IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION EIGHT

TAMARA BUCK, SHARON BROWN, SARAH LUCAS, CHARLENE HOUSEN, DAWNIELLE SELDEN, SERGE EUSTACHE, TRICIA EUSTACHE, and NIKKI JENCEN, Plaintiffs and Appellants, **v.** **KAREN SMITH, Director of the California Department of Public Health; THE STATE OF CALIFORNIA, and DOES 1-99, inclusive,** Defendants and Respondents.	Case No. B279936

Los Angeles County Superior Court, Case No. BC617766
Hon. Gregory W. Alarcon, Judge

RESPONDENTS' BRIEF

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Case Name: *TAMARA BUCK, SHARON BROWN, SARAH LUCAS, CHARLENE HOUSEN, DAWNIELLE SELDEN, SERGE EUSTACHE, TRICIA EUSTACHE, and NIKKI JENCEN v. KAREN SMITH, Director of the California Department of Public Health; THE STATE OF CALIFORNIA, and DOES 1-99, inclusive*

Court of Appeal No.: B279936

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

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The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

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Respondents Karen Smith, Director of the California Department of Public Health, and the State of California (collectively, respondents) respectfully submit this respondents' brief in opposition to appellants' opening brief.

INTRODUCTION

Appellants have challenged and seek to invalidate California's statutory child-immunization requirements prescribed in Senate Bill 277 (Stats 2015 ch. 35) (SB 277), on the grounds that mandatory childhood vaccinations violate their rights under the Free Exercise Clause, the Equal Protection Clause, the right to a free public education, and the Due Process Clause of the California Constitution, as well as the Health and Safety Code's prohibition against unlawful medical experiments.

As the superior court correctly found, each of the five causes of action in appellants' second amended complaint (SAC) fails to state a claim on which relief may be granted. Federal and state constitutional law has for decades consistently held that (1) a state's exercise of its police powers in protecting the public from communicable diseases is rationally based; (2) states have a legitimate and compelling interest in requiring children to be vaccinated before entering school; and (3) personal belief exemptions in mandatory vaccination statutes are not constitutionally protected and, as such, may be eliminated by the Legislature. In so doing, courts have consistently rejected challenges to mandatory vaccination laws predicated on the First Amendment, the Equal Protection Clause, the Due Process Clause, education rights, parental rights, and privacy rights, such as appellants assert in their SAC.

In enacting Senate Bill 277, the Legislature expressed its intent to provide a means for the eventual achievement of total immunization of children against a number of dangerous, but highly preventable, childhood

diseases. Appellants' claims are predicated on the misguided supposition that their subjective personal beliefs against childhood vaccinations outweigh the health and safety of the millions of children enrolled in California schools and day care centers, the health and safety of the general public, and the considered judgment of the California Legislature in addressing a significant public health issue that embodies a core function of government: to protect the health and safety of its citizens against preventable harm.

This is one of five cases filed by various plaintiffs in California courts challenging SB 277. All of the other cases – filed in the Central and the Southern Districts of California, and the Placer County Superior Court – have affirmed the constitutionality of SB 277.

By seeking to enjoin the enforcement of SB 277, appellants are asking this Court to disregard decades of federal and state jurisprudence. The public health and welfare must not be jeopardized by the subjective beliefs of a small minority of individuals who, against all recognized scientific and legal authority, disregard the long-recognized safety and effectiveness of vaccines, and who fail to recognize the public health threat that their unsupported opinions have on the lives of others around them.

Accordingly, the trial court's judgment sustaining respondents' demurrer should be affirmed on appeal. Additionally, because the SAC is appellants' third attempt to assert claims that are demonstrably contrary to settled law, the lower court's order dismissing appellants' case without leave to amend was within its sound discretion and should be affirmed.

PROCEDURAL HISTORY AND ORDER APPEALED FROM

Appellants filed their initial complaint in the superior court on April 22, 2016, against the State of California as the only named defendant. (Clerk's Transcript (CT) at pp. 5, 31.) The case was timely removed to

federal court on July 12, 2016, after appellants filed their first amended complaint (FAC) in the superior court asserting federal claims against newly named defendant Karen Smith, in her capacity as Director of the California Department of Public Health. (CT at p. 55; and Suppl. CT at p. 1.) The case was remanded to the superior court after appellants filed their SAC in federal court, which appellants admit is textually identical to their FAC, except that appellants re-labeled their federal claims as state constitutional claims expressly to avoid federal jurisdiction. (CT at p. 386.)

The SAC asserts five causes of action: (1) a violation of the Free Exercise Clause of article I, section 4 of the California Constitution; (2) a purported denial of appellants' right to an education under article IX, section 5 of the California Constitution; (3) a violation of the Equal Protection Clause of article I, section 7 of the California Constitution, on the grounds that California schools allegedly have a legal duty to enroll students regardless of whether they are vaccinated; (4) a violation of Health and Safety Code section 24175, subdivision (a), on the grounds that SB 277 allegedly constitutes a prohibited medical experiment; and (5) a violation of the Due Process Clause of article I, section 7 of the California Constitution, on the grounds that the medical exemption provisions of SB 277 are allegedly unconstitutionally vague. (CT at p. 386.)

Respondents filed their demurrer and motion to strike the SAC, with their request for judicial notice, on August 22, 2016. (CT, at pp. 64, 96 and 237.) On October 21, 2016, the superior court sustained respondents' demurrer without leave to amend, and ordered that respondents' motion to strike be taken off-calendar as moot in light of its ruling on the demurrer. (CT at pp. 434-436.)

Appellants filed their notice of appeal on December 23, 2016. (CT at p. 441.) However, this Court deemed the appeal premature without a

written order of dismissal from the superior court. The superior court entered its order of dismissal on February 3, 2017. (CT at pp. 452, 457.)

On October 24, 2017, on appellants' request, the appeal was dismissed as to appellants Tamara Buck and Charlene Housen.

STATEMENT OF FACTS

SB 277 was enacted on June 30, 2015. (See Stats 2015 ch. 35.) In relevant part, SB 277 eliminates the personal belief exemption from the statutory requirement that children receive vaccines for certain infectious diseases prior to being admitted to any public or private elementary or secondary school, or day care center. (*Ibid*.) In so doing, SB 277 revised the Health and Safety Code by amending sections 120325, 120335, 120370, and 120375, added section 120338, and repealed section 120365. (*Ibid*.)

In enacting SB 277, the Legislature reaffirmed its intent "to provide . . . [a] means for the eventual achievement of total immunization of appropriate age groups" against what are now commonly viewed as childhood diseases. (Health & Saf. Code, § 120325, subd. (a).) SB 277 requires children to be immunized against (1) diphtheria, (2) hepatitis B, (3) haemophilus influenzae type b, (4) measles, (5) mumps, (6) pertussis (whooping cough), (7) poliomyelitis, (8) rubella, (9) tetanus, (10) varicella (chickenpox), and (11) "[a]ny other disease deemed appropriate by the [California Department of Public Health]." (*Ibid*.)[1]

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[1] The inherent dangers of these diseases are chronicled by the World Health Organization (WHO) and the Centers for Disease Control (CDC). *Diphtheria* is caused by a bacterium that produces a toxin that can harm or destroy human body tissues and organs. (http://www.who.int/immunization/topics/diphtheria/en/.) "Diphtheria affects people of all ages, but most often it strikes unimmunized children." (*Ibid*.) *Hepatitis B* causes liver infection which "can lead to serious health issues, like cirrhosis or liver cancer." (http://www.cdc.gov/hepatitis/hbv/index.htm.) *Haemophilus*

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SB 277 has been in effect since January 1, 2016. Personal belief exemptions have been prohibited since that date, subject to a limited grandfathering section noted below. (Health & Saf. Code, § 120335, subd. (g)(1).) And, since July 1, 2016, school authorities may not unconditionally admit for the first time any child to private or public elementary or secondary school, child day care center, day nursery, nursery school, family day care home, or development center, or advance any pupil to seventh grade, unless the pupil either has been properly immunized, or qualifies for other exemptions recognized by statute. (*Id*., § 120335, subd. (g)(3).)

There are exemptions to the immunization requirements under SB 277. Vaccinations are not required for any student in a home-based private school or independent study program who does not receive classroom-based instruction. (Health & Saf. Code, § 120335, subd. (f).) Moreover, a child may be medically exempt from the immunizations specified in the

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influenzae, which is not to be confused with influenza (the "flu") causes severe infection "occurring mostly in infants and children younger than five years of age . . . and can cause lifelong disability and be deadly." (http://www.cdc.gov/hi-disease/index.html.) *Measles* can cause, among other things, pneumonia, brain damage, and death. http://www.cdc.gov/vaccinesafety/vaccines/mmrv-vaccine.html. *Mumps* can cause deafness, inflammation of the brain and/or tissue covering the brain and spinal cord, and death. (*Ibid*.) *Rubella* could cause spontaneous miscarriages in pregnant women or serious birth defects. (*Ibid*.) *Varicella (chickenpox)* can lead to brain damage or death. (*Ibid*.) *Tetanus* causes painful muscle contractions, and can lead to death. (http://www.cdc.gov/tetanus/index.html.) *Pertussis*, also known as whooping cough, is a highly contagious respiratory disease "known for uncontrollable, violent coughing which often makes it hard to breathe," and can be deadly. (http://www.cdc.gov/pertussis/.) *Polio* is an incurable, "crippling and potentially fatal infectious disease," which spreads by "invading the brain and spinal cord and causing paralysis." (http://www.cdc.gov/polio/.)

statute if a licensed physician states in writing that "the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe." (*Id*., § 120370, subd. (a).) Any other immunizations not presently specified in the statute, but "deemed appropriate" by the California Department of Public Health, may be mandated "if exemptions are allowed for both medical reasons and personal beliefs." (*Id*., § 120338.) SB 277 also provides an exception relating to children in individualized education programs. (*Id*., § 120335, subd. (h).)

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

SB 277 was enacted in response to, among other things, a health emergency beginning in December 2014, when California "became the epicenter of a measles outbreak which was the result of unvaccinated individuals infecting vulnerable individuals including children who are unable to receive vaccinations due to health conditions or age requirements." (See CT at p. 113 [Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.)].)

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

(CT at p. 113 [Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.)], italics added.) As further noted in SB 277's legislative history, "[a]ll of the diseases for which California requires

school vaccinations are very serious conditions that pose very real health risks to children." (CT at p. 123 [Assem. Com. on Health, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.)].) "For example, measles in children has a mortality rate as high as about one in 500 among healthy children, higher if there are complicating health factors." (*Id*., at p. 122.) "Most of the diseases can be spread by contact with other infected children." (*Id*., at p. 123.)

The legislative history confirms that SB 277 was enacted with the support of recognized medical, educational and child-advocacy organizations in California, including, among others, the California Medical Association, the California Chapter of the American College of Emergency Physicians, the California Association for Nurse Practitioners, the California Primary Care Association, the California School Boards Association, the California School Nurses Organization, and the Children's Defense Fund-California. (CT at p. 118 [Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.)].)

STANDARD OF REVIEW

An appellate court employs two standards of review when a demurrer is sustained without leave to amend. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) The complaint is first reviewed *de novo* to determine whether it contains sufficient facts to state a cause of action. (*Ibid*; Code Civ. Proc., § 430.10, subd. (e).) The court deems as true all material facts properly pled, and those facts that may be implied or inferred from those expressly alleged. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591; *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) However, the court will not assume the truth of contentions, deductions or conclusions of fact or law, and the court may disregard allegations that are contrary to law, or are contrary to a fact of which judicial notice may be

taken. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Where an allegation "is contrary to law or to a fact of which a court may take judicial notice, it is to be treated as a nullity." (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955.) The court "will not close [its] eyes to situations where a complaint contains . . . allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

Consistent with the fundamental principle of truthful pleading, a complaint otherwise good on its face can be rendered defective by judicially noticed facts. (*Watson v. Los Altos School Dist*. (1957) 149 Cal.App.2d 768, 771-772; see Code Civ. Proc., § 430.30, subd. (a).) Thus, a demurrer may be sustained on the ground that matters properly subject to judicial notice show that the complaint fails to state facts sufficient to constitute a cause of action. (See *Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5.)

In the event the demurrer is sustained on appeal, the appellate court then determines whether the trial court abused its discretion in doing so without leave to amend. (*Hernandez v. City of Pomona, supra,* 49 Cal.App.4th at p. 1497, citing *Kilgore v. Younger* (1982) 30 Cal.3d 770, 781; *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636.) On appeal of the lower court's refusal to grant leave to amend, an appellate court "will only reverse for abuse of discretion if [it] determine[s] there is a reasonable possibility the pleading can be cured by amendment. Otherwise, the trial court's decision will be affirmed for lack of abuse." (*Hernandez v. City of Pomona, supra,* 49 Cal.App.4th at p. 1497, citing *Hendy v. Losse* (1991) 54 Cal.3d 723, 742; *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662.)

ARGUMENT

I. MANDATORY IMMUNIZATION LAWS ARE LONG-RECOGNIZED CONSTITUTIONAL PUBLIC HEALTH MEASURES.

The authority of the Legislature to require students to be vaccinated in order to protect the health and safety of other students and the public at large, irrespective of their parents' personal beliefs, is firmly embedded in our jurisprudence, and embodies a quintessential function of an organized government to protect its people from preventable harm. The State's legitimate and compelling interest in protecting public health and safety by mandating vaccinations for school children has been consistently recognized by federal and state courts for the past two centuries.

In *Jacobson v. Commonwealth of Massachusetts* (1905) 197 U.S. 11, 32 (hereafter *Jacobson*), the U.S. Supreme Court held that a state's mandatory vaccination statute was a lawful exercise of the state's police power to protect the public health and safety. Recognizing that "the principle of vaccination as a means to prevent the spread of smallpox has been enforced in many States by statutes making the vaccination of children a condition of their right to enter or remain in public schools," *Jacobson* relied in part on the California Supreme Court's decision in *Abeel v. Clark* (1890) 84 Cal. 226 (hereafter *Abeel*). (See *Jacobson, supra,* 197 U.S., at pp. 32-33.) In *Abeel*, the court upheld the State's school vaccination requirements, recognizing that "it was for the legislature to determine whether the scholars of the public schools should be subjected to [vaccination]."

Since *Jacobson*, the legitimate and compelling state interest in protecting the public health through mandatory vaccinations, especially for school children, has remained unquestioned and been re-affirmed. Courts have repeatedly upheld mandatory vaccination laws over challenges predicated on the First Amendment, the Equal Protection Clause, the Due

Process Clause, the Fourth Amendment, education rights, parental rights, and privacy rights, frequently citing *Jacobson*. (See, e.g., *Zucht v. King* (1922) 260 U.S. 174, 175-177 ["it is within the police power of a state to provide for compulsory vaccination"]; *Prince v. Massachusetts* (1944) 321 U.S. 158 (hereafter *Prince*) [a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds"]; *Vernonia School District 47J v. Acton* (1995) 515 U.S. 646 (hereafter *Vernonia*) ["[f]or their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases"]; *Phillips v. City of New York* (2nd Cir. 2015) 775 F.3d 538, 543 (hereafter *Phillips*) [holding that "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause"]; *Workman v. Mingo County Sch.* (S.D. W. Va. 2009) 667 F.Supp.2d 679, 690-691 ["a requirement that a child must be vaccinated and immunized before it can attend the local public schools violates neither due process nor . . . the equal protection clause of the Constitution"], *affd. Workman v. Mingo County Bd. of Educ.* (4th Cir. 2011) 419 F.App'x 348, 353-354; *Boone v. Boozman* (E.D. Ark. 2002) 217 F.Supp.2d 938, 956 ["the question presented by the facts of this case is whether the special protection of the Due Process Clause includes a parent's right to refuse to have her child immunized before attending public or private school where immunization is a precondition to attending school. The Nation's history, legal traditions, and practices answer with a resounding 'no'"].)

Jacobson also has been consistently applied beyond the smallpox vaccine from which that seminal case arose. (See, e.g., *Phillips, supra,* 775 F.3d 538 [New York law required school children to be vaccinated for poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and

hepatitis B]; *Workman v. Mingo County Sch., supra,* 667 F.Supp.2d 679 [West Virginia law required school child vaccination against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough]; *Boone v. Boozman, supra,* 217 F.Supp.2d 938 [Arkansas law required school child vacation against poliomyelitis, diphtheria, tetanus, pertussis, red (rubeola) measles, rubella, and other diseases as designated by the State Board of Health]; *Sherr v. Northport-East Northport Union Free School Dist.* (E.D.N.Y. 1987) 672 F.Supp. 81 [New York law at that time required school child vaccination against poliomyelitis, mumps, measles, diphtheria, and rubella]; *Hanzel v. Arter* (S.D. Ohio 1985) 625 F.Supp. 1259 [Ohio law required school children to be vaccinated against mumps, poliomyelitis, diphtheria, pertussis, tetanus, rubeola, and rubella].)

Since *Abeel* and *Jacobson,* California courts have consistently recognized the constitutionality of the State's mandatory vaccination statutes. In *French v. Davidson* (1904) 143 Cal. 658, 662 (hereafter *French*) the California Supreme Court reaffirmed *Abeel* and further held that California's mandatory vaccination law "in no way interferes with the right of the child to attend school, provided the child complies with its provisions." And in *Williams v. Wheeler* (1913) 23 Cal.App. 619, 625 the court observed that the state legislature has the power to prescribe "the extent to which persons seeking entrance as students in educational institutions within the state must submit to its [vaccination] requirements as a condition of their admission." (See also *Love v. Superior Court* (1990) 226 Cal.App.3d 736, 740 ["[t]he adoption of measures for the protection of the public health is universally conceded to be a valid exercise of the police power of the state, as to which the legislature is necessarily vested with large discretion not only in determining what are contagious and infectious diseases, but also in adopting means for preventing the spread thereof"];

Walker v. Superior Court (1988) 47 Cal.3d 112, 140 ["parents have no right to free exercise of religion at the price of a child's life, regardless of the prohibitive or compulsive nature of the governmental infringement"].)

The continued viability of *Jacobson* was more recently recognized by the California Supreme Court in *Thor v. Superior Court* (1993) 5 Cal.4th 725 (*Thor*), cited by appellants in their opening brief at page 12. In *Thor*, the Court found that the State's interest *does prevail* over individual health decisions in certain circumstances, such as "*simple vaccination permissible to protect public health*," citing *Jacobson*. (*Ibid*., italics added.)

Respondents are unaware of any case in which a court has struck down a state's mandatory school immunization law.

II. THE CONSTITUTIONALITY OF SB 277 HAS BEEN AFFIRMED IN CALIFORNIA STATE AND FEDERAL COURTS

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

In so holding, the *Whitlow* court observed that "[c]onditioning school enrollment on vaccination has long been accepted by the courts as a permissible way for States to innoculate large numbers of young people and prevent the spread of contagious diseases." (*Whitlow*, *supra*, 203 F.Supp.3d at p. 1091 (citing *Vernonia, supra,* 515 U.S. at p. 656.) On

August 31, 2016, the *Whitlow* plaintiffs filed their request for voluntary dismissal of their lawsuit, and thus extinguished any possible appeal of the federal court's order.

On November 21, 2016, another group of plaintiffs filed a complaint in the Central District of California against various state entities and officials, seeking to challenge the constitutionality of SB 277, alleging violations of substantive due process, equal protection of California's right to education, and title 42 United States Code section 1983. (*Torrey Love, et al. v. State of California Department of Education et al*., Case No. ED CV 16-2410-DMG (DTBx) (*Torrey Love I*).) The federal district court granted the defendants' motion to dismiss, holding in relevant part as follows:

> Here, contrary to Plaintiffs' allegations, the issue is not simply one of whether children have a fundamental right to refuse medical treatment or whether parents have a "fundamental right to control what types of medications are put into [their] child's body." . . . Rather, the linchpin of Plaintiffs' due process claim is whether the right to refuse immunization before attending a public school that requires immunization is a fundamental right subject to heightened protection. "The Nation's history, legal traditions, and practices answer with a resounding 'no.'" . . . The Supreme Court long ago declared that a state can require children to be vaccinated as a precondition for school attendance without running afoul of the Due Process Clause in the interests of maintaining the public health and safety. . . . Though Plaintiffs assail these cases [*Jacobson* and *Zucht*] for their age, they have not been overturned and are still good law and binding upon this Court.

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

Although the district court in *Torrey Love I* permitted leave to amend, the plaintiffs voluntarily dismissed their action in its entirety on February 1, 2017, thereby extinguishing any possible appeal of the federal court's order.

However, on April 4, 2017, the *Torrey Love I* plaintiffs re-filed their claims in Placer County Superior Court. (See *Torrey Love et al. v. State of California Department of Education et al*., Placer County Superior Court Case No. S-CV-0039311 (*Torrey Love II*). On August 15, 2017, that court sustained defendants' demurrer on grounds similar to those stated in the decision by the Central District of California in *Torrey-Love I*. (RJN, Exh. C.) The plaintiffs in *Torrey Love II* filed their appeal on November 15, 2017. (See *Love et al. v. State of California, Department of Education et al.,* Third Appellate District Case No. C086030.)

And, on December 15, 2016, in *Middleton et al. v. Pan et al.*, U.S.D.C., Central District of California Case No. 2:16-cv-05224-SVW-AGR, the Magistrate Judge recommended dismissal with leave to amend because the plaintiffs are appearing *pro se*. (RJN, Exh. D.) In so doing, the Magistrate Judge found the reasoning in *Whitlow* "persuasive," and adopted *Whitlow's* rejection of the various constitutional challenges to SB 277 that are substantially similar to those raised by appellants here. (*Id*., at pp. 10-15.) The Magistrate Judge's Report and Recommendation was approved and adopted by the District Court on July 13, 2017. (RJN, Exh. E.) Defendants' motions to dismiss plaintiff's first amended complaint (which is nearly identical to the initial complaint) are under consideration in that case.

III. APPELLANTS FAIL TO STATE FACTS SUFFICIENT TO CONSTITUTE A VIOLATION OF THE FREE EXERCISE CLAUSE.

A. Appellants' Philosophical Objections to Mandatory Vaccinations Do Not Properly Invoke the Free Exercise Clause.

In their first cause of action, appellants allege that SB 277 violates their rights because the statute no longer allows exemptions based on "philosophical objections." (CT at p. 402:15-20.) These alleged beliefs, no

matter how genuinely held by appellants, provide no basis for relief under the Free Exercise Clause.

California courts review challenges "under the free exercise clause of the California Constitution in the same way we might have reviewed a similar challenge under the federal Constitution." (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 562.)

The Free Exercise Clause protects religious beliefs, not personal beliefs. Citing *Wisconsin v. Yoder* (1972) 406 U.S. 205 (hereafter *Yoder*), appellants argue in their SAC that it is a "fundamental interest of parents . . . to guide the religious education of their children." (CT at p. 394:13-17.) Yet, the Supreme Court in *Yoder* was clear: "philosophical and personal . . . belief[s] [do] not rise to the demands of the Religion Clauses." (*Yoder, supra,* 406 U.S. at p. 216.)

Here, of the six remaining appellants, only three individuals mention religion. None of those appellants explains how the SB 277-mandated vaccines violate their right to freely exercise their religious beliefs. Appellants Brown, Lucas and Selden allege that they are Christian. (CT at pp. 398:23-24, 399:1-2, 399:16-17.) However, although Brown and Selden allege that they oppose vaccines that contain aborted fetal cells, they fail to specify which vaccines they oppose as a matter of religion, or the religious doctrine on which their beliefs are based, and fail to specify which vaccines purportedly contain aborted fetal cells. (*Id*., at pp. 398:17-28, 399:16-24.) Plaintiff Lucas does not explain how vaccination interferes with her Christian beliefs – indeed, she admits that her children have previously been vaccinated. Lucas merely alleges that she believes that "failure to further vaccinate should not impact public school access." (*Id*., at p. 399:1-8.)

The other appellants make no mention of religion and merely allege purported philosophical and conscientious objections. Plaintiff Serge

Eustache wants to keep "our freedom of choice in the matter of vaccination." (CT at p. 400:1). Plaintiff Trishe Eustache "believes that health is best maintained by adhering to an organic diet, high in raw foods, as well as exercise, routine cleansing, and detox." (*Id*., at p. 400:10-12.) Plaintiff Jencen "believes that a holistic and organic lifestyle is best for all." (*Id*., at p. 400:26-27.)

Similar to the appellants here, the appellants in *Hanzel v. Arter* (S.D. Ohio 1985) 625 F.Supp. 1259 (hereafter *Hanzel*), objected to the immunization of their children on the basis of their belief in "a body of thought which teaches that injection of foreign substances into the body is of no benefit and can only be harmful." (*Id.,* at p. 1260.) The *Hanzel* court disagreed, stating "[a]s made clear by the Supreme Court in *Wisconsin v. Yoder,* philosophical beliefs do not receive the same deference in our legal system as do religious beliefs, even when the aspirations flowing from each such set of beliefs coincide." (*Id*., at p. 1265; see also *Friedman v. Southern California Permanente Medical Group* (2002) 102 Cal.App.4th 39 ["While veganism compels plaintiff to live in accord with strict dictates of behavior, it reflects a moral and secular, rather than religious, philosophy"]; *Syska v. Montgomery County Bd. of Ed.* (Md. Ct. Spec. App. 1980) 45 Md.App. 626, 632 ["[A]ppellant's objections to the immunization program . . . are based on her own subjective evaluation of and rejection of the benefits to the public safety and to her children derived therefrom. Her beliefs . . . are philosophical and personal rather than religious."].)[2]

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[2] Plaintiff Brown also alleges that SB 277 violates her family's privacy rights. (CT at p. 398:27-28.) In *Hanzel,* the court held that a statute mandating vaccination for school admission did not violate privacy rights, because "the immunization decision is not encompassed within the right of privacy." (*Hanzel*, *supra*, 625 F.Supp. at p. 1263.)

"A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief." (*Yoder*, *supra*, 406 U.S. at p. 215.) That appellants are entitled to their personal beliefs is without question. But, as a matter of law, these personal beliefs are not protected under the Free Exercise Clause. Nor are these personal beliefs a legitimate restraint on the State's authority to protect the public from the spread of communicable diseases.

B. Even if Appellants' Objections Are Religious, Their Claims Fail Because SB 277 Is Rationally Related to a Legitimate Interest.

Even if appellants' objections could be characterized as based on religious beliefs, appellants' argument that strict scrutiny is the applicable standard of review for their claims is wrong. (Suppl. CT at p. 403:1-2.) "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 531.) SB 277 is neutral and of general applicability; it applies to all children in day care, public schools and private schools. (See Health & Saf. Code, § 120325 et seq.)

Moreover, the California Supreme Court has held that, "when danger to health exists . . . state regulation shall be tested under the *rational basis* standard." (*People v. Privitera* (1979) 23 Cal.3d 697, 703, original emphasis.) Even when a state "statute *restricts a fundamental right*, when the state asserts important interests in safeguarding health, review is under the rational basis standard." (*Wilson v. California Health Facilities Com.* (1980) 110 Cal.App.3d 317, 324, italics added.)

"[T]he rational-basis standard . . . employs a relatively relaxed standard." (*Massachusetts Bd. of Retirement v. Murgia* (1976) 427 U.S. 307, 314.) A law is upheld "so long as it bears a rational relation to some legitimate end." (*Romer v. Evans* (1996) 517 U.S. 620, 631.) "[C]ourts are compelled . . . to accept a legislature's generalizations even when there is an imperfect fit between means and ends." (*Heller v. Doe by Doe* (1993) 509 U.S. 312, 321.)

The U.S. Supreme Court, the California Supreme Court, and numerous other federal and state courts have uniformly held that state immunization laws serve a rational, if not a compelling, state interest in protecting the public from the spread of communicable diseases. This interest was recognized by the U.S. Supreme Court in *Jacobson* 112 years ago and is consistently affirmed today. (See, e.g., *Phillips*, *supra*, 775 F.3d at 542.)

SB 277 is rationally related to a legitimate state interest of protecting the public from the spread of debilitating, and potentially fatal, diseases, as its legislative history confirms: "Vaccine coverage at the community level is vitally important for people too young to receive immunizations and [for] those unable to receive immunizations due to medical reasons." (CT at p. 142 [Sen. Jud. Com., Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.)].) "Given the highly contagious nature of [these] diseases . . . vaccination rates of up to 95% are necessary to preserve herd immunity and prevent future outbreaks." (*Id*., at p. 141.)

Hence, appellants' claims fail as a matter of law because the Legislature's removal of the personal beliefs exemption in SB 277 was rationally related to a legitimate, if not a compelling, state interest in protecting the health and safety of public school students and the general public.

IV. SB 277 DOES NOT VIOLATE THE RIGHT TO AN EDUCATION.

Appellants wrongly assert in their second cause of action that SB 277 violates the right to an education under article IX, section 5 of the California Constitution. (CT at p. 407.) To the contrary, the statute operates to *protect* children's access to education by ensuring that such access is not impaired by the proliferation of otherwise preventable diseases.

A. Mandatory Vaccinations Do Not Infringe on the Right to a Free Public Education

The California Constitution provides that the "Legislature shall provide for a system of common schools by which a free school shall be kept up and supported." (Cal. Const., art. IX, § 5.) In *French*, the California Supreme Court expressly held that the State's mandatory school vaccination statute "in no way interferes with the right of the child to attend school, provided the child complies with its provisions." (*French*, *supra*, 143 Cal. at p. 662.) Similarly, in a case cited extensively in *Jacobson*, the New York Court of Appeal in *Viemeister v. White* (1904) 179 N.Y. 235, 72 N.E. 97, expressly held that New York's mandatory school vaccination statute did not violate that state's constitutional right to a free public education, which is virtually identical to that contained in California's Constitution. (*Id.*, 179 N.Y. at p. 238 ["[t]he right to attend the public schools of this state is necessarily subject to some restrictions and limitations in the interest of the public health"].)

In bringing their claims, appellants fail to acknowledge the rights of the millions of school children and their parents who rely on mandatory vaccinations to ensure that their right to an education is not threatened by the spread of potentially fatal diseases. Indeed, the U.S. Supreme Court has long recognized that the institutional interest of schools, as well as the rights of the student body at large, often hold sway over the rights of

individual students. "For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases." (*Vernonia, supra,* 515 U.S. 646 [noting with approval that "all 50 States required public school students to be vaccinated against diphtheria, measles, rubella, and polio," and that "[p]articularly with regard to medical examinations and procedures, therefore, 'students within the school environment have a lesser expectation of privacy than members of the population generally'"].)

Because mandatory vaccinations promote, rather than infringe on the right to a free public education, the analysis of appellants' second cause of action ought to stop here, and respondents' demurrer should be sustained.

B. Even if SB 277 Arguably Infringed on Children's Right to a Free Public Education, the Statute Survives Appellants' Constitutional Challenge Because it is Rationally Related to the State's Legitimate Interest in Protecting Public Health.

In holding that "education is a fundamental interest," the California Supreme Court applied strict scrutiny review to laws affecting the right to an education. (*Serrano v. Pries*t (1976) 18 Cal.3d 728, 766.) However, the constitutional challenge in *Serrano* was not to a health and safety provision. After *Serrano,* the California Supreme Court held that the infringement of a constitutional right by a health and safety statute is held to the less restrictive rational basis standard of review. (*People v. Privitera, supra,* 23 Cal.3d 697 at p. 70.)

As discussed in detail above, *Jacobson* and its progeny have unequivocally held that immunization laws are justified because they serve a legitimate state interest in protecting public health and safety. SB 277 is rationally related to the State's legitimate interest in protecting the health and safety of its citizens, including children. In enacting SB 277, the Legislature recognized that "[s]afe schools are a precondition to education." (CT at p. 142.) SB 277 does not violate the right to an education; to the

contrary, it benefits and supports safe access to education for all school children by ensuring that the exercise of the right to education is not impaired by the transmission of serious or potentially fatal diseases. (See also Cal. Const., art. I, § 28(7) ["the People find and declare that the right to public safety extends to public and private primary, elementary, junior high, and senior high school, . . . where students and staff have the right to be safe and secure in their persons"].)

Appellants have not stated a valid cause of action because SB 277 serves a legitimate interest of the State in protecting the health and well-being of children, and in promoting a safe environment in California's schools.

C. SB 277 Also Withstands a Strict Scrutiny Analysis

Although rational basis is the appropriate level of scrutiny under California law, mandatory vaccination statutes, *including SB 277*, have also withstood scrutiny under the compelling state interest standard. (See *Whitlow*, *supra*, 203 F.Supp.3d at p. 1090 ["the State's interest in protecting the public health and safety, particularly the health and safety of children, does not depend on or need to correlate with the existence of a public health emergency . . . That interest exists regardless of the circumstances of the day, and is equally compelling whether it is being used to prevent outbreaks or eradicate diseases."]; see also *Workman v. Mingo County Sch., supra,* 419 F.App'x at pp. 353-54 ["the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest"]; *Sherr v. Northport-East Northport Union Free School Dist.* (E.D.N.Y. 1987) 672 F.Supp. 81, 88 [holding there is a "compelling interest . . . in fighting the spread of contagious diseases through mandatory inoculation programs"].) Appellants are unable to cite to a single case where a court has held that

there is no compelling state interest in protecting the public from the spread of communicable diseases through vaccination.

SB 277 is narrowly tailored to serve the State's legitimate and compelling interest in protecting public health. It does not mandate vaccination for all diseases, but only those that the Legislature determined are "very serious" and that "pose very real health risks to children." (CT at p. 123 [Assem. Com. on Health, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.)].) SB 277 only eliminates the personal belief exemption as to the ten specific vaccines presently enumerated in the statute. (Health & Saf. Code, § 120338.) It also contains appropriate but limited exemptions for children with medical conditions for whom vaccinations were medically determined to be unsafe, and children who are homeschooled or enrolled in independent study programs. (*Id*., § 120335, subd. (f).) SB 277 also provides an exception related to students who attend individualized education programs. (*Id*., at subd. (h).)

Therefore, even if, as appellants assert, SB 277 must be reviewed under strict scrutiny, appellants fail to state a claim for a violation of the right to a free public education because SB 277 is narrowly tailored to meet the State's compelling interest in protecting the health of school children and the public at large.

V. APPELLANTS' EQUAL PROTECTION CLAIM FAILS BECAUSE VACCINATION-BASED DISTINCTIONS HAVE NEVER BEEN RECOGNIZED UNDER THE EQUAL PROTECTION CLAUSE

Appellants' claim under the Equal Protection Clause hinges on their assertion, made without any supporting legal authority, that "[s]chools must treat all students the same regardless of whether they are vaccinated." (CT at p. 408:10-11.)

Equal protection of the laws assures that people who are "similarly situated for purposes of [a] law" are generally treated similarly by the law.

(*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Appellants' attempt to construct a vaccination-based distinction to substantiate alleged equal protection violations is unavailing. (Opening Br., at pp. 24-25.) Unvaccinated children are not similarly situated to children who have been vaccinated, for the simple fact that the former are more likely to contract and spread dangerous diseases than the latter. Nor do unvaccinated children belong to a suspect class. SB 277 is neutral on its face. It does not discriminate on the basis of race, national origin, wealth or age. The Legislature established a system of vaccination requirements that follows national recommendations and schedules for all children and adolescents.

Even if this Court were to entertain appellants' attempts to create a new classification, SB 277 survives both rational basis and strict scrutiny review. The rational basis standard of review is "the basic and conventional standard for reviewing economic and social welfare legislation in which there is a 'discrimination' or differentiation of treatment between classes or individuals." (See *Vergara v. State of California* (2016) 246 Cal.App.4th 619, 645 (hereafter *Vergara*).) Strict scrutiny is employed only when the "distinction drawn by a statute rests upon a so-called 'suspect classification' or impinges upon a fundamental right." (*Id.*, 246 Cal.App.4th at p. 645.) However, even when a statutory classification impinges a fundamental right (and does not involve a suspect classification), strict scrutiny will not apply "if the effect on the fundamental right is merely 'incidental,' 'marginal,' or 'minimal.'" (*Id.*, citing *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 47.)

Even in those cases when strict scrutiny applies, however, a statute is deemed justified if the State has "a compelling interest which justifies the law [and] that the distinctions drawn by the law are necessary to further its purpose." (*Vergara*, *supra*, 246 Cal.App.4th at p. 645.) As discussed in

detail above, the U.S. Supreme Court and California courts have uniformly held that the state has a rational and a compelling interest in mandating the vaccinations of children before they are admitted to school. In light of this overwhelming precedent, appellants cannot state a valid equal protection claim.

VI. VACCINATIONS DO NOT CONSTITUTE MEDICAL EXPERIMENTS UNDER THE HEALTH AND SAFETY CODE

Appellants have not stated a valid claim in their fourth cause of action, in which they assert that vaccinations constitute "medical experiments" prohibited by Health and Safety Code section 24174. (CT at pp. 412-417.) That statute is limited to medical procedures "in or upon a human subject in the practice or research of medicine *in a manner not reasonably related to maintaining or improving the health of the subject or otherwise directly benefiting the subject*." (Health & Saf. Code, § 24174, italics added; see also *Perez v. Nidek Co*. (9th Cir. 2013) 711 F.3d 1109 [holding that the informed consent provisions of section 24174 apply only to procedures done in furtherance of pure research, and not to therapeutic treatments].) It is beyond reasonable dispute that vaccinations are designed to maintain or improve the health of the subject, by preventing the transmission of communicable, and potentially disabling or fatal, diseases.

Indeed, appellants' unsupported assertions in support of all of their claims that vaccinations are, in their opinion, "unavoidably unsafe" or "medically unnecessary," disregard the proper constitutional test that has been applied to mandatory vaccination laws. (See Opening Br., at pp. 13-23.) As the U.S. Supreme Court held in *Jacobson*: "[t]he possibility that the belief [in the effectiveness of vaccinations] may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases."

(*Jacobson*, *supra*, 197 U.S. at p. 35.) This is consistent with the California Supreme Court's holding in *Abeel* that "[w]hat is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is invested with a large discretion, which cannot be controlled by the courts, except, perhaps, when its action is clearly evasive, and where, under pretense of lawful authority, it has assumed to exercise one that is unlawful." (*Abeel*, 84 Cal. at p. 231.)

Appellants do not dispute that, in enacting SB 277, the Legislature found that "[a]ll of the diseases for which California requires school vaccinations are very serious conditions that pose very real health risks to children." (CT at p. 123 [Assem. Com. on Health, Analysis of Sen. Bill 277 (2014-25 Reg. Sess.)].) Also, the legislative history of SB 277 notes that, in 2011, a committee of the Institute of Medicine (IOM) established under the federal National Childhood Vaccine Injury Act of 1986 (NCVIA), published a report entitled *Adverse Effects of Vaccines: Evidence and Causality*, which was "an extensive study of peer reviewed vaccine related research to date." (CT at p. 126 [Assem. Com. on Health, Analysis of Sen. Bill No. 277 (2014-15 Reg. Sess.)].) As it did in an earlier report, the IOM "again found that vaccines generally are very safe and that serious adverse events are quite rare." (*Ibid*.)

Nor do appellants dispute that the views of the Legislature reflect the common belief of the people (except for appellants), and the conclusions of recognized scientific, medical and public health authorities. Indeed, the safety and effectiveness of vaccines are facts of such common knowledge that courts have taken "judicial notice of the nature, purpose, and effects of vaccination." (*Southern California Edison Co. v. Industrial Accident Com.* (1925) 75 Cal.App.709, 715.) Specifically, courts have held "[t]hat [protection for school children against crippling and deadly diseases by

immunization] . . . can be done effectively and safely has been incontrovertibly demonstrated over a period of a good many years *and is a matter of common knowledge of which this [c]ourt takes judicial notice*." (*Brown v. Stone* (Miss. 1979) 378 So.2d 218, 220-221, italics added; see also *Jacobson, supra,* 197 U.S. at p. 35 ["that vaccination is a preventive . . . we take judicial notice"]; *Wright v. DeWitt Sch. Dist.* (Ark. 1965) 385 S.W.2d 644, 648 [holding that preventative vaccination is subject to judicial notice].) [3]

Appellants instead rely on a false and misleading mischaracterization of the decision in *Bruesewitz v. Wyeth LLC* (2011) 562 U.S. 223 (*Bruesewitz*). (See Opening Br., at pp. 13-20.) Contrary to appellants' assertions, at no point in *Bruesewitz* did the Supreme Court hold that vaccines were unavoidably unsafe. Instead *Bruesewitz* considered only "whether a preemption provision enacted in [the NCVIA] bars state-law design-defect claims against vaccine manufacturers." (*Bruesewitz*, *supra*, 562 U.S. at p. 226.) The decision was not a criticism of the safety or

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[3] In support of their demurrer and motion to strike, respondents asked the lower court to take judicial notice of numerous peer-reviewed journals and recognized authorities and thereby take judicial notice of the fact that protection of school children against crippling and deadly diseases by vaccinations is done effectively and safely, and that such protection and safety are matters of common knowledge. (CT at pp. 96-236; see also *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145 [holding that judicial notice may be taken of "facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter."], citing Comment, Assem. Judiciary Com. accompanying enactment of Evid. Code, § 452 (1965); see also *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 414 ["[m]atters of scientific certainty are subject to judicial notice"].) Respondents' concurrently-filed motion for judicial notice incorporates these authorities by reference.

effectiveness of vaccines. To the contrary, the Supreme Court expressly acknowledged that "the elimination of communicable diseases through vaccination became 'one of the greatest achievements' of public health in the 20th century." (*Ibid*., quoting Centers for Disease Control, *Achievements in Public Health, 1900-1999: Impact of Vaccines Universally Recommended for Children*, 48 Morbidity and Mortality Weekly Report 243, 247 (Apr. 2, 1999).)

The *petitioners* in *Bruesewitz*, and not the Supreme Court, introduced the term, "unavoidably unsafe" from comment k to section 402A of the Restatement (Second) of Torts, to support their arguments. (*Id*. at p. 234.) The Supreme Court merely recognized in the abstract that, according to the Restatement comment, an "unavoidably unsafe product" is a product "incapable of being made safer for [its] . . . intended use." (*Ibid*.) However, the Supreme Court expressly stated that "[w]e have no need to consider the finer points of comment k," and declined to adopt the petitioners' assertion that their claims should be considered under the "unavoidably unsafe" language of comment k. (*Id*., at p. 235.)[4]

Appellants also rely on a Note in the Harvard Law Review to erroneously contend that SB 277 is not medically necessary. (Opening Br., at p. 23, citing Note, *Toward a Twenty-First-Century* (2008) (hereafter Note) 121 Harv. L.Rev. 1820, 1828-1834.) Appellants have grossly

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[4] Plaintiffs' allegation that since its enactment, "the National Vaccine Injury Compensation Program . . . has paid-out more than $3.4 billion dollars . . . on vaccine injury and wrongful death claims" (CT at p. 395:3-4), is not only a gross mischaracterization of the reality of vaccine injury compensation data, but also an extraordinarily misleading statistic. According to HHS, for every *one million* doses of vaccine that were distributed, *one individual* was compensated under the NCVIA. (HHS, National Vaccine Injury Compensation Data Report (July 1, 2016). (http://www.hrsa.gov/vaccinecompensation/data/statisticsreport.pdf).

mischaracterized the writing. The Note expressly states that "[t]his Note does not argue that courts should find compulsory vaccination against STDs or similar diseases unconstitutional . . . Rather, this Note's primary claim is that vaccine law must be updated . . . to respond better to future biomedical advances." (Note*, supra*, 121 Harv. L.Rev. at pp. 1820-1821.)

In fact, the Note expressly contradicts appellants' claims. The Note recognizes that "legally compelled immunization is the only practical way to combat the disease effectively." (*Note*, *supra*, 121 Harv. L.Rev. at p. 1820.) The Note does not argue for *Jacobson* to be overturned or for any school immunization statute to be repealed. Moreover, the Note acknowledges that "[v]accination has substantially obliterated many diseases in this country to the point where new generations of Americans are totally unaware of them, unlike earlier Americans who lived through the epidemics." (*Id*. at p. 1827.) And, the Note confirms that anti-vaccination claims such as those that appellants make here about the lack of medical necessity "are troubling," because "[t]he modern anti-vaccinationists are overlooking that vaccines have been one of the most effective developments in suppressing diseases and prolonging life. More troubling is that when these anti-vaccinationists move into town, they threaten herd immunity and endanger all their neighbors." (*Ibid*.)

In addition, in their letter dated November 17, 2017, purporting to inform this Court of "New Authorities," appellants now assert that vaccines might contain glyphosate. This assertion is neither new nor authoritative, and should be disregarded by this Court. Appellants refer to a purported finding by the California Office of Environmental Health Hazard Assessment (OEHHA), that glyphosate as an active ingredient in Roundup (weedkiller), may cause cancer. Appellants' letter acknowledges that the purported finding is not "new authority," but rather was made on March 28, 2017, almost seven months before appellants' opening brief was filed.

Appellants provide no explanation why it was not referenced in their initial filing. Substantively, appellants do not assert, because they cannot, that OEHHA determined that glyphosate is present in vaccines, or, even if it is, whether it is present in any potentially harmful amounts. Tellingly, appellants merely assert that they suspect glyphosate may be in some vaccines indirectly via animal products, a dubious claim with no recognized scientific basis. To the contrary, the claim that vaccines contain glyphosate is another allegation circulating among anti-vaccination groups on the Internet that has not been confirmed by any recognized scientific authority.

Much like the rest of appellants' claims, their unsubstantiated allegations that vaccinations are unsafe, or "medically unnecessary" to protect public health, disregard applicable law, and are misguided and misinformed. (Opening Br., at pp. 22-23.)

VII. SB 277'S MEDICAL EXEMPTION IS NOT UNCONSTITUTIONALLY VAGUE.

Appellants' assertion in their fifth cause of action that SB 277 violates the Due Process Clause because the statute's medical exemption is unconstitutionally vague (Suppl. CT at pp. 418-422) is belied by the plain language of the statute.

Due process claims under California and federal law are analyzed under the same principles. (See, e.g., *Patel v. City of Gilroy* (2002) 97 Cal.App.4th 483, 486.) A statute is void for vagueness only "where a person of 'common intelligence must necessarily guess at its meaning and differ as to its application.'" (*Davidovich v. City of San Diego* (S.D. Cal. Dec. 1, 2011) Case No. 11 cv 2675 WQH-NLS, 2011 U.S. Dist. LEXIS 138319, *17, citing *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391.) Moreover, "the Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning

as to the proscribed conduct when measured by common understanding and practices." (*Id.*, citing *Roth v. United States* (1957) 354 U.S. 476, 491.)

Appellants admit that the plain language of the medical exemption requires "a written statement by a licensed physician to the effect that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe, indicating the specific nature and probable duration of the medical condition or circumstances, including, but not limited to, family medical history, for which the physician does not recommend immunization." (CT at p. 419:5-17, quoting Health & Saf. Code, § 120370, subd. (a).)

On its face, SB 277 sufficiently conveys what is required for a medical exemption under SB 277.

VIII. RESPONDENTS' DEMURRER WAS PROPERLY SUSTAINED WITHOUT LEAVE TO AMEND

In sum, respondents' demurrer should be sustained on appeal because all of the causes of action in appellants' SAC fail to state a claim as a matter of law. Each of appellants' claims runs counter to over a century of jurisprudence in the U.S. and California Supreme Courts, and the rest of the nation – jurisprudence that (1) has consistently affirmed the states' legitimate and compelling interest to require school children to be vaccinated to protect their health; (2) rests upon the overwhelming great weight of scientific evidence confirming the transformative public health benefits of vaccination; and (3) ensures children's right to a safe and healthy environment for their education.

Because appellants' claims, as advanced in three separate pleadings, conflict so markedly with established precedent, there is no reasonable possibility that the SAC can be cured by amendment. Therefore, the superior court's decision to sustain respondent's demurrer without leave to amend was not an abuse of discretion and should be affirmed.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request that this Court affirm the lower court's ruling that sustained respondents' demurrer to appellants' SAC without leave to amend.

Dated: December 12, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENTS' BRIEF uses a 13 point Times New Roman font and contains 9,202 words.

Dated: December 12, 2017

XAVIER BECERRA
Attorney General of California

/s/ Jonathan E. Rich
JONATHAN E. RICH
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DECLARATION OF SERVICE

Case Name: **Buck, et al. vs. Smith, et al.**

Case No.: **B279936**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 12, 2017, I served the attached **RESPONDENTS' BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Hon. Gregory W. Alarcon Los Angeles County Superior Court 111 N. Hill Street Los Angeles, CA 90012	T. Matthew Phillips, Esq. Attorney for Appellants 10040 W. Cheyenne Ave., #170 Las Vegas, NV 89129

On December 12, 2017, I caused one electronic copy of the **RESPONDENTS' BRIEF** in this case to be served on the California Supreme Court by sending the copy to the Supreme Court's electronic service address pursuant to Rule 8.212(c).

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 12, 2017, at Los Angeles, California.

/s/ *Jonathan E. Rich*
Declarant