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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SARA ROYCE; **SARAH CLARK**; **TIFFANY BROWN**; and **KRISTI CARAWAY;**

Plaintiffs,

v.

ROB BONTA, in his official capacity as attorney general of California;

Defendant.

Case No.: 23-CV-2012-H-BLM

Honorable Marilyn L. Huff

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Date: January 22, 2024
Time: 10:30 a.m.
Dept: 12A

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I. INTRODUCTION

For over 60 years, California provided a personal belief exemption to its mandatory student vaccination requirements. In 2016, California passed Senate Bill ("SB") 277, repealing all personal belief exemptions, including religious exemptions, from its compulsory vaccination law. California is now one of only five states that denies religious students the right to a public and private education. Plaintiffs Sara Royce, Sarah Clark, Tiffany Brown, and Kristi Caraway are all California residents and mothers of school-aged children, and all hold religious beliefs that forbid them from vaccinating their children.

California's compulsory vaccination law requires all students to receive numerous vaccines to enter public or private school – vaccines that are neither 100 percent risk-free nor 100 percent effective. Cal. Health & Saf. Code §§ 120325-120375. Plaintiffs' children are unable to enjoy the benefits of a public and private education that their secular peers enjoy because of California's compulsory vaccination requirements. Plaintiffs desire to enroll their children in California public or private schools but are forbidden from doing so.

Notably, California law allows students to object to the required school vaccines for secular reasons, but SB 277 removed the ability for students to object to the compulsory vaccines on religious grounds. Students can still enter public or private school if they are homeless, enrolled in an individualized education program ("IEP"), or have a medical objection to vaccination. California also allows children to participate in camps, visit a public library, or participate in extra-curricular activities – all without proof of vaccination. California has no compelling, much less rational, justification for eliminating religious exemptions when religiously exempt students pose no greater risk than secularly exempt students.

Defendant Rob Bonta ("Defendant" or "State") attempts to dismiss Plaintiffs' lawsuit, claiming they fail to state a claim for relief. *See* Defendant's Memorandum

of Points and Authorities in Support of Motion to Dismiss ("Mot."), ECF 4.1. The Court should deny the motion for two reasons.

First, Defendant erroneously supports its motion to dismiss with outside evidence such as a law review article and evidence regarding the efficacy of the school-mandated vaccines. Defendant relies on this evidence to undermine Plaintiffs' sincerely held religious beliefs and factual allegations regarding the efficacy of the vaccines. This evidence is impermissible at the motion to dismiss stage.

Second, Defendant erroneously relies on *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) and many outdated cases to challenge the sufficiency of Plaintiffs' First Amendment claim. Plaintiffs easily state a claim for relief in light of the seismic shift in First Amendment jurisprudence brought by *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) ("Brooklyn Diocese") and its progeny. Plaintiffs have sufficiently pled that SB 277 violates the Free Exercise Clause because it discriminates against similarly situated individuals by allowing unvaccinated students enrolled in an IEP or students with medical contraindications into California schools while excluding students with religious objections. Students with religious objections pose no greater threat of transmission than students with medical objections.

Accordingly, this Court should deny the State's motion to dismiss. Alternatively, if the Court is inclined to dismiss, it should grant Plaintiffs leave to amend.

II. FACTUAL BACKGROUND

A. History Of Childhood Vaccination Requirements In California.

California's compulsory vaccination for school attendance began in 1961 with just a single dose of the polio vaccination. Complaint ("Compl."), ¶ 26. Over the next 49 years, the California Legislature added 15 additional doses of various vaccines, including DTaP, Hep B, MMR, and Varicella. *Id.* at ¶¶ 27-32. Children

now need 16 doses of various vaccines to enter Kindergarten at a public or private school in California. *Id.* at ¶¶ 26-32. An additional dose of Tdap is required for advancement to the seventh grade. *Id*. at ¶ 32.

In 2015, as a response to the measles outbreak, the California Legislature enacted SB 277, which eliminated the personal belief exemption ("PBE") – including religious exemptions. *Id.* at ¶ 33. At the time, only approximately 2.5% of students had PBEs. *Id.* Until SB 277, each of the required vaccinations for school entry were subject to a PBE. *Id.* at ¶¶ 34. Despite eliminating the PBE, SB 277 still provides exemptions to the vaccination requirements, including medical exemptions, Cal. Health & Safety Code § 120370(a), exemptions for "home-based private school or …an independent study program[,]" *id.* § 120335(f), and exemptions for students who qualify for an IEP, *id.* § 120335(h). *Id.* at ¶ 35. California also allows immigrant and homeless children to attend public and private schools without proof of vaccination. *Id.* at ¶ 36.

SB 277 also broadened medical exemptions under § 120370(a) to give physicians discretion to write medical exemptions beyond the narrow Center for Disease Control (CDC) guidelines. *Id.* at ¶ 37. When former Governor Brown signed SB 277, he acknowledged that "[t]he Legislature, after considerable debate, specifically amended SB 277, to exempt a child from immunizations whenever the child's physician concludes that there are circumstances, including, but not limited to, family medical history, for which the physician does not recommend immunization…." *Id.* at ¶ 38.

Notably, when considering SB 277, the Senate Judiciary committee highlighted that repealing the PBE "effectively repeals any possible religious exemptions" and may conflict with the Free Exercise Clause. *Id.* at ¶ 39. Numerous religious adherents testified to the committee about how SB 277 would impact them and their families, but Governor Brown still signed the bill over their objections and in contradiction to his prior conduct. *Id.* at ¶ 41. For instance, in 2012, he directed

the California Department of Public Health to allow for religious exemptions under Assembly Bill 2109. *Id.*

Several legislators, including the author of SB 277, Richard Pan, have made discriminatory remarks about individuals who have sincerely held religious objections to vaccines. *Id.* at ¶ 42. For instance, on social media, Richard Pan stated that people who "opt out of vaccines should be opted out of American society." *Id.* at ¶ 43. He even equated these individuals to drunk drivers. *Id.* Maral Farsi, who serves as the Deputy Director of Legislative and Inter-Governmental Affairs, has stated that anti-vaxxer parents are "oxygen thieves who don't care about children." *Id.* at ¶ 44. These statements diminish the sincerely held religious beliefs of parents across California. *Id.* at ¶ 45.

Since 2021, after the development of the COVID-19 vaccine, information related to the efficacy of vaccines and religious objections to the development of vaccines became more widely known and understood. *Id.* at ¶ 46. More members of the public are now aware that several childhood vaccines are derived from aborted fetal cells. *Id.* at ¶ 47. Even if a vaccine is not directly associated with aborted fetal cells, they are still made by manufacturers who profit from the use of aborted fetal cells. *Id.* This knowledge has prompted many parents to object to their children receiving the mandatory vaccines to enter public and private schools, including Plaintiffs. *Id.* at ¶ 48.

B. SB 277 Is Not Congruent With California's Interest In Slowing The Spread Of Disease.

California vaccination rates are high—higher than the national average for each disease listed on the CDC schedule. *Id.* at ¶ 50. Additionally, just prior to SB 277's passage, childhood vaccination rates were on the rise in California. *Id.* at ¶ 51. Vaccine rates increased 0.2% for Kindergarteners and 1.2% for seventh graders between the 2013/14 and 2014/15 school years, while PBEs were declining. *Id.* In 2015-2016, the year before SB 277 went into effect, California's seventh grade

students were vaccinated at an overall rate of 97.8%. *Id.* at ¶ 52. The percentage of students with PBEs this same year was 1.66%, while the percentage of students with medical exemptions was 0.14%. *Id.* For entering kindergarten students in the 2015-2016 school year, 92.9% had received all required vaccines. *Id.* The percentage of kindergarten students with PBEs this same year was 2.38%, while the percentage of kindergarten students with medical exemptions was 0.17%. *Id.*

Herd immunity thresholds for required vaccinations against contagious diseases range from 80% to 95%. *Id.* at ¶ 53. If immunity is above the "herd immunity" threshold for a group of people, then an infectious disease might cause a few cases, but it will quickly stop spreading because enough people are protected. *Id.*

California cannot demonstrate that religiously exempt students pose a greater risk than secularly exempt students. *Id.* at ¶ 54. The exempt unvaccinated children under SB 277 are still free to sweat in weekend sports leagues together, participate in public extracurricular activities, and sit through hours of services at churches and synagogues. *Id.*

California also mandates vaccines that are not necessary. For instance, chickenpox is a mild disease and complications in children are rare. Chickenpox vaccination also increases the risk of shingles in adults, which is a more dangerous disease and comes with a higher risk of complications. *Id.* at ¶ 55. Forty-five states and the District of Columbia currently offer religious exemptions from compulsory school vaccination laws. *Id.* at ¶ 56. California is one of only five states that does not offer a religious exemption from compulsory school vaccination laws. *Id.*

III. LEGAL STANDARD

In considering a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). This is a very

liberal standard. For a complaint to survive a 12(b)(6) motion, it must allege "enough facts to state a claim to relief that is plausible on its face." *Hastings v. Ford Motor Co.*, No. 19-CV-02217-BAS-MDD, 2020 WL 12688367, at *2 (S.D. Cal. Oct. 2, 2020). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

This standard is especially liberal when applied to the constitutional claims alleged in this action, which are governed by Rule 8. Rule 8's burden is minimal and requires only that the plaintiff provide "a short and plain statement of the claim showing that the pleader is entitled to relief." *George v. Grossmont Cuyamaca Cmty. Coll. Dist. Bd. of Governors*, No. 22-CV-0424-BAS-DDL, 2022 WL 17330467, at *13 (S.D. Cal. Nov. 29, 2022). Under Rule 8(a)(2), Plaintiffs must only "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Id*.

IV. ARGUMENT

The Court should deny Defendant's motion to dismiss because Defendant relies on improper outside evidence. Additionally, accepting its allegations as true, the Complaint adequately alleges a Free Exercise claim against the State.

A. Defendant Supports Its Motion To Dismiss With Outside Evidence.

In support of its motion to dismiss, Defendant presents evidence outside the pleadings. Generally, a court cannot consider evidence outside the pleadings without converting a motion to dismiss into one for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003). This is because a motion to dismiss tests the sufficiency of Plaintiffs' Complaint based on the face of the pleadings. *See* Fed. R. Civ. Pro. 12 (b)(6). Here, Defendant introduces outside evidence via various requests for judicial notice ("RJN"), a law review article, and evidence regarding aborted fetal tissue in vaccines.

Requests for Judicial Notice. Defendant asks the Court to judicially notice 18 exhibits, comprised of bill text, bill history and analysis, legislative history, and California Department of Public Health ("CDPH") records. *See* RJN, ECF 4.2. Through the RJN, Defendant seeks to prove several issues of fact, including the efficacy of vaccines, the risk posed by unvaccinated children, and the necessity and effectiveness of SB 277. *Id.*

While courts may take judicial notice of legislative history and the actions and records of state agencies, courts do not take judicial notice of reasonably disputed facts contained within the judicially noticed documents. *See Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001). Additionally, courts generally take judicial notice of legislative history to determine the meaning of a statute – not for purposes of establishing the factual context necessitating or surrounding the bill. *See Zephyr v. Saxon Mortg. Servs., Inc.*, 873 F. Supp. 2d 1223, 1226 (E.D. Cal. 2012).

The State relies on the RJN in support of its argument that SB 277 is not rationally related to a legitimate state interest or, alternatively, is not narrowly tailored to achieve a compelling government interest. Mot. at 15-20. Determining whether SB 277 satisfies the rational basis test or strict scrutiny is not apt for resolution at this stage. This Court should only consider legal issues at this stage, such as whether strict scrutiny or rational basis applies. Exceeding beyond this scope would require that this Court weigh the merits of Plaintiffs' allegations. Plaintiffs allege SB 277 is not congruent with California's interest in slowing the spread of disease, and Plaintiffs cite several studies to support this contention. Compl., ¶¶ 50-56. This Court, at this stage, must accept these factual allegations as true. *Wyler Summit P'ship*, 135 F.3d at 661. Additionally, the meaning of SB 277 is not in dispute, so legislative history is unnecessary at this stage. *Id.* Accordingly, while the Court may take judicial notice of the existence of the documents, the RJN cannot establish the truth of the factual matters asserted.

Law Review Article. Defendant's use of a law review article also exceeds the scope of the Complaint and introduces new evidence. Mot. at 2-3 (citing *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. Mich. J.L. Reform 353, 365 (2004)). Through citation to this article, Defendant seeks to prove that compulsory state immunization laws led to reductions in childhood diseases and that "anti-vaccination sentiments" are responsible for disease outbreaks. Mot. at 2.

A court cannot consider evidence outside the pleadings at this stage, including from a law review article, without converting a motion to dismiss into one for summary judgment. *See Ritchie*, 342 F.3d at 907–08. This is particularly improper because the accuracy of such law review articles is frequently questioned. *See Mitchell v. Tillett*, 715 F. App'x 741, 742 n.1 (9th Cir. 2018) (refusing to judicially notice a law review article because it "is a source whose accuracy may be debated and questioned"); *Crocker v. Glanz*, 752 F. App'x 564, 568 (10th Cir. 2018) (same).

The facts in the law review article conflict with Plaintiffs' allegations regarding the efficacy of the mandated childhood vaccines. Compl., ¶¶ 50-56. Defendants cannot introduce evidence of reasonably disputed facts through a law review article. *See Lee*, 250 F.3d at 688-89.

Evidence on Aborted Fetal Tissue. Defendant also improperly introduces new evidence challenging whether vaccines contain aborted fetal cells. Mot. at 14-15. This evidence raises an issue of fact. Plaintiffs allege they rejected the vaccines because they were derived from aborted fetal cells. Compl., ¶¶ 46-48. Again, this Court must accept these allegations as true at this stage. *Wyler Summit P'ship*, 135 F.3d at 661.

B. Plaintiffs State A Claim For Relief Under The First Amendment.

1. Defendant relies on cases that are outdated in light of *Brooklyn Diocese*.

In *Brooklyn Diocese*, the Supreme Court fundamentally altered Free Exercise jurisprudence. There, the Court enjoined enforcement of Governor Cuomo's Cluster Action Initiative – an order that restricted indoor worship during the COVID-19 pandemic. *Brooklyn Diocese*, 141 S. Ct. at 64. The Court held the order was not neutral and generally applicable because it treated churches harsher than secular entities and activities like acupuncture facilities, bike shops, and liquor stores. *Id.* at 66-67.

Notably, Justice Kavanaugh, in his concurrence, rejected New York's argument that it did not discriminate against religion because some secular businesses like movie theaters were treated equally or more harshly.

> "[U]nder this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions …. Rather, once a State creates a favored class of business, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class."

Id. at 73 (emphasis in original).

In applying *Brooklyn Diocese*, the Supreme Court has been very consistent: every application for injunctive relief on behalf of churches during the COVID-19 pandemic has resulted in the vacatur of lower court opinions denying injunctive relief. *See, e.g., Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020); *Robinson v. Murphy*, 141 S. Ct. 972 (2020); *High Plains Harvest Church v. Polis,* 141 S. Ct. 527 (2021); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) ("South Bay"); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

The Ninth Circuit noted *Brooklyn Diocese's* "seismic shift in Free Exercise law." *Calvary Chapel Dayton Valley v. Sisolak,* 982 F.3d 1288, 1233 (9th Cir. 2021).

On January 22, 2021, the Ninth Circuit granted an injunction against California's COVID-19 restrictions on indoor religious gatherings. *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1151-52 (9th Cir. 2021). The Ninth Circuit also granted a similar injunction in *Harvest Rock Church, Inc. v. Newsom*, 985 F.3d. 711 (9th Cir. 2020).

All of Defendant's cited cases in support of dismissal were prior to *Brooklyn Diocese*. Mot. at 8-11. Plaintiffs address each in turn. Defendants first cite *Jacobson* to argue that mandatory vaccination does not offend the First Amendment. Mot. at 8. However, the Supreme Court refused to apply *Jacobson* in the religious challenge to New York's COVID-19 orders. *See Brooklyn Dioceses*, 141 S. Ct. at 66-67. Justice Gorsuch, in his concurring opinion, squarely confronts and dismisses the precedential value of *Jacobson* in the First Amendment context: "Even if judges may impose emergency restrictions on rights that some have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise." *Id.* at 70-71.

Additionally, SB 277 is far more egregious than the challenged legislation in *Jacobson*. In *Jacobson*, individuals were required to receive *one* vaccination during an active and deadly outbreak, pay a fine, or identify a basis for exemption. 197 U.S. at 12, 14. This law was challenged (and upheld) on Fourteenth Amendment substantive due process grounds, specifically given the minimal fine and opt-outs available to objectors. *Id.* at 36, 38–39.

Here, by contrast, the State has mandated 16 vaccination doses for school attendance –banning religious objectors from entering California public and private schools indefinitely, while permitting secular objectors to remain in school. Compl., ¶¶ 26-32, 35. "Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights." *Brooklyn Dioceses*, 141 S. Ct. at 70–71.

The Supreme Court cases following *Jacobson* do not alter this analysis. Mot. at 9 (citing *Zucht v. King*, 260 U.S. 174, 175–77 (1922); *Prince v. Massachusetts*, 321 U.S. 158 (1944)). These cases were decided in the early 1920s and 1940s when minimal vaccines (1-3 doses) were required during live (and deadly) outbreaks, and they were not challenged on First Amendment grounds. Notably, *Prince* does not concern mandatory vaccination, but rather challenges child labor laws. 321 U.S. at 160. No First Amendment analysis was undertaken in either case.

While Defendants cite various California, state, and federal opinions in accord with *Jacobson* and *Prince* (Mot. at 9-10), most of these cases were decided on non-Free Exercise grounds. *See Abeel v. Clark*, 84 Cal. 226, 230-31 (1890) (mandatory vaccination challenged under the State's police powers); *French v. Davidson*, 143 Cal. 658, 661-63 (1904) (mandatory vaccinations for school children challenged on Fourteenth Amendment grounds); *Williams v. Wheeler*, 23 Cal.App. 619, 625 (1913) (challenged under Art. 9, § 9 of the California Constitution and various California legislative acts); *Love v. Superior Court*, 226 Cal. App. 3d 736, 740-47 (1990) (public health measures challenged on Fourth Amendment, due process, and equal protection grounds); *Workman v. Mingo County Sch.,* 667 F. Supp. 2d 679, 690-691 (S.D. W. Va. 2009) (mandatory vaccination challenged on due process, equal protection, and Free Exercise grounds); *Boone v. Boozman*, 217 F. Supp. 2d 938, 956 (E.D. Ark. 2002) (mandatory vaccinations challenged under the Establishment Clause, Due Process Clause, and Free Exercise Clause); *Hanzel v. Arter,* 625 F. Supp. 1259, 1261-66 (S.D. Ohio 1985) (holding that mandatory vaccination does not fall under the protection of the Establishment Clause); *Maricopa County Health Dept. v. Harmon,* 750 P.2d 1364, 1369-1370 (Ariz. 1987) (holding that the state's health department did not violate the right to public education in Arizona's Constitution).

Phillips, *Workman*, and *Boone* are the only cited cases that involve challenges to school-mandated vaccination under the Free Exercise Clause. *Phillips v. City of*

New York, F.3d 538, 543-44 (2nd Cir. 2015); *Workman*, 667 F. Supp. 2d at 690-91; *Boone*, 217 F. Supp. 2d at 956. Even still, the scant analysis in these cases is untenable because they rely on *Zucht*, *Prince*, and *Jacobson* – cases that did not involve the First Amendment. *Id.*

The prior federal and state challenges to SB 277 are also unpersuasive because they were decided prior to *Brooklyn Diocese*. Mot. at 11-13 (citing cases). Both *Whitlow v. California*, F. Supp. 3d 1070, 1085-86 (S.D. Cal. 2016) and *Brown v. Smith*, 24 Cal. App. 5th 1135, 1144-45 (2018) rely primarily on *Prince*, *Workman*, *Phillips*, and *Jacobson* when analyzing SB 277 under the Free Exercise Clause. *Brooklyn Diocese* renders these cases dead letters.

2. **SB 277 substantially burdens Plaintiffs' Free Exercise of Religion.**

Defendants attempt to frame Plaintiffs' religious beliefs as merely "personal beliefs" and thus not entitled to First Amendment protection. Mot. at 13-14. Any belief that is "sincerely held" and "rooted in religious belief" is entitled to Free Exercise protection. *Malik v. Brown,* 16 F.3d 330, 333 (9th Cir.1994). "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 714 (1981).

Additionally, Defendant attempts to undermine the legitimacy of Plaintiffs' religious objections to the use of aborted fetal cells in vaccinations. Mot. at 13-14. As discussed above, it is not proper for this Court to decide, at this stage, whether Plaintiffs' religious objections are valid. *See supra,* Section IV(A). While Plaintiffs unanimously object to vaccinations based upon the use of aborted fetal cells, Plaintiffs also object on other grounds. Compl., ¶¶ 8, 11, 15, 19. For example, Plaintiff Sarah Clark alleges that her body is a temple of the Holy Spirit (1 Corinthians 6:19-20) and that she must honor the Lord with the things she puts into her body. *Id.* at ¶ 11. Mrs. Clark believes that vaccines violate the bible because they are a foreign substance and are harmful to the body. *Id.* At this stage, Plaintiffs have

sufficiently pled that their beliefs are religious in nature and subject to First Amendment protection.

3. **SB 277 is neither neutral nor generally applicable.**

Defendant erroneously claims that rational basis review is the appropriate level of scrutiny because SB 277 is a neutral law of general applicability. Mot. at 15-19. SB 277 is neither neutral nor generally applicable for the following reasons.

First, SB 277 is not generally applicable because it invites "the government to consider the particular reasons for a persons' conduct by providing a mechanism for individualized exemptions." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). Strict Scrutiny applies "regardless of whether any exceptions have been given, because it 'invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude…." *Id.* at 1879. SB 277 is not generally applicable under *Fulton* because it permits discretionary medical exemptions but prohibits the assessment of religious exemptions. Compl., ¶¶ 69-71. In other words, California has determined that religious objections are not worthy of solicitude, but that medical exemptions are.

Second, a law is not neutral when it is intolerant of religious beliefs or restricts practices because of their religious nature. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) ("Lukumi"). "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* at 534. "Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements by members of the decision-making body." *Id.* at 540 (internal citations omitted).

California passed SB 277 even though the Senate Judiciary committee was aware it raised Free Exercise concerns. Compl., ¶¶ 38-40. The contemporaneous statements of legislators reveal hostility towards religious adherents. *Id.* at ¶¶ 42-44.

The author of SB 277, Richard Pan, stated that people who "opt out of vaccines should be opted out of American society." *Id.* at ¶ 43. SB 277 also undermines its stated purpose of reducing transmission because it broadened protections for individuals requesting medical exemptions while preventing religious exemptions – even though PBEs were declining prior to SB 277's enforcement. *Id.* at ¶¶ 37-38, 51. Considering the events and circumstantial evidence surrounding SB 277 alleged in the Complaint, Plaintiffs have demonstrated SB 277 is not neutral under *Lukumi.*

Third, SB 277 fails both the neutrality and general applicability tests under *Brooklyn Diocese* and *Tandon*. A regulation is not neutral and generally applicable where it "treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62 (emphasis in original) (citing *Brooklyn Diocese*, 141 S. Ct. at 67-68). And "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon,* 593 U.S. at 62 (citing *Brooklyn Diocese*, 141 S. Ct. at 67). Moreover, a law lacks general applicability when "it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877.

The Third, Sixth, and Eleventh Circuits have held that laws that provided secular, but not religious, exemptions for conduct that undermined the law's objectives in similar ways were not generally applicable. *See Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-67 (3rd Cir. 1999) (holding that a police department's no-beard policy was not generally applicable because it provided medical exemptions and prohibited religious exemptions); *Monclova Christian Academy v. 10 Toledo-Lucas Health Dept.*, 984 F.3d 477, 482 (6th Cir. 2020) (holding that a county public health order closing all schools, including religious schools, was not generally applicable because it permitted various secular businesses to remain open); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232-35 (11th Cir. 2004) (finding a zoning ordinance lacking in general applicability for

permitting nightclubs, but not synagogues, in a business district). The Iowa Supreme Court employed the same approach. *See Mitchell County v. Zimmerman*, 810 N.W.2d 1, 15-18 (Iowa 2012) (holding a law prohibiting the use of tire studs on highways lacked general applicability because it permitted school buses to use them but prohibited a Mennonite farmer from using them for religious reasons).

In *U.S. Navy Seals 1-26 v. Biden*, the Fifth Circuit Court of Appeals concluded that the processing and granting of medical exceptions and refusal to accept religious exceptions to the COVID-19 vaccine, rendered the policy invalid under both the Religious Freedom Restoration Act of 1993 and the First Amendment. 27 F.4th 336, 350-53 (5th Cir. 2022). In June 2022, the Northern District of California held that prioritizing employees with medical exemptions over religious exemptions to the COVID-19 vaccine for consideration for vacant positions was not neutral. *UnifySCC v. Cody*, No. 22-CV-01019-BLF, 2022 WL 2357068, at *10-11 (N.D. Cal. June 30, 2022)

Recently, a Mississippi district court held that strict scrutiny was appropriate when reviewing Mississippi's mandatory school vaccination law. *Bosarge v. Edney*, No. 1:22CV233-HSO-BWR, 2023 WL 2998484, at *10 (S.D. Miss. Apr. 18, 2023). The Court reasoned that because "Mississippi officials could consider secular exemptions, particularly medical exemptions," but could not consider religious exemptions, the law could not be neutral or generally applicable. *Id.*; *see also Dahl v. Bd. of Trustees of Western Michigan Univ.*, 15 F.4th 728, 733-735 (6th Cir. 2021) (holding that a university's requirement that student-athletes be vaccinated against COVID-19 was not neutral or generally applicable because the university's requirement provided a "mechanism for individualized exemptions"); *Thoms v. Maricopa Cnty. Cmty. Coll. Dist.*, No. CV-21-01781-PHX-SPL, 2021 WL 5162538, at *9-11 (D. Ariz. Nov. 5, 2021) (holding that a university's policy was not generally applicable when it provided exceptions to its vaccine policies to other students for non-religious reasons but not to Plaintiffs for religious reasons).

Here, SB 277 precludes exemptions for religious adherents but exempts immigrant and homeless children, students with medical exemptions, and students enrolled in an independent student program or IEP. Compl., ¶¶ 33-36. SB 277 is not congruent with California's interest in "protecting the public from the spread of debilitating, and potentially fatal, diseases." Mot. at 17. At this stage, "California cannot demonstrate that religiously exempt students pose a greater risk than secularly exempt students." Compl., ¶ 54.

Plaintiffs' reliance on *We The Patriots USA, Inc. v. Connecticut Off. of Early Childhood Dev.*, 76 F.4th 130 (2d Cir. 2023) is misplaced. Mot. at 12-13. There, Connecticut's amended statute allowed unvaccinated students to attend school only with a medical exemption. *Id.* at 155. In the 2019-2020 school year, "more than ten times as many students had religious exemptions than medial exemptions." *Id.* By contrast, California permits exemptions for several secular categories. Compl., ¶¶ 33-36.

Indeed, in *Fox v. Makin*, the Court emphasized that Maine's statute was distinguishable from Connecticut's because it "continues to permit multiple non-religious exemptions, including a 90-day grace period for non-religious students, a medical exemption, and the IEP sunset provision…while restricting religious exemptions that may pose comparable risks." No. 2:22-CV-00251-GZS, 2023 WL 5279518, at *9 (D. Me. Aug. 16, 2023). The court also noted that Connecticut's medical exemption process was more stringent because it required a certification from a physician and supporting documents. *Id.* The court, therefore, declined to dismiss plaintiffs' Free Exercise claim for failure to state a claim. *Id.* at *10.

At this stage, Plaintiffs allege enough facts under Rule 8 to state a claim for relief under the Free Exercise Clause. At the very least, Plaintiffs' allegations raise serious questions regarding the thoroughness of the medical exemption process and the statistical differences in rates of medical and religious exemptions, rendering dismissal inappropriate.

4. **SB 277 fails strict scrutiny.**

Even though it is unnecessary for this Court to address strict scrutiny, Plaintiffs have alleged that SB 277 is not narrowly tailored to advance a compelling government interest. "A government policy can survive strict scrutiny only if it advances interests of the highest order and is narrowly tailored to achieve those interests." *Fulton,* 141 S. Ct. at 1881 (internal citations and quotation marks omitted). California's interest in ensuring that school children are vaccinated to prevent the spread of contagious disease is compelling only in the abstract. "[A] law cannot be regarded as protecting an interest of the highest order… when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal citations and quotation marks omitted). While the State has an interest in protecting public health and safety (Mot. at 19), Defendant offers "no compelling reason why it has a particular interest in denying an exception [to these particular Plaintiffs] while making them available to others." *Fulton*, 141 S. Ct. at 1882.

California permits both pre-existing and future medical exemptions to its mandatory school vaccination law. Compl., ¶ 35. The state even allows exemptions for students who are homeless, immigrants, or who qualify for an IEP. *Id.* at ¶¶ 35-36. Yet, it refuses to permit religious exemptions. The State has no compelling interest in rejecting religious exemptions because the medical exemption (and other exemptions) leave "appreciable damage to [the government's] supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547.

For related reasons, Defendants falter on the narrowly tailored prong. As the Supreme Court recently put it with respect to the government's "interest in reducing the spread of COVID," "[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Tandon*, 141 S. Ct. at 1297. Defendants cannot show that an unvaccinated religious adherent

undermines their asserted interests any more than an unvaccinated student with a medical exemption.

California also mandates vaccines that are unnecessary. For instance, Chickenpox is a mild disease and complications in children are rare. Compl., ¶ 55. Chickenpox vaccination also increases the risk of shingles in adults, which is a more dangerous disease and comes with a higher risk of complications. *Id*. At this stage, Defendant cannot demonstrate how and why their interests demand more severe intervention than "the vast majority of States" that have employed a less restrictive approach. *Holt v. Hobbs*, 574 U.S. 352, 368 (2015).

C. In the Alternative, Leave To Amend Should Be Granted

Plaintiffs' cause of action has been sufficiently pled. However, should the Court be inclined to sustain Defendant's motion to dismiss for any reason, leave to amend should be granted. *See, e.g., Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) ("a district court should grant leave to amend . . . unless it determines that the pleading could not possibly be cured by the allegation of other facts"); *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1099 (9th Cir. 2004) (same).

V. CONCLUSION

For the foregoing reasons, this Court should deny Defendant's motion to dismiss.

Respectfully submitted,

DATED: January 8, 2024

ADVOCATES FOR FAITH & FREEDOM

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