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18 **UNITED STATES DISTRICT COURT**
19 **SOUTHERN DISTRICT OF CALIFORNIA**

20 ANA WHITLOW, et al.,

21 Plaintiffs,

22 vs.

23 STATE OF CALIFORNIA, et al.,

24 Defendants.

Case No. 3:16-cv-01715-DMS-BGS

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

Courtroom: 13A
Judge: The Honorable Dana
Makato Sabraw
Trial Date: None Set
Action Filed: July 1, 2016
Hearing Date: August 12, 2016
Hearing Time: 1:30 p.m.

1 Plaintiffs respectfully submit this Memorandum of Points and Authorities in
 2 Support of their Motion for a Preliminary Injunction, pursuant to 42 U.S.C. § 1983,
 3 28 U.S.C. § 1343(a)(3), and 28 U.S.C. § 2201.¹

4 I. PRELIMINARY STATEMENT

5 In a few short weeks, all California students will be returning to classrooms,
 6 except some students with previously-valid Personal Belief Exemptions (“PBEs”) to
 7 California’s school vaccination requirements, and those who would have exercised
 8 PBEs. Effective July 1, 2016, Senate Bill (“SB”) 277 permanently bars these children
 9 from every public and private school in the State, in a dramatic and unprecedented
 10 departure from California’s long-standing history of unwavering protection of every
 11 child’s right to an equal education. Without injunctive relief, in SB 277’s first year of
 12 implementation alone, approximately 33,000 children, including many with
 13 disabilities, are barred from classrooms and deprived of an equal education or, for
 14 some children, any education at all. Every day throughout the State, schools are
 15 closing their doors to children who want and deserve to go to school, depriving them
 16 of fundamental rights and subjecting them to severe humiliation, prejudice, stigma
 17 and emotional distress.

18 Crafted at the intersection of irrational panic and special-interest politics, SB
 19 277 irreconcilably conflicts with the California and United States Constitutions and
 20 numerous State and federal laws. SB 277 deprives children of the fundamental right
 21 to an equal education guaranteed by the California Constitution. *See* Cal. Const. art.
 22 IX, §§ 1 and 5. In a series of decisions in *Serrano v. Priest*, 5 Cal. 3d 584 (1971)
 23 (*Serrano I*), *Serrano v. Priest*, 18 Cal. 3d 728 (1976) (*Serrano II*), and *Serrano v.*

24
 25 ¹ Plaintiffs have met and conferred with the California Attorney General’s
 26 office, counsel for Defendant The California Department of Public Health. Plaintiffs
 27 proposed a stay on the enforcement of SB227 pending the outcome of this action or,
 28 alternatively for the current school year, to be revisited again in subsequent school
 years during the pendency of this action. Alternatively, Plaintiffs proposed a briefing
 schedule for this motion. *See* Declaration of James S. Turner, Esq., ¶12 and Ex. 1.
 Defendant declined to stay SB 277 or to stipulate to a briefing schedule. *Id.* at ¶13.

1 *Priest*, 20 Cal. 3d 25 (1977) (*Serrano III*), the California Supreme Court held, clearly
2 and unequivocally, that education is a fundamental right in California, *Serrano I*, at
3 605-606, *Serrano II*, at 766, that “society has a compelling interest in affording
4 children an opportunity to attend school,” *Serrano I*, at 606 (citation omitted), and
5 that courts “must unsympathetically examine any action of a public body which has
6 the effect of depriving children of the opportunity to obtain an education.” *Id.*
7 (citation omitted). Further recognizing the central role of education in society,
8 California **requires** that all children attend school. Educ. Code § 48200.

9 Moreover, to provide an equal education for all children and to prevent
10 discrimination, both California and federal law prohibit a child’s expulsion from
11 school based on fear of contagion. For example, federal law prohibits the exclusion of
12 children with chronic contagious illnesses such as HIV/AIDS and hepatitis from
13 school. *See* 20 U.S.C. § 794, 42 U.S.C. § 12132, *et seq.* Consistent with this
14 protection of all children’s rights to an education despite health status, in 2004, the
15 California Legislature repealed a statute that allowed exclusion of children with
16 contagious or infectious diseases from school. *See* Educ. Code § 48211 (allowing
17 schools to “exclude children of filthy or vicious habits, or children suffering from
18 contagious or infectious diseases”), *repealed* by AB 2855 (2004). Flying in the face
19 of State and federal laws protecting children from discrimination based on their actual
20 or perceived health status or fear of contagion, SB 277 permanently bars healthy,
21 non-contagious children from schools based **precisely** on a baseless and irrational fear
22 of contagion. The State thus discriminates against non-infectious and non-contagious
23 children who pose no threat to the public health, based **solely** on vaccination status,
24 permanently excluding from school this discrete minority of children without any
25 showing that such discrimination furthers a compelling state interest and is necessary
26 to achieve that interest.

27 The harm to Plaintiffs and their children from SB 277’s draconian result is
28 immense and it is irreparable. Schools are rejecting kindergarten enrollment packages

1 and issuing expulsion notices to incoming seventh graders, medical exemptions are
2 being scrutinized and rejected, children with disabilities and learning challenges are
3 losing their federally-protected educational benefits, parents are facing the cruel
4 illusion of choice between abandoning their deeply held conscientious or religious
5 convictions, quitting their jobs, or leaving the State, and tens of thousands of children
6 are hearing that there is something so inherently wrong with them and so dangerous
7 about them, that they will never again be allowed in school. As the foregoing
8 demonstrates and as discussed in detail below, SB 277 comes at a tremendous cost to
9 the children and families of California and there is simply no justification for it, let
10 alone a compelling state interest.

11 As set forth below and as demonstrated by Plaintiffs' First Amended
12 Complaint ("FAC"), Plaintiffs far exceed the minimum showing to support a
13 preliminary injunction. First, Plaintiffs have a high likelihood of success on the merits
14 because SB 277 and Defendants' conduct in its enforcement impermissibly infringe
15 on the Plaintiffs' fundamental right to education and other constitutionally-protected
16 rights, as well as an array of other federal and state laws. Second, Plaintiffs can
17 demonstrate irreparable injury because Defendants are infringing multiple
18 constitutionally-protected rights and causing other injuries for which Plaintiffs have
19 no adequate remedy at law. Third, the balance of hardships tips overwhelmingly
20 towards Plaintiffs, whose children are excluded from school and for whom
21 homeschooling is a severe hardship or impossibility, resulting in threatened truancy
22 charges or removal of children from their parents. Finally, an injunction will advance
23 the public interest to ensure that both fundamental rights and the public health are
24 protected under the *status quo ante*. See *Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008).
25 Accordingly, Plaintiffs respectfully request that the Court enter an order enjoining
26 Defendants from enforcing SB 277 pending the outcome of this action.

27
28

1 **II. STATEMENT OF FACTS**

2 **A. SB 277 NEGATIVELY IMPACTS PLAINTIFFS**

3 Effective July 1, 2016, SB 277 requires that schools deny admission to children
 4 who previously attended school and daycare with PBEs exempting them from one or
 5 more of the 30 to 38 doses of vaccines California requires for school attendance. *See*
 6 Health & Safety Code §§ 120325, 120335, *see also* Cal. Dept. Pub. Health
 7 (“CDPH”), *Immunization Timing 2016*, RJN Ex. 1. As part of its implementation, SB
 8 277 establishes “checkpoints,” consisting of entry into daycare, entry into
 9 kindergarten, and advancement to the seventh grade. Health & Safety Code §
 10 120335(g). A child cannot pass a “checkpoint” without first becoming fully-
 11 vaccinated with all of the required vaccine doses. *Id.* Accordingly, in its first year of
 12 implementation this fall, SB 277 impacts children entering kindergarten, advancing to
 13 the seventh grade, or entering daycare, while allowing all other children, including
 14 children with PBEs who have not reached a “checkpoint,” to remain in school. *Id.* SB
 15 277 exempts children who are homeschooled or in independent study programs with
 16 no classroom-based component. Health & Safety Code § 120335(f). It also requires
 17 that schools honor Individualized Education Programs (“IEPs”) of children with
 18 special needs or learning disabilities. Health & Safety Code § 120335(h).

19 As the declarations submitted in support of this motion demonstrate, SB 277 is
 20 causing severe hardship and distress for children and families across the State as
 21 schools are, among other things: (a) rejecting kindergarten enrollment packages and
 22 issuing expulsion notices to seventh graders, *see, e.g.*, Declarations (“Dec.”) of
 23 Andrade, ¶ 17, Loy, ¶¶ 4-6 and 19, Nicolaisen, ¶¶ 4-5 and 15, Owens, ¶ 22, Schultze-
 24 Alva, ¶¶ 20-21, Sutton, ¶¶ 5-19, and Whitlow, ¶¶ 3-5 and 16; (b) scrutinizing and
 25 refusing to accept physician-provided medical exemptions and delayed vaccination
 26 schedules, *see, e.g.*, Dec. of Schultze-Alva, ¶ 15, Sutton, ¶¶ 5-19; (c) denying
 27 admission and services to children with disabilities, learning challenges and IEPs,
 28 *see, e.g.*, Dec. of Delgado, ¶¶ 9-18, Saunders, ¶ 7 and (d) denying admission to

1 children with lab-confirmed proof of immunity to illnesses for which vaccination is
2 required, *see, e.g.*, Dec. of Whitlow, ¶¶ 18-19. Faced with this conduct, parents with
3 deeply-held religious objections to certain vaccine ingredients, including aborted fetal
4 cells, are being forced to either violate their faith or lose their children's fundamental
5 right to an education. *See, e.g.*, Dec. of Andrade, ¶¶ 7-12, 15 and 18, Crain, ¶ 9,
6 Nicolaisen, ¶¶ 13-14, Schultze-Alva, ¶¶ 16-18, Whitlow ¶ 17.

7 Plaintiffs care deeply about their children and are distressed about telling their
8 children that they cannot go to school. Yet with each passing day and the fast-
9 approaching start of the fall semester, Plaintiffs find themselves having to choose
10 between their children's health and unique needs, their deeply-held conscientious and
11 religious convictions, their financial, employment and family obligations, and their
12 children's desire to go to school with their peers.

13 **B. PRE-SB 277 CALIFORNIA LAW**

14 California has a long-standing history of respecting bodily autonomy and
15 personal choice regarding vaccination. Indeed, California's PBE is as old as its first
16 polio mandate. In 1961, when the California legislature enacted a polio mandate, it
17 did so subject to a PBE, a simple statement that vaccination was contrary to one's
18 beliefs. *See* AB 1940, DeLotto. The school vaccination schedule has expanded
19 dramatically since 1961, with the addition of new vaccines and additional doses of
20 existing vaccines, and now requires that children receive between 30 and 38 vaccine
21 doses to attend school. PBEs have remained available with each expansion of the
22 vaccination schedule. Yet, in 55 years, PBE rates have never exceeded 3.2 percent.

23 In 2012, the State enacted AB 2109, codified in Health and Safety Code §
24 120365 and effective January 1, 2014. AB 2109 required parents who wished to use
25 PBEs to obtain a physician's signature attesting that the physician provided the parent
26 with information regarding the benefits and risks of vaccines and the risks of the
27 covered illnesses. AB 2109 also allowed for the temporary exclusion from school if a
28 child with a PBE was exposed to an illness for which a vaccine exists. AB 2109 had

1 been in effect for less than one school year when SB 277 was introduced in the midst
2 of the Disneyland measles outbreak, which did not affect schools and was not caused
3 or exacerbated by children with PBEs.

4 As a result of AB 2109 and prior to the introduction and enactment of SB 277,
5 PBE use was declining. PBE rates dropped from an already low 3.15% for
6 kindergarteners in 2013-14 to 2.54% in 2014-15. Rates fell further in 2015-16 to
7 2.38%,² before SB 277 went into effect. *See* CDPH 2015-16 K Assess., RJN, Ex. 2, at
8 2. Accordingly, to the extent the State's goal with SB 277 was to increase vaccination
9 rates, those rates were increasing under AB 2109, rendering SB 277 unnecessary and
10 overbroad. The injunction Plaintiffs seek against enforcement of SB 277 would
11 reinstate AB 2109, maintaining the *status quo ante*.

12 **C. PUBLIC HEALTH DATA DOES NOT SUPPORT SB 277**

13 SB 277 gained momentum and was rushed through the legislative process
14 based on incorrect assumptions that the public record does not support. SB 277's
15 proponents repeatedly created the impression that the State was on the brink of an
16 epidemic and that healthy, disease-free children with PBEs are somehow capable of
17 transmitting diseases they do not have and endangering public health. *See, e.g.,* Sen.
18 Judic. Cmtee, Memo., SB277, Version: April 22, 2015, RJN Ex. 3, at 6.

19 Without factual basis, the impression was also created that a large and
20 increasing number of California children are "unvaccinated." But data from the
21 CDPH, the U.S. Centers for Disease Control ("CDC"), and other public sources belie
22 those claims. According to CDPH data, over 97 percent of kindergartners entered
23 school in 2014-15 and 2015-16 without any exemption (medical or PBE). *See* CDPH
24 2015-16 K Assess., RJN, Ex. 2, at 4. However, even these high vaccination rates
25 underestimate vaccine coverage. A significant percentage (up to 87 percent) of

26
27 ² Substantial drops were also seen for 7th graders (PBE rates fell from 3.26%
28 in 2013-14 to 2.09% in 2014-15, and further fell to 1.66% in 2015-16). *See* CDPH
2015-16 7th Grade Assess., RJN Ex. 4, at 1.

1 children with PBEs are partially vaccinated.³ CDPH does not track individual vaccine
2 data for children with PBEs, artificially depressing vaccination rates on a vaccine-by-
3 vaccine basis. According to the CDC, however, less than one percent of children are
4 completely unvaccinated. *See* footnote 3.

5 SB 277's proponents premised the law's necessity on a small measles outbreak
6 in late 2014 and early 2015, which originated from a foreign visitor to Disneyland. Of
7 the 136 (0.00035%) Californians who contracted measles, the majority were adults.
8 No evidence shows that children with PBEs caused or contributed to this outbreak: no
9 school-based transmission was reported, no child was quarantined, and no California
10 school closed because of the outbreak. *See* CDPH, *Cal. Measles Surveillance Update*
11 (April 17, 2015), RJN Ex. 5, at 1, 2 (school-aged children represented only 18% of
12 cases, and their vaccination status was not reported).

13 SB 277's proponents also pointed to occasional pertussis (whooping cough)
14 outbreaks in California to show the need to eliminate PBEs. But CDPH, CDC, FDA
15 and others attribute these outbreaks not to children with PBEs, but rather to vaccine
16 failure, waning immunity, and asymptomatic transmission by vaccinated individuals.
17 *See* CDPH, *Pertussis Report* (June 1, 2015), RJN Ex. 6; FDA News Release,
18 (November 27, 2013), RJN Ex. 7; Benjamin M. Althouse & Samuel V. Scarpino,
19 *Asymptomatic transmission and the resurgence of Bordetella pertussis*, 13 BMC MED
20 (2015), RJN Ex. 8; Associated Press, *State whooping cough outbreak shows vaccine*
21 *weakness* (February 8, 2015), RJN Ex. 9; Greg Bledsoe and Laura McVicker, *Del*
22 *Mar Mom Frustrated Family Got Whooping Cough After Vaccinating* (January 12,
23 2015), RJN Ex. 10. Notably, with respect to pertussis cases in 2014, as SB 277's

24 _____
25 ³ The CDC has estimated that only 0.316 percent of California children are
26 fully unvaccinated. *See* Philip J. Smith, *et al.*, *Children Who Have Received No*
27 *Vaccines: Who Are They and Where Do They Live*, 114 PEDIATRICS 187-195 (2004),
28 RJN Ex. 11, at 193. Extrapolating that data, at least 87% of the 2.38% of 2015-16
kindergartners with PBEs are partially vaccinated. *Id.*; CDPH 2015-16 K Assess.,
RJN Ex. 2, at 2; *see also* News from the National Academies, *IOM Report Details*
Strategy for Monitoring Safety of Childhood Immunization Schedule (January 16,
2013), RJN Ex. 12, at 2 (less than 1% of children are completely unvaccinated).

1 proponents were blaming PBEs for whooping cough outbreaks, CDPH data and
 2 reports showed that **90 percent** of the children with whooping cough for whom
 3 vaccination records were available were vaccinated against pertussis. CDPH June 1,
 4 2015 Pertussis Report, RJN Ex. 6, at 1.

5 **D. IMPLEMENTATION OF SB 277**

6 SB 277's implementation has been riddled with problems, causing distress to
 7 Plaintiffs and confusion for schools and students. CDPH, through local health
 8 departments, is wrongfully training school nurses to scrutinize and reject physician-
 9 provided medical exemptions, *See, generally*, Glaser Dec. and Exs. The State
 10 Department of Education ("DOE") has declined to guide implementation of SB 277,
 11 including regarding the education of federally-protected students with disabilities. *See*
 12 Adams Dec. ¶¶ 12-15, Ex. 2; *see also* Jane Meredith Adams, *Avoiding controversy,*
 13 *California declines to clarify vaccination law and special ed* (May 9, 2016), RJN Ex.
 14 13; and Jane Meredith Adams, *Some districts exempt students in special ed from*
 15 *vaccination law* (January 6, 2016), RJN Ex. 14. With no guidance from the State,
 16 school districts are applying the law arbitrarily, causing disparate treatment of
 17 children, including federally-protected children with disabilities.

18 1. Inconsistent Interpretation of IEP Amendment

19 SB 277 exempts children with disabilities who have Individualized Education
 20 Plans ("IEPs") from vaccine mandates. Health and Safety Code § 120335(h). In
 21 contravention of SB 277, some school districts refuse to admit IEP students and are
 22 even threatening to seek court orders against parents to vaccinate children.⁴ Districts
 23 refusing to admit IEP students violate the rights of students under the Federal
 24 Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*,
 25 which guarantees students with qualifying disabilities a free and appropriate public
 26

27 ⁴ Adams Dec. Ex. 1 (letter dated August 19, 2015, from Ronald D. Wenkart,
 28 General Counsel for the Orange County Department of Education, OPAD 15-20:
 "Questions and Answers Regarding Senate Bill 277"), at 6.

1 education in the least restrictive environment.⁵ School districts have told Plaintiffs
 2 Veronica Delgado and Dawn Saunders that their children with IEPs cannot enroll,
 3 despite SB 277's explicit terms. *See* Dec. of Delgado ¶¶ 9-18, Saunders, ¶7. Dawn
 4 Saunders, a widowed mother of three, already has been forced to put her daughter
 5 with a traumatic brain injury in a homeschool program, causing the family financial
 6 and emotional stress and stalling her daughter's progress. Saunders Dec., ¶¶ 7, 13-16.
 7 Ms. Saunders works two part-time jobs to provide for her children and manage her
 8 daughter's schedule. *Id.*, ¶ 14. Her children qualify for free school meals but because
 9 SB 277 bans her daughter from school, this assistance is unavailable. *Id.*, ¶ 16.

10 2. Undermining of Medical Exemptions

11 SB 277 exempts children upon a physician's written statement that
 12 vaccination is unsafe for the child. Health & Safety Code § 120370(a). This child
 13 safety requirement contains no provision allowing school districts, health departments
 14 or anyone else to review or reject a physician's medical judgment. In contravention of
 15 the law, however, some local health departments are providing schools with incorrect
 16 information about exemptions, causing illegal scrutiny and rejection of physician-
 17 provided medical exemptions. These actions not only violate SB 277, but also may
 18 violate many federal and state privacy laws. *See, generally*, Glaser Dec. and Exs.
 19 These actions also pressure doctors to deny medical exemptions that protect
 20 children's safety and health. The result is physicians summarily refusing, as a matter
 21 of policy, to write medical exemptions for medically-fragile children who are at risk
 22 for potential vaccine injury. *See* Schultze-Alva Dec., ¶ 15 (recounting pediatrician's
 23 statement that her hospital does not allow doctors to write medical exemptions);
 24 Owens Dec. ¶¶ 18-20 (recounting doctor's statement that he had received training
 25 that medical exemptions should be based on CDC guidelines); Sutton Dec. ¶ 5

26 _____
 27 ⁵ Many IEPs indicate year round services, and many specify a required class
 28 size, therapy services that are provided at the school (sometimes in the classroom,
 and often with peers), social skills groups or activities, and additional resources and
 supports that cannot be provided readily, if at all, outside school.

1 (school’s questioning of medical exemption from physician); Hogan Dec. ¶¶ 8-9
 2 (physicians in disagreement and none step forward to write a medical exemption).

3 **III. ARGUMENT**

4 As discussed in detail below, an order enjoining the State from enforcing SB
 5 277 is necessary and warranted, because Plaintiffs can establish: (1) a likelihood of
 6 success on the merits, (2) the likelihood of irreparable injury to Plaintiffs, (3) that the
 7 balance of hardships tips towards Plaintiffs, and (4) that an injunction will advance
 8 the public interest. *See Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008); *Alliance for the*
 9 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

10 **A. PLAINTIFFS HAVE A STRONG LIKELIHOOD OF SUCCESS** 11 **ON THE MERITS ON ALL OF THEIR CLAIMS**

12 SB 277 is in irreconcilable conflict with both the State and Federal Constitutions,
 13 as well as numerous state and federal laws.

14 1. Plaintiffs Will Succeed on Their Claims Under The California and 15 Federal Constitutions

16 As the threshold matter, strict scrutiny review applies to Plaintiffs’ claims
 17 under the State and Federal Constitutions. Under California law, courts must apply
 18 strict scrutiny when Plaintiffs allege violations of fundamental rights protected under
 19 the State Constitution or when suspect classifications are at issue. *Butt v. State of*
 20 *California*, 4 Cal. 4th 668, 685-86 (1992); *Serrano I*, 5 Cal. 3d at 597. In such
 21 instances, “the presumption of constitutionality normally attaching to state legislative
 22 classifications falls away,” *Serrano II*, 18 Cal. 3d at 768, and “the state bears the
 23 burden of establishing not only that it has a compelling interest which justifies the
 24 law but that the distinctions drawn by the law are necessary to further its purpose.”
 25 *Serrano I*, 5 Cal. 3d at 597; *Serrano II*, 18 Cal. 3d at 761.

26 Education is a fundamental right in California, guaranteed by the State
 27 Constitution. Cal. Const. art. 9 §§ 1 and 5; *Serrano I*, 5 Cal. 3d at 608-09 (“the
 28 distinctive and priceless function of education in our society warrants, indeed

1 compels, our treating it as a ‘fundamental interest’”). Thus, courts “must
2 unsympathetically examine any action of a public body which has the effect of
3 depriving children of the opportunity to obtain an education.” *Serrano I*, 5 Cal. 3d at
4 606 (citation and internal quotation marks omitted).

5 Strict scrutiny also applies because wealth or socioeconomic status, a suspect
6 classification under *Serrano*, is at issue in the enforcement of SB 277. *Serrano I*, 5
7 Cal. 3d at 597, 614 (holding that “[e]ducation must respond to the command of the
8 equal protection clause” and that a scheme “invidiously discriminates against the
9 poor” where it “makes the quality of a child’s education a function of the wealth of
10 his parents”). Only discriminatory impact, not motivation, is required. *Id.* at 602.
11 Here, SB 277 closes the doors of all public and private schools to Plaintiffs’ children,
12 forcing them into homeschooling or independent study. But homeschooling is not
13 viable for most families, including single-parent households, families who rely on
14 two incomes to survive, and immigrant families who cannot homeschool in the
15 English language as required by law. Numerous Plaintiffs do not have the means to
16 homeschool and SB 277 creates significant hardship for them. *See, e.g.*, Dec. of
17 Crain, ¶¶ 10-15, Delgado, ¶¶ 19-22, Loy, ¶¶ 19-20, Nicolaisen, ¶¶ 16-22, Saunders,
18 ¶¶ 13-17, Andrade, ¶¶ 13-14 and 16, and Sutton, ¶¶ 4 and 20. Similarly, families who
19 cannot afford expensive medical or genetic testing to help identify susceptibility to
20 vaccine injury are foreclosed from obtaining medical exemptions without which their
21 children cannot attend school. *See, e.g.*, Saunders Dec. ¶¶ 11-12. Accordingly, SB
22 277 disproportionately impacts low-income and immigrant families, necessitating
23 strict scrutiny review.

24 Strict scrutiny also applies to Plaintiffs’ claims under the U.S. Constitution
25 because Plaintiffs assert claims under the Free Exercise Clause, as well as “hybrid
26 rights” together with due process and equal protection claims under the Fourteenth
27 Amendment. *See Empl. Div. Oregon Dept. of Human Res. v. Smith*, 494 U.S. 872,
28 881-82 (1990); *Thomas vs. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 707 (9th

1 Cir. 1999), *rev'd on other grounds en banc*, 220 F.3d 1134 (9th Cir. 2000) (“a free
2 exercise plaintiff must make out a “colorable claim” that a companion right has been
3 violated—that is, a “fair probability” or a “likelihood,” but not a certitude, of success
4 on the merits.”). Here, the State impermissibly impinges on Plaintiffs’ rights to Free
5 Exercise and exerts an undue burden on Plaintiffs’ rights under the Fourteenth
6 Amendment to individual autonomy, parental rights, bodily integrity and informed
7 consent.

8 Both the United States and California Constitutions protect the free exercise of
9 religion. U.S. Const. amend. I; Cal. Const. art. I, § 4; *see Wisconsin v. Yoder*, 406
10 U.S. 205, 215 (1972) (“...only those interests of the highest order and those not
11 otherwise served can overbalance legitimate claims to the free exercise of religion”).
12 Moreover, the Supreme Court’s First Amendment jurisprudence allows religious
13 objectors to individually pursue relief from government programs that permit secular
14 exemptions. *Oregon v. Smith*, 494 U.S. at 884; *see also Gonzales v. O Centro*
15 *Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430-31 (2006) (where an
16 individual's religious exercise is burdened by a policy that does admit some
17 exemptions, the government must demonstrate a compelling interest in denying
18 exemption to the particular claimant). The “government cannot discriminate between
19 religiously motivated conduct and comparable secularly motivated conduct in a
20 manner that devalues religious reasons for acting.” *Tenafly Eruv Association, Inc. v.*
21 *Borough of Tenafly*, 309 F.3d 144, 169 (3d Cir. 2002); *see also Fraternal Order of*
22 *Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir.1999).

23 Here, many Plaintiffs find conflict between full vaccination and their religious
24 beliefs and practices, including sincere opposition to abortion and vaccines that are
25 made using aborted fetal tissue. *See, e.g.*, Dec. of Andrade, ¶¶ 7-12, 15 and 18, Crain,
26 ¶ 9, Nicolaisen, ¶¶ 13-14, Schultze-Alva, ¶¶ 16-18, and Whitlow, ¶ 17. SB 277 bars
27 children from school because their families have a faith-based objection to certain
28 vaccine ingredients. Some are guided by their faith to not vaccinate. As such, SB 277

1 imposes a penalty against Plaintiffs for their religiously-motivated conduct, thus
2 placing a substantial burden on Plaintiffs' religious rights and forcing parents to
3 choose between the dictates of their faith and their children's education. *See Everson*
4 *v. Board of Education*, 330 U.S. 1, 16 (1947) (finding that a substantial burden exists
5 when a person must choose between exercising religious beliefs and participating in a
6 public program). SB 277 further impinges on Plaintiffs' Free Exercise rights because
7 it provides secular exemptions, such as the medical exemption, homeschooling/
8 independent study exemption and IEP exemption, without a corresponding religious
9 accommodation. *Oregon v. Smith, supra*.

10 In addition to substantially burdening Plaintiffs' Free Exercise rights, SB 277
11 substantially burdens parental rights, rights to bodily integrity and informed consent,
12 further necessitating strict scrutiny review. Regarding parental rights, the "primary
13 role of parents in the upbringing of their children is...established beyond debate as an
14 enduring American tradition." *Yoder*, 406 U.S. at 232; *see also Santosky v. Kramer*,
15 455 U.S. 745, 753 (1982) (recognizing a "fundamental liberty interest of natural
16 parents in the care, custody, and management of their child"); *Meyer v. Nebraska*,
17 262 U.S. 390 (1923) (recognizing parents' fundamental right to direct the education
18 and raising of children); *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (requiring a
19 compelling interest to substitute a state's decisions for parents). Plaintiffs'
20 declarations demonstrate that their decisions regarding both the education and health
21 of their children, including vaccination decisions, are well-considered and based on
22 their children's best interests. SB 277 essentially eliminates parental decision-making
23 with regard to the education and health of Plaintiffs' children.

24 The right to bodily integrity is protected by the Due Process Clause. *See*
25 *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Planned Parenthood of*
26 *Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992); *Rochin v. California*,
27 342 U.S. 165, 172 (1952); *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 522 (9th Cir.
28 1984). California law also recognizes this fundamental right. *See Thor v. Superior*

1 *Court*, 5 Cal. 4th 725, 737-38 (1993). Plaintiffs’ declarations demonstrate that they are
2 concerned about unwarranted state intrusions into their children’s bodily integrity
3 through coerced medical treatment, particularly where the children have had an
4 adverse reaction to a vaccine in the past, where the children are medically fragile and
5 at risk of vaccine injury, or where there is a family history that raises genuine
6 concern. *See, e.g.*, Dec. of Andrade, ¶¶ 7, Crain, ¶ 6, Delgado, ¶¶ 4-5, Loy, ¶¶ 11-14
7 and 17, Owens, ¶¶ 6-14 and 17, Saunders, ¶¶ 8 and 10, Schultze-Alva, ¶¶ 7-8 and 14-
8 15, Sunukjian, ¶¶ 4-9, Sutton, ¶ 5, Veneziano, ¶¶ 8 and 18, Whitlow ¶¶ 9-10, 13, and
9 15.

10 Finally, both federal and state law recognize the principle of informed consent.
11 The California Supreme Court has upheld the doctrine of informed consent and the
12 right to refuse unwanted medical treatment. *Thor*, 5 Cal. 4th at 737-38 (“we respect
13 human dignity by granting individuals the freedom to make choices in accordance
14 with their own values”) (internal quotation marks and citation omitted); *see also*
15 *Harbeson*, 746 F.2d at 522 (“The doctrine [of informed consent] is premised on the
16 fundamental principle that a competent individual has a right to determine what shall
17 be done with her own body”). Vaccination is a medical procedure. Like all medical
18 procedures, it is not risk free.⁶ In any medical procedure that carries risk, there must
19 be patient choice. This is why free and informed consent is the cornerstone of
20 medical ethics. *See Rivers v. Katz*, 67 N.Y.2d 485, 494 (1986) (recognizing the
21 “fundamental right to make decisions concerning one’s own body”). SB 277
22 eliminates Plaintiffs’ rights to informed consent regarding vaccination by
23 conditioning access to education on its coerced waiver.

24 _____
25 ⁶Even with careful screening, some children will be injured or killed by
26 vaccines. *See* 42 U.S.C. § 300aa-1 to 300aa-24 (acknowledging vaccines carry
27 serious risks and shielding vaccine manufacturers and doctors from liability by
28 establishing the National Vaccine Injury Compensation Program (“NVICP”) to
compensate vaccine injury victims and their families). Since its inception in 1989,
NVICP has paid over \$3 billion for vaccine injuries and deaths. *See* U.S. Dept. of
Health and Human Serv., Health Res. and Serv. Admin., Data and Statistics, *Monthly
Status Report* (updated July 1, 2016), RJN Ex.15, at 8-9.

1 2. SB 277 Fails Strict Scrutiny

2 Because SB 277 deprives children of their fundamental right to an education,
3 implicates the suspect classification of socioeconomic status, unduly burdens the free
4 exercise of Plaintiffs' religion and impinges on parental rights and rights to informed
5 consent and bodily autonomy, strict scrutiny applies, placing the burden on the State
6 to establish that a compelling state interest exists for SB 277 and that SB 277 is
7 necessary. *Serrano I*, 5 Cal. 3d at 597. The State cannot satisfy its burden.

8 a. No Compelling Interest Exists For SB 277

9 The State must show that it has a compelling state interest sufficient to justify
10 its complete abdication of its constitutional mandate to provide education to all
11 California children. The State's interest must also be sufficiently compelling to justify
12 deprivation of Plaintiffs' fundamental rights, including rights to education, religious
13 freedom, equal protection and due process. The State cannot meet this high burden.

14 While compelling education under Education Code section 48200, under SB
15 277, the State has abdicated its constitutional mandate to educate children. But the
16 State's duty to educate California's children is non-delegable and no compelling state
17 interest exists to justify expelling tens of thousands of healthy, non-infectious, non-
18 contagious children from school, scapegoating and marginalizing them. Yet that is all
19 SB 277 will accomplish. Strict scrutiny requires the State to justify depriving *each*
20 *child* of the fundamental and constitutionally protected right to education. The State
21 cannot meet its burden.

22 During the legislative process, the reasons provided to justify barring
23 Plaintiffs' children from school were to achieve full vaccination to keep schools
24 "free from dangerous contagions" and eliminate "pockets" of high PBE use. But none
25 of these stated interests justify permanently barring children from school.

26 As a threshold and important matter, the State must admit that at the heart of
27 SB 277 is the utterly baseless treatment of Plaintiffs' children as inherently diseased,
28 perpetual carriers of "dangerous contagions." It is this unfortunate and pervasive

1 mischaracterization of Plaintiffs' children as contagious and dangerous vectors of
2 disease that has led to extreme bias and prejudice against them, ultimately leading the
3 State to take the unprecedented step of permanently barring them from its schools.
4 But the children who have fallen victim to the State's bias and prejudice are neither
5 infectious nor contagious. Nor are they capable of transmitting diseases they do not
6 have. And yet the State's irrational "fear of contagion" has led to the deprivation of
7 their most fundamental right to go to school with their peers and become contributing
8 members of society. *See Serrano I*, 5 Cal. 3d at 605 ("[E]ducation is a major
9 determinant of an individual's chances for economic and social success in our
10 competitive society...a unique influence on a child's development as a citizen and his
11 participation in political and community life. ... Thus, education is the lifeline of both
12 the individual and society.")

13 Even if the State's interest in enacting SB 277 was simply to increase its
14 vaccination rates, that interest cannot justify SB 277's draconian result, as that
15 interest was already served by AB 2109. California already has high vaccination
16 rates. In fact, at the time SB 277 was introduced, California's vaccination rate was
17 already "at or near all-time high levels," with over 97% of kindergarteners entering
18 school without PBEs or medical exemptions. *See* CDPH 2015-16 K Assess., RJN Ex.
19 2, at 4. Moreover, before SB 277, California's PBE rates were falling, by 19% (from
20 3.15% to 2.54%) in 2014-2015 and by another 7% (from 2.54% to 2.38%) in 2015-
21 2016. *See, id.*; *see also* 2014-2015 Kindergarten Assess. Results, RJN Ex. 16.

22 Permanently barring the fewer than 2.5% of schoolchildren with PBEs from
23 school cannot and does not serve a compelling state interest, especially in light of SB
24 277's arbitrary "grandfathering" clauses, which allow children with PBEs to remain
25 in school until they reach a "checkpoint," as if children with PBEs somehow become
26 ill or dangerous upon reaching a "checkpoint."⁷ Under SB 277's arbitrary

27
28 ⁷ To be clear, Plaintiffs are grateful that in its first year of enforcement the full
impact of SB 277 will not be felt by all of the approximately 200,000 children with
PBEs who are currently in California schools and daycares. However, approximately

1 “checkpoint” scheme, this year, the State will exclude approximately 33,000 children
2 from school.⁸ These children represent only an estimated 0.46% of the preschool and
3 K-12 school population. *See* CDPH 2015-16 Childcare Assess., RJN Ex. 18 at 4;
4 Calif. Dept. of Educ. 2014-15 K-12 Enrollment, RJN Ex. 19.⁹ And they represent
5 only an estimated 0.084% – less than a tenth of a percent – of California’s total
6 population. *See* United States Census Bureau, *United States Census Quick Facts*,
7 *California*, RJN Ex. 20. This miniscule number of children relative to the population
8 **cannot** impact public health and no public health benefit can be achieved by barring
9 them from school.

10 The State may also assert a compelling state interest in eliminating certain
11 “pockets” of PBEs in California. *See* Senate Rules Committee, Unfinished Business
12 Report, RJN Ex. 21, at 5. “Pockets” refers to a small number of school districts that
13 have higher-than average PBE rates. Any potential public health detriment from
14 “pockets” is based on speculation and conjecture. But even if “pockets” are a
15 concern, SB 277 cannot and will not achieve their elimination. In fact, it will have the
16 opposite effect by simply moving these alleged “pockets” from schools to
17 homeschooling communities. SB 277 cannot prevent children from living in their
18 communities, playing sports, shopping, eating at restaurants, attending cultural
19 events, museums, parks, sporting events, playing on playgrounds, joining clubs, and
20 engaging in other community activities. *See Homeschooling in California: State*
21 *Organizations and Local Support Groups*, RJN Ex. 22. But these children are barred

22 33,000 children will be excluded this year in an arbitrary and ad hoc manner having
23 nothing to do with public health.

24 ⁸ Under SB 277, the State will not exclude all students with PBEs from schools
25 until 2022. *See* Paul L. Delamater, *et al.*, *California Senate Bill 277’s Grandfather*
26 *Clause and Nonmedical Vaccine Exemptions in California, 2015-2022*, 170(6) JAMA
PEDIATRICS 619-620 (June 2016), RJN Ex. 17. This arbitrary “checkpoint” phase-in
has no relation to the alleged compelling interest in eliminating exemptions.

27 ⁹ For consistency, the denominator of this calculation was based on 2014-15
28 data, the last full K-12 data on the State Education Department website. Calif. Dept.
of Educ. 2014-15 K-12 Enrollment, RJN Ex. 19.

1 from schools, as if infections (which healthy children with PBEs do not carry) respect
2 arbitrary boundaries like school buildings.

3 Moreover, California already controls diseases, including those targeted by
4 vaccines. CDPH's 2014 data demonstrate that with the exception of pertussis,¹⁰ for
5 the illnesses for which vaccines are mandated, there were few or no cases in school-
6 aged children and no outbreaks of any disease attributable to children with PBEs. *See*
7 CDPH, 2014 Annual Report, RJN Ex. 23, at 8, 13-15, 17-19, 23-37.

8 With vaccination rates rising and PBE rates falling and with no disease
9 outbreaks attributable to students with PBEs, Defendants cannot show a compelling
10 interest in eliminating exemptions for 0.46 percent of school children this year. *See*
11 *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, No. 15-274, slip op. at 19, 36
12 (S. Ct. June 27, 2016) (finding "[u]nnecessary health regulations that have the
13 purpose or effect of presenting a substantial obstacle to a woman seeking an abortion
14 impose an undue burden on the right" while "provid[ing] few, if any, health
15 benefits...").

16 b. SB 277 Is Not Necessary, Narrowly Tailored, or The Least
17 Restrictive Means of Achieving A Compelling State
Interest

18 Even assuming that Defendants establish a compelling state interest, SB 277 is
19 not necessary, narrowly tailored or the least restrictive means of achieving that
20 interest.

21 SB 277 is extreme, far-reaching legislation that flies in the face of myriad State
22 and Federal fundamental rights and disability rights. SB 277 is not necessary and not
23 narrowly tailored to increase vaccination rates or reduce PBE rates. Indeed, if that
24 was the State's goal, SB 277 was simply not needed. PBE rates were already
25 dropping under SB 277's predecessor law, AB 2109 and were at 2.54% before SB
26 277's introduction and at 2.38% before its implementation.

27 _____
28 ¹⁰ As discussed in the factual background, *supra*, pertussis outbreaks occur
primarily as a result of vaccine failure and waning immunity, not PBEs.

1 Moreover, the desire to increase full vaccination rates cannot come at the
2 expense of depriving children of an education, particularly for children in low income
3 households and immigrant families. Even strong vaccine proponents recognize that
4 such laws are overbroad and cannot withstand strict scrutiny:

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

10 Douglas J. Opel, *et al.*, *Childhood Vaccine Exemption Policy: The Case for a Less*
11 *Restrictive Alternative*, 137(4) PEDIATRICS 1-4 (March 18, 2016), RJN Ex. 24, at 2.

12 SB 277 is not narrowly tailored to reduce “pockets.” As discussed above, SB
13 277 will create more “pockets” by forcing children into homeschooling and by
14 forcing homeschooled children into their own separate-and-woefully-unequal
15 communities. By contrast, AB 2109, Health & Safety Code § 120365, the predecessor
16 law to SB 277, substantially increased vaccination rates and lowered PBE rates in
17 California in the two years it was in effect. The right to a PBE under AB 2109 was
18 hardly unfettered. It required a doctor’s signature. But while AB 2109 placed burdens
19 on parents’ exercise of the PBE, it still allowed access to exemptions without undue
20 burden. AB2109 was effective yet far less restrictive and left no reason for SB 277 to
21 be enacted. AB 2109 also provided a means of preventing outbreaks by providing for
22 the *temporary exclusion* of a child with a PBE in the event of exposure to an illness
23 for which a vaccine is available. Accordingly, SB 277’s *permanent quarantine* of
24 tens of thousands of non-infectious and non-contagious children until the age of 18 is
25 not only unnecessary, it is wholly unjustified.

26 Further, Defendants could raise the rate of full vaccination by focusing not on
27 the small percentage (less than 2.5%) of children with PBEs but rather on those
28 children who are “conditional entrants” (typically 5-7%). If Defendants focused on

1 encouraging conditional entrants who are not fully vaccinated but not overdue to
2 attain full vaccination, they could increase compliance rates without impinging on the
3 substantial rights of families exercising PBEs and without excluding children from
4 school.

5 SB 277 advances no legitimate, let alone a compelling, state interest. With
6 vaccine mandates already in place resulting in high vaccination rates and with PBEs
7 declining, SB 277 takes children out of school. SB 277 is not related to public health
8 because public health was never threatened by children with PBEs attending school.
9 As such, SB 277 constitutes an exercise of the state's police power in such an
10 arbitrary, unreasonable and oppressive manner as to amount to an abuse of that
11 power. *See Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (warning, in the
12 context of vaccination, that "the police power of a state...may be exerted in such
13 circumstances, or by regulations so arbitrary and oppressive...as to justify the
14 interference of the courts to prevent wrong and oppression").

15 The State's own data unequivocally demonstrate that the legal *status quo ante*
16 protected public health without placing an undue burden on children's and their
17 families' fundamental rights. SB 277 is not necessary and must be enjoined.

18 3. SB 277 Violates State and Federal Disability Laws

19 Plaintiffs assert claims against Defendants under the Individuals With
20 Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA), Section 504 of the
21 Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, and the Americans With
22 Disabilities Act of 1990, 42 U.S.C. § 12132 ("ADA"). Facially and as implemented,
23 SB 277 flies in the face of federal laws that protect children with disabilities.
24 Providing no guidance to schools and school districts, the State, including the DOE
25 have allowed and condoned the disparate treatment of children with disabilities,
26 including children protected by the IDEA, ADA, and Section 504. Children with
27 IEPs, which SB 277 exempts from full vaccination, are nonetheless being barred from
28 school and denied their IEP services. SB 277 makes no accommodations for children

1 with Section 504 plans, as opposed to IEPs, even though just like students with IEPs,
2 students with Section 504 plans are entitled to a Free and Appropriate Public
3 Education (“FAPE”). School districts have written policies directing their schools to
4 deny enrollment to children with IEPs under SB 277. With written admissions from
5 Defendants themselves, Plaintiffs have a high likelihood of success on their claims
6 under the IDEA, Section 504 and the ADA.

7 Moreover, by treating children with PBEs as inherently infectious and
8 contagious and by permanently excluding them from school for “fear of contagion,”
9 the State has placed them in a protected category. The ADA, Section 504 and
10 California disability laws forbid discrimination against a person for “fear of
11 contagion.” Specifically, the law prohibits discrimination against children infected
12 with hepatitis B, HIV/AIDS and other chronic illnesses. Notably, one need not
13 actually have the disability for these laws to apply if one is treated as having the
14 disability: “Discrimination based solely on fear of contagion is a discrimination based
15 on handicap when the impairment has that effect on others.” U.S. Department of
16 Education, Office for Civil Rights, *Placement of School Children With Acquired*
17 *Immune Deficiency Syndrome (AIDS)* (July 1991) (RJN Ex. 25). Indeed, as the U.S.
18 Supreme Court has stated, “[f]ew aspects of a handicap give rise to the same level of
19 public fear and misapprehension as contagiousness.” *School Board of Nassau County,*
20 *Fla. v. Arline*, 480 U.S. 273, 286 (1987).

21 The entire basis for SB 277 *is* fear of contagiousness and the children’s
22 perceived contagiousness, albeit baseless, places them into a protected class,
23 precluding discrimination against them and their exclusion from school. Accordingly,
24 Plaintiffs have a strong likelihood of success on their disability-related claims.

25 4. Plaintiffs Will Prevail on Their Equal Protection Claims

26 Plaintiffs will succeed in their claims for violation of the Equal Protection
27 clause of the Fourteenth Amendment to the U.S. Constitution and the Equal
28 Protection clauses of the California Constitution. Cal. Const. art. I, § 7 and Art. IV, §

1 16. Equal Protection requires that a law treat all those similarly situated equally. Both
2 facially and as applied, SB 277 fails an equal protection challenge.

3 SB 277 violates equal protection by denying some children their fundamental
4 right to an education, while preserving the right for others. SB 277 treats healthy
5 children with PBEs differently from all other California children by denying them an
6 education. SB 277 violates equal protection by excluding children with PBEs who
7 have reached “checkpoints,” treating them differently than other children with PBEs.
8 There is no legitimate reason to differentiate a seventh grader from a sixth grader or
9 an eighth grader. SB 277 does this for administrative ease, not any legitimate, let
10 alone compelling, state interest.

11 Further, SB 277 violates the equal protection rights of special education
12 students. First, as written, SB 277 exempts special education students with IEPs
13 pursuant to IDEA who are entitled to FAPE under federal law but does not exempt
14 students with 504 plans pursuant to the Rehabilitation Act of 1973 (29 U.S.C. § 794),
15 who are similarly entitled to FAPE. Second, as applied, SB 277 violates equal
16 protection with respect to IEP students, because some districts are refusing to admit
17 IEP students with PBEs and others are not. Thus, students with IEPs throughout the
18 State, who otherwise are similarly situated and protected under federal law, are
19 subject to disparate treatment based solely on their geographic location. In treating
20 similarly situated groups of students with disabilities differently, SB 277 violates
21 equal protection.

22 **B. PLAINTIFFS ARE IRREPARABLY HARMED, WITH NO**
23 **ADEQUATE REMEDY AT LAW**

24 Absent injunctive relief, Plaintiffs are suffering and will continue to suffer
25 irreparable harm and they have no adequate remedy at law. Fundamental rights
26 violations necessarily constitute irreparable harm. *See Elrod v. Burns*, 427 U.S. 347,
27 373 (1976). Because SB 277 violates numerous fundamental rights under both federal
28

1 and state law, irreparable harm will ensue if the *status quo ante* is not preserved
2 during this litigation.

3 SB 277 will irreparably harm Plaintiffs' children and thousands of other
4 students by excluding them from school. Permanent exclusion from school will cloud
5 these children's future, damaging dreams of college and careers. California will not
6 tolerate a sub-standard education for its children, let alone no education at all, as is
7 the case under SB 277. *See Serrano I*, 5 Cal. 3d at 610 (a child assigned to an
8 "inferior state school takes on the complexion of a prisoner, complete with a
9 minimum sentence of 12 years") (citation and internal quotation marks omitted). If an
10 "inferior state school" is akin to a 12-year prison sentence, then SB 277's permanent
11 deprivation of the right to attend school and forced isolation of children in
12 homeschool or independent study is akin to solitary confinement. The harm to
13 Plaintiffs is irreparable.

14 Moreover, few things are as difficult for a parent as telling her small child that
15 she will never go to school or telling her teenager that she cannot go on to the seventh
16 grade because society views her as a carrier of "dangerous contagions." And yet, this
17 is precisely what Plaintiffs are forced to do.

18 SB 277 has caused irreparable harm to families who have lost employment to
19 provide for their children's education and care during school hours, including
20 transportation of children with special needs to receive IEP services. *See, e.g.*,
21 Saunders Dec. ¶¶ 13-14. Plaintiffs are also irreparably harmed because they face loss
22 of employment and their children face loss of an education if SB 277 is not enjoined.
23 *See* Saunders Dec. ¶¶ 13-17, *see also* Dec. of Crain, ¶¶ 10-15, Delgado, ¶¶ 19-22,
24 Loy, ¶¶ 19-20 and 22, and Nicolaisen, ¶¶ 16-22.

25 Further, for students with disabilities under Section 504 who are not exempted
26 by SB 277 and those IEP students whose districts refuse to admit them, every day of
27 missed education and extended-year services is irreparable harm. Finally, for parents
28

1 forced against their will to vaccinate their children should Defendants not be
2 enjoined, the risk of the ultimate irreparable harm, death or serious injury, is real.

3 **C. THE BALANCE OF HARDSHIPS DECISIVELY FAVORS**
4 **PLAINTIFFS**

5 The balance of hardships tips strongly in Plaintiffs' favor. For the children
6 expelled from school this year, the impact is devastating. Families are impermissibly
7 burdened with the State's non-delegable duty to educate their children or violate
8 truancy laws, thus facing severe penalties and possible removal of their children.¹¹
9 Plaintiffs include parents who are unable to homeschool or for whom homeschooling
10 imposes severe financial and other penalties. *See, e.g.*, Dec. of Crain, ¶¶ 10-15,
11 Delgado, ¶¶ 19-22, Loy, ¶¶ 19-20 and 22, Nicolaisen, ¶¶ 16-22; Saunders, ¶¶ 13-17.
12 If lower income parents are forced to leave their jobs because they cannot in good
13 conscience vaccinate their children, they may financially jeopardize their homes and
14 other necessities. It is practically impossible to obtain a medical exemption for many
15 Plaintiffs when doctors may, for example, require expensive testing to justify an
16 exemption. *See, e.g.*, Saunders Dec. ¶¶ 11-12. For families in which the parents do
17 not speak English, homeschooling is not an option. Some of these decisions – such as
18 coerced vaccination without informed consent – cannot be undone.

19 The State faces no similar hardship. If an injunction issues, SB 277's
20 predecessor AB 2109 will be reinstated and Health & Safety Code section 120365
21 will become effective again. CDPH will reinstate the existing PBE form used with
22 AB2109, make the link to the form publicly available and schools, which already are
23 familiar with the form, will admit students with PBEs as they have done for 55 years.
24 Moreover, since CDPH has not yet created a form for medical exemptions and DOE

25 _____
26 ¹¹ These children would be deemed truant under the Education Code. *See* Educ.
27 Code §48260(a); Educ. Code § 48263.6; and Educ. Code § 48262). Substantial
28 penalties may apply to parents of truants including monetary fines (*see* Educ. Code §
48293 and Penal Code §§ 270.1 and 272), education and counseling (Educ. Code §
48293), imprisonment (Penal Code §§ 270.1 and 272), and removal of their children
(Welfare and Institutions Code § 300, *et seq.*).

1 has declined to issue any guidance to schools on SB 277's implementation, not only
2 will an injunction not burden the State, but it will solve the numerous implementation
3 problems the law has caused. Indeed, an injunction will restore order back to schools
4 and families.

5 **D. PUBLIC INTEREST WEIGHS IN PLAINTIFFS' FAVOR**

6 Finally, upholding the fundamental rights of Californians serves the public
7 interest. Education is one of the most important rights under federal and California
8 law. Keeping children in school undoubtedly serves the public interest both in the
9 short and long term. There is no public health reason to override fundamental rights.
10 The *status quo ante* provides more than adequate protection for the health of
11 Californians.

12 **IV. CONCLUSION**

13 Based on the foregoing, Plaintiffs respectfully request that the Court
14 preliminarily enjoin SB 277 and preserve the *status quo ante* during the pendency of
15 this action, preserving the fundamental right to an education under the California
16 Constitution to all children, including children with PBEs. The State will endure no
17 hardship from children returning to their classrooms. The children, on the other hand,
18 face enduring, irreparable harm, if SB 277 is not enjoined.

19
20 DATED: July 15, 2016

Respectfully submitted,

21
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28