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10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

14 **SARA ROYCE; SARAH CLARK;**  
 15 **TIFFANY BROWN; and KRISTI**  
 16 **CARAWAY,**  
 17 Plaintiffs,  
 18 v.  
 19 **ROB BONTA, in his official capacity**  
 20 **as Attorney General of California,**  
 21 Defendant.

23-CV-2012-H-BLM

**REPLY TO PLAINTIFFS’  
 OPPOSITION TO MOTION TO  
 DISMISS COMPLAINT FOR  
 INJUNCTIVE AND  
 DECLARATORY RELIEF**

Date: January 22, 2024  
 Time: 10:30 a.m.  
 Ctrm: 12A  
 Judge: Hon. Marilyn L. Huff  
 Trial Date: Not Set  
 Action Filed: 10/31/2023

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## INTRODUCTION

Plaintiffs’ opposition to Attorney General Bonta’s motion to dismiss Plaintiffs’ Complaint does not dispute the state’s legitimate and indeed compelling interest in protecting the public health of students attending institutionalized classroom settings in public and private schools when the state enacted Senate Bill No. 277 (Cal. Stats. 2015 ch. 35 (2015-2016 Reg. Sess.)) (SB 277) to end personal belief exemptions (PBEs). Nor do they dispute the Legislature expressed intent to provide a means for the eventual achievement of total immunization of school children against a number of deadly, but highly preventable, childhood diseases.

Rather, Plaintiffs continue to rely on conclusory allegations to assert that SB 277 violates the Free Exercise Clause of the First Amendment because of a claimed religious animus and on the grounds that SB 277 purportedly treats comparable secular exemptions more favorably than PBEs. Plaintiffs’ arguments fail. Plaintiffs’ conclusory allegations are contradicted by reports and articles incorporated by reference into their Complaint. Likewise, Plaintiffs’ claim of religious animus fails because they do not demonstrate any temporal connection between the two purported social media statements by Senator Pan and Governor Brown’s Deputy Director of Legislative and Inter-Governmental affairs and either the introduction or enactment of SB 277. Plaintiffs’ argument that SB 277 is neither neutral nor generally applicable fails because all PBEs were eliminated and Plaintiffs fail to articulate how either the other limited exemptions (for medical conditions, the temporary allowance of conditional admission to schools based on homelessness and immigrant status pending vaccination verification) or access to independent study and federally mandated IEP services are comparable to PBEs and thus treat the subset of PBEs based on religious beliefs differently to a degree that violates the First Amendment.

Accordingly, Plaintiffs fail to allege facts sufficient to “raise a right to relief above the speculative level” to the “plausible” level. *Bell Atlantic Corp. v.*

1 *Twombly*, 550 U.S. 544, 556 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679-680,  
2 (2009). Plaintiffs' Complaint should be dismissed with prejudice.

### 3 **ARGUMENT**

#### 4 **I. PLAINTIFFS EFFECTIVELY CONCEDE THAT CALIFORNIA HAS A** 5 **LEGITIMATE PUBLIC HEALTH INTEREST IN CHILD VACCINATION**

6 Plaintiffs' opposition does not dispute that the state has a legitimate public  
7 health interest in mandatory child vaccination as a condition to attending  
8 institutional classroom settings in public and private schools. Instead, Plaintiffs  
9 attempt to allege that SB 277 and its elimination of PBEs "is not congruent with  
10 California's interest in slowing the spread of disease" by alleging that California's  
11 vaccination rates were already high when SB 277 was enacted and PBE requests  
12 were declining. Opp. at 4:21-5:11; Complaint at 8:9-9:8, 9:22-28 (¶¶ 50-53 and  
13 notes 1-5). They also attempt to downplay the state's legitimate and compelling  
14 public health interest by focusing on one required vaccination and making  
15 conclusory allegations that chickenpox "is a mild disease" and suggesting that  
16 vaccination against chickenpox increases the risks of shingles in adults. Opp. at  
17 5:17-20; Complaint at 9:14-17 (¶ 55). Plaintiffs' conclusory allegations are  
18 properly disregarded as contradicted by the very reports and medical journal article  
19 identified and referenced in Plaintiffs' own Complaint.

20 Documents incorporated by reference in a Complaint are properly considered  
21 in a motion to dismiss under Federal Rules of Civil Procedure rule 12(b)(6). *In re*  
22 *NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014). The court may  
23 disregard allegations in the complaint if contradicted by facts established by  
24 reference to documents attached as exhibits or otherwise incorporated by reference  
25 in a complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.  
26 2001); *Thompson v. Illinois Dep't of Pro. Regul.*, 300 F.3d 750, 754 (7th Cir. 2002)  
27 (exhibits that contradict the allegations of the complaint control).  
28

1 Here, Plaintiffs make the generalized allegation that herd immunity thresholds  
2 are reached at vaccination rates of 80% to 90%, citing Carrie MacMillan, *Herd*  
3 *Immunity, Will We Ever Get There?*, Yale Medicine, May 21, 2021. However, the  
4 cited assertion is expressly qualified and those qualifications are contrary to  
5 Plaintiffs' conclusory inferences. The article expressly notes herd immunity is  
6 dependent on disease contagiousness, the relative vaccination levels of the  
7 population on a local level, and variability over time—"if vaccination rates for a  
8 highly contagious disease go down in one pocket of the country, for example, the  
9 disease can resurface and spread in that area." So, when Plaintiffs rely on  
10 California Department of Public Health (CDPH) immunization assessment results  
11 for 2014-2015 and 2015-2016 for the conclusory proposition that childhood  
12 vaccination rates were on the rise and PBEs on the decline just before SB 277's  
13 enactment, it does not support their overarching assertion that elimination of PBEs  
14 was incongruent with the state's public health interest. Complaint at 8:10–9:4 (¶¶  
15 50–52, nn. 2–4).

16 The CDPH reports referenced in Plaintiffs' Complaint actually show that until  
17 the 2014-2015 school year, the percentage of students requesting PBEs had  
18 consistently increased annually and that during the prior five years the percentage  
19 of students completing each of the required vaccines steadily declined. *See, e.g.*,  
20 2014-2015 Kindergarten Immunization Assessment Results at 6-7.<sup>1</sup> The reports  
21 further show that despite indications of overall vaccination rates of 92.9% for  
22 kindergarten students and 97.8% for 7th grade students in the 2015-2016 school  
23 year, there remained a number of counties with vaccination rates well below 85%  
24 and higher PBE rates. *Id.*; *see also* Mot. Request for Judicial Notice (RJN) at Ex.  
25 6.6. SB 277 was directed at addressing the low vaccination rates in local areas  
26 through a statewide approach with a consistent standard that could be consistently

27 <sup>1</sup> Each of the reports referenced in plaintiffs' Complaint can be accessed at  
28 <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/School/tk-12-reports.aspx#>.



1 applied by local school districts. RJN at Exs. 7.18, 9.2 (noting overall increase in  
 2 PBEs and geographic pockets with exemption rates of 21% or more), 9.5 (noting  
 3 statewide statistical immunization rates mask local vaccination rates and citing  
 4 reports that more than a quarter of California schools had measles-immunization  
 5 rates below CDC recommended levels).

6 **II. PLAINTIFFS’ ATTEMPT TO ALLEGE A RELIGIOUS ANIMUS IN THE**  
 7 **ENACTMENT OF SB 277 FAILS**

8 Plaintiffs attempt to seize upon the recent Supreme Court holding in *Fulton v.*  
 9 *City of Philadelphia*, — U.S. —, 141 S. Ct. 1868, 1877, to assert that SB 277 is not  
 10 a neutral law, based on their allegations that its introduction and passage was  
 11 motivated by a religious animus. Opp. at 13:7–14:7; Complaint at 7:14–22, 11:9–  
 12 22 (¶¶ 42–44, 63–65). However, Plaintiffs fail to allege sufficient detail to show  
 13 when the purported statements by Senator Pan and Maral Farsi, Governor Brown’s  
 14 Deputy Director of Legislative and Inter-Governmental Affairs, were made such  
 15 that they could have impacted the passage of SB 277.<sup>2</sup> Nor do Plaintiffs adequately  
 16 allege how statements by one state senator and a deputy director in the governor’s  
 17 office impermissibly resulted in a bill that was passed based on religious animus.

18 To fail the neutrality prong based on an asserted religious animus, “it is not  
 19 enough for a law to simply *affect* religious practice; the law or the process of its  
 20 enactment must demonstrate ‘hostility’ to religion.” *We The Patriots USA, Inc. v.*  
 21 *Connecticut Off. of Early Childhood Dev.*, 76 F.4th 130, 145 (2d Cir. 2023) (*We*  
 22 *The Patriots*), citing *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, —  
 23 U.S. —, 138 S. Ct. 1719, 1729, 201 L.Ed.2d 35 (2018). “Factors relevant to the

24 <sup>2</sup> SB 277 was passed in 2016. Fatal to plaintiff’s claim of religious animus, a  
 25 simple internet search by counsel would have confirmed that the proffered  
 26 statements by Senator Pan were in 2019. See <https://www.facebook.com/RichardPanMD/posts/10156459101775674/>. Likewise,  
 27 Maral Farsi was appointed as Governor Brown’s Deputy Director of Legislative  
 28 and Inter-Governmental Affairs in April of 2018, well after the passage of SB 277.  
 See <https://www.ca.gov/archive/gov39/2018/04/02/governor-brown-announces-appointments-32/index.html>.

1 assessment of governmental neutrality include ‘the historical background of the  
2 decision under challenge, the specific series of events leading to the enactment or  
3 official policy in question, and the legislative or administrative history, including  
4 contemporaneous statements made by members of the decisionmaking body.’”  
5 *Masterpiece Cakeshop, Ltd.*, at 138 S. Ct. 1731.<sup>3</sup>

6 Here, SB 277 was introduced in the wake of the 2015 measles outbreak in  
7 California and reports from the CDC that there were more measles outbreaks in  
8 January of 2015 than any one month in the 20 years prior. RJN at Exs. 4.2, 5.5. SB  
9 277’s author’s statement also identified concerns over the significant rise in  
10 PBEs—a 337 percent increase between 2000 and 2012—with some areas of  
11 California having PBE rates as high as 21%, “which places our communities at risk  
12 for preventable disease.” *Id.* These are all neutral grounds concerned with public  
13 health and addressing low vaccination rates. There is no demonstrable religious  
14 animus behind the introduction of SB 277 and Plaintiffs have failed to allege any  
15 temporal connection between the quoted statements of Senator Pan or Maral Farsi  
16 and the introduction of SB 277. Complaint at 7:14-24 (¶¶ 43–45.) Likewise,  
17 Plaintiffs fail to allege any temporal connection between the statements and passage  
18 of the bill. *Id.* Nor do they allege how the statements attributed to one senator and  
19 one deputy director of legislative affairs demonstrate religious animus in SB 277’s  
20 passage when SB 277 passed by margins of over 60%. *See* RJN Ex. 2 (vote of 25  
21 to 11 in Senate and 46 to 31 in Assembly). At most, Plaintiffs allege the statements  
22 “diminish the sincerely held religious beliefs of parents across California.”  
23 Complaint at 7:23–24 (¶ 45). That does not satisfy the requirement to show  
24 hostility towards religion and religious beliefs in the enactment of a law. *We The*  
25 *Patriots*, 76 F.4th at 145; *Masterpiece Cakeshop*, 138 S. Ct. at 1729; and *see Doe v.*  
26

27 <sup>3</sup> Plaintiffs’ religious animus contention thus places the legislative history of  
28 SB 277 directly in issue. Plaintiffs’ argument SB 277’s legislative history should  
not be judicially noticed on grounds it is unnecessary thus fails. *Opp.* at 7:1–27.

1 *San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177 (9th Cir. 2021). Plaintiffs’  
2 religious animus allegations fail.

3 **III. PLAINTIFFS’ ALLEGATIONS THAT SB 277 TREATS COMPARABLE**  
4 **SECULAR ACTIVITY MORE FAVORABLY THAN RELIGIOUS EXERCISE FAILS**

5 Plaintiffs argue that they have adequately alleged SB 277 does not satisfy the  
6 neutrality and general applicability tests, thus warranting strict scrutiny. Opp. at  
7 14:8–16:7. They cite to conclusory allegations that SB 277 “exempts immigrant  
8 and homeless children, students with medical exemptions and students enrolled in  
9 independent study programs or IEP.” *Id.* at 16:1–3, citing Complaint at 6:7–18 (¶¶  
10 33–36). Plaintiffs’ arguments fail because they ignore the fact that SB 277 treated  
11 all personal beliefs, religious or otherwise, the same in eliminating California’s  
12 allowance of PBEs to vaccination in their entirety. *Does 1-6 v. Mills*, 16 F.4th 20,  
13 30 (1st Cir. 2021), cert. den. 142 S. Ct. 1112 (2022) (“The state legislature removed  
14 both religious and philosophical exemptions from mandatory vaccination  
15 requirements, and thus did not single out religion alone.”).

16 Additionally, Plaintiffs’ conclusory allegations of a purported exemption for  
17 homeless and immigrant children is not actually an exemption from the mandatory  
18 vaccination requirements. Rather, it allows conditional admission pending the  
19 school district or child obtaining proof of vaccination status or otherwise  
20 completing the required vaccinations. *See* Cal. Health & Saf. Code §§ 120340,  
21 120341(b); Cal. Edu. Code §§ 48852.7. These provisions for temporary admission  
22 recognize that homeless and immigrant youth often lack access to vaccination  
23 records due to their current circumstances, or may otherwise need a limited period  
24 of time to complete mandatory vaccinations. Homeless and immigrant children  
25 who hold religious beliefs are equally entitled to the advantages that California law  
26 recognizes when that individual is homeless or an immigrant. Moreover,  
27 conditional admissions for a short period of time do “not raise a serious question  
28 concerning the mandate’s general applicability.” *Doe v. San Diego Unified Sch.*

1 *Dist.*, 19 F.4th 1173, 1179 (9th Cir. 2021) (analyzing school district’s mandatory  
2 COVID-19 vaccination requirement allowing conditional admission for a limited  
3 period under specified circumstances).

4 Plaintiffs’ conclusory independent study and IEP assertions similarly fail.  
5 First, federal law requires implementation of IEPs. *See* 20 U.S.C. § 1415(j); *Doe v.*  
6 *San Diego Unified Sch. Dist.*, 19 F.4th at 1179. State law was thus required to  
7 accommodate access to IEP services. Second, students engaged in independent  
8 study without classroom instruction or specifically accessing federally mandated  
9 IEP services are not necessarily placed in an institutionalized classroom setting  
10 where they would interact with multiple students over the entire school day. Thus,  
11 allowing access to independent study and federally mandated IEP services does not  
12 pose the same risks as PBEs which would allow full access to the classroom setting.  
13 It “is unlikely that the ‘risk’ to the government’s asserted interest posed by this  
14 provision would qualify as ‘comparable’ to the risk posed by” PBEs. *Doe v. San*  
15 *Diego Unified Sch. Dist.*, 19 F.4th at 1180. Plaintiffs offer no allegations or  
16 arguments otherwise.

17 Finally, Plaintiffs’ conclusory allegations and arguments fail to demonstrate  
18 that SB 277’s continued allowance and expansion of medical exemptions makes SB  
19 277 not generally applicable. *Opp.* at 13:7–16, *Complaint* at 12:7–18 (¶¶ 69–71.)  
20 Specifically, Plaintiffs’ conclusory allegations do not show how the statutes  
21 allegedly provide for individualized determinations on medical exemptions. *Id.*

22 On its face, California Health and Safety Code section 120370(a) (2016)  
23 requires the medical exemption upon the submission of a physician’s form  
24 declaring the physical condition of the child, or the child’s medical circumstances  
25 are such that immunization is not considered safe. *See* RJN at Ex. 1.4.<sup>4</sup> Plaintiffs’

26 <sup>4</sup> California Health and Safety Code section 120370 was further amended and  
27 section 120372 added in 2019 to provide for a statewide standardized medical  
28 exemption form and to provide standardized CDC, ACIP or AAP criteria for  
appropriate medical exemptions. *See* Cal. Stats. 2019 ch. 278 and 281 (2019-2020

1 facial challenge to the statute based on conclusory allegations thus fails. In  
2 addition, as recognized in *Doe v. San Diego Unified Sch. Dist.*, allowing for  
3 medical exemptions based on medically contraindicated conditions “serves the  
4 primary interest for imposing the mandate—protecting student ‘health and  
5 safety’—and so does not undermine the [state’s] interests as a [PBE] would. *Doe v.*  
6 *San Diego Unified Sch. Dist.*, 19 F.4th at 11778, citing in part to *Fulton*, 141 S. Ct.  
7 at 1877 (“A law . . . lacks general applicability if it prohibits religious conduct  
8 while permitting secular conduct that undermines the government’s asserted  
9 interests in a similar way”); *Does 1-6 v. Mills*, 16 F.4th at 30–31 (exempting from  
10 vaccination only those whose health would be endangered by vaccination did not  
11 undermine state’s interest in requiring healthcare worker vaccination for COVID-  
12 19); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 282, 285, 289–290 (2d Cir.  
13 2021) cert. den. sub. nom. *Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022) (medical  
14 exemption did not undermine state’s interest; medical exemption not rendered  
15 discretionary where statute relied on accepted medical standards); *Tandon v.*  
16 *Newsom*, — U.S. —, 141 S. Ct. 1294, 1296 (2021) (“[W]hether two activities are  
17 comparable for purposes of the Free Exercise Clause must be judged against the  
18 asserted government interest that justifies the regulation at issue”). Finally, medical  
19 exemptions are not comparable to PBEs because medical exemptions may be of  
20 limited duration, whereas PBEs would apply to the student’s entire education. *See*  
21 *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th at 1178.

22 Plaintiffs’ challenges to SB 277 thus fail for the reasons articulated in the  
23 moving papers and for the reasons addressed above. SB 277 serves a legitimate and  
24 compelling state interest, survives rational basis review. Defendant’s motion to  
25 dismiss should be granted.

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Reg. Sess.); Cal. Health & Saf. Code §§ 120370(a)(1), 120372(a)(1)-(2),  
120372(d)(3)(A) (West 2024).

1 **IV. LEAVE TO AMEND SHOULD BE DENIED**

2 Plaintiffs argue that if the Court grants the motion to dismiss, leave to amend  
3 should be granted. Opp. at 18:10–16. However, Plaintiffs fail to articulate how  
4 they can amend to overcome the defects in their Complaint. The request for leave  
5 to amend should be denied.<sup>5</sup>

6 **CONCLUSION**

7 For the reasons set forth above and in the moving papers, Plaintiffs’ cause of  
8 action for violation of the Free Exercise Clause of the First Amendment fails to  
9 state a claim. The motion to dismiss should be granted without leave to amend.

10 Dated: January 12, 2024

Respectfully submitted,

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12 Attorney General of California  
13 BENJAMIN G. DIEHL  
14 Supervising Deputy Attorney General

15 /s Darin L. Wessel  
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<sup>5</sup> Defendant reserves the right to raise Eleventh Amendment immunity challenges to any amended Complaint.

## CERTIFICATE OF SERVICE

Case Name: Royce, et al. v Bonta No. 23-CV-2012-H-BLM

I hereby certify that on **January 12, 2024**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

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

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on **January 12, 2024**, at San Diego, California.

G. Lopez  
Declarant

  
Signature