 at *10-11 (N.D. Cal. June 30, 2022).
18 Recently, a Mississippi district court held that strict scrutiny was appropriate when
19 reviewing Mississippi's mandatory school-vaccination law. *Bosarge v. Edney*, No. 1:22CV233-
20 HSO-BWR, ECF 87 (S.D. Miss. August 29, 2023). The Court reasoned that because "Mississippi
21 officials could consider secular exemptions, particularly medical exemptions," but could not
22 consider religious exemptions, the law could not be neutral or generally applicable. *Bosarge v.*
23 *Edney*, No. 1:22CV233-HSO-BWR, ECF 77 at p. 22 (S.D. Miss. April 18, 2023) (citing *Fulton*,
24 *supra*, 141 S. Ct. at 1877); *see also Dahl v. Bd. of Trustees of Western Michigan Univ.*, 15 F.4th
25 728, 733-735 (6th Cir. 2021) (holding that a university's requirement that student-athletes be
26 vaccinated against COVID-19 was not neutral or generally applicable because the requirement
27 provided a "mechanism for individualized exemptions" with the university retaining discretion to
28 extend exemptions in whole or in part); *Thoms v. Maricopa Cnty. Cmty. Coll. Dist.*, No. CV-21-

01781-PHX-SPL, 2021 WL 5162538, at *9-11 (D. Ariz. Nov. 5, 2021) (holding that a university's policy was not generally applicable when it provided exceptions to its vaccine policies to other students for non-religious reasons but not to plaintiffs for religious reasons).

Here, SB 277 precludes exemptions for religious adherents but exempts immigrant and homeless children, students with medical exemptions, and students enrolled in an independent student program ("IEP"). Complaint, ¶¶ 53-55. There is no way to reconcile these exemptions with the Constitution, case precedent, or common sense. SB 277 is incongruent with California's interest in "protecting the health and safety of students and the community." Motion, p. 1, lines 15 to 17. At this stage, "California is unable to establish that students with religious exemptions to vaccinations present a higher risk compared to those with secular exemptions." Complaint, ¶ 72.

Defendants' reliance on *We The Patriots USA, Inc. v. Connecticut Off. of Early Childhood Dev.*, 76 F.4th 130 (2d Cir. 2023) is misplaced. Motion, *passim*. There, Connecticut's amended statute allowed unvaccinated students to attend school *only* with a medical exemption. *Id.* at 155. In the 2019-2020 school year, "more than ten times as many students had religious exemptions than medical exemptions." *Id.* By contrast, California permits exemptions for several secular categories. Complaint, ¶¶ 53, 57. Indeed, in *Fox v. Makin*, the court emphasized that Maine's statute was distinguishable from Connecticut's because it "continues to permit multiple non-religious exemptions, including a 90-day grace period for non-religious students, a medical exemption, and the IEP sunset provision…while restricting religious exemptions that may pose comparable risks." *Fox v. Makin*, No. 2:22-CV-00251-GZS, 2023 WL 5279518, at *9 (D. Me. Aug. 16, 2023). The court also noted that Connecticut's medical exemption process was more stringent because it required a certification from a physician and supporting documents. *Id.* The *Fox* court, therefore, declined to dismiss plaintiffs' Free Exercise claim for failure to state a claim. *Id.* at *10.

At this stage, Plaintiffs allege enough facts under Rule 8 to state a claim for relief under the Free Exercise Clause. At the very least, Plaintiffs' allegations raise serious questions regarding the thoroughness of the medical exemption process and the statistical differences in

rates of medical and religious exemptions – issues ripe for post-pleading discovery – rendering dismissal inappropriate.

4. SB 277 Fails Strict Scrutiny.

Though it is unnecessary for this Court to address strict scrutiny, Plaintiffs have alleged that SB 277 is not narrowly tailored to advance a compelling government interest.

"A government policy can survive strict scrutiny only if it advances interests of the highest order and is narrowly tailored to achieve those interests." *Fulton*, *supra*, 141 S. Ct. at 1881 (internal citations and quotation marks omitted). Strict scrutiny applies "regardless of whether any exceptions have been given, because it 'invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude…" *Id.* at 1879. A law burdening religious exercise is subject to "the most rigorous of scrutiny" unless it is both neutral and generally applicable. *Fellowship*, *supra*, 82 F.4th at 690 (en banc) (quoting *Lukumi*, *supra*, 508 U.S. at 546). Strict scrutiny in the Free Exercise Clause context "is not watered down; it really means what it says." *Tandon*, *supra*, 593 U.S. at 65 (per curiam) (quotations omitted). Thus, on strict-scrutiny review, "only those interests of the highest order and those not otherwise served can over-balance legitimate claims to the free exercise of religion." *Bowen v. Roy*, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring). Put differently, if strict scrutiny applies, limits on religious practice are unconstitutional absent a "showing that [the limitation] is essential to accomplish an *overriding* governmental interest." *United States v. Lee*, 455 U.S. 252, 257 (1982) (emphasis added). Strict scrutiny also requires that a law inhibiting religious belief or practice go only as far as necessary to further the government interest. States cannot "justify an inroad on religious liberty" without first "showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981).

California's interest in ensuring that school children are vaccinated to prevent the spread of contagious disease is compelling only in the abstract: "a law cannot be regarded as protecting an interest of the highest order…when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, *supra*, 508 U.S. at 547 (internal citations and quotation marks omitted). While California has an interest in protecting public health and safety (Motion, p. 19),

1 Defendants offer "no compelling reason why it has a particular interest in denying an exception
2 [to these particular Plaintiffs] while making them available to others." *Fulton*, *supra*, 141 S. Ct.
3 at 1882.

4 California permits both pre-existing and future medical exemptions to its mandatory
5 school-vaccination law. Complaint, ¶¶ 53-56. The state even allows exemptions for students
6 who are homeless, immigrants, or who qualify for an IEP. Complaint, ¶¶ 57-60. Yet, it refuses to
7 permit religious exemptions. Defendants claim that homeless, immigrant, and IEP students are of
8 no import to this SB 277 dispute because those students are to provide proof of vaccination within
9 30 school days of enrollment. Motion, p. 19, fn. 7. This is not simply a harmless grace period.
10 California does not require school districts to disenroll students if they do not provide proof of
11 vaccination within thirty days. Complaint, ¶ 60. There are circumstances when school districts,
12 including schools in the Inland Empire of California, spend the entire school year trying to ensure
13 that such students are compliant. Complaint, ¶ 60.[3]

14 Such secular exemption from SB 277's requirements allows unvaccinated students to
15 attend school for *at least* six weeks without being vaccinated, exposing classmates and staff to
16 infection, thus demonstrating California's anti-religion standard: unvaccinated homeless,
17 immigrant, and IEP students are welcome to attend school in person with all other students, but a
18 student unvaccinated for religious reasons cannot. California has no compelling interest in
19 rejecting religious exemptions because the medical exemption (and other exemptions) leave
20 "appreciable damage to [the government's] supposedly vital interest unprohibited." *Lukumi*,
21 *supra*, 508 U.S. at 547.

22 Similarly, the *Bosarge* decision found that because Mississippi affords a discretionary
23 medical exemption process by statute, it must similarly afford a religious accommodation process
24 and that not having a religious accommodation process, where it affords a secular one, is
25 unconstitutional. *Bosarge v. Edney*, No. 1:22CV233-HSO-BWR, ECF 87 at p. 1 (S.D. Miss.
26 April 18, 2023) (citing *Fulton*, *supra*, 141 S. Ct. at 1876).

27 [3] IEP students can be federally exempt from showing proof of vaccination under the Individuals
with Disabilities Education Act which ensures that students with disabilities receive a Free
28 Appropriate Public Education.

For related reasons, Defendants falter on the narrowly tailored prong of this test. As the Supreme Court recently put it with respect to the government's "interest in reducing the spread of COVID," "[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Tandon*, *supra*, 141 S. Ct. at 1297.

Less than two months ago, in *Bacon v. Woodward*, No. 22-35611 (9th Cir. June 18, 2024), the Ninth Circuit reversed a Washington district court's dismissal of a lawsuit by firefighters who claim that their Free Exercise Clause rights were infringed by the City of Spokane refusing to accommodate their religious objections to the Covid vaccine. The majority said in part:

> The Complaint alleges that, once unvaccinated firefighters were terminated, Spokane would turn to firefighters from neighboring fire departments to fill the gaps left by the firefighters' departure even though those fire departments granted religious accommodations to their employees. In other words, Spokane implemented a vaccine policy from which it exempted certain firefighters based on a secular criterion—being a member of a neighboring department—while holding firefighters who objected to vaccination on purely religious grounds to a higher standard. The Free Exercise Clause prohibits governments from "treat[ing] comparable secular groups more favorably."

Id.

Defendants simply cannot show that an unvaccinated religious adherent undermines their asserted interests any more than an unvaccinated student with a medical exemption. The case begins and ends here. It is both constitutionally and logically deficient to burden the religiously devout while exempting others.

California also mandates vaccines that are unnecessary. For instance, Chickenpox is a mild disease and complications in children are rare. Complaint, ¶ 67. Chickenpox vaccination also increases the risk of shingles in adults, which is a more dangerous disease and comes with a higher risk of complications. *Id*. At this stage, Defendants cannot demonstrate how and why their interests demand more severe intervention than "the vast majority of States" that have employed a less restrictive approach. *Holt v. Hobbs*, 574 U.S. 352, 368 (2015).

D. Defendants Improperly Support Their Motion With Outside Evidence.

Defendants impermissibly present evidence outside the pleadings. Generally, a court cannot consider evidence outside the pleadings without converting a motion to dismiss into one

for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003). This is because a motion to dismiss tests the sufficiency of Plaintiffs' Complaint based on the face of the pleadings. *See* Fed.R.Civ.P. 12(b)(6). Here, Defendants seek to introduce outside evidence via various requests for judicial notice ("RJN") for statutes and bills, reports, news articles, a press release, and a handbook. By doing so, Defendants rather egregiously attempt to have a trial on the science at the 12(b) phase of this proceeding. This Court, at this stage, must accept Plaintiffs' factual allegations as true. *Leatherman*, *supra*, 507 U.S. at 164.

Concurrently with the filing of this Opposition, Plaintiffs have filed their Objections To Defendants' RJN. Plaintiffs request that the Court sustain those objections for the reasons stated.

E. To Clarify Any Issues, If Necessary, Leave to Amend Should Be Granted.

If the Court determines that Plaintiffs' claims must be distilled or refined in any way, then leave to amend should be granted, consistent with the liberal federal policy regarding the same. *See* Fed.R.Civ.P. 15(a)(2) and (b)(1); *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) ("a district court should grant leave to amend . . . unless it determines that the pleading could not possibly be cured by the allegation of other facts"); *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1099 (9th Cir. 2004) (same). Plaintiffs' claims should proceed, in any event. But, if needed, they should be granted the option to amend.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the Motion.

Respectfully Submitted,

DATED: August 16, 2024

THE NICOL LAW FIRM

By: /s/ *Jonathon D. Nicol*

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