

**LITIGATING ALTERNATIVE FACTS:
SCHOOL VACCINE MANDATES IN THE COURTS**

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ABSTRACT

In June 2015, California’s governor signed into law SB277, which removed the personal belief exemption to school immunization requirements, making medical exemptions the only valid way to send an unvaccinated child in the affected categories to school. Naturally, vaccine-hesitant parents opposed the legislation. After their efforts failed in the legislature, they turned to the courts, raising arguments old and new. To date, opponents have filed five lawsuits against the new California law, all of which have failed. This Article explains why courts in the United States, which have consistently upheld school immunization requirements, are correct to do so. These requirements are supported by strong policy reasons and serve a compelling interest, since they dramatically reduce the risk of outbreaks of potentially deadly diseases. These mandates fit with our basic principles of state police power, reasonable limits on individual rights, and protecting children. They are also supported by over a hundred years of jurisprudence. Using the opponents’ arguments to identify the strongest claims against SB277, the Article explains why those arguments—including claims based in the First Amendment, in parental rights, and in the right to education—cannot stand.

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INTRODUCTION

School immunization mandates have existed for over a century in the United States, and have been litigated ever since their creation.¹ In each legislative session at least some states see bills introduced addressing these mandates.² The predicted constitutionality of the proposed bills is debated during the legislative process, as are the arguments that courts address. In April of 2017, one anti-vaccine organization published that they were tracking “173 Vaccine Bills in 40 States.”³ This Article explains why so far, no court, state or federal, in the United States has found state school immunization mandates unconstitutional. This is true even when states have set limits on the scope of religious exemptions from the mandates.⁴ It demonstrates why upholding school immunization requirements is the right thing to do, both from a legal and policy perspective. The Article uses the recent litigation surrounding the California law enacted in 2015, which removed the personal

¹ For an early example of school immunization mandates litigation, see *Abeel v. Clark*, 24 P. 383 (Cal. 1890).

² Allison M. Bутtenheim, *The Vaccination-Exemption Challenge*, GOVERNING (July 11, 2017), <http://www.governing.com/gov-institute/voices/col-stronger-state-laws-vaccination-immunization-exemption-school-entry.html>.

³ Jeffrey Jaxen, *Activate: NVIC Now Monitoring 173 Vaccine Bills in 40 States*, JEFFREYJAXEN.COM (Apr. 25, 2017), <http://www.jeffreyjaxen.com/news/activate-nvic-now-monitoring-173-vaccine-bills-in-40-states>.

⁴ Dorit R. Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1567–70 (2014).

belief exemption to school immunization requirements, to set out its argument. The Article takes seriously the best arguments against mandates—including new arguments, or old arguments in new forms—and explains why they cannot stand. Politically, school immunization requirements may face heated battles. In the reason-based world of the law, vaccine mandates correctly enjoy broad, strong support, because extensive evidence shows that the mandates are sound policy serving important goals of preventing outbreaks and protecting children and the community.

School immunization requirements have been the focus of many court and legislative battles since at least the 19th century. They are likely to remain contentious, because the stakes are high both for those who acknowledge the benefits of vaccines and are concerned about outbreaks, and for those who see vaccines as harmful and are afraid to vaccinate their children.

Although none of the five lawsuits against SB277 had gone beyond trial level at this point,⁵ the validity of school immunization mandates is an important legal question expected to arise in other states as well.⁶ In addition to legal relevance, school immunization mandates affect the rate of immunization in the state, and stricter mandates are linked to higher rates of immunization and fewer outbreaks.⁷ Their constitutional validity therefore directly affects the health of communities and children.

As this Article demonstrates, SB277 lawsuits were correctly rejected—and courts should continue to reject such claims. Basically, opponents of SB277 face two obstacles they have yet to overcome. One is precedent: for over a century, our jurisprudence has solidly and consistently found school immunization mandates to be constitutional, with no requirement that states provide non-medical exemptions. The other is the policy rationale supporting such strong constitutional jurisprudence: scientific studies demonstrate both that school immunization mandates reduce the risk of preventable diseases and that vaccines are safe and effective. Mandates fit neatly into our basic principles, which allow reasonable public health regulation even when it interferes with individual rights.

⁵ Though two are under appeal.

⁶ During 2017, both Florida and Michigan have seen litigation on the issue. *See* *Flynn v. Estevez*, 221 So. 3d 1241 (Fla. Dist. Ct. App. 2017) (concerning whether a diocesan school district may require all its students to be immunized, where Florida law allows parents to claim a religious exemption from immunization for their children); *Nikolao v. Lyon*, 238 F. Supp. 3d 964, 968 (E.D. Mich. 2017) (describing a county health department's alleged violation of the First Amendment in its treatment of a mother seeking to exempt her children from immunization).

⁷ W. David Bradford & Anne Mandich, *Some State Vaccination Laws Contribute to Greater Exemption Rates and Disease Outbreaks in the United States*, 34 HEALTH AFF. 1383, 1383 (2015).

The lawsuits against vaccine mandates are often (though not always) brought by people who believe, contrary to the strong empirical evidence, that vaccines are dangerous; they are reluctant to vaccinate their children for that reason. As a result, litigants are fighting at a disadvantage. They are arguing against both a policy that protects children specifically and the community generally, and against a legislative judgment on health issues supported by extensive evidence. For these reasons, courts—correctly—have consistently rejected opponents’ challenges to school mandates.⁸

The focus of this Article is to provide a fair examination of the most plausible claims against school immunization mandates, put forth by people with a real passion and strong feelings about the topic. The SB277 lawsuits, representing opponents’ best efforts, help achieve that goal.

The Article proceeds as follows: Part I discusses vaccines, school immunization mandates, and the literature about both. It demonstrates that strong evidence shows that vaccines are safe and effective and that school mandates work—and it shows the problem California faced as its immunization rates declined. Part II discusses SB277 and its passage, setting out the trigger to the act—the Disneyland measles outbreak—the thorough deliberative process SB277 went through, and the broad support it enjoyed. Part III provides a short description of the lawsuits, addresses the reformulation of the facts by opponents, and then sets out the basic principles governing school mandates. Part IV examines the efforts of opponents to challenge the validity of SB277, addressing the most plausible (but still not compelling) arguments first—covering right to education, religious freedom, and unconstitutional conditions. It continues by examining arguments that are plausible, but have already been discussed and dismissed by multiple courts: parental freedom, equal protection, and substantive due process. It ends with two very weak arguments, the claim that liability protections for vaccine manufacturers cannot coexist with mandates, and the claim that legislators passing SB277 engaged in racketeering activity.

⁸ That is not to say that there have been no legal victories for opponents of mandatory immunization. For example, opponents have succeeded in striking down attempts to limit religious exemptions to members of organized religions, *Dalli v. Bd. of Educ.*, 267 N.E.2d 219, 222–23 (Mass. 1971), and in having statutes empowering officials to deny exemptions construed narrowly. In *re LePage*, 18 P.3d 1177, 1180 (Wyo. 2001); *see also* Reiss, *supra* note 4, at 1567–70. But as the Article details, they have failed in getting immunization mandates struck down, or having a court declare that a non-medical exemption is required.

I. BACKGROUND: VACCINES AND SCHOOL MANDATES

Vaccines are one of the great modern medical advances.⁹ In the United States alone, vaccines prevent tens of thousands of deaths and millions of hospitalizations each year.¹⁰ Worldwide, vaccines prevent millions of deaths each year, and could prevent more if broader coverage was achieved.¹¹ Like all medical interventions, vaccines carry a risk of serious harm, but that risk is extremely low; serious harm from vaccines is very rare.¹² To give one example, the very serious risk of a severe allergic reaction to vaccines—one that if left untreated can be fatal—is around one per million.¹³ Similarly, the risk of immune thrombocytopenic purpura (“ITP”), a blood platelet disorder, occurring after receipt of the Measles, Mumps and Rubella vaccine (“MMR”) is about 1 in 22,300 people, with most cases resolving within 6 months (note that the risk of ITP from measles infection is much higher).¹⁴ But as vaccines led to dramatic decreases in preventable diseases, some people have become more concerned about risks (real or imagined) of vaccines than their benefits. In words cited by the Supreme Court, vaccines are “victims of their own success.”¹⁵ For multiple reasons, past years have seen the rise of an anti-vaccine movement¹⁶ that has had some legislative success.¹⁷

High vaccination rates are important to prevent outbreaks. If a high enough percentage of people is immune to a disease—whether through vaccination or through getting the disease—the chances of an outbreak decrease and may even completely disappear; this is the concept known as herd or community immunity.¹⁸ The idea is that if there are enough immune

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- ⁹ Michael Worboys, *Vaccines: Conquering Untreatable Diseases*, 334 *BMJ* 19 (2007).
- ¹⁰ Cynthia G. Whitney et al., *Benefits from Immunization During the Vaccines for Children Program Era— United States, 1994–2013*, *CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP.* (Apr. 25, 2014), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6316a4.htm>.
- ¹¹ *Immunization Coverage Fact Sheet*, WORLD HEALTH ORGANIZATION (July 16, 2018), <http://www.who.int/mediacentre/factsheets/fs378/en/>.
- ¹² Margaret A. Maglione et al., *Safety of Vaccines Used for Routine Immunization of US Children: A Systematic Review*, 134 *PEDIATRICS* 325, 325 (2014).
- ¹³ Michael McNeil et al., *Risk of Anaphylaxis after Vaccination in Children and Adults*, 137 *J. ALLERGY CLINICAL IMMUNOLOGY* 868, 868 (2016).
- ¹⁴ Elizabeth Miller et al., *Idiopathic Thrombocytopenic Purpura and MMR Vaccine*, 84 *ARCHIVE DISEASES CHILDHOOD* 227, 228 (2001).
- ¹⁵ *Bruesewitz v. Wyeth*, 562 U.S. 223, 226 (2011).
- ¹⁶ PAUL A. OFFIT, *DEADLY CHOICES: HOW THE ANTI-VACCINE MOVEMENT THREATENS US ALL* 2–11 (2011).
- ¹⁷ Denise F. Lillvis et al., *Power and Persuasion in the Vaccine Debates: An Analysis of Political Efforts and Outcomes in the United States, 1998–2012*, 92 *MILBANK Q.* 475, 495 (2014).
- ¹⁸ T. Jacob John & Reuben Samuel, *Herd Immunity and Herd Effect: New Insights and Definitions*, 16 *EUR. J. EPIDEMIOLOGY* 601, 602–03 (2000). I also discuss this in Dorit Rubinstein Reiss, *Herd Immunity*

people, germs—even those introduced by non-immune travelers—are less likely to spread and reach the few people in the community who are not immune and are susceptible to infection.¹⁹ The corollary is that when vaccination rates drop, for example, because a congregation of people chose not to vaccinate, herd immunity is undermined, and the risk of outbreaks increases.²⁰

One of the best ways to increase immunization rates and achieve herd immunity is through implementation of school immunization requirements. While they have a long history, going back at least to the 19th century, these requirements became more commonplace in the second half of the 20th century.²¹ Today, all states and the District of Columbia have school immunization requirements, though states vary in the specific vaccines required and other details. California, for example, requires that children be vaccinated against ten diseases before attending school: diphtheria, Haemophilus influenzae type b (“Hib”), measles, mumps, pertussis, polio, rubella, tetanus, hepatitis B, and varicella (“chickenpox”).²² All states, however, provide some type of exemptions from school immunization requirements. Court battles tend to focus on exemptions. All states allow medical exemptions, and most also recognize some type of non-medical exemption, such as religious or personal belief exemptions.²³ States vary in the type of exemptions allowed and the ease of obtaining them.²⁴ Studies consistently show that when exemptions are easier to obtain, higher exemption rates tend to occur.²⁵ Studies also consistently show that higher

and Immunization Policy: The Importance of Accuracy, 94 OR. L. REV. 1, 14–16 (2015).

¹⁹ Charlotte A. Moser & Paul A. Offit, *News & Views: Herd Immunity and Vaccine Duration*, CHILD. HOSP. PHILA. (Nov. 03, 2014), <http://www.chop.edu/news/herd-immunity-and-vaccine-duration>.

²⁰ Paul Fine et al., “Herd Immunity”: *A Rough Guide*, 52 CLINICAL INFECTIOUS DISEASES 911, 914 (2011) (“Social clustering among parents who decide not to vaccinate their children can result in groups of children in which vaccination levels are well below the herd immunity threshold. The same effect is found in religious communities that eschew vaccination . . .”).

²¹ Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 BUFFALO L. REV. 881, 892 (2015) (discussing the early adoption of inoculation practices by Massachusetts in 1855 and enactment of vaccinations requirements for schools through the 20th century).

²² Cal. Health & Safety Code § 120335 (West 2016).

²³ Reiss & Weithorn, *supra* note 21, at 915.

²⁴ Y. Tony Yang & Ross D. Silverman, *Legislative Prescriptions for Controlling Nonmedical Vaccine Exemptions*, 313 [J]AMA 247, 247–48 (2015) (discussing non-medical exemptions ranging from exemptions for strictly medical issues to religious exemptions, and reviewing the difficulty in obtaining exemptions in different states).

²⁵ Nina R. Blank et al., *Exempting Schoolchildren from Immunizations: States with Few Barriers Had Highest Rates of Nonmedical Exemptions*, 32 HEALTH AFF. 1282, 1289 (2013) (confirming the inverse relationship “between non-medical exemptions rates and the complexity of exemption applications

exemption rates lead to outbreaks of preventable diseases.²⁶

With this background, it is not surprising that declines in vaccination rates tend to lead states to try to tighten exemption laws. For example, recently in Texas, the response to rising rates of exemptions was an introduction of (unsuccessful, as of yet) bills aimed at making it harder to get exemptions.²⁷ Earlier, both Washington state and Oregon passed bills requiring parents seeking exemptions to fulfill an educational requirement before obtaining an exemption.²⁸

In 2010, California saw an outbreak of whooping cough that dwarfed previous outbreaks. The outbreak exceeded 9,000 cases, 809 people were hospitalized, and ten infants younger than three months of age died from the disease.²⁹ This was much, much higher than previous decades.³⁰ Multiple studies found an association between locations of outbreaks and high

procedures”); Jennifer S. Rota et al., *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AM. J. PUB. HEALTH, 645, 645 (2001) (finding that less complex non-medical exemption application processes increase the number of parents claiming exemptions for children); Stephanie Stadlin et al., *Medical Exemptions to School Immunization Requirements in the United States—Association of State Policies with Medical Exemption Rates (2004–2011)*, 206 J. INFECTIOUS DISEASES 989, 989 (2012) (finding that states with easier medical exemption methods had an increased number of exemptions); Yang & Silverman, *supra* note 24, at 248 (reviewing the range of exemptions nationally and recommending more stringent laws for obtaining non-medical exemptions).

²⁶ Daniel R. Feikin et al., *Individual and Community Risks of Measles and Pertussis Associated with Personal Exemptions to Immunization*, 284 [J]AMA 3145, 3145 (2000) (finding that the schools with higher numbers of measles and pertussis outbreaks had more vaccine exemptors); Aamer Imdad et al., *Religious Exemptions for Immunization and Risk of Pertussis in New York State, 2000–2011*, 132 PEDIATRICS 37, 40, 42 (2013) (finding that higher rates of pertussis occurred in areas with higher numbers of vaccine exemptions); Saad B. Omer et al., *Geographic Clustering of Nonmedical Exemptions to School Immunization Requirements and Associations with Geographic Clustering of Pertussis*, 168 AM. J. EPIDEMIOLOGY 1389, 1394 (2008) (finding that “community-level risk[s] of outbreaks [are] also increased in the presence of geographic clusters of [vaccine] exemptors”); Saad B. Omer et al., *Nonmedical Exemptions to School Immunization Requirements: Secular Trends and Association of State Policies with Pertussis Incidence*, 296 [J]AMA 1757, 1757 (2006) (finding that states allowing personal belief exemptions and easily granting them was associated with an increased incidence of pertussis); Jennifer L. Richards et al., *Nonmedical Exemptions to Immunization Requirements in California: A 16-Year Longitudinal Analysis of Trends and Associated Community Factors*, 31 VACCINE 3009, 3009 (2013) (confirming an increase in non-medical exemptions in California from 1994 to 2009 and comparing data between geographic regions); Daniel A. Salmon et al., *Health Consequences of Religious and Philosophical Exemptions from Immunization Laws*, 281 [J]AMA 47, 47 (1999) (finding that increases in the number of vaccine exemptors caused an increased incidence of measles in non-exempt individuals).

²⁷ Julie Chang, *Bills Target High Rates of Texas Schoolchildren Lacking Vaccinations*, MYSTATESMAN (Dec. 07, 2016), <https://www.statesman.com/NEWS/20170109/Bills-target-high-rates-of-Texas-schoolchildren-lacking-vaccinations>.

²⁸ Lillvis et al., *supra* note 17, at 502.

²⁹ Kathleen Winter et al., *California Pertussis Epidemic, 2010*, 161 J. PEDIATRICS 1091, 1091, 1093–94 (2012).

³⁰ Jessica E. Atwell et al., *Nonmedical Vaccine Exemptions and Pertussis in California, 2010*, 132 PEDIATRICS 624, 624 (2013); Omer et al. *supra* note 26, at 1389.

vaccination exemption rates, including the California outbreak mentioned earlier.³¹ These data strongly supported a link between the outbreak and California's exemptions rates increasing dramatically over the previous decade.³²

In 2012, California passed AB2109. The law required that parents seeking a personal belief exemption get a doctor's signature on a portion of the exemption form stating that a healthcare provider informed parents about the risks and benefits of vaccines and the risks of the diseases they prevent.³³ Governor Brown added a statement to the law requiring the California Health Department to add a separate religious exemption on the form.³⁴ The bill came into effect in January 2014, and the following year exemption rates declined somewhat.³⁵

And then, the Disneyland measles outbreak started.

³¹ See, e.g., Maimuna S. Majunder et al., *Substandard Vaccination Compliance and the 2015 Outbreak*, 169 [J]AMA PEDIATRICS 494, 494 (2015); Atwell et al., *supra* note 30, at 627; Imdad et al., *supra* note 26.

³² See Richards et al., *supra* note 26, at 3012 (confirming an increase in nonmedical exemptions to kindergarten vaccine requirements for California schools from 1994 through 2009, and highlighting the need for more stringent rules for obtaining such exemptions).

³³ Assemb. B. 2109, 2011–12 Leg., Reg. Sess. (Cal. 2012); *Senate OKs Bill Targeting Unvaccinated Students*, SAN DIEGO UNION-TRIB. (Aug. 22, 2012, 5:12 PM), <http://www.sandiegouniontribune.com/sdut-senate-oks-bill-targeting-unvaccinated-students-2012aug22-story.html>.

³⁴ Signing Statement of Edmund G. Brown Jr., Office of the Governor, Assemb. B. 2109, 2011–12 Leg., Reg. Sess. (Cal. 2012) (“I will direct the department to allow for a separate religious exemption on the form. In this way, people whose religious beliefs preclude vaccinations will not be required to seek a health care practitioner’s signature.”). However, Governor Brown may have unlawfully altered the law with the addition of a religious exemption form, which AB2109 did not stipulate. See Dorit R. Reiss, *Viewpoint: Signing Statement on Vaccines Is Not Law*, U.C. HASTINGS RECORDER (Oct. 9, 2013), <https://www.law.com/therecorder/almID/1202622728667/viewpoint-signing-statement-on-vaccines-is-not-law/> (arguing that the governor’s signing statement went beyond the law and was *ultra vires*). This theory has not been tested in court.

³⁵ CAL. DEP’T HEALTH, IMMUNIZATION BRACH, 2014–2015 KINDERGARTEN IMMUNIZATION ASSESSMENT RESULTS 1 (2015), <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/Immunization/2017-2018KindergartenSummaryReport.pdf>.

II. SB277 AND ITS PASSAGE

A. *The Measles Outbreak*

In early 2015, California experienced what turned out to be a large outbreak of measles, which eventually spanned seventeen states, Mexico, and Canada.³⁶ The Centers for Disease Control and Prevention (“CDC”) described the outbreak as follows:

On January 5, 2015, the California Department of Public Health (CDPH) was notified about a suspected measles case. The patient was a hospitalized, unvaccinated child, aged 11 years with rash onset on December 28. The only notable travel history during the exposure period was a visit to one of two adjacent Disney theme parks located in Orange County, California. On the same day, CDPH received reports of four additional suspected measles cases in California residents and two in Utah residents, all of whom reported visiting one or both Disney theme parks during December 17–20. By January 7, seven California measles cases had been confirmed, and CDPH issued a press release and an Epidemic Information Exchange (Epi-X) notification to other states regarding this outbreak.³⁷

News outlets blamed the outbreak on anti-vaccine activism, with news articles declaring that “[t]his looks like another artifact of the rise of the anti-vaccination movement.”³⁸ Headlines included “Disneyland: The Latest Victim of the Anti-Vaxxers”³⁹ and “Disneyland measles outbreak sheds light on anti-vaccine movement.”⁴⁰ Concern was high in California as cases increased. A study published in March pointed out that “substandard vaccination compliance is likely to blame for the 2015 measles outbreak. Our study estimates that MMR vaccination rates among the exposed population in which secondary cases have occurred might be as low as 50% and likely

³⁶ *Measles—The Americas*, WORLD HEALTH ORG. (Feb. 13, 2015), <http://www.who.int/csr/don/13-february-2015-measles/en/>. The outbreak made California an exporter not just of computers, electronic commodities, and other goods, but of measles. *Trade Statistics*, CALCHAMBER ADVOCACY (2017), <https://advocacy.calchamber.com/international/trade/trade-statistics/>.

³⁷ Jennifer Zipprich et al., *Measles Outbreak—California, December 2014–February 2015*, CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. (Feb. 20, 2015), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6406a5.htm?s_cid=mm6406a5_w.

³⁸ Michael Hiltzik, *Anti-Vaccination Update: How the Measles Crisis Struck Disneyland*, L.A. TIMES (Jan. 8, 2015, 9:26 AM), <http://www.latimes.com/business/hiltzik/la-fi-mh-antivaccination-update-the-measles-crisis-strikes-disneyland-20150108-column.html>.

³⁹ Jeffrey Kluger, *Disneyland: The Latest Victim of the Anti-Vaxxers*, TIME, <http://time.com/3664553/disneyland-measles-antivaxxers/> (last updated Jan. 23, 2015).

⁴⁰ Marisa Taylor, *Disneyland Measles Outbreak Sheds Light on Anti-Vaccine Movement*, ALJAZEERA AMERICA (Jan. 23, 2015, 12:14 PM), <http://america.aljazeera.com/articles/2015/1/23/measles-disneyland-anti-vaccine.html>.

no higher than 86%.”⁴¹

The emphasis on non-vaccination as a cause of the outbreak drew attention to the problem of the high exemption rates in some California communities. While the emphasis in the media was on the Disneyland outbreak, this was the second year in a row that California saw relatively high rates of measles. Although the largest outbreak in 2014 was not in California, but in an Amish community with low immunization rates in Ohio,⁴² California’s 2014 outbreak led to the highest number of cases in the state since 1995.⁴³ In this relatively large measles outbreak 22 out of more than 60 cases occurred in Orange County (where Disneyland is located), an area that therefore saw two unusually large outbreaks of measles in two consecutive years.⁴⁴

B. Legislative Result

While some of the lawsuits tried to present SB277 as the result of pharmaceutical companies’ influence alone, the broad support behind it, and the events leading to it, do not support such an interpretation. This was not a law that was created by one person, nor was it passed without going through the normal legislative process.

After calls from constituents, a coalition of legislators which included Senator and pediatrician Richard Pan, Senator Ben Allen, and Assemblywoman Lorena Gonzales, formed to put the legislation together.⁴⁵ They were supported by a group of parent activists with different backgrounds who formed an organization called Vaccinate California that co-sponsored the bill.⁴⁶ The proposed SB277 went through three legislative committees in the California Senate—the Senate’s Health Committee, Education Committee, and Judiciary Committee—before heading to the

⁴¹ Majumder et al., *supra* note 31 at 494.

⁴² Paul A. Gastañaduy et al., *A Measles Outbreak in an Underimmunized Amish Community in Ohio*, 375 *NEW ENG. J. MED.* 1344, 1344 (2016).

⁴³ Zipprich et al., *Notes from the Field: Measles Outbreak—California, January 1–April 18, 2014*, *CENTERS FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP.* (Apr. 25, 2014), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6316a6.htm>.

⁴⁴ Eryn Brown, *CDC: 2014 A Record Year for Measles, California Has 60 Cases*, *L.A. TIMES* (May 29, 2014, 6:16 PM), <http://www.latimes.com/local/lanow/la-me-ln-measles-california-cdc-20140529-story.html>.

⁴⁵ Jeremy B. White, *From Death Threats to Holocaust Warning, California Vaccine Bill an Extraordinary Fight*, *SACRAMENTO BEE* (June 30, 2015, 5:01 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article25909216.html> (last updated June 30, 2015, 11:01 PM).

⁴⁶ Hannah Henry, *And Then Immunity Won the Day*, *MOTHERTHINK* (July 3, 2015), <http://www.motherthink.com/2015/07/03/and-then-immunity-won-the-day/>.

floor for a vote.⁴⁷ It passed the Senate, went through the Assembly's Health Committee, passed the Assembly, and was signed by California's Governor—going through a full deliberative process.⁴⁸

In each Committee hearing, both sides presented testimony,⁴⁹ and in each hearing, several hundreds of people opposed to at least some vaccines filled the meeting chamber, many of them families with children in tow, attending to oppose the legislation.⁵⁰ While opposition was intense, it is important to remember opponents represent a very small, if vocal, minority in California.⁵¹ On the other side, the bill was co-sponsored by the parents' organization, Vaccinate California, which coordinated letters of support from all California's counties, spoke up for the bill in different forums, and supported the bill on social media.⁵² It also received written support from the California Parents-Teachers Association⁵³ and several school boards.⁵⁴

Opponents had multiple chances to present their objections and convince legislators, and made full use of them, with phone calls, letters, and extensive social media advocacy. Most legislators, however, ended up supporting the law, which passed with large majorities. The final vote was 24 supporting to 14 opposing in the Senate, with two not voting, and 46 to 31 in the Assembly,

⁴⁷ *Vote Totals*, S.B. 277, 2014–15 S., Reg. Sess. (Cal. 2015), https://leginfo.ca.gov/faces/billVotesClient.xhtml?bill_id=201520160SB277.

⁴⁸ *Id.*

⁴⁹ For full disclosure, I was one of the witnesses testifying before the Judiciary Committee. Notes from my testimony are on file with Author, to be shared on request.

⁵⁰ Tracy Seipel, *Vaccine Exemptions: California SB277 Against Opt-Outs Advances in 6-2 Senate Health Committee*, MERCURY NEWS (Apr. 8, 2015, 7:51 AM), <http://www.mercurynews.com/2015/04/08/vaccine-exemptions-california-sb277-against-opt-outs-advances-in-6-2-senate-health-committee-vote/> (last updated Aug. 12, 2016, 4:47 AM).

⁵¹ Robin Abcarian, *California Vaccine Law Opponents: Passionate, Persistent, and Science-averse*, L.A. TIMES (June 29, 2015, 4:17 PM) <http://www.latimes.com/local/abcarian/la-me-ra-vaccine-opponents-persistent-20150629-column.html>; Jennifer Medina, *California Set to Mandate Childhood Vaccines Amid Intense Fight*, N.Y. TIMES (June 25, 2015), <https://www.nytimes.com/2015/06/26/us/california-vaccines-religious-and-personal-exemptions.html>.

⁵² *SB277 Becomes Law*, VACCINATECALIFORNIA BLOG (July 1, 2015), <http://vaccinatecalifornia.org/2015/07/01/sb277-becomes-law/>.

⁵³ *Health Care and Immunizations*, CALIFORNIA STATE PTA, <http://capta.org/focus-areas/health-safety/health-care-and-immunizations/>.

⁵⁴ See, e.g., Noel Brinkerhoff, *School Board Approves New Immunization Policy*, NAPA VALLEY REG. (Feb. 5, 2016), http://napavalleyregister.com/news/local/school-board-approves-new-immunization-policy/Article_ba454325-0ac4-5b2c-b240-007a95d6e631.html (illustrating an example of a school board demonstrating support for vaccination requirements); see also *Briefs: Piedmont School Board Supports State's Vaccination Bill*, MERCURY NEWS (June 17, 2015, 11:22 AM), <http://www.mercurynews.com/2015/06/17/briefs-piedmont-school-board-supports-states-vaccination-bill> (illustrating an additional example of a school board demonstrating support for vaccination requirements).

with three not voting.⁵⁵ Governor Jerry Brown signed the bill the day after the assembly vote,⁵⁶ with a strong signing statement that said, among other things:

The science is clear that vaccines dramatically protect children against a number of infectious and dangerous diseases. While it's true that no medical intervention is without risk, the evidence shows that immunization powerfully benefits and protects the community.⁵⁷

Opponents were not willing to give up. They mobilized to place the issue directly before California's voters by putting a referendum about it on the ballot. However, they failed to gather the required number of signatures to put it on the ballot (five percent of the votes cast for the Governor at the last election),⁵⁸ falling far below the minimum required.⁵⁹ They tried to recall the lead author of the bill, pediatrician and Senator Richard Pan, but they failed to submit any signatures supporting their recall effort.⁶⁰

They also turned to the courts, asking courts to overturn the law.

⁵⁵ *Vote Totals*, S.B. 277, 2014–15 S., Reg. Sess. (Cal. 2015), https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201520160SB277.

⁵⁶ Tracy Seipel & Jessica Calefati, *California Vaccine Bill SB 277 Signed into Law by Jerry Brown*, MERCURY NEWS, <http://www.mercurynews.com/2015/06/30/california-vaccine-bill-sb-277-signed-into-law-by-jerry-brown/> (last updated Aug. 12, 2016, 1:53 AM).

⁵⁷ Signing Statement of Edmund G. Brown Jr., Office of the Governor, Assemb. B. 2109, 2011–12 Leg., Reg. Sess. (Cal. 2012).

⁵⁸ Alex Padilla, *Referendum*, CALIFORNIA SECRETARY OF STATE (2018), <http://www.sos.ca.gov/elections/ballot-measures/referendum/>.

⁵⁹ Jeremy B. White, *California Vaccine Referendum Falls Short in Internal Count*, SACRAMENTO BEE (Sept. 30, 2015, 8:08 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/Article37144386.html> (last updated Oct. 1, 2015, 8:38 AM).

⁶⁰ Jeremy B. White, *Richard Pan Recall Effort Falls Short on Vaccine Issue*, SACRAMENTO BEE (Jan. 4, 2016, 9:25 AM), <http://www.sacbee.com/news/politics-government/capitol-alert/Article52931130.html> (last updated Feb. 2016, 4:28 PM). This is notably not a mistake; they submitted “[n]ot a single signature.” *Id.*

III. LEGAL CHALLENGES TO SB277

August 2016 was a tense month in California's vaccine wars. The first case against the new immunization law, SB277, was filed with a federal judge in San Diego. On August 12, 2016, I attended a hearing conducted by Judge Dana M. Sabraw to decide whether to grant a preliminary injunction in a suit filed by seventeen different plaintiffs and four organizations against the new law.⁶¹ The law removed California's Personal Belief Exemption from school immunization requirements.⁶² The plaintiffs, all unwilling to fully vaccinate their children against the ten diseases the law required they be protected from before attending school, believed they had no choice but to keep their children out of school in the wake of the law. The stakes, from their point of view, were very high. Their supporters—mostly anti-vaccine activists, including people from out-of-state—also saw the stakes as high, concerned about the precedent SB277 could set for other states if not struck down. A long line of opponents of the act attended the hearing; to my knowledge, I was the only person there not in opposition to SB277, aside from the state attorneys. I had at that point been advocating for vaccines for over four years and was involved in supporting the law during the legislative process, including testifying before the judiciary committee on the legal aspects of school immunization mandates, explaining why the proposed law was constitutional under existing jurisprudence.

The Judge asked a lot of questions during the hearing, but his demeanor let neither party know where he stood. We all had to wait for two weeks for the decision. Until 2016, no court—state or federal—had struck down a school immunization mandate, and a long line of cases upheld them. But the plaintiffs' lawyers worked hard to convince the judge that California's SB277 should be struck down, that this time a state went too far in requiring immunizations for school, that the requirement was too stringent. However, their efforts were unsuccessful. Judge Sabraw's decision to reject their request for a preliminary injunction made it clear he thought their chances of success on the merits were low, and they decided to withdraw the lawsuit.⁶³

⁶¹ For details on the questions asked and the arguments made at the hearing, see Transcript of Motion Hearing, *Whitlow v. California*, 203 F. Supp. 3d 1079 (S.D. Cal. Aug. 12, 2016) (No. 3:16-cv-01715).

⁶² The law amended California's Public Health and Safety code to repeal section 120365, which allowed parents to exempt their children from the school immunization requirements if those conflicted with their personal beliefs. S.B. 277, 2014–15 S., Reg. Sess. § 4 (Cal. 2015).

⁶³ Notice of Voluntary Dismissal Without Prejudice at 1, *Whitlow v. California*, 203 F. Supp. 3d 1079 (S.D. Cal. Aug. 31, 2016) (No. 3:16-cv-01715); see also Dennis F. Hernandez, *Health First*, L.A. LAWYER, June 2018, at 31 (noting the willingness of the court in *Whitlow* to limit an individual's right to practice religion freely when that individual right endangers the health of the community).

This lawsuit was the first of several lawsuits attacking SB277. So far, five lawsuits have been filed against SB277 (One is a lawsuit initially filed in federal court, rejected, and refiled in state court by the same group).⁶⁴ Three of them were professionally written, thoughtfully (if not very convincingly, as explained) argued.⁶⁵ One, filed by a lawyer, did not clearly make its claims and ended with the demurrer against it sustained, and a strong court of appeals decision against it.⁶⁶ The last lawsuit was filed by a number of prose litigants, and its arguments were the least plausible.⁶⁷ All five have been rejected by the trial courts. Two were appealed; for one, a panel of the Court of Appeal for the Second Appellate District soundly rejected the appeal, and the other is still open.⁶⁸ The rejection in each case drew, in part, on Judge Sabraw's initial, carefully reasoned decision to reject the motion for preliminary injunction.

This Article assumes that these lawsuits represent the best efforts of SB277 opponents. I will use them to overcome my natural bias, as a supporter of the legislation. As Part I sets out, school immunization mandates draw on extensive data that shows that vaccines are safe (their risks are small, and the risks of not vaccinating are much greater), that high rates of vaccination reduce outbreaks, and thus strong school mandates increase rates of vaccination and reduce outbreaks. These facts led courts in the United States to largely uphold states' choices in relation to school

⁶⁴ Table 1, in Appendix, describes the lawsuit in more detail, including the lawyers (to highlight that one had unrepresented plaintiffs).

⁶⁵ See generally Complaint for Declaratory & Injunctive Relief, *Whitlow v. California*, 203 F. Supp. 3d 1079 (S.D. Cal. July 1, 2016) (No. 3:16-cv-01715); Complaint for Declaratory, Injunctive, or Other Relief, *Torrey Love v. Cal. Dep't of Educ.*, No. SCV0039311 (Cal. Super. Ct. Apr. 4, 2017) [hereinafter *Torrey Love* Complaint]. *Torrey Love* is actually two lawsuits, one filed in federal court and the other in state court, hence there were three professionally written complaints. The state version of *Torrey Love* is currently under appeal in the California Court of Appeal. *Torrey Love*, No. SCV0039311 (Cal. Super Ct. Nov. 2, 2017), *appeal docketed*, No. C086030 (Cal. Ct. App. Nov. 15, 2017).

⁶⁶ See Order of Dismissal, *Buck v. California*, No. BC617766 (Cal. Super. Ct. Feb. 3, 2017). In October 2017, during the appeal, two of the plaintiffs, including Tamara Buck, the initial lead, withdrew from the lawsuit. It then became *Brown v. Smith* on appeal. See *Brown v. Smith*, 24 Cal. App. 5th 1135, 1143 (Cal. Ct. App. 2018). However, since the initial court decision rejecting the lawsuit was still *Buck*, and since the lawsuit drew heavily (and wrongly) on *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), I will continue to refer to it as *Buck* for the purpose of this Article in order to avoid confusion. *Buck* was the first lawsuit, filed in April 2016, but because its arguments are relatively weak it will get less emphasis in this Article.

⁶⁷ Report & Recommendation of U.S. Magistrate Judge, *Middleton v. Pan*, 2017 WL 7053936 (C.D. Cal. Dec. 15, 2016) (No. 2:16-cv-05224-SVW-AGR). The district judge adopted the magistrate judge's recommendation to dismiss the lawsuit. See *Middleton v. Pan*, No. 2:16-cv-05224-SVW-AGR, 2018 WL 582324 (C.D. Cal. Jan. 25, 2018), *appeal dismissed*, No. 18-55268 (9th Cir. June 27, 2018).

⁶⁸ See *Brown v. Smith*, 24 Cal. App. 5th 1135 (Cal. Ct. App. 2018).

mandates.⁶⁹ Opponents had to challenge both the factual basis behind the mandates and the existing jurisprudence. Because the bulk of the Article focuses on the legal arguments raised to challenge the jurisprudence, this section—seeking to present the basic principles and framework within which the lawsuits had to operate—starts with opponents’ efforts to challenge the factual premises behind SB277, before continuing with the longstanding jurisprudence upholding immunization mandates and the basic principles behind them. Part IV, then, deals with opponents’ legal arguments for moving away from this jurisprudence.

A. *Reframing the Facts*

One of the reasons legislatures pass mandates and courts uphold them is that abundant evidence supports the claim that such mandates prevent diseases, and, in doing so, protect children and the community.⁷⁰ One way to fight against mandates is to try and challenge that evidence. SB277 opponents challenged the descriptions I provided above in three major ways (not necessarily in the order I present them). First, they challenged tightening school mandates in California as unnecessary, by claiming that at California’s rate of exemptions, unvaccinated children do not pose a risk to other children. Second, they challenged the role of the measles outbreak in triggering SB277, claiming there was no public health emergency justifying the bill even in relation to vaccination against measles, and certainly in relation to the other vaccines cover by California’s immunization mandate. Finally, they claimed that vaccines were neither safe nor necessary, challenging the science on vaccines.

These claims are repeated across the lawsuits, and this Article will only provide the strongest examples for each.

⁶⁹ State jurisprudence serves as an exception, setting limits on the ways states enforce religious exemptions to school mandates. *See* Reiss, *supra* note 4, at 1558–70 (discussing religious exemptions to school mandates in practice by the states).

⁷⁰ *See infra* Part I.

1. School Mandates and Necessity

In *Whitlow v. California*, the plaintiffs claimed that the number of children with non-medical exemptions in California prior to the law was too low to affect public health, and that treating unvaccinated children as disease carriers is unfair and unjustified. The lawsuit stated that:

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 [personal belief exemption] 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%. In fact, at SB 277’s introduction, California’s vaccination rate was “at or near all-time high levels.”

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.” Defendants do not explain how Plaintiffs’ healthy children are a “danger to public health” or how their exclusion from school “protects the public.”⁷¹

This description understates the issue on two fronts. First, it ignores the trend of rising exemptions. Between 1996 and 2010, California’s exemption rate increased 380%, from 0.5% to 2.3%.⁷² While the total number of exemptions in the state never rose above three percent, the exemption rate was not evenly distributed: some areas and some schools had much higher rates of PBEs than others, making them potential hot spots for outbreaks.⁷³ Second, the complaint understates the risk from unvaccinated children, individually and in aggregate. Unvaccinated children are at higher risk of getting a preventable disease, and at higher risk of transmitting it.⁷⁴ Several outbreaks in the United States were directly traced to an unvaccinated child

⁷¹ Plaintiffs’ Reply to State Defendant Opposition to Motion for Preliminary Injunction at 3–4, *Whitlow v. California*, 203 F. Supp. 3d 1079 (S.D. Cal. 2016) (No. 3:16-cv-01715-DMS-BGS) (internal citations omitted).

⁷² See Malia Jones & Alison Buttenheim, *Potential Effects of California’s New Vaccine Exemption Law on the Prevalence and Clustering of Exemptions*, 104(9) AM. J. PUB. HEALTH 3 (2014) (discussing California exemption rates and the effect of policy change on vaccine refusal trends).

⁷³ See Elaine Won, *Protecting Our Children: The California Public School Vaccination Mandate Debate*, 10 CAL. LEGAL HIST. 471, 477–79 (2015) (discussing studies that report higher exemption rates among wealthier populations in California).

⁷⁴ See, e.g., Feikin et al., *supra* note 26, at 3145 (finding that vaccine “[e]xemptors were 22.2 times . . . more likely to acquire measles and 5.9 times . . . more likely to acquire pertussis than vaccinated children”); Jason M. Glanz et al., *Parental Refusal of Pertussis Vaccination is Associated with an Increased Risk of Pertussis Infection in Children*, 123 PEDIATRICS 1446, 1447, 1449 (2009) (detailing studies demonstrating increased risks of contracting infectious diseases for unvaccinated children).

coming back from abroad with a preventable disease.⁷⁵ When unvaccinated children congregate, another risk arises, the risk of undermining herd immunity. High rates of exemptions mean rates of vaccination have gone down—and it is therefore unsurprising that studies repeatedly found that areas with high rates of exemptions were more vulnerable to outbreaks.⁷⁶ So the simple reality is that unvaccinated children create a risk of disease to others, a risk much higher than the one created by their vaccinated, protected peers, and when they congregate—for example, when a community leans towards non-vaccination—there is a larger risk of disease. That was exactly the situation in California before the outbreak, where although the overall rate of immunization was high, some counties had very low rates, and it contributed to the Disneyland outbreak.⁷⁷

2. *The Measles Outbreak as an Impetus to SB277*

Several lawsuits claimed that the measles outbreak did not justify the passage of SB277. For example, the plaintiff's in *Whitlow* stated that:

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

⁷⁵ See David E. Sugerman et al., *Measles Outbreak in a Highly Vaccinated Population, San Diego, 2008: Role of the Intentionally Undervaccinated*, 125 PEDIATRICS 747, 747 (2010) (investigating the large outbreak of measles in San Diego, California following the return of an unvaccinated, infected child traveling from Switzerland). See generally Amy A. Parker et al., *Implications of a 2005 Measles Outbreak in Indiana for Sustained Elimination of Measles in the United States*, 355 NEW ENG. J. MED. 447 (2006); Maggie Fox, *Measles Outbreak in Minnesota Caused by Vaccine Skeptics*, NBC (May 8, 2017, 12:43 PM), <https://www.nbcnews.com/health/health-news/measles-outbreak-minnesota-caused-vaccine-skeptics-n756246> (last updated May 9, 2017, 3:13 PM) (detailing measles outbreaks in Indiana and Minnesota during 2005 and 2017, respectively).

⁷⁶ Feikin et al., *supra* note 26, at 3145; see also Aamer Imdad et al., *Religious Exemptions for Immunization and Risk of Pertussis in New York State, 2000–2011*, 132 PEDIATRICS 37, 40, 42 (2013) (indicating a positive correlation between areas of high exemption rates and prevalence of pertussis in the state of New York); Omer *supra* note 30, at 1394 (discussing evidence for an increased risk of vaccine-preventable diseases in areas with geographic “clusters” of exemptors).

⁷⁷ See Majumder et al., *supra* note 31, at 494 (indicating substandard vaccination compliance was likely to blame for the 2015 outbreak of measles at Disneyland Resort).

isolating healthy schoolchildren is necessary.⁷⁸

While the Disneyland outbreak was relatively limited, this claim ignores two things. While compared to the population of California, the outbreak was limited in scope (not surprising, when most people are vaccinated), it was the largest outbreak in the state since the 1990s, dramatically higher than what should happen when vaccination rates are high enough, and it was concentrated in areas with low rates of vaccination. Second, the outbreak was quickly contained through extensive work by the California Health Department, work that was costly and time-consuming: the costs were in the millions.⁷⁹ Further, the response to the outbreak involved quarantining tens of people.⁸⁰ In other words, though outbreaks caused by non-vaccination can be contained, containment efforts at best cost money that the state cannot spend on other important health issues, and at worst, fail to prevent deaths and harms.⁸¹ Containment also involves limiting the liberty of people exposed to the disease. At worst the measles outbreak would cost lives and permanent disabilities.⁸²

⁷⁸ Plaintiffs' Reply to State Defendant Opposition to Motion for Preliminary Injunction, *supra* note 71, at 6.

⁷⁹ Kathleen Harriman, *2014–2015 Measles Outbreak: It's a Small World After All*, CAL. DEP'T PUB. HEALTH (June 9, 2015), https://www.hhs.gov/sites/default/files/nvpo/nvac/meetings/pastmeetings/2015/2014-2015_california_measles_outbreak.pdf (referencing the \$1.56–\$3.91 million in estimated public health cost in California from this outbreak). That kind of cost is not unusual for measles outbreaks. *See generally* Tara Haelle, *Measles Outbreaks in Dollars and Cents: It Costs Taxpayers Bigtime*, FORBES (Feb. 11, 2015, 7:01 AM), <https://www.forbes.com/sites/tarahaelle/2015/02/11/measles-outbreak-in-dollars-and-cents-it-costs-taxpayers-bigtime/#1dcd12fb3f63> (discussing the expensive economic costs that follow measles outbreaks).

⁸⁰ To give a few examples, fourteen infants in a daycare in Santa Monica were quarantined during the outbreak. Brittany Mejia & Matt Hamilton, *Measles: State Totals Rise by One Case, But No Slowdown in the Outbreak*, L.A. TIMES (February 2, 2015, 9:01 PM), <http://www.latimes.com/local/lanow/la-me-ln-santa-monica-baby-measles-20150202-story.html>. Unvaccinated high school students were kept home. Rebecca Plevin & Adrian Florido, *Disneyland Measles Tally Rises, Unvaccinated OC Highschool Students Kept Home*, SCPR (Jan. 16, 2015), <https://www.scpr.org/news/2015/01/16/49326/amid-measles-outbreak-oc-high-school-makes-unvacci/>.

⁸¹ *See generally* Charlotte A. Moser et al., *Funding the Costs of Disease Outbreaks Caused by Non-Vaccination*, J. LAW, MED. & ETHICS 633–36, 643, 647 (2015) (discussing the costs the government must pay in response to vaccine-preventable disease outbreaks).

⁸² Europe, where low vaccination rates led to high rates of measles in the past few years, has seen tens of deaths, including in France, Italy, and Portugal, and thousands of hospitalizations. *Measles Cases Hit Record High in the European Region*, WORLD HEALTH ORGANIZATION (Aug. 20, 2018), <http://www.euro.who.int/en/media-centre/sections/press-releases/2018/measles-cases-hit-record-high-in-the-european-region>. In the first six months of 2018 Europe saw 41,000 measles cases and thirty-seven people died. To take Italy as an example, in 2017 over forty percent of patients were hospitalized. *Measles in Italy: Weekly Bulletin*, EPICENTRO (Nov. 4 2017), http://www.epicentro.iss.it/problemi/morbillo/bollettino/Measles_WeeklyReport_N33eng.pdf

3. Vaccines Risks and Benefits

At least three of the cases tried to challenge the scientific consensus that vaccines risks are small and their benefits large, with different degrees of competence. These make a large part of the lawsuits, and I will only address some of these claims. The plaintiffs in *Torrey-Love*, for example, asserted that the vaccines required are not necessary, making some incorrect assertions,⁸³ like the claim that Hepatitis B is almost always sexually transmitted,⁸⁴ or the claim that tetanus (a disease with ten percent mortality and almost always a long, painful recovery)⁸⁵ is “very rarely” dangerous to the individual.⁸⁶ The complaint generally downplayed the risk from vaccine-preventable diseases.

More extremely, the plaintiffs in *Buck v. Smith* claimed that vaccines do not provide immunity, that their immunity is short-lived (“only a few weeks (if at all)”)⁸⁷ and that there are real alternatives to mandates: parents may use “non-allopathic” means of immunity (the complaint does not specify what those would be),⁸⁸ or the state may quarantine the sick. The complaint argues that:

Natural immunity comes with no risk of harmful side effect; by contrast, all vaccines come with dozens of harmful side-effects, e.g. asthma, allergies, autism, autoimmune issues, encephalitis, paralysis, and death, (which are listed on lengthy vaccine inserts).⁸⁹

It is simply incorrect to claim that diseases like diphtheria, polio, and hepatitis B, that would have to be contracted (and survived) for a person to

⁸³ *Torrey Love* Complaint, *supra* note 65, at 12.

⁸⁴ For adults, the main route is sexual. For children, other routes exist, and the epidemiology is often unknown. See W. Ray Kim, *Epidemiology of Hepatitis B in the United States*, 49 HEPATOLOGY 28, 28–34 (2009) (discussing the differences between children and adults in routes of hepatitis B transmissions). Before the vaccine, about 16,000 children under the age of ten were infected each year, about half through infected mothers, the rest through other routes. In other words, the implication that this is mostly a sexually transmitted disease that is not a risk for children is incorrect. See Gregory L. Armstrong et al., *Childhood Hepatitis B Virus Infections in the United States before Hepatitis B Immunization*, 108 PEDIATRICS 1123, 1123 (2001) (finding thousands of American children were infected by hepatitis B each year before routine HPV immunization). When a child gets hepatitis B, the risk of chronic infection that can lead to liver disease and cancer is much, much higher. *Id.*

⁸⁵ *Epidemiology and Prevention of Vaccine-Preventable Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 8, 2015), <https://www.cdc.gov/vaccines/pubs/pinkbook/tetanus.html#complications> (defining and describing the tetanus disease and its characteristics).

⁸⁶ *Torrey Love* Complaint, *supra* note 65, at 12.

⁸⁷ Second Amended Complaint, at 6, *Buck v. Smith*, No. 2:16-cv-05111-GHK-MRW (C.D. Cal. July 21, 2016) [hereinafter *Buck* Complaint].

⁸⁸ Allopathic is a term those who prefer alternative medicine over traditional, science-based medicine use to refer to traditional medicine. *Allopathy*, THEFREEDICTIONARY: MEDICAL DICTIONARY (accessed Sept. 18, 2018), <http://medical-dictionary.thefreedictionary.com/allopathy>.

⁸⁹ *Buck* Complaint, *supra* note 87, at 6.

have natural immunity, come with no risk of harmful side effects. To use two of the examples in *Buck*, encephalitis is one of the risks of measles,⁹⁰ and paralysis one of the risks of polio.⁹¹ In fact, without vaccines, the diseases in question are estimated to cause tens of thousands of deaths and millions of cases of illness in a single birth cohort.⁹²

The *Middleton v. Pan* suit had an even more extreme set of factual claims. The whole basis for the complaint is that SB277 is a conspiracy to harm children, based on a belief that vaccines are extremely dangerous.⁹³ One claim used to make that point is an emphasis on vaccine ingredients, a common anti-vaccine trope; while the ingredients may sound frightening to people without scientific background (like most of us), in the tiny amounts found in vaccines they are not, in fact, harmful.⁹⁴ To give one example, the plaintiffs express concerns about aluminum salts used in vaccines. Aluminum salts have been used as adjuvants in vaccines since the 1920s, and have an excellent safety record.⁹⁵ Plaintiffs disagree. But the sources they use to address this are the FDA's limits for intravenous feeding of infants—daylong provision of solution directly into an infant's vein—and articles about the risks from such IV feeding of premature babies.⁹⁶ That is very different from vaccines, injected into the muscle—not directly into a vein—once every few months.⁹⁷ Because of this distinction, it is not a good counter to sources that are actually on point. The FDA does have limits for vaccines, and the schedule does not exceed them.⁹⁸ Further, the FDA studied the safety of

⁹⁰ Walter A. Orenstein, Robert T. Perry & Neal Halsey, *The Clinical Significance of Measles: A Review*, 189 J. INFECTIOUS DISEASES 4, 7–8 (2004).

⁹¹ *Epidemiology and Prevention of Vaccine-Preventable Diseases*, CTFRS. FOR DISEASE CONTROL & PREVENTION (Apr. 2015), <https://www.cdc.gov/vaccines/pubs/pinkbook/downloads/polio.pdf>.

⁹² Fangjun Zhou et al., *Economic Evaluation of the Routine Childhood Immunization Program in the United States, 2009*, 133 PEDIATRICS 1, 1 (2014).

⁹³ Complaint at 4–5, *Middleton v. Pan*, 2017 WL 7053936 (C.D. Cal. Dec. 15, 2016) (No. 2:16-cv-05224-SVW-AGR) [hereinafter *Middleton* Complaint].

⁹⁴ Paul A. Offit & Rita K. Jew, Special Article, *Addressing Parents' Concerns: Do Vaccines Contain Harmful Preservatives, Adjuvants, Additives, or Residuals?*, 112 PEDIATRICS 1 (2003); see also Reiss & Weithorn, *supra* note 21, at 944–45.

⁹⁵ Bruno Guy, *The Perfect Mix: Recent Progress in Adjuvant Research*, 5 NATURE REV. MICROBIOLOGY 505, 514 (2007); Philippa Marrack et al., *Towards an Understanding of the Adjuvant Action of Aluminium*, 9(4) NAT. REV. IMMUNOLOGY 287, 293 (2009).

⁹⁶ *Middleton* Complaint, *supra* note 93, at 7.

⁹⁷ On the differences between intravenous and intramuscular routes for this purpose, as well as the absorption and effect, see Robert J. Mitkus et al., *Updated Aluminum Pharmacokinetics Following Infant Exposures Through Diet and Vaccination*, 29 VACCINE 9538, 9541 (2011) and Tammy Z. Movsas et al., *Effect of Routine Vaccination on Aluminum and Essential Element Levels in Preterm Infants*, 167 [J]AMA PEDIATRICS 870, 871 (2013).

⁹⁸ See 21 C.F.R. § 610.15 (2017) (prescribing limits to the amount of ingredients, preservatives, diluents, and adjuvants allowed in vaccines, including aluminum content); see also Offit & Jew, *supra* note 94;

aluminum salts used in the infant vaccine schedule and found them safe.⁹⁹

Similarly, the complaint's discussion of formaldehyde—another ingredient it highlights—ignores the fact that, aside from its presence in many fruits, formaldehyde is created by the human body as part of our metabolism.¹⁰⁰ It is already present in infants' blood in much, much higher amounts than those in vaccines.¹⁰¹

In short, several of the lawsuits attempt to challenge the scientific consensus on vaccines, but the arguments used are extremely problematic, with little use of expert sources or evidence of expertise.

B. Basic Principles

The biggest challenge facing the plaintiffs in any of these lawsuits—and any other across the United States—is that a jurisprudence founded on strong basic principles has consistently upheld vaccine mandates at both the state and federal level.

Judge Sabraw, ruling in *Whitlow*, explained that: “For more than 100 years, the United States Supreme Court has upheld the right of the States to enact and enforce laws requiring citizens to be vaccinated.”¹⁰²

In the following paragraphs I will emphasize three basic principles that support immunization mandates. First, for over a century—and possibly dating back to the beginning of the Republic—public health has been a core state function, an area where states had acknowledged powers and responsibility. Second, while individual liberties are important, our jurisprudence has always acknowledged that individual liberty can be limited to protect the public health—indeed, that without that society cannot exist. Third, school mandates occupy a special sphere in which state power to regulate is especially strong: they are justified by both public health and protection of children's health, two powerful interests, and conversely, because the core individual right they affect—parental freedom to make decisions for their children—runs against both the child's welfare and the welfare of those outside the family, it is at its weakest there.

Vaccine Ingredients—Aluminum, CHILD. HOSP. PHILA. (2018), <http://www.chop.edu/centers-programs/vaccine-education-center/vaccine-ingredients/aluminum>.

⁹⁹ Robert J. Mitkus et al., *Updated Aluminum Pharmacokinetics Following Infant Exposures Through Diet and Vaccination*, 29 VACCINE 9538, 9542–43 (2011).

¹⁰⁰ Robert J. Mitkus et al., *Pharmacokinetic Modeling as an Approach to Assessing the Safety of Residual Formaldehyde in Infant Vaccines*, 31 VACCINE 2738 (2013).

¹⁰¹ Offit & Jew, *supra* note 94.

¹⁰² *Whitlow v. California*, 203 F. Supp. 3d 1079, 1083 (S.D. Cal. 2016).

While the states' police power is not well defined, courts have clearly and consistently ruled (at least since the nineteenth century) that it encompasses a state's power to regulate for the public health.¹⁰³ In 1905, in *Jacobson v. Massachusetts*, the United States Supreme Court upheld a statute requiring vaccination against smallpox on those grounds. The Court, addressing the tension between public health and individual rights, stated that:

[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. . . . Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.¹⁰⁴

Jacobson clearly acknowledged that the ability of states to limit individual rights were not absolute—it explained that:

[I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.¹⁰⁵

However, the authority in *Jacobson* clearly allowed states to put in place reasonable regulations limiting personal freedom, and it is clearly acknowledged today that states have authority to use quarantine powers, which directly interfere in civil liberties,¹⁰⁶ to mandate seatbelts,¹⁰⁷ and other public health intervention in personal behavior like smoking bans and drinking while driving.¹⁰⁸ It is clear today that individual liberties can be limited for public health purposes—though the states' authority to do so has limits, too.¹⁰⁹

¹⁰³ See *Slaughterhouse Cases*, 83 U.S. 36, 62 (1872) (recognizing for the first time that the police power allows states to regulate for the public's wellbeing).

¹⁰⁴ *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

¹⁰⁵ *Id.* at 28 (citing *Wis., Minn., & Pac. R.R. Co. v. Jacobson*, 179 U.S. 287, 301 (1900)).

¹⁰⁶ Lawrence O. Gostin, *Public Health Law in a New Century Part II: Public Health Powers and Limits*, 283 [J]AMA 2979, 2980 (2000).

¹⁰⁷ Jeffrey L. Thomas, *The Freedom to Be Foolish? L.B. 496: The Mandatory Seatbelt Law*, 19 CREIGHTON L. REV. 743, 748 (1986) (“[T]here are few reported cases in which the constitutionality of mandatory seat belt laws has been challenged.”).

¹⁰⁸ George A. Mensah et al., *Law as a Tool for Preventing Chronic Diseases: Expanding the Spectrum of Effective Public Health Strategies*, 1 PREVENTING CHRONIC DISEASES 1, 3 (2004).

¹⁰⁹ Gostin, *supra* note 106, at 2980–82.

There is every reason to think a mandate with no non-medical exemption—like the one embodied in SB277—is well within the reasonable limits of state police powers. In a recent article, Professor Lois Weithorn and I addressed the fact that *Jacobson* is still correct and applicable when it comes to children’s immunization (but may be challenged on several grounds when attempting to criminalize adult refusal to be immunized).¹¹⁰ In relation to childhood vaccines, limiting parents’ liberty is supported by both the child’s interest to be free from disease—an interest the state can legitimately protect—and the public health.¹¹¹ It is important to remember what parents are demanding when they challenge school mandates. The parents in question do not only claim the freedom to reject a global expert consensus that vaccines’ risks are small, and smaller than their benefits, and leave their child at risk of preventable diseases. They also claim the freedom to create a risk of outbreak in the school, an outbreak that would affect other children and the community in general, by sending their children to school unvaccinated.

Our courts have not been sympathetic to that demand.

In 1922, relying on *Jacobson*, the Supreme Court upheld a city ordinance requiring that children be vaccinated before attending schools (public and private), an ordinance with no exemption.¹¹² The *Zucht v. King* Court rejected both a due process and an equal protection challenge to the ordinance.¹¹³

While the Supreme Court has not directly ruled on the constitutionality of vaccine mandates since, in obiter dictum in *Prince v. Massachusetts*,¹¹⁴ the Court made the strong statement that:

[A parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.¹¹⁵

No court, state or federal, has ever struck down an immunization mandate, and many have upheld them. Most recently, two circuit courts of appeals rejected such challenges. In *Workman v. Mingo County Board of Education*, the Fourth Circuit Court of Appeals addressed a challenge to West Virginia’s school immunization mandate, which does not have a non-medical exemption—and rejected it, finding the mandate constitutional.¹¹⁶

¹¹⁰ Reiss & Weithorn, *supra* note 21, at 895–915.

¹¹¹ *Id.*

¹¹² *Zucht v. King*, 260 U.S. 174, 176 (1922).

¹¹³ *Id.* at 176.

¹¹⁴ 321 U.S. 158 (1944).

¹¹⁵ *Id.* at 166–67.

¹¹⁶ 419 F. App’x 348, 355–56 (4th Cir. 2011).

Similarly, in *Phillips v. City of New York*,¹¹⁷ the Second Circuit Court of Appeals rejected a challenge to New York's immunization mandate.

SB277 challengers faced a formidable background: a strong jurisprudence supporting vaccine mandates, solidly grounded in the important interests they protect: child's health and the community's health. SB277 opponents tried to counter the jurisprudence by reframing the facts, by attempting to distinguish the jurisprudence from modern reality, or by downplaying the jurisprudence and instead reaching for other legal arguments. However, challenges to SB277 cannot and should not win without providing a strong basis—factual and legal—for deviating from the jurisprudence, and so far, the cases have not.

Relevant to this section, three of the lawsuits—*Whitlow*, *Torrey-Love*, and *Buck*—also tried to distinguish the cases. In *Whitlow*, the plaintiffs' attorneys raised several arguments in attempts to distinguish from previous jurisprudence. For example, during the preliminary hearing¹¹⁸ Attorney Turner, speaking for the plaintiffs, suggested that the court in *Zucht* “did not reach the constitutional issues.” But that is incorrect. What the *Zucht* Court actually said was:

But, although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character. Long before this suit was instituted, *Jacobson v. Massachusetts* had settled that it is within the police power of a state to provide for compulsory vaccination. That case and others had also settled that a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative.¹¹⁹

In other words, the court declared that the constitutional issues were decided and clear, and in essence, reaffirmed that previous jurisprudence and its constitutional findings.

In the hearing mentioned above, Attorney Rosenberg attempted to distinguish *Phillips* by pointing out—correctly—that New York has a religious exemption, and that two of the cases in *Phillips* were catholic parents that had an exemption but whose children were kept out of school during an outbreak.¹²⁰ This is a correct depiction of the circumstances that brought

¹¹⁷ 775 F.3d 538, 542 (2d Cir. 2015) (per curiam) (upholding New York state requirement that students be vaccinated in order to attend public school).

¹¹⁸ Transcript of Motion Hearing at 13, *Whitlow v. California*, 203 F. Supp. 3d 1079 (S.D. Cal. 2016) (No. 16CV1715-DMS).

¹¹⁹ *Zucht v. King*, 260 U.S. 174, 176 (1922) (internal citations omitted) (citing *Sugarman v. United States*, 249 U.S. 182, 184 (1919)).

¹²⁰ Transcript of Motion Hearing, *supra* note 118, at 28.

two of the plaintiffs to court (the third was denied a religious exemption), but it is not the legal question the court addressed, or apparently, the plaintiffs pleaded. *Phillips* opens by saying:

Plaintiffs brought this action challenging on constitutional grounds New York State’s requirement that all children be vaccinated in order to attend public school. Plaintiffs argued that the statutory vaccination requirement, which is subject to medical and religious exemptions, violates their substantive due process rights, the Free Exercise Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Ninth Amendment, and both state and municipal law.¹²¹

In other words, while the scenario that brought two of the plaintiffs to court was different than the one facing SB277 plaintiffs (the third situation was a more direct parallel, a child refused admission unless vaccinated), the argument was the same—and the decision directly relevant.¹²²

Similarly, Attorney Rosenberg for the plaintiffs suggested *Workman* did not address the educational issue at focus here¹²³—but while she’s right that a state’s constitutional right to education was not discussed in *Workman*, other claims raised by the plaintiffs were.

Torrey-Love made a more systematic effort to distinguish past precedent. In its request for preliminary injunction, the plaintiffs’ complaint made a number of points. First, they pointed to the fact that *Jacobson* was cited in *Buck v. Bell*,¹²⁴ in which the Supreme Court upheld forced sterilization, to suggest *Jacobson* does not comport with modern values.¹²⁵ While *Buck* is a stain on our jurisprudence and a very, very problematic case,¹²⁶ it is not *Jacobson*; modern sensibilities are rightly outraged by forced sterilization,¹²⁷ but there is—appropriately—overwhelming support for vaccines that protect children from diseases and save lives.¹²⁸ *Jacobson* is maintained as a leading

¹²¹ *Phillips*, 775 F.3d at 540.

¹²² Whether or not the broader argument was a litigation strategy error on the part of the attorney handling *Phillips*—or whether combining the two cases opposing exclusion during an outbreak with a case directly attacking the lack of exemption—can be debated, and is not the focus of this Article.

¹²³ Transcript of Motion Hearing, *supra* note 118, at 28.

¹²⁴ 274 U.S. 200, 207 (1927).

¹²⁵ Plaintiffs’ Notice of Motion and Motion for a Preliminary Injunction, and Memorandum of Points and Authorities in Support of Motion for a Preliminary Injunction at 10, *Torrey-Love v. Cal. Dep’t of Educ.*, No. 5:16-cv-2410-DMG-DTB (C.D. Cal. Dec. 8, 2016) [hereinafter *Torrey-Love Preliminary Injunction Motion*].

¹²⁶ See Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 31 (1985) (“In the almost sixty years since *Buck v. Bell* was decided, commentators have repeatedly attempted to understand its more problematic aspects.”).

¹²⁷ PAUL A. OFFIT, *PANDORA’S LAB 108–110* (2017) (showing how disease outbreak can undermine education).

¹²⁸ Cary Funk, Brian Kennedy & Meg Hefferon, *Vast Majority of Americans Say Benefits of Childhood Vaccines*

case in public health where *Buck v. Bell* has long been relegated to the dustbin of historical embarrassments because *Jacobson* protects important interests.

The *Torrey-Love* plaintiffs also attempted to distinguish *Jacobson* by construing it narrowly (as did other litigants). In their motion for preliminary injunction, plaintiffs stated:

The proper view recognizes *Jacobson* and its progeny as narrow, limited, and distinguishable, consistent with modern precedent. The *Jacobson* line of cases articulated that (a) a relatively self-contained township; (b) could require an individual to be vaccinated against a highly contagious, airborne disease; (c) or pay a fine; (d) during a serious outbreak of the same disease; (e) before the era of widespread travel made such mandates less meaningful.¹²⁹

In footnote 9 to the Request, plaintiffs added: “The *Jacobson* line must be read to impose limitations on the state’s police power in these situations, including requirements of necessity, reasonableness, proportionality, and clear harm avoidance.”¹³⁰

Plaintiffs reiterated:

Once more, *Jacobson* and *Zucht* are instructive and provide a stark contrast to the present situation. In those cases, towns passed laws, before the era of international travel—indeed before much travel at all. Therefore, the ordinances there were credibly tailored to meet its ends. The folly of burdening California schoolchildren and infringing their fundamental rights, while millions of unvaccinated foreign children alone visit the state each year, is manifest.¹³¹

The first problem plaintiffs run into in this attempt to distinguish is that two of their distinctions—the existence of an outbreak and the penalty in *Jacobson*—are countered by *Zucht*. In *Zucht*, the Supreme Court, citing *Jacobson*, upheld a school immunization mandate with no exemptions, at a time when there was no active outbreak. In other words, attempts to narrow *Jacobson* to a fine and an outbreak cannot pass the barrier of *Zucht*.

Outweigh Risks, PEW RES. CTR. (Feb. 2, 2017), <http://www.pewinternet.org/2017/02/02/vast-majority-of-americans-say-benefits-of-childhood-vaccines-outweigh-risks/>; see also *U.S. Infant Vaccination Rates High*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 28, 2014), <https://www.cdc.gov/media/releases/2014/p0828-infant-vaccination.html>; *Immunization*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 03, 2017), <https://www.cdc.gov/nchs/fastats/immunize.htm> (noting that the vast majority of infants aged nineteen to thirty-five months had received vaccinations for a variety of diseases).

¹²⁹ *Torrey-Love* Preliminary Injunction Motion, *supra* note 125, at 10–11 (footnotes omitted).

¹³⁰ *Id.* at 11 n. 9.

¹³¹ *Id.* at 14–15 (footnote omitted). Note that the claim of infringing on the children’s constitutional rights is the focus of the litigation, and not, as the plaintiffs phrase it, a foregone conclusion. Arguably, protecting children from disease supports their right to life.

Furthermore, in *Whitlow*, Judge Sabraw also addressed the claim of an existence of an outbreak in *Jacobson*, and explained that the state's interest in protecting the health of children does not depend on the existence of a public health emergency.¹³² He could also have gone further and reminded us that *Jacobson* itself relied on school immunization requirements—not all of which were during outbreaks—in its ruling, finding that an acceptable use of state powers.¹³³

Necessity does not by itself mean that there has to be an ongoing outbreak, rather than a need to prevent one. The state does not have to wait for children to be sick, die, or for costs to accumulate before adopting evidence-based public health measures. It can adopt them to prevent such a result.

The other arguments are just as problematic. The “highly contagious, airborne disease” claim applies just as much to several diseases we vaccinate against, such as measles, chickenpox, whooping cough, and diphtheria. But the fact that a dangerous disease is transmitted in another way doesn't remove its risk. Polio, for example, is very dangerous, and can be transmitted in the school context.¹³⁴ Limiting school immunization mandates just to airborne diseases would leave children at unnecessary risk of other harmful diseases.

As to the fact that *Jacobson* and *Zucht* preceded modern air travel, the claim seemed based on a misunderstanding of the way herd immunity operates.¹³⁵ Herd immunity is even more important in a period of international travel. Herd immunity means that enough people in the population are immune to a disease that even if the disease is introduced, it will not reach the susceptible people and outbreaks will either not happen at all or be limited and easily contained.¹³⁶ While an outbreak can certainly happen in a small, confined community, in an era of international travel, the chances of a case being introduced into the community are higher, not lower. Essentially, the size of the “herd” is now bigger, and the community is no longer isolated—with these interconnections increasing the risk of exposure. For example, an unvaccinated child can travel abroad to a measles endemic country and return with an infection—as has happened in the past.¹³⁷ Generally, the CDC

¹³² *Whitlow v. California*, 203 F. Supp. 3d 1079, 1090 (S.D. Cal. 2016)

¹³³ *Jacobson v. Massachusetts*, 197 U.S. 11, 31–35 (1905).

¹³⁴ See, e.g., Louis Weinstein, *Poliomyelitis—A Persistent Problem*, 288 NEW ENG. J. MED. 370, 370 (1973) (discussing a school-centered outbreak of the polio virus).

¹³⁵ See Fine et al., *supra* note 20, at 911 (“Many examples of herd immunity have been described, illustrating the importance of indirect protection for predicting the short- and long-term impact of vaccination programs, for justifying them economically, and for understanding the nature of the immunity induced by various vaccines.”).

¹³⁶ Reiss, *supra* note 18, at 7–8.

¹³⁷ David E. Sugerman et al., *Measles Outbreak in a Highly Vaccinated Population, San Diego, 2008: Role of the*

explains that “Travelers with measles continue to bring the disease into the U.S.” and “Measles can spread when it reaches a community in the U.S. where groups of people are unvaccinated.”¹³⁸ Unvaccinated visitors who carry infections can infect unvaccinated children they interact with; those children can in turn infect classmates and start an outbreak in their schools. In other words, because we live in an era of international travel, and diseases are routinely brought into the states by travelers, or United States based travelers visit areas where diseases are endemic, having higher immunization rates is crucial to prevent outbreaks. By limiting the number of unvaccinated and unprotected children in communities, and especially in the high-transmission environment of the school,¹³⁹ SB277 is very well tailored to meet the end of preventing disease outbreaks.

In other words, the attempts to distinguish *Jacobson* and *Zucht* and the subsequent cases were unconvincing, and indeed, those courts that had an opportunity to examine them rejected them.¹⁴⁰ Litigants were therefore forced to try and look elsewhere to challenge the existing jurisprudence.

IV. SCHOOL MANDATES AND LEGAL CLAIMS

The focus of the rest of this Article is on the legal arguments made by SB277 opponents in their effort to challenge the act, and why the courts in question were correct to reject those arguments. The arguments are arranged from strongest to weakest. I consider the strongest (but still far from compelling) arguments to be the claim that SB277 violates the right to education embodied in the California constitution, violates the First Amendment by requiring parents with religious objections to vaccinate, and

Intentionally Undervaccinated, 125 PEDIATRICS 747, 748 (2010).

¹³⁸ *Measles Cases and Outbreaks*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 9, 2018) <https://www.cdc.gov/measles/cases-outbreaks.html>.

¹³⁹ See Muireann Brennan et al., *Evidence for Transmission of Pertussis in Schools, Massachusetts, 1996: Epidemiologic Data Supported by Pulsed-Field Gel Electrophoresis Studies*, 181 J. INFECTIOUS DISEASES 210, 214 (2000) (“[S]everal lines of evidence suggest that pertussis transmission occurred in Massachusetts in 1996 and that school-aged children, particularly those aged 10-19 years, played an important role in the statewide outbreak.”); Alan Hinman et al., *Childhood Immunization: Laws that Work*, 30 J.L., MED. & ETHICS 122, 123 (2002) (noting that many vaccine-preventable diseases were primarily being transmitted at school); Dieter Schenzle, *An Age-Structured Model of Pre- and Post-Vaccination Measles Transmission*, 1 IMA J. MATHEMATICS APPLIED MED. & BIOLOGY 169, 169 (1984) (discussing the fact that schools are areas of high disease transmission).

¹⁴⁰ *Whitlow v. California*, 203 F. Supp. 3d 1079, 1092 (S.D. Cal. 2016). The federal district court that dismissed *Torrey-Love* made short work of the cases, saying: “Though Plaintiffs assail these cases for their age, they have not been overturned and are still good law and binding upon this Court.” *Torrey-Love v. California*, No. 5:16-cv2410-DMG-DTB, slip op. at 6 (C.D. Cal. Jan. 12, 2017) (footnote omitted).

the new and creative argument that SB277 runs afoul of the unconstitutional conditions doctrine, because the existing jurisprudence does not directly address the first and the last, and because the question of religious freedom is a current and contentious one.

Less strong, but still plausible, are the claims that SB277 violates parental rights, substantive due process and equal protection. These are weaker claims because existing jurisprudence—either on school mandates or more generally—clearly addresses them and likely forecloses them.

Finally, I address two completely implausible arguments, founded on misunderstanding of law—the argument that the state cannot mandate products that are unavoidably unsafe or that liability protections cannot co-exist with mandates and the claim legislators violating the law were involved in a criminal conspiracy. These claims are addressed as a public service: while implausible, they are likely to appeal to those without background in law, and may be raised both in legislative debates and in lawsuits. By addressing them here, I hope to arm legislators and courts with ready counters, saving them work. These last arguments also demonstrate, in my view, the extreme worldview of some of the litigants, and thus shed light on the extreme edges of the anti-vaccine movement.

A. *The Strongest Claims*

1. *A Constitutional Right to Education*

Each of the lawsuits claimed that SB277 violates the right to education, a fundamental right under California's constitution.¹⁴¹ For example, the plaintiffs in *Whitlow* said:

Plaintiff's children have a fundamental right to education. . . . *Serrano I* explained why education is a protected, fundamental right, citing (1) its relationship to economic advancement; (2) its relevance to all aspects of social life; (3) its duration of ten to thirteen years; (4) its impact on children's emotional and psychological health; and (5) its compulsory nature. Strict Scrutiny must be applied to violations of fundamental protected rights under the California State Constitution, or where suspect classifications are at issue.¹⁴²

This state law claim is likely the strongest claim the cases have, because it had not been directly addressed by our jurisprudence, and is not

¹⁴¹ CAL. CONST. art. IX, §1.

¹⁴² Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, at 6, *Whitlow v. California*, 203 F. Supp. 3d 1079 (S.D. Cal. 2016) (No. 3:16-cv-1715-DMS-BGS) (citing *Serrano v. Priest*, 5 Cal. 3d 584 (1971)).

implausible. There is no federally protected right to education.¹⁴³ But many states have constitutional clauses addressing education. California's constitution addresses education in Article IX Section 1 states:

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.¹⁴⁴

The subsequent constitutional sections set out many administrative details of how the system will operate.¹⁴⁵ In the 1970s, in a series of cases addressing the funding of California's educational system, the Supreme Court of California found that California's school funding system was unconstitutional because it implicated a suspect category (wealth) in the context of a fundamental interest (education).¹⁴⁶ *Serrano v. Priest* correctly stands for the premise that education is a fundamental interest under the California constitution, and for the importance of access to education. The question is whether SB277 violates it.

There are at least three compelling arguments against the claim that SB277 violates the right to education. First, a starting point is that schools were never an unregulated sphere, and regulating schools for health and safety is one of the traditional roles of the state.¹⁴⁷ A vaccine mandate is one such health and safety regulation. Arguably, reducing the risks of outbreaks protects education, since outbreaks undermine education in several ways. Outbreaks undermine the education of the children who fall ill during the

¹⁴³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

¹⁴⁴ CAL. CONST. art. IX, § 1. This language is fairly typical—many state constitutions have provisions focused on public education. For example, Florida's constitution says:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

FLA. CONST. art. IX, §1. Oklahoma's says: "Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all children of the state . . ."

OKLA. CONST. art. I, § 5. Arizona's states: "The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated." Arizona's says: "The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system . . ." ARIZ. CONST. art. XI, § 1.

¹⁴⁵ CAL. CONST. art. IX, §§ 2–14.

¹⁴⁶ *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1255, 1258 (Cal. 1971); *see also* *Serrano v. Priest* (*Serrano II*), 557 P.2d 929, 948 (Cal. 1976) (en banc).

¹⁴⁷ Dorit Rubinstein Reiss, *Vaccines, School Mandates, and California's Right to Education*, 63 UCLA L. REV. DISCOURSE 98, 108 (2015).

outbreak, even more so if they are permanently disabled or killed by the disease.¹⁴⁸ Outbreaks also undermine education for unimmunized children who need to be kept at home during the outbreak.¹⁴⁹ In fact, since vaccinating the child also helps to keep the child safe while in school, something squarely within a parent's responsibility, and squarely connected to the child's right to education (a child will not be getting an education if sick, or worse, hurt by a disease), conditioning access to school on protecting the child from disease is not squarely a clash.

An article written during the SB277 legislative process points out that in at least one settled case brought under *Serrano*, the state's duty to preserve the health of California's children while at school was emphasized—something school mandates support.¹⁵⁰ Opponents of SB277 attempt to use *Serrano* to prevent the state from regulating schools to protect health. However, *Serrano* focused on providing access to schools and preventing wealth-based discrimination. Therefore, such an argument takes *Serrano* out of context and undermines education—a fundamental interest.

In addition, when we are talking about access to education, it is important to remember that there is one more group whose access is affected by vaccination rates. Children with medical conditions that prevent vaccination are often especially vulnerable to the risks of infectious diseases—for example, children with cancer, or with transplants. When immunization rates in school drop, those parents are faced with the choice of allowing the child into an area vulnerable to outbreaks, risking the child's life, or leaving the child out of school—with the consequence of limiting that child's access to education. Strong school mandates protect that child, and allow her access to the school. While not a legal barrier, it is a very real barrier to access. Why should we prefer the access of the child whose parents chose not to vaccinate over the access of the child whose parents cannot vaccinate?¹⁵¹

¹⁴⁸ *Id.* at 109–10.

¹⁴⁹ *Id.*

¹⁵⁰ Elaine Won, *Protecting Our Children: The California Public School Vaccination Mandate Debate*, 10 CAL. LEGAL HIST. 471, 479 (2015).

¹⁵¹ Reiss, *supra* note 147, at 108. For example, one of the speakers during the SB277 debate was six year old Rhett Krawitt, a recovering leukemia patient who, because of his disease, could not be vaccinated and was at risk during the measles outbreak. Because of the high rate of unvaccinated children in his school, Rhett was at risk when attending the school, leading his family to express concern about sending him there. See Jon Brooks, *Boy Leukemia Patient Weighs in as Big Vaccine Exemption Vote Nears*, KQED (June 23, 2015), <https://www.kqed.org/stateofhealth/39317/boy-leukemia-patient-weighs-in-as-vote-on-vaccine-bill-nears>; Tamar Lewin, *Sick Child's Father Seeks Vaccination Requirement in California*, N.Y. TIMES (Jan. 28, 2015), <https://www.nytimes.com/2015/01/29/us/father-of-boy-with-leukemia-asks-california-school-officials-to-bar-unvaccinated-students.html>.

Finally, because of the importance of the interest protected by school mandates—that of preventing diseases that can kill, harm, or maim—the right to education does not bar them. That is the reason that early cases addressing school mandates in states that had a constitutional right to education upheld them.¹⁵² In *Whitlow*, Judge Sabraw also addressed the question what happens if the right to education is subject to heightened review without ruling whether that is the case. He pointed out that our jurisprudence implicitly or explicitly acknowledged that states have a compelling interest in “fighting the spread of infectious diseases through mandatory vaccination of school-aged children,” and went through a review of the extensive jurisprudence supporting the point.¹⁵³ In relation to whether SB277 is the least restrictive means, the judge pointed to California’s goal, as declared in the preamble to its school mandate statute—a goal of achieving total immunization.¹⁵⁴ The judge concluded that “[t]he objective of total immunization is not served by a law that allows for PBEs, whether the PBE rate is 2% or 25%.”¹⁵⁵

In other words, the goal of achieving total immunization, with the view of preventing diseases as much as possible, is a legitimate one, protecting a compelling interest—and there is no real alternative to removing the PBE to achieve it.

In ruling on this issue in *Buck*, the Court of Appeal of the Second Appellate District—the only appellate decision on this so far—went further:

Plaintiffs allege in their complaint that Senate Bill No. 277 is not narrowly tailored to meet the state’s interest, because there are less restrictive alternatives (such as alternative means (unspecified) of immunization, and quarantine in the event of an outbreak of disease). This argument fails, of course, as compulsory immunization has long been recognized as the gold standard for preventing the spread of contagious diseases. As is noted in the legislative history, studies have found that “when belief exemptions to vaccination guidelines are permitted, vaccination rates decrease,” and community immunity wanes if large numbers of children do not receive required vaccinations.¹⁵⁶

¹⁵² *Viemeister v. White*, 72 N.E. 97, 98 (N.Y. 1904) (“The right to attend the public schools of the state is necessarily subject to some restrictions and limitations in the interest of the public health . . . If vaccination strongly tends to prevent the transmission or spread of [smallpox], it logically follows that children may be refused admission to the public schools until they have been vaccinated.”); *see also* *French v. Davidson*, 143 Cal. 658, 662 (Cal. 1904) (holding that it is within the police power of the State of California to say whether all school children should be vaccinated).

¹⁵³ *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016).

¹⁵⁴ CAL. HEALTH & SAFETY CODE §120325(a) (West 2016).

¹⁵⁵ *Whitlow*, 203 F. Supp. 3d at 1091.

¹⁵⁶ *Brown v. Smith*, 24 Cal. App. 5th 1135, 1146 (Cal. Ct. App. 2018) (citation omitted) (quoting

In a similar vein, Won pointed out that there is no support or reason to believe that less restrictive means would achieve the required rate for herd immunity—over ninety or ninety-four percent for the most contagious diseases—in schools where many parents are anti-vaccine.¹⁵⁷ There is no real evidence, therefore, that less restrictive means like an educational requirement would protect the compelling interest of preventing outbreaks of potentially fatal diseases.

Judge Sabraw concluded:

The right of education, fundamental as it may be, is no more sacred than any of the other fundamental rights that have readily given way to a State's interest in protecting the health and safety of its citizens, and particularly, school children. Because a personal belief exemption is not required in the first instance, the State can remove it—and impinge on education rights—in light of the compelling interest here. In this context, removal of the PBE is necessary or narrowly drawn to serve the compelling objective of SB 277.¹⁵⁸

As part of its argument in *Whitlow* that SB277 did not violate California's Right to Education, the state cited several cases from the late nineteenth century and early twentieth century—all upholding school immunization mandates—on the basis that they do not violate the right to education.¹⁵⁹ While these cases provide legitimate legal support for upholding SB277, the arguments above are, in my view, stronger because the California cases in question preceded *Serrano*, and the effect of *Serrano* on school immunization mandates had not, at the beginning of the challenges, been litigated yet. At this point, however, both several trial courts and the second appellate district have ruled against the claims.

2. *The First Amendment's Free Exercise Clause*

Three of the lawsuits—*Whitlow*, *Buck*, and *Middleton*—raised a First Amendment claim. In its strongest form, the claim is that freedom of religion, a fundamental right in our system, is undermined when parents with religious opposition to vaccines are required to vaccinate their children in order to send them to school. Both *Jacobson* and *Zucht* predated the

Assem. Comm. on Health, Analysis of S.B. No. 277, 2016 Reg. Sess., at 5 (Cal. 2015)).

¹⁵⁷ Won, *supra* note 150, at 475–76, 499.

¹⁵⁸ *Whitlow*, 203 F. Supp. 3d at 1091.

¹⁵⁹ *Abeel v. Clark*, 24 P. 383, 383–84 (Cal. 1890) (upholding mandatory vaccination statute because the law operated uniformly on all school); *Viemeister v. White*, 72 N.E. 97, 98 (N.Y. 1904) (upholding mandatory vaccination as consistent with the New York state Constitution); *see also* Michelle M. Mello, David M. Studdert & Wendy E. Parmet, *Shifting Vaccination Politics—The End of Personal-Belief Exemptions in California*, 373 NEW ENG. J. MED., 785, 787 (2015) (defending SB277 with state supreme court cases holding similar statutes as constitutional).

incorporation of the First Amendment's Free Exercise Clause towards the state.¹⁶⁰ So litigants could reasonably claim that they did not address whether a religious exemption to immunization mandates is, today, constitutionally require—since the First Amendment, at the time, did not apply to states. That makes this claim, too, a plausible one—as does the fact that recent Supreme Court cases raise questions about the future interpretation of the First Amendment in this context.¹⁶¹

Our jurisprudence, however, does not support this, and there are good grounds to think it will continue not to support it, at least in this context. First, in obiter in *Prince v. Massachusetts*, the court made it clear that freedom of religion “does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death,”¹⁶² and hence a First Amendment claim cannot stand. This statement was relied on in subsequent jurisprudence, most recently, at the federal appellate level, in *Phillips v. City of New York*.¹⁶³ While the *Prince* statement focusing on vaccines is obiter, the ruling in the case was that even a combination of parental rights and religious freedom cannot overcome legislation that protects children—in that case, child labor law—and vaccines were mentioned as an example of the application of that ruling. The conclusion, as the Court suggested, is even stronger for requiring vaccines which protect both child and community than it is for the child labor laws addressed in the case, which affect primarily the child.

Furthermore, even beyond the immunization context, under *Employment Division v. Smith*, legislatures are not required to offer a religious exemption from a neutral law of general applicability.¹⁶⁴ Immunization mandates are clearly neutral on religion—they don't target a specific religion, their focus is on preventing disease—and hence, under *Smith*, don't require a specific mandate.¹⁶⁵

¹⁶⁰ But see *Cantwell v. Connecticut*, 310 U.S. 296, 306–07 (1940) (incorporating the free exercise clause towards the state). As a reminder, incorporation is the process by which the provisions of the Bill of Rights, which originally applied only to the federal government, were applied to the states.

¹⁶¹ Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 154–158 (2014) (analyzing the possible avenues First Amendment jurisprudence might take in the coming years post *Hobby Lobby*).

¹⁶² *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

¹⁶³ 775 F.3d 538, 543 (2d Cir. 2015) (finding New York can constitutionally require that all children be vaccinated in order to attend public school).

¹⁶⁴ *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990).

¹⁶⁵ Note that *Burwell v. Hobby Lobby Stores, Inc.* did not overturn *Smith* on this, focusing on the federal Religious Freedom Restoration Act (“RFRA”), not the First Amendment. 134 S. Ct. 2751, 2760–62 (2014). In fact, both majority and dissent included language that supported *Smith*. *Id.* at 2760, 2790. On whether RFRA can pose an issue for vaccine mandates in states with religious freedom restoration acts, see generally Dina Nathanson, *Herd Protection v. Vaccine Abstention: Potential Conflict*

Some raised concern that the recent decision in *Burwell v. Hobby Lobby Stores, Inc.* may lead to expansion of a requirement of religious exemptions in at least some contexts, a development which could have a variety of potentially harmful effects in several contexts.¹⁶⁶ However, *Hobby Lobby* itself did not suggest a move to rethink the interpretation of the First Amendment, and its opening clearly distinguished between interpreting the Religious Freedom Restoration Act it focused on and interpreting the First Amendment.¹⁶⁷ Similarly, the more recently decided *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,¹⁶⁸ which found in favor of a baker who refused to make a cake for a gay couple, did not overturn *Smith*. The narrow majority decision strongly focused on the lack of neutrality on the part of the Colorado Civil Rights Commission, as expressed in their statements and actions.¹⁶⁹ The Court's focus was at what they saw as hostility to Mr. Phillips—the baker's—religious point of view, and the Court found that unacceptable, in a 7-2 decision that included several of the liberal Justices on the court.¹⁷⁰ In one sense, this is not new—the Court has, in the past, struck down actions where there was evidence of hostility of the government to a specific belief.¹⁷¹ Since SB277—or immunization laws generally—are pretty clearly not directed at a specific religious belief, but against non-immunization, *Masterpiece Cakeshop* does not, arguably, touch it. In fact, the change in the law removed a personal belief exemption that covered any belief—it did not have to be religious, and it certainly did not focus on a specific belief.¹⁷² However, there is a concern here. Both *Hobby Lobby* and *Masterpiece Cakeshop* sided with an applicant seeking to expand his religious freedom. While neither case is on point, insofar as they suggest an increasing emphasis of the Supreme Court on religious freedom, there is a valid

Between School Vaccine Requirements and State Religious Freedom Restoration Acts, 42 AM. J.L. & MED. 621 (2016). This is an issue that deserves separate treatment, but may be beyond the scope of this Article, as California has not implemented a RFRA. Reiss & Weithorn *supra* note 21, at 1612.

¹⁶⁶ Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 28 HARV. L. & POL'Y REV. 63, 72–74 (2015); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 28 HARV. J.L. & GENDER 35, 92–100 (2015).

¹⁶⁷ *Hobby Lobby*, 134 S. Ct. at 2760–62.

¹⁶⁸ 138 S. Ct. 1719 (2018).

¹⁶⁹ *Id.* at 1729–31.

¹⁷⁰ *Id.* at 1731–34 (Kagan, J., concurring). Justice Ginsburg, joined by Justice Sotomayor, dissented, though they, too, agreed with part of the majority's criticism of the Commission. *Id.* at 1748–52 (Ginsburg, J., dissenting).

¹⁷¹ *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 545–46 (1993) (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.”).

¹⁷² S.B. 277, 2014–15 S., Reg. Sess. § 1(c) (Cal. 2015) (changing “Exemptions from immunization for medical reasons or personal beliefs” to “Exemptions from immunization for medical reasons”).

question about the continuous validity of *Smith*. At the same time, the Supreme Court appears to be cautious in the steps it is making in this area, and at this point, there is no good reason to assume they will extend the First Amendment to undermine vaccine mandates—after all, the jurisprudence upholding vaccine mandates predated *Smith*, and was not touched even in the years before it.

In *Whitlow*, the plaintiffs tried to deal with *Smith* by claiming that SB277 involves a hybrid right.¹⁷³ Rather than overruling the previous case of *Wisconsin v. Yoder*,¹⁷⁴ the *Smith* court distinguished the case as applying to situations where there is a constellation of several rights—in *Yoder*, the combination of parental rights to make education choices for their children combined with religious freedom.¹⁷⁵ In the case of vaccine mandates, arguably, parental liberty to make medical decisions combines with religious freedom in a similar constellation, and hence fits the category of hybrid rights.¹⁷⁶ If the hybrid rights doctrine applied, the lack of religious exemption would be subject to strict scrutiny, which would reduce its chances of surviving (though not eliminate them, as I will discuss later).¹⁷⁷

The court in *Whitlow* rejected this claim, because “[t]he ‘hybrid rights doctrine has been widely criticized, and, notably, no court has ever allowed a plaintiff to bootstrap a free exercise claim in this manner.’” Following that directive, this Court declines to apply the “hybrid rights” doctrine to Plaintiffs’ free exercise claim, and thus declines to apply strict scrutiny.¹⁷⁸

Two other reasons support rejecting the claim. First, in *Smith* itself, the court mentioned forced vaccination as an example that shows the problems with requiring a religious exemption for every neutral law, suggesting that forced vaccination squarely falls under *Smith*’s general ruling, and the lesser requirement of school mandates even more so.¹⁷⁹ Second, the recent case of

¹⁷³ *Whitlow v. California*, 203 F. Supp. 3d 1074, 1086 n.4 (S.D. Cal. 2016) (“[T]hey argue they are asserting ‘hybrid rights,’ which warrants strict scrutiny.”).

¹⁷⁴ *See Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (holding that Amish children could not constitutionally be forced to attend public school past eighth grade by state law).

¹⁷⁵ *See Emp’t. Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (refusing to hold that “when otherwise prohibitable conduct is accompanied by religious convictions, . . . the conduct itself must be free from governmental regulation”).

¹⁷⁶ Reiss & Weithorn, *supra* note 21, at 899 (exploring the idea of this possible hybrid right argument in a larger context).

¹⁷⁷ *Id.* at 896–97 (stating that laws subject to strict scrutiny are less likely to be upheld).

¹⁷⁸ *Whitlow v. California*, 203 F. Supp. 3d 1079, 1086 n.4 (S.D. Cal. 2016).

¹⁷⁹ *See Smith*, 494 U.S. at 888–89 (“The rule respondents favor would open the prospect of constitutionally required religious exemptions . . . [to] compulsory vaccination laws.”).

*Hobby Lobby*¹⁸⁰ suggests that the cases referred to as creating the hybrid rights doctrine are no longer a good framework.¹⁸¹

The Free Exercise Clause of the First Amendment, therefore, does not prevent states from removing non-medical exemptions. At least one court and one scholar go further: they consider religious exemptions to violate the Equal Protection Clause of the Fourteenth Amendment¹⁸² and the Due Process Clause in it.¹⁸³

3. *Unconstitutional Conditions*

The plaintiffs in *Torrey-Love* tried to use the doctrine of unconstitutional conditions to challenge SB277. They argued that SB277 impermissibly requires that children wanting to exercise their constitutional right to education give up rights to privacy, bodily autonomy, or that their parents give up the right to make medical decisions for their children. That, claims the complaint, is impermissible under our Supreme Court doctrine of unconstitutional conditions.¹⁸⁴ The complaint in state court put it thus:

If the state may compel the surrender of a constitutional right as a condition of its favor, then the guaranties embedded in the Constitution may be manipulated out of existence. In such case, the “government bears a heavy burden of demonstrating the practical necessity for [such a] limitation. At the very least it must establish that the imposed conditions relate to the purposes of the legislation which confers the benefit or privilege.” . . . Put simply, the “state may not impose conditions which require the relinquishment of constitutional rights.”¹⁸⁵

The federal court that dismissed *Torrey-Love* did not thoroughly discuss the argument. It correctly pointed out that, under our jurisprudence, children do not have a fundamental right to refuse immunization before attending school.¹⁸⁶ In essence, it rejected the plaintiffs’ attempt to frame the issue as separate rights to various things and pointed out the jurisprudence focused on whether immunization mandates are constitutional. The court

¹⁸⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760–62 (2014) (analyzing the movement away from the *Sherbert* test in recent decades by the Supreme Court).

¹⁸¹ *See* Reiss & Weithorn, *supra* note 21, at 899–900 (using *Smith* and *Hobby Lobby* to argue against vaccination refusal as a protected right under a hybrid rights theory).

¹⁸² *See* *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (holding that a religious exemption clause in a statute mandating vaccinations violates the Equal Protection Clause).

¹⁸³ Allan J. Jacobs, *Do Belief Exemptions to Compulsory Vaccination Programs Violate the Fourteenth Amendment?*, 42 U. MEM. L. REV. 73, 98–102 (2011) (arguing that the holding in *Brown* could be upheld on either an Equal Protection basis, as *Brown* did, or under a Due Process basis by those who cannot receive vaccinations).

¹⁸⁴ *Torrey Love* Complaint, *supra* note 65, at 10.

¹⁸⁵ *Id.* (quoting *Bagley v. Wash. Twp. Hosp. Dist.*, 421 P.2d 409, 414 (Cal. 1966)).

¹⁸⁶ *Torrey-Love v. California*, 5:16-cv2410-DMG-DTB, slip op. at 6 (C.D. Cal. Jan. 12, 2017).

does not have to accept the plaintiffs' framing, and following the specific jurisprudence is a legitimate way to handle the claim. The federal court rejected the claim based on the fact that none of the rights claimed was absolute.¹⁸⁷

In an article on the topic, Professor Cass Sunstein suggested the unconstitutional conditions doctrine is unhelpful because it removes the focus from the right questions and distracts attention from whether the government is inappropriately infringing on protected constitutional rights (even if indirectly).¹⁸⁸ If that is the focus, the federal court's approach is correct: the determining question is whether the government is impermissibly trying to infringe on protected rights, or indeed is infringing on them—and for school immunization, extensive jurisprudence shows that is not the case: There is no protected right to send a child to school without vaccinating the child.¹⁸⁹

In this Article, however, I believe it is important to also address the unconstitutional conditions claim on its merits. In my view, it is a creative and smart legal argument, but in this context, it does not work well for three reasons. First, the doctrine is nowhere as clear-cut as the plaintiffs assert; second, under the most common modes of analysis the plaintiffs fail its application; and third, the specific rights claims do not hold well in this case.

The starting point is that the jurisprudence about unconstitutional conditions is extremely conflicting and unclear. To give two examples, in 1991, the Supreme Court found that it was constitutional for Congress to restrict funding to programs that counseled on family planning when those programs also offered counseling on abortion. The Court upheld the condition even though it potentially implicated the doctor's right to free speech, and less directly, a woman's right to abortion.¹⁹⁰ In contrast, the Supreme Court struck down a California Coastal Commission plan to offer coastal owners benefits for allowing the public to use their waterfront.¹⁹¹

¹⁸⁷ See *id.* at 6–7 (rejecting the plaintiffs' arguments under each theory in turn).

¹⁸⁸ Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337, 339–41 (1989) (arguing that, by focusing more on the differences between certain rights, we can more readily explain why some governmental actions are constitutional and others are not).

¹⁸⁹ See *Phillips v. City of New York*, 775 F.3d 538, 542–43 (2nd Cir. 2015) (rejecting a substantive due process argument for the right to not vaccinate one's child).

¹⁹⁰ *Rust v. Sullivan*, 500 U.S. 173, 178, 192, 196 (1991).

¹⁹¹ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

An article examining constitutional conditions explained:

Despite early judicial assertions that such offers are, on the one hand, always permissible or, on the other, always unconstitutional, it is now universally recognized that such conditional offers are sometimes constitutionally permissible and sometimes not. Indeed, correctly understood, that is all the famed and contentious unconstitutional conditions doctrine holds. The persistent challenge, consequently, has been to articulate some coherent or at least intelligible principles or tests by which to determine which offers fall into which category—to explicate, in other words, a theory to support the doctrine. Regrettably, more than a century of judicial and scholarly attention to the problem has produced few settled understandings.¹⁹²

In other words, the doctrine means that sometimes conditions are unconstitutional and sometimes they are not—and there is no guiding principle to know which is which. There have certainly been efforts to impose guiding principles on the doctrine, but there is no clear jurisprudential acceptance of any of them.¹⁹³

The lack of clear guidance as to its application does not make the doctrine illegitimate; it does make it unclear. When an ill-defined, unclear in scope doctrine like this runs against a consistent line of cases upholding school immunization mandates, the argument is not very strong.

In the same article, Mitchell Berman examines one possible analysis the Supreme Court used to analyze constitutional conditions; that analysis focuses on the relation between the condition and the benefit.¹⁹⁴ In his discussion, Berman points out that the Court's application of the relationship was itself inconsistent.¹⁹⁵ In one case, *Nollan*, the Court focused on whether there was a link between the condition and the purpose—whether an unrelated condition was only added to coerce, with no direct link to the legitimate government action—and an (misapplied, in Berman's view) inquiry into whether the purpose of the condition is connected to denying

¹⁹² Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 3 (2001) (footnotes omitted); see also Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 67 (2013) (“But an amusing aspect of the unconstitutional conditions doctrine is that there is no doctrine. At least there is no snappy and established test for analyzing unconstitutional conditions questions.”).

¹⁹³ See generally Berman, *supra* note 192; Brian T. Hodges, *Are Critical Area Buffers Unconstitutional? Demystifying the Doctrine of Unconstitutional Conditions*, 8 SEATTLE J. ENVTL. L. 1, 25–29 (2018).

¹⁹⁴ Berman, *supra* note 192, at 90–93 (contrasting the central inquiry and conceptual treatment of germaneness doctrine in *Nollan* and *Dole*, and criticizing the Court's use of germaneness as a “heuristic device” lacking in jurisprudential rigor).

¹⁹⁵ *Id.* at 90–91 (noting the analytical similarities between *Nollan* and *Dole*, but arguing that each case posed distinct questions diverging in treatment of the germaneness inquiry).

the benefit.¹⁹⁶ In *Dole*, the Court looked at whether the condition was related to the purpose of granting the benefit.¹⁹⁷ But with vaccines both inquiries lead to the same place. Using the *Nollan* inquiry, the focus is on whether the denial of school attendance fits the purpose of the act. In that case, the goal of SB277 is achieving total immunization, with the purpose of making schools safer from the diseases in question; making schools safer from disease is a legitimate state interest, and requiring vaccines is very, very germane to the state interest, and in fact, it is the heart of achieving it. So, under this approach, the plaintiffs would fail. Using the *Dole* inquiry, if the benefit is school attendance, still a large purpose of SB277 is allowing students to safely attend school, and the condition fits it.

Berman suggests his own more coherent solution—he suggests seeing conditions as presumably unconstitutional if they involve coercion—and he defines coercion as a situation in which doing the threatened act would be unconstitutional,¹⁹⁸ for example, if a benefit is withheld for unconstitutional purposes.¹⁹⁹ But, as already addressed in the previous sections, school immunization mandates are constitutional, even through a prism of the right to education. Under this approach, too, the plaintiffs would fail.

Another, more recent attempt by Elhauge to offer a coherent approach to the problem would also not help SB277 opponents.²⁰⁰ This article suggests a distinction between contrived and uncontrived threats. Under this standard, school mandates would also not be unconstitutional—because “the government has a power to order the relevant action because the individual or state has no constitutional right against such compulsion. Whenever direct coercion is permissible, that fact moots the issue of when threats of otherwise-lawful action should be deemed coercive, because they would be permissible either way.”²⁰¹ As explained, the jurisprudence supports requiring that children be vaccinated.

¹⁹⁶ *Id.* at 90 (explaining the condition in *Dole* could not stand because it was not germane to the legitimate purposes for which the agency could deny the benefit).

¹⁹⁷ *Id.* at 91 (internal citations omitted) (breaking down Chief Justice Rehnquist’s inquiry into discrete questions that “compared the government’s purpose for imposing the condition with its purpose for granting the benefit”).

¹⁹⁸ *Id.* at 16–18 (stating a normative definition for coercion and applying it within the context of constitutional violations).

¹⁹⁹ *Id.* at 19 (noting that even where the Constitution does not require a state to give a benefit, a state may act unconstitutionally if it offers that benefit and withholds it based on an unconstitutional purpose).

²⁰⁰ Einer Elhauge, *Contrived Threats versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 505–06 (2016) (summarizing the doctrinal problems posed by the unconstitutionality of coercion and offering a coherent theory).

²⁰¹ *Id.* at 506.

Further, the rights allegedly violated by the condition do not withstand closer scrutiny. One claim is that the right in tension with attending schools is the right of the plaintiff minor children—mostly five to seven-year-olds, one nine-year-old, one eleven-year-old—to bodily autonomy and to refuse medical treatments.²⁰² The right to bodily autonomy is a very important right in our system and has been for a long time.²⁰³ But it does not apply in the same way to children.²⁰⁴ The five, six, or seven-year-old plaintiffs in *Torrey-Love* did not make the decision to not vaccinate and not protect themselves from diseases like diphtheria, hib, polio, and measles themselves. Even the nine and eleven-year-old plaintiffs did not make a unilateral decision. It is the parent making the choice here. Talking about a child’s bodily autonomy in this context is simply wrong. Would these parents let the child decide about other treatments, including alternative treatments they think their children should get? Would these parents allow a child that wants to be vaccinated to get the vaccine? There is little debate that children at that age do not make their own medical decisions, and the issue is not their bodily autonomy.

Another right mentioned is the right of privacy, a right the *Torrey-Love* lawsuit correctly described as broader in California than the federal right to privacy.²⁰⁵ Plaintiffs correctly point out that this right has also been applied to minors in some contexts,²⁰⁶ and, as they quote, it applies in matters concerning “the preservation of . . . personal health” and matters involving “retaining personal control over the integrity of [one’s] own body.”²⁰⁷

²⁰² See, e.g., *Torrey Love* Complaint, *supra* note 65, at 11 (arguing that the California vaccination mandate and disclosure of exemption violate the right to bodily autonomy under the state and federal constitutions).

²⁰³ The right to bodily autonomy was acknowledged at least since *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (“Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . .”).

²⁰⁴ *Reiss & Weithorn*, *supra* note 21, at 904–05 (noting that the Court has recognized that the government has greater authority to “regulate the lives of children”).

²⁰⁵ Plaintiffs’ Opposition to Defendants’ Demurrer to Plaintiff’s Complaint; Memorandum of Points and Authorities in Support Thereof at 4, *Torrey Love v. Cal. Dep’t of Educ.*, No. SCV0039311, (Cal. Super. Ct. June 7, 2017) [hereinafter *Torrey-Love* Opposition to Demurrer] (basing its argument on *Williams v. Superior Court*, 236 Cal. App. 4th 1151 (Cal. Ct. App. 2015). Though, as will be discussed, the California Supreme Court overturned the decision. *Williams v. Superior Court*, 398 P. 3d 69, 86–88 (Cal. 2017).

²⁰⁶ *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 813–14 (Cal. 1997) (finding that a statute that restricts a pregnant minor’s ability to decide on an abortion implicates a “constitutionally protected privacy interest.”).

²⁰⁷ *Torrey-Love* Opposition to Demurrer, *supra* note 205, at 4 (citing *Lungren*, 940 P.2d at 813). On medical matters, see also *Pettus v. Cole*, 57 Cal. Rptr. 2d 46, 72 (Cal. Ct. App. 1996) (finding that a patient has a “legally cognizable interest in maintaining the privacy of [their] detailed medical

From that, plaintiffs concluded that “Section 120325 is unconstitutional because it requires a child to reveal intimate medical history details before attending school.”²⁰⁸ This conclusion, however, is both extreme and unsupported by the jurisprudence. The disclosure in question is providing school officials with a child’s immunization record or medical exemption. Under plaintiffs’ approach, a child—or more accurately, the child’s parents—will not have to alert the school to any medical problems the child has, even ones that may put the child or others at risk during school hours. Schools are responsible for a child’s welfare during hours—and that comes with a need to know certain medical facts about the child, making applying a strong right of privacy against the school inappropriate. In relation to vaccines, and if taken to its logical conclusion, the claim does not only require the return of the exemption—it requires striking down the pre-SB277 law. The previous law required that parents provide the child’s immunization records or an exemption form.²⁰⁹ A personal belief exemption form would violate the child’s privacy in the same way that a medical exemption does, by at least letting the school know that the child is unvaccinated. If the concern is a stigma attached to the child, that would also be covered. Such a conclusion would prevent, for example, keeping unvaccinated children out during outbreak, putting them and the public health at risk. It could also cause a more direct risk to the child if she were, for example, exposed to tetanus on the school grounds and those treating her did not know she is unprotected against it.

Such a conclusion is also not required by California’s jurisprudence. The standard in question has been set by the California Supreme Court in *Hill v. National College Athletic Association* and was recently reaffirmed in *Lewis v. Superior Court*.²¹⁰ *Lewis v. Superior Court* provides a summary of California’s standard for privacy violations:

[T]he complaining party must meet three “‘threshold elements’ . . . utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision.” The party must demonstrate “(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant

information” given to a doctor).

²⁰⁸ *Torrey-Love Opposition to Demurrer*, *supra* note 205, at 5.

²⁰⁹ CAL. HEALTH & SAFETY CODE § 120365 (West 2015) (providing an exemption for submitting immunizations forms where the parents has filed a letter or affidavit affirming that immunizations are contrary to their beliefs).

²¹⁰ *Hill v. Nat’l Coll. Athletic Ass’n*, 865 P.2d 633, 657 (Cal. 1994) (defining a conjunctive test for invasions of privacy based on the Privacy Initiative of the California Constitution); *Lewis v. Superior Court*, 397 P.3d 1011, 1018 (Cal. 2017) (outlining the required elements for proving an unconstitutional invasion of privacy based on the *Hill* test).

constituting a serious invasion of privacy.” This initial inquiry is necessary to “permit courts to weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant.”

Second, if a claimant satisfies the threshold inquiry, “[a] defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests.” “The plaintiff, in turn, may rebut a defendant’s assertion of countervailing interests by showing there are feasible and effective alternatives to defendant’s conduct which have a lesser impact on privacy interests.”²¹¹

It is very clear that the right to privacy of medical records is not absolute.²¹² Here, there is no good reason to claim that a child in school has a reasonable expectation of privacy in the circumstances against the school authorities—who are entrusted with the child’s wellbeing and need to be privy to medical information allowing them to take care of it. We are not discussing broadcasting a child’s medical information to the public. And the fact that California has had a school immunization law that required filing medical and personal belief exemptions for decades also goes against the view that a child has a reasonable expectation of privacy in this context.

A person seeking to prevent disclosure of immunization preferences may have a lesser privacy interest against disclosure. *Lewis*, citing *Hill*, stated that:

The standard that a defendant’s proffered countervailing interests must satisfy varies based on the privacy interest asserted: “Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a ‘compelling interest’ must be present to overcome the vital privacy interest. If in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed.” “The existence of a sufficient countervailing interest or an alternative course of conduct present[s] threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. . . . [I]n cases where material facts are undisputed,

²¹¹ *Lewis*, 397 P.3d at 1018 (internal citations omitted) (quoting *Loder v. City of Glendale*, 927 P.2d 1200 (Cal. 1997); then quoting *Hill*, 865 P.2d 633; then quoting *Loder*, 927 P.2d 1200; and then quoting *Hill*, 865 P.2d 633) (stating the legal standard for establishing and defending privacy violations based on the *Hill* standard). The plaintiffs in *Torrey-Love* cited another case that used the first part of the *Hill* test. *Torrey-Love* Opposition to Demurrer, *supra* note 205, at 5 (citing *Willard v. AT&T Commc’ns of Cal., Inc.*, 138 Cal. Rptr. 3d 636, 643 (Cal. Ct. App. 2012)). However, *Lewis* provides more recent and authoritative guidance on the standard.

²¹² See *People v. Martinez*, 88 Cal. App. 4th 465, 474–75 (Cal. Ct. App. 2001) (“Defendant’s reasonable expectation of privacy in his medical/psychological records must be evaluated in light of his criminal background, his status as a prisoner, and the provisions of the SVPA.”).

adjudication as a matter of law may be appropriate.”²¹³

Here, there is an argument that the interest is not fundamental to personal autonomy: even if education is a fundamental interest, it is not directly about autonomy. The only case in which a compelling interest was required was in *Lungren*, where the question was a minor’s direct access to abortion.²¹⁴ Attending school is important, but does not have the same implication for bodily autonomy that deciding whether to have an abortion does. The question is not whether parental consent is required to agree to a vaccine. The question, simply, is whether informing the school about a child’s medical exemption or lack thereof violates a right to privacy. The same autonomy interest is not involved; the claim the plaintiffs make is that this will impose stigma on the child.²¹⁵ This claim fits more clearly into cases that were handled under a balancing test.²¹⁶

If that’s the case, all that is needed is a balance between the state’s interest in preventing diseases that can kill and maim and the limited invasion of privacy that providing school authorities with a child’s immunization status or medical exemption presents. Even if we applied the compelling interest test, that test is met by the need to prevent disease. But it is unlikely that requirement applies here.

Finally, the plaintiffs claim SB277 conditions education on their use of their right as parents to make medical decisions for their children.²¹⁷ This is probably the strongest argument, but as addressed in Section II.B.1 below, it is not convincing in this context, because parental rights are not absolute—and the jurisprudence has allowed states to limit it in the vaccination context. Again, as *Prince v. Massachusetts* stated, parental rights (or religious freedom) do not “include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”²¹⁸

²¹³ *Lewis*, 397 P.3d at 1018 (alterations in original) (internal citations omitted) (quoting *Hill*, 865 P.2d at 653, 657).

²¹⁴ *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 818–19 (Cal. 1997) (finding that where the statute infringes on a fundamental interest in personal autonomy of pregnant minors, the Court must apply a more stringent “compelling interest” standard to justify the intrusion).

²¹⁵ *Torrey Love* Complaint, *supra* note 65, at 12 (stating that families will face stigma for disclosing “confidential medical decisions”).

²¹⁶ For example, in *Loder v. City of Glendale*, an employer’s drug testing of an employee could violate constitutional privacy rights, but whether it did or did not depends on reasonableness in the circumstances. 927 P.2d 1200, 1221 (Cal. 1997).

²¹⁷ *Torrey Love* Complaint, *supra* note 65, at 12 (arguing that SB227 infringes on the parents’ right to make medical decisions for their children).

²¹⁸ 321 U.S. 158, 166–167 (1944) (citation omitted) (citing *People v. Pierson*, 68 N.E. 243 (N.Y. 1903)).

B. Claims Contradicted Directly by the School Mandates Jurisprudence

The next set of claims is less strong, in my view, because it is addressed by extensive and well-founded jurisprudence that is unlikely to be completely overturned.

1. Parental Rights

Each of the complaints claimed that SB277 violates parental rights. The argument is that by forcing parents to choose between vaccinating and sending a child to private or public school (or daycare), the law coerces parents to vaccinate, and violates their right to make decisions. In *Whitlow*, the lawyers made an effort to find litigants they could present as having a real problem with keeping their children out of school. One plaintiff was a single mother. In *Torrey-Love*, too, the complaint emphasized that the plaintiffs had to forgo “much-needed income” to homeschool.²¹⁹

Parental rights are very, very important in our system—but they have never been absolute.²²⁰ And for over a century, consistent jurisprudence upheld school immunization mandates in spite of the important status of parental rights in our system.²²¹ The rationale, as Professor Weithorn and I previously discussed, is that school immunization mandates protect two sets of important interests: a child’s interest in being protected from disease, and the state’s public health interest in preventing an outbreak.²²² In a real sense, the parental rights argument is very problematic in this context. The risks of vaccinating, for every child but the few with medical contraindications—children who are not required to vaccinate under SB277—are much smaller than the risks of not vaccinating (which puts the child at physical risk).²²³ This is a long-standing reason to act and limit parental rights. Furthermore, sending an unvaccinated child to school also affects other families and their children, and the argument that one’s parental rights justify putting other children at risk is even weaker.

²¹⁹ *Torrey Love* Complaint, *supra* note 65, at 3–4 (arguing that SB227 infringes on the parents right to make medical decisions for their children).

²²⁰ See Dorit Rubinstein Reiss, *Rights of the Unvaccinated Child*, 73 *STUD. L., POLS., & SOC’Y*, 73, 79–80 (2017); Reiss & Weithorn, *supra* note 21, at 909–10 (footnotes omitted) (noting that states usually defer to parents on decisions regarding their children, but “parental discretion is not unlimited . . . where the benefits to the child are uncertain or outweighed by risks.”).

²²¹ Reiss & Weithorn, *supra* note 21, at 913 n.132 (footnotes omitted) (pointing to Supreme Court precedent authorizing states to require parents to vaccinate their children).

²²² *Id.* at 914 (comparing vaccination requirements to other compulsory rules regulating children, and arguing that vaccination mandates serve both immediate and long-term needs).

²²³ *Supra* Part I.

Initially, I was of the view that there is also an argument that SB277 does not force parents to vaccinate, because of the existence of alternatives, such as homeschooling.²²⁴ I have somewhat retreated from that position, though. For some parents, circumstances may make homeschooling untenable or require them to choose between earning a living wage and homeschooling. It is certainly problematic to claim there is no coercion in those circumstances, as the plaintiffs point out.

I maintain, however, that there are degrees of coercion, and that the level of coercion in SB277 is less than in other contexts. It is important to remember that there is jurisprudence supporting direct coercion of parents who refuse medical treatment in circumstances that put children at risk, even if the risk there was more visible and imminent than in this context.²²⁵ In Philadelphia in 1991, during a measles outbreak that killed nine children, a judge ordered vaccination of children in recalcitrant religious communities over parental objection.²²⁶ In some cases in the 1950s–1960s, parents were criminally charged and sometimes convicted of non-vaccination and truancy.²²⁷ SB277 does not go that far.

School immunization mandates certainly burden choice substantially but are less coercive than direct force or criminalization accompanied by the threat of incarceration, for example.²²⁸ In this way, it is a less coercive tool from the state's arsenal of tools to promote vaccination, though still a real and potentially serious imposition. In a recent book, Linda Fentiman compares the relatively gentle treatment non-vaccinating mothers are subjected to the much harsher, more coercive treatment meted out to poor mothers who put their children at risk in various ways, for example, by drug

²²⁴ See Won, *supra* note 73, at 494–95 (explaining the existence of free homeschooling and independent study options).

²²⁵ Reiss, *supra*, note 220, at 91–95.

²²⁶ PAUL A. OFFIT, *BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE* 66–80 (2015) (providing an example of courts intervening with child welfare when parents with strong religious beliefs refuse their children medical treatment).

²²⁷ Efthimios Parasidis & Douglas J. Opel, *Parental Refusal of Childhood Vaccines and Medical Neglect Laws*, 107 AM. J. PUB. HEALTH 68, 69–70 (2017) (illustrating the court frequently finding parents guilty of child neglect for failing to immunize their children); Reiss, *supra* note 219, at 89.

²²⁸ See Reiss & Weithorn, *supra* note 21 at 960–62 (“A *mandate*, as discussed here, burdens choice fairly heavily, while not eliminating it completely. It requires that persons engage in affirmative conduct—in this case, vaccination of children—accompanied by a threat of deleterious consequences for noncompliance. . . . We place school-entry vaccination requirements in this category, recognizing the centrality of elementary and secondary school attendance as a cherished opportunity in American society. Removal of that opportunity introduces an exceptional and perhaps unequal deprivation into the lives of those prevented from attending.”)

use during pregnancy.²²⁹ She, too, highlights the less coercive treatment these mothers—mostly white and middle class—receive.²³⁰

When it comes to sending unvaccinated children to school, the argument for a parental right to send the child to school unvaccinated runs into two other important sets of rights, the right of the child to health, and the right of other families for a safe school environment.²³¹ The state could have chosen to criminalize non-vaccinating—as it criminalized other decisions that put children at risk—and may have been more justified here, because of the effect on others (a counter to that argument is that in areas with high vaccine rates, herd immunity makes the risk less imminent; state legislation, however, is hard to target that finely). SB277 is a less coercive option than what the state could have chosen, and parental rights are not a barrier to it.

2. Equal Protection

An equal protection claim was raised in the lawsuits in two versions. One is extreme and one more is nuanced, but both face similar problems. In the extreme version, the *Buck* plaintiffs stated that:

SB277 will segregate children based on whether they are vaccinated or unvaccinated, and this constitutes discrimination based on “vaccination status.” Under a *Brown v. Board of Education* analysis, such a bifurcated school system—vaccinate [sic] and unvaccinated—reeks of separate-but-equal and thus, cannot stand. Under California law, segregation based on vaccination status is every bit as odious as segregation based on race, creed or color.²³²

In the most nuanced version, the *Willow* plaintiffs stated that:

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

Further, SB 277 violates the equal protection rights of special education students. First, as written, SB 277 exempts special education students with IEPs pursuant to IDEA who are entitled to FAPE under federal law but does

²²⁹ LINDA FENTIMAN, *BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN'S HEALTH* 247, 273–74 (2017) (comparing the different treatment of mother's who do not vaccinate their children with mother's who engage in other behavior society deems neglectful).

²³⁰ *Id.* at 273–74 (indicating racial disparities).

²³¹ Won, *supra* note 143, at 479, 484.

²³² *Buck* Complaint, *supra* note 87, at 3.

not exempt students with 504 plans pursuant to the Rehabilitation Act of 1973. . . .²³³

In both cases, the problem plaintiffs face is that they are incorrect in claiming discrimination, and less correct in claiming illegal discrimination. Discrimination happens when like cases are treated differently—different treatment of different cases does not violate equal protection.²³⁴ But vaccinated and unvaccinated children are not alike. This is true whether the child is missing one vaccine or is completely unvaccinated. Modern vaccines are not perfect, but they are highly effective: the vaccines required for school attendance usually range in effectiveness from seventy to ninety-seven percent.²³⁵ As a result, children who get these vaccines are much less likely to get the diseases than their unprotected, unvaccinated peers. Studies repeatedly and consistently show higher rates of preventable diseases among the unvaccinated.²³⁶

Sending a completely or partially unvaccinated child to school creates a preventable risk that the child will infect other children, for example, children who cannot be vaccinated, young siblings of classmates – too young to be fully vaccinated - or the rare few that suffer vaccine failure. At least two measles outbreaks in the United States, for example, started when

²³³ Memorandum of Points & Auths. in Support of Plaintiffs' Motion for Preliminary Injunction at *23, *Whitlow v. California*, 203 F. Supp. 3d 1079 (C.D. Cal 2016) (No. 3:16-CV-01715-DMS-GBS).

²³⁴ *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); see also Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV 575, 590–91 (1983).

²³⁵ See Aruna Chandran, James P. Watt & Mathuram Santosham, *Haemophilus Influenzae Vaccines*, VACCINES 167, 175–176 (Stanley A. Plotkin, Walter Orenstein & Paul A. Offit eds., 2013); see also *Haemophilus Influenza Type B*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vaccines/pubs/pinkbook/downloads/hib.pdf> (finding that the vaccine against Hib consistently shows to protect over 90% of children who complete the series); Emmanuel Vidor, Stanley A. Plotkin, *Poliovirus Vaccine—Inactivated Vaccines* 573, 587–588 (Stanley A. Plotkin, Walter Orenstein and Paul A. Offit eds. 2013) (noting the high efficacy rates of various polio vaccines); *Polio*, in VACCINES 167, 175–176 (Stanley A. Plotkin, Walter Orenstein & Paul A. Offit eds., 2013); see also *Haemophilus Influenza Type B*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/pubs/pinkbook/downloads/polio.pdf> (showing that the inactivated vaccine against polio consistently shows over eighty percent effectiveness and in some studies, over ninety-five percent effectiveness in preventing paralytic polio); see also Reiss, *supra* note 18, at 9–10 (illustrating similar statistics indicating vaccines reducing various diseases).

²³⁶ Most recently, a review showed that a relationship between vaccination and contracting measles and pertussis. Varun K. Phadke et al., *Association Between Vaccine Refusal and Vaccine-Preventable Diseases in the United States: A Review of Measles and Pertussis*, 315 [J]AMA 1149, 1158 (2016); *Invasive Haemophilus Influenzae Type B Disease in Very Young Children—Minnesota, 2008*, CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. (Jan. 30 2009), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5803a4.htm>; Jason M. Glanz, et al., *Parental Refusal of Pertussis Vaccination Is Associated With an Increased Risk of Pertussis Infection in Children*, 123 PEDIATRICS 1446, 1449–50 (2009).

unvaccinated children traveled to Europe, contracted measles there, and brought it back.²³⁷ While a vaccinated child can also be among the small percent for whom the vaccine fails, and may also catch and transmit the disease, that situation is much less likely and unpreventable. It is the difference between an accident caused because someone made a conscious decision not to maintain her brakes, and an accident caused because of an unpreventable and rare mechanical brake failure. We treat the cases differently because the first is the result of a choice not to prevent a risk, and the second is the result of pure bad luck, with no real precaution available to reduce the risk. It is a meaningful difference.

Not only can unvaccinated children themselves contract and transmit a disease, but a concentration of such children undermines herd immunity. This puts the community at increased risk of outbreaks.²³⁸ In fact, there is evidence that a child is safer from preventable disease if she's unvaccinated in a community with high vaccination rates than if she is vaccinated in a community with low rates.²³⁹ In this sense, too, unvaccinated children are meaningfully different than vaccinated ones. By congregating, they can create a risk of an outbreak in a community, putting everyone at risk.

Since the cases of vaccinated and unvaccinated children are not alike, it is not discrimination to treat them differently.

Furthermore, there is a big difference between status-based distinctions and those relying on choice. Our system treats historically vulnerable groups differently than it treats other classifications, and certainly those based on risk-causing behavior. Children whose parents chose not to vaccinate are very, very different from children from minority groups based on ethnicity or religion. If a parent sent the unvaccinated child to school in violation of SB277, the child would be denied access, and that is not discrimination. It is

²³⁷ Parker et al., *supra* note 74, at 447 (illustrating that disease epidemics occurring in the United States often are a result of a non-vaccinated individual traveling abroad and bringing the disease back into the United States); Sugerman, *supra* note 74, at 747 (providing another example of an individual traveling abroad and bringing into the United States a seemingly eradicated virus).

²³⁸ See Bradford & Mandich, *supra* note 7, at 1383 (finding that more effective state immunization policies increase overall immunity to diseases within the community); P Gahr et al., *An Outbreak of Measles in an Undervaccinated Community*, 134 PEDIATRICS 3220, 3220 (2014) (outlining the possibility that once eradicated diseases could become epidemics should widespread immunization not be maintained); Omer et al., *supra* note 26, at 1389 (illustrating the increased prevalence of disease in communities with larger numbers of children who have not been vaccinated); Omer et al., *supra* note 25, at 1757 (illustrating the increased prevalence of disease in communities with larger numbers of children who have not been vaccinated).

²³⁹ S. von den Hof et al., *Measles Epidemic in the Netherlands: 1999–2000*, 186 J. INFECTIOUS DISEASES 1483, 1485 (2002) (illustrating the principle of herd immunity).

a consequence imposed as a result of the parent's *choice* not to protect the child from disease—for the protection of the child and others. It is not discrimination because it is based on behavior. As I have explained elsewhere:

Behavior that imposes risks on others can and should be regulated. For example, the state can and does regulate one's ability to drink and drive; while you are free to drink, the state can penalize you if you drive while under the influence, because that behavior creates a risk. . . .

In this context, parents who choose not to vaccinate are more like those who choose to drink and drive than . . . members of an ethnic group. They have no more claim of discrimination than does the Association Against Discriminating on the Basis of Alcohol Consumption (ADOBAC).²⁴⁰

Judge Sabraw, in *Whitlow*, addressed this issue thus:

Here, none of the disputed classifications supports an equal protection claim. First, children with PBEs are not similarly situated to children without PBEs. Nor are children at "checkpoints" similarly situated to children not at "checkpoints." And the same may be said of children with IEPs versus those without. In each of those categories, the children are not similarly situated, which dooms Plaintiffs' equal protection claim.

Moreover, even if these children were similarly situated, these classifications would not violate the equal protection clause. Plaintiffs have failed to show that children with PBEs, children at "checkpoints," and section 504 children are members of a suspect class. Plaintiffs have also failed to show that these classifications burden a fundamental right. Thus, these classifications would be subject to rational basis review, not strict scrutiny.²⁴¹

And, explains the judge, all the classifications have a rational basis behind them.²⁴²

²⁴⁰ Reiss *supra* note 147, at 107 (footnotes omitted). ADOBAC is a fictional association.

²⁴¹ *Whitlow v. California*, 203 F. Supp. 3d 1079, 1087 (S.D. Cal. 2016) (footnotes omitted) (first citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985); then citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)).

²⁴² *Id.* at 1087–88.

3. *Substantive Due Process*

All the lawsuits raised a claim of substantive due process. This claim is tied to the claim of violation of parental liberties, which have long since been considered part of the liberty interest protected under the Fourteenth Amendment.²⁴³ However, such rights, as discussed, are not absolute, and in the context of vaccines, the jurisprudence has long rejected due process challenges to school mandates as far back as *Zucht*.²⁴⁴ Most recently, both *Phillips*²⁴⁵ and *Workman*²⁴⁶ rejected an identical claim. And in *Whitlow*, citing these cases, Judge Sabraw found that the due process claim is foreclosed by *Zucht*, and also rejected the claim.²⁴⁷

An extensive jurisprudence rejects the argument that substantive due process is violated when a parent is denied the possibility of sending an unvaccinated child to school, something that risks both the child and others.

C. *Implausible Claims*

Two very implausible claims were raised in the lawsuits. I discuss them here—in spite of their obvious weaknesses—for two purposes. First, as legally unconvincing as they are, they have been aggressively raised in the SB277 discussions, and may well be raised in other states during legislative debates: it may therefore be useful to arm policy makers, public activists and courts with ready explanation of the problems. Second, I think the claims shed important light on the frame of mind of the most extreme of opponents to mandates.

1. *Liability Protections and Unavoidably Unsafe*

The *Buck* lawsuit claimed, and *Whitlow* suggested, that the liability protections manufacturers enjoy are a reason to reject mandates since they imply that vaccines carry risks.²⁴⁸

²⁴³ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 63–66 (2000); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 533–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

²⁴⁴ *Zucht v. King*, 260 U.S. 174, 176–77 (1922).

²⁴⁵ *Phillips v. City of New York*, 775 F.3d 538, 542–43 (2d Cir. 2015).

²⁴⁶ *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App’x 348, 355–56 (4th Cir. 2011).

²⁴⁷ *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089 (S.D. Cal. 2016).

²⁴⁸ *Buck* Complaint, *supra* note 87, at 10; Complaint for Declaratory, Injunctive, or Other Relief, at 17, *Whitlow v. California*, 203 F. Supp. 3d 1079, 1091 (S.D. Cal. 2016).

In part, the claim, as described in *Buck*, seemed to draw on a misunderstanding of the term Unavoidably Unsafe.²⁴⁹ The appellate brief states:

[A]ll vaccine designs are “unavoidably unsafe” (factually and legally). Under federal law, all vaccine designs all legally presumed to come with the risk of “Unavoidable adverse side effects.” In short, all vaccines are “unavoidably unsafe” because their designs are presumed to be “unavoidably defective.” Plaintiffs’ argument on appeal is simple and straightforward: no state may mandate unavoidably unsafe products—i.e., known to cause indiscriminate death and permanent disability—without a parent’s right to decline. . . .²⁵⁰

Buck’s plaintiffs, first and foremost, confuse the unavoidably unsafe exception in comment k to the Restatement (Second) of Torts with the idea of a defective product.²⁵¹ Comment k itself explains that the category it creates is not “defective”: “such a product, properly prepared, and accompanied by proper directives and warnings, is not defective, nor is it unreasonably dangerous.”²⁵² In other words, the argument is based on a pretty deep misunderstanding of the source of the term it uses.

Nor is there any justification to see “all” vaccines, as the brief claims, as defective. Vaccines certainly have inherent risks—but every product, even a perfectly made one, has risks. The existence of a risk alone does not make a product defective, or all knives, all cars, all drugs would be defective going in – and they are not: plaintiffs have to show more than a risk to win a product liability case.²⁵³

Nothing is one hundred percent safe, but as mentioned, the small risks of vaccines are far outweighed by their benefits, and the lives saved.²⁵⁴ Seatbelts, too, carry risks²⁵⁵—but are mandated because of their substantial

²⁴⁹ The appellate court addressing this issue stated, very directly, that “Plaintiffs are, of course, quite wrong.” *Brown v. Smith*, 24 Cal. App. 5th 1135, 1143 (Cal. Ct. App. 2018).

²⁵⁰ Appellants’ Opening Brief at 13, *Buck v. Smith*, No. B279936 (Cal. Ct. App. Dec. 20, 2016) (internal citations omitted) (citing 42 U.S.C. § 300aa-22(b)).

²⁵¹ RESTATEMENT (SECOND) OF TORTS § 402A, cmt. k (AM. LAW INST. 1965).

²⁵² *Id.*

²⁵³ JOHN S. ALLEE ET AL., *PRODUCT LIABILITY*, § 2.46.6-2.5[2] (2012).

²⁵⁴ See Maglione *supra* note 12, at 325. This point was also made by the Court of Appeal. *Brown v. Smith*, 24 Cal. App. 5th 1135, 1143 (Cal. Ct. App. 2018) (“No doubt injuries and deaths have been caused by vaccines, and no doubt there are cases of ‘unavoidable, adverse side effects.’ This does not change the pertinent point: as *Bruesewitz* tells us, ‘the elimination of communicable diseases through vaccination became “one of the greatest achievements” of public health in the 20th century.’ But ‘these gains are fragile’ and ‘[e]ven a brief period when vaccination programs are disrupted can lead to children’s deaths.’” (quoting *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 230 (2011))).

²⁵⁵ See generally Seema Biswas et al., *Abdominal Injury Patterns in Patients with Seatbelt Signs Requiring Laparotomy*, 7(4) J. EMERGENCY, TRAUMA, & SHOCK 295 (2014); William N. Evans & John D. Graham, *Risk Reduction or Risk Compensation? The Case of Mandatory Safety-Belt use Laws*, 4 J. RISK & UNCERTAINTY 61 (1991).

benefits in saving lives.²⁵⁶ In other words, the mere fact that there is a (small) risk attached to vaccines does not prevent the state from mandating them when the benefits are larger, just as the states may require a child undergo life-saving surgery—even though surgery carries undeniable risks—when the risks of no surgery are higher.²⁵⁷

Nor are liability protections in contrast with a mandate. To protect the vaccine supply, in 1986 Congress passed the National Childhood Vaccine Injury Act, which created, among other things, a no-fault program to compensate for the potential harms from vaccines.²⁵⁸ The program has several goals, among them, and likely most important, to ensure the national vaccine supply and keep vaccine prices affordable by protecting manufacturers from unpredictable liability²⁵⁹ and to address the shortcomings of the tort system with a no-fault forum designed to resolve vaccine injury claims “quickly, easily, with certainty and generosity.”²⁶⁰ In other words, liability protections for manufacturers in the United States are part of a parcel that provides claimants a much easier process than having to go through the regular civil courts would.²⁶¹ The existence of such a forum is not an argument against school mandates that make schools safer.

This claim, therefore, is simply implausible.

2. RICO

The core of one of the lawsuits—*Middleton*—is a Racketeer Influenced and Corrupt Organization (“RICO”) claim.²⁶² That claim, as presented here, is extremely weak. The only reason to analyze it is that other states passing immunization laws may well face identical claims from litigating non-lawyers. Having the explanation why these claims are invalid at hand might be helpful.

RICO claims against legislatures passing vaccine-related legislation and governors signing such legislation simply will not work. Under our

²⁵⁶ See generally Christopher S. Carpenter & Mark Stehr, *The Effects of Mandatory Seatbelt Laws on Seatbelt Use, Motor Vehicle Fatalities, and Crash-Related Injuries Among Young Adults*, 27 J. HEALTH ECON. 642 (2008); Alma Cohen & Liran Einav, *The Effects of Mandatory Seat Belt Laws on Driving Behavior and Traffic Fatalities*, 85 REV. ECON. & STAT. 828 (2003).

²⁵⁷ See, e.g., *In re Phillip B.*, 92 Cal. App. 3d 796, 801 (Cal. Ct. App. 1979).

²⁵⁸ 42 U.S.C. §§ 300aa-1–aa-34 (2012).

²⁵⁹ Geoffrey Evans et al., *Legal Issues*, in VACCINES 1481 (Stanley A. Plotkin et al. eds. 2013).

²⁶⁰ H.R. REP. NO. 99-908, pt. 1, at 3 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6344.

²⁶¹ *Bruesewitz v. Wyeth*, 562 U.S. 223, 227–28 (2011). The program has its issues, but also substantial benefits. For more discussion of it, see generally ANNA KIRKLAND, *VACCINE COURT: THE LAW AND POLITICS OF INJURY* 6–9 (2016) and Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631 (2015).

²⁶² See 18 U.S.C. § 1961–1968 (1990).

jurisprudence, as the court's decision in *Middleton* highlighted, legislators are absolutely immune from monetary damages suits for legislative activities (passing laws is clearly legislative)—including from RICO claims.²⁶³ So even if the plaintiffs establish the elements of RICO—and they do not—the legislators they sued would be immune, for good reason. The goal of the doctrine of legislative immunity is to allow legislators to act and speak freely when representing their constituents, without fear of intimidation by lawsuits.²⁶⁴ Under the Eleventh Amendment the Governor, too, is immune from damages suits when he acts in his official capacity.²⁶⁵

Even if courts ignore immunity, or plaintiffs choose defendants without immunity, the RICO claim is not appropriate in this context. The RICO Act²⁶⁶ was originally created to allow the government to capture and deal with organized crime, but its use quickly expanded to other contexts.²⁶⁷ The act allows for criminal action against certain kinds of activities, but also allows for civil suits, with the tempting remedy of treble damages for successful plaintiffs.²⁶⁸ The courts have interpreted RICO expansively.²⁶⁹ Plaintiffs, however, have gone beyond that expansive interpretation, in ways that suggest abuse of the law in a variety of contexts.²⁷⁰

In this lawsuit, too, RICO appears overused. The magistrate's recommendation, accepted by the judge, explains part of the reason it is not appropriate:

²⁶³ *Middleton v. Pan*, No. 2:16-cv-05224-SVW-AGR, 2016 WL 7053936, at *7 (C.D. Cal. Dec. 15, 2016) (citing *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) (noting that legislators hold immunity from liability)); *see also* *Chappell v. Robbins*, 73 F.3d 918, 920, 924 (9th Cir. 1996).

²⁶⁴ *Gravel v. United States*, 408 U.S. 606, 617 (1972) (holding that the purpose of legislative immunity is “to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary”).

²⁶⁵ *Middleton*, 2017 WL 7053936, at *7 (noting that the Eleventh Amendment gives the governor immunity from civil liability).

²⁶⁶ 18 U.S.C. § 1961–1968 (1990).

²⁶⁷ Paul A. Batista, *The Uses and Misuses of RICO in Civil Litigation: A Guide for Plaintiffs and Defendants*, 8 DEL. J. CORP. L. 181, 181–83 (1983) (“The emerging use of RICO in the context of traditional civil lawsuits presents unique opportunities. . . .”); Nicholas L. Nybo, *A Three-Ring Circus: The Exploitation of Civil RICO, How Treble Damages Caused It, and Whether Rule 11 Can Remedy the Abuse*, 18 ROGER WILLIAMS U. L. REV. 19, 24–26 (2013) (discussing frivolous claims brought forth by private plaintiffs).

²⁶⁸ Lee Coppola & Nicholas DeMarco, *Civil RICO: How Ambiguity Allowed the Racketeer Influenced and Corrupt Organizations Act to Expand Beyond its Intended Purpose*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 242 (2012) (“In addition to severe criminal penalties, RICO also provides a civil action for treble damages where an aggrieved party may recovery for injury to their business or property. . . .”).

²⁶⁹ *Id.*

²⁷⁰ Nybo, *supra* note 267, at 25–27.

The court is hard pressed to see any way in which Plaintiffs' challenge to SB 277 could plausibly fall within RICO. Section 1961 contains only the definitions. In the event Plaintiffs attempt to amend the RICO claims, Plaintiffs are advised that they must allege injury to their business or property by reason of a violation of § 1962. The FAC does not contain allegations of injury to Plaintiffs' business or property.

Section 1962(a) provides that it is unlawful "for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest . . . any part of such income . . . in . . . operation of . . . any enterprise." The FAC contains no such allegations. Moreover, under § 1962(a), Plaintiffs must "allege facts tending to show that he or she was injured by the use or investment of racketeering income." Injury from alleged racketeering acts that generated the income is not sufficient.

Absent allegations of a viable RICO violation, Plaintiffs' allegations of a conspiracy to violate RICO under § 1962(d) also fail to state a claim.²⁷¹

In other words, RICO is not a synonym for "something is wrong, someone did something bad."²⁷² RICO is a specific act that requires meeting exacting legal standards. In this case, plaintiffs did not say which one of the enumerated federal crimes in Section 1961's definition of "Racketeering Activity" defendants are supposed to have violated. RICO does not cover any corrupt conduct or ethically problematic conduct: it addresses a specific set of crimes. Plaintiffs allege corruption and conspiracy, but that is not enough. Their mention of campaign contributions might suggest they think there was bribery—but legal campaign contributions are not bribery. In other words, it is unclear what the specific racketeering activity is. General claims of obstruction of justice and oath violation are not enough to form a basis for a RICO claim, either. Civil rights violations alone, even if they did occur, are not racketeering activity, either.²⁷³

As the state pointed out in its motion to dismiss, "RICO's civil remedy section 'requires as a threshold for standing an injury to 'business or property.'"²⁷⁴ Plaintiffs did not claim an injury to their property, only to their liberty, so on this, too, they fail. It is hard to see any direct injury to property from school immunization mandates; they do not focus on property, but on

²⁷¹ Report & Recommendation of U.S. Magistrate Judge, *supra* note 67, at 17–18 (internal citations omitted) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495–97 (1985); then quoting *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992)).

²⁷² For a humorous and less than politically correct treatment of the issue that is nonetheless sophisticated and accurate, see Ken White, *Lawsplainer: IT'S NOT RICO, DAMMIT, POPEHAT* (June 14, 2016), <https://www.popehat.com/2016/06/14/lawsplainer-its-not-rico-dammit/>.

²⁷³ *Bowen v. Oistead*, 125 F.3d 800, 806 (9th Cir. 1997) (noting that civil rights violations are not racketeering).

²⁷⁴ State's Motion to Dismiss at 21, *Middleton v. Pan*, 2017 WL 7053936 (C.D. Cal. Dec. 15, 2016) (No. 2:16-cv-05224-SVW-AGR) (quoting *Avalos v. Baca*, 596 F.3d 583, 592 (9th Cir. 2010)).

preventing outbreaks. A weak argument could be made that being required to forego income to homeschool affects property or business, but that is a very tenuous connection to the alleged racketeering activity.

In other words, the RICO claim is unfounded because plaintiffs did not even try to meet the requirements of a RICO suit. Even if they had, passing a law that plaintiffs think is the result of special interests' influence is not racketeering activity. The plaintiffs are attempting to force a scenario that is just a bad match to a RICO claim into that mold.

CONCLUSION

Plaintiffs fighting against school immunization mandates must overcome two obstacles. First, they must overcome the strong public policy reasons behind mandates—stronger mandates reduce outbreaks,²⁷⁵ prevent deaths, suffering, and reduce costs.²⁷⁶ Second, they must overcome the long-standing jurisprudence that supports these mandates—exactly because of their substantial benefits for children and the community.²⁷⁷ In fighting SB277, plaintiffs tried a variety of legal strategies and creative arguments to combat the law, but so far courts have consistently rejected the arguments. This Article outlines the claims, analyzes them, and explains why continuing to reject these claims is the correct legal conclusion, as well as the correct public policy.

It is easy to sympathize with parents who are so frightened from vaccines that they see being required to vaccinate their children as a condition to sending them to school as coercion. Fear is understandable, even when based on misconceptions. But this sympathy is not a reason to prevent states from acting to protect children and the community by passing strong immunization laws. After all, it is important to remember that the children left unvaccinated also depend on the community having high vaccination rates. Lacking protection of their own, they are at high risk during an outbreak of preventable diseases. Courts' unwavering support of school immunization protects children in the school, the community, and yes, the children whose parents are frightened of vaccinating because of (incorrect) anti-vaccine claims. In this case, law, justice, and sound policy collide.

²⁷⁵ See Bradford & Mandich, *supra* note 7, at 1383 (“States that had the most effective portfolio of policies had lower incidences of pertussis.”).

²⁷⁶ See Moser, *supra* note 81, at 633 (“By disregarding evidence of the safety and effectiveness of vaccines and choosing not to vaccinate their children, some parents are increasing the risk of outbreaks and their attendant costs.”); Zhou, *supra* note 91, at 581 (discussing the number of projected deaths saved and costs averted).

²⁷⁷ See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (discussing the ways in which a state can restrict parental control).

APPENDIX

Table 1: The Four SB277 Lawsuits²⁷⁸

Whitlow	Buck	Middleton	Torrey-Love
Plaintiffs			
Seventeen individual plaintiffs and four organizations, including partially vaccinated & some claiming vaccine injuries.	Eight individual plaintiffs, very strongly anti-vaccine.	Over twenty pro-se litigants, led by a non-lawyer.	Seven individual plaintiffs, three parents and four minor children, and the organization “A Voice for Choice.”
Venue			
Federal District Court, Southern District of California	State Superior Court, Los Angeles; continued to California Court of Appeals of the Second District	Federal District Court, Central District of California	First round: Federal District Court, Central District of California Second round: State Superior Court, Placer County

²⁷⁸ The full name of each lawsuit was included in the text. *See supra* Part III. For ease of use, the first plaintiff’s name is used as the title.

Whitlow	Buck	Middleton	Torrey-Love
Lawyers			
Plaintiff: James S. Turner, Robert T. Moxley, Kimberly M. Mack Rosenberg, Carl M. Lewis Defendant: Jonathan E Rich (Office of the Attorney General)	Plaintiff: T. Matthew Phillips (T Matthew Phillips Law Offices) Defendant: Jonathan E Rich (Office of the Attorney General)	Plaintiff: No lawyer, but Travis Middleton, lead plaintiff, is a repeat litigant and considers himself an expert. He is clearly the leading spirit. Defendant: Cara L. Jenkins (Office of Legislative Counsel) Jacquelyn Young and Jonathan E. Rich (Office of the Attorney General)	Plaintiff: Brad A. Hakala (The Hakala Law Group PC), James Leon Moultrie, III (Hakala Law Group PC), Jeffrey B. Compangano (Hakala Law Group PC) Defendant: Jacquelyn Young and Jonathan E. Rich (Office of the Attorney General)

Whitlow	Buck	Middleton	Torrey-Love
Procedural Posture			
<p>On appeal from denied injunction in the U.S. District Court for the Southern District of California (Plaintiffs voluntary dismiss their claim without prejudice Aug. 31, 2016) (Filed in state court, removed to federal court, remanded back to state) States demurrer accepted by Superior Court Judge.</p>	<p>Demurrer is sustained, without leave to amend Plaintiffs appealed, parties filed briefs on appeal.</p>	<p>It is a bit unclear. The initial case was dismissed but the judge accepted, in that decision, the plaintiffs' second amended complaint as another claim, and that proceeding is not finished. In the meantime, the plaintiffs filed a Habeas motion with the Ninth Circuit, for reasons not quite clear.</p>	<p>Defendant motion to dismiss granted, Plaintiff motion for preliminary injunction denied. A Voice for Choice appealed the dismissal to the California Court of Appeal of the Second District.</p>

Whitlow	Buck	Middleton	Torrey-Love
Main Claims			
<p>Plaintiffs assert they are challenging the elimination of the personal belief exemption; claim violation of free exercise of religion under First Amendment, violation of due process, equal protection, right of education, 29 U.S.C. § 794 (no discrimination under federal grants and programs)</p>	<p>Violation of: 1) Free Exercise Clause, 2) right to an education under Article IX, § 5 of California constitution, 3) Equal Protection Clause, 4) Health and Safety Code § 24175, 5) Due Process Clause</p>	<p>1) Violation of RICO under 18 U.S.C. §§ 1961, 1962(a), (d), 2) conspiracy to promote the sale and use of biological weapons on California citizens 18 U.S.C. § 175, 3) conspiracy to promote the sale and use of chemical weapons on California citizens 18 U.S.C. § 178, 4) violation of 18 U.S.C. §§ 241, 242, 5) violation of 42 U.S.C. §§ 1983, 1986, 6) intentional infliction of emotional distress</p>	<p>Violation of: 1) substantive due process rights under Fourteenth Amendment, 2) the Equal Protection Clause of the Fourteenth Amendment, and 3) 42 U.S.C. § 1983 right to refuse immunization, right to public education, equal protection, unconstitutional condition</p>