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17
18 UNITED STATES DISTRICT COURT
19 SOUTHERN DISTRICT OF CALIFORNIA

20 ANA WHITLOW, et al.,
21
22 Plaintiffs,
23 v.
24 STATE OF CALIFORNIA,
25 DEPARTMENT OF EDUCATION, et al.,
26 Defendants.

Case No.: [Case No.]

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

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1 **INTRODUCTION**

2 Plaintiffs, by and through counsel, respectfully submit this Memorandum of Points
3 and Authorities in Support of their Motion for a Temporary Restraining Order and a
4 Preliminary Injunction, pursuant to, *inter alia*, Rule 65 of the Federal Rules of Civil
5 Procedure and 42 U.S.C. § 1983, 28 U.S.C. § 1343(a)(3), and 28 U.S.C. § 2201.
6 Plaintiffs seek redress for deprivation of rights secured by the United States Constitution,
7 and invoke supplemental jurisdiction over California state law claims.

8 The challenged law, SB 277 (RJN Ex. 1), requires that California’s school districts
9 take unprecedented action to bar tens of thousands of children, about 2.5 % of all
10 California school children, from school. Plaintiffs seek injunctive relief requiring
11 Defendants¹ to maintain the *status quo ante*, and to halt the July 1, 2016 implementation
12 of SB 277. The law negates 55 years of California law allowing a Personal Belief
13 Exemption (PBE) from mandated vaccines. It will deprive tens of thousands of healthy,
14 disease-free California students of the right to education, protected under both the
15 California and United States Constitutions. It will strip them of fundamental rights
16 including Free Exercise of religion, informed consent, parental decision-making, privacy,
17 bodily integrity, equal protection, and due process.

18 Pending a final determination, these children and their families should retain their
19 protected rights. A temporary restraining order, pending a hearing and preliminary
20 injunction, is the appropriate remedy; otherwise SB 277’s impact on thousands of
21 children and their parents will be immediate and severe. *See* the declarations of
22

23 _____
24 ¹ Plaintiffs have named the State Superintendent of Public Instruction and the Director of
25 the Department of Public Health as defendants since “it is the general and long-
26 established rule that in actions for declaratory and injunctive relief challenging the
27 constitutionality of state statutes, state officers with statewide administrative functions
28 under the challenged statute are the proper parties.” *Serrano v. Priest*, 18 Cal. 3d 728,
752 (1976), *supplemented*, 20 Cal. 3d 25 (1977).

1 individual Plaintiffs who are parents of such children. For example, although special
2 education students with individualized education plans (IEPs) are exempted from
3 vaccination mandates under SB 277, some school districts have taken action to require
4 those students to be vaccinated. Students in year-round IEP Programs face immediate
5 expulsion and deprivation of education.

6 The Court may issue a temporary restraining order without notice where “specific
7 facts in an affidavit or a verified complaint clearly show that immediate and irreparable
8 injury, loss, or damage will result to the movant before the adverse party can be heard in
9 opposition.” FRCP R. 65(b)(1)(A). An applicant for injunctive relief must show: (1) a
10 likelihood of success on the merits; (2) likelihood of irreparable injury if preliminary
11 relief is not granted; (3) balance of hardships; and (4) advancement of the public interest.
12 *See Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008).

13 The Ninth Circuit applies a serious question and sliding scale test, in which “the
14 elements of the preliminary injunction test are balanced, so that a stronger showing of
15 one element may offset a weaker showing of another.” *See Alliance for the Wild Rockies*
16 *v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). “Serious questions going to the merits
17 and a balance of hardships that tips sharply towards the plaintiff can support issuance of a
18 preliminary injunction, so long as the plaintiff also shows that there is a likelihood of
19 irreparable injury and that the injunction is in the public interest.” *Id.* at 1135. “A
20 ‘serious question’ is one on which the movant ‘has a fair chance of success on the
21 merits.’” *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir.
22 1984).

23 The Plaintiffs’ Complaint demonstrates: (1) a high likelihood of success on the
24 merits because the Defendants’ conduct impermissibly infringes on the Plaintiffs’
25 fundamental, constitutionally-protected rights; (2) the likelihood of irreparable injury
26 because Plaintiffs’ children face educational deprivation or the risk of serious bodily
27 harm from vaccination; (3) the balance of hardships tips sharply towards the Plaintiffs,
28 and (4) that an injunction will advance the public interest.

1 **I. PLAINTIFFS HAVE SHOWN LIKELIHOOD OF SUCCESS ON THE**
2 **MERITS**

3 First, Plaintiff’s children have a fundamental right to education. Quoting *Brown v.*
4 *Board of Education*, which invalidated racial segregation in schools, the *Serrano I* Court
5 called education “perhaps the most important function of state and local governments.”
6 *Serrano v. Priest*, 5 Cal. 3d 584 (1971) (*Serrano I*). *Serrano I* explained why education
7 is a protected, fundamental right, citing (1) its relationship to economic advancement; (2)
8 its relevance to all aspects of social life; (3) its duration of ten to thirteen years; (4) its
9 impact on children’s emotional and psychological health; and (5) its compulsory nature.
10 *Id.* at 608-10. Strict Scrutiny must be applied to violations of fundamental protected
11 rights under the California State Constitution, or where suspect classifications are at
12 issue. *See id.*

13 Second, SB 277 attacks the Plaintiffs’ ability to freely practice their religious
14 beliefs. This is particularly invidious where, as here, the law permits medical exemptions
15 and exemptions for students with Individualized Education Plans (IEPs), but provides no
16 religious exemption. The First Amendment allows for religious persons to individually
17 pursue relief from government programs that feature secular exemptions. *See, e.g.,*
18 *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990);
19 *Gonzales v. O Centro Espirita Beneficiente Uniao Vegetal*, 546 U.S. 418 (2006). As
20 shown by their declarations, several of the plaintiffs have sincere personal religious
21 objections to vaccination. When a law creates secular exemptions to its operation —
22 here, the “medical exemption” — with even an incidental burden on religious practice,
23 the State must demonstrate a compelling interest for eliminating the religious exception
24 itself. *Gonzales v. O Centro Espirita Beneficiente Uniao Vegetal*, 546 U.S. 418 (2006).
25 Where a government policy burdens an individual’s religious exercise that allows some
26 exceptions, the government must demonstrate a compelling interest in denying a religious
27 exemption to **that particular** religious claimant. *See id., at 431.*

1 As shown by the Complaint and accompanying declarations, the Plaintiffs seek
2 PBEs in the best interest of their children based on their parental rights, right to bodily
3 integrity, right to informed consent and to refuse medical intervention, and their religious
4 beliefs. The California Supreme Court has unanimously upheld the doctrine of informed
5 consent and the right to refuse unwanted medical treatment. *Thor v. Superior Court*, 5
6 Cal. 4th 725 (1993). After reviewing federal common law and California precedents on
7 self-determination and bodily integrity, the Court concluded “we respect human dignity
8 by granting individuals the freedom to make choices in accordance with their own
9 values.” *Id.* at 737. *See, e.g., Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 522 (9th Cir.
10 1984).

11 Defendants can show no compelling interest in abolishing PBEs that justifies their
12 infringements on fundamental rights. Further, Defendants cannot show that their goal is
13 narrowly tailored and that it uses the least restrictive means. The stated goal of SB 277 is
14 “total immunization of appropriate age groups against [10] childhood diseases.” The
15 State’s own data unequivocally demonstrates that the legal *status quo* protected public
16 health prior to the Amendment without placing an undue burden on students’ and their
17 families’ rights. As shown below, California has a high vaccination compliance rate
18 statewide. According to the California Department of Public Health, the rate is sufficient
19 to confer herd immunity. California also already has in place a system which balances
20 PBEs with public health concerns.

21 In 1961, when California mandated its first vaccine, California enacted a personal
22 belief exemption to prevent mandates from trespassing upon fundamental rights, stating
23 that: “[i]mmunization of a person shall not be required for admission to a public or
24 private...school...if such immunization is contrary to his or her beliefs.” L 1961 ch 837.
25 The State’s evidence shows that few California parents ever exercised this option.
26 Parents selectively vaccinated just over 2% of children – with many of those children
27
28

1 receiving significant numbers of vaccines. **Less than one third of one percent** of
2 California’s children have never been vaccinated. (RJN Ex. 2 at 2; RJN Ex. 3 at 7.)²

3 Further, the mandated vaccines purport to repress diseases that are not
4 communicated by school children or otherwise pose no threat to public safety. For
5 example: tetanus is not a contagious disease; hepatitis B is a blood borne disease and
6 even students with hepatitis B infections can attend school; it is well established that
7 vaccination status seems to have little effect on the spread of pertussis due to vaccine
8 failure; and the diphtheria and inactivated polio vaccines do not prevent the infection and
9 transmission of disease.

10 SB 277 was based on incorrect assumptions, unsupported by the public record.
11 The proponents of SB 277 assumed that healthy and disease-free children with PBEs
12 pose a risk to themselves and others, and that a large and increasing number of California
13 children are “unvaccinated.” However, data from the California Department of Public
14 Health (CDPH), the Centers for Disease Control (CDC), and other public sources belie
15 any argument that SB 277 was necessary to protect public health. According to the
16 CDPH, over 97% of school-aged children in California are fully vaccinated and an
17 additional 2% plus are selectively vaccinated. Children with PBEs account for only an
18 estimated 2.45% of California’s school age children. The overwhelming bulk of those
19 children, like the children of many of the Plaintiffs, have been selectively vaccinated in
20 their best interest.

21 SB 277’s proponents misguidedly relied on two recent incidents. The first was a
22 small measles outbreak started by an adult foreign visitor to Disneyland. No evidence
23 shows that children with PBEs caused or contributed to this outbreak. Despite the media
24

25
26 ² In 2015-2016, 2.38% of parents with kindergarteners in a California school claimed a
27 PBE. (RJN Ex. 2 at 2.) The CDC previously estimated that only .316% of California
28 children are fully unvaccinated. (RJN Ex. 3 at 7.) Extrapolating that data, at least 87%
of the 2.38% of 2015-16 kindergartners with PBEs are partially vaccinated.

1 frenzy surrounding this event, in reality more than 50,000 people visit Disneyland daily³
2 and approximately 20,000 people⁴ are directly employed by the park. Yet only 136
3 Californians contracted mild cases of the measles in the outbreak. (RJN Ex. 4 at 1).
4 Fewer than 18% of cases occurred in school-aged children, whose vaccination status is
5 unknown. (RJN Ex. 4 at 2). No transmission occurred in schools, no school was closed,
6 and not a single child was quarantined as a result of this outbreak.

7 Unrelated to the Disneyland outbreak, proponents of SB 277 also pointed to
8 pertussis (whooping cough) in California, the one disease against which children are
9 vaccinated that does have occasional significant outbreaks. These outbreaks are not a
10 result of low vaccination rates. Rather, the outbreaks result from vaccine failure and
11 waning immunity. To illustrate, for 2014, the CDPH stated that 90% of the children with
12 pertussis for whom vaccination records are available were vaccinated against pertussis.
13 (RJN Ex. 5 at 1). Further, multiple studies, including one by the FDA, show that
14 vaccinated individuals may become infected and spread pertussis while asymptomatic.
15 (See RJN Exs. 6-7). The CDPH, CDC, FDA, and others confirm that pertussis outbreaks
16 result primarily from vaccine failure and waning immunity, not unvaccinated individuals.
17 (See RJN Exs. 5-9).

18 California and federal law recognize the importance of access to public education
19 and thus have enacted numerous laws to ensure equal educational opportunities. These
20 laws seek to avoid discrimination against students based on, among other things, actual or
21 perceived contagion. As the U.S. Department of Education, Office of Civil Rights states:
22 “Discrimination based solely on the fear of contagion is discrimination based on handicap
23

24
25 ³ 2014: <http://temporarytourist.com/how-many-people-go-to-disney-world-every-day/>;
26 2015: [http://temporarytourist.com/how-many-people-go-to-disney-world-every-day-
2015-edition/](http://temporarytourist.com/how-many-people-go-to-disney-world-every-day-2015-edition/)

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28 ⁴ [https://web.archive.org/web/20140310052802/http://corporate.disney.go.com/corporate/
board_news/2004/2005_0305_dlrstudy.html](https://web.archive.org/web/20140310052802/http://corporate.disney.go.com/corporate/board_news/2004/2005_0305_dlrstudy.html).

1 ...” (RJN Ex. 10.) Thus, the State cannot legally exclude children infected with hepatitis
2 B or HIV/AIDS who are not contagious through ordinary contact. Discriminating against
3 healthy children who have PBEs, and barring them permanently from school when they
4 are disease-free and not contagious, violates their civil rights.

5 In sum, the State has no compelling interest to exclude children from school when
6 there are less restrictive and more effective means to protect the public health, as has
7 been the case for 55 years.

8 As discussed above, SB 277 exempts from its enforcement children who receive
9 special education services and related services pursuant to an Individualized Education
10 Plan. While this exemption on its face allows a select class of students to attend school
11 regardless of vaccination status, it discriminates against students who may not require
12 special education services or even those who receive accommodations pursuant to other
13 federal individualized plans, such as 504 plans, rather than IEPs. It appears that the
14 legislature added this exemption not for public health reasons but to avoid violating the
15 Federal Individuals with Disabilities in Education Act (20 U.S.C. § 1400, *et seq.*), which
16 guarantees students with disabilities access to a free and appropriate public education in
17 the least restrictive environment. There is no legitimate public health reason to
18 distinguish between IEP special education students and other students (whether other
19 special education or mainstream, typically developing students).

20 The California legislature’s official analysis of SB277 provided that “vaccination
21 rates of up to 95 percent are necessary to preserve herd immunity and prevent future
22 outbreaks.” (RJN Ex. 11 at 5.) California’s vaccination coverage rates of school-aged
23 children exceeded 95% before the legislature passed the law. For each vaccine on
24 California’s childhood vaccination schedule, statewide vaccination rates are at or above a
25 level providing protection according to the theory of herd immunity. The Immunization
26 Branch of the CDPH stated in August 2014 that “Vaccination coverage in California is at
27 or near all-time high levels.” (RJN Ex. 12.) The State has shown no benefit in increasing
28 the vaccination rate above the levels postulated by the theory of herd immunity. A

1 vaccination rate for California schools higher than that required for herd immunity does
2 not have a rational basis much less constitute a compelling state interest.

3 Furthermore, California controls the diseases targeted by vaccines as well. For
4 2014, the most recent report available, the CDPH annual report on vaccine preventable
5 diseases (RJN Ex. 13) showed that, in school-age children, there were no cases of Hib⁵,
6 hepatitis B, polio, tetanus, diphtheria, and likely⁶ rubella. There were only eight cases of
7 mumps,⁷ three cases of varicella-related hospitalization or death (in 5-19 year olds), and
8 fewer than twenty-five cases of measles in 2 to 5-year-olds and 6 to 18-year-olds). (*Id.*)
9 While in 2014 there were 11,203 cases of pertussis for all ages (including adults), with
10 6,359 of those among children 7-16 years old, pertussis outbreaks result from vaccine
11 failure and waning immunity, and not from selectively vaccinated individuals, as
12 explained above. (*See* RJN Exs. 5-9.)

13 In sum, healthy, disease-free children with PBEs are not disease vectors. They
14 pose no risk to public health that the current system does not already address. The State's
15 own data demonstrate that the *status quo ante* has worked well to control disease in
16 California.

17 Viewing the theory of herd immunity properly in the context of the state as a
18 whole, vaccination or school exclusion of the .42 of one percent of the population with
19

20
21 ⁵ The CDPH report states that there have been no cases of Hib in children under 15 since
22 2011 (RJN Ex. 23 at 7).

23 ⁶ The CDPH noted 2 cases of rubella from travelers to India and Afghanistan (RJN Ex.
24 23 at 32).

25 ⁷ The CDPH report notes that there were 27 probable cases of mumps in all age ranges in
26 2014 but only 10 confirmed cases. (RJN Ex. 23 at 25). The efficacy of the mumps
27 vaccine has come under question and outbreaks are seen even among the fully-
28 vaccinated. (*See, e.g.*, RJN Exs. 14 and 15).

1 PBEs does not constitute a compelling state interest. Since adults as well as children can
2 become sick and transmit disease, and because adults work within schools and interact
3 with others outside of school, it makes little sense to view herd immunity in the vacuum
4 of school-aged populations.

5 There is no compelling interest to exclude children who have proven immunity to
6 certain diseases but who have not had the requisite number of State-mandated vaccines.
7 Plaintiffs (list of names), like over 87 percent of children with PBEs in this State, have
8 been selectively vaccinated. Antibody titers are the standard measure of immunity –
9 whether vaccine-induced or through exposure to and recovery from disease. With
10 sufficient antibody titers, science considers a person immune. In fact, many states have
11 serological exemptions to vaccination, meaning that sufficient antibody titers exempt a
12 child from vaccination. Antibody titers are the basis on which vaccines are considered
13 effective.

14 There is no compelling interest to exclude children who have demonstrated titers
15 for the diseases for which they are “missing” vaccines – such as Plaintiff Ana Whitlow’s
16 child, who has demonstrated titers for diphtheria, pertussis and tetanus, but is simply
17 missing one vaccination against those three diseases.

18 By essentially forcing children to be homeschooled, SB 277 violates equal
19 protection by rendering the quality of a child’s education a function of the wealth of his
20 or her family. Furthermore, SB 277 violates equal protection by causing poorer families
21 to be unable, or less able than wealthier families, to obtain medical exemptions, which
22 will affect the child’s enrollment in school. To illustrate, even if poor parents are certain
23 their child will suffer an adverse reaction based on past adverse experiences, without the
24 economic resources to substantiate this medically, the family will not be able to secure a
25 medical exemption. This amounts to disparate treatment on the basis of economic status.

26 In fact, even vaccine proponents recognize that the overbroad Amendment is
27 troubling:
28

1 Perhaps the most persuasive argument against invoking a sweeping policy
2 that eliminates [non-medical exemptions] from all vaccines is that it violates
3 the ethical principle of least restriction. This principle offers guidance for
4 balancing the competing values of individual liberty and the common good
5 inherent to vaccination policy: “if two options exist to address a public
6 health problem, we are required, ethically, to choose the approach that poses
7 fewer risks to other moral claims, such as liberty, privacy, opportunity, and
8 justice, assuming benefits are not significantly reduced.”⁸

9 California already has in place a restrictive law that has narrowed the conscientious
10 exemption based on personal beliefs and reduced PBE rates substantially. AB2109,
11 which became effective in January 2014, creating section 120365 of the Health & Safety
12 Code, requires parents claiming a PBE to submit a form to their school or child care
13 facility, stating their objection and containing verification from a health care practitioner
14 of the fact that the parent had received information about the benefits and risks of
15 vaccination and the risks of vaccine preventable diseases. While AB2109 places certain
16 burdens on parents’ use of the PBE, it does so without crushing fundamental rights.
17 AB2109 is an effective and far less restrictive way to protect public health than SB 277.

18 Moreover, California law already codifies the authority to exclude selectively
19 vaccinated children during outbreaks. California Health & Safety Code § 120365(e).
20 This state police power has lived in harmony with the PBE for 55 years and has
21 effectively protected public health.

22 **II. PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE**
23 **HARM, AND HAVE INADEQUATE LEGAL REMEDIES**

24 Violation of fundamental rights constitutes irreparable harm. Because SB 277
25 violates Plaintiffs’ fundamental rights to education, bodily integrity, parental choice,
26 informed consent, Free Exercise of religion, due process and equal protection, the Court

27 ⁸ Opel DJ, *et al.*, “Childhood Vaccine Exemption Policy: The Case for a Less Restrictive
28 Alternative,” *Pediatrics* 137(4):1-4 (April 2016) (citation omitted). (RJN Ex. 16).

1 must find that irreparable harm will ensue if the *status quo* is not preserved while this
2 case is being litigated.

3 Exclusion from school constitutes irreparable injury. SB 277 will bar tens of
4 thousands of students, who either will lose their Personal Belief Exemptions or be unable
5 to obtain a PBE for the coming school year. (*See* RJN Ex. 17.)⁹ Plaintiffs' children
6 would be irreparably harmed by being excluded from school.

7 Additionally, special education students in year-round IEP Programs face
8 immediate expulsion.

9 **III. BALANCE OF HARDSHIPS DECISIVELY FAVORS PLAINTIFFS**

10 Plaintiffs seek to preserve the *status quo* that has existed in California for 55 years
11 pending the outcome of this litigation. Without an injunction, the state will deprive
12 children of significant constitutionally protected rights, including the fundamental right to
13 an education. Individual children's education will suffer as well. Parents may be forced
14 to vaccinate their children, in violation of these rights. Other families may face economic
15 and emotional hardships in order to protect their children. Some of these decisions –
16 such as forced vaccination without informed consent – cannot be undone.

17 The State would not face any similar hardship if an injunction were issued.
18 Delaying implementation of SB 277 will not negatively impact public health. The State's
19 own implementation plan shows lack of hardship on the State if implementation is
20 enjoined. Specifically, SB 277 grandfathers all children in school with PBEs for their
21 entire remaining grade span. The three grade spans are: birth to preschool; kindergarten
22 through grade 6; and grades 7 through 12. (Cal. Health & Safety Code § 120335(g).)

24
25 ⁹ An estimated 164,148 students had PBEs in 2015. *See* RJN Ex. 17. This number
26 represents 2.45% of all students in California, K-12. *Id.* California tracks PBEs at
27 gateway gradespan years (*e.g.*, Kindergarten and 7th grade for school-aged children),
28 therefore the authors used kindergarten and seventh grade data from prior years to
estimate numbers for each grade level. *Id.*, at 619.

1 This means that a child who just completed kindergarten with a PBE may remain in
2 school under that PBE for the next six years.

3
4 **IV. PUBLIC INTEREST WEIGHS IN PLAINTIFFS' FAVOR**

5 Upholding the fundamental rights of many Californians, and keeping children in
6 school, undoubtedly serves the public interest. There is no public health emergency to
7 override those fundamental rights.

8
9 DATED: July 1, 2016

Respectfully submitted,

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