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In Defense of California's Mandatory Child Vaccination Law: California Courts Should Not Depart From Established Precedent

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In Defense of California's Mandatory Child Vaccination Law: California Courts Should Not Depart From Established Precedent

Cover Page Footnote

J.D., 2017, Loyola Law School, Los Angeles; B.A. Criminology, Law & Society, 2012, University of California, Irvine. My sincerest thanks go to Brietta Clark, Associate Dean for Faculty, for providing invaluable guidance and insight throughout the writing of this Article. Also, I would like to thank the staffers and editors of the Loyola of Los Angeles Law Review who helped prepare this Article for publication. Last, but not least, heartfelt thanks go to my family for their continuous support, encouragement, and love.

IN DEFENSE OF CALIFORNIA'S MANDATORY CHILD VACCINATION LAW: CALIFORNIA COURTS SHOULD NOT DEPART FROM ESTABLISHED PRECEDENT

*Stephanie Awanyai**

In the wake of the 2015 measles outbreak in California, California Senate Bill 277 (S.B. 277) was enacted. S.B. 277 repeals the personal belief exemption to California's immunization requirement for children in public and private educational or child care facilities in the State. While S.B. 277 was enacted to prevent the spread of contagious diseases through mandatory vaccinations of school-aged children, there are objections to this approach. Parents who oppose S.B. 277 contend that S.B. 277 violates their federal and state constitutional rights to make medical decisions on behalf of their child, and infringes on their child's fundamental state interest in education. This Article sets forth legal precedent for the notion that California may impose mandatory vaccination requirements without providing an exception for personal beliefs. The author concludes that such constitutional challenges to mandatory vaccination requirements are likely without merit.

* J.D., 2017, Loyola Law School, Los Angeles; B.A. Criminology, Law & Society, 2012, University of California, Irvine. My sincerest thanks go to Brietta Clark, Associate Dean for Faculty, for providing invaluable guidance and insight throughout the writing of this Article. Also, I would like to thank the staffers and editors of the *Loyola of Los Angeles Law Review* who helped prepare this Article for publication. Last, but not least, heartfelt thanks go to my family for their continuous support, encouragement, and love.

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I. INTRODUCTION

Disneyland may no longer be the happiest place on Earth. Officials from the California Department of Public Health suspect that on or about December 15, 2014, an unvaccinated international visitor at one of the Disneyland theme parks infected approximately forty people, who visited or worked at the park on that day, with measles.¹ There have been over 134 confirmed measles cases reported across thirteen California counties as part of the 2015 measles outbreak.² Some of the confirmed cases involved people who visited Disneyland between December 15–20, 2014, when they are presumed to have been exposed to measles.³ Other patients were “household or close contacts to a confirmed case,” and some were “exposed in a community setting (e.g., emergency room) where a confirmed case was known to be present.”⁴ The ages of those infected with measles during this outbreak varied: 56 percent were twenty years or older; roughly 20 percent were between the ages of five and nineteen; 15 percent were ages one to four, and; 11 percent were under the age of one.⁵

While a measles outbreak would not alarm most parents in California, since most children are vaccinated against measles, six-year-old Rhett Krawitt, who was diagnosed with leukemia, is particularly vulnerable to a measles outbreak.⁶ His chemotherapy treatments drastically undermined his immune system to a level where he cannot receive vaccinations to protect himself against infection.⁷ “Measles in children has a mortality rate as high as about one in 500 among healthy children, and higher if there are complicating health

1. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 2 (Cal. 2015). Measles (Rubeola) is a highly contagious virus and spreads through the air through coughing and sneezing. *Measles*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/measles/index.html> (last visited Nov. 11, 2015).

2. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 7 (Cal. 2015).

3. Lisa Aliferis, *Measles Makes an Unwelcome Visit to Disneyland*, NPR (Jan. 8, 2015, 9:34 AM), <http://www.npr.org/sections/health-shots/2015/01/08/375832981/measles-makes-an-unwelcome-visit-to-disneyland>.

4. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on Health*, 2015–2016 Sess., at 4 (Cal. 2015).

5. *Id.*

6. Lisa Aliferis, *A Boy Who Had Cancer Faces Measles Risk from the Unvaccinated*, NPR (Feb. 3, 2015, 3:57 AM), <http://www.npr.org/sections/health-shots/2015/02/03/383324228/a-boy-who-had-cancer-faces-measles-risk-from-the-unvaccinated>.

7. *Id.*

factors.”⁸ Due to his compromised immune system, an illness that is readily preventable for most children poses a serious and deadly threat to Rhett.⁹

Rhett’s father, Carl Krawitt, is reluctant to take Rhett to school because he fears that Rhett will contract measles from one of the students.¹⁰ Since Rhett cannot receive vaccinations, his only protection against infectious diseases comes from compulsory school vaccination laws designed to create herd immunity.¹¹ The idea of herd immunity is that if a significant portion of the community is vaccinated, then those who cannot receive vaccinations will be protected from illness by the community members who are vaccinated.¹² “The proportion of the population that has to be immune to provide this ‘herd immunity’ varies according to the infectious agent.”¹³ Typically more than 90 percent of the community must be vaccinated for herd immunity to be effective in eliminating chains of infection associated with measles.¹⁴ Accordingly, given the highly contagious nature of diseases such as measles, the California Legislature and schools must take measures to ensure that vaccination rates reach a threshold of 95 percent to protect the health of the schoolchildren and the community.¹⁵

On June 30, 2015, California Governor Edmund G. Brown, Jr. signed into law Senate Bill 277 (hereinafter “S.B. 277”).¹⁶ Effective July 1, 2016, S.B. 277 eliminates the exemption for both personal and religious beliefs (hereinafter “personal beliefs”)¹⁷ from the school

8. *Senate Third Reading: Hearing on S.B. 277 Before the Assemb. Comm. on Health*, 2015–2016 Sess., at 3 (Cal. 2015).

9. Aliferis, *supra* note 6.

10. *See id.*

11. *See id.*

12. *See* Donald S. Kenkel, *Prevention*, in 1B HANDBOOK OF HEALTH ECONOMICS 1677, 1694 (Anthony J. Culyer and Joseph P. Newhouse eds., 2000) (defining “herd immunity” as a concept “where any given individual’s chances of getting an infectious disease falls when others in the society are immune because of previous vaccinations.”).

13. KEVIN MALONE ET AL., *LAW IN PUBLIC HEALTH PRACTICE* 264 (Goodman et al. eds., 2003).

14. *Id.*

15. *Senate Third Reading: Hearing on S.B. 277 Before the Assemb. Comm. on Health*, 2015–2016 Sess., at 3 (Cal. 2015) (statement of Sen. Richard Pan, District Six of California, and Sen. Ben Allen, District Twenty-Six of California).

16. S. 277, 2015–16 Leg., Reg. Sess. (Cal. 2015).

17. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on Health*, 2015–2016 Sess., at 1 (Cal. 2015) (explaining that by eliminating the personal belief exemption, S.B. 277 effectively repeals any possible religious exemptions).

mandatory child vaccination requirement.¹⁸ S.B. 277 requires schoolchildren enrolled in private or public schools or childcare centers to be fully immunized against various diseases, including diphtheria, hepatitis B, haemophilus influenzae type B, measles, mumps, pertussis, poliomyelitis, rubella, tetanus, and varicella (chickenpox).¹⁹ S.B. 277's mandatory immunization provisions do not apply to medically exempt schoolchildren,²⁰ homeschooled students, or to students enrolled in independent study programs pursuant to the California Education Code.²¹ Supporters of S.B. 277, such as the American Academy of Pediatrics, argue that “[i]f there is a single place that children must be kept safe as humanly possible it is at school/child care.”²² On the other hand, those in opposition to S.B. 277 tend to view the consequences of mass vaccination on an individualistic basis, focusing on their personal choice, rather than addressing the needs of society at-large.²³

Notwithstanding the benefits of vaccines, state constitutional challenges to S.B. 277 are expected. As this Article was in its final editing stages, the very first complaint²⁴ challenging matters regarding S.B. 277 was filed on July 1, 2016. It echoes many of the potential challenges to S.B. 277 identified in this Article.²⁵ One of the major

18. CAL. HEALTH & SAFETY CODE § 120325 (West 2016). S.B. 277 provides for a limited grandfathering of students who submit a personal belief exemption affidavit to the school prior to January 1, 2016 to continue attending public or private school after July 1, 2016 until they enroll in the next “grade span.” The three grade spans are defined as birth to preschool, kindergarten to sixth grade, and grades seven through twelve. *Id.*; see also *Senate Third Reading: Hearing on S.B. 277 Before the Assemb. Comm. on Health*, 2015–2016 Sess., at 2 (Cal. 2015).

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

20. *Id.* § 120370 (explaining that if the “medical circumstances relating to the child are such, that immunization is not considered safe” and the treating physician “does not recommend immunization,” then the child is exempt from the vaccination requirement.).

21. *Id.* § 120335.

22. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 7 (Cal. 2015) (statement of American Academy of Pediatrics).

23. *Senate Third Reading: Hearing on S.B. 277 Before the Assemb. Comm. on Health*, 2015–2016 Sess., at 10–11 (Cal. 2015).

24. On July 1, 2016, six parents and four advocacy groups filed a lawsuit in the United States District Court in San Diego to overturn S.B. 277. *Whitlow v. State of California*, Department of Education, et al., No. 16CV1715DMSBG (9th Cir. filed July 1, 2016). There, Plaintiffs named the State of California, the Department of Education, Superintendent of the Department of Education Tom Torlakson, the State Department of Public Health, and Director of the Department of Public Health Dr. Karen Smith as defendants. *Id.* Plaintiffs request temporary, preliminary, and permanent injunctive relief prohibiting the enforcement of S.B. 277. *Id.*

25. This Article was in its editing stages when the Whitlow complaint (“Complaint”) was filed on July 1, 2016. Although this Article cannot discuss all of the claims asserted in the Whitlow complaint, it does highlight which of the Complaint’s claims are consistent with those analyzed in

issues addressed in this Article is whether the state has exceeded its power to enforce laws that serve as a public health or public safety intervention. Further, parents who cite the classic American values of freedom and individualism argue that S.B. 277 infringes on their child's fundamental interest in education²⁶ as well as a parent's decision of whether to vaccinate their child.²⁷ Thus, this Article will consider whether parents can bring federal or state constitutional challenges against S.B. 277 regarding: (1) whether S.B. 277 infringes on their fundamental right to control the upbringing of their child by refusing to participate in group child vaccinations on behalf of their child; and (2) whether S.B. 277 violates their child's fundamental interest in education. In researching similar challenges, this author was unable to find any claims brought that challenged the fundamental interest in education within the context of health regulations in California. Thus, predicting the validity of such a claim is critical and timely, as cases of first impression are now being filed challenging the constitutionality of California's revised mandatory child vaccine law.

Ultimately, this Article asserts that any federal or state constitutional challenges against S.B. 277 are likely to fail. First, given the highly contagious nature of diseases such as measles, and rising exemption rates, S.B. 277 does not infringe on fundamental parental rights because the government has the inherent state police power and *parens patriae* power to protect the health and safety of schoolchildren and the public from future outbreaks.

Second, S.B. 277 does not violate a child's fundamental interest in education. At the federal level, there is no constitutional right to a public education recognized. Although there is such a right in the California constitution, this law does not violate the right because it exempts a variety of homeschooling options for children whose parents do not want to vaccinate their child due to their own personal

this Article.

26. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 8 (Cal. 2015)

27. *See, e.g., Douglas S. Diekema, Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention*, 25 *THEORETICAL MED. & BIOETHICS* 243, 244 (2004). Oftentimes, fears regarding unfounded vaccine risks negatively affect a parent's decision to vaccinate their child. *See Steve P. Calandrillo, Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 *U. MICH. J.L. REFORM* 353, 391 (2004) ("It is crucial that Americans, in order to make sensible healthcare decisions, not lose sight of the fact that the actual risks of vaccines must be compared to the risks of *not* vaccinating—i.e., risk versus risk analysis.").

beliefs.

Third, even if a court were to find that S.B. 277 infringes a child's fundamental interest to education, the law would likely still be found constitutional because the government has a compelling interest in protecting the health and safety of schoolchildren and the public from communicable diseases.²⁸ In addition, S.B. 277 provides the least restrictive means to achieve this compelling interest—by exempting children with medical conditions that make vaccinations unsafe for them, homeschooled children, and children enrolled in independent study programs.²⁹ Thus, the bill is narrowly tailored and still achieves its goal of maintaining high levels of vaccination to prevent the spread of communicable diseases, especially among children with complicating health factors who rely on herd immunity.³⁰

Fourth, S.B. 277 is essential to effectively protect California's fundamental interest in education, as schoolchildren need to be healthy to attend school. Lastly, with the 2015 anti-vaccine referendum falling short of the 365,880 signatures needed to place the measure before state voters in November 2016, this outcome further reiterates the general consensus that mandatory vaccines are needed to protect California's public health.³¹ In conclusion, S.B. 277 is constitutional.

Part II of this Article identifies the medical significance of mandatory school vaccinations and S.B. 277's effect on California law. Part III examines California's state powers to mandate vaccinations. In addition, Part III analyzes the likelihood of success of federal and state constitutional claims that an anti-vaccination plaintiff may bring against California school districts and the state itself.

28. See *Senate Third Reading: Hearing on S.B. 277 Before the Assemb. Comm. on Health*, 2015–2016 Sess., at 5 (Cal. 2015).

29. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 1 (Cal. 2015).

30. See *Senate Third Reading: Hearing on S.B. 277 Before the Assemb. Comm. on Health*, 2015–2016 Sess., at 5 (Cal. 2015).

31. Jane Meredith Adams, *Vaccination Referendum Falls Far Short, Says Campaign Coordinator*, EDSOURCE (last visited Oct. 6, 2015), <http://edsource.org/2015/sb277-vaccination-referendum-donnelly-falls-far-short-sayscampaign-coordinator/88534>. On July 1, 2015, former Assembly member Tim Donnelly (“Donnelly”) filed a referendum on the S.B. 277 measure with the California Attorney General's office to repeal this bill. *Id.* However, in October 2015, Donnelly's efforts proved futile, as it was officially reported that “opponents of S.B. 277 turned in some 228,000 signatures on petitions, far short of the number needed to qualify it for next year's ballot.” *Id.* Donnelly's proposed referendum marked the first formal challenge to the law. *Id.*; see also, Referendum, CAL. SEC'Y OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/referendum/>.

II. CALIFORNIA'S MANDATORY CHILD VACCINATION LAW: AN OVERVIEW

For purposes of protecting public health and safety, school and child daycare vaccination laws have played a key role in the control of communicable diseases in the United States.³² Modern school vaccination laws requiring children to be vaccinated before they enter school were enacted as a direct response to the 1960s and 1970s measles outbreaks in the United States.³³ Specifically, in 1976, a measles outbreak in Los Angeles led California public health officials to strictly enforce the existing child vaccination requirements, and as a result, the number of measles cases dropped dramatically.³⁴ Protecting the individual and the community from communicable diseases such as measles is a core function of public health.³⁵ As evidenced by the 1970s measles outbreak in Los Angeles, school and childcare vaccination requirements have been effective in limiting the spread of disease by increasing immunization coverage, and providing an overall public health benefit.³⁶ Herd immunity, which varies by vaccine, provides protections for students and staff who are unable to be vaccinated for medical reasons or are immunocompromised.³⁷

In response to the 2015 measles outbreak, S.B. 277 amends certain sections of California's Health and Safety Code to remove a parent's option to exempt their child from receiving vaccines for specific communicable diseases prior to being admitted to any private or public elementary school or childcare center, based on their personal beliefs.³⁸ Accordingly, S.B. 277 does not create any new vaccination requirements, but rather amends the law to strengthen its existing requirements.³⁹

32. MALONE, *supra* note 13, at 269.

33. Jared P. Cole & Kathleen S. Swendiman, CONG. RES. SERV., RS21414, Mandatory Vaccinations: Precedent and Current Laws 1, 3 (2014); *see also* Calandrillo, *supra* note 27, at 382.

34. MALONE, *supra* note 13, at 269.

35. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 7 (Cal. 2015) (statement of California Hepatitis Alliance).

36. MALONE, *supra* note 13, at 269; *see also Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 2 (Cal. 2015) (“According to the California Department of Public Health (CDPH), implementation of statewide immunization requirements has been effective in maintaining a 92 percent immunization rate among children in child care facilities and kindergartens.”).

37. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 6 (Cal. 2015).

38. *Id.*

39. The California Legislature has only eliminated an exemption while specifically

A. *Why California Vaccination Law Did Not Keep Children Safe*

Prior to the enactment of S.B. 277, section 120365 of the California Health and Safety Code provided that immunization of a child attending a private or public school or childcare center shall not be required if the parent, guardian, or adult (hereinafter “parent”) responsible for the child files with the governing authority a letter or affidavit that documents which required immunizations have been given and which immunizations have not been given on the basis that they are contrary to his or her beliefs, otherwise known as a personal belief exemption.⁴⁰ However, through this method, personal belief exemptions were frequently abused.⁴¹ In practice, the availability of personal belief exemptions often resulted in “exemptions of convenience”⁴²—parents opting out of immunizations not for any deeply held belief, but because it was easier to do so than to fulfill the state’s mandatory vaccination schedule.⁴³

In 2012, as a response to concerns of increased personal belief exemptions and their frequent abuse, the California Legislature passed Assembly Bill 2109 (hereinafter “A.B. 2109”) to amend section 120365 of California’s Health and Safety Code by narrowing the process for obtaining immunization exemptions based on personal beliefs.⁴⁴ A.B. 2109, which became effective on January 1, 2014, instead required that the letter or affidavit be accompanied by a form prescribed by the California Department of Public Health that included a signed attestation from a health care practitioner.⁴⁵ Further, the then-existing law required that the signed attestation indicate that

authorizing local school districts to continue to make and enforce these rules and regulations to secure vaccination of their pupils, a power which local school districts already had under the provisions of California Health and Safety Code section 120335(a). *See* CAL. HEALTH & SAFETY CODE §§ 120325(e), 120335(a) (West 2016).

40. CAL. HEALTH & SAFETY CODE § 120365 (repealed June 30, 2015).

41. *See* Calandrillo, *supra* note 27, at 418.

42. “Exemptions of convenience” are defined as parents opting-out their children from required vaccinations because it is easier to do so than to fill out the necessary vaccination documents required by the school. Calandrillo, *supra* note 27, at 417. The increased abuse of personal belief exemptions may have contributed to the 2015 measles epidemic, which will be developed in a later section.

43. *Id.* at 417–18 (“In [California] schools with the greatest number of opt-outs, there was some indication that ‘parents claimed exemptions because it was easier to do so than to go to the effort of finding [their child’s] immunizations record.’”).

44. Assemb. 2109, 2011–12 Leg., Reg. Sess. (Cal. 2012).

45. CAL. HEALTH & SAFETY CODE § 120365 (repealed June 30, 2015) (requiring a written statement of which immunizations have been given and which immunizations have not been given on the basis that they are contrary to a parent’s beliefs).

the parent of the child subject to the immunization requirements was provided with information regarding the benefits and risks of the immunization and the health risks of contracting communicable diseases to the child and the community.⁴⁶ However, A.B. 2109 proved ineffective in eliminating “exemptions of convenience,” as the only critical change was that personal belief exemptions now merely required documentation that health care practitioners informed the parents about vaccines and diseases in the state’s child vaccine schedule.⁴⁷ Thus, “exemptions of convenience” continued to grow.

B. Eliminating “Exemptions Of Convenience”: S.B. 277 Strengthens Existing Vaccination Law

On June 30, 2015, A.B. 2109 was replaced when California Governor Jerry Brown signed S.B. 277 into law.⁴⁸ S.B. 277, effective July 1, 2016, is “an act to amend [s]ections 120325, 120335, 120370, and 120375 [], to add [s]ection 120338, and to repeal [s]ection 120365 of the California Health and Safety Code, relating to public health.”⁴⁹ S.B. 277 takes well-reasoned public health and safety measures to increase herd immunity through vaccination by eliminating “personal beliefs” as an exemption from the state mandate that all schoolchildren be vaccinated before their first admission to any private or public school, or childcare center.⁵⁰ S.B. 277 also extends to any related law requiring a form to accompany a personal belief exemption.⁵¹ By enacting S.B. 277, the California State Legislature declared that California public health officials have the power to protect schoolchildren and the public from highly contagious diseases by creating programs that will promote and achieve full and timely immunization of children, especially in light of the 2015 measles outbreak.⁵² Further, while S.B. 277 amends several sections of the

46. *Id.*

47. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 4 (Cal. 2015). Notably, the documentation requires a parent to acknowledge either: (1) that he or she has received information from an authorized health care practitioner regarding the benefits and risks of immunizations, as well as the health risks to the student and to the community; or (2) that he or she is a member of a religion which prohibits seeking medical advice or treatment from authorized health care practitioners. *Id.*

48. S. 277, 2015–16 Leg., Reg. Sess. (Cal. 2015).

49. *Id.*

50. *Id.*; see also CAL. HEALTH & SAFETY CODE § 120338 (West 2016).

51. S. 277, 201516 Leg., Reg. Sess. (Cal. 2015).

52. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 8 (Cal. 2015).

California Health and Safety Code, this section will serve to highlight the relevant provisions of the law that are key to the federal and state constitutional challenges being brought against S.B. 277.

S.B. 277 repealed section 120365 of the California Health and Safety Code, which allowed personal beliefs exemptions from the existing immunization requirements.⁵³ To reflect the repeal of this section, S.B. 277 amended the California Health and Safety Code section 120375(b) to read:

The governing authority of each school or institution included in Section 120335 shall prohibit from further attendance any pupil admitted conditionally who failed to obtain the required immunizations within the time limits allowed in the regulations of the department, unless the pupil is exempted under Section 120370,⁵⁴ until that pupil has been fully immunized against all of the diseases listed in Section 120335.⁵⁵

Additionally, S.B. 277 provides several other amendments to the child immunization requirement. First, S.B. 277 amends the California Health and Safety Code to clarify that parents and guardians can still utilize the medical exemption if appropriate.⁵⁶ Second, section 120335 of the California Health and Safety Code provides that the mandatory immunization requirements do not apply to a pupil who is enrolled in an independent study program pursuant to Article 5.5 of Chapter 5 of Part 28 of the California Education Code and does not receive classroom-based instruction.⁵⁷

Further, S.B. 277 amends section 120335(h) of California's Health and Safety Code to read: the required immunizations "d[o] not prohibit a pupil who qualifies for an individualized education program, pursuant to federal law and Section 56026 of the Education Code, from accessing any special education and related services required by his or her individualized education program."⁵⁸ S.B. 277

53. CAL. HEALTH & SAFETY CODE § 120365 (repealed June 30, 2015).

54. Section 120370(a) of the California Health and Safety Code states that: "[i]f the parent or guardian files with the governing authority a written statement by a licensed physician to the effect that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe . . . that child shall be exempt from the [immunization] requirement . . ." *Id.* § 120370(a).

55. *Id.* § 120375(b).

56. *Id.* §§ 120325(c), 120370(a).

57. *Id.* § 120335(f).

58. CAL. HEALTH & SAFETY CODE § 120335(h) (West 2016).

still provides the same list of childhood diseases that schoolchildren must be immunized against, and routine requirements that parents keep adequate records of immunization so that health departments, schools, and other institutions can discern the immunization status of the child.⁵⁹ Lastly, as provided in section 120370(b) of California's Health and Safety Code:

If there is good cause to believe that a child has been exposed to a disease listed in subdivision (b) of Section 120335 and his or her documentary proof of immunization status does not show proof of immunization against that disease, that child may be temporarily excluded from the school or institution until the local health officer is satisfied that the child is no longer at risk of developing or transmitting the disease.⁶⁰

Accordingly, the revisions to the California Health and Safety Code as described under S.B. 277 serve as an incentive for public health authorities to continue to design innovative and creative programs to promote and achieve full and timely immunization of children in public settings.⁶¹

III. THE CONSTITUTIONAL BASIS OF CALIFORNIA'S MANDATORY CHILD VACCINATION LAW

This section examines the likelihood of success of potential federal and state constitutional claims against California school districts and the state of California⁶² regarding the enactment of S.B. 277. By enacting this law, California state officials relied on two long-standing powers: the power to regulate health and safety through the state's police power and the state's *parens patriae* power.⁶³ Over a century ago, in *Jacobson v. Massachusetts*,⁶⁴ the U.S. Supreme Court

59. *Id.* § 120325.

60. *Id.* § 120370(b).

61. *Id.* Additional provisions that were amended include S.B. 277 amendments to section 120335(g) of the California Health and Safety Code, which reads: a pupil who, prior to January 1, 2016, submitted a letter or affidavit on file at a children's education institution, stating their beliefs opposed to immunization, must provide this letter or affidavit in order to be allowed enrollment to any child education institutions until the pupil enrolls in the next grade span. *Id.* § 120335(g) (defining "grade span" as: a) birth to preschool; b) kindergarten (including transitional kindergarten) to grade six; or c) grades seven to twelve).

62. The state of California includes both state and county public agencies and officials against whom anti-vaccination plaintiffs may file constitutional claims.

63. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 8 (Cal. 2015).

64. 197 U.S. 11 (1905).

upheld the constitutionality of a mandatory vaccine statute as a valid exercise of the state's police power.⁶⁵ Additionally, in *Prince v. Massachusetts*,⁶⁶ the U.S. Supreme Court, in considering a parent's challenge to a child labor regulation, concluded that a parent's right to control the upbringing of their child is not absolute, and can be interfered with if necessary to protect a child's health under the state's *parens patriae* power.⁶⁷

But there are limits to how these powers are used. The enactment of S.B. 277 raises questions over whether the state has exceeded the limits of its powers in requiring vaccines for all schoolchildren, except those who are medically exempt, homeschooled, or enrolled in an independent study program.⁶⁸ Accordingly, parents have raised two major arguments alleging that California's attempt to mandate child vaccinations exceeds its power: (1) S.B. 277 infringes on a parent's federal and state constitutional right to make medical decisions on behalf of their child and to control the upbringing of their child, and; (2) S.B. 277 violates their child's fundamental state interest in education, as well as the equal protection provisions of the California Constitution.⁶⁹

However, S.B. 277 does not infringe on either a parent's constitutional right to control the upbringing of their child or a child's fundamental state interest in education. A long line of federal and state cases have settled that it is within the states' inherent police and *parens patriae* powers to provide compulsory child vaccination laws.⁷⁰ Hence,

65. *Id.* at 25.

66. 321 U.S. 158 (1944).

67. *Id.* at 166–67.

68. S. 277, 2015–16 Leg., Reg. Sess. (Cal. 2015).

69. *See Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 18–19 (Cal. 2015).

70. *See* Cole, *supra* note 33, at 2 (citing to several federal cases that have reaffirmed *Jacobson's* holding that states may delegate power to its public officials to order vaccines, such as: *Adams v. Milwaukee*, 228 U.S. 572, 581–82 (1913) (reaffirming *Jacobson's* holding that states may delegate the power to order vaccinations to local municipalities for the enforcement of public health regulations); *Zucht v. King*, 260 U.S. 174, 176 (1922) (holding that vaccination laws do not discriminate against schoolchildren to the exclusion of others similarly situated, i.e., children not enrolled in school); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding generally that the right to practice religion does not include the liberty to jeopardize the well-being of minors)). *See also* *Phillips v. City of New York*, 27 F. Supp. 3d 310, 312 (E.D.N.Y. 2014) (reaffirming *Jacobson's* holding that “religious objectors are not constitutionally exempt from vaccinations”); *Cude v. State*, 377 S.W.2d 816, 819 (1964) (“According to the great weight of authority, it is within the police power of the state to require that school children be vaccinated against smallpox, and that such requirement does not violate the constitutional rights of anyone, on religious grounds or otherwise.”).

S.B. 277 does not exceed the scope of California's power to protect and regulate the health and safety of its constituents. Nevertheless, even assuming that S.B. 277 infringes on a fundamental right, S.B. 277 is still constitutional because it furthers a compelling interest: protecting the health and safety of schoolchildren and the public against communicable diseases. In fact, the reach of S.B. 277 is further limited because it neither requires medically exempt children nor children who are homeschooled or enrolled in independent study to receive vaccinations, and thus, applies the least restrictive means to combat the spread of vaccine-preventable diseases. Thus, S.B. 277 is narrowly tailored to achieve its goal of ensuring that school and community vaccination levels overall remain sufficiently high to establish herd immunity through its requirement that all children attending public or private schools and childcare centers be vaccinated, subject to a few exemptions.

A. S.B. 277 Does Not Infringe on a Parent's Federal or State Constitutional Right to Control the Upbringing of Their Child

It is well settled law that both the federal⁷¹ and state⁷² constitutions recognize a fundamental right to parent. Anti-vaccination plaintiffs have tried to limit the state's police power to require vaccinations on federal constitutional grounds, as well as state constitutional grounds. In response, state courts have increasingly adopted the same standards used by the U.S. Supreme Court when applying federal constitutional law.⁷³ In California, parents who bring

71. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding that there is a fundamental liberty interest of parents and guardians to direct the upbringing and education of their children); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (upholding the parent's fundamental right to educate one's child as one chooses); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (noting that the Court previously held that the right to "establish a home and bring up children" is a fundamental personal right (quoting *Meyer*, 262 U.S. at 399)); *Kelson v. City of Springfield*, 767 F.2d 651, 655 (9th Cir. 1985) ("In short, existing Supreme Court and Ninth Circuit precedent establish that a parent has a constitutionally protected interest in the companionship and society of his or her child.").

72. *In re Marilyn H.*, 851 P.2d 826, 833 (1993) ("A parent's interest in the companionship, care, custody and management of his children is a compelling one, ranked among the most basic of civil rights."); *In re B.G.*, 523 P.2d 244, 250 (1974) (noting that a parent's interest in the companionship, care, custody and management of his child is a compelling interest).

73. For purposes of this section, the analysis of state constitutional claims, with respect to parental rights and privacy interests, against child vaccination mandates will apply the same analysis used in similar U.S. Supreme Court cases, since state courts tend to adopt the same standards used by the U.S. Supreme Court applying federal constitutional law. *See e.g., Cude*, 377 S.W.2d at 819 (rejecting a constitutional challenge to an Arkansas vaccination law, and adopting

suit individually and as parent or guardian of their minor child will argue that S.B. 277 violates their federal and state constitutional rights in refusing to admit their child to public school without the immunizations required by state law.⁷⁴ However, in matters of federal constitutional rights, prior decisions from the U.S. Supreme Court show that compulsory child vaccination laws are not in violation of federally-held constitutional rights. Similarly, other federal and state courts, although only persuasive authority, support the conclusion that compulsory child vaccination laws do not infringe on fundamental parental rights because the states have broad authority to regulate the health and safety of their constituents under their state police power and *parens patriae* power.

1. The State's Inherent Power to Regulate Health and Safety

The breadth of the state power has been duly recognized in numerous cases where such power has been challenged as a violation of federal and state constitutional rights. Beginning with *Jacobson*, the U.S. Supreme Court upheld the right of states to compel vaccination.⁷⁵ In its landmark decision, the U.S. Supreme Court held that a health regulation requiring smallpox vaccination was a reasonable exercise of the state's police power, and that the regulation did not violate the liberty rights of individuals under the Fourteenth Amendment to the U.S. Constitution.⁷⁶ In *Jacobson*, the Commonwealth of Massachusetts had enacted a statute that authorized local boards of health to require vaccination of persons over the age of twenty-one against smallpox, and determined that the vaccination program instituted in the city of Cambridge had "a real and substantial relation

the U.S. Supreme Court's reasoning in the *Jacobson* decision, by holding that it is within the state's police power to require that school children be vaccinated against smallpox); *Seubold v. Ft. Smith Special Sch. Dist.*, 237 S.W.2d 884, 887 (1951) (following federal principles discussed in the U.S. Supreme Court's *Jacobson* and *Zucht* decisions; holding that Arkansas' school vaccination requirements do not deprive individuals state liberty and property interests without due process of law); *State ex rel. Mack v. Bd. of Educ.*, 204 N.E.2d 86, 90 (Ohio Ct. App. 1963) (holding that a child does not have an absolute state right to enter school without being vaccinated against certain communicable diseases); *Brown v. Stone*, 378 So.2d 218, 222–23 (1979) (adopting the U.S. Supreme Court's reasoning in *Jacobson*, and holding that the state may exercise its police power where safety, morals, and health are involved with respect to a child).

74. See *Whitlow v. State of California, Department of Education, et al.*, No. 16CV1715DMSBGs (9th Cir. filed July 1, 2016) (arguing under Count II: Infringement On Rights Protected By The U.S Constitution that Defendants conduct as required under S.B. 277 "infringes on the Plaintiffs' . . . fundamental rights, including parental rights . . .").

75. *Jacobson*, 197 U.S. at 25.

76. *Id.* at 27–28; MALONE, *supra* note 13, at 271.

to the protection of the public health and safety.”⁷⁷

Jacobson challenged his conviction for refusing to be vaccinated against smallpox, as required by regulations of the Cambridge Board of Health.⁷⁸ While acknowledging the potential for vaccines to cause adverse events and the inability to determine with absolute certainty whether a particular person can be safely vaccinated, the U.S. Supreme Court specifically rejected the idea of an exemption based on personal choice.⁷⁹ In rendering its decision, the U.S. Supreme Court acknowledged limits to the state’s power to protect the public health and set forth a reasonableness test⁸⁰ for public health measures when it recognized⁸¹ the legitimate police power of the state to enact reasonable public health and public safety regulations.⁸² The Court also found that such regulations cannot infringe on constitutionally granted or secured rights.⁸³ Thus, while the U.S. Supreme Court acknowledged that individual liberty rights may prevent state intrusion in some instances, the Court made clear that when the health concerns of the larger community are at stake, the state has the authority to infringe upon individual rights.⁸⁴

Specifically, the U.S. Supreme Court noted 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 free 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.⁸⁵

Hence, to do otherwise “would practically strip the legislative

77. *Jacobson*, 197 U.S. at 31.

78. *Id.* at 13.

79. *Id.* at 26.

80. The *Jacobson* Court introduced a means/ends test that required a reasonable relationship between the public health intervention and the achievement of a legitimate public health objective. *Id.* at 29–30. Even though the objective of the legislature may be valid and beneficent, the methods adopted must have a “real or substantial relation” to the protection of the public health, and cannot be “a plain, palpable invasion of rights.” *Id.* at 31.

81. *Cole*, *supra* note 33, at 2–3.

82. See *Public health: vaccinations: Hearing on S.B. 277 Before the Senate Comm. on Judiciary*, 2015–2016 Sess., at 9 (Cal. 2015).

83. *Public health: vaccinations: Hearing on S.B. 277 Before the Senate Comm. on Judiciary*, 2015–2016 Sess., at 9 (Cal. 2015).

84. Calandrillo, *supra* note 27, at 384.

85. *Jacobson*, 197 U.S. at 26.

department of its function to [in its considered judgment] care for the public health and the public safety when endangered by epidemics of disease.”⁸⁶ Further, the U.S. Supreme Court noted that “the police power is the authority reserved to the states by the Constitution and embraces such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”⁸⁷ Accordingly, the U.S. Supreme Court established that mandatory vaccine laws were within the full discretion of the state.⁸⁸

In light of its decision in *Jacobson*, the U.S. Supreme Court rendered a similar holding in the case of *Zucht v. King*,⁸⁹ where it concluded that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law.⁹⁰ There, the U.S. Supreme Court upheld a city ordinance that stated “no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination.”⁹¹ Under this ordinance, public officials excluded a child from public and private schools because she did not have the required certificate and refused to submit to vaccination.⁹²

The U.S. Supreme Court found that the vaccination ordinance did not discriminate against schoolchildren to the exclusion of others in violation of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.⁹³ Thus, the U.S. Supreme Court denied a due process Fourteenth Amendment challenge to the constitutionality of city ordinances that excluded children from school attendance for failure to present a certificate of vaccination.⁹⁴ Moreover, the U.S. Supreme Court established that “these ordinances confer not arbitrary power, but only that broad discretion be required for the protection of the public health.”⁹⁵ In so holding, the U.S. Supreme Court invoked *Jacobson* for the principle that states may use their broad police power

86. *Id.* at 37.

87. *Id.* at 25.

88. Cole, *supra* note 33, at 1–2 (quoting *Jacobson*, 197 U.S. at 25). With respect to federal powers, such laws extended only to ensure that the state laws did not “contravene the Constitution of the United States or infringe any right granted or secured by that instrument.” *Id.*

89. 260 U.S. 174 (1922).

90. *Id.* at 176.

91. *Id.* at 175.

92. *Id.*

93. *Id.* at 176.

94. *Id.*

95. *Id.* at 177.

to require vaccinations.⁹⁶

In accordance with the U.S. Supreme Court decisions in *Jacobson* and *Zucht*, California has broad discretion in using its state police power to enact laws such as S.B. 277 that serve the public good. Since *Jacobson*, the breadth of state power in matters of public health is duly recognized by federal and state governments.⁹⁷ Further, insofar as a state's exercise of the police power must still be "reasonable" to be constitutional, S.B. 277 meets the *Jacobson* "reasonableness test" for public health measures, as it strikes a reasonable balance in advancing public health and safety without unduly encroaching on the private family sphere.⁹⁸

The importance of California's state power is evidenced by the public health recommendations of the Centers for Disease Control and Prevention's ("CDC"), a federal agency, which suggests that states adopt mandatory child vaccinations.⁹⁹ The CDC's child vaccination recommendations have been especially significant in California in recent years, as their reports show that there have been more California measles cases in January 2015 than in any one month in the past twenty years.¹⁰⁰ With extremely lenient vaccine exemptions and lax enforcement in California, personal belief exemptions rapidly increased, thus placing California communities at risk for the spread

96. See *id.* at 176 ("Long before this suit was instituted, *Jacobson v. Massachusetts*, 197 U.S. 11, had settled that it is within the police power of a State to provide for compulsory vaccination.").

97. See, e.g., *id.* at 176–77 ("[The *Jacobson*] 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. *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358 [1910]. And still others had settled that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law. *Lieberman v. Van De Carr*, 199 U.S. 552 [1905]."); *Prince v. Massachusetts*, 321 U.S. 158, 169 (1944) (holding that it is within the state's police power to enact legislation to protect public health and safety); *Adams v. City of Milwaukee*, 228 U.S. 572, 583 (1913) (holding that the Court will not overthrow an exercise of a state's police power through any regulation that has the purpose of protecting the public health); *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir. 2011) (holding that West Virginia may use its police power to prevent the spread of communicable diseases); *Cude v. State*, 377 S.W.2d 816, 819 (1964) ("According to the great weight of authority, it is within the police power of the State to require that school children be vaccinated against smallpox, and that such requirement does not violate the constitutional rights of anyone . . ."); *In re Eric B.*, 189 Cal. App. 3d 996, 1003 (1987) ("[the] state may act if it appears that parental decisions will jeopardize the health or safety of the child.").

98. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 11 (Cal. 2015).

99. Vaccines and Immunizations, CDC, <https://www.cdc.gov/vaccines/vac-gen/why.htm> (last visited Dec. 5, 2015 at 10:08 PM).

100. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on Health*, 2015–2016 Sess., at 5 (Cal. 2015).

of measles.¹⁰¹

Between 2000 and 2012, the number of personal belief exemptions to school required immunizations increased by 337 percent.¹⁰² Moreover, “in certain geographic pockets of California, exemption rates are 21 percent or more, placing our communities at risk for the rapid spread of entirely preventable diseases.”¹⁰³ Based on these statistics, it is no surprise that California became the epicenter of a measles outbreak in 2015. S.B. 277 seeks to ensure that school and community vaccination levels overall remain sufficiently high to achieve herd immunity to prevent further measles outbreaks. Accordingly, California reasonably exercised its broad health and safety powers as necessary to protect its constituents from this disease.

More importantly, the U.S. Supreme Court’s holdings in *Jacobson* and *Zucht* are significant in upholding S.B. 277’s constitutionality because they suggest that it would be arduous to attack state vaccination laws on the federal level based on the U.S. Supreme Court’s deference to the states’ police power to regulate health and safety in such matters.

Further evidence in support of California’s mandatory child vaccine law being upheld can be seen where the United States Supreme Court recently dimmed the likelihood of success for state and federal constitutional challenges to require school vaccinations, when it announced that it would not hear an appeal from a New York parent who alleged that the vaccination requirement in New York public schools violated her federal and state religious freedom.¹⁰⁴

Therefore, if anti-vaccination plaintiffs argue that there is an infringement of their constitutional interests in parenting, privacy, free exercise of religion, or bodily integrity, they likely will need to rely on

101. *Id.*

102. *Id.*

103. *Id.*

104. *Phillips v. City of New York*, 27 F. Supp. 3d 310, 313 (E.D.N.Y. 2014) (“As to Plaintiffs’ substantive due process causes of action [with respect to free exercise of religion], the Second Circuit has found that *Jacobson* flatly defeats any such claims.”). The U.S. Supreme Court let stand a 2015 lower court decision in the case, *Phillips v. City of New York*, that affirmed the constitutionality of a New York state law requiring that students be vaccinated before attending public schools. *Id.* at 313; *see also* Jane Meredith Adams, *Vaccination referendum falls far short, says campaign coordinator*, EDSOURCE (Oct. 6, 2015), <http://edsources.org/2015/sb277-vaccination-referendum-donnely-falls-far-short-sayscampaign-coordinator/88534> (“[T]hat decision, made by a three-judge panel of the U.S. Court of Appeals for the Second Circuit, also said that the regulation authorizing school officials to temporarily exclude unvaccinated students during an outbreak of a vaccine-preventable disease is constitutional.”).

state courts to hear such claims. However, to the extent state courts are following the lead of the U.S. Supreme Court in cases challenging mandatory vaccination laws, the California Supreme Court and lower California courts are likely to give significant deference to the government in potential lawsuits challenging the constitutionality of S.B. 277.¹⁰⁵

2. The State's Authority to Compel Vaccination of Schoolchildren Under the Doctrine of *Parens Patriae*

It is duly noted that the doctrine of *parens patriae* is applicable in the context of S.B. 277 because mandated child vaccinations implemented by the state to protect the public health is equally as critical in its use to protect the individual health of a minor child.¹⁰⁶ In *Prince v. Massachusetts*, the U.S. Supreme Court considered a parent's challenge to a child labor regulation on the basis of the Free Exercise Clause of the First Amendment to the U.S. Constitution.¹⁰⁷ There, a nine year-old girl was soliciting for the Jehovah's Witness religion at the direction and consent of her parent, who claimed that the child labor law violated her liberty to control the upbringing of her child.¹⁰⁸

The U.S. Supreme Court explained that the state's "authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he

105. See, e.g., *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D.Ark. 2002) ("The constitutional right to freely practice one's religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children."); *Cude*, 377 S.W.2d 816, 819 (1964) (holding that parents have no legal right to prevent vaccination of children when required to attend school even if their objections are based on good faith religious beliefs in accordance with *Prince*); *Mason v. Gen. Brown Cent. Sch. Dist.*, 851 F.2d 47, 49 (2d. Cir. 1988) (holding that the parents' sincerely held belief that immunization was contrary to the "genetic blueprint" was a secular, not religious, belief, and thus their children's required vaccination did not violate the Establishment Clause.); *In re Eric B.*, 189 Cal. App. 3d 996, 1008-09 (1987); *Brown v. Stone*, 378 So.2d 218, 222-23 (1979) (noting that "[i]t must not be forgotten that a child is indeed himself an individual, although under certain disabilities until majority, with rights in his own person which must be respected and many be enforced. Where its safety, morals, and health are involved, it becomes a legitimate concern of the state."). see also *infra* pp. 39-44 for a more detailed discussion.

106. See *Prince*, 321 U.S. at 166-67 (concluding that "[t]he 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.").

107. *Id.* at 163-64.

108. See *id.* at 166, 172. The U.S. Supreme Court upheld child labor laws under an asserted right of the application of child labor laws to a nine-year old girl who was soliciting for a religious group at the direction of her parents. *Id.* at 166.

cannot claim freedom from compulsory vaccination for the child more than for himself.”¹⁰⁹ In weighing the competing claims of a parent’s right to control the upbringing of their child and a child’s right to adequate health, the U.S. Supreme Court concluded that neither rights of religion nor rights of parenthood are beyond limitation of the state’s authority to regulate health and safety.¹¹⁰

Further, under the doctrine of *parens patriae*, where the state acts to guard the general interest in a youth’s well-being, the state may restrict the parent’s control of their child by, for example, requiring school attendance, regulating or prohibiting the child’s labor, or mandating vaccinations for the child.¹¹¹ This is because 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.”¹¹² Accordingly, in upholding the child labor laws at issue, the U.S. Supreme Court recognized that the right to make parental decisions regarding the care and upbringing of the child is not absolute, and can be interfered with if necessary to protect a child.¹¹³

More recently, when examining the right of parents to make medical decisions on behalf of their child, California courts have held consistently with the U.S. Supreme Court, as the court in *In re Eric B.* noted: “[the] state may act if it appears that parental decisions will jeopardize the health or safety of the child.”¹¹⁴ In this type of clash between parents and the state ‘the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.’”¹¹⁵

Here, “the state’s authority over children’s activities is broader than its authority over like actions of adults, and this is particularly

109. *See id.*

110. *Id.* at 166–67 (“But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States*, 98 U.S. 145; *Davis v. Beason*, 133 U.S. 333. And neither rights of religion nor rights of parenthood are beyond limitation.”).

111. *See id.*

112. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“The family itself is not beyond regulation in the public interest, as against a claim of religious liberty . . . [a]nd neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the [parent] . . . cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds.”).

113. *Id.* at 166–67 (noting that “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”).

114. *In re Eric B.*, 189 Cal. App. 3d 996, 1003 (1987) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972)).

115. *Id.* at 1008–09 (quoting *Yoder*, 406 U.S. at 215–16).

true of children in public activities and settings.”¹¹⁶ “A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”¹¹⁷ According to *Prince* and *In re Eric B.*, a child’s right to basic healthcare treatment to aid against vaccine-preventable diseases trumps a parent’s right to decide for their child that he or she will not be vaccinated merely because it goes against their personal beliefs.

S.B. 277 is necessary to ensure that all children in school institutions maintain adequately high levels of immunization to sustain and protect a functional education system and the community against communicable diseases.¹¹⁸ Thus, mandatory child vaccination laws, such as S.B. 277, do not unconstitutionally infringe on a parent’s fundamental right to control the upbringing of their child. This conclusion is buttressed by the opinions of numerous federal and state courts that have reached similar conclusions in comparable cases.¹¹⁹ Clearly, then, where the public health is at issue, “the rights of individuals to be free from unwanted government interference in the form of compulsory vaccinations has been severely limited by the courts.”¹²⁰ In sum, in matters of a child’s health, S.B. 277 is a valid exercise of the state’s *parens patriae* power to intervene on behalf of children’s health.

116. *Prince*, 321 U.S. at 168.

117. *Id.*

118. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 8 (Cal. 2015).

119. *See, e.g.*, *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (“The constitutional right to freely practice one’s religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children.”); *Cude v. State*, 377 S.W.2d 816, 819 (1964) (holding that parents have no legal right to prevent vaccination of children when required to attend school even if their objections are based on good faith religious beliefs in accordance with *Prince*); *Mason v. Gen. Brown Cent. Sch. Dist.*, 851 F.2d 47, 49 (2d. Cir. 1988) (holding that the parents’ sincerely held belief that immunization was contrary to the “genetic blueprint” was a secular, not religious, belief, and thus their children’s required vaccination did not violate the Establishment Clause.); *In re Eric B.*, 189 Cal. App. 3d 996, 1008–09 (1987); *Brown v. Stone*, 378 So.2d 218, 222–23 (1979) (noting that “[i]t must not be forgotten that a child is indeed himself an individual, although under certain disabilities until majority, with rights in his own person which must be respected and may be enforced. Where its safety, morals, and health are involved, it becomes a legitimate concern of the state.”).

120. Calandrillo, *supra* note 27, at 385.

B. S.B. 277 Does Not Violate a Child's Fundamental Interest in Education

The U.S. Supreme Court has specifically held that there is not a federally-held fundamental right to education, which is why anti-vaccination plaintiffs would have no federal constitutional claim to make on this basis.¹²¹ However, the California Supreme Court does recognize such a fundamental right in education, under which anti-vaccination plaintiffs are now challenging the state's child vaccination laws.¹²² Therefore, parents on both sides of the debate have recognized that S.B. 277 raises questions regarding the fundamental interest of California children, both vaccinated and unvaccinated, in education. "Parents against vaccination would be forced to choose whether to vaccinate their child and send them to school, or to not vaccinate their child and exercise the home school or independent study option."¹²³ On the other hand, parents supporting student vaccination requirements fear that their children might bear an "increased risk of harm as a result of" regular contact with "unvaccinated children in a fairly confined environment, for five days a week."¹²⁴

Despite this alarming fact, parents challenging S.B. 277 argue that the exclusion of their unimmunized child from school due to the parents' personal beliefs violates their child's fundamental state interest in education.¹²⁵ For the reasons detailed in this section, S.B. 277 likely would not be found to infringe a child's fundamental state interest in education because of the homeschool and independent study exemptions. However, even if a court does find a child's fundamental state interest is infringed, the law would likely pass the strict scrutiny test California courts apply to determine if the law is

121. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (holding that education is not a fundamental interest).

122. *Serrano v. Priest*, 487 P.2d 1241, 1258 (1971); *see also* JOSEPH GRODIN ET AL., *THE CALIFORNIA STATE CONSTITUTION* 55 (G. Alan Tarr ed., 2011); CAL. CONST. art. I, § 7(2) (West, Westlaw through December 2015 amendments) ("In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of . . . maximizing the educational opportunities and protecting the health and safety of all public school pupils . . .").

123. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 14 (Cal. 2015).

124. *Id.*

125. *See Whitlow v. State of California, Dep't of Educ., et al.*, No. 16CV1715DMSBGS (9th Cir. filed July 1, 2016) (arguing under Count I: Infringement On Rights Protected By The California Constitution that "S.B. 277 violates the right of education and equal protection provisions of the California Constitution . . .").

constitutional.¹²⁶ Under the strict scrutiny test, “the state bears the burden of establishing [that] not only [does the state have] a *compelling* interest which justifies the law but that the distinctions drawn by law are *necessary* to further its purpose.”¹²⁷ In doing so, California courts ask whether the statute being challenged is the “least restrictive” alternative for accomplishing its purpose.¹²⁸ Under this test, challenges against S.B. 277 regarding a child’s fundamental interest in education will likely fail because S.B. 277 furthers a compelling state interest: protecting the health and safety of schoolchildren and the public against communicable diseases. In addition, S.B. 277 is necessary because it uses the least restrictive alternative to ensure that school and community vaccination levels overall remain sufficiently high to establish herd immunity through its requirement that all children attending public or private school be vaccinated, subject to a few exemptions.¹²⁹

1. Health and Safety is a Compelling State Interest and S.B. 277 is Necessary to Achieve This Goal

Following the California Supreme Court’s holding in *Serrano*, the first question is whether S.B. 277 infringes on a child’s fundamental interest in education. It is well-settled law that a regulation is not violative of the federal and California’s state equal protection clauses merely because it is not all-embracing.¹³⁰ Further, “although a state may provide a religious or personal belief exemption to mandatory vaccination, it need not do so.”¹³¹ Despite S.B. 277’s enactment, each California school district’s governing board still retains full authority to compel immunization to prevent the spread of communicable

126. *Serrano*, 487 P.2d at 1249 (quoting *Westbrook v. Mihaly*, 471 P.2d 487, 500–01 (1970)).

127. *Id.* (quoting *Westbrook v. Mihaly*, 471 P.2d 487, 500–01 (1970)).

128. *Hill v. Nat’l Collegiate Athletic Assn.*, 865 P.2d 633, 652 (1994) (explaining that under the “compelling interest/least restrictive alternative” test, the defendant must establish that its approach was the “least restrictive” alternative furthering its interest); *see also Ramirez v. Brown*, 507 P.2d 1345, 1350 (1973) (“[I]t is not enough that there be a rational relation between the restriction and the compelling interest; the restriction is now constitutionally permissible only if its ‘necessary’ to promote that interest, and to be ‘necessary’ it must constitute, inter alia, the ‘least burdensome’ alternative possible.”).

129. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 5 (Cal. 2015). As previously stated, S.B. 277 neither requires compulsory vaccination where children might have a medical condition that makes vaccination unsafe for that child, nor when children would otherwise be homeschooled or enrolled in independent study programs. *See id.* at 1.

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

131. *Workman v. Mingo Cty. Bd. of Educ.*, 419 F.App’x 348, 354 (4th Cir. 2011).

diseases. And this they do by making and enforcing rules and regulations, such as S.B. 277, to secure the vaccination and immunization of pupils.

Further, S.B. 277 does not infringe a child's fundamental interest in education because it exempts a variety of homeschooling options for children whose parents do not want to vaccinate their child due to their own personal beliefs.¹³² If parents are unwilling to protect children from "certain crippling and deadly diseases"¹³³ that are vaccine-preventable, "they have choices – even if those would not be their first choice."¹³⁴ Thus, S.B. 277 does not unconstitutionally infringe a child's fundamental interest in education, nor does it limit or deny a child's equal access to education.¹³⁵

Next, even assuming that S.B. 277 does infringe on this fundamental interest, the law will still be upheld by California courts because S.B. 277 serves a compelling interest. Under California law, a law that infringes an education right is subject to strict scrutiny and may only be upheld if it:(1) meets a compelling interest; (2) the distinctions drawn by law are necessary to further its purpose, and; (3) is the "least restrictive" alternative for furthering that interest.¹³⁶ In *Serrano*, parents brought suit on behalf of their children who attended Los Angeles public schools, alleging that the state's method of funding public education failed to meet the requirements of the U.S. Constitution's 14th Amendment equal protection clause and the California Constitution.¹³⁷ The California Supreme Court held that the state's system for financing public schools (allowing more money for schools in wealthier districts) to be invalid, and that the state must provide children with equal access to education, subject to the equal protection clause of the state constitution.¹³⁸ In rendering its decision,

132. S. 277, 2015–16 Leg., Reg. Sess. (Cal. 2015).

133. *Brown v. Stone*, 378 So.2d 218, 222 (1979).

134. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 17 (Cal. 2015).

135. *See, e.g.*, *Seubold v. Ft. Smith Special Sch. Dist.*, 237 S.W.2d 884, 887 (1951) (holding school vaccination requirements do not deprive individuals of liberty and property interests without due process of law); *State ex rel. Mack v. Bd. of Educ.*, 204 N.E.2d 86, 90 (Ohio Ct. App. 1963) ("A child does not have an absolute right to enter school without immunization against polio, smallpox, pertussis, and tetanus on the basis of his parents' objections to his vaccination. The school board has authority to make and enforce rules and regulations to secure immunization.").

136. *See Serrano v. Priest*, 487 P.2d 1241, 1249 (1971) (quoting *Westbrook v. Mihaly*, 471 P.2d 487, 500–01 (1970)); *see also Hill v. Nat'l Collegiate Athletic Assn.*, 865 P.2d 633, 652 (1994).

137. *Serrano*, 487 P.2d at 1245.

138. *Id.* at 1262–63.

the California Supreme Court concluded that the State therefore must not limit or deny equal access to education unless it demonstrates that its actions are necessary to achieve a compelling interest.¹³⁹

Long-standing federal and state case law, although only persuasive, helps us understand what interests the courts have considered “compelling.” These interests have included “the health and safety of children”, as well as the “state’s need to protect its constituents against the spread of infectious and contagious diseases.”¹⁴⁰ For example, in a state court holding made within the Ninth Circuit, *Maricopa County Health Department v. Harmon*, the Arizona Court of Appeals found a compelling interest in protecting the public health and safety of its constituents by ensuring high rates of immunization to establish herd immunity.¹⁴¹ There, during a measles epidemic in Maricopa County, the Arizona Court of Appeals held that the state’s health department had authority to exclude unvaccinated children from school even if there were no reported cases of the disease in question, and did so without violating the right to public education in the Arizona Constitution.¹⁴² Accordingly, the Arizona Court of Appeals concluded that the Maricopa County Health Department prudently acted to combat disease by excluding unvaccinated children from school given the reasonably perceived, though unconfirmed, risk for the spread of measles.¹⁴³

Similarly, in *Brown v. Stone*,¹⁴⁴ the Mississippi Supreme Court held that a state law

[R]equiring immunization against certain crippling and deadly diseases particularly dangerous to children before they may be admitted to school served an overriding and compelling public interest, and that such interest extends to

139. *Id.* at 1257–58 (explaining that the “distinctive . . . function of education in our society warrants . . . our treating it as a ‘fundamental interest.’”).

140. *See, e.g., supra* pp. 33–34; *supra* pp. 42–43; *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987) (“[I]t has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs.”); *Workman v. Mingo Cty. Bd. of Educ.*, 419 F.App’x 348, 353–54 (4th Cir. 2011); *Maricopa Cty. Health Dep’t v. Harmon*, 750 P.2d 1364, 1369 (Ariz. Ct. App. 1987); *Davis v. State*, 451 A.2d 107, 112 (1982) (“Maryland’s compulsory immunization program clearly furthers the important governmental objective of eliminating and preventing certain communicable diseases.”).

141. *Maricopa Cty. Health Dep’t.*, 750 P.2d at 1369.

142. *Id.*

143. *Id.* at 1369–70.

144. 378 So. 2d 218 (1979).

the exclusion of a child until such immunization has been effected, not only as a protection of that child but as a protection of the large number of other children comprising the school community and with whom he will be in daily close contact in the school room.¹⁴⁵

There, the Mississippi Supreme Court heard the case of Chad Brown, a six-year-old whose family was denied a religious exemption from the state.¹⁴⁶ The Mississippi Supreme Court reasoned that the health of children and the general public were too important to allow people to opt out of vaccinating their children based on personal or religious beliefs; thus, the mandatory vaccine law furthered a compelling interest.¹⁴⁷

Moreover, the United States Court of Appeals for the Fourth Circuit's rejection of such challenges was clearly articulated in the 2011 case of *Workman v. Mingo County Board of Education*, where the Fourth Circuit held that "the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest."¹⁴⁸ There, a mother filed an action against West Virginia state and county officials ("Defendants"), alleging that Defendants violated her constitutional rights by refusing to admit her daughter to public school without immunizations required by state law.¹⁴⁹ The Fourth Circuit affirmed the district court's grant of summary judgment to the defendants, holding that the state had a compelling interest to require children to be vaccinated before allowing them to attend public school.¹⁵⁰

Here, as evidenced through case law, the theme of "protecting public health and safety" by establishing avenues to eliminate communicable diseases that infect the masses has recurred in numerous federal and state court decisions. These courts have found that mandatory child vaccines are necessary to achieve the compelling interest of protecting children and the public from vaccine-preventable diseases. S.B. 277 is aligned with this theme because it "aims to

145. *Id.* at 222–23.

146. *Id.*

147. *Id.* at 222.

148. *See Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir. 2011).

149. *Id.* at 351 (West Virginia state and county officials allegedly denied the plaintiff's application for a medical exemption on behalf of her daughter and prohibited her daughter from attending school without immunizations required by state law).

150. *Id.* at 352, 354.

prevent future measles outbreaks by eliminating pockets of unimmunized individuals that may appear at any school district at any time.”¹⁵¹ The 2015 measles outbreak clearly shows that there is a compelling need for this law, as A.B. 2109 did not do enough to protect the public from the measles outbreak that quickly spread, infecting over 134 people across thirteen counties in a span of less than six months.¹⁵²

Moreover, S.B. 277 is necessary to further California’s compelling interest in preventing measles outbreaks because no other alternative, less intrusive of the right to education, can work.¹⁵³ As noted in Section II of this Article, although A.B. 2109, a less restrictive alternative, attempted to eliminate the increase in personal belief exemptions, the recent 2014–2015 measles outbreak underscored the Legislature’s need to do more.¹⁵⁴ Further, unlike vaccination laws in other states, S.B. 277 does not require compulsory vaccination for children who might have medical conditions that make vaccination unsafe, or for children who are homeschooled or enrolled in independent study programs.¹⁵⁵ Additionally, the bill “implicates the liberty interests of other students and members of the public to be free of harm that could be avoided by proper vaccination.”¹⁵⁶ Thus, this approach would also protect the vaccine-deprived children themselves from disease.¹⁵⁷

151. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 18 (Cal. 2015) (statement of Sen. Richard Pan, District Six of California, and Sen. Ben Allen, District Twenty-Six of California).

152. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 7 (Cal. 2015).

153. *See Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 7 (Cal. 2015) (statement of The American Academy of Pediatrics).

154. The California Legislature has already tried a less restrictive alternative under A.B. 2109, and it led to a measles outbreak. *See* A.B. 2109, 2011–2012 Reg. Sess. (Cal. 2012); *see also Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 7 (Cal. 2015) (statement of The American Academy of Pediatrics).

155. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 1 (Cal. 2015). Drafters of S.B. 277 note that “without the recent broadening of the homeschooling exemption and the addition of the independent study option, many parents might not have been able to feasibly exercise any choice, due to the combination of financial constraints and compulsory education laws.” *Id.*

156. *Id.*

157. *Id.*

2. Safe and Healthy Schools are a Precondition to a Child's Exercise of the Fundamental Interest in Education

When the California Supreme Court held education to be a fundamental interest, it first examined the indispensable role education plays in the modern industrial state and concluded that education acts as a major determinant of an individual's chances for economic and social success in our competitive society. Thus, society should recognize that for such an opportunity to exist for a child, there is a strong need for a healthy populace in our integrated society.

Safe schools are a precondition to the fundamental state interest in education, and it is well established through case law that the state can act to obtain this goal by ensuring high vaccination levels.¹⁵⁸ It is duly noted that "California public school students have a right to education in California, but also that their schools be clean, safe, and functional. 'A safe school for many children is a school with a high level of herd immunity that protects them from known diseases,'"¹⁵⁹ ultimately, allowing children to exercise their fundamental right to education.

With this concept in mind, we clearly see how mandatory child vaccination laws, like S.B. 277, play a direct and positive role in a child's educational, as well as future economic and social interests. The distinctive function of health in our society compels our treating S.B. 277 as a necessary tool to aid in the proper facilitation of a child's fundamental state interest in education. Therefore, the California Legislature duly recognizes that when "[the compelling public purpose of the state law] may conflict with the religious beliefs of a parent, however sincerely entertained, the interests of the school children much prevail."¹⁶⁰ To hold otherwise would be to "discriminate against the great majority of children who have no such personal belief or religious conviction" and would subject to them to disease.¹⁶¹

For instance, the government could argue that personal belief exemptions that are not exercised by the majority would require the

158. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 15 (Cal. 2015).

159. *Id.*

160. *Brown v. Stone*, 378 So.2d 218, 223 (1979). Although non-binding authority, the California Legislature, like the Mississippi Supreme Court, recognizes that providing personal belief exemptions conflicts with their respective statewide child immunization requirements.

161. *Id.*

great body of schoolchildren to be vaccinated and at the same time expose them to the hazard of associating in school with unvaccinated children, who were exempted due to their parents' personal beliefs.¹⁶² Therefore, for the foregoing reasons, the California Supreme Court should reject an anti-vaccination plaintiff's contention that S.B. 277 is invalid under the state's equal protection provisions.

Lastly, California's state and county public health officials believe that "to provide a statewide standard allows for a consistent policy that can be publicized in a uniform manner, so districts and educational efforts may be enacted with best practices for each district."¹⁶³ "While pockets cluster in a regionalized area, districts may have one school that does not reach community immunity, and therefore should have a policy that they can easily implement."¹⁶⁴

IV. CONCLUSION

While the mandatory child vaccination law may be new to California, in actuality, it is not a new concept. More than a century after the United States Supreme Court seminal decision in *Jacobson v. Massachusetts*, both federal and state courts have upheld school immunization requirements as constitutional, even in states that do not provide religious or personal belief exemptions. "Science conclusively shows that vaccines are safe and effective, grounded on factually sufficient scientific research, and essential to protect public health as they continue to save countless lives."¹⁶⁵ "We should not have to see a child die from measles, a vaccine-preventable disease, before we take this important step to prevent additional measles outbreaks."¹⁶⁶ Thus, federal and state constitutional challenges against mandatory child vaccine laws will likely continue to be unsuccessful because we, as a people, are focused on providing disease-free learning environments for schoolchildren, like Rhett Krawitt, who can now fully exercise his fundamental right in education, free from the threat

162. *See id.* at 223.

163. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 18 (Cal. 2015).

164. *Id.*

165. *Vaccine Law Opponents Fall Short on Signatures for Repeal Effort*, CALIFORNIA HEALTHLINE (Oct. 1, 2015), <http://www.californiahealthline.org/articles/2015/10/1/vaccine-law-opponents-fall-short-on-signatures-for-repeal-effort> (statement of Jay Lee, President, California Academy of Family Physicians).

166. *Public health: vaccinations: Hearing on S.B. 277 Before the S. Comm. on the Judiciary*, 2015–2016 Sess., at 7 (Cal. 2015) (statement of the California Immunization Coalition).

of contracting life-threatening communicable diseases.¹⁶⁷

167. Given the amount of conflicting information spread by the media and internet today about child vaccines and the unsupported fear that vaccines cause autism, starting January 2016, California legislators and schools must disseminate accurate data to the general public, especially to parents in minority and limited English proficiency communities in order to eliminate such fears and increase public support for S.B. 277. *See, e.g.,* Jason Jaxon, *California Vaccine Refusers to Get “Court Order” or “CPS Visit” Under SB 277*, HEALTH IMPACT NEWS (Oct. 29, 2015), <http://healthimpactnews.com/2015/california-vaccine-refusers-to-get-court-order-or-cps-visit-under-sb277/>.

