

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BEFORE HONORABLE DANA M. SABRAW, JUDGE PRESIDING

ANA WHITLOW, ET AL.,
PLAINTIFFS,

VS.

STATE OF CALIFORNIA, DEPARTMENT OF
EDUCATION, ET AL.,
DEFENDANTS.

)
)
) CASE NO. 16CV1715-DMS
)
)
)

) SAN DIEGO, CALIFORNIA
) FRIDAY, AUGUST 12, 2016
) 1:30 P.M. CALENDAR
)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

REPORTED BY:

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OFFICIAL COURT REPORTER
UNITED STATES COURTHOUSE
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1 BARRY PRESENT ON BEHALF OF COUNTY OF SANTA BARBARA DEFENDANTS
2 DR. WADA AND DR. DEAN.

3 **THE COURT:** THANK YOU. AND WELCOME.

4 I HAVE READ ALL OF THE BRIEFING, ALL OF THE
5 SUBMISSIONS, AND ALL OF THE EVIDENCE, INCLUDING THE AFFIDAVITS
6 THAT WERE SUBMITTED. AND I APPRECIATE THE BRIEFING VERY MUCH.

7 FOR TODAY'S HEARING, AS I UNDERSTAND THE FOCUS -- I
8 WOULD INQUIRE FIRST OF MR. TURNER.

9 THERE IS NOT A REQUEST FOR INJUNCTIVE RELIEF AGAINST
10 ANY OF THE COUNTY DEFENDANTS. AM I CORRECT?

11 **MR. TURNER:** THAT IS CORRECT.

12 **THE COURT:** THE FOCUS IS TO PRELIMINARILY ENJOIN THE
13 STATE FROM REPEALING THE PERSONAL BELIEF EXEMPTION, THE PBE.

14 **MR. TURNER:** THAT IS CORRECT.

15 **THE COURT:** THAT WOULD BE THE SINGULAR FOCUS.

16 **MR. TURNER:** THAT IS THE SINGULAR ISSUE BEFORE THE
17 COURT AT THIS POINT.

18 **THE COURT:** THERE ARE AT LEAST A COUPLE OF
19 AS-APPLIED CHALLENGES WITH RESPECT TO, FOR EXAMPLE, THE IEP IN
20 MADERA AND PLACER COUNTIES RAISED BY SAUNDERS AND SALGADO, I
21 BELIEVE -- DELGADO AND SAUNDERS FAMILY, AND THE ADAMS FAMILY
22 IN ORANGE COUNTY HAS RAISED THAT ISSUE.

23 THOSE AS-APPLIED ISSUES ARE AGAINST COUNTIES WHO ARE
24 NOT NAMED DEFENDANTS. YOU ARE NOT PURSUING INJUNCTIVE RELIEF
25 AT THIS TIME, ARE YOU?

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1 **MR. TURNER:** WE ARE PURSUING INJUNCTIVE RELIEF ON
2 THE STATUTE ITSELF, WHICH WOULD COVER ALL COUNTIES AS FAR AS
3 THE ISSUES ON THE PERSONAL BELIEF EXEMPTIONS AND THE EFFORTS
4 OF SB 277 TO LIMIT THE EXEMPTIONS.

5 **THE COURT:** BUT WITH RESPECT TO THE SPECIFIC ISSUE
6 OF, FOR EXAMPLE, IN MADERA AND PLACER COUNTIES, COUNTIES THAT
7 MAY NOT BE PERMITTING CHILDREN WITH IEP'S TO ATTEND, ARGUABLY
8 IN VIOLATION OF LAW, THAT ISSUE IS NOT ON THE TABLE AT THE
9 PRESENT TIME. THAT WOULD BE AN AS-APPLIED CHALLENGE, AS I
10 VIEW IT.

11 **MR. TURNER:** THAT IS CORRECT. HOWEVER, WE ARE
12 CITING THAT AND UTILIZING THAT TO SHOW UNEVEN APPLICATION OF
13 THE STATUTE WITH REGARD TO THE VARIOUS EXEMPTIONS.

14 **THE COURT:** SO THAT WOULD BE AN EVIDENTIARY ARGUMENT
15 IN SUPPORT OF, FOR EXAMPLE, AN EQUAL PROTECTION CLAIM.

16 **MR. TURNER:** THAT IS CORRECT.

17 **THE COURT:** SIMILARLY, THERE ARE AS-APPLIED
18 CHALLENGES RELATING TO SANTA BARBARA COUNTY AND EFFORTS THAT
19 PLAINTIFFS CLAIM ARE BEING MADE AGAINST THE COUNTY ESSENTIALLY
20 TO DISSUADE DOCTORS FROM PROVIDING MEDICAL EXEMPTIONS. THAT
21 ISSUE IS NOT ON THE TABLE.

22 **MR. TURNER:** THAT ISSUE IS NOT ON THE TABLE TODAY.

23 **THE COURT:** ALL RIGHT. AND THANK YOU FOR THAT
24 CLARIFICATION.

25 THIS LAW WAS ENACTED JUNE 30, 2015, IT WAS EFFECTIVE

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1 JANUARY 1, 2016. AND I HAVE A COUPLE OF QUESTIONS HERE.

2 FIRST, WITH RESPECT TO THE INJUNCTIVE RELIEF THAT IS
3 REQUESTED, WHEN DOES SCHOOL START FOR THE 17 INDIVIDUAL
4 PLAINTIFFS? I SUSPECT THERE ARE DIFFERENT START DATES, BUT DO
5 YOU HAVE THE EARLIEST?

6 **MR. TURNER:** THERE ARE DIFFERENT START DATES. WE
7 HAVE START DATES APPROXIMATELY THE 15TH OF AUGUST, ALTHOUGH I
8 BELIEVE THAT ONE START DATE MIGHT HAVE ALREADY OCCURRED.

9 **THE COURT:** THEN THE SOONEST THAT YOU ARE AWARE OF
10 WOULD BE AUGUST 15?

11 **MR. TURNER:** THAT IS CORRECT.

12 **THE COURT:** WHO WOULD THAT RELATE TO?

13 **MR. TURNER:** WE WILL CHECK THAT, YOUR HONOR.

14 **THE COURT:** ALL RIGHT.

15 CAN YOU APPROXIMATE FOR ME, ARE MOST PLAINTIFFS
16 STARTING AFTER LABOR DAY, OR SOMETIME LATER IN AUGUST PRIOR TO
17 LABOR DAY?

18 **MR. TURNER:** MOST AFTER LABOR DAY -- PARDON ME. I
19 AM SORRY. MOST BEFORE LABOR DAY.

20 **THE COURT:** DO YOU HAVE A START DATE FOR MOST OF THE
21 PLAINTIFFS?

22 **MR. TURNER:** NOW AND SEPTEMBER 1ST.

23 **THE COURT:** BETWEEN NOW AND SEPTEMBER 1.

24 **MR. TURNER:** NOW AND SEPTEMBER 1ST FOR MOST
25 PLAINTIFFS.

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1 **THE COURT:** ALL RIGHT.

2 THE FOLLOW-UP QUESTION IS, WHY WAIT TO FILE THE
3 LAWSUIT AT THIS TIME WHEN IT BECAME EFFECTIVE JANUARY 1 OF
4 THIS YEAR?

5 **MR. TURNER:** THERE WERE A NUMBER OF PLAINTIFFS THAT
6 WERE IN NEGOTIATIONS -- FIRST OF ALL, ALL OF THE PLAINTIFFS
7 ARE PARTIALLY VACCINATED PATIENTS -- PLAINTIFFS. AND THEY
8 WERE -- A NUMBER OF THEM WERE IN DISCUSSIONS WITH THE STATE --
9 WITH THEIR OWN SCHOOL -- EXCUSE ME -- AND THEY WERE GOING BACK
10 AND FORTH AS TO WHETHER THEY WOULD OR WOULD NOT BE ADMITTED.
11 NOW, IN ONE INSTANCE THEY WERE INFORMED ON JUNE 29TH THAT THEY
12 WOULD NOT BE ADMITTED INTO THE SCHOOL.

13 IN ADDITION, THERE IS THAT ISSUE, AND BETWEEN
14 JANUARY 1ST AND JULY 1ST WE HAVE A SUBSTANTIAL AMOUNT OF
15 COMMUNICATIONS BETWEEN THE HEALTH DEPARTMENT AND THE EDUCATION
16 DEPARTMENT ABOUT WHAT -- HOW THEY WERE GOING TO IMPLEMENT THIS
17 LAW, WHAT WERE THE SPECIFICS GOING TO BE. SO THAT THERE WAS
18 AN OPENING ON AN-ONGOING BASIS AS TO THE IDEA THAT IT WOULD BE
19 CLARIFIED AND REGULATIONS OR SOMETHING WOULD COME FORWARD THAT
20 WOULD INDICATE THAT THIS IS THE WAY YOU PROCEED UNDER THE NEW
21 LAW.

22 NO SUCH GUIDANCE EVER DID COME FORWARD, SO THAT IT
23 WAS NOT UNTIL THE LAW ACTUALLY WENT INTO ITS FINAL DAY OF --
24 ACTUALLY ITS FINAL ENACTING DAY, THE DAY THAT IT BECAME
25 EFFECTIVE WAS JULY 1ST. THAT'S THE DAY THAT WE FILED BECAUSE

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1 AT THAT POINT THERE WAS NO LONGER ANY LIKELIHOOD OF REGULATION
2 OR OF AN AGREEMENT BETWEEN THE SCHOOL AND THE PERSON THAT THEY
3 WERE DEALING WITH AT THE SCHOOL. SO THAT IS WHY WE FILED THEM
4 THAT DATE.

5 **THE COURT:** SO, AS A PRACTICAL MATTER, THE
6 PLAINTIFFS, THROUGH YOUR OFFICES, ATTEMPTED TO RESOLVE THE
7 ISSUE THROUGH NEGOTIATIONS. AND ONCE IT WAS CLEAR THAT THAT
8 WAS UNFRUITFUL THEN THE LAWSUIT WAS FILED.

9 **MR. TURNER:** THAT IS CORRECT. THAT IT WAS THROUGH
10 THE AUSPICES OF THE VARIOUS ATTORNEYS INVOLVED WITH THE SUIT
11 AND OTHERS, NOT JUST MYSELF.

12 **THE COURT:** YOU WOULD AGREE, THOUGH, WOULDN'T YOU,
13 THAT THE EFFECTIVE DATE BEING WHAT IT IS, JANUARY 1, 2016,
14 SCHOOL BEING MANDATORY, THAT THIS ISSUE WOULD BE RIPE,
15 PERHAPS, FOR REVIEW AND COULD HAVE BEEN PRESENTED IMMEDIATELY
16 AFTER JANUARY 1?

17 **MR. TURNER:** WELL, THE ACTUAL FINAL EFFECTIVE DATE
18 OF THE LEGISLATION IS JULY 1ST. THAT'S WHEN IT FINALLY WENT
19 INTO EFFECT. AND THAT WAS THE DATE THAT WE THOUGHT IF WE
20 COULD GET RESOLUTION OF THESE ISSUES PRIOR TO THAT IT WOULD BE
21 RESOLVED. AND THEN IT TURNED OUT THAT IT WASN'T, THERE WERE
22 NO REGULATIONS, THERE WAS NO FRAMEWORK SET FORWARD FOR HOW
23 SOMEONE COULD APPROACH THE SCHOOLS AND LEARN WHAT THEY WERE
24 SUPPOSED TO DO.

25 **THE COURT:** THE EFFECTIVE DATE WAS JULY 1? I

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1 THOUGHT IT WAS JANUARY 1 PER STATUTE. AM I INCORRECT?

2 **MR. RICH:** YOUR HONOR, YOU ARE CORRECT. THE FIRST
3 EFFECTIVE DATE OF THE STATUTE WAS JANUARY 1. IT WAS AS OF
4 THAT DATE THAT PERSONAL BELIEF EXEMPTIONS WOULD NO LONGER BE
5 ACCEPTED.

6 THE JULY 1ST DATE THAT COUNSEL IS REFERRING TO IS
7 THE DATE AT WHICH LOCAL SCHOOL BOARDS WERE EXPRESSLY BARRED
8 FROM ACCEPTING ANY STUDENTS WITHOUT A PERSONAL BELIEF
9 EXEMPTION THAT HAD NOT BEEN SUBMITTED PRIOR TO JANUARY 1,
10 2016.

11 **THE COURT:** ALL RIGHT. OKAY. I THINK I HAVE
12 SUFFICIENT INFORMATION ON THAT ISSUE AS WELL, SO I THANK YOU
13 FOR THAT.

14 THIS CASE --

15 **MR. TURNER:** YOUR HONOR, JUST --

16 **THE COURT:** YES.

17 **MR. TURNER:** I AM SORRY, I GOT DISTRACTED.

18 THERE IS A CALIFORNIA HEALTH DEPARTMENT LETTER
19 SAYING THAT JULY 1ST IS THE EFFECTIVE DATE.

20 **THE COURT:** RIGHT. OKAY. I HAVE THAT
21 CLARIFICATION --

22 **MR. TURNER:** SORRY.

23 **THE COURT:** -- IN MIND AS SET OUT BY MR. RICH.

24 AS I UNDERSTAND THE FRAMING OF THE ISSUES,
25 MR. TURNER, YOU MAKE THE ARGUMENT THAT THIS CASE IS DIFFERENT

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1 FROM ALL THE OTHERS THAT THE DEFENDANTS CITE, ALL OF THE OTHER
2 STATE OR FEDERAL CASES, BECAUSE IT INVOLVES THE CALIFORNIA
3 CONSTITUTION AND THE FUNDAMENTAL RIGHT TO EDUCATION. AM I
4 CORRECT?

5 **MR. TURNER:** THAT IS CORRECT, YOUR HONOR.

6 **THE COURT:** THAT ISSUE OBVIOUSLY WOULD BE A STATE
7 ISSUE. IF THAT IS THE PRINCIPAL ISSUE WHY IS THIS CASE FILED
8 IN THIS COURT RATHER THAN STATE COURT?

9 **MR. TURNER:** WE ARE ALLEGING, IN ADDITION TO THE
10 STATE CONSTITUTION, A FEDERAL CONSTITUTIONAL RIGHT TO
11 EDUCATION AND TO EACH OF THE OTHER RIGHTS THAT WE HAVE CITED.

12 **THE COURT:** WOULDN'T IT BE A POSSIBILITY, THOUGH,
13 THAT WHEN THE COURT ADDRESSES THE MERITS, PERHAPS ON A
14 12(B)(6) DOWN THE ROAD, THE COURT COULD ADDRESS THE FEDERAL
15 CLAIMS ONLY, AND AS OFTEN IS DONE DISMISS THE STATE CLAIM.
16 AND IN THIS CASE, AS I UNDERSTAND THE ARGUMENTS, THE STATE
17 CLAIM IS REALLY THE PRINCIPAL CLAIM THAT YOU ARGUE
18 DISTINGUISHES THIS CASE.

19 **MR. TURNER:** WE HAVE -- THERE ARE A SERIES OF
20 FEDERAL CLAIMS THAT HAVE TO DO WITH THE WAY THAT THE
21 EXEMPTIONS, THE PERSONAL BELIEF EXEMPTIONS, ARE BEING APPLIED
22 TO STUDENTS WHO ARE DISABLED STUDENTS WHO ARE REQUIRED UNDER
23 FEDERAL LAW TO ATTEND SCHOOL. AND WE BELIEVE THAT THAT IS AN
24 IMPORTANT FEDERAL ISSUE THAT IS INVOLVED HERE.

25 IN ADDITION TO THAT THERE ARE SOME INDIVIDUALS WHO

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1 ARE DISABLED AND SHOULD BE -- AND ARE REQUIRED TO ENTER SCHOOL
2 WHO DO NOT HAVE A RECOGNIZED EXEMPTION UNDER SB 277. WE
3 BELIEVE THOSE KINDS OF ISSUES MAKE THIS A FEDERAL CASE,
4 PRIMARILY A FEDERAL CASE. AND WE ALSO ARE ALLEGING A FEDERAL
5 RIGHT TO EDUCATION AS A PART OF OUR CASE.

6 **THE COURT:** ALL RIGHT.

7 ON THE STANDARD OF REVIEW, WHICH IS OBVIOUSLY A
8 SIGNIFICANT ISSUE HERE, YOU ARGUE THAT STRICT SCRUTINY APPLIES
9 EVEN TO THE FEDERAL CLAIMS BECAUSE OF THE HYBRID RIGHTS
10 THEORY. IS THAT --

11 **MR. TURNER:** THAT IS CORRECT.

12 **THE COURT:** -- FAIR?

13 AND HERE THE ARGUMENT IS THAT YOU HAVE ALLEGED FREE
14 EXERCISE CLAIMS IN COMBINATION WITH COLORABLE EQUAL
15 PROTECTION, DUE PROCESS AND RELATED CLAIMS; AND, THEREFORE,
16 UNDER THE SMITH CASE AND RELEVANT NINTH CIRCUIT CASE LAW UNDER
17 THE HYBRID RIGHTS THEORY STRICT SCRUTINY WOULD APPLY.

18 **MR. TURNER:** THAT IS ONE OF THE PRIMARY REASONS FOR
19 STRICT SCRUTINY, YES.

20 **THE COURT:** ALL RIGHT.

21 SO LET'S ASSUME STRICT SCRUTINY FOR A MOMENT. DO
22 YOU AGREE THAT IT IS LONG-SETTLED, FROM THE FEDERAL COURTS,
23 STARTING WITH THE SUPREME COURT IN 1905, THAT STATES CAN
24 PROPERLY EXERCISE POLICE POWERS AND COMPEL VACCINATION OF
25 SCHOOL CHILDREN?

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1 **MR. TURNER:** WE DO NOT CHALLENGE THE RIGHT OF THE
2 STATE TO COMPEL VACCINATION. WHAT WE ARE SAYING IS THAT THE
3 MANNER IN WHICH THAT RIGHT, THAT POWER, IS EXERCISED IS A
4 ISSUE THAT IS SUBJECT TO STRICT SCRUTINY.

5 SO, FOR EXAMPLE, THE SITUATION THAT WE HAVE IN --
6 UNDER THE CURRENT SB 277, WE HAVE A SITUATION WHERE IT IS
7 REPLACING OR IT IS MOVING FORWARD AND EXPANDING ACTIONS THAT
8 WERE TAKEN TWO YEARS EARLIER UNDER -- ACTUALLY IT WAS PASSED
9 IN 2012 AND THEN BECAME FINALIZED ON JANUARY 1, 2014, AB 2109,
10 WHICH PUT BURDENS ON THE PERSONAL BELIEF EXEMPTION, BURDENS
11 WHICH ARE CONSTITUTIONAL, WHICH PASS STRICT SCRUTINY.

12 AND IT IS INCUMBENT UPON THE STATE IN A SITUATION
13 WHERE THEY ARE NOW GOING TO ADD FURTHER ENCUMBRANCES, IN FACT
14 EXTINGUISH A RIGHT UNDER SB 277, THEY NEED TO, UNDER STRICT
15 SCRUTINY, PRESENT A COMPELLING STATE INTEREST FOR THE
16 ADDITIONAL BURDENS THAT THEY ARE PUTTING ON THE RIGHT TO
17 EDUCATION.

18 SO WE ARE NOT CHALLENGING THE STATE'S RIGHT OR POWER
19 TO MANDATE VACCINATION; WE ARE SAYING THAT IT HAS TO BE DONE
20 IN A WAY THAT DOES NOT BURDEN THE RIGHT TO EDUCATION IN AN
21 UNREASONABLE WAY.

22 **THE COURT:** YOU AGREE, THEN, THAT THAT STATE CAN
23 COMPEL VACCINATION OF SCHOOL CHILDREN BY PRECLUDING THE
24 ENROLLMENT OF SCHOOL CHILDREN WHO DO NOT VACCINATE.

25 **MR. TURNER:** I AM SORRY. COULD YOU REPEAT THAT?

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1 **THE COURT:** SO YOU AGREE THAT THE STATE CAN COMPEL
2 VACCINATION OF SCHOOL CHILDREN AND DO SO BY PRECLUDING
3 CHILDREN WHO DO NOT SHOW PROOF OF VACCINATION.

4 **MR. TURNER:** THAT, I BELIEVE, IS AN OPEN QUESTION.
5 THAT IS ONE OF THE QUESTIONS THAT IS BEFORE THE COURT IN OUR
6 MAIN INJUNCTION CASE.

7 THE ARGUMENT IS THAT, YES, THERE ARE SITUATIONS IN
8 WHICH THE STATE CAN DO THAT.

9 **THE COURT:** THERE ARE SITUATIONS THAT IT CAN BE
10 DONE, BUT YOU WOULD ARGUE IT HAS TO COMPLY WITH STRICT
11 SCRUTINY.

12 **MR. TURNER:** CORRECT.

13 **THE COURT:** ZUCHT, FOR EXAMPLE, THE U.S. SUPREME
14 COURT CASE FROM 1922, IS CLEAR ON THIS PROPOSITION THAT A
15 STATE CAN FORCE OR COMPEL VACCINATION OF SCHOOL CHILDREN AND
16 PRECLUDE CHILDREN FROM COMING TO SCHOOL IF THEY DON'T SHOW
17 PROOF OF VACCINATION.

18 **MR. TURNER:** THAT CASE DID NOT REACH THE
19 CONSTITUTIONAL ISSUES.

20 **THE COURT:** ALTHOUGH THERE WERE DUE PROCESS AND
21 EQUAL PROTECTION CLAIMS RAISED THAT THEY APPEARED TO DISCOUNT.

22 **MR. TURNER:** THEY ACTUALLY DECIDED IT ON PROCEDURAL
23 GROUNDS. THERE WAS NOT -- THEY SAID THAT THE ISSUE OF THE
24 CONSTITUTIONAL QUESTION HAD NOT BEEN PUT BEFORE THEM SO THEY
25 DID NOT HAVE TO ADDRESS IT.

1 **THE COURT:** BUT THEY LET STAND THE SAN ANTONIO
2 ORDINANCE WHICH FORCED VACCINATION OF SCHOOL CHILDREN, AND THE
3 PENALTY BEING IF THERE WAS NOT PROOF OF A VACCINATION THE
4 CHILD WOULD NOT BE ADMITTED INTO SCHOOL.

5 **MR. TURNER:** THAT IS CORRECT. BUT THE ISSUE WAS NOT
6 BEFORE THE COURT IN THE WAY IT WAS PRESENTED ON -- THAT IT WAS
7 PRESENTED BY, AND SO THE COURT DID NOT REACH THE QUESTION OF
8 THE CONSTITUTIONALITY, AND I THINK ACTUALLY SAID THAT.

9 BUT, IN ADDITION, THAT WAS A PERIOD PRIOR TO THE
10 DEVELOPMENT OF THE STRICT SCRUTINY TYPE OF STANDARD THAT IS
11 BEING APPLIED IN LAW NOW, THE LAST COUPLE OF DECADES, SO THAT
12 WE DON'T THINK IT ACTUALLY PROVIDES THE ANSWER TO THE STRICT
13 SCRUTINY QUESTION THAT WE BELIEVE IS BEFORE THE COURT.

14 **THE COURT:** THERE IS AUTHORITY FOR THE PROPOSITION
15 THAT -- AND IT HAS BEEN CITED, I THINK, TO PRINCE AND PHILLIPS
16 AND WORKMAN, THE SECOND AND FOURTH CIRCUIT CASES,
17 RESPECTIVELY -- THAT MANDATORY VACCINATION CAN BE PURSUED
18 CONSTITUTIONALLY BY A STATE AND IT CAN BE REQUIRED EVEN
19 WITHOUT PROVIDING A FREE EXERCISE EXEMPTION. DO YOU DISPUTE
20 THAT?

21 **MR. TURNER:** WELL, FIRST OF ALL, THE CASES THAT ARE
22 CITED WOULD DEAL WITH SUCH THINGS AS BEING REMOVED FROM SCHOOL
23 DURING THE TIME OF AN OUTBREAK; NOT PERMANENTLY FOR THE ENTIRE
24 SCHOOL PERIOD, 13 YEARS, WHATEVER IT TURNS OUT TO BE.

25 SO WE BELIEVE THAT THOSE CASES -- WE BELIEVE THAT

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1 ONE NEEDS TO APPLY STRICT SCRUTINY TO THE SITUATION THAT IS
2 BEFORE US. AND WE BELIEVE THAT THOSE CASES MIGHT VERY WELL
3 PASS THAT STRICT SCRUTINY TEST, POSSIBLY; THE IDEA BEING THAT
4 THEY ARE BEING EXCLUDED FROM SCHOOL FOR A SHORT PERIOD OF TIME
5 IN ONE OF THOSE PLACES.

6 IT IS A REASONABLE WAY TO HANDLE A PART OF THE
7 PROBLEM THAT MAY OCCUR. AND IT IS A PIECE OF WHAT WAS IN AB
8 2109 WHICH WE ARE SAYING IS THE STATUS QUO MANDATE, AND THAT
9 IS WHAT WE WANT TO SEE BROUGHT BACK INTO FORCE WHILE THIS CASE
10 IS DECIDED IN THE DETAILS OF THE PERMANENT INJUNCTION.

11 **THE COURT:** SO YOU WOULD ARGUE THAT THOSE CASES ARE
12 DISTINGUISHABLE BECAUSE THEY INVOLVE TEMPORARY BANS.

13 **MR. TURNER:** CORRECT.

14 **THE COURT:** AND THERE ARE SOME STATE CASES, I THINK
15 IN ARKANSAS AND MISSISSIPPI, THAT I BELIEVE INVOLVE PERMANENT
16 BANS, BUT YOU WOULD ARGUE THAT THOSE ARE WRONGLY DECIDED.

17 **MR. TURNER:** THEY ARE VERY DIFFERENT CASES IN
18 MISSISSIPPI AND -- THE CASE IN MISSISSIPPI AND THE CASES IN
19 ARKANSAS ARE VERY DIFFERENT.

20 IN THE ARKANSAS CASE, MR. MOXLEY WAS AN ATTORNEY FOR
21 THE PLAINTIFFS IN ARKANSAS, I WAS ATTORNEY FOR A GROUP THAT
22 FILED AMICUS BRIEF.

23 WHAT HAPPENED IS THE TWO FEDERAL COURTS DECLARED THE
24 RELIGIOUS EXEMPTION UNCONSTITUTIONAL BECAUSE IT REQUIRED
25 MEMBERSHIP IN A SPECIFIC RELIGIOUS ORGANIZATION. THAT WAS

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1 APPEALED TO THE CIRCUIT AND THE STATE, AND THE PLAINTIFFS CAME
2 TO AN AGREEMENT TO STAY THE OPERATION OF THE ABSENCE OF THE
3 EXEMPTION FOR THE DURATION OF THE LITIGATION. DURING THE
4 DURATION OF THE LITIGATION THE STATE LEGISLATURE PASSED A
5 PERSONAL BELIEF EXEMPTION ALMOST IDENTICAL TO WHAT CALIFORNIA
6 HAD IN PLACE UNTIL SB 277.

7 SO THOSE CASES DO NOT ACTUALLY SUPPORT THE ARGUMENT
8 THAT THE STATE IS PUTTING FORTH IN TERMS OF THE TOTAL --
9 TOTALITY OF THE REALITY OF THE SITUATION.

10 WITH REGARD TO MISSISSIPPI, THAT CASE IS -- AGAIN,
11 IT IS A CASE WHERE THERE WAS NO LEGISLATION INVOLVED, IT WAS
12 THE COURT LOOKING AT THE RELIGIOUS EXEMPTION. AND IT IS AN
13 OUTLYING CASE. IT DOES NOT REPRESENT THE KIND OF
14 JURISPRUDENCE THAT HAS BEEN GOING ON IN THE AREA OF
15 EXEMPTIONS.

16 AND WE THINK WE CAN DISTINGUISH IT IN PART, BUT AT
17 THE SAME TIME WE DO NOT THINK THE ANALYSIS FOLLOWS. AND WE
18 COULD WALK THROUGH THAT, IF THAT WAS NECESSARY.

19 **THE COURT:** DO YOU DISPUTE THAT A STATE LEGISLATURE
20 CAN REQUIRE VACCINATION OF SCHOOL CHILDREN WITHOUT PROVIDING A
21 FREE EXERCISE EXEMPTION?

22 **MR. TURNER:** WE ARE NOT RAISING THAT ISSUE HERE
23 BECAUSE WE HAVE A DIFFERENT SITUATION. THE SITUATION WE HAVE
24 IS A 55-YEAR HISTORY OF A PERSONAL BELIEF EXEMPTION WHICH WAS
25 ACTUALLY A VERY -- IT WAS DONE IN 1961 WHEN THE POLIO VACCINE

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1 WAS FIRST MANDATED. AND IT WAS IN FACT A VERY ENLIGHTENED AND
2 VERY SMART LEAD IN THE WAY THAT EXEMPTION LAW UNFOLDED BECAUSE
3 IT BASICALLY WOVE TOGETHER A RELIGIOUS AND A PERSONAL BELIEF
4 EXEMPTION. IT ALSO HAD MEDICAL EXEMPTIONS.

5 AND THAT PARTICULAR APPROACH, WE ARGUE, MEETS THE
6 CONSTITUTIONAL TEST UNDER STRICT SCRUTINY; THAT IS, HAVING THE
7 PERSONAL BELIEF EXEMPTION AND A MANDATE. IT WORKS, AND IT
8 AVOIDS CERTAIN KINDS OF PUBLIC HEALTH PROBLEMS THAT MIGHT
9 EXIST IF IT WASN'T DONE THAT WAY.

10 AND WE ARE SAYING THAT WE DON'T BELIEVE THAT -- WE
11 ARE NOT CHALLENGING THE STRUCTURE THAT WAS SET UP UNDER AB
12 29 -- THE PREVIOUS LAW. BUT WE DO NOT -- WE ARE NOT SAYING
13 FOR SURE THAT NO -- NO EXEMPTION OF A PERSONAL BELIEF KIND,
14 THAT THAT KIND OF A LAW WOULD IN FACT WITHSTAND STRICT
15 SCRUTINY. BUT THAT IS NOT THE ISSUE THAT WE ARE RAISING HERE.

16 **THE COURT:** HASN'T THE COURT, THOUGH, THROUGH PRINCE
17 AND SOME OF THESE OTHER CIRCUIT CASES, ALL OF THE CASE LAW HAS
18 INDICATED, THAT DISCUSSES THIS ISSUE, THAT STATES CAN REQUIRE
19 VACCINATION WITHOUT PROVIDING A FREE EXERCISE EXEMPTION?

20 **MR. TURNER:** I AM BEING HANDED A NOTE ON THIS.

21 FIRST OF ALL, I WANT TO JUST GO BACK AND RESTATE
22 THAT THE ISSUE HERE, IN OUR OPINION, THAT WE ARE URGING, IS
23 THAT THE RIGHT TO AN EDUCATION GUARANTEED BY THE CONSTITUTION
24 OF CALIFORNIA IS THE MEASURE OF THIS PIECE OF LEGISLATION.
25 CAN THE RIGHT TO EDUCATION BE TAKEN AWAY FROM STUDENTS AS A

1 WAY OF ENFORCING A STATE POLICY, ANY STATE POLICY, AND WHEN
2 CAN IT DO THAT.

3 AND WE ARE SAYING THAT THE STRICT SCRUTINY OF THAT
4 QUESTION IS WHAT HAS TO BE APPLIED IN ORDER TO DETERMINE
5 WHETHER SB 277 WHICH -- THE ONLY EFFECT OF WHICH WAS TO REMOVE
6 THE PERSONAL BELIEF EXEMPTION, WHETHER THAT PIECE OF
7 LEGISLATION MEETS THE STRICT SCRUTINY TEST MEASURED AGAINST
8 THE RIGHT OF EDUCATION FOR CALIFORNIA STUDENTS.

9 **THE COURT:** THE ARGUMENT WOULD BE THAT IF A STATE
10 CAN REQUIRE VACCINATION WITHOUT A FREE EXERCISE EXEMPTION THEN
11 A STATE CERTAINLY COULD PROVIDE FOR MANDATORY VACCINATION OF
12 SCHOOL CHILDREN WITHOUT A PERSONAL BELIEF EXEMPTION, BECAUSE A
13 PERSONAL BELIEF EXEMPTION IS, AT ITS BEST, A FIRST AMENDMENT
14 FREE EXERCISE EXEMPTION. AND MORE COMMONLY IT IS SOMETHING
15 LESS THAN A FREE EXERCISE EXEMPTION, IT IS A PHILOSOPHICAL
16 PERSONALLY-HELD BELIEF BUT NOT NECESSARILY A RELIGIOUS BELIEF.

17 SO IF, UNDER THE EXISTING LAW, A STATE CAN REQUIRE
18 VACCINATION WITHOUT PROVIDING FOR A FIRST AMENDMENT EXEMPTION,
19 WHY CAN'T -- WHAT WOULD PRECLUDE THE STATE FROM REQUIRING
20 VACCINATION OF SCHOOL CHILDREN WITHOUT EVEN GRANTING A
21 PERSONAL BELIEF EXEMPTION?

22 **MR. TURNER:** WE BELIEVE THAT THEY ARE REQUIRED TO.
23 LET ME ASK YOU -- YOU WANTED ME TO SAY SOMETHING?
24 (DISCUSSION OFF THE RECORD)

25 **MR. TURNER:** OUR ARGUMENT IS THAT IN FACT THEY HAVE

1 TO HAVE AN EXEMPTION.

2 **THE COURT:** BECAUSE OF THE RIGHT OF EDUCATION?

3 **MR. TURNER:** NO, THAT'S PART OF IT. BUT WE ALSO ARE
4 SAYING THEY HAVE A MEDICAL EXEMPTION. AND THE SMITH VERSUS
5 GONZALES CASE SAYS THAT WHERE YOU HAVE THE -- ONE KIND OF
6 EXEMPTION THE RELIGIOUS EXEMPTION HAS TO BE THERE AS WELL.
7 YOU CAN'T HAVE A SECULAR EXEMPTION AND EXTINGUISH THE
8 RELIGIOUS EXEMPTION. AND IN THIS INSTANCE, INCIDENTALY --

9 **THE COURT:** WHAT CASE WAS THAT?

10 **MR. TURNER:** IT IS OREGON VERSUS SMITH AND GONZALES.

11 **THE COURT:** DO YOU HAVE A CITE?

12 SO IS THE ARGUMENT THAT IF YOU HAVE A MEDICAL
13 EXEMPTION THEN YOU HAVE TO HAVE A FREE EXERCISE EXEMPTION
14 ALSO?

15 **MR. TURNER:** THAT'S OUR POSITION, YES.

16 **THE COURT:** AND WHY IS THAT? WHAT WOULD MAKE THAT
17 REQUIREMENT?

18 **MR. TURNER:** THAT -- LET ME JUST -- WOULD IT BE
19 POSSIBLE TO HEAR FROM ATTORNEY MOXLEY ON THAT POINT?

20 **THE COURT:** YES.

21 **MR. MOXLEY:** THANK YOU, YOUR HONOR.

22 WE BELIEVE THAT THIS IS CONTROLLED BY THE SPECIFIC
23 EXEMPTION LAW EMANATING FROM THE U.S. SUPREME COURT. AND WE
24 BELIEVE THAT SMITH VERSUS OREGON, WHICH IS THE PEYOTE CASE,
25 EVEN THOUGH IT, IN THE CASE OF A GENERALLY APPLICABLE LAW,

1 TOOK AWAY STRICT SCRUTINY, IT MAINTAINED STRICT SCRUTINY IN
2 EXEMPTION AREAS. AND IT SPECIFICALLY HOLDS THAT ANY TIME
3 THERE IS A SECULAR EXEMPTION THAT THE REFUSAL TO GIVE A FIRST
4 AMENDMENT EXEMPTION AS WELL IS SUBJECT TO THE STRICTEST OF
5 SCRUTINY.

6 THEN THE GONZALES CASE IS THE DEA CASE WHERE THE
7 COURT DID UPHOLD THE CREATION OF A RELIGIOUS EXEMPTION TO --
8 FOR THE SACRAMENTAL USE OF A SOUTH AMERICAN PSYCHEDELIC DRUG
9 CALLED WASKA. AND IT FOLLOWED OREGON VERSUS SMITH WITH THE
10 DOCTRINE THAT IF A SECULAR EXEMPTION IS AVAILABLE STRICT
11 SCRUTINY REQUIRES THAT FIRST AMENDMENT EXEMPTIONS BE SEEN WITH
12 THE SAME DEGREE OF DIGNITY.

13 AND IN FACT THAT DOCTRINE, IN BETWEEN THE TIME OF
14 OREGON VERSUS SMITH AND THE GONZALES CASE, WAS APPLIED IN THE
15 NEWARK CASE, THE NEWARK FRATERNAL ORDER OF POLICE VERSUS CITY
16 OF NEWARK.

17 **THE COURT:** LET ME ASK A QUESTION HERE.

18 I AM AWARE THAT IF YOU PROVIDE AN EXEMPTION YOU HAVE
19 TO DO IT CORRECTLY. SO THE SHERR CASE, FOR EXAMPLE, THE NEW
20 YORK DISTRICT COURT CASE, STRUCK DOWN THE EXEMPTION BECAUSE IT
21 SAID FOR CERTAIN RELIGIONS YOU HAVE AN EXEMPTION, FOR OTHERS
22 YOU DON'T, BASICALLY, AND THAT WOULD BE IMPROPER.

23 BUT THE QUESTION I HAVE IS, DO YOU EVEN HAVE TO
24 PROVIDE AN EXEMPTION? THERE ARE A NUMBER OF CASES -- PRINCE
25 AND WORKMAN AND PHILLIPS AND PERHAPS OTHERS -- THAT SEEM TO BE

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1 SAYING THE STATE CAN REQUIRE VACCINATION OF SCHOOL CHILDREN
2 WITHOUT EVEN PROVIDING A FREE EXERCISE EXEMPTION.

3 **MR. MOXLEY:** WE FRANKLY DO BELIEVE THOSE CASES ARE
4 WRONG. WE BELIEVE THOSE CASES ARE COMPLETELY CONTRARY TO
5 OREGON VERSUS SMITH AND TO THE GONZALES CASE. AND WE BELIEVE
6 THAT THEY CUT AGAINST THE GRAIN OF ALL OF THE 14TH AMENDMENT
7 JURISPRUDENCE THERE IS EXCEPT FOR VACCINATIONS. WE THINK THAT
8 VACCINATIONS ARE SOMEWHAT OF A SACRED COW.

9 BUT IF YOU LOOK AT THE FUNDAMENTAL RIGHTS
10 JURISPRUDENCE THAT HAS SUCCEDED JACOBSON BY YEARS AND YEARS
11 AND YEARS, AND IF YOU LOOK EVEN BACK TO THE OLDEST RELIGIOUS
12 EXEMPTION CASES, SHERBERT VERSUS VERNER, WISCONSIN VERSUS
13 YODER, CASES THAT IN THE HYBRID RIGHTS DISCUSSION OF THE
14 SUPREME COURT HAVE STILL BEEN SAID TO HAVE COMPLETE VITALITY,
15 THOSE ARE STRICT SCRUTINY CASES AND THEY REQUIRE INDIVIDUAL
16 STRICT SCRUTINY.

17 THEY BASICALLY SAY THAT -- WELL, THERE IS ANOTHER
18 CASE HERE THAT COUNTS A LOT AND IT IS A CHURCH OF THE LUKUMI
19 BABALU AYE. THAT CASE SAYS THAT ANY LAW THAT TARGETS A
20 RELIGIOUS EXEMPTION HAS TO BE LOOKED AT WITH THE GREATEST OF
21 STRICT SCRUTINY.

22 AND WE BELIEVE THAT THE DIFFERENCE BETWEEN THIS CASE
23 AND VARIOUS OTHER CASES IS THAT WE ARE NOT FOCUSED ON THE
24 POWER OF THE STATE TO MANDATE VACCINATIONS, WE ARE FOCUSED ON
25 THE UNIQUE ASPECT OF THIS LEGISLATION WHICH IS NEW -- THERE

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1 HAS NEVER BEEN LEGISLATION THAT SAYS WE WILL ABOLISH
2 OBJECTIONS, ABOLISH CONSCIENTIOUS OBJECTIONS AND BY EXTENSION
3 ABOLISH RELIGIOUS EXEMPTIONS.

4 SO WE BELIEVE THAT THE BROAD BRUSH OF THE FIRST
5 AMENDMENT COVERS THE GREAT, GREAT MAJORITY OF ALL OF THESE
6 EXEMPTION CLAIMS.

7 AND REALLY THE ONLY OTHER SPECIES OF EXEMPTION
8 CLAIM, YOUR HONOR, IS MEDICAL EXEMPTIONS. THE ANIMUS OF ANY
9 PERSONAL BELIEF EXEMPTION THAT IS NOT ROOTED IN
10 CONSTITUTIONALLY PROTECTED CONSCIENCE IS ROOTED IN
11 CONSTITUTIONALLY PROTECTED CONCERN FOR THE WELL-BEING OF
12 CHILDREN, AND THAT PARENTS ARE ABSOLUTELY PRESUMED UNDER
13 TROXEL VERSUS GRANVILLE AND GOING ALL THE WAY BACK TO PRINCE,
14 LOTS AND LOTS OF CASES PRESUME THAT PARENTS ARE ACTING IN THE
15 BEST INTEREST OF THEIR CHILDREN.

16 SO FOR PRELIMINARY INJUNCTION PURPOSES WE BELIEVE
17 THAT THE STATE WOULD HAVE TO SOMEHOW PROVE, OR PUT ON A PRIMA
18 FACIE CASE TO SHOW, THAT THE PARENTS THAT WE REPRESENT ARE NOT
19 ACTING IN THE BEST INTEREST OF THEIR CHILDREN IN ORDER TO
20 CARRY THEIR BURDEN TO RESIST A PRELIMINARY INJUNCTION.

21 **THE COURT:** ON THE ISSUE OF -- IF WE ASSUME THAT
22 THERE ARE CASES -- AND PRINCE PERHAPS MAY BE ONE OF THEM.
23 PRINCE HAS THE FOLLOWING LANGUAGE: THE RIGHT TO PRACTICE
24 RELIGION FREELY DOES NOT INCLUDE LIBERTY TO EXPOSE THE
25 COMMUNITY OR THE CHILD TO COMMUNICABLE DISEASES, OR THE LATTER

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1 TO ILL HEALTH OR DEATH.

2 THAT LANGUAGE HAS BEEN CITED BY WORKMAN AND PHILLIPS
3 AND OTHER CASES TO STATE THAT A STATE CAN REQUIRE VACCINATION
4 OF CHILDREN WITHOUT A FREE EXERCISE EXEMPTION.

5 LET'S ASSUME THAT THAT IS A CORRECT STATEMENT OF THE
6 LAW, THAT THE STATE CAN REQUIRE VACCINATION AND NOT PROVIDE A
7 FREE EXERCISE EXEMPTION. WOULDN'T THAT NECESSARILY MEAN THAT
8 A STATE CAN PROVIDE FOR MANDATORY VACCINATION AND NOT PROVIDE
9 FOR PERSONAL BELIEF EXEMPTION?

10 **MR. MOXLEY:** LET ME RESPOND TO THAT.

11 **THE COURT:** YES.

12 **MR. TURNER:** THERE ARE TWO THINGS.

13 FIRST OF ALL, THE STANDARD THAT YOU READ, WE ARE
14 SAYING THEY HAVE TO PROVE IT. THEY HAVE TO PROVE THAT WHAT
15 THEY ARE DOING BY REMOVING THESE PERSONAL BELIEF EXEMPTIONS
16 FITS THAT STANDARD. WE ARE SAYING THEY HAVE NOT DONE THAT;
17 AND NOT ONLY THAT, THEY CANNOT DO THAT.

18 THERE IS NO EVIDENCE THAT REMOVING THESE PERSONAL
19 BELIEF EXEMPTIONS IN FACT IMPROVES THE HEALTH OF THE
20 COMMUNITY; AND IN FACT WE WOULD ARGUE IN SOME INSTANCES IT MAY
21 ACTUALLY UNDERMINE THE HEALTH OF THE COMMUNITY.

22 **THE COURT:** THAT ARGUMENT CONCEDES THAT A STATE CAN
23 REQUIRE VACCINATION WITHOUT A PERSONAL BELIEF EXEMPTION.

24 **MR. TURNER:** I ACCEPTED YOU PRESENTED THAT AS THE
25 PREMISE OF YOUR QUESTION.

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1 **THE COURT:** YES.

2 **MR. TURNER:** I WAS SAYING ACCEPTING THAT PREMISE,
3 EVEN WITH THAT PREMISE THERE IS A STANDARD THAT HAS TO BE MET
4 IN ORDER FOR THE STATE TO ACTUALLY DO WHAT WAS SAID IN THAT --
5 IN WHAT YOU READ.

6 **THE COURT:** YES.

7 **MR. TURNER:** AND NOW ALSO I JUST WANT TO MENTION, IF
8 I COULD, ATTORNEY ROSENBERG, KIM ROSENBERG, WOULD LIKE TO
9 SPEAK ON THAT POINT. IS THAT POSSIBLE?

10 **THE COURT:** YES.

11 **MS. ROSENBERG:** THANK YOU VERY MUCH, YOUR HONOR.

12 **THE COURT:** YOU ARE WELCOME.

13 **MR. MOXLEY:** THANK YOU, YOUR HONOR.

14 **MR. TURNER:** ALSO, YOUR HONOR, I DO HAVE THE
15 CITATIONS FOR THOSE CASES IF YOU WOULD LIKE THEM.

16 **THE COURT:** YES. BEFORE WE CLOSE I WOULD LIKE
17 THOSE.

18 **MS. ROSENBERG:** THANK YOU, YOUR HONOR. I APPRECIATE
19 YOUR INDULGENCE IN ALLOWING ME TO SPEAK.

20 IN OUR PERSPECTIVE MANDATES AREN'T THE ISSUE HERE.
21 SB 277 DOESN'T ACTUALLY TOUCH THE MANDATES UNDER CALIFORNIA
22 LAW, THE MANDATES THAT WERE UNDER HEALTH AND SAFETY CODE
23 120325(A)(1) THROUGH (10) AND 120335(A)(1) THROUGH (10) REMAIN
24 IN PLACE, REGARDLESS OF WHETHER THE INJUNCTION ISSUES OR NOT.
25 WE BELIEVE THAT THE COMPELLING INTEREST, STATE

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1 INTEREST, THAT THEY NEED TO SHOW TO SURVIVE STRICT SCRUTINY IS
2 A COMPELLING INTEREST IN REMOVING PERSONAL BELIEF EXEMPTIONS.
3 AND WE BELIEVE THEY HAVEN'T AND CANNOT MEET THAT HERE.

4 IN PART ONE ISSUE IS THAT PERSONAL BELIEF EXEMPTIONS
5 WERE ACTUALLY DECLINING UNDER AB 2109, AND THEY WENT FROM 3.15
6 PERCENT IN 2013/2014 DOWN TO 2.4 PERCENT THE FOLLOWING YEAR.
7 AND LAST YEAR THEY WERE DOWN TO 2.38 PERCENT.

8 SO AB 2109 WAS, WHILE PUTTING BURDENS ON FAMILIES TO
9 GO TO DOCTORS IN ORDER TO OBTAIN PBE'S, WAS STILL ALLOWING
10 THEM TO EXERCISE THAT FUNDAMENTAL RIGHT AND WAS ALSO REDUCING
11 THE RATE OF PERSONAL BELIEF EXEMPTIONS. SO THERE WAS A BURDEN
12 BUT IT WASN'T AN UNDUE BURDEN. AND IT WAS A SUCCESSFUL AND --
13 WAS A SUCCESSFUL LAW WHILE IT WAS IN PLACE, AND BALANCED THE
14 INTERESTS OF THE STATE AND THE PERSONAL FUNDAMENTAL INTERESTS
15 OF FAMILIES AND INDIVIDUALS.

16 BUT THE OTHER ISSUE, YOUR HONOR, IS THAT THERE
17 ARE -- EVEN WITHOUT THE PERSONAL BELIEF EXEMPTION THERE ARE
18 EXEMPTIONS IN SB 277 IN ADDITION TO THE MEDICAL EXEMPTION.
19 THERE ARE EXEMPTIONS FOR IEP STUDENTS. THAT CREATES ISSUES
20 THAT WE RAISED IN OUR PAPER WITH RESPECT TO 504 STUDENTS AND
21 EQUAL PROTECTION AS WELL. BUT THERE ARE EXEMPTIONS FOR IEP
22 STUDENTS.

23 THERE ARE EXEMPTIONS FOR HOME SCHOOLERS WHO CHOOSE
24 HOME SCHOOLING AS THEIR EDUCATIONAL CHOICE. THERE ARE
25 EXEMPTIONS FOR STUDENTS ENGAGED IN INDEPENDENT STUDY.

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1 AND THERE ARE EXEMPTIONS FOR EVERY STUDENT EXCEPT
2 STUDENTS IN KINDERGARTEN AND 7TH GRADE WHO ARE THE STUDENTS
3 WHO WILL BE EXCLUDED FROM SCHOOL THIS YEAR IF AN INJUNCTION
4 DOESN'T ISSUE. BUT STUDENTS IN FIRST GRADE, SECOND GRADE,
5 SIXTH GRADE, WHO ARE REALLY NO DIFFERENT -- AND, YOU KNOW,
6 EIGHTH GRADE THROUGH 12TH GRADE, REALLY NO DIFFERENT THAN THE
7 KINDERGARTENERS OR 7TH GRADERS, ARE BEING ALLOWED TO REMAIN IN
8 SCHOOL WITH THEIR PERSONAL BELIEF EXEMPTIONS.

9 **THE COURT:** DOESN'T THAT, THOUGH, JUST ALLOW FOR AN
10 ORDERLY PROCESS; IN OTHER WORDS, IT GIVES TIME. INSTEAD OF
11 200,000 CHILDREN ALL AT ONCE, IT IS 33,000 AND THEN
12 STAIR-STEPS, BASICALLY.

13 **MS. ROSENBERG:** FRANKLY, YOUR HONOR, WE BELIEVE THAT
14 IS A MATTER OF ADMINISTRATIVE EASE. THERE IS NO REAL
15 COMPELLING INTEREST IN DOING THAT. THERE IS NO DIFFERENCE
16 FROM A PUBLIC HEALTH PERSPECTIVE IF THEY ARE ARGUING THAT
17 THESE CHILDREN PRESENT A PUBLIC HEALTH RISK. THERE IS NO
18 DIFFERENCE.

19 AND WE DISPUTE THAT, YOUR HONOR, BY THE WAY,
20 VEHEMENTLY. THESE CHILDREN ARE HEALTHY CHILDREN. THEY ARE
21 NOT VECTORS OF DISEASE, THEY DO NOT CARRY DISEASES. THEY ARE
22 NOT PRESENTING A PUBLIC HEALTH RISK. BUT THERE IS NO
23 DIFFERENCE BETWEEN A 7TH GRADER AND A 6TH GRADER, OR A 7TH
24 GRADER AND AN 11TH GRADER, SO THERE IS NO LEGITIMATE INTEREST
25 AND COMPELLING INTEREST IN THAT GRANDFATHERING PROGRAM.

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1 **THE COURT:** SO MAYBE I WOULD LIKE TO FOLLOW UP WITH
2 YOU.

3 AGAIN, THIS REQUIRES THE ACCEPTANCE OF THE
4 PROPOSITION THAT THERE IS CASE LAW THAT INDICATES YOU CAN HAVE
5 MANDATORY VACCINATION WITHOUT PROVIDING A FREE EXERCISE
6 EXEMPTION.

7 IF THAT IS THE LAW, THEN A STATE COULD REQUIRE
8 VACCINATION WITHOUT PROVIDING A PERSONAL BELIEF EXEMPTION.
9 AND IF THAT IS THE CASE, WHAT WOULD BE IMPERMISSIBLE,
10 UNLAWFUL, UNCONSTITUTIONAL, IN TAKING AWAY THAT WHICH IS NOT
11 REQUIRED IN THE FIRST INSTANCE. SO, IN OTHER WORDS, IF A PBE
12 IS NOT REQUIRED UNDER THE LAW, CALIFORNIA NEVER HAD TO GIVE IT
13 IN THE FIRST INSTANCE, HOW CAN IT BE IMPROPER TO TAKE IT AWAY?

14 **MS. ROSENBERG:** WE BELIEVE IT IS IMPROPER TO TAKE IT
15 AWAY WHEN THE STATE LEAVES IN PLACE A VARIETY OF OTHER
16 EXEMPTIONS THAT ALLOWS STUDENTS TO ATTEND SCHOOL. AND THOSE
17 EXEMPTIONS -- IT INVOLVES AN ARBITRARY AND CAPRICIOUS EXERCISE
18 OF POLICE POWER WITH -- JACOBSON IS ACTUALLY VERY CLEAR IS NOT
19 ALLOWED. POLICE POWER CAN GO UP TO -- UP TO A POINT, BUT WHEN
20 IT OVERSTEPS THOSE BOUNDS AND BECOMES ARBITRARY AND CAPRICIOUS
21 THEN IT IS NOT ALLOWABLE.

22 AND WE BELIEVE THAT THAT IS EXACTLY WHAT SB 277 HAS
23 DONE FOR THE REASONS THAT I STATED REGARDING THE VARIOUS TYPES
24 OF EXEMPTIONS THAT IT ALLOWS AND DOESN'T ALLOW.

25 **THE COURT:** ALL RIGHT. SO IF I UNDERSTAND THE

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1 RESPONSE IT IS THAT THE PROBLEM HERE IS THAT THE REMOVAL OF
2 THE PBE, EVEN IF IT DIDN'T HAVE TO BE GRANTED IN THE
3 BEGINNING, IT HAS TO BE DONE IN A MANNER THAT COMPORTS WITH
4 STRICT SCRUTINY.

5 **MS. ROSENBERG:** PRECISELY, YOUR HONOR.

6 YOUR HONOR, IF I COULD ADDRESS -- YOU HAD RAISED
7 SOME OF THE CASES, PRINCE AND JACOBSON, PHILLIPS.

8 **THE COURT:** YES.

9 **MS. ROSENBERG:** PHILLIPS IS A NEW YORK CASE THAT NEW
10 YORK HAS A RELIGIOUS EXEMPTION TO VACCINATION, IT IS BASED ON
11 SINCERE -- PERSONAL AND SINCERE RELIGIOUS BELIEFS.

12 THE PHILLIPS CASE ADDRESSED A VERY LIMITED ISSUE
13 WITH RESPECT TO WHETHER STUDENTS WITH RELIGIOUS EXEMPTIONS
14 COULD BE EXCLUDED FROM SCHOOL DURING AN OUTBREAK. THAT IS
15 WHAT THE LAW IS UNDER AB 2109 AS WELL. WE ARE NOT DISPUTING
16 THAT. THAT WAS THE SAME WITH THE MARICOPA CASE THAT
17 DEFENDANTS RELIED ON.

18 WORKMAN DOES NOT ADDRESS THE FUNDAMENTAL EDUCATIONAL
19 ISSUE THAT IS AT STAKE HERE AND DOES NOT ENGAGE IN A STRICT
20 SCRUTINY ANALYSIS. AND A NUMBER OF THE OTHER CASES THAT THEY
21 CITE ARE SIMILARLY DISTINGUISHABLE.

22 PRINCE WAS A CASE -- IT IS ACTUALLY IRONIC THAT THEY
23 CITE PRINCE. PRINCE WAS A CASE THAT WAS WORKING TO GET
24 CHILDREN BACK INTO SCHOOL; NOT KEEP THEM OUT OF SCHOOL. AND
25 THEY ARE USING IT TO TRY TO EXCLUDE CHILDREN FROM SCHOOL NOW.

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1 **THE COURT:** ALL RIGHT.

2 ON THE FUNDAMENTAL RIGHT TO EDUCATION UNDER THE
3 CALIFORNIA CONSTITUTION, WHAT IS THE RESPONSE TO THE ARGUMENT
4 THAT THAT RIGHT REMAINS, IT IS A ROBUST RIGHT. THAT RIGHT IS
5 PROVIDED BY THE CALIFORNIA CONSTITUTION, IT WAS NOT PROVIDED
6 BY THE PERSONAL BELIEF EXEMPTION. SO IF IT IS NOT BEING
7 PROVIDED BY THE PERSONAL BELIEF EXEMPTION, IF ONE REMOVES THE
8 PBE HOW IS THAT A VIOLATION OF A FUNDAMENTAL RIGHT. IT IS THE
9 REMOVAL OF A STATUTORY RIGHT THAT NEVER CONFERRED A RIGHT TO
10 EDUCATION, RATHER THAT IS A CONSTITUTIONAL STAND-ALONE RIGHT.

11 **MS. ROSENBERG:** YOUR HONOR, I BELIEVE THAT BY
12 REMOVING THE PBE IT PREVENTS CHILDREN FROM ACTUALLY ACCESSING
13 EDUCATION AND TAKING ADVANTAGE OF THEIR CONSTITUTIONAL RIGHT
14 TO A PUBLIC -- TO A CLASSROOM-BASED EDUCATION. WITHOUT THE
15 PBE THEY CANNOT ACCESS EDUCATION TO WHICH THEY ARE ENTITLED.

16 **THE COURT:** ULTIMATELY, AS I UNDERSTAND THE
17 ARGUMENT, IN PRACTICAL TERMS, THE QUARREL WITH REPEALING THE
18 PBE IS THAT IT FORCES A HOBSON'S CHOICE ON PARENTS; THAT IS,
19 TO VACCINATE THEIR CHILDREN, OR NOT. IF THEY CHOOSE THE
20 LATTER THEN THEIR OPTION IS HOME SCHOOLING. AND THAT THAT
21 HOBSON'S CHOICE IS FUNDAMENTALLY UNFAIR AND DOES NOT PASS
22 STRICT SCRUTINY.

23 **MS. ROSENBERG:** CORRECT, YOUR HONOR.

24 I THINK, AS WE DEMONSTRATED IN OUR PAPERS AND IN THE
25 VARIOUS DECLARATIONS FROM OUR PLAINTIFFS, PLAINTIFFS WILL BE

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1 IRREPARABLY HARMED BY THIS. A NUMBER OF PLAINTIFFS, MANY OF
2 WHOM ARE HERE TODAY, THE NICOLAISENS, FOR EXAMPLE, HAVE
3 DEMONSTRATED VERY CLEARLY IN THEIR DECLARATIONS THAT THEY
4 CANNOT AFFORD TO HOME SCHOOL. THAT HOME SCHOOLING IS
5 REQUIRING THEM TO MAKE VERY DIFFERENT CHOICES.

6 VERONICA DELGADO SIMILARLY HAS A NUMBER OF CHILDREN,
7 HAS EXPRESSED THE MEANS IN WHICH HOME SCHOOLING WOULD BE VERY
8 CHALLENGING FOR HER. SHE HAS TWO CHILDREN WITH IEP'S, THAT
9 CREATES ADDITIONAL CHALLENGES.

10 AND, YOUR HONOR, IF I MAY. YOU MENTIONED THAT
11 PARENTS WOULD HAVE TO CHOOSE BETWEEN VACCINATING AND SENDING
12 THEIR CHILDREN TO SCHOOL. MANY OF THESE CHILDREN -- ALL OF
13 OUR PLAINTIFFS HAVE CHILDREN WHO ARE PARTIALLY VACCINATED.
14 THESE ARE NOT FULLY UNVACCINATED CHILDREN.

15 I THINK IT IS A MISNOMER THAT IS CARRIED THROUGH IN
16 DEFENDANTS' ARGUMENTS. AND THESE CHILDREN ARE NOT -- AGAIN,
17 THEY ARE NOT VECTORS OF DISEASE. MANY OF THEM HAVE RECEIVED
18 ALMOST ALL OF THE VACCINES REQUIRED.

19 PARENTS ARE REALLY ENGAGING IN PRECISE -- PRECISION
20 MEDICINE IN ORDER TO MAKE THE BEST CHOICES IN THE BEST
21 INTEREST OF THEIR CHILDREN AND THEIR CHILDREN'S HEALTH. AND
22 THE STATE HAS GIVEN NO EVIDENCE THAT THE PARENTS -- AS
23 MR. MOXLEY SAID, NO EVIDENCE WHATSOEVER THAT THE PARENTS
24 AREN'T ACTING IN THEIR CHILDREN'S BEST INTEREST.

25 **THE COURT:** ALL RIGHT. AND THAT IS A FAIR

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1 DISTINCTION. I UNDERSTAND THAT, THAT MOST OF THE CHILDREN ARE
2 PARTIALLY VACCINATED AND PARENTS ARE PARSING WHICH VACCINES
3 THEY WOULD LIKE TO CHALLENGE AMONG THE 10 ENUMERATED VACCINES.

4 **MS. ROSENBERG:** IN FACT, YOUR HONOR, FOR SOME OF OUR
5 PLAINTIFFS IT IS NOT EVEN THAT THEY ARE CHOOSING SOME VACCINES
6 OR NOT OTHER VACCINES. SOME WOULD PREFER, FOR HEALTH REASONS
7 AND BASED ON THEIR OWN CHILDREN'S MEDICAL CONDITIONS, TO
8 VACCINATE THEIR CHILDREN ON A SLOWER SCHEDULE. MS. LOY, FOR
9 EXAMPLE, IS ONE SUCH PLAINTIFF, AND DR. SCHUTZE-ALVA IS
10 ANOTHER, WHO ARE VACCINATING THEIR CHILDREN ON A SLOWER
11 SCHEDULE. THEIR SCHOOLS WERE UNWILLING TO ACCEPT LETTERS FROM
12 THEIR DOCTORS INDICATING THAT THESE CHILDREN WERE WORKING
13 TOWARD COMPLIANCE WITH VACCINATION MANDATES BUT WERE DOING SO
14 ON A DIFFERENT SCHEDULE.

15 **THE COURT:** ALL RIGHT. THANK YOU.

16 LET ME ASK A FEW QUESTIONS OF MR. RICH, AND THEN WE
17 CAN CIRCLE BACK TO PLAINTIFFS' COUNSEL.

18 MR. RICH, DO YOU AGREE THAT STRICT SCRUTINY APPLIES
19 WITH RESPECT TO THE CALIFORNIA CONSTITUTIONAL CLAIM?

20 **MR. RICH:** IF THIS CASE IMPLICATED THE RIGHT TO
21 EDUCATION UNDER THE CALIFORNIA CONSTITUTION IT WOULD; BUT OUR
22 POSITION IS THAT IT DOES NOT.

23 THE RIGHT TO EDUCATION IS A RIGHT THAT BELONGS TO
24 THE CHILDREN. THE OBLIGATION TO ENROLL CHILDREN IN SCHOOL
25 CORRESPONDS TO THAT RIGHT. THAT OBLIGATION BELONGS TO THE

1 PARENTS. SPECIFICALLY UNDER THE CALIFORNIA EDUCATION CODE
2 UNDER SECTION 48216 THAT PARENTS HAVE TO CONFORM TO THE
3 MANDATORY VACCINATION STATUTE WHEN DECIDING WHETHER TO ENROLL
4 THEIR KIDS, AND SECTION 48293 WHICH MAKES IT A VIOLATION OF
5 LAW NOT TO ENROLL YOUR CHILD WHEN TO DO SO IS COMPELLED BY
6 STATE STATUTE.

7 SO I THINK THAT THE -- WITH ALL DUE RESPECT TO
8 PLAINTIFFS' COUNSEL, I BELIEVE THAT THEY ARE IMPROPERLY
9 CONFLATING THESE TWO ISSUES.

10 SB 277 DOES NOT TARGET THE CHILDREN'S RIGHT TO AN
11 EDUCATION INSOFAR AS IT IS PRECLUDING CHILDREN FROM BEING
12 EDUCATED; SB 277 IS TARGETED TO THE PARENTS' OBLIGATION TO
13 PROPERLY ENROLL THEIR CHILDREN WITHIN THE CONFINES OF THE LAW.

14 IF IN FACT A PARENT DOES NOT COMPLY WITH SB 277, IT
15 IS NOT THE CHILD WHO IS BEING PUNISHED. THE CHILD IS NOT, AS
16 A MATTER OF LAW, BEING DEPRIVED OF THEIR RIGHT TO AN
17 EDUCATION; IT IS THE PARENT WHO IS IN VIOLATION OF LAW, IT IS
18 THE PARENT WHO IS SUBJECT TO PENALTY, AND IT IS BECAUSE IT IS
19 THE PARENT WHO IS MAKING THAT DECISION ON BEHALF OF THE CHILD.

20 SB 277, THEREFORE, DOES NOT INFRINGE UPON ANY
21 CONSTITUTIONAL RIGHT OF CHILDREN TO AN EDUCATION. TO THE
22 CONTRARY, AS WE HAVE ARGUED, IT IS INTENDED TO PROMOTE THE
23 RIGHT TO EDUCATION OF EVERY CHILD IN CALIFORNIA SO THAT THEY
24 CAN RECEIVE AN EDUCATION IN A SAFE AND HEALTHY ENVIRONMENT.

25 SO BEFORE WE EVEN GET TO THE LEVEL OF SCRUTINY THE

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1 FIRST STEP IS TO DETERMINE WHETHER OR NOT THERE IS ACTUALLY AN
2 INFRINGEMENT OF THE STATE CONSTITUTIONAL RIGHT. AND WITH ALL
3 DUE RESPECT TO PLAINTIFFS' COUNSEL, WE INSIST THAT THAT FIRST
4 STEP HAS NOT BEEN MET HERE.

5 NOW, IF YOUR HONOR WOULD LIKE I CAN ADDRESS, UNDER
6 WHAT WE BELIEVE IS THE FALSE ASSUMPTION THAT THERE IS AN
7 INFRINGEMENT, WE DO BELIEVE THAT THE STATUTE SATISFIES STRICT
8 SCRUTINY, ALTHOUGH IT NEED NOT DO SO.

9 **THE COURT:** AND THE ARGUMENT THERE, FROM THE
10 BRIEFING, IS THAT THERE IS THE COMPELLING INTEREST OF
11 PREVENTING CONTAGIOUS DISEASES, AND THAT THIS LAW IS NARROWLY
12 TAILORED IN THAT IT IDENTIFIES THE 10 DISEASES.

13 **MR. RICH:** CORRECT. IT IS NARROWLY TAILORED BECAUSE
14 IT IDENTIFIES 10 DISEASES.

15 THERE IS A PROVISION OF SB 277 IN FACT, YOUR HONOR,
16 THAT STILL PERMITS PBE'S. IT IS -- IF YOU GIVE ME A MOMENT I
17 WILL FIND THE CITATION.

18 BUT IT IS HEALTH AND SAFETY CODE SECTION 120338,
19 WHICH SPECIFICALLY STATES THAT PBE'S -- THAT THE ELIMINATION
20 OF THE PBE EXEMPTION APPLIES ONLY TO THE 10 IDENTIFIED
21 DISEASES IN SB 277.

22 THERE IS A CATCH-ALL PROVISION, PARAGRAPH NO. 11 OF
23 120335 AND 120325, WHICH PERMITS MANDATORY VACCINATIONS FOR
24 ADDITIONAL DISEASES WITHIN THE DISCRETION OF THE DEPARTMENT OF
25 PUBLIC HEALTH SO LONG AS IT COMPLIES WITH VARIOUS NATIONAL

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1 STANDARDS. SECTION 120338 SPECIFICALLY SAYS WITH REGARD TO
2 THOSE SO FAR AS YET UNIDENTIFIED MANDATORY VACCINATIONS
3 EXEMPTIONS ARE ALLOWED FOR BOTH MEDICAL REASONS AND PERSONAL
4 BELIEFS.

5 SO NOT ONLY IS IT NARROWLY TAILORED TO THE 10, IT
6 ALSO PRESERVES THE PERSONAL BELIEF EXEMPTION TO VACCINATIONS
7 THAT ARE NOT AS YET ACKNOWLEDGED OR RECOGNIZED, AT LEAST BY
8 THE LEGISLATURE, TO REQUIRE MANDATORY VACCINATIONS
9 IRRESPECTIVE OF THE PARENTS' PERSONAL BELIEFS.

10 THE STATUTE IS ALSO NARROWLY TAILORED FOR A NUMBER
11 OF OTHER REASONS. PLAINTIFFS' COUNSEL ACKNOWLEDGE THERE IS A
12 MEDICAL EXEMPTION. AND THAT, BY THE WAY, IS ENTIRELY
13 CONSISTENT WITH JACOBSON WHICH, IF MEMORY SERVES ME RIGHT, THE
14 LANGUAGE THAT THE PLAINTIFFS WERE RELYING UPON WITH REGARD TO
15 JACOBSON SETTING MAXIMUM LIMITS IN PRINCIPLE, THE COURT
16 ACTUALLY WAS REFERRING TO INSTANCES WHERE A VACCINATION MAY DO
17 PHYSICAL HARM TO THE RECIPIENT. AND IN THAT CASE THE COURT
18 WAS RESERVING ITS DECISION FOR SUCH CIRCUMSTANCES.

19 SO THE MEDICAL EXEMPTION IS NOT CONTRARY TO
20 JACOBSON; IN FACT IT IS COMPLETELY CONSISTENT WITH IT.

21 **THE COURT:** ON THE FEDERAL CLAIMS, WHAT ABOUT THE
22 HYBRID RIGHTS THEORY?

23 **MR. RICH:** AGAIN, I AM AFRAID I DO NOT AGREE WITH
24 THE PLAINTIFFS ON THAT CASE. THE CASE THAT THEY WERE
25 REFERRING TO, OREGON -- AS THEY CHARACTERIZE IT OREGON V.

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1 SMITH, AS I UNDERSTAND IT IS CITED AS EMPLOYMENT DIVISION
2 VERSUS SMITH.

3 AND YOU ASKED FOR THE -- THE COURT ASKED FOR A
4 CITATION, AND IT IS AT 494 U.S. 872, 1990. IF YOUR HONOR
5 NEEDS I COULD CITE THE PARALLEL CITES, IF YOU NEED THEM.

6 **THE COURT:** THAT'S ALL RIGHT.

7 **MR. RICH:** ALL RIGHT.

8 THE HYBRID RIGHTS SO-CALLED DOCTRINE IS REALLY NOT A
9 DOCTRINE THAT HAS BEEN UNIFORMLY ACCEPTED BY THE CIRCUIT.

10 **THE COURT:** ISN'T IT ACCEPTED IN THE NINTH CIRCUIT,
11 THOUGH?

12 **MR. RICH:** NO, IT IS NOT, YOUR HONOR. I DISAGREE
13 WITH THAT, WITH ALL DUE RESPECT.

14 THE PLAINTIFFS CITED TO THE THOMAS CASE, WHICH HAD
15 APPARENTLY -- THE PANEL IN THOMAS HAD APPLIED THE HYBRID
16 RIGHTS -- THE HYBRID RIGHTS DOCTRINE.

17 **THE COURT:** IS THAT THE PICKUP CASE, PICKUP V.
18 THOMAS, PERHAPS?

19 **MR. RICH:** IT IS THOMAS VERSUS ANCHORAGE EQUAL
20 RIGHTS COMMISSION, I BELIEVE.

21 **THE COURT:** ISN'T THERE ANOTHER CASE, PICKUP. IT IS
22 AN ALASKA CASE WITH JUDGE O'SCANNLAIN?

23 **MR. RICH:** RIGHT. THAT IS THE ONE THAT I AM
24 REFERRING TO, YOUR HONOR. BUT WHEN I SHEPARDIZED THE CASE
25 THAT WAS CITED IN PLAINTIFFS' BRIEF, THAT THOMAS CASE, THE

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1 DECISION WAS WITHDRAWN. IT IS NO LONGER PUBLISHED. IN FACT I
2 COULDN'T EVEN READ THE CASE, AT LEAST UNDER LEXIS, IT WOULDN'T
3 ALLOW ME TO.

4 THAT MAY BE INCORRECT ON MY PART. I CERTAINLY
5 INVITE THE COURT TO DOUBLE CHECK ME ON THAT.

6 BUT SINCE THAT CASE, AS YOUR HONOR HAS POINTED OUT,
7 THE OTHER THOMAS CASE IN 2000, IN HIS CONCURRING OPINION,
8 JUSTICE O'SCANNLAIN OBSERVED THAT IT HAS BEEN DEEMED A LIVE
9 CONTROVERSY ARISING IN ONE OF THE STATES OF THIS CIRCUIT,
10 SMITH IS FRAUGHT WITH COMPLEXITY BOTH IN DOCTRINE AND IN
11 PRACTICE. IN FACT OBSERVED THAT THE MAJORITY AVOIDED THE
12 ISSUE, AND HE THOUGHT PRUDENTLY SO, UNTIL THE SUPREME COURT
13 CLARIFIED WHAT IT MEANT BY THE LANGUAGE IN SMITH.

14 SINCE THAT THOMAS CASE THERE ARE TWO OTHER CASES IN
15 THE NINTH CIRCUIT -- PARDON ME -- THREE OTHER CASES -- PARDON
16 ME -- I WAS RIGHT THE FIRST TIME, TWO OTHER CASES IN THE NINTH
17 CIRCUIT.

18 IN 2008 IN THE JACOBS CASE, 526 F.3RD 419, THE COURT
19 SPECIFICALLY DECLINED TO APPLY THE HYBRID RIGHTS TEST. IN
20 FOOTNOTE 45 THE COURT STATES: WE REJECT PLAINTIFFS'
21 CONTENTION THAT JACOBS AND DRESSER RAISED HYBRID RIGHTS CLAIMS
22 THAT SHOULD BE SUBJECTED TO STRICT SCRUTINY. THE HYBRID
23 RIGHTS DOCTRINE HAS BEEN WIDELY CRITICIZED. AND IN FACT CITES
24 TO THE DISSENTING OPINION OF JUSTICE SOUTER IN CITY OF
25 HIALEAH, EXPLAINING WHY THE DOCTRINE IS ULTIMATELY UNTENABLE.

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1 AND THEN THERE IS A STRING CITE TO SEVERAL OTHER CASES CALLING
2 THE DOCTRINE COMPLETELY ILLOGICAL. DECLINING TO -- THE SIXTH
3 CIRCUIT DECLINED TO RECOGNIZE IT UNTIL THE SUPREME COURT
4 EXPRESSLY DOES SO ITSELF.

5 **THE COURT:** YOUR VIEW OF THE BOTTOM LINE IS THE
6 NINTH CIRCUIT, PICKUP VERSUS -- I THINK WE ARE TALKING ABOUT
7 THE SAME CASE -- THOMAS, HAS BEEN WITHDRAWN.

8 **MR. RICH:** THAT IS MY UNDERSTANDING, YOUR HONOR.
9 CORRECT.

10 **THE COURT:** SO --

11 **MR. RICH:** THERE IS ONE MORE CITE, YOUR HONOR, I
12 WON'T BELABOR YOU WITH, BUT I WILL JUST GIVE YOU THE CITATION.
13 THE STEVENS CASE, WHICH IS, I BELIEVE, OUT OF THIS DISTRICT,
14 810 F.SUPP. 2D 1074.

15 NOW, IN THERE THE COURT ASSUMED WITHOUT DECIDING
16 THAT THE COMPELLING INTEREST ANALYSIS APPLIED TO THE HYBRID
17 RIGHTS CLAIM, BUT SKIRTED THE ISSUE WITHOUT ADOPTING IT,
18 ACKNOWLEDGING THE INSTABILITY OF THE ALLEGED DOCTRINE AND
19 SIMPLY HELD THAT IT MET THE TEST, IN ANY EVENT.

20 **THE COURT:** ALL RIGHT. SO YOU WOULD STAND ON THE
21 ARGUMENTS YOU RAISED IN THE BRIEFING, THAT THE RATIONAL BASIS
22 TEST WOULD APPLY TO THE FEDERAL CLAIMS.

23 **MR. RICH:** THAT IS CORRECT, YOUR HONOR.

24 **THE COURT:** WHAT ABOUT --

25 **MR. RICH:** I AM SORRY.

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1 THAT BEING SAID, NEVERTHELESS, SHOULD STRICT
2 SCRUTINY APPLY WE BELIEVE WITHOUT HESITATION THAT SB 277
3 FULFILLS STRICT SCRUTINY. AND WE -- FOR THE REASONS STATED IN
4 OUR BRIEF.

5 **THE COURT:** DO YOU -- AND PERHAPS YOU ARGUED IT
6 EXPLICITLY, THIS CONCEPT THAT I HAD ASKED PLAINTIFFS' COUNSEL
7 ABOUT. IS IT THE STATE'S POSITION THAT CALIFORNIA CAN REQUIRE
8 VACCINATION OF SCHOOL CHILDREN EVEN WITHOUT PROVIDING A FREE
9 EXERCISE EXEMPTION?

10 **MR. RICH:** ABSOLUTELY, YOUR HONOR. FOR ALL OF THE
11 REASONS STATED BY YOU IN YOUR QUESTIONING, THOSE VERY CASES WE
12 HAD INTENDED TO BRING TO YOUR ATTENTION IN THIS ARGUMENT.

13 IF I MAY ALSO, WITH REGARD TO THE RIGHT TO
14 EDUCATION, THERE IS ACTUALLY -- THERE ARE TWO CASES THAT
15 ACTUALLY ADDRESS MANDATORY VACCINATIONS IN THE CONTEXT OF THE
16 CONSTITUTIONAL RIGHT -- A STATE CONSTITUTIONAL RIGHT TO AN
17 EDUCATION, AND ONE OF THEM IS IN FACT BY THE CALIFORNIA
18 SUPREME COURT. IT IS THE FRENCH CASE THAT WE CITED IN OUR
19 BRIEF.

20 **THE COURT:** IS THAT --

21 **MR. RICH:** FRENCH VERSUS DAVIDSON.

22 AND ON PAGE 662 -- AND IT SHOULD BE NOTED THAT THE
23 CASE WAS DECIDED IN 1994, AFTER THE ENACTMENT OF THE
24 CALIFORNIA CONSTITUTIONAL PROVISION PROVIDING FOR A RIGHT TO
25 PUBLIC EDUCATION, WHICH I BELIEVE WAS ADOPTED IN 1879.

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1 AND IN THAT CASE, WITHOUT MUCH FURTHER DISCUSSION, I
2 WILL AGREE, BUT THE COURT STATES ON PAGE 662 -- AND THIS IS AT
3 THE 143 CAL. 658 CITATION. REFERRING TO THE STATUTE IT SAYS
4 IT IN NO WAY INTERFERES WITH THE RIGHT OF THE CHILD TO ATTEND
5 SCHOOL PROVIDED THE CHILD COMPLIES WITH THE PROVISIONS.

6 NOW, THERE IS ANOTHER CASE THAT WAS IN FACT CITED BY
7 JACOBSON AND DISCUSSED AT LENGTH IN JACOBSON, WHICH COMES OUT
8 OF THE NEW YORK COURT OF APPEAL, VIEMEISTER VERSUS WHITE. AND
9 THE CITATION FOR THAT IS RATHER ANCIENT. IT IS 70 L.R.A. 796.
10 IT IS REPORTED IN THE NEW YORK REPORTS AT 179 NEW YORK 235.

11 AND THERE THE NEW YORK COURT OF APPEALS SPECIFICALLY
12 ADDRESSED A CHALLENGE TO NEW YORK'S MANDATORY VACCINATION
13 STATUTE AS A VIOLATION OF NEW YORK'S CONSTITUTIONAL PROVISION
14 ENSURING THE RIGHT TO AN EDUCATION, WHICH IS SUBSTANTIALLY --
15 IS VIRTUALLY IDENTICAL TO CALIFORNIA'S.

16 AND IN THAT CASE THE COURT SPECIFICALLY HELD THAT
17 THE RIGHT TO ATTEND THE PUBLIC SCHOOLS OF THE STATE IS
18 NECESSARILY SUBJECT TO SOME RESTRICTIONS AND LIMITATIONS IN
19 THE INTEREST OF THE PUBLIC HEALTH. THEN HELD THAT IN FACT
20 THAT MANDATORY VACCINATION STATUTE IN NEW YORK SURVIVED
21 NOTWITHSTANDING THE CONSTITUTIONAL RIGHT TO AN EDUCATION.

22 THERE IS A THIRD CASE OUT OF CALIFORNIA WHICH I
23 THINK GOES TO YOUR HONOR'S QUESTION AS TO THE NECESSITY OF A
24 PERSONAL BELIEF OR A RELIGIOUS EXEMPTION. THAT CASE IS THE
25 WILLIAMS CASE CITED IN OUR BRIEF. THAT CASE -- THE CITE TO

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1 THAT IS 23 CAL.APP. 619, THE COURT OF APPEAL OUT OF THE FIRST
2 DISTRICT OF CALIFORNIA.

3 IN THAT CASE AT ISSUE WAS A CHALLENGE TO A PROVISION
4 BY THE CALIFORNIA BOARD OF REGENTS GOVERNING THE UNIVERSITY
5 ADMISSION, WHICH DID NOT CONTAIN ANY PERSONAL BELIEF
6 EXEMPTION, REQUIRED VACCINATIONS.

7 APPARENTLY, CONTRARY TO WHAT COUNSEL HAS --
8 UNDERSTANDS, THERE WAS A PERSONAL BELIEF EXEMPTION IN
9 CALIFORNIA FOR THE PUBLIC SCHOOLS AT LEAST GOING BACK TO 1913.

10 AND THE PLAINTIFF IN FRENCH ARGUED BECAUSE THERE IS
11 A PERSONAL BELIEF EXEMPTION IN THE STATE STATUTE THAT APPLIES
12 TO PUBLIC SCHOOLS, THE REGENTS HAD NO DISCRETION AND HAD TO IN
13 FACT ACT CONSISTENTLY IN ITS REGULATIONS AND PROVIDE ONE FOR
14 UNIVERSITY STUDENTS. AND THE COURT SAID NO, IT DOES NOT,
15 BECAUSE IT IS NOT A NECESSARY ELEMENT OF THE STATUTE.

16 IN FACT THE COURT SAYS -- AND I AM QUOTING -- IT
17 WOULD RATHER SEEM TO BE THE VERY OPPOSITE OF A HEALTH
18 REGULATION FOR A LAW, WHOSE TITLE DECLARES ITS PURPOSE TO
19 ENCOURAGE AND PROVIDE FOR A GENERAL VACCINATION, TO HAVE
20 EMBRACED WITHIN IT A PROVISIO EXEMPTING FROM SUCH VACCINATION
21 THOSE WHOSE MENTAL ATTITUDE IS THAT OF OPPOSITION TO THE
22 AVOWED OBJECT OF THE LAW.

23 AND IT SAID THAT THE UNIVERSITY OF CALIFORNIA WAS
24 NOT BOUND BY THE OPERATION OR EFFECT OF THAT, IT WAS A
25 DISCRETIONARY PROVISION WITHIN THE STATE STATUTE AND DID NOT

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1 QUALIFY AS A HEALTH REGULATION OR IN ANY OTHER WAY WAS
2 ENFORCEABLE AGAINST THE REGENTS.

3 **THE COURT:** IT IS THE STATE'S ARGUMENT, THEN, THAT
4 THE PBE IS NOT REQUIRED IN THE FIRST INSTANCE.

5 **MR. RICH:** CORRECT.

6 **THE COURT:** SO IF IT IS NOT REQUIRED IN THE FIRST
7 INSTANCE, THERE IS NOTHING TO PRECLUDE THE STATE FROM TAKING
8 IT AWAY.

9 **MR. RICH:** CORRECT. IT IS A CREATURE OF STATUTE,
10 YOUR HONOR, AND AS SUCH IT CAN BE REMOVED BY THE LEGISLATURE
11 IN ITS JUDGMENT.

12 **THE COURT:** AND THE STATE ARGUES IT IS A CREATURE OF
13 STATUTE NOT NECESSITATED BY ANY CONSTITUTIONAL PROVISION.

14 **MR. RICH:** WE BELIEVE THAT IS VERY CLEAR, NOT ONLY
15 BASED UPON JACOBSON BUT THE ABEEL CASE FROM THE CALIFORNIA
16 SUPREME COURT, WHICH PREDATES JACOBSON, WHICH UPHELD
17 CALIFORNIA'S MANDATORY VACCINATION STATUTE.

18 AND, BY THE WAY, THE ABEEL CASE POSTDATES -- I
19 BELIEVE IT WAS DECIDED IN 1890, WHICH WAS 11 YEARS AFTER THE
20 CALIFORNIA RIGHT TO EDUCATION PROVISION WAS ADOPTED.

21 NOW, ABEEL DID NOT EXPRESSLY ADDRESS THE ISSUE IN
22 THE CONTEXT OF THAT PARTICULAR PROVISION, BUT ABEEL, WHICH IS
23 CITED BY JACOBSON, SPECIFICALLY HELD THAT IT WAS FOR THE
24 LEGISLATURE TO DETERMINE WHETHER THE SCHOLARS OF THE PUBLIC
25 SCHOOLS SHOULD BE SUBJECTED TO IT. AND WE THINK IT WAS

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1 JUSTIFIED IN DEEMING IT A NECESSARY AND SALUTARY BURDEN TO
2 IMPOSE UPON THAT GENERAL CLASS, MEANING OF STUDENTS.

3 **THE COURT:** ALL RIGHT.

4 **MR. RICH:** SO OUR BELIEF, YOUR HONOR, IS BASED NOT
5 ONLY ON FEDERAL DOCTRINES, AS APPLIED TO THE STATES
6 REPEATEDLY, BUT ALSO CALIFORNIA LAW.

7 THERE HAS NOT BEEN A SINGLE CASE THAT WE ARE AWARE
8 OF THAT, IN THE HISTORY OF OUR JURISPRUDENCE, HAS RULED IN THE
9 MANNER IN WHICH THE PLAINTIFFS ARE ASKING THIS COURT TO RULE.
10 AND BECAUSE OF THIS WE BELIEVE IT IS HIGHLY UNLIKELY THEY ARE
11 GOING TO PREVAIL ON THEIR CLAIMS.

12 **THE COURT:** ALL RIGHT. THANK YOU.

13 **MR. RICH:** MAY I ADDRESS THE COURT'S QUESTIONS WITH
14 REGARD TO DELAY AS WELL, OR ARE YOU SATISFIED ON THAT ISSUE?

15 **THE COURT:** I THINK I HAVE SUFFICIENT INFORMATION.

16 **MR. RICH:** OKAY. THANK YOU, YOUR HONOR.

17 **THE COURT:** MR. TURNER, WOULD YOU LIKE TO RESPOND,
18 OR ANY PLAINTIFFS' COUNSEL?

19 **MS. ROSENBERG:** YES, I WOULD. THANK YOU, YOUR
20 HONOR.

21 **THE COURT:** THEN FOLLOWING THESE RESPONSES WE WILL
22 RECESS.

23 **MS. ROSENBERG:** THANK YOU, YOUR HONOR.

24 I WOULD LIKE TO RESPOND TO A NUMBER OF POINTS THAT
25 MR. RICH MADE.

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1 FIRST, HE STATES THAT SB 277 DOES NOT TARGET A
2 CHILD'S RIGHT TO AN EDUCATION. WE BELIEVE WHILE IT OBVIOUSLY
3 ON ITS FACE DOESN'T DIRECTLY SAY THAT IT IS TARGETING A RIGHT
4 TO A CHILD'S EDUCATION, THE EFFECT OF SB 277 ABSOLUTELY
5 TARGETS THE RIGHTS OF CHILDREN WHOSE FAMILIES WOULD LIKE TO
6 EXERCISE PBE'S TO OBTAIN A CLASSROOM-BASED EDUCATION. AND IT
7 INFRINGES ON THAT CONSTITUTIONAL RIGHT.

8 THEY TALK ABOUT A SAFE AND HEALTHY SCHOOL
9 ENVIRONMENT. I BELIEVE WE HAVE ADDRESSED IN OUR PAPERS THAT
10 IN FACT THE 10 -- EVEN ASSUMING THE 10 MANDATED VACCINES, THAT
11 DOES NOT GUARANTEE A COMPLETELY SAFE SCHOOL ENVIRONMENT, IN
12 FACT CHILDREN ARE EXPOSED TO A NUMBER OF DISEASES FOR WHICH
13 VACCINES AREN'T -- AREN'T MANDATED.

14 THE FACT THAT SB 277 STILL WILL PERMIT -- ARGUABLY
15 PERMIT PBE'S FOR NEWLY MANDATED VACCINES, WE BELIEVE RATHER
16 THAN SUPPORTING DEFENDANTS' ARGUMENT ACTUALLY GOES AGAINST IT
17 BECAUSE IT CREATES AN ARBITRARY AND CAPRICIOUS DISTINCTION.
18 AGAIN, WE ARE CREATING A DISTINCTION ABOUT PBE'S FOR EXISTING
19 MANDATES AND PBE'S FOR NEW MANDATES. AND THERE IS NO
20 JUSTIFICATION FOR THAT DISTINCTION.

21 WITH RESPECT TO THE THOMAS CASE THAT COUNSEL CITED,
22 MY READING OF THOMAS AND MY SHEPARDIZING OF THOMAS SHOWS THAT
23 THOMAS STILL REMAINS GOOD LAW. THE LAW WE WERE CITING IS
24 THOMAS AGAINST ANCHORAGE EQUAL RIGHTS COMMISSION, 165 F.3RD
25 692. IT WAS REVERSED ON OTHER GROUNDS BUT ITS POSITON ON

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1 HYBRID RIGHTS STILL STANDS AS LAW IN THE NINTH CIRCUIT AND IS
2 GOOD LAW IN THE NINTH CIRCUIT, AS DOES THE OREGON V. SMITH
3 CASE.

4 WITH RESPECT TO FRENCH, ABEEL, AND WILLIAMS, WE
5 BELIEVE THOSE CASES ARE DISTINGUISHABLE. FIRST, NONE OF THEM
6 ADDRESSES THE FUNDAMENTAL RIGHT TO EDUCATION UNDER THE
7 CALIFORNIA CONSTITUTION. WHETHER OR NOT THOSE CASES WERE
8 DECIDED BEFORE OR AFTER THAT RIGHT WAS ENACTED UNDER THE
9 CONSTITUTION, THEY FAILED TO ADDRESS IT.

10 AND WITH RESPECT TO WILLIAMS, THERE IS NO
11 FUNDAMENTAL RIGHT TO A COLLEGE EDUCATION UNDER CALIFORNIA LAW,
12 WE ARE TALKING ABOUT A FUNDAMENTAL RIGHT TO A PRIMARY AND
13 SECONDARY SCHOOL EDUCATION.

14 WITHOUT PBE'S THE MANDATES WOULD VIOLATE THE RIGHT
15 TO EDUCATION, AND IT DOES MANDATE STRICT SCRUTINY.

16 THEY ARE ALSO MANDATING DISEASES THAT ARE NOT
17 COMMUNICABLE DISEASES. FOR EXAMPLE, THERE ARE MANDATES FOR
18 VACCINES FOR TETANUS, WHICH IS A COMPLETELY NONCOMMUNICABLE
19 DISEASE. FOR HEPATITIS B, WHICH IS A BLOOD-BORNE ILLNESS THAT
20 IS NOT EASILY TRANSMITTED AMONG SCHOOL CHILDREN.

21 **THE COURT:** THERE IS LANGUAGE IN THE CASES, I THINK
22 PRINCE AND OTHERS, THAT SEEM TO HAVE TWO INTERESTS; ONE IS
23 PREVENTING CONTAGIOUS DISEASES AND THE OTHER IS THE STATE'S
24 INTEREST IN THE INDIVIDUAL CHILD AND THE SAFETY OF THAT CHILD.
25 COULDN'T IT BE ARGUED THAT THE STATE HAS AN INTEREST IN

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1 MANDATING TETANUS SHOTS, EVEN THOUGH THAT IS NOT CONTAGIOUS IT
2 IS IN THE BEST INTEREST OF THE CHILD.

3 **MS. ROSENBERG:** THE STATE HERE HAS MADE THE ARGUMENT
4 THAT THE REASON THESE MANDATES ARE NECESSARY AND THAT THE
5 REMOVAL OF PBE'S IS NECESSARY IS BECAUSE THESE ARE CONTAGIOUS
6 DISEASES THAT CHILDREN WILL EXPOSE ONE ANOTHER TO IN SCHOOL.
7 THAT IS EXPLICITLY ARGUED IN THEIR PAPERS.

8 WITH RESPECT TO FRENCH, WILLIAMS, ABEEL, AGAIN THESE
9 CASES WERE ALL DECIDED IN A VERY DIFFERENT ENVIRONMENT. THEY
10 ALL RELATE TO A SMALLPOX VACCINATION. SMALLPOX, OBVIOUSLY,
11 PARTICULARLY AT THE TURN OF THE LAST CENTURY, WAS A VERY
12 DEADLY, HIGHLY COMMUNICABLE DISEASE. IT IS A VERY DIFFERENT
13 ENVIRONMENT THAT WE ARE IN NOW.

14 IN ADDITION WE ADDRESS IN OUR PAPERS, BOTH IN OUR
15 MOVING PAPERS AND OUR REPLY PAPERS, CONCERNS ABOUT VACCINE
16 WANING IMMUNITY AND VACCINE FAILURE, PARTICULARLY WITH RESPECT
17 TO THE PERTUSSIS AND MUMPS VACCINE. SO THERE IS A QUESTION
18 CONCERNING PUBLIC HEALTH BENEFITS REGARDING THOSE VACCINES.

19 AND THE STATE HERE WE BELIEVE IS -- THE STATE HAS A
20 NONDELEGABLE DUTY TO EDUCATE ALL CHILDREN, AND WE BELIEVE SB
21 277 ACTUALLY TRIES TO UNDERMINE AND MOVE THAT DUTY FROM THE
22 STATE IMPERMISSIBLY TO PARENTS WHO ARE NOT CHOOSING THE HOME
23 SCHOOLING OPTION FOR THEIR CHILDREN.

24 AGAIN, FOR PARENTS WHO CHOOSE TO HOME SCHOOL THAT IS
25 AN EXCELLENT OPTION FOR THE PARENTS WHO MAKE THAT CHOICE. BUT

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1 WHAT SB 277 IS DOING IS FORCING PARENTS WHO ARE NOW UNABLE TO
2 OBTAIN PERSONAL BELIEF EXEMPTIONS TO HOME SCHOOL THEIR
3 CHILDREN.

4 **THE COURT:** WHAT ABOUT THE COUNTER ARGUMENT THAT THE
5 STATE MAKES THAT SB 277 ACTUALLY PROMOTES THE RIGHT TO
6 EDUCATION FOR THE MASSES. SO THE 90 TO 95 PERCENT OR SO THAT
7 ELECT TO BE VACCINATED, THEY ARGUE THOSE CHILDREN AND THEIR
8 PARENTS HAVE A RIGHT TO EDUCATION IN A SAFE ENVIRONMENT, AND
9 THAT THE INTERESTS OF THE FEWER CITIZENS AND CHILDREN HAS TO
10 GIVE WAY.

11 **MS. ROSENBERG:** SURE. OF COURSE, YOUR HONOR. THERE
12 ARE A COUPLE OF RESPONSES I HAVE TO THAT.

13 FIRST, AS I INDICATED, WE ARE TALKING ABOUT MANDATES
14 FOR 10 DISEASES, AND CHILDREN ARE EXPOSED TO A NUMBER OF OTHER
15 COMMUNICABLE DISEASES, YOU KNOW, MONONUCLEOSIS, STREP THROAT,
16 THE COMMON COLD, IN SCHOOLS EVERY DAY. THESE AREN'T DISEASES
17 FOR WHICH VACCINES ARE EVEN AVAILABLE, LET ALONE MANDATED. SO
18 MANDATING VACCINATION FOR 10 DISEASES DOES NOT REMOVE ALL
19 ILLNESS FROM SCHOOLS.

20 BUT MOST IMPORTANTLY IS THE FACT THAT THESE CHILDREN
21 ARE NOT SICK CHILDREN. THEY ARE HEALTHY CHILDREN. THEY ARE
22 NOT CURRENTLY CARRIERS OF DISEASE.

23 THE STATUS QUO AB 2109 HAD IN PLACE A PROVISION THAT
24 IF THERE WAS AN OUTBREAK OF A COMMUNICABLE DISEASE OR A
25 VACCINE -- A DISEASE FOR WHICH ONE OF THE VACCINES WAS

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1 MANDATED, THAT CHILDREN WHO CANNOT PROVE EITHER IMMUNITY TO
2 THE DISEASE --

3 AND IN FACT WE HAVE, YOUR HONOR, BY THE WAY, SOME
4 PLAINTIFFS WHOSE CHILDREN ARE BEING EXCLUDED FROM SCHOOL EVEN
5 THOUGH THEY HAVE HAD BLOOD TESTS CALLED TITER TESTS THAT SHOW
6 THAT THEY ARE IMMUNE TO THE DISEASES FOR WHICH VACCINATION IS
7 REQUIRED, BUT THEY ARE NOT ALLOWED TO GO TO SCHOOL EVEN THOUGH
8 THEY HAVE PROOF OF IMMUNITY BECAUSE THEY HAVEN'T RECEIVED THAT
9 PARTICULAR VACCINE.

10 BUT THESE CHILDREN ARE NOT -- THEY ARE NOT SICK
11 CHILDREN. AND THERE ARE PROVISIONS IN PLACE TO DEAL WITH
12 OUTBREAKS AND LIMITED EXCLUSION FOR BRIEF PERIODS OF TIME IN
13 ORDER TO CONTAIN THE SPREAD OF DISEASE. SO WE BELIEVE THAT
14 THE PRIOR LAW ACTUALLY ADEQUATELY ADDRESSES THOSE ISSUES.

15 FURTHER, WHAT THE STATE HAS BASICALLY DONE IS
16 ASSUMED THAT THESE CHILDREN -- BASED ON A FEAR OF CONTAGION
17 ASSUMED THAT THESE CHILDREN ARE DISEASED CHILDREN AND THEY ARE
18 TREATING THEM AS IF THEY ARE DISEASED CHILDREN; YET UNDER BOTH
19 FEDERAL AND CALIFORNIA LAW A CHILD WHO ACTUALLY HAS, FOR
20 EXAMPLE, HIV OR AIDS OR HAS HEPATITIS B IS ALLOWED TO, AND
21 SHOULD BE ALLOWED TO, ATTEND SCHOOL. WE ARE TREATING THESE
22 HEALTHY CHILDREN WORSE THAN WE ARE TREATING OTHER CHILDREN.

23 **THE COURT:** ALL RIGHT.

24 MR. RICH.

25 **MR. RICH:** YOUR HONOR, MAY I ASK THE COURT'S

1 INDULGENCE --

2 **THE COURT:** YES.

3 **MR. RICH:** -- JUST TO ADDRESS SOME VERY SPECIFIC
4 LIMITED ISSUES THAT WERE RAISED IN COUNSEL'S REMARKS.

5 **THE COURT:** YES.

6 **MR. RICH:** FIRST OF ALL, MY COLLEAGUE, MS. YOUNG,
7 THROUGH THE WONDERS OF 21ST CENTURY SCIENCE, RESHEPARDIZED THE
8 CITE OF THOMAS VERSUS ANCHORAGE EQUAL RIGHTS COMMISSION AT 165
9 F.3RD 692.

10 AND IS THIS WESTLAW OR LEXIS?

11 **MS. YOUNG:** IT IS ON WESTLAW.

12 **MR. RICH:** WESTLAW, WHICH IS CONSISTENT WITH WHAT I
13 READ IN LEXIS, IT STATES "OPINION WITHDRAWN" BY THOMAS V.
14 ANCHORAGE, NINTH CIRCUIT, OCTOBER 19TH, 1999; WHICH IS THE
15 CASE THAT YOU AND I WERE DISCUSSING WITH JUSTICE O'SCANNLAIN'S
16 CONCURRING OPINION.

17 **THE COURT:** YES. OKAY.

18 **MR. RICH:** SO THE HYBRID RIGHTS EXCEPTION HAS NOT
19 BEEN ADOPTED BY THE NINTH CIRCUIT.

20 WITH REGARD TO TETANUS, YOUR HONOR, IF I COULD JUST
21 DRAW THE COURT'S ATTENTION TO THE LEGISLATIVE RECORD, BECAUSE
22 THIS IS AN ISSUE THAT WAS EXPRESSLY CONSIDERED BY THE
23 LEGISLATURE IN ENACTING SB 277. AND I AM REFERRING TO THE ECF
24 NUMBERS.

25 **THE COURT:** ON THAT ISSUE, I WOULD RESPECTFULLY

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1 DECLINE TO HEAR ARGUMENT. THERE HAS BEEN AN OBJECTION TO THE
2 RECORD, AND I WOULD LIKE TO EVALUATE THIS CASE BASED ON WHAT
3 IS STATED IN THE STATUTE ITSELF, AND THEN THE CONSTITUTIONAL
4 STATUTORY ARGUMENTS THAT HAVE BEEN ADVANCED.

5 **MR. RICH:** VERY WELL, YOUR HONOR.

6 WITH REGARD TO THE LAST ARGUMENT THAT COUNSEL MADE
7 WITH REGARD TO THE FACT THAT SOME CHILDREN HAVE HAD LABORATORY
8 TESTS THAT INDICATE THEY ARE IMMUNE. THE CALIFORNIA
9 REGULATIONS, 17 CFR SECTION -- I BELIEVE IT IS -- FORGIVE ME.
10 I WON'T BELABOR THE COURT.

11 BUT CALIFORNIA REGULATIONS EXPRESSLY PROVIDE THAT A
12 CHILD WHO HAS BEEN NATURALLY IMMUNIZED BY HAVING CONTRACTED
13 THE DISEASE WOULD QUALIFY FOR A MEDICAL EXEMPTION SO LONG AS,
14 DEPENDING UPON THE VACCINATION, EITHER A PHYSICIAN CERTIFIES
15 THAT, CONFIRMS THAT IN WRITING, AND WITH SOME OF THE VACCINE,
16 I BELIEVE RUBELLA AND MEASLES, THAT THE PHYSICIAN HAS TO
17 CONFIRM IT WITH AN ACCEPTED LABORATORY CERTIFICATION.

18 SO THE STATE ALREADY ACKNOWLEDGES THAT CIRCUMSTANCE.
19 I DON'T KNOW THE CIRCUMSTANCES IN WHICH PLAINTIFFS HAVE
20 ALLEGED. I DON'T KNOW THE LABORATORIES, THEY HAVEN'T ALLEGED
21 THESE WITH ANY PARTICULARITY.

22 FINALLY, YOUR HONOR, WITH REGARD TO THIS NOTION OF
23 PARTIAL VACCINATION. I JUST WANT TO LEAVE THE COURT WITH THIS
24 THOUGHT, THAT I BELIEVE THAT THE ARGUMENT IS UNFOUNDED.

25 IF PARENTS ARE ASKING FOR THE RIGHT TO MAKE

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1 DECISIONS VIS-A-VIS ANY ONE PARTICULAR VACCINATION, THEN THEY
2 ARE INDEED ASKING FOR THE RIGHT TO REJECT ALL VACCINATIONS,
3 BECAUSE OTHERWISE ANY RULING OF THIS COURT IS UNWORKABLE.

4 IF THE PLAINTIFFS ARE ENTITLED TO REJECT TWO OR
5 THREE OF THE VACCINATIONS, WHAT WOULD STOP OTHER PARENTS FROM
6 REJECTING EIGHT OR NINE OF THE VACCINATIONS, OR ALL 10.

7 THAT IS THE THOUGHT I WOULD LEAVE THE COURT WITH.

8 **THE COURT:** OKAY. I WANT TO THANK COUNSEL FOR
9 APPEARING. IT WAS NICE TO SEE YOU ALL IN PERSON, TO MEET YOU
10 HERE IN COURT. AND I APPRECIATE, AS INDICATED, ALL OF THE
11 BRIEFING AND SUBMISSIONS.

12 AND I APPRECIATE ALL OF YOU IN THE GALLERY WHO HAVE
13 TAKEN TIME OUT OF YOUR BUSY SCHEDULES TO BE HERE TO
14 PARTICIPATE AND TO WITNESS AND EVALUATE THE ARGUMENTS.

15 I UNDERSTAND THE SIGNIFICANCE OF THE ISSUE AND HOW
16 DEEPLY HELD THESE PERSONAL BELIEFS ARE. AND I WILL TAKE THAT
17 THOUGHT INTO CONSIDERATION WHEN I ISSUE A RULING.

18 THE DECISION I MAKE WILL BE IN WRITTEN FORM. I
19 WOULD LIKE TO TAKE IT UNDER SUBMISSION. AND I WILL DO MY BEST
20 TO DO SO PROMPTLY, GIVEN THE SCHOOL YEAR THAT IS IMPENDING ON
21 A NUMBER OF CHILDREN.

22 I THINK, REALISTICALLY, IT MAY NOT BE NEXT WEEK BUT
23 PERHAPS THE FOLLOWING WEEK THAT I ISSUE AN ORDER. I WILL DO
24 MY BEST TO GET IT OUT SOON, BUT I AM WORKING IN A TIME FRAME
25 SUCH THAT I HAVE ALL OF THE COMPETING ISSUES IN MIND AND I

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1 WILL ISSUE A RULING AS SOON AS I PRACTICALLY CAN.

2 THANK YOU VERY MUCH, AND HAVE A NICE WEEKEND.

3 **MR. RICH:** THANK YOU, YOUR HONOR.

4 **MR. TURNER:** THANK YOU, YOUR HONOR.

5 **MS. ROSENBERG:** THANK YOU, YOUR HONOR.

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I CERTIFY THAT THE FOREGOING IS A CORRECT
TRANSCRIPT FROM THE RECORD OF PROCEEDINGS
IN THE ABOVE-ENTITLED MATTER.

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S/LEEANN PENCE

8/16/2016

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LEEANN PENCE, OFFICIAL COURT REPORTER DATE

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AUGUST 12, 2016