James S. Turner, Esq. (D.C. Bar No. 82479)
Pro Hac Vice
Betsy E. Lehrfeld, Esq. (Cal. Bar No. 77153)
Swankin & Turner
1400 16th Street, NW #101
Washington, DC 20036
Telephone: (202) 462-8800
Facsimile: (202) 265-6564
E-mail: jim@swankin-turner.com;
betsy@swankin-turner.com

Robert T. Moxley, Esq. (Wyo. Bar. No. 5-1726)
Pro Hac Vice
Robert T. Moxley, P.C.
2718 O'Neil Avenue
Post Office Box 565
Cheyenne, Wyoming 82003-0565
Telephone: (307) 632-1112
Facsimile: (307) 632-0401
E-mail: vaccinelawyer@gmail.com

Kimberly M. Mack Rosenberg, Esq. (NY Bar. No. 2597045)
Pro Hac Vice
Law Office of Kimberly M. Mack Rosenberg
244 Fifth Avenue, Suite K-257
New York, NY 10001
Telephone: (917) 797-8033
Email: kmackrosenberg@gmail.com

Carl M. Lewis, Esq. (Cal. Bar No. 121776)
1916 Third Avenue
San Diego, California 92101
Telephone: (619) 232-0160
Facsimile: (619) 232-0420
Email: cmllaw@pacbell.net

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANA WHITLOW, et al.,

Plaintiffs,

vs.

STATE OF CALIFORNIA, et al.,

Defendants.

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

PLAINTIFFS' REPLY TO STATE DEFENDANTS' OPPOSITION TO 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.

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INTRODUCTION

The 2016-17 school year is different from prior years – and not in a good way. This year, more than 33,000 California children, many with learning disabilities and special needs, are permanently barred from all public and private schools and daycares. These children have a fundamental right to a classroom-based education and they want to go to school. Yet in a dramatic departure from its history of unwavering protection of every child's right to an education, and without satisfying strict scrutiny, California has enacted Senate Bill ("SB") 277 to abolish the Personal Belief Exemption ("PBE") to its mandatory vaccination law and to permanently bar children with PBEs from school. But the U.S. and California Constitutions, as well as an array of federal and state disability and anti-discrimination laws, prohibit SB 277's draconian result and necessitate injunctive relief.

Plaintiffs' Motion for Preliminary Injunction exceeds the showing required for injunctive relief to maintain the *status quo ante* pending the outcome of this case. Plaintiffs provide a detailed analysis of the facts and law to demonstrate likelihood of success on the merits of their claims for deprivation of the right to education under the California Constitution, deprivation of free exercise, equal protection and due process rights under the U.S. Constitution, which protects parental rights, bodily integrity and informed consent, and violation of both State and Federal disability and anti-discrimination rights. Plaintiffs provide extensive evidence of irreparable injury, establish that the balance of hardships tips overwhelmingly toward Plaintiffs, and demonstrate that an injunction will serve the public interest. Plaintiffs also demonstrate that the *status quo ante* properly protects Plaintiffs' rights and the public health by allowing temporary exclusion of children with PBEs in the event of an outbreak or exposure to an illness for which they have not received a vaccine.

In response, State Defendants attempt to confuse the issues and mislead the Court as to the facts and the law, without addressing Plaintiffs' arguments and evidence. While conceding that SB 277 deprives Plaintiffs and their children of

fundamental rights, State Defendants contend, in a surprisingly cavalier tone, that the deprivation of those rights is justified. They unapologetically admit, for example, that SB 277 denies Plaintiffs' children education based on nothing more than the unfortunate misperception of those children – who are neither infectious nor contagious – as carriers of "dangerous diseases" and "threats to public health," Opp., Doc. 30, at 9. State Defendants base their arguments on biased, unsupported, and inadmissible statements from SB 277's author and sponsors contained in legislative committee reports and on conclusory testimony from a declarant who, without laying a proper foundation for his opinions, contradicts Defendants' own data and reports.[1]

Defendants also misrepresent SB 277's purpose and effect in a strained and irrelevant analysis that attempts to turn this case on its head and shift the focus from Plaintiffs' actual claims to issues that Defendants would prefer to litigate. Defendants base their entire Opposition on the argument that the State has the authority to enact vaccine mandates. But Defendants ignore the fact that SB 277 did not enact a vaccine mandate. California's vaccine mandates, codified in Health and Safety Code sections 120325(a)(1) - (10) and 120335(a)(1) - (10), predate SB 277 and were unchanged by it. Instead, SB 277 repealed Health and Safety Code section 120365 and abolished PBEs, subject to an arbitrary "checkpoint" scheme that serves no public health benefit. Accordingly, the cases on which Defendants rely to support SB 277 are irrelevant and easily distinguishable on the foregoing and other grounds.

Plaintiffs seek to enjoin SB 277's enforcement to allow kindergarten and seventh grade children with PBEs to return to their schools and obtain the education to which they are constitutionally entitled, pending the outcome of this case.

[1] As set forth in Plaintiffs' Evidentiary Objections, legislative committee reports are inadmissible. They lack foundation, include opinions from various named and unnamed supporters and opponents of a bill, contain hearsay, and contradict publicly-available California Department of Public Health ("CDPH") and Centers for Disease Control and Prevention ("CDC") data and reports that Plaintiffs have asked the Court to judicially notice. Similarly, most of Robert Schechter, M.D.'s declarations is inadmissible for lack of foundation and hearsay, leaving Defendants' Opposition with virtually no factual support.

Plaintiffs' request is modest and consistent with 55 years of pre-SB 277 law. Defendants, on the other hand, ask this Court to allow the unprecedented denial of education to tens of thousands of children who face loss of protected education and special education rights, possible truancy, and removal from their families and whose parents face severe hardship including loss of employment or loss of parental custody. Without injunctive relief, this year alone, approximately 13,000 children will not experience their first day of kindergarten and more than 8,000 pre-teens/teenagers will not advance to the seventh grade. These children make up less than half of one percent of the State's school population and cannot impact public health. Yet the harm to each child from being denied an education is immense and irreparable.

Plaintiffs respectfully request that the Court grant their Motion and preserve the *status quo ante* while the parties litigate this case. California's children deserve better than to be barred from school and subjected to forced permanent quarantine, isolation, humiliation, prejudice, and emotional distress because of an unnecessary, draconian and discriminatory law that flies in the face of the State's compelling interest in educating children. *See Serrano v. Priest*, 5 Cal.3d 584, 605 (1971) ("[E]ducation is a major determinant of an individual's chances of economic and social success…a unique influence on a child's development as a citizen and his participation in political and community life. … Thus, education is the lifeline of both the individual and society.")

STATEMENT OF FACTS

I. DEFENDANTS IGNORE AND MISREPRESENT THEIR OWN DATA

Motivated by special-interest politics, SB 277 is an unnecessary solution to a non-existent problem, introduced when California's children were, according to CDPH, "well protected" from communicable diseases. Defendants claim "SB 277 was a reasoned response to escalating numbers of unvaccinated children and further outbreaks of dangerous communicable diseases." Opp., Doc. 30, at 18. But California did not have "escalating numbers of unvaccinated children" when SB 277 was

introduced. As CDPH reports show, prior to SB 277's introduction and enactment, kindergarten PBE rates had dropped 19%, from an already low 3.15% in 2013-14 to 2.54% in 2014-15. Rates fell another 7% in 2015-16, to 2.38%. CDPH 2015-16 K Assess., RJN, Doc. 13-5, Ex. 2. In fact, at SB 277's introduction, California's vaccination rate was "at or near all-time high levels" Motion, Doc. 14-1, at 16.

Defendants' claim that only 92.9% of kindergarten children in 2015-16 had all required vaccines improperly lumps conditional entrants with PBE students. Conditional entrants - typically 5-7% of kindergarteners – are not exempt and must become fully-vaccinated within the time specified by the school district. Motion, Doc. 14-1, at 19-20. California's PBE rate has never exceeded 3.2%, *id.* at 5, and was only 2.54% when SB 277 was introduced. Defendants provide no evidence to the contrary except to attempt to artificially inflate the percentage of children with PBEs.

II. DEFENDANTS TREAT HEALTHY CHILDREN AS "DISEASE CARRIERS"

Defendants characterize Plaintiffs' children – all of whom are selectively vaccinated, none of whom carry any illnesses, and some of whom have laboratory-confirmed immunity – as "unvaccinated" carriers of "potentially fatal diseases." Opp., Doc. 30, at 4, 9. Defendants do not explain how Plaintiffs' healthy children are a "danger to public health" or how their exclusion from school "protects the public." Defendants also provide no justification for forcing children with lab-confirmed immunity take another vaccine to attend school, subjecting them to the risk of an unnecessary medical procedure. *See* Whitlow Dec., Doc. 13-2, ¶¶ 18-19. Defendants also ignore that some children become immune with fewer vaccine doses, while others never acquire immunity no matter how many doses they take. Indeed, the State simply assumes every fully vaccinated child is "immunized" and every child who has not received every single one of the 30 to 38 required doses as an "unvaccinated public health threat" even where the child has lab-confirmed immunity.

Moreover, most children with PBEs are vaccinated. They have simply not received every single dose California mandates. *See* Motion, Doc. 14-1, at 7, n3. Indeed, only 0.316% of California children are completely vaccine-free and they are not "public health threats" either. *Id.* Thus, Defendants' characterization of every child with a PBE as "unvaccinated" and diseased is disingenuous, to say the least.

Finally, according to CDPH, Californians are well-protected without SB 277. For 2014, with the exception of pertussis,[2] there were few – and in many instances no — cases reported of the ten diseases for which California mandates vaccines and no outbreaks were attributable to children with PBEs. *See* CDPH, 2014 Annual Report, RJN, Doc. 13-3, Ex. 23, at 8, 13-15, 17-19, 23-37. Therefore, there is no basis to permanently exclude any child from school.

III. DEFENDANTS MISREPRESENT THE PRESENCE OF FETAL TISSUE IN VACCINES AND THE CATHOLIC CHURCH'S POSITION

Defendants distort facts in their attempt to dismiss Plaintiffs' sincerely held religious beliefs against the use of cell lines derived from aborted fetal tissue in vaccine manufacture, even though this belief has served as the basis for religious exemptions. *See* NYS Ed. Dept. Dec. 16,805 (Aug. 3, 2015), Reply RJN Ex. 1. The use of cell lines derived from aborted fetal tissue in vaccines is indisputable. *See* CDC Vaccine Excipient Table, Reply RJN Ex. 2; manufacturer product inserts, Reply RJN Ex. 3. The Catholic Church, as described in Pontifical Academy for Life's statement "Moral Reflections on Vaccines Prepared from Cells Derived from Aborted Human Fetuses" strongly condemns the use of aborted fetal tissue in vaccine manufacture and recognizes that families "should take recourse, if necessary, to the use of conscientious objection with regard to the use of vaccines produced by means of cell lines of aborted human fetal origin." Reply RJN Ex. 4, at 6-7.

[2] Pertussis outbreaks occur mostly in vaccinated children and result from vaccine failure and waning immunity, not PBEs. *See* Motion, Doc. 14-1, at 7.

IV. MEASLES OUTBREAKS DO NOT JUSTIFY SB 277

Predictably, the State continues to rely on the Disneyland measles outbreak to justify SB 277 by reciting that 18 children were not vaccinated. Opp., Doc. 30, at 7. The State does not dispute that no evidence shows that children with PBEs caused or exacerbated the outbreak or that kicking children out of schools will prevent measles outbreaks at theme parks. The State also refers to a 2008 measles outbreak in San Diego to justify SB 277. Opp., Doc. 30, at 7. What the State ignores is that both outbreaks began with foreign-imported measles and ended with relatively few people affected. Despite originating from a foreign visitor in one of the most populous places in the state, where more than 60,000 people were potentially exposed, the Disneyland outbreak affected a total of 136 Californians and was quickly contained. Defendants present no evidence that Disneyland, or any outbreak, would have been any different if children with PBEs had been permanently barred from school. Moreover, if anything, the Disneyland outbreak shows that even when many thousands are exposed to measles, very few become infected, belying Dr. Schechter's speculation that California is on the verge of a pandemic so imminent that draconian actions, like repealing PBEs or permanently isolating healthy schoolchildren is necessary.

Importantly, Defendants do not even attempt to justify the repeal of PBEs for the nine other vaccines California mandates. No justification exists with California's 97% vaccination rate which Defendants concede is sufficient to satisfy the theory of "herd immunity." Moreover, tetanus is non-communicable, hepatitis B is blood-borne, the mumps vaccine is highly ineffective and virtually every person affected in mumps outbreaks is fully vaccinated, the pertussis vaccine does not prevent infection or transmission and wanes quickly, chickenpox is a mild childhood illness, and diphtheria, polio and rubella are essentially eliminated in the United States and do not circulate in California schools. *See, e.g.*, CDPH, 2014 Annual Report, RJN, Doc. 13-6, Ex. 23, at 5, 13, 30, 33; Pertussis Report, RJN, Doc. 13-5, Ex. 6; Examples of outbreaks in highly vaccinated populations, Reply RJN Ex. 5.

V. SB 277 CANNOT ELIMINATE OUTBREAKS

Defendants claim SB 277 is necessary to make California schools "disease-free." But if SB 277's "end" is to prevent outbreaks, then the "means" of excluding children from school cannot justify that unattainable "end." SB 277 will not actually increase overall vaccination rates – it will only artificially inflate school vaccination rates by excluding children with PBEs. These children will remain in the community and will participate in sports, go to stores and theme parks, and have playdates. But they will be permanently barred from the most important place – school. SB 277 also cannot prevent outbreaks because, as evidenced in countless published case reports and news articles, outbreaks of "vaccine-preventable" illnesses like measles, whooping cough, and mumps regularly occur in highly vaccinated communities. *See, e.g.*, Reply RJN Ex. 5.

VI. SB 277'S IMPLEMENTATION HAS CREATED TURMOIL AND CONFUSION FOR SCHOOLS AND FAMILIES

By their own actions and inactions, CDPH and the Department of Education ("CDE") have created confusion for parents, schools, local public health agencies, and medical practitioners. CDE refuses to provide guidance to school districts regarding admission of children with IEPs, leaving children with disabilities at the mercy of local school districts even though federal law requires the State to provide each of these children a Free and Appropriate Public Education ("FAPE"). Defendants concede that "[t]he IDEA provides that a state must, in order to receive federal financial assistance, have policies and procedures in effect that assure all students with disabilities the right to [FAPE]" and that "CDE has general oversight responsibility for special education in California." Opp. Doc. 30, at 26, 28. Yet CDE attempts to absolve itself of any responsibility to supervise local school districts, telling Plaintiffs and tens of thousands of other parents to take their grievances up with their local school districts. This is an unlawful abdication of CDE's duties and CDE appears unconcerned that at issue are the rights of thousands of federally-

protected children with disabilities who are not receiving services they need, causing them tremendous hardship and detriment. CDE's position is an admission that, with the State's knowledge and consent, school districts are violating the equal protection rights of children with IEPs who are being treated differently across the state depending upon the district in which they reside and attend school. This fact alone is sufficient to warrant injunctive relief.

CDPH has created even more confusion, as the Health and Safety sections of the California Code of Regulations ("CCRs") still recognize PBEs and require schools to unconditionally admit students with PBEs into school. *See* 17 Cal. Code Reg. § 6051 ("[a] pupil with a permanent medical exemption or a personal beliefs exemption to immunization shall be admitted unconditionally."); 17 Cal. Code Reg. § 6075 (setting reporting requirements on the number of students with PBEs); 17 CCR § 6055 (concerning students who are not vaccinated and do not have a PBE or medical exemption). The CDPH website also advises that PBEs are available. *See, e.g.*, https://www.cdph.ca.gov/HEALTHINFO/DISCOND/Pages/Measles.aspx, Reply RJN Ex. 6 ("Some children are allowed by California law to skip immunizations if a parent submits a personal beliefs exemption (PBE) or medical exemption (PME) at enrollment"). Thus, while taking the position that PBEs are no longer available, CDPH expressly makes PBEs available under the CCRs, which "have the effect of law." *See* http://www.oal.ca.gov/ccr.htm, Reply RJN Ex. 7. Accordingly, under the current statutory framework, PBEs are available, even though, at CDPH direction, schools refuse to admit children with PBEs into school. Notwithstanding the above, CDPH claims that everything should have been clear to parents when CDPH itself is violating its own CCRs. CDPH's inability to consistently interpret SB 277 and failure to provide consistent guidance to parents and schools continues to today. *See*, *e.g.*, July 2, 2015 letter from CDPH, Reply RJN Ex. 8 (declaring SB 277 effective July 2016); February 4, 2016 Bd. of Directors Mtg., Cal. Conf. of Local Health Officers, Reply RJN Ex. 9 (CDPH unsure on certain issues of SB 277 implementation);

February 4, 2016 SB 277 – Update, Reply RJN Ex. 10, at 5 ("CDPH continues to review SB 277 in consultation with CDE and CDSS"). Accordingly, any argument that the law is clear and Plaintiffs have had months to prepare for it lacks any merit.

ARGUMENT

Defendants concede that SB 277 deprives Plaintiffs of their fundamental rights, including the fundamental right to education under the California Constitution. To protect those rights, Plaintiffs ask this Court to enjoin enforcement of SB 277 and maintain the *status quo ante* during the pendency of this case. A preliminary injunction "is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment." *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010). Its purpose "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). To obtain a preliminary injunction, a showing that there is a "reasonable probability of success – not an overwhelming likelihood – is all" that is needed. *Gilder v. PGA Tour, Inc.* 936 F.2d 417, 422 (9th Cir. 1991). When a violation of constitutionally protected rights is shown, no further showing of irreparable injury is necessary. *Topanga Press, Inc. v. City of Los* Angeles, 989 F.2d 1524, 1528-29 (9th Cir. 1993). Plaintiffs have met the requirements for a preliminary injunction.

I. DEFENDANTS DO NOT REFUTE PLAINTIFFS' SHOWING OF LIKELIHOOD OF SUCCESS ON THEIR CLAIMS

Plaintiffs have established, and Defendants' Opposition tacitly concedes, that SB 277 violates Plaintiffs' fundamental rights and irreconcilably conflicts with the California and Federal Constitutions, as well as numerous state and federal laws.

A. Strict Scrutiny Applies to SB 277 Because SB 277 Deprives Plaintiffs of Fundamental Rights and Suspect Classifications Are Issue

Education is a fundamental right guaranteed by the California Constitution. *Serrano I*, 5 Cal. 3d at 608-09 ("the distinctive and priceless function of education in

our society warrants, indeed compels, our treating it as a 'fundamental interest"). Defendants do not contest that education is a fundamental right and merely claim that its violation under SB 277 is justified without citing to a single case that has upheld denial of education to California students. Opp., Doc. 30, at 16-17. Defendants also do not refute Plaintiffs' evidence that SB 277, by its homeschooling exemption, implicates the suspect classifications of socioeconomic status and national origin. *Serrano I*, 5 Cal. 3d at 597, 614. Thus, strict scrutiny applies to SB 277 and, as discussed in detail in Plaintiffs' Motion and below Defendants' Opposition falls far short of overcoming strict scrutiny.

B. *Jacobson* and its Progeny Do Not Help Defendants Overcome Strict Scrutiny

Defendants' primary defense of SB 277 relies on *Jacobson v. The Commonwealth of Massachussetts*, 197 U.S. 11 (1905) and its progeny generally upholding vaccine mandates. But Defendants' reliance on *Jacobson* is misplaced.

As a threshold matter, SB 277 did not enact a vaccine mandate. It eliminated PBEs from the State's existing vaccine mandates by repealing Health and Safety Code section 120365. Indeed, California's vaccine mandates, codified in Health and Safety Code sections 120325(a)(1) - (10) and 120335(a)(1) - (10), existed under the *status quo ante* and were unchanged by SB 277. Plaintiffs do not ask the Court to invalidate those mandates. Rather, they seek an injunction of SB 277's repeal of PBEs, allowing children with PBEs to attend school pending resolution of this case. Accordingly, cases focused on vaccine mandates are irrelevant to a constitutional analysis of SB 277.

Furthermore, *Jacobson* and its progeny do not support Defendants' position. In fact, *Jacobson* expressly warns against legislation like SB 277. In *Jacobson*, the Court upheld the state's right to levy a $5.00 fine (approximately $122 dollars today) against Jacobson for refusing a smallpox vaccine during an epidemic. Jacobson was

not excluded from society and denied fundamental rights. Most importantly, even in the absence of strict scrutiny – which post-dates *Jacobson* – the Supreme Court warned of overbroad, oppressive legislation like SB 277. *Jacobson*, 197 U.S. at 38 ("the police power of a state...may be exerted in such circumstances, or by regulations so arbitrary and oppressive...as to justify the interference of the courts to prevent wrong and oppression"). Thus, a fair reading of *Jacobson* demonstrates that it requires public health necessity, proportionality, harm avoidance, and fairness in the exercise of a state's police power. SB 277, by contrast, is unnecessary, draconian, punitive legislation that constitutes precisely the kind of abuse of police power that justifies the "interference of courts to prevent wrong and oppression." *Id.*

None of the other post-*Jacobson* cases Defendants cite support the repeal of PBEs and permanent expulsion of children from school. For example, *Phillips v. City of New York*, 775 F.3d 538, 543 (2nd Cir. 2015) and *Maricopa County Health Dept. v. Harmon*, 750 P.2d 1364 (Ariz. 1987) upheld temporary – ***not permanent*** – exclusion of children from school during an outbreak. As such, those cases are consistent with pre-SB 277 California law which allowed for the temporary exclusion of children with PBEs during an outbreak.

Each of the remaining cases Defendants cite is inapposite or distinguishable. The California cases, *Abeel v. Clark*, 84 Cal. 226 (1890), *French v. Davidson*, 143 Cal. 658 (1904), and *Williams v. Wheeler*, 23 Cal. App. 619, 625 (1913) all arose in the context of vaccination for one disease (smallpox) and do not include denial of the fundamental right to education or the application of strict scrutiny. Similarly, *Zucht v. King*, 260 U.S. 174 (1922) dealt only with vaccination for smallpox and was decided on procedural grounds with no constitutional analysis. The *dicta* Defendants rely on in *Prince v. Massachusetts*, 321 U.S. 158 (1944), does not support SB 277's repeal of PBEs and denial of education. Moreover, since most adults in California are not subject compulsory vaccination, *Prince* would prohibit compulsory vaccination for their children as well. *See Prince*, 321 U.S. 158, 166 ("[a parent] cannot claim

freedom from compulsory vaccination for the child **more than for himself** on religious grounds") (emphasis added). In addition to being misplaced, Defendants' reliance on *Prince* is ironic. *Prince* applied the doctrine of *parens patriae* to keep children in school, while Defendants use it to bar children permanently from school.

Defendants' reliance on *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002), is particularly troubling. Defendants neglect to advise the Court that *Boone* was appealed to the Eighth Circuit where the appeal was dismissed as moot because, in the interim, the Arkansas legislature enacted broad religious and philosophical exemptions to Arkansas's vaccination mandate (Ark. Code Ann. 6-18- 702(d)(4).). *See McCarthy v. Ozark School Dist.*, 359 F.3d 1029 (2004). Thus, *Boone* has, in effect, been superseded by statute.

Finally, cases from the only two jurisdictions other than California that do not have a philosophical or religious exemption do not support Defendants. Neither *Workman* v. *Mingo County Sch.,* 667 F. Supp. 2d 679 (S.D. W. Va. 2009), *aff'd*, *Workman v. Mingo County Bd. of Educ.*, 419 F. App'x 348, 353-54 (4th Cir. 2011) (unpublished) nor *Brown v. Stone*, 378 So.2d 218 (1979), *cert. denied* 449 U.S. 887 (1980) address denial of the fundamental right to education or apply strict scrutiny.[3]

As the foregoing demonstrates, the cases Defendants cite do not address Plaintiffs' claims or the instant Motion and are not relevant to an analysis of whether the State's repeal of California's PBE statute and resulting ***permanent*** exclusion of healthy children with PBEs from school is constitutional, where various fundamental rights including the right to education are denied. In fact, these cases, when properly analyzed, support the relief Plaintiffs seek.

[3] West Virginia has never had religious or philosophical exemptions. In Mississippi, the *Brown* Court, in a strained equal protection analysis, struck a religious exemption that applied only to members of religions "whose religious teachings require reliance on prayer or spiritual means of healing." *Brown*, 378 So.2d at 219. In any event, religious exemptions that are limited to certain religions and do not allow for sincere and genuine personal religious beliefs are unconstitutional. *See Sherr v. Northport-East Northport Union Sch. Dist.*, 672 F. Supp. 81, 91-92 (E.D.N.Y. 1987). That was not the case with California's PBE.

C. Defendants Misconstrue Plaintiffs' Free Exercise Claims

As a preliminary matter, strict scrutiny, not rational basis review, applies to Plaintiffs' Free Exercise claims, because Plaintiffs assert "hybrid rights." *See Empl. Div. Oregon Dept. of Human Res. v. Smith*, 494 U.S. 872, 881-82 (1990); *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 707 (9th Cir. 1999), *rev'd on other grounds en banc*, 220 F.3d 1134 (9th Cir. 2000). Defendants impermissibly separate Plaintiffs' constitutional claims and fail to address the "hybrids rights" strict scrutiny analysis, thereby waiving their arguments. Moreover, Defendants are wrong, both legally and factually, in their analysis of Plaintiffs' Free Exercise claims. Religious claims need not be based on teachings of a particular religious sect as Defendants contend, but can be grounded in an individual's sincere and genuine religious beliefs. *See Sherr v. Northport-East Northport Union Sch. Dist.*, 672 F. Supp. 81, 91-92 (E.D.N.Y. 1987); *Maier v. Besser*, 72 Misc. 2d 241, 341 N.Y.S.2d 411 (Sup. Ct. Onondaga Cty. 1972). Defendants are also wrong that Free Exercise does not "protect personal beliefs." It is axiomatic that "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). First Amendment jurisprudence explicitly protects views both secular and religious in nature. *See Callahan v. Woods*, 658 F.2d 679, 684 (9th Cir.1981) ("a coincidence of religious and secular claims in no way extinguishes the weight appropriately accorded the religious one"). A person may not be compelled to choose between the exercise of his religious beliefs and participation in a public program. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). Plaintiffs raise Free Exercise claims and pursuant to the applicable hybrid rights analysis, these claims require strict scrutiny review, which Defendants cannot overcome.

D. Defendants Fail to Address Plaintiffs' Equal Protection Claims

Plaintiffs argue that Defendants have violated equal protection by impermissibly creating classes of children who are excluded from school and treated

differently than others who are similarly situated. Defendants fail to address this issue instead arguing, off topic, that the mandates themselves are applied uniformly. Defendants concede that Plaintiffs' children are being deprived of their fundamental right to go to school and that children with IEPs are being treated differently across the state. Defendants thus admit violating equal protection. Defendants do not address why SB 277 exempts children who are homeschooled, in independent study or who have IEPs. Nor do Defendants address why children with disabilities who have Section 504 plans are not exempt from SB 277 while children with disabilities who have IEPs are exempt. Finally, Defendants do not address why for each of the next six years, kindergarten and seventh grade students with PBEs will be excluded from school under SB 277's "checkpoint" scheme, while children with PBEs in all other grades remain in school. Education is a fundamental right and SB 277 denies different categories of children that right at different times, violating equal protection.

E. The State Fails to Meet Its Burden Under Strict Scrutiny

Because SB 277 deprives children of the fundamental right to education, implicates the suspect classification of socioeconomic status, and unduly burdens other fundamental rights, strict scrutiny applies, placing the burden on the State to establish that a compelling state interest exists for SB 277 and that SB 277 is necessary, narrowly tailored and the least restrictive means to meet that interest. *Serrano I*, 5 Cal. 3d at 597. The State has failed to satisfy this burden.

1. Defendants Have Not Met Their Burden of Establishing A Compelling Interest For SB 277

The State has failed to show a compelling state interest to justify its complete abdication of its constitutional mandate to provide education to all California children. *Butt v. State of California*, 4 Cal. 4th 668, 685 (1992) ("The State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity"). Defendants point to absolutely nothing that justifies removing PBEs and permanently barring

thousands of students from school. Defendants have also failed to meet their burden of demonstrating that SB 277 serves any necessary public health goal. In particular, as shown in Plaintiffs' Motion and herein, there is no public health justification, either rational or compelling, to support the patchwork of distinctions made under SB 277 and there is no public health emergency warranting even a temporary exclusion of students from schools, let alone SB 277's draconian, permanent result. Children with PBEs are not perpetual carriers of dangerous contagions and the State's treatment of them as such is unlawful and prohibited.[4]

2. Defendants Have Failed To Demonstrates that SB 277 Is Necessary, Narrowly Tailored, and The Least Restrictive Means of Achieving A Compelling State Interest

As demonstrated in Plaintiffs' Motion and herein, even assuming Defendants established a compelling state interest – which they have failed to do – SB 277 is not necessary, narrowly tailored or the least restrictive means of achieving that interest. In fact, the only portion of this prong that Defendants try to address, as shown below, is the "narrow tailoring," but their argument is limited to the fact that the legislation has a medical exemption and a provision excluding homeschooled children from the mandate. That is not narrow tailoring. The homeschool provision is not an exception but rather a punishment for those students who have not met the State's rigid vaccination mandate.

Defendants' fail to oppose Plaintiffs' evidence that the PBE rate in California was declining after AB2109 imposed conditions on the assertion of PBEs. Motion, Doc. 14-1, at 16. For that reason and the foregoing arguments, the State has not shown that SB 277 was necessary at a time when PBE rates were dropping, the state

[4] SB 277's permanent expulsion of thousands of children from school without due process is unprecedented and unsupportable. Even children who are expelled for cause (violence or harassment) are entitled to due process and may attend another school or receive an education program provided by their schools. *See, e.g.*, Calif. Educ. Code §§ 48915.1, 48915.2, 48916, 48916.1; see also https://www.aclunc.org/our-work/know-your-rights/school-discipline (Reply RJN Ex. 11).

demonstrated its ability to easily contain an outbreak of measles that originated in the most populous place in the entire state, and California's vaccination rates were at an "all time high" with schools that were "well-protected" from "vaccine-preventable" diseases according to CDPH.

Defendants try to argue that students have a right to attend safe schools and that the choice of the ten vaccines to mandate is a narrow tailoring designed to serve this interest. As a general proposition, Plaintiffs do not dispute that school safety is an important issue. However the State has introduced no admissible evidence to support their assertion that healthy children with PBEs endanger school safety or that school safety is assured by SB 277, neither of which is true. Defendants cannot argue that SB 277's permanent exclusion of healthy children from school is narrowly tailored or necessary for public health when pre-SB 277 law allowed for the temporary exclusion of children with PBEs during outbreaks.

SB 277 is unjustifiable. It is a draconian, overbroad, extreme measure that provides no public health benefit while depriving tens of thousands of children of their fundamental right to education and undermining the State's own compelling interest in educating its children. *Serrano I*, 5 Cal.3d at 606 ("society has a compelling interest in affording children an opportunity to attend school").

F. SB 277 Violates State and Federal Disability Laws

As an initial matter, there is no justification for Defendants' argument that the only claims for which injunctive relief is appropriate are those involving constitutional violations. *See* Opp., Doc. 30, at 24. As shown below, the severity of the violations of disability laws is sufficient grounds to support injunctive relief here. Substantively, Defendants misapprehend Plaintiffs' disability claims and fail to refute Plaintiffs' evidence entitling them to injunctive relief.

1. The State Refuses To Provide Guidance To Allow The Admission of Students with IEPs

While Defendants admit that SB 277 exempts students with IEPs, Defendants still have inexplicably failed to provide guidance to the districts to enroll students with IEPs. Plaintiffs allege that SB 277, as applied, violates IDEA and that DOE is obligated, as part of its non-delegable duty under the State Constitution and under Federal law, to ensure equal access to schools for students with IEPs. *See Butt, supra*. Plaintiffs unquestionably have a private right of action against Defendants and where, as here, systemic violations impacting thousands of students are alleged, exhaustion would be futile and is not required. *See, e.g.*, *Honig v. Doe*, 484 U.S. 305, 327 (1988); *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992; *Morgan Hill Concerned Parents Assoc. v. Calif. Dept. of Educ.*, No. 2:11-cv-3471-KJM-AC, 2013 WL 1326301, at *8 (E.D. Calif. March 29, 2013).

2. Defendants Fail to Refute Plaintiffs' Section 504 claims

As with with IEPs, students with Section 504 plans are entitled to a Free and Appropriate Public Education under federal law. However, unlike IEP students, there is no exception in SB 277 to protect their rights. As demonstrated in Plaintiffs' Motion and herein, this violates the equal protection rights of students with 504 plans.

Defendants misstate Plaintiffs' claims concerning discrimination under Section 504 and the ADA. Plaintiffs do not allege that vaccine mandates are applied differently to students with disabilities. Rather, Plaintiffs demonstrate that the State's treatment of children with PBEs as inherently infectious and contagious and its exclusion of these children from school based on fear of contagion places these students in a protected category under the ADA, Section 504 and California disability laws. Defendants' entire Opposition is an admission of Defendants' treatment of Plaintiffs' children as vectors of "dangerous diseases" who threaten the public with "imminent harm." Thus, based on Defendants' own admissions, Plaintiffs have a

strong likelihood of success under the Section 504 and ADA claims, entitling them to injunctive relief.

II. DEFENDANTS CONCEDE THAT PLAINTIFFS WILL BE IRREPARABLY HARMED

Defendants do not contest that Plaintiffs will be irreparably harmed in the absence of an injunction and therefore have conceded the irreparable harm prong. Plaintiffs have made a substantial showing of irreparable injury, including violations of constitutionally protected rights. Motion, Doc. 14-1, at 22-24.

To the extent Defendants argue that there is no irreparable harm based on alleged delay by Plaintiffs in moving for injunctive relief, *see* Opp., Doc. 30, at 8, they are incorrect. Defendants argue that because parents could not file PBEs after January 1, 2016, the *status quo* changed on that day and Plaintiffs delayed several months in moving for relief. This is a frivolous argument. Defendants selectively read SB 277, which specifically provides that PBEs filed before January 1, 2016 stay in effect until July 1 2016: " . . . on and after July 1, 2016, the governing authority shall not unconditionally admit to any of those institutions specified in this subdivision for the first time, or admit or advance any pupil to 7th grade level, unless the pupil has been immunized for his or her age as required by this section." Health and Safety Code § 120335(g)(3). Thus, irreparable injury occurs – and grounds for injunctive relief exist – when children are denied admission.[5] In its July 5, 2016 Order, Doc. 4, denying Plaintiffs' motion for a TRO, this Court recognized that Plaintiffs are harmed when the fall semester begins and they cannot attend school. Thus, contrary to Defendants' claims, Plaintiffs' motion is timely and ripe for adjudication.

[5] *See* Reply RJN Ex. 12, which includes school calendars from various of Plaintiffs' school districts demonstrating that children on traditional school calendars are returning to school this month, many in just a few days.

III. THE BALANCE OF HARDSHIPS FAVORS PLAINTIFFS

The balance of hardships tips overwhelmingly toward Plaintiffs who, as demonstrated in their Motion, face a tremendous burden in loss of their children's right to an education, forced homeschooling against their will, as well as potential truancy charges and child removal if they are unable to homeschool. They face loss of jobs and resultant financial crises, and the possibility of moving out of state to secure their rights. These decisions, including the possibility of having to vaccinate their children to obtain education in violation of their fundamental rights, create tremendous hardship.

Conversely, there is no hardship to Defendants. Particularly, Defendants' discriminatory and prejudicial contentions notwithstanding, Plaintiffs' healthy children pose no threat that the State is attempting to prevent. Nor does reinstating the procedures used under AB 2109, the *status quo ante*, pose a hardship. Schools and medical professionals are familiar with PBEs, which existed for 55 years prior to SB 277. CDPH would be required to make the PBE form, Reply RJN Ex. 13 and its AB 2109 Frequently Asked Questions available on their website. No change to the CCRs would be needed, as CDPH has never repealed the CCRs that provide for PBEs. In fact, current law, as set forth in the CCRs specifically provides for PBEs. The State would simply stop asking schools to violate the CCRs. Finally, given the disarray in the state caused by Defendants' lack of guidance and inconsistent information, an injunction will restore order to schools and families.

IV. PUBLIC INTEREST WEIGHS IN PLAINTIFFS' FAVOR

Defendants also fail to address the public interest prong of the preliminary injunction analysis. Education is one of the most important rights under federal and California law. Keeping children in school undoubtedly serves the public interest both in the short and long term. There is no public health reason to override fundamental rights. The *status quo ante* has provided more than adequate protection for the health of Californians for more than fifty-five years.

V. DEFENDANTS PREMATURELY RAISE ARGUMENTS CONCERNING PLANTIFFS' MEDICAL RECORDS CLAIMS

Defendants have raised several arguments concerning Plaintiffs' claims with respect to medical records and the expenditure of state funds that are not properly before the Court. While Plaintiffs' claims are significant and are addressed in detail in Plaintiffs' First Amended Complaint, they were not a basis for Plaintiffs' Motion. Accordingly, it is improper for Defendants to raise these arguments in opposition and Plaintiffs do not address them in reply.

CONCLUSION

Plaintiffs respectfully request that the Court preliminarily enjoin SB 277 and preserve the *status quo ante* during the pendency of this action. The California Supreme Court recognized, 45 years ago, that "society has a compelling interest in affording children an opportunity to attend school," *Serrano v. Priest*, 5 Cal.3d at 602, and that education is "the bright hope for entry of the poor and oppressed into the mainstream of American society." *Id.* SB 277 is a stark departure from California's proud history of championing education, a legislative mistake that should not cost tens of thousands of children their education while Plaintiffs work to correct it. Children across the state are returning to their classrooms. Plaintiffs respectfully request that the Court grant their Motion and allow their children to join their peers.

DATED: August 5, 2016

Respectfully submitted,

By: */s/ James S. Turner*
James S. Turner
Betsy E. Lehrfeld
Robert T. Moxley
Kimberly M. Mack Rosenberg
Carl M. Lewis

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2016, I electronically filed the following document with the Clerk of the Court by using the CM/ECF system, on behalf of all Plaintiffs:

PLAINTIFFS' REPLY TO STATE DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION.

I certify that all participants in the case are registered CM/ECF users and they will be served by the CM/ECF system.

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 August 5, 2016, at Washington, D.C.

/s/ James S. Turner

James S. Turner, Declarant