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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ANA WHITLOW, Individually and as
Parent and Next Friend of B.A.W. and
D.M. F.-W., minor children, *et al.*,

Plaintiffs,

v.

STATE OF CALIFORNIA,
Department of Education, *et al.*,

Defendants.

CASE NO. 16cv1715 DMS (MDD)
**ORDER DENYING PLAINTIFF’S
MOTION FOR PRELIMINARY
INJUNCTION**

This case involves a challenge to California’s Senate Bill (“SB”) 277, which repealed the personal belief exemption (“PBE”) to California’s immunization requirements for children entering public and private educational and child care facilities in the State. Plaintiffs are a group of seventeen parents and their children that reside throughout the State of California, and four non-profit corporations. Defendants include the California Department of Education and Department of Public Health, among others. In their First Amended Complaint (“FAC”), Plaintiffs allege SB 277 violates their federal and state constitutional rights and federal and state statutory law.

On July 15, 2016, Plaintiffs filed the present motion seeking to preliminarily enjoin the State from enforcing SB 277. In support of the motion, Plaintiffs allege SB 277 violates their rights to free exercise, equal protection, due process and education, as well as the Individuals with Disabilities in Education Act (“IDEA”), Section 504 of

1 the Rehabilitation Act of 1973 (“Section 504”) and the Americans with Disabilities Act
2 (“ADA”). Defendants filed responses to the motion, and Plaintiffs filed a reply.

3 The motion came on for hearing on August 12, 2016. James S. Turner, Kimberly
4 Rosenberg, Robert Moxley, Betsy Lehrfeld and Carl Lewis appeared for Plaintiffs,
5 Jonathan Rich and Jacquelyn Young appeared for the State Defendants and Mary Pat
6 Barry appeared for Defendants Takashi Wada, M.D. and Charity Dean, M.D.¹

7 **I.**

8 **BACKGROUND**

9 SB 277 was enacted on June 30, 2015. In enacting SB 277, the California
10 Legislature declared its intent was:

11 to provide:

12 (a) A means for the eventual achievement of total immunization of
13 appropriate age groups against the following childhood diseases:

- 14 (1) Diphtheria.
- 15 (2) Hepatitis B.
- 16 (3) Haemophilus influenzae type b.
- 17 (4) Measles.
- 18 (5) Mumps.
- 19 (6) Pertussis (whooping cough).
- 20 (7) Poliomyelitis.
- 21 (8) Rubella.
- 22 (9) Tetanus.
- 23 (10) Varicella (chickenpox).

24 Cal. Health & Safety Code § 120325(a)(1)-(10). SB 277 amended this section of the
25 California Health and Safety Code to declare the Legislature’s intent, but otherwise left
26

27 ¹ Defendants Wada and Dean are named in their official capacities as employees
28 of the Santa Barbara County Department of Public Health. The present motion does not
seek preliminary injunctive relief against those Defendants, and thus the Court does not
address Plaintiffs’ claims against them in this Order.

1 undisturbed the prior law’s vaccination requirements for school-aged children in
2 California. In particular, SB 277 removed a parent’s ability under prior law to opt-out
3 of the State’s vaccination requirements based on that parent’s personal beliefs.² The
4 law now provides that if a parent had on file or filed a PBE prior to January 1, 2016,
5 his or her child could be enrolled in school or day care, unless that child was at a
6 “checkpoint,” *i.e.*, was a first-time enrollee in day care or kindergarten or was enrolling
7 in the seventh grade. Cal. Health & Safety Code § 120335(g). Those first-time
8 enrollees and students entering seventh grade are no longer allowed admission to the
9 State’s public and private schools and day care centers unless they have complied with
10 the vaccination requirements. Cal. Health & Safety Code § 120335(g)(3). Plaintiffs
11 estimate there are 33,000 children that fall into this category, and are being denied
12 enrollment as a result of SB 277.

13 SB 277 provides three exemptions to the vaccination requirements at issue: One
14 for medical reasons, Cal. Health & Safety Code § 120370(a), one for children in a
15 ‘home-based private school or ... an independent study program[,]’ Cal. Health &
16 Safety Code § 120335(f), and one for students who qualify for an individualized
17 education program, or IEP. Cal. Health & Safety Code § 120335(h).

18 II.

19 DISCUSSION

20 For more than 100 years, the United States Supreme Court has upheld the right
21 of the States to enact and enforce laws requiring citizens to be vaccinated. *Jacobson*
22 *v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905); *Zucht v. King*, 260 U.S.
23 174 (1922). In 1902, the Board of Health in Cambridge, Massachusetts enacted a
24 regulation to that effect, and the State thereafter filed a criminal complaint against Mr.

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27 ² The law provided, “Immunization of a person shall not be required for
28 admission to school ... if the parent or guardian ... files with the governing authority a
letter or affidavit that documents which immunizations required by [law] have been
given, and which immunizations have not been given on the basis that they are contrary
to his or her beliefs.” Cal. Health & Safety Code § 120365 (repealed by SB 277).

1 Jacobson for failing to comply with the regulation. In his defense, Mr. Jacobson
2 argued that the law was unconstitutional. In particular, he argued,

3 that his liberty is invaded when the State subjects him to fine or
4 imprisonment for neglecting or refusing to submit to vaccination; that a
5 compulsory vaccination law is unreasonable, arbitrary and oppressive, and
6 therefore, hostile to the inherent right of every freeman to care for his own
body and health in such a way as to him seems best; and that the execution
of such a law against one who objects to vaccination, no matter for what
reason, is nothing short of an assault upon his person.

7 197 U.S. at 26. The Court rejected that argument. Speaking for the Court, Mr. Justice
8 Harlan stated,

9 the liberty secured by the Constitution of the United States to every person
10 within its jurisdiction does not import an absolute right in each person to
11 be, at all times and in all circumstances, wholly freed from restraint.
12 There are manifold restraints to which every person is necessarily subject
13 for the common good. On any other basis organized society could not
14 exist with safety to its members. Society based on the rule that each one
15 is a law unto himself would soon be confronted with disorder and anarchy.
16 Real liberty for all could not exist under the operation of a principle which
17 recognizes the right of each individual person to use his own, whether in
18 respect of his person or his property, regardless of the injury that may be
19 done to others. This court has more than once recognized it as a
20 fundamental principle that “persons and property are subjected to all kinds
21 of restraints and burdens, in order to secure the general comfort, health,
22 and property of the State; of the perfect right of the legislature to do which
23 no question ever was, or upon acknowledged general principles ever can
24 be made, so far as natural persons are concerned.”

25 *Id.* (citations omitted). The Court further stated, “a community has the right to protect
26 itself against an epidemic of disease which threatens the safety of its members[,]” *id.*
27 at 27, and “it was the duty of the constituted authorities primarily to keep in view the
28 welfare, comfort, and safety of the many, and not permit the interests of the many to
be subordinated to the wishes or convenience of the few.” *Id.* at 29. The Court
concluded that the statute was a proper exercise of the legislative prerogative and that
it did not deprive Mr. Jacobson of his constitutional guarantees of personal and
religious liberty.

Seventeen years later, the Court considered another mandatory vaccination law,
this time one aimed at schoolchildren. *Zucht*, 260 U.S. 174. There, the plaintiff’s
children were excluded from a Texas public school because they were not vaccinated.
The plaintiff argued that the laws violated her rights to due process and equal

1 protection under the United States Constitution, but the Court rejected those
2 arguments. Relying on *Jacobson*, the Court stated it was long-ago “settled that it is
3 within the police power of a State to provide for compulsory vaccination.” *Id.* at 176.

4 Even outside the context of vaccination laws, the Supreme Court has reiterated
5 that fundamental rights under the First Amendment to the United States Constitution
6 do not overcome the State’s interest in protecting a child’s health. Specifically, in
7 *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court stated: “The right to practice
8 religion freely does not include liberty to expose the community or the child to
9 communicable disease or the latter to ill health or death.” *Id.* at 166-67.

10 Although the Ninth Circuit has yet to decide a case involving a challenge to a
11 mandatory vaccination law, two other Circuits and the California Supreme Court have
12 decided such cases. *Phillips v. City of New York*, 775 F.3d 538 (2d Cir.), *cert. denied*,
13 ___ U.S. ___, 136 S. Ct. 104 (2015); *Workman v. Mingo County Bd. of Ed.*, 419 Fed.
14 Appx. 348, 356 (4th Cir. 2011); *Abeel v. Clark*, 84 Cal. 226 (1890). In *Workman*, the
15 plaintiff argued that a local school board in West Virginia violated her rights to free
16 exercise, equal protection and substantive due process when it refused to admit her
17 daughter to public school without the immunizations required by state law. The court
18 rejected all of those arguments, relying principally on *Jacobson*, *Zucht* and *Prince*. In
19 *Phillips*, the plaintiffs argued that a New York law requiring mandatory vaccination
20 of school children violated their rights to due process, free exercise and equal
21 protection. As in *Workman*, the court rejected the plaintiffs’ substantive due process
22 claim, stating it was “foreclosed by the Supreme Court’s decision in *Jacobson*[.]” 775
23 F.3d at 542. The court also rejected the plaintiffs’ free exercise claim, following the
24 reasoning of *Workman*, “that a parent ‘cannot claim freedom from compulsory
25 vaccination for the child more than for himself on religious grounds. The right to
26 practice religion freely does not include liberty to expose the community or the child
27 to communicable disease or the latter to ill health or death.’” *Id.* at 543 (quoting
28 *Prince*, 321 U.S. at 166-67). The court then affirmed the dismissal of the plaintiffs’

1 equal protection claim for failure to state a claim. In *Abeel*, the California Supreme
2 Court upheld the State's mandatory vaccination law as a proper exercise of police
3 powers under the California Constitution, allowing a public school to exclude a child
4 who had not been vaccinated in accordance with the law. 84 Cal. at 230.

5 In light of these cases, Plaintiffs here deny they are challenging the State's right
6 to compel vaccination of its schoolchildren. Rather, they assert they are challenging
7 the State's decision to eliminate the PBE. However, reframing the case in those terms
8 does not bolster Plaintiffs' position because it is clear that the Constitution does not
9 require the provision of a religious exemption to vaccination requirements, much less
10 a PBE. *See Phillips*, 775 F.3d at 543 (stating "New York law goes beyond what the
11 Constitution requires by allowing an exemption for parents with genuine and sincere
12 religious beliefs."); *Workman*, 419 Fed. Appx. at 355 (agreeing with district court that
13 "although a state may provide a religious exemption to mandatory vaccination, it need
14 not do so."); *Wright v. De Witt School Dist.*, 385 S.W.2d 644 (Ark. 1965) (rejecting
15 challenge to mandatory vaccination law on ground it did not include religious
16 exemption).

17 Finally, the Court notes that although the decision to eliminate the PBE, which
18 had been in existence for decades, raises principled and spirited religious and
19 conscientious objections by genuinely caring parents and concerned citizens, the
20 wisdom of the Legislature's decision is not for this Court to decide. *Jacobson*, 197
21 U.S. at 30 (stating the existence of medical opinion attaching little or no value to
22 vaccination as a means of preventing spread of smallpox was of no moment; it was for
23 the Legislature, and not the court, to determine the most effective method of protecting
24 the public against disease). The objections and concerns with SB 277 were presented
25 to the Legislature, and it decided to proceed with the law over those objections.
26 Whether those objections were valid is not for this Court to decide. Rather, this Court
27 is concerned only with whether the law is constitutional. With this background in
28 mind, the Court turns to the specific facts and claims in this case, and the important

1 question of whether Plaintiffs are entitled to a preliminary injunction barring
2 enforcement of SB 277.

3 **A. Legal Standard**

4 A party seeking injunctive relief under Federal Rule of Civil Procedure 65 must
5 show ““that he is likely to succeed on the merits, that he is likely to suffer irreparable
6 harm in the absence of preliminary relief, that the balance of equities tips in his favor,
7 and that an injunction is in the public interest.”” *Am. Trucking Ass'ns v. City of Los*
8 *Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def.*
9 *Council, Inc.*, 555 U.S. 7, 20 (2008)). Injunctive relief is “an extraordinary remedy that
10 may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”

11 *Winter*, 555 U.S. at 22.

12 **B. Likelihood of Success**

13 Plaintiffs rely only on constitutional and federal statutory claims in the present
14 motion. Plaintiffs assert they have shown a likelihood of success on each of these
15 claims, which supports the issuance of a preliminary injunction. The Court addresses
16 these claims in the order in which they were pleaded in the First Amended Complaint.

17 1. Free Exercise

18 The first claim at issue here is the Parent Plaintiffs’ claim that SB 277 violates
19 their right to free exercise of religion under the First Amendment to the United States
20 Constitution.³ Specifically, Plaintiffs contend SB 277 violates their right to free
21 exercise by (1) failing to provide a religious exemption to the vaccine mandate, (2)
22 forcing parents to choose between the dictates of their faith and their children’s

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25 ³ The Court notes that only Plaintiffs Whitlow, Nicolaisen, Schultz-Alva,
26 Andrade, Crain and Kennedy have religious objections to the vaccine mandate. To the
27 extent any of the other individual Plaintiffs have objections to the mandate based on
28 their personal, as opposed to religious beliefs, those beliefs are not protected by the
First Amendment. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“A way of life,
however virtuous and admirable, may not be interposed as a barrier to reasonable state
regulation of education if it is based on purely secular consideration; to have the
protection of the Religion Clauses, the claims must be rooted in religious beliefs.”)

1 education, and (3) offering secular exemptions (medical, home schooling and IEP)
2 while refusing to provide a religious exemption.⁴

3 The cases discussed above, particularly *Workman*, *Phillips*, and by extension,
4 *Prince*, demonstrate that Plaintiffs are unlikely to succeed on the first aspect of their
5 claim. As stated in *Prince*, the right to free exercise does not outweigh the State's
6 interest in public health and safety. 321 U.S. at 166-67 ("The right to practice religion,
7 freely does not include liberty to expose the community or the child to communicable
8 disease or the latter to ill health or death.") Both the Second and Fourth Circuits have
9 explicitly rejected the claim raised here, *see Phillips*, 775 F.3d at 543 (finding
10 "mandatory vaccination as a condition for admission to school does not violate the Free
11 Exercise Clause"); *Workman*, 419 Fed. Appx. at 352-54 (same), as have state courts
12 in Maryland, *Davis v. State*, 294 Md. 370, 379 (1982) (finding state need not "provide
13 a religious exemption from its immunization program."), and Arkansas. *Cude v. State*,
14 237 Ark. 927, 932 (1964) (stating smallpox vaccine mandate did "not violate the
15 constitutional rights of anyone, on religious grounds or otherwise.") In light of these
16 cases, which this Court finds persuasive, Plaintiffs are unlikely to succeed on their
17 claim that SB 277 violates their right to free exercise because it fails to include a
18 religious exemption.

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20 _____
21 ⁴ The parties disagree on the standard of review for Plaintiffs' free exercise
22 claim, with Plaintiffs arguing for strict scrutiny and Defendants for rational basis. The
23 Supreme Court has stated that "a neutral law of general application need not be
24 supported by a compelling government interest even when 'the law has the incidental
25 effect of burdening a particular religious practice.'" *Stormans, Inc. v. Wiesman*, 794
26 F.3d 1064, 1075-76 (9th Cir.), *cert. denied*, ___ U.S. ___, 136 S.Ct. 2433 (2016),
27 (quoting *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993)).
28 Rather, "[s]uch laws need only survive rational basis review." *Id.* at 1076 (citing *Miller*
v. Reed, 176 F.3d 1202, 1206 (9th Cir. 1999)). Plaintiffs do not dispute that SB 277 is
a neutral law of general application, which would therefore be subject to rational basis
review. Instead, they argue they are asserting "hybrid rights," which warrants strict
scrutiny. However, "[t]he 'hybrid rights' doctrine has been widely criticized, and,
notably, no court has ever allowed a plaintiff to bootstrap a free exercise claim in this
manner." *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008)
(citations omitted). Following that directive, this Court declines to apply the "hybrid
rights" doctrine to Plaintiffs' free exercise claim, and thus declines to apply strict
scrutiny.

1 Plaintiffs are also unlikely to succeed on their claim that SB 277 violates their
2 rights to free exercise because it forces them to choose between exercising their
3 religious beliefs and their children’s education. As stated in *Prince*, the right to
4 practice religion does not “include liberty to expose the community or the child to
5 communicable disease or the latter to ill health or death.” 321 U.S. at 166-67.

6 The final aspect of Plaintiffs’ Free Exercise claim is that SB 277 violates the
7 First Amendment because it provides secular exemptions but fails to provide a
8 religious exemption. In support of this claim, Plaintiffs rely on *Employment Div.,
9 Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). However,
10 nowhere in that case does the Supreme Court state that if the government provides a
11 secular exemption to a law or regulation that it must also provide a religious
12 exemption. Indeed, a majority of the Circuit Courts of Appeal have “refused to
13 interpret *Smith* as standing for the proposition that a secular exemption automatically
14 creates a claim for a religious exemption.” *Grace United Methodist Church v. City of
15 Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006). Thus, Plaintiffs have not shown a
16 likelihood of success on their free exercise claim.

17 2. Equal Protection

18 Next, Plaintiffs allege SB 277 violates their rights to equal protection.
19 Specifically, Plaintiffs allege SB 277 treats children with PBEs differently from other
20 children in denying the former an education, and it treats children with PBEs who have
21 reached “checkpoints” differently from children with PBEs who are not at
22 “checkpoints” in excluding the former from school. Plaintiffs also claim that SB 277
23 treats children with IEPs differently from section 504 children in providing an
24 exemption from the vaccination mandate for the former but not the latter.⁵

25
26 ⁵ Plaintiffs also raise an as-applied equal protection challenge to the IEP
27 exemption, arguing that some school districts are admitting children with IEPs while
28 others are not. Based on the facts alleged in the First Amended Complaint, it appears
two of the Plaintiff Children with IEPs may be being denied enrollment because they
are advancing to the seventh grade. (*See* FAC ¶¶ 16, 18.) The third Plaintiff Child with
an IEP is not in that situation, but has apparently been denied enrollment. (*Id.* ¶ 22.)

1 “The Equal Protection Clause does not forbid classifications. It simply keeps
2 governmental decision makers from treating differently persons who are in all relevant
3 respects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *F.S. Royster Guano*
4 *Co. v. Virginia*, 253 U.S. 412, 415 (1920)). “Evidence of different treatment of unlike
5 groups does not support an equal protection claim.” *Wright v. Incline Village Gen.*
6 *Improvement Dist.*, 665 F.3d 1128, 1140 (9th Cir. 2011).

7 Here, none of the disputed classifications supports an equal protection claim.
8 First, children with PBEs are not similarly situated to children without PBEs. Nor are
9 children at “checkpoints” similarly situated to children not at “checkpoints.” And the
10 same may be said of children with IEPs versus those without. In each of those
11 categories, the children are not similarly situated, which dooms Plaintiffs’ equal
12 protection claim.

13 Moreover, even if these children were similarly situated, these classifications
14 would not violate the equal protection clause. Plaintiffs have failed to show that
15 children with PBEs, children at “checkpoints,” and section 504 children are members
16 of a suspect class.⁶ Plaintiffs have also failed to show that these classifications burden
17 a fundamental right.⁷ Thus, these classifications would be subject to rational basis
18 review, not strict scrutiny. *Id.* at 1141.

19 Under the rational basis test,

20 the Equal Protection Clause is satisfied so long as there is a plausible
21 policy reason for the classification, the legislative facts on which the
22 classification is apparently based rationally may have been considered to
23 be true by the governmental decisionmaker, and the relationship of the
classification to its goal is not so attenuated as to render the distinction
arbitrary or irrational.

24 These as-applied challenges, however, are not at issue in the present motion. Therefore,
25 the Court does not address them further.

26 ⁶ Intellectual disability is not a suspect class. *See City of Cleburne, Tex. v.*
Cleburne Living Ctr., 473 U.S. 432, 442 (1985).

27 ⁷ Education is not a fundamental right under the United States Constitution. *See*
28 *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education,
of course, is not among the rights afforded explicit protection under our Federal
Constitution. Nor do we find any basis for saying it is implicitly so protected.”)

1 *Nordlinger*, 505 U.S. at 11 (citations omitted). That test is met here for each of the
2 classifications alleged above.

3 First, there is a rational basis for treating children with PBEs differently from
4 other children: The former are not completely vaccinated, if at all, while the latter are
5 fully vaccinated. Allowing the latter to attend school and excluding the former is
6 rationally related to the State's interest in protecting public health and safety.

7 There is also a plausible reason for treating children with PBEs at "checkpoints"
8 differently from children with PBEs outside of "checkpoints." The "checkpoints"
9 provisions provide a grace period for children with PBEs to remain in their grade span
10 while their parents comply with the new law. Rather than drawing legislation that
11 would have immediately impacted all children with PBEs (approximately 200,000,
12 according to Plaintiffs), the legislation has a more limited effect by initially focusing
13 only on those children with PBEs who are advancing to the next grade level
14 (approximately 33,000, according to Plaintiffs). The "checkpoints" provision therefore
15 provides parents with an orderly opportunity to comply with the law and softens the
16 impact of SB 277 through graduated application. That, of course, is rational.

17 Finally, and assuming Plaintiffs have standing to bring this claim on behalf of
18 students protected by section 504, there is also a rational basis for providing an
19 exemption for children with IEPs as opposed to children protected by section 504.
20 Unlike section 504, which is primarily geared toward preventing discrimination in the
21 provision of state services generally to all individuals with disabilities, *A.G. v.*
22 *Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1203, (9th Cir. 2016) (citing
23 *Mark H. v. Lemaheiu*, 513 F.3d 922, 929 (9th Cir. 2008)), the IDEA is designed to
24 provide disabled students with access to special education and related services in
25 schools. *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 818 (9th Cir. 2007) (quoting *Bd.*
26 *of Educ. of Henrick Hudson Central Sch. Dist., Westchester County v. Rowley*, 458
27 U.S. 176, 200 (1982)). The exemption for students with IEPs ensures that right of
28 access, and furthers the State's legitimate interest in providing special education and

1 related services to those students. *Zucht*, 260 U.S. at 176-77 (“A long line of decisions
 2 by this court had also settled classification may be freely applied, and that regulation
 3 is not violative of the equal protection clause merely because it is not all-embracing.”)
 4 For these reasons, Plaintiffs have failed to show a likelihood of success on their equal
 5 protection claim.⁸

6 3. Due Process

7 Next, Plaintiffs’ claim that SB 277 violates their rights to due process.
 8 Specifically, Plaintiffs allege SB 277 impinges on fundamental liberties by denying
 9 children with PBEs the opportunity to attend school and stigmatizing children with
 10 PBEs as “vectors of disease,” and violating both parental rights regarding decision-
 11 making concerning their child’s health and education and childrens’ rights to bodily
 12 integrity. (FAC ¶ 147.)

13 “The Due Process Clause ‘provides heightened protection against government
 14 interference with certain fundamental rights and liberty interests.’” *Workman*, 419
 15 Fed. Appx. at 355 (quoting *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997)).
 16 Here, however, all of Plaintiffs’ arguments are foreclosed by *Zucht*, 260 U.S. at 176
 17 (rejecting due process challenge to permanent exclusion of child from public and
 18 private school because child did not have required certificate and refused to submit to
 19 vaccination).

22 ⁸ Plaintiffs’ equal protection argument under the California Constitution fails for
 23 the same reasons. As with the federal claim, the Court is not persuaded that heightened
 24 scrutiny applies to Plaintiffs’ equal protection claim under the California Constitution.
 25 While education is a fundamental interest in California, impingement of the right is
 26 insufficient to trigger strict scrutiny. Rather, there must be a showing of “disparate
 27 treatment” that has a “real and appreciable impact” on that right. *Butt v. State of*
 28 *California*, 4 Cal.4th 668, 686 (1992). The asserted classifications addressed above do
 not have real and appreciable impact on the right of education and some are foreclosed
 by law. *See, e.g., French v. Davidson*, 143 Cal. 658 (1904), which forecloses the
 argument that distinguishing between vaccinated and unvaccinated children violates the
 equal protection clause. Children attending school “occupy a natural class by
 themselves, more liable to contagion[,] *id.* at 664, thus there is “no element of class
 legislation” in precluding unvaccinated children from school but allowing vaccinated
 children to enroll. *Id.*

1 Unquestionably, imposing a mandatory vaccine requirement on school children
2 as a condition of enrollment does not violate substantive due process. This case is even
3 one more step removed, as it involves the removal of an exemption that is not required
4 under the law. The removal of the PBE subjects the children to mandatory vaccination,
5 but the State is well within its powers to condition school enrollment on vaccination.
6 Plaintiffs have not demonstrated a likelihood of success on their due process claim.⁹
7

8 4. Section 504¹⁰

9 Although Plaintiffs allege there are students who require section 504
10 accommodation, (FAC ¶ 117), they fail to allege those children are not concurrently
11 covered by the IDEA; if those children are covered by the IDEA, they are exempt from
12 vaccination. Thus, Plaintiffs have not shown a likelihood of success on this claim
13 sufficient to warrant a preliminary injunction.

14 5. Right of Education

15 The only remaining claim at issue is Plaintiffs' claim that SB 277 violates their
16 right to education under the California Constitution. The parties do not dispute that
17 education is a fundamental interest under the California Constitution. *See Butt*, 4 Cal.
18 4th at 685-86 (holding education is a "fundamental interest"); *Serrano v. Priest*, 18 Cal.
19 3d 728, 766 (1976). Thus, if the right is sufficiently implicated it is subject to
20 heightened review. *Serrano*, 18 Cal. 3d at 768. Given Defendants' concession that
21 this claim is subject to heightened review, the Court assumes without deciding that

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24 ⁹ Plaintiffs' due process arguments under the California Constitution fail for the
25 same reasons.

26 ¹⁰ In their briefs, Plaintiffs also raised their IDEA and ADA claims as bases for
27 the present motion. However, the IDEA and ADA claims involve as-applied challenges
28 rather than facial challenges. At oral argument, Plaintiffs' counsel stated they were not
relying on any as-applied arguments in support of the present motion for any claim.
Thus, the Court declines to address whether Plaintiffs have shown a likelihood of
success on their IDEA, ADA or any other claims based on as-applied challenges in
deciding the present motion.

1 this is the proper standard. Under that standard, Defendants must show a compelling
2 state interest, and that the law is necessary or narrowly tailored to meet that interest.

3 Here, the right to education is implicated only by the removal of the PBE.
4 Defendants assert that eliminating the PBE serves the compelling societal interest in
5 protecting public health and safety. There is no question that society has a compelling
6 interest in fighting the spread of contagious diseases through mandatory vaccination
7 of school-aged children. All courts, state and federal, have so held either explicitly or
8 implicitly for over a century. *See, e.g., Abeel*, 84 Cal. at 230 (“The legislature has
9 power to enact such laws as it may deem necessary, not repugnant to the constitution
10 to secure and maintain the health and prosperity of the state, by subjecting both person
11 and property to such reasonable restraints and burdens as will effectuate such
12 objects.”); *Zucht*, 260 U.S. at 176 (stating it is “settled that it is within the police power
13 of a state to provide for compulsory vaccination.”); *Jacobson*, 197 U.S. at 11 (“the
14 police power of a State must be held to embrace, at least, such reasonable regulations
15 established directly by legislative enactment as will protect the public health and the
16 public safety.”); *Workman*, 419 Fed. Appx. at 356 (quoting *Sherr v. Northport-East*
17 *Northport Union Free Sch. Dist.*, 672 F.Supp. 81, 88 (E.D.N.Y. 1987)) (holding there
18 is a “compelling interest of society in fighting the spread of contagious diseases
19 through mandatory inoculation programs.”); *Brown v. Stone*, 378 So.2d 218, 223
20 (Miss. 1979) (holding “protection of the great body of school children attending the
21 public schools” against diseases through mandatory vaccination serves “compelling
22 public purpose”); *Cude*, 237 Ark. at 932 (1964) (holding mandatory vaccination of
23 school children “does not violate the constitutional rights of anyone, on religious
24 grounds or otherwise.”); *Bd. of Ed. v. Maas*, 56 N.J. Super. 245, 164 (1959) (similar);
25 *Viemeister v. White*, 88 A.D. 44, 49, 84 N.Y.S. 712 (1903) (similar). And it is evident
26 from the text of SB 277 that this was the Legislature’s intent in enacting the law. *See*
27 Cal. Health & Safety Code § 120325 (“In enacting this chapter ... it is the intent of the
28

1 Legislature to provide: (a) A means for the eventual achievement of total immunization
2 of appropriate age groups against the following childhood diseases: ...”)

3 Faced with this line of cases, Plaintiffs argue this case is distinguishable.
4 Plaintiffs assert the vaccine mandates at issue in some of those cases were enacted
5 during times of outbreaks. As Plaintiffs see it, the existence of an actual outbreak gave
6 the States a compelling reason to enact a vaccine mandate. Here, by contrast, and
7 according to Plaintiffs, there was no similar outbreak, and therefore, California did not
8 have a compelling interest in enacting SB 277. However, the State’s interest in
9 protecting the public health and safety, particularly the health and safety of children,
10 does not depend on or need to correlate with the existence of a public health
11 emergency. *See Maricopa County Health Dept. v. Harmon*, 156 Ariz. 161, 166 (1987)
12 (rejecting argument that “there is no compelling state interest in taking limited and
13 temporary steps to combat a reasonably perceived risk of the spread of measles absent
14 a serologically confirmed case[.]”); *Sadlock v. Bd. of Ed.*, 137 N.J.L. 85, 90 (1948)
15 (rejecting argument that compulsory vaccination law could not stand “since at the time
16 of its adoption, there was no epidemic or threatened epidemic of smallpox ... and that,
17 therefore the resolution performed no reasonable exercise of the police power.”);
18 *Mosier v. Varren County Bd. of Health*, 308 Ky. 829, 831 (1948) (“the health
19 authorities are not required to wait until an epidemic exists before acting, but it is their
20 duty to adopt timely measures to prevent one.”). That interest exists regardless of the
21 circumstances of the day, and is equally compelling whether it is being used to prevent
22 outbreaks or eradicate diseases.

23 The existence of a compelling state interest, however, is not sufficient, by
24 itself, to satisfy the strict scrutiny standard. Defendants must still show that removal
25 of the PBE was necessary or narrowly tailored to serve society’s interest.

26 Plaintiffs argue removal of the PBE is not narrowly tailored. Specifically, they
27 assert the previous law, which allowed for PBEs, served the same purpose as SB 277
28 and was a less restrictive means of achieving that purpose. Comparing new law to old,

1 however, has nothing to do with heightened scrutiny analysis. Rather, SB 277's
2 removal of the PBE must be examined to determine if it is narrowly tailored to address
3 the identified interest it sets out, here, “a means for the eventual achievement of total
4 immunization” of appropriate school-aged children. Cal. Health & Safety Code §
5 120325(a). However effective the previous law may have been in reducing the PBE
6 rate, that is not the purpose of the current law. The objective of total immunization is
7 not served by a law that allows for PBEs, whether the PBE rate is 2% or 25%.

8 Conditioning school enrollment on vaccination has long been accepted by the
9 courts as a permissible way for States to inoculate large numbers of young people and
10 prevent the spread of contagious diseases. Indeed, “[i]n the 1991-1992 school year,
11 all 50 states required public school students to be vaccinated against diphtheria,
12 measles, rubella, and polio.” *Vernonia Sch. Dist 475 v. Acton*, 515 U.S. 646, 656
13 (1995) (citing U.S. Dept. of Health & Human Services, Public Health Service, Centers
14 for Disease Control, State Immunization Requirements 1991-1992, p.1.) Moreover,
15 States can impose those vaccination requirements without providing religious or
16 conscientious exemptions. While removing the PBE is an aggressive step, so, too, is
17 the goal of providing a means for the eventual achievement of total immunization. An
18 aggressive goal requires aggressive measures, and the State of California has opted for
19 both here.

20 The right of education, fundamental as it may be, is no more sacred than any
21 of the other fundamental rights that have readily given way to a State’s interest in
22 protecting the health and safety of its citizens, and particularly, school children.
23 Because a personal belief exemption is not required in the first instance, the State can
24 remove it—and impinge on education rights—in light of the compelling interest here.
25 In this context, removal of the PBE is necessary or narrowly drawn to serve the
26 compelling objective of SB 277. Plaintiffs have not shown they have a likelihood of
27 success on their claim that SB 277 violates the right to education under California law.

28 ///

1 **C. Other Factors**

2 “When, as here, a party has not shown any chance of success on the merits, no
3 further determination of irreparable harm or balancing of hardships is necessary.”
4 *Global Horizons, Inc. v. United States Dep’t of Labor*, 510 F.3d 1054, 1058 (9th Cir.
5 2007). “This rule applies with equal force to the public interest element of our
6 preliminary injunction analysis.” *Id.* Pursuant to this rule, the Court declines to
7 address the other preliminary injunction factors.

8 The Court notes, however, that Plaintiffs’ delay in filing this case undercuts
9 any assertion of “urgency and irreparable harm.” *Oakland Tribune, Inc. v. Chronicle*
10 *Publishing Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). Although Plaintiffs dispute the
11 effective date of SB 277, the law was approved by the Governor on June 30, 2015, and
12 stated PBEs would not be accepted on or after January 1, 2016. “Where the
13 inevitability of the operation of a statute against certain individuals is patent, it is
14 irrelevant to the existence of a justiciable controversy that there will be a time delay
15 before the disputed provisions will come into effect.” *Blanchette v. Connecticut Gen.*
16 *Ins. Corps.*, 419 U.S. 102, 143 (1974). “One does not have to await the consummation
17 of threatened injury to obtain preventive relief. If the injury is certainly impending,
18 that is enough.” *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). Here,
19 Plaintiffs waited until July 1, 2016, to file the present case. That delay appears to have
20 been a tactical decision, and weighs against the issuance of a preliminary injunction in
21 this case.

22 **III.**

23 **CONCLUSION**

24 State Legislatures have a long history of requiring children to be vaccinated
25 as a condition to school enrollment, and for as many years, both state and federal courts
26 have upheld those requirements against constitutional challenge. History, in itself,
27 does not compel the result in this case, but the case law makes clear that States may
28 impose mandatory vaccination requirements without providing for religious or

1 conscientious objections. Although the removal of the PBE here affects a great many
2 people, this Court,

3 is not prepared to hold that a minority, residing or remaining in any city
4 or town where [disease] is prevalent, may thus defy the will of its
5 constituted authorities, acting in good faith for all, under the legislative
6 sanction of the State. If such be the privilege of a minority then a like
7 privilege would belong to each individual of the community, and the
8 spectacle would be presented of the welfare and safety of an entire
9 population being subordinated to the notions of a single individual who
10 chooses to remain a part of that population.

11 *Jacobson*, 197 U.S. at 37-38. Over 100 years ago, the Supreme Court was,

12 unwilling to hold it to be an element in the liberty secured by the
13 Constitution of the United States that one person, or a minority of persons,
14 residing in any community and enjoying the benefits of its local
15 government, should have the power thus to dominate the majority when
16 supported in their action by the authority of the State.

17 *Id.* at 38. In this case, Plaintiffs have not made a showing that they are entitled to the
18 extraordinary remedy of a preliminary injunction. Accordingly, their motion is
19 respectfully denied.

20 **IT IS SO ORDERED.**

21 DATED: August 26, 2016

22 

23 HON. DANA M. SABRAW
24 United States District Judge