

1 ADVOCATES FOR FAITH & FREEDOM
 2 Mariah R. Gondeiro (SBN 323683)
 3 mgondeiro@faith-freedom.com
 4 Julianne Fleischer (SBN 337006)
 5 jfleischer@faith-freedom.com
 6 25026 Las Brisas Road
 7 Murrieta, California 92562
 8 Telephone: (951) 304-7583
 9 Attorneys for Plaintiffs

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

13 **SARA ROYCE; SARAH CLARK;**
 14 **TIFFANY BROWN; and KRISTI**
 15 **CARAWAY;**

16 Plaintiffs,

17 v.

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

20 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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TABLE OF AUTHORITIES

Cases

U.S. Navy Seals 1-26 v. Biden,
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Fox v. Makin,
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Abeel v. Clark,
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Boone v. Boozman,
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Bosarge v. Edney,
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Brown v. Smith,
24 Cal. App. 5th 1135 (2018) 12

Church of Lukumi Babalu Aye, Inc. v. Hialeah,
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Crocker v. Glanz,
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Dahl v. Bd. of Trustees of Western Michigan Univ.,
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Fraternal Order of Police v. City of Newark,
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George v. Grossmont Cuyamaca Cmty. Coll. Dist. Bd. of Governors,
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Hanzel v. Arter,
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Harvest Rock Church v. Newsom,
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Harvest Rock Church, Inc. v. Newsom,
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Hastings v. Ford Motor Co.,
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 11 *Malik v. Brown*,
 12 16 F.3d 330 (9th Cir.1994) 12
 13 *Maricopa County Health Dept. v. Harmon*,
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 15 *McQuillion v. Schwarzenegger*,
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ADVOCATES
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1 *UnifySCC v. Cody*,
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1 **I. INTRODUCTION**

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

10 California’s compulsory vaccination law requires all students to receive
11 numerous vaccines to enter public or private school – vaccines that are neither 100
12 percent risk-free nor 100 percent effective. Cal. Health & Saf. Code §§ 120325-
13 120375. Plaintiffs’ children are unable to enjoy the benefits of a public and private
14 education that their secular peers enjoy because of California’s compulsory
15 vaccination requirements. Plaintiffs desire to enroll their children in California
16 public or private schools but are forbidden from doing so.

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

26 Defendant Rob Bonta (“Defendant” or “State”) attempts to dismiss Plaintiffs’
27 lawsuit, claiming they fail to state a claim for relief. *See* Defendant’s Memorandum
28

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

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

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

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

23 II. FACTUAL BACKGROUND

24 A. History Of Childhood Vaccination Requirements In California.

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



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

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

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

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



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

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

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

21 **B. SB 277 Is Not Congruent With California’s Interest In Slowing The**
22 **Spread Of Disease.**

23 California vaccination rates are high—higher than the national average for
24 each disease listed on the CDC schedule. *Id.* at ¶ 50. Additionally, just prior to SB
25 277’s passage, childhood vaccination rates were on the rise in California. *Id.* at ¶ 51.
26 Vaccine rates increased 0.2% for Kindergarteners and 1.2% for seventh graders
27 between the 2013/14 and 2014/15 school years, while PBEs were declining. *Id.* In
28 2015-2016, the year before SB 277 went into effect, California’s seventh grade



1 students were vaccinated at an overall rate of 97.8%. *Id.* at ¶ 52. The percentage of
2 students with PBEs this same year was 1.66%, while the percentage of students with
3 medical exemptions was 0.14%. *Id.* For entering kindergarten students in the 2015-
4 2016 school year, 92.9% had received all required vaccines. *Id.* The percentage of
5 kindergarten students with PBEs this same year was 2.38%, while the percentage of
6 kindergarten students with medical exemptions was 0.17%. *Id.*

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

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

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

24 III. LEGAL STANDARD

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

1 liberal standard. For a complaint to survive a 12(b)(6) motion, it must allege “enough
 2 facts to state a claim to relief that is plausible on its face.” *Hastings v. Ford Motor*
 3 *Co.*, No. 19-CV-02217-BAS-MDD, 2020 WL 12688367, at *2 (S.D. Cal. Oct. 2,
 4 2020). “A claim has facial plausibility when the plaintiff pleads factual content that
 5 allows the court to draw the reasonable inference that the defendant is liable for the
 6 misconduct alleged.” *Id.*

7 This standard is especially liberal when applied to the constitutional claims
 8 alleged in this action, which are governed by Rule 8. Rule 8’s burden is minimal and
 9 requires only that the plaintiff provide “a short and plain statement of the claim
 10 showing that the pleader is entitled to relief.” *George v. Grossmont Cuyamaca Cmty.*
 11 *Coll. Dist. Bd. of Governors*, No. 22-CV-0424-BAS-DDL, 2022 WL 17330467, at
 12 *13 (S.D. Cal. Nov. 29, 2022). Under Rule 8(a)(2), Plaintiffs must only “give the
 13 defendant fair notice of what the ... claim is and the grounds upon which it rests.”
 14 *Id.*

15 IV. ARGUMENT

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

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

20 In support of its motion to dismiss, Defendant presents evidence outside the
 21 pleadings. Generally, a court cannot consider evidence outside the pleadings without
 22 converting a motion to dismiss into one for summary judgment. *United States v.*
 23 *Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003). This is because a motion to dismiss
 24 tests the sufficiency of Plaintiffs’ Complaint based on the face of the pleadings. *See*
 25 *Fed. R. Civ. Pro. 12 (b)(6)*. Here, Defendant introduces outside evidence via various
 26 requests for judicial notice (“RJN”), a law review article, and evidence regarding
 27 aborted fetal tissue in vaccines.
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1 ***Requests for Judicial Notice.*** Defendant asks the Court to judicially notice 18
2 exhibits, comprised of bill text, bill history and analysis, legislative history, and
3 California Department of Public Health (“CDPH”) records. *See* RJN, ECF 4.2.
4 Through the RJN, Defendant seeks to prove several issues of fact, including the
5 efficacy of vaccines, the risk posed by unvaccinated children, and the necessity and
6 effectiveness of SB 277. *Id.*

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

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

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

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

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

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



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

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

4 In *Brooklyn Diocese*, the Supreme Court fundamentally altered Free Exercise
5 jurisprudence. There, the Court enjoined enforcement of Governor Cuomo’s Cluster
6 Action Initiative – an order that restricted indoor worship during the COVID-19
7 pandemic. *Brooklyn Diocese*, 141 S. Ct. at 64. The Court held the order was not
8 neutral and generally applicable because it treated churches harsher than secular
9 entities and activities like acupuncture facilities, bike shops, and liquor stores. *Id.* at
10 66-67.

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

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

21 *Id.* at 73 (emphasis in original).

22 In applying *Brooklyn Diocese*, the Supreme Court has been very consistent:
23 every application for injunctive relief on behalf of churches during the COVID-19
24 pandemic has resulted in the vacatur of lower court opinions denying injunctive
25 relief. *See, e.g., Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020); *Robinson*
26 *v. Murphy*, 141 S. Ct. 972 (2020); *High Plains Harvest Church v. Polis*, 141 S. Ct.
27 527 (2021); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021)
28 (“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).



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1 On January 22, 2021, the Ninth Circuit granted an injunction against California’s
2 COVID-19 restrictions on indoor religious gatherings. *S. Bay United Pentecostal*
3 *Church v. Newsom*, 985 F.3d 1128, 1151-52 (9th Cir. 2021). The Ninth Circuit also
4 granted a similar injunction in *Harvest Rock Church, Inc. v. Newsom*, 985 F.3d. 711
5 (9th Cir. 2020).

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

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

22 Here, by contrast, the State has mandated 16 vaccination doses for school
23 attendance –banning religious objectors from entering California public and private
24 schools indefinitely, while permitting secular objectors to remain in school. Compl.,
25 ¶¶ 26-32, 35. “Nothing in *Jacobson* purported to address, let alone approve, such
26 serious and long-lasting intrusions into settled constitutional rights.” *Brooklyn*
27 *Dioceses*, 141 S. Ct. at 70–71.

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

8 While Defendants cite various California, state, and federal opinions in accord
9 with *Jacobson* and *Prince* (Mot. at 9-10), most of these cases were decided on non-
10 Free Exercise grounds. *See Abeel v. Clark*, 84 Cal. 226, 230-31 (1890) (mandatory
11 vaccination challenged under the State’s police powers); *French v. Davidson*, 143
12 Cal. 658, 661-63 (1904) (mandatory vaccinations for school children challenged on
13 Fourteenth Amendment grounds); *Williams v. Wheeler*, 23 Cal.App. 619, 625 (1913)
14 (challenged under Art. 9, § 9 of the California Constitution and various California
15 legislative acts); *Love v. Superior Court*, 226 Cal. App. 3d 736, 740-47 (1990)
16 (public health measures challenged on Fourth Amendment, due process, and equal
17 protection grounds); *Workman v. Mingo County Sch.*, 667 F. Supp. 2d 679, 690-691
18 (S.D. W. Va. 2009) (mandatory vaccination challenged on due process, equal
19 protection, and Free Exercise grounds); *Boone v. Boozman*, 217 F. Supp. 2d 938,
20 956 (E.D. Ark. 2002) (mandatory vaccinations challenged under the Establishment
21 Clause, Due Process Clause, and Free Exercise Clause); *Hanzel v. Arter*, 625 F.
22 Supp. 1259, 1261-66 (S.D. Ohio 1985) (holding that mandatory vaccination does not
23 fall under the protection of the Establishment Clause); *Maricopa County Health*
24 *Dept. v. Harmon*, 750 P.2d 1364, 1369-1370 (Ariz. 1987) (holding that the state’s
25 health department did not violate the right to public education in Arizona’s
26 Constitution).

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

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

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

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

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

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

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

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

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

7 *First*, SB 277 is not generally applicable because it invites “the government
8 to consider the particular reasons for a persons’ conduct by providing a mechanism
9 for individualized exemptions.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877
10 (2021). Strict Scrutiny applies “regardless of whether any exceptions have been
11 given, because it ‘invite[s] the government to decide which reasons for not
12 complying with the policy are worthy of solicitude....” *Id.* at 1879. SB 277 is not
13 generally applicable under *Fulton* because it permits discretionary medical
14 exemptions but prohibits the assessment of religious exemptions. Compl., ¶¶ 69-71.
15 In other words, California has determined that religious objections are not worthy of
16 solicitude, but that medical exemptions are.

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

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

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

8 *Third*, SB 277 fails both the neutrality and general applicability tests under
9 *Brooklyn Diocese* and *Tandon*. A regulation is not neutral and generally applicable
10 where it “treat[s] any comparable secular activity more favorably than religious
11 exercise.” *Tandon*, 593 U.S. at 62 (emphasis in original) (citing *Brooklyn Diocese*,
12 141 S. Ct. at 67-68). And “whether two activities are comparable for purposes of the
13 Free Exercise Clause must be judged against the asserted government interest that
14 justifies the regulation at issue.” *Tandon*, 593 U.S. at 62 (citing *Brooklyn Diocese*,
15 141 S. Ct. at 67). Moreover, a law lacks general applicability when “it prohibits
16 religious conduct while permitting secular conduct that undermines the
17 government’s asserted interests in a similar way.” *Fulton*, 141 S. Ct. at 1877.

18 *The Third, Sixth, and Eleventh Circuits have held that laws that provided*
19 *secular, but not religious, exemptions for conduct that undermined the law’s*
20 *objectives in similar ways were not generally applicable. See Fraternal Order of*
21 *Police v. City of Newark*, 170 F.3d 359, 364-67 (3rd Cir. 1999) (holding that a police
22 department’s no-beard policy was not generally applicable because it provided
23 medical exemptions and prohibited religious exemptions); *Monclova Christian*
24 *Academy v. 10 Toledo-Lucas Health Dept.*, 984 F.3d 477, 482 (6th Cir. 2020)
25 (holding that a county public health order closing all schools, including religious
26 schools, was not generally applicable because it permitted various secular businesses
27 to remain open); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232-
28 35 (11th Cir. 2004) (finding a zoning ordinance lacking in general applicability for



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

6 In *U.S. Navy Seals 1-26 v. Biden*, the Fifth Circuit Court of Appeals
7 concluded that the processing and granting of medical exceptions and refusal to
8 accept religious exceptions to the COVID-19 vaccine, rendered the policy invalid
9 under both the Religious Freedom Restoration Act of 1993 and the First
10 Amendment. 27 F.4th 336, 350-53 (5th Cir. 2022). In June 2022, the Northern
11 District of California held that prioritizing employees with medical exemptions over
12 religious exemptions to the COVID-19 vaccine for consideration for vacant
13 positions was not neutral. *UnifySCC v. Cody*, No. 22-CV-01019-BLF, 2022 WL
14 2357068, at *10-11 (N.D. Cal. June 30, 2022)

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



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

8 Plaintiffs’ reliance on *We The Patriots USA, Inc. v. Connecticut Off. of Early*
9 *Childhood Dev.*, 76 F.4th 130 (2d Cir. 2023) is misplaced. Mot. at 12-13. There,
10 Connecticut’s amended statute allowed unvaccinated students to attend school only
11 with a medical exemption. *Id.* at 155. In the 2019-2020 school year, “more than ten
12 times as many students had religious exemptions than medial exemptions.” *Id.* By
13 contrast, California permits exemptions for several secular categories. Compl., ¶¶
14 33-36.

15 Indeed, in *Fox v. Makin*, the Court emphasized that Maine’s statute was
16 distinguishable from Connecticut’s because it “continues to permit multiple non-
17 religious exemptions, including a 90-day grace period for non-religious students, a
18 medical exemption, and the IEP sunset provision...while restricting religious
19 exemptions that may pose comparable risks.” No. 2:22-CV-00251-GZS, 2023 WL
20 5279518, at *9 (D. Me. Aug. 16, 2023). The court also noted that Connecticut’s
21 medical exemption process was more stringent because it required a certification
22 from a physician and supporting documents. *Id.* The court, therefore, declined to
23 dismiss plaintiffs’ Free Exercise claim for failure to state a claim. *Id.* at *10.

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



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

2 Even though it is unnecessary for this Court to address strict scrutiny,
3 Plaintiffs have alleged that SB 277 is not narrowly tailored to advance a compelling
4 government interest. “A government policy can survive strict scrutiny only if it
5 advances interests of the highest order and is narrowly tailored to achieve those
6 interests.” *Fulton*, 141 S. Ct. at 1881 (internal citations and quotation marks
7 omitted). California’s interest in ensuring that school children are vaccinated to
8 prevent the spread of contagious disease is compelling only in the abstract. “[A] law
9 cannot be regarded as protecting an interest of the highest order... when it leaves
10 appreciable damage to that supposedly vital interest unprohibited.” *Lukumi*, 508 U.S.
11 at 547 (internal citations and quotation marks omitted). While the State has an
12 interest in protecting public health and safety (Mot. at 19), Defendant offers “no
13 compelling reason why it has a particular interest in denying an exception [to these
14 particular Plaintiffs] while making them available to others.” *Fulton*, 141 S. Ct. at
15 1882.

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

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



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

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

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

11 Plaintiffs’ cause of action has been sufficiently pled. However, should the
12 Court be inclined to sustain Defendant’s motion to dismiss for any reason, leave to
13 amend should be granted. *See, e.g., Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir.
14 2000) (“a district court should grant leave to amend . . . unless it determines that the
15 pleading could not possibly be cured by the allegation of other facts”); *McQuillion*
16 *v. Schwarzenegger*, 369 F.3d 1091, 1099 (9th Cir. 2004) (same).

17 **V. CONCLUSION**

18 For the foregoing reasons, this Court should deny Defendant’s motion to
19 dismiss.

20
21 Respectfully submitted,

22
23 DATED: January 8, 2024

24
25 ADVOCATES FOR FAITH & FREEDOM

26 By: /s/ Mariah Gondeiro
27 Mariah Gondeiro, Esq.
28

