KAMALA D. HARRIS
Attorney General of California
RICHARD T. WALDOW
ELIZABETH S. ANGRES
Supervising Deputy Attorneys General
ELIZABETH G. O'DONNELL (SBN 162453)
JONATHAN E. RICH (SBN 187386)
JACQUELYN Y. YOUNG (SBN 306094)
Deputy Attorneys General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2000
Fax: (213) 897-2805
E-mail: Elizabeth.ODonnell@doj.ca.gov
E-mail: Jonathan.Rich@doj.ca.gov
E-mail: Jacquelyn.Young@doj.ca.gov

Attorneys for Defendants
Governor Edmund G. Brown, Jr.,
Anne Gust, and the State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Travis Middleton, et al., Plaintiffs, **v.** **Richard Pan, et al.,** Defendants.	2:16-cv-05224-SVW-AGR **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANTS STATE OF CALIFORNIA, GOVERNOR BROWN AND ANNE GUST TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** **[Filed Concurrently with Notice of Motion and Motion to Dismiss]** Date: December 13, 2016 Time: 10:00 a.m. Courtroom: B Judge: Hon. Alicia G. Rosenberg, Magistrate Judge Trial Date: None Set Action Filed: July 15, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS- Cont'd

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES – Cont'd

TABLE OF AUTHORITIES – Cont'd

TABLE OF AUTHORITIES – Cont'd

TABLE OF AUTHORITIES – Cont'd

TABLE OF AUTHORITIES – Cont'd

STATUTES

TABLE OF AUTHORITIES – Cont'd

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs' First Amended Complaint (FAC), predicated on the claim that the Governor, various state legislators, *and their spouses*, engaged in an unlawful conspiracy to influence the enactment of California's mandatory child vaccination statute, California Senate Bill 277 (Stats 2015 Ch. 35) (SB 277), should be dismissed with prejudice because Plaintiffs' claims fall dramatically short of the plausibility standard for stating claims on which relief may be granted.

Plaintiffs assert that SB 277 violates their constitutional rights by subjecting them to "chemical and biological warfare for [Defendants'] financial gain and profit." FAC, ECF No. 15, at 13, lines 2-3.

Even if there were a shred of plausibility to Plaintiffs' claims, and there is none, their claims fail as a matter of law. The Eleventh Amendment prohibits suit against the State, and by extension, the Governor in his official capacity, in federal court. Moreover, the advocacy for and passage of legislation, as well as the acceptance of campaign contributions, are protected activities under the *Neorr-Pennington* immunity doctrine.

The object of the alleged conspiracy, the enactment of SB 277, was indisputably an exercise of the Legislature's legitimate and compelling interest in protecting public health and safety by mandating vaccinations for school children, something which has been *unanimously* recognized by the U.S. Supreme Court, the California Supreme Court, and every other federal and state court that has addressed the issue *for over a century*. As such, Plaintiffs' foundational claim, that their constitutional rights have been violated, fails as a matter of both state and federal law.

Plaintiffs' claims under the federal Racketeer Influenced and Corrupt Organizations (RICO) statutes are also defective. RICO cannot be used to address an alleged civil rights violation. As such, Plaintiffs have not pled "predicate acts"

upon which Plaintiffs can base their claims.

As to Defendant Anne Gust, she is only identified as the spouse of Governor Brown, and no allegations are made regarding her alleged role in the purported "conspiracy." In fact, Plaintiffs offer no insight whatsoever as to why the spouses of the Governor and the legislators have been named in this civil action.

When stripped of their implausible conspiracy theory, Plaintiffs' claims are premised on the misguided supposition that their subjective personal beliefs against childhood vaccinations outweigh the health and safety of the millions of children enrolled in California schools, the health and safety of the general public, and the considered judgment of the California Legislature in addressing a significant public health issue that embodies a core function of government: to protect the health and safety of its citizens against preventable harm.

The public health and welfare must not be allowed to be jeopardized by the subjective beliefs and unfounded conspiracy theories of a small minority of individuals who, against all recognized scientific and legal authority, stubbornly disregard the long-recognized safety and effectiveness of vaccines, and who fail to accept the public health threat that their unsupported opinions pose to the lives of others around them.

STANDARD OF REVIEW

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure (Rule 12(b)(6)), the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

The "plausibility" requirement serves to ensure that the "plain statement" required under Rule 8 of the Federal Rules of Civil Procedure (Rule 8) has "enough heft to 'sho[w] that the pleader is entitled to relief.'" *Twombly*, 550 U.S. at 557. Purely conclusory allegations will not suffice; "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and

conclusions . . . ." *Id*. at 555-556. Plaintiffs may not rely on wholly conclusory allegations in the complaint and then simply hope that, through the discovery process, the necessary facts will arise to support their claim. *Id*. at 557-558.

Moreover, the complaint must be dismissed if there could be an alternative, non-nefarious explanation for defendants' conduct, and that plaintiffs have failed to plead specific facts to rebut it. *Twombly*, 550 U.S. at 567-567.

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court clarified that the standards of Rule 8 it articulated in *Twombly*, *supra*, apply to all civil actions. The Supreme Court re-affirmed that, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 678 (quoting from *Twombly*).

Adherence to the pleading requirements in Rule 8 is critical to ensuring that government officials are not forced into litigation unnecessarily. As recognized in *Ashcroft v. Iqbal*:

> If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed.

Iqbal, 556 U.S. at 685.

Dismissal under Rule 12(b)(6) may be based on either: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011). On a Rule 12(b)(6) motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996). However, the Court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, as amended by 275 F.3d 1187 (9th Cir. 2001).

In evaluating a complaint under Rule 12(b)(6), the court may consider not only the allegations contained in the complaint, but also matters properly subject to judicial notice. *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage*, 524 F.3d 1090, 1096 (9th Cir. 2008). Additionally, the court need not accept as true allegations that contradict matters properly subject to judicial notice. *Sprewell*, 266 F.3d at 988. [1]

While *pro se* pleadings are liberally construed, a pro se action should be dismissed if, after careful consideration, the court concludes that the allegations of the complaint disclose that no cognizable claim can be stated and that amendment would be futile. *Cato v. United States*, 70 F.3d 1103, 1196 (9th Cir. 1995).

ARGUMENT

Plaintiffs' FAC asserts nine separate Claims for Relief: (1) violation of 18 U.S.C. § 1961 et seq. (RICO); (2) violation of 18 U.S.C. § 1962(a)(d) (RICO-Conspiracy); (3) violation of 18 U.S.C. § 175 (Promoting the Sale and Use of Biological Weapons); (4) violation of 18 U.S.C. § 178 (Promoting the Sale and Use of Chemical Weapons); (5) violation of 18 U.S.C. § 241 (Infringement of

[1] There is some question as to whether dismissal based on Eleventh Amendment immunity should be analyzed under Rule 12(b)(6) or as a jurisdictional issue under Rule 12(b)(1). *Elwood v. Drescher*, 456 F.3d 943, 949 (9th Cir.2006)(12(b)(6)); but see *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040–44 (9th Cir.2003) (jurisdictional issue under Rule 12(b)(1)). The Ninth Circuit has since attempted to reconcile these cases by calling Eleventh Amendment immunity "quasi-jurisdictional." *Bliemeister v. Bliemeister* (*In re Bliemeister*), 296 F.3d 858, 861 (9th Cir. 2002). Since this motion is a facial challenge to the FAC, the analysis is the same under both rules. *See, e.g., Hardesty v. Barcus*, Case No. CV 11-103-M-DWM-JCL, 2012 U.S. Dist. LEXIS 28902, **8-9 (D. Montana, January 20, 2012) ("[t]here is some confusion in the Ninth Circuit as to which of these two rules [Rules 12(b)(1) and 12(b)(6)] provides the proper vehicle for seeking dismissal based on Eleventh Amendment immunity. But because the legal standards under both rules are essentially the same, the Court would reach the same conclusion under either rule").

Constitutional Rights); (6) violation of 18 U.S.C. § 242 (Deprivation of Rights); (7) violation of 18 U.S.C. § 1983 (Violation of Civil Rights); (8) violation of 18 U.S.C. § 1986 (Civil Rights); (9) intentional infliction of emotional distress.

The defendant state legislators and their spouses and Anne Gust are named in all of the foregoing Claims for Relief. The State of California and the Governor are named in the First, Second and Ninth Claims for Relief, asserting violations of RICO and intentional infliction of emotional distress. For the reasons discussed below, each of these claims is facially implausible and, respectfully, should be dismissed with prejudice.

I. THE STATE OF CALIFORNIA AND GOVERNOR BROWN ARE IMMUNE FROM SUIT IN THIS CASE

A. Plaintiffs' Claims Against the State and Governor Brown Are Barred by the Eleventh Amendment

Plaintiffs' First, Second and Ninth Causes of Action against the State of California and Governor Brown are barred by the Eleventh Amendment, which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

The immunity of the State from suit in federal court in cases such as this is unquestioned. "The Eleventh Amendment grants a State immunity from suit in federal court by citizens of other States, and by its own citizens as well." *Lapides v. Ed. Of Regents*, 535 U.S. 613, 616, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002) (citation omitted). [2]

[2] The Eleventh Amendment makes explicit reference only to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amdt. 11. The Supreme Court nevertheless has long recognized the doctrine to apply to any suits by private parties against a State. *Alden v. Maine*, 527 U.S. 706, 712-713 (1999) ("The phrase [Eleventh Amendment immunity] is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment … but is a fundamental aspect of the sovereignty which the States (continued…)

A state agency is entitled to the same Eleventh Amendment immunity enjoyed by the State when a judgment against the agency "would have had essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401, 99 S. Ct. 1171, 1177, 59 L. Ed. 2d 401 (1979). Likewise, and most important for the purposes of the current motion, the bar to jurisdiction imposed by the Eleventh Amendment also applies to cases premised on federal questions and injunctions against state officials. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); *Cory v. White*, 457 U.S. 85, 91 (1982); *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987). An official capacity suit is, in all respects, to be treated as a suit against the State. See *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991) (citing *Kentucky v. Graham*, 437 U.S. 159 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). As a result, the Eleventh Amendment bars Plaintiffs' claims against the State as well as the Governor.[3]

While there exists an exception to the bar against naming a state official in his or her official capacity, that exception is not applicable to the present case and the facts pled. Under the doctrine established by *Ex Parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment does not bar suits to enjoin state officials from enforcing *unconstitutional* statutes. *Id.* at 159-160. In accordance with its original rationale, "the exception applies only where the underlying authorization upon which the named official acts is asserted to be illegal[.]" *Papasan v. Allain*, 478 U.S. 265, 277 (1986). As a threshold matter, Plaintiffs' claims do not satisfy the *Ex Parte*

(…continued)
enjoyed before the ratification of the Constitution, and which they retain today").

[3] "The *Ex parte Young* exception does not apply to state law claims brought against the state." Therefore, state law based claims such as Plaintiffs' Ninth claim for intentional infliction of emotional distress are barred against state officials in their official capacities as suits against the state itself. *McKinley v. Abbott*, 643 F.3d 403, 406 (5th Cir. 2011) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, supra, 465 U.S. at 106.)

Young exception because Plaintiffs have not plausibly asserted that SB 277 is unconstitutional since, as discussed below, federal and state courts have uniformly upheld the constitutionality of state mandatory vaccination statutes.

Even so, "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)). For example, the *Ex Parte Young* exception does not apply when the state is the "real, substantial party in interest," as when the "judgment sought would expend itself on the public treasury . . . or interfere with public administration." *Va. Office for Protection and Advocacy v. Stewart,* 131 S. Ct. 1632, 1638 (2011 (quoting *Pennhurst*, 465 U.S. at 101, n. 11). The exception only allows suit to be brought against a state officer in federal court for the purpose of enforcing the Supremacy Clause to the Constitution if the following criteria are met: (1) the state official named is responsible for enforcing the law at issue in that person's official capacity; (2) the plaintiff has alleged an ongoing violation of federal law; and (3) the plaintiff has requested the proper relief, that is, prospective, injunctive relief, or relief that is ancillary to prospective relief. See *Walker v. Livingston*, 381 F. App'x 477,478 (5th Cir. 2010) (per curiam) (citing *Seminole Tribe of Fla*., 517 U.S. at 73.

While in this instance Plaintiffs allege a violation of federal law and a request for injunctive relief, the Governor is not the official "responsible for enforcing" SB 277. An official named in an *Ex Parte Young* suit "must have some connection with the enforcement of the act. That connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Assn. des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013); quoting *National Audubon Society v. Davis*, 307 F.3d 835, 846-847 (9th Cir.2002) (Governor entitled to Eleventh Amendment immunity

because only connection to statute at issue is general duty to enforce California law).

> It is well established that "a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir.1998); *see also Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946, 953 (9th Cir.1983) (governor's "general duty to enforce California law . . . does not establish the requisite connection between him and the unconstitutional acts" alleged in suit claiming de jure segregation of city school system); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir.1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute"). Additionally, "[w]here the enforcement of a statute is the responsibility of parties other than the governor . . . the governor's general executive power [to enforce laws] is insufficient to confer jurisdiction"). *Women's Emergency Network v. Bush*, 323 F.3d 937, 949-50 (11th Cir. 2003).

Nichols v. Brown, 859 F.Supp.2d 1118, 1131-32 (C.D. Cal. 2012)

Further, the fact that Governor Brown signed the law at issue is not enough to establish that he is responsible for the enforcement of it. "A governor is entitled to absolute immunity for the act of signing a bill into law." *Nichols*, 859 F.Supp.2d at 1132. *See also Torres–Rivera v. Calderon–Serra*, 412 F.3d 205, 213 (1st Cir. 2005) (governor who signs into law legislation passed by the legislature is entitled to absolute immunity for that act); *Women's Emergency Network,* 323 F.3d at 950 ("Under the doctrine of absolute legislative immunity, a governor cannot be sued for signing a bill into law") (citing *Supreme Ct. of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731–34 (1980)).[4] As such, the Governor cannot be named in a federal court action on the basis that he signed the law that is the subject of the suit.

[4] Similarly, the Governor is also immune under the doctrine of legislative immunity, which holds that state and local officials are absolutely immune from federal suit for personal damages for their legitimate legislative activities. *See, e.g.*, *Empress Casino Joliet Corporation v. Blagojevich*, 638 F.3d 519 (7th Cir. 2011) (holding that the doctrine of legislative immunity applies to state governor acting in his legislative capacity in signing legislation, and was thus immune from civil RICO claims).

All of Plaintiffs' claims brought against the Governor of the State of California are barred by operation of the Eleventh Amendment as the Court has no jurisdiction to hear such claims. As such, the claims should be dismissed.

B. Plaintiffs' Claims Against the Governor Are Barred by Operation of the *Noerr-Pennington* Immunity Doctrine

Derived from the *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) cases, the "*Noerr-Pennington"* immunity doctrine holds that "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Rupert v. Bond,* 68 F.Supp.3d 1142, 1156 (N.D. Cal. 2014). Conduct covered under the immunity doctrine includes speech, proposals and petitions. *Swetlik v. Crawford,* 738 F.3d 818, 830 (7th Cir. 2013) (concurring opinion); citing *Miracle Mile Associates v. Rochester*, 617 F.2d 18 (2d Cir.1980); *Mariana v. Fisher*, 338 F.3d 189 (3d Cir. 2003). The doctrine encompasses any branch of government, including the executive, legislative, judicial and administrative agencies. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).

While initially recognized in the context of anti-trust claims, the *Noerr-Pennington* immunity is no longer limited to the antitrust context, but is also applicable to both §1983 and RICO claims. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 942 (9th Cir.2006); *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000). In *Manistee,* the Ninth Circuit noted:

> Government officials are frequently called upon to be ombudsmen for their constituents. In this capacity, they intercede, lobby, and generate publicity to advance their constituents' goals, both expressed and perceived. This kind of petitioning may be nearly as vital to the functioning of a modern representative democracy as petitioning that originates with private citizens. We decline to interpret § 1983 as regulating this quintessentially "political activity." See *id*. The petitioning or lobbying of another governmental entity is insufficient to "subject" or "cause to be subjected" a person "to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

Manistee, 227 F.3d at 1093.

Here, the pertinent allegations against the Governor are that he colluded with lawmakers and drug companies to espouse a position on the issue of mandatory vaccinations and, when the legislation came before him, signed SB 277 into law. Plaintiffs assert that the receipt of campaign contributions was the motivation for these purported acts. However, the *Noerr-Pennington* immunity is applicable to all the alleged acts of the Governor even if, as Plaintiffs allege, the Governor also advocated for the law and worked for its passage behind the scenes, outside of the view of the public. Plaintiffs' conclusory allegations of "secret," "closed door" meetings to influence the outcome of the passage of the bill are clearly covered by *Noerr-Pennington*. *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 895 (9th Cir. 1988). In *Boone,* the Ninth Circuit held that the plaintiffs' allegations of "shadowy secret meetings and covert agreements" did not take their claim outside of *Noerr-Pennington*. *Id.* at 894-895. Likewise, while Plaintiffs allege that legislators accepted campaign contributions in exchange for passage of the law, such allegations are not sufficient to negate the *Noerr-Pennington* immunity. "Payments to public officials, in the form of honoraria or campaign contributions, is a legal and well-accepted part of our political process" and "fall within the *Noerr-Pennington* doctrine." *Ibid.* Thus, not only are Plaintiffs' conclusions factually unsupported, but they all clearly entail activity that the *Noerr-Pennington* doctrine covers.

In short, the *Noerr-Pennington* immunity has evolved into "a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause." *Sosa*, 437 F.3d at 931. Regardless of the inflammatory language used by Plaintiffs, their claims against the Governor, even if true, are not actionable in light of the immunity afforded to him under the

Noerr-Pennington doctrine and its progeny. As such, the first and second claims against the Governor in the First Amended Complaint do not, and cannot, state a claim against him, and this motion to dismiss should be granted.

II. PLAINTIFFS HAVE FAILED TO PLEAD A VIOLATION OF THEIR CONSTITUTIONAL RIGHTS BECAUSE LAWS REQUIRING MANDATORY IMMUNIZATION HAVE UNEQUIVOCALLY BEEN UPHELD AS CONSTITUTIONAL FOR OVER A CENTURY

Even if this Court should find that the State and the Governor are not immune, Plaintiffs' claims fail, as a matter of law, to allege a violation of their constitutional rights by any of the Defendants.

The thrust of Plaintiffs' claims is that Defendants somehow conspired to enact SB 277, and that, in so doing, Defendants violated Plaintiffs' constitutional rights. The facial implausibility of Plaintiffs' conspiracy claims is addressed in subsequent sections of this Memorandum. However, as discussed below, Plaintiffs' claims ultimately fail because the purported object of the alleged conspiracy, the enactment of SB 277, was a proper exercise of the Legislature's legitimate and compelling interest in protecting the public health through mandatory vaccination of school children, continuously recognized for decades by the U.S. Supreme Court, the California Supreme Court, and every other federal and state court that has considered the issue.

A. The Enactment of California Senate Bill 277

Enacted over one year ago, on June 30, 2015, SB 277 eliminates the personal belief exemption from the statutory requirement that children receive vaccines for certain infectious diseases prior to being admitted to any public or private elementary or secondary school, or day care center. In enacting SB 277, the Legislature reaffirmed its intent "to provide . . . [a] means for the eventual achievement of total immunization of appropriate age groups" against these childhood diseases. Cal. Health & Saf. Code, § 120325(a). SB 277 requires children to be immunized against (1) diphtheria, (2) hepatitis B, (3) haemophilus

influenza type b, (4) measles, (5) mumps, (6) pertussis (whooping cough), (7) poliomyelitis, (8) rubella, (9) tetanus, (10) varicella (chickenpox), and (11) "[a]ny other disease deemed appropriate by the [California Department of Public Health (Department)]." Cal. Health & Saf. Code, § 120325(a). SB 277 revised the California Health and Safety Code by amending sections 120325, 120335, 120370, and 120375, adding section 120338, and repealing California Health and Safety Code section 120365.

Vaccinations are not required for any student in a home-based private school or independent study program who does not receive classroom-based instruction. Cal. Health & Saf. Code, § 120335(f). Moreover, a child may be medically exempt from the immunizations specified in the statute if a licensed physician states in writing that "the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe." Cal. Health & Saf. Code, § 120370(a). Notwithstanding the immunizations listed, any other immunizations may only be mandated "if exemptions are allowed for both medical reasons and personal beliefs." Cal. Health & Saf. Code, § 120338. SB 277 also provides an exception relating to children in individualized education programs. Cal. Health & Saf. Code, § 120335(h).

B. The U.S. Supreme Court, California Supreme Court, and State and Federal Courts Have Consistently Upheld the Constitutionality of Mandatory Vaccination Laws

In enacting SB 277, the California Legislature expressed its intent to provide a means for the eventual achievement of total immunization of school children against a number of deadly, but highly preventable, childhood diseases. The authority of the Legislature to require students to be vaccinated in order to protect the health and safety of other students and the public at large, irrespective of their parents' personal beliefs, is firmly embedded in our jurisprudence, and embodies a quintessential function of an organized government to protect its people from preventable harm.

For more than 100 years, the United States Supreme Court has upheld the right of the States to enact and enforce laws requiring citizens to be vaccinated. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905). After facing criminal charges for failing to comply with a regulation that called for immunization against smallpox, the plaintiff in *Jacobson* argued that a compulsory vaccination law infringed on his personal constitutional rights. The Supreme Court disagreed, noting that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members[.]" *Id.* at 27. The Court further noted that "it was the duty of the constituted authorities primarily to keep in view the 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 the plaintiff of his constitutional guarantees of personal and religious liberty.

The Supreme Court again addressed the issue of compulsory vaccination, this time in the context of schoolchildren, in the case of *Zucht v. King*, 260 U.S. 174 (1922). In *Zucht*, the plaintiff's children were excluded from a Texas public school because they were not vaccinated. The plaintiff in *Zucht* argued that the vaccination laws violated her rights to due process and equal protection under the United States Constitution, but the Court rejected those arguments. Relying on *Jacobson*, the Court stated it was long-ago "settled that it is within the police power of a State to provide for compulsory vaccination." *Id*. at 176.

In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Supreme Court again affirmed the State's overriding interest in the matter of public health, stating by way of example that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id*. at 166-167.

Since *Jacobson, Zucht,* and *Prince*, federal courts have repeatedly upheld mandatory vaccination laws over challenges predicated on the First Amendment, the Equal Protection Clause, the Due Process Clause, the Fourth Amendment, education rights, parental rights, and privacy rights, frequently citing *Jacobson*. In *Workman v. Mingo County Sch.*, 667 F. Supp.2d 679, 690-691 (S.D. W. Va. 2009), *affirmed Workman v. Mingo County Bd. of Educ.*, 419 F. App'x 348, 353-54 (4th Cir. 2011) (unpublished), the court rejected the argument that the plaintiff's rights to free exercise, equal protection and substantive due process were violated when her daughter was not permitted to attend public school without the immunizations required by state law. The court noted that "a requirement that a child must be vaccinated and immunized before it can attend the local public schools violates neither due process nor . . . the equal protection clause of the Constitution." *Id*.

In *Phillips v. City of New York*, 775 F.3d 538 (2d Cir.), *cert. denied*, ___ U.S. ___, 136 S. Ct. 104 (2015), citing *Jacobson*, the Second Circuit rejected the plaintiffs' claims that New York's mandatory vaccination law violated their rights to due process, free exercise of religion and equal protection, holding that "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause." *Id.*

Workman and *Phillips* are the most recent in an extended line of cases from various jurisdictions that have upheld state mandatory vaccination statutes. *See, e.g., Sherr v. Northport-East Northport Union Free School Dist.* 672 F. Supp. 81 (E.D.N.Y. 1987) (recognizing that New York had a compelling state interest in enacting its mandatory vaccination statute); *Hanzel v. Arter*, 625 F. Supp. 1259 (S.D. Ohio 1985) (holding parents' objections to vaccination based on "chiropractic ethics" did not fall under the protection of the Establishment Clause); *Maricopa County Health Dept. v. Harmon*, 750 P.2d 1364 (Ariz. 1987) (holding that the state's health department did not violate the right to public education in Arizona's Constitution when it excluded unvaccinated children from school); *Boone v.*

Boozman, 217 F. Supp.2d 938, 956 (E.D. Ark. 2002) ("the question presented by the facts of this case is whether the special protection of the Due Process Clause includes a parent's right to refuse to have her child immunized before attending public or private school where immunization is a precondition to attending school. The Nation's history, legal traditions, and practices answer with a resounding 'no.'"). *See also Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) ("[f]or their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases").

Recognizing that mandatory vaccination laws are a proper exercise of police powers, the California Supreme Court in *Abeel v. Clark*, 84 Cal. 226 (1890) (*Abeel*) upheld the State's school vaccination requirements, recognizing that "it was for the legislature to determine whether the scholars of the public schools should be subjected to [vaccination]." *Id.*, at 230. The California Supreme Court revisited the issue in *French v. Davidson*, 143 Cal. 658 (1904) (*French*), in which the Court upheld San Diego's vaccination requirement, explaining that "the proper place to commence in the attempt to prevent the spread of a contagion was among the young, where they were kept together in considerable numbers in the same room for long hours each day . . . children attending school occupy a natural class by themselves, more liable to contagion, perhaps, than any other class that we can think of." *Id*. at 662, italics added; *see also Williams v. Wheeler*, 23 Cal. App. 619, 625 (1913) (the state legislature has the power to prescribe "the extent to which persons seeking entrance as students in educational institutions within the state must submit to its [vaccination] requirements as a condition of their admission"); *Love v. Superior Court*, 226 Cal.App.3d 736, 740 (1990) ("[t]he adoption of measures for the protection of the public health is universally conceded to be a valid exercise of the police power of the state, as to which the legislature is necessarily vested with large discretion not only in determining what are contagious

and infectious diseases, but also in adopting means for preventing the spread thereof").

The federal district court in San Diego recently confirmed the unquestioned authority of *Jacobson* and its progeny and rejected a similar challenge to SB 277 by a separate group of plaintiffs, in *Whitlow, et al. v. Department of Education et al.*, S.D. Cal. Case No. 3:16-cv-01715-DMS-BGS (*Whitlow*). Like the plaintiffs here, the *Whitlow* plaintiffs alleged violations of various constitutional rights arising from the enactment of SB 277. *Id*. On July 15, 2016, the *Whitlow* plaintiffs filed their motion for preliminary injunction, in which they sought to enjoin the enforcement of SB 277. (See *Whitlow*, Pls.' Mot., ECF Nos. 13, 14.) However, on August 26, 2016, the *Whitlow* court denied the plaintiffs' motion, holding that the plaintiffs' claims were unlikely to succeed because of the weight of authority represented by *Jacobson* and its progeny:

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

(*Whitlow*, Order, ECF No. 43, at 17-18 (italics added).

The court in *Whitlow* further stated that, in light of such precedent, "this Court, 'is not prepared to hold that a minority, residing or remaining in any city or town where [disease] is prevalent, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State.'" *Id*., at 18, quoting *Jacobson*, 197 U.S. at pp. 37-38. On August 31, 2016, the *Whitlow* plaintiffs filed their request for voluntary dismissal of their lawsuit, and thus extinguished any possible appeal of the federal court's Order. *Whitlow*, Pls.' Notice, ECF No. 44.

Thus, the State's compelling interest in protecting public health and safety by mandating vaccinations for school children has been unanimously recognized by the U.S. Supreme Court, the California Supreme Court, and every other federal and state court that has addressed the issue. As such, it is beyond dispute that SB 277 is a constitutional enactment. Therefore, even if there were a shred of plausibility to Plaintiffs' claims that Defendants engaged in an alleged conspiracy, Plaintiffs' claims fail regardless because, as a matter of law, the object of that alleged conspiracy, the enactment of SB 277, was entirely lawful and, indeed, constitutional.

III. PLAINTIFFS' CLAIMS UNDER RICO FAIL TO STATE CLAIMS AGAINST DEFENDANTS

A. Plaintiffs' Allegations of RICO Violations

Plaintiffs' allegations that the Governor, state legislators and their spouses engaged in racketeering activity by "obstructing justice" in violation of 18 U.S.C. § 1503, by influencing the outcome of state Assembly and Senate hearings on the bill, are entirely conclusory and facially implausible.

Plaintiffs allege without any factual support that Defendants' alleged motivation was financial gain in the form of campaign contributions by pharmaceutical companies. FAC ¶ 114. Plaintiffs allege that Defendants also engaged in "racketeering" activity by committing "perjury of their oaths of office," resulting in treason and sedition and conspiracy to overthrow the state and federal constitutions. Finally, Plaintiffs allege that Defendants engaged in racketeering by engaging in a conspiracy to violate 18 U.S.C. § 1951 (the Hobbs Act) by extorting Plaintiffs' "liberty" from them "without their consent, induced by wrongful use or threat of use of force, or fear, or under color of official right" and further conspiring to "racketeer." FAC ¶ 130. Once SB 277 was passed, Plaintiffs claim, the Governor and legislators used their offices and positions to influence agencies in the State, in counties

and local law enforcement agencies, to enforce the law by means of threat and intimidation. FAC ¶ 132.

All of these allegations fail because, as discussed above Plaintiffs have no constitutional right to send their unimmunized children to school, and, as discussed below, Plaintiffs fail to state any plausible claim under federal or state law.

B. RICO, the Hobbs Act and Obstruction of Justice

RICO provides for civil remedies to "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]." 18 U.S.C. § 1964(c). Section 1962(c) prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." RICO defines "racketeering activity" as certain 'predicate acts' which include among other things "any act or threat involving . . . bribery, extortion. . . which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under" enumerated sections of title 18 of the United States Code. §§ 1961(1)(A)-(B) (2000 ed., Supp. IV).

Included in the enumerated sections of title 18 that may stand as a basis for a RICO claim is 18 U.S.C. § 1503, which codifies obstruction of justice. The "omnibus clause" of this statute makes it a federal crime to obstruct a judicial proceeding:

> Whoever … corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). . .

The elements of obstructing justice pursuant to the omnibus clause of 18 U.S.C. § 1503 are: (1) a judicial proceeding must be pending; (2) the

defendant must know that the judicial proceeding is pending; and (3) the defendants must act corruptly with the specific intent or purpose to obstruct, influence or impede a proceeding in its due administration of justice. *United States v. Bashaw*, 982 F.2d 168, 170 (6th Cir. 1992).

Also included in the enumerated sections of title 18 that may stand as a basis for a RICO claim is 18 U.S.C. § 1951 (the Hobbs Act). That Act subjects a person to criminal liability if he "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. § 1951(a). The Hobbs Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

C. Plaintiffs Have Failed to Plead Predicate Acts Upon Which RICO Claims Can Be Based

1. *Plaintiffs' Reliance on An Allegation of Obstruction of Justice Under 18 U.S.C. § 1503 to Support Their RICO Claims Fails*

Plaintiffs' allegation that Defendants obstructed justice and therefore violated 18 U.S.C. § 1503 (section 1503) by influencing the outcome of Assembly and Senate hearings and by committing "perjury" of their oaths of office, cannot stand as a basis for claims under RICO under the facts alleged by Plaintiffs.

In referring to "obstruction of justice," section 1503 is not, as Plaintiffs appear to believe, tied to *their* concept of "justice." In other words, section 1503 has nothing to do with what Plaintiffs believe is right or just, or in the case of SB 277, wrong and an infringement of their rights. Rather, section 1503 addresses the administration of justice within the judicial system. *Pettibone v. United States*, 148 U.S. 197 (1893). Thus, Plaintiffs cannot support their allegations of a violation of RICO based on section 1503 by claiming that Defendants unduly influenced a

legislative, rather than judicial, matter.

Claims that Defendants somehow "perjured" their oaths of office as Governor and legislators suffer a similar fate. Thus, Plaintiffs' claim that Defendants violated 18 U.S.C. §1951 by "conspiring" to racketeer by violating section 1503 also fails.

2. *Plaintiffs' Reliance on Allegations Of Extortion Under the Hobbs Act to Support Their RICO Claims Fails*

Plaintiffs' allegation that Defendants engaged in racketeering because they "extorted" a liberty interest from Plaintiffs in violation of the Hobbs Act, by influencing the passage of SB 277 is facially implausible because "*[c]ivil rights violations. . . do not fall within the statutory definition of "racketeering activity*." *Bowen v. Oistead*, 125 F.3d 800, 806 (9th Cir. 1997) (emphasis added).

Moreover, Plaintiffs' assertion that Defendants obtained "property" from them because they took away Plaintiffs' "liberty," by working to pass SB 277, is facially implausible and legally insupportable. FAC ¶131. Under the Hobbs Act, the property allegedly extorted cannot be a right, but must be something tangible**.** *See Sekhar v. United States*, 133 S. Ct. 2720, 2726, 186 L. Ed. 2d 794 (2013) ("The principle announced there—that a defendant must pursue something of value from the victim that can be exercised, transferred, or sold—applies with equal force here. Whether one considers the personal right at issue to be "property" in a broad sense or not, it certainly was not obtainable property under the Hobbs Act.")

Therefore, Plaintiffs' reliance on the claim that Defendants "extorted" their constitutional rights by working to pass and then passing SB 277, as the basis for a RICO claim, also fails as a matter of law.

3. *Plaintiffs Have Not Alleged Any Recognized Predicate Acts by Defendants Under RICO*

The act of "influencing" the Assembly and Senate hearings in which Defendants allegedly participated, in order to ensure the passage of SB 277, cannot be considered a "predicate act" under RICO. Discussing legislation under consideration and taking a position as to that legislation are part and parcel of the job of legislators and the Governor, and said acts are undertaken for the State of California. Acts undertaken by a public official for the benefit of the government cannot constitute a predicate act of racketeering activity under RICO. *Wilkie v. Robbins*, 551 U.S. 537, 5555-556, 127 S. Ct. 2588, 2605, 168 L. Ed. 2d 389 (2007).

In addressing claims that government employees engaged in racketeering while enforcing forfeiture regulations against plaintiffs, the United States Supreme Court in *Wilkie* noted that, "it is not just final judgments, but the fear of criminal charges or civil claims for treble damages that could well take the starch out of regulators who are supposed to bargain and press demands vigorously on behalf of the Government and the public." *Id.* at 567. "[Public] employees do not become racketeers by acting like aggressive regulators." *Id.* at 566; quoting *Sinclair v. Hawke*, 314 F.3d 934, 944 (8th Cir. 2003).

This concept is in accord with the immunities afforded to the Governor and legislators, such as the *Noerr-Pennington* immunity doctrine, discussed above.

D. Plaintiffs Have Not Alleged an Injury to Business or Property As Required by RICO

Plaintiffs' RICO claims also fail since, similar to the Hobbs Act discussed above, RICO's civil remedy section "requires as a threshold for standing an injury to 'business or property.' " *Avalos v. Baca*, 596 F.3d 583, 592 (9th Cir. 2010).

> To have standing under § 1964(c), a civil RICO plaintiff must show: (1) that his alleged harm qualifies as injury to his business or property; and (2) that his harm was "by reason of" the RICO violation, which requires the plaintiff to establish proximate causation. [citations omitted.]"

Canyon Cty. v. Syngenta Seeds, Inc., 519 F.3d 969, 972 (9th Cir. 2008), *cert. denied, Canyon County, Idaho v. Syngenta Seeds, Inc*. 555 U.S. 970, U.S., Oct. 20, 2008.

Despite their verbose and convoluted FAC, Plaintiffs have not alleged an injury to a business or property interest. Instead, they have alleged injury to their alleged personal "liberty" interest under the Constitution to not be required to immunize their children in order to send them to school. Since this liberty was extorted, Plaintiffs argue in a circular fashion, they lost "their time, money, labor and constitutional freedoms." FAC ¶¶ 131, 135. Plaintiffs also allege that they "have lost hundreds of dollars in: petitioning the Defendants to not violate their rights, [and] travel to and from the state capital. . ." FAC ¶ 149. However, while alleging financial loss is necessary, alleging a financial loss alone is insufficient if Plaintiffs have not also alleged an injury to a business or property.

> To determine whether a plaintiff has sufficiently alleged that he has been "injured in his business or property," we must examine carefully the nature of the asserted harm. Our circuit requires that a plaintiff asserting injury to property allege "concrete financial loss." *Oscar v. Univ. Students Coop. Ass'n*, 965 F.2d 783, 785 (9th Cir.1992) (en banc). *Financial loss alone, however, is insufficient. "Without a harm to a specific business or property interest*—a categorical inquiry typically determined by reference to state law—*there is no injury to business or property within the meaning of RICO***."** [citations omitted.]

Id., at 975 (9th Cir. 2008) [Emphasis added.]

The loss that Plaintiffs claim is not an injury to either a business, or to a property interest. Rather, Plaintiffs allege an injury to their liberty. However, as noted above with regard to the Hobbs Act, a liberty is not "property" for the purposes of RICO. More important, regardless of the theory, right, or Amendment on which they base their arguments, *Plaintiffs do not have a constitutional right to refuse to immunize their children and then enroll those children in school.* Thus, even if Plaintiffs could successfully argue that an injury to a constitutional right is an injury to a

"property interest" for the purposes of claiming injury under RICO, Plaintiffs cannot rely on this argument to save their RICO claims, since the right Plaintiffs claim was injured *does not exist*. The State's compelling interest in protecting public health and safety by mandating vaccinations for school children has been unanimously recognized by the U.S. Supreme Court, the California Supreme Court, and every other federal and state court that has addressed the issue for over a century. Thus, no right has been violated, and Plaintiffs have not alleged an injury to "business or property" as required to plead a RICO claim.

E. The Enactment of SB 277 Does Not Implicate Interstate Or Foreign Commerce

RICO applies only to an "enterprise engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(c). Plaintiffs bear the burden of establishing that the alleged acts have an effect on interstate commerce. *Musick v. Burke*, 913 F.2d 1390, 1398 (9th Cir.1990). In a civil RICO prosecution, the plaintiffs must show at least a "minimal" connection with interstate commerce.

Here, plaintiffs have pled no activities that affect interstate or foreign commerce. The enactment of SB 277 was directed exclusively toward activities within the State of California, *to wit*, the mandatory vaccination of children attending schools or day care centers in California. The effect on interstate or foreign commerce, if any, is insufficient for application of RICO in this case.

F. Plaintiffs Have Not Pled RICO Allegations with Sufficient Particularity

All elements of RICO liability must be pled particularly: "Rule 9(b)'s requirement that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity applies to civil RICO fraud claims." *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065-1066 (9th Cir.

2004). "To satisfy Rule 9(b), a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). Under Rule 9(b), "the complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993).

A cursory review of the overbroad and conclusory RICO allegations in the FAC clearly shows a complete failure to set forth facts with the required specificity. Plaintiffs merely allege in their complaint that certain lawmakers have taken political contributions from pharmaceutical companies and had some "closed door" meetings, and that Governor Brown entered into an enterprise with the legislators and the pharmaceutical companies to pass a law based on science that Plaintiffs reject. Thus, Plaintiffs conclude, all the legislators and the Governor engaged in a criminal enterprise aimed at "extorting" Plaintiffs' rights. This is simply insufficient to support a claim under RICO.

IV. PLAINTIFFS ASSERT NO FACTUAL ALLEGATIONS TO SUPPORT ANY CLAIMS AGAINST DEFENDANT GUST

Plaintiffs allege in their complaint that the legislators' spouses and the Governor's wife "have conspired to aid, abet, encourage and supported[sic] the other defendants and receive the financial benefit of their public office." FAC ¶ 117. This is the sum of the allegations against the spouses of the legislators and the Governor's wife found in the FAC. Plaintiffs have made no factual allegation that supports their claim that the spouses, including Defendant Gust, had any knowledge of the matters set forth in the FAC, or had any role in them, even if they were true.

Further, even if Plaintiffs were to allege communications between Gust and the Governor or legislators regarding the passage of SB277, any such communications or "petitioning" would be covered by the *Noerr-Pennington*

immunity as discussed above. Similarly, any such activity, even if Gust had taken part, or was aware of it occurring, could not be considered a violation of RICO, as discussed above. Thus, none of the causes of action against Defendant Gust can stand, as they are factually void and facially implausible.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' First Amended Complaint, without leave to amend.

Dated: October 26, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
RICHARD T. WALDOW
ELIZABETH S. ANGRES
Supervising Deputy Attorneys General
JONATHAN E. RICH
JACQUELYN Y. YOUNG
Deputy Attorney General

/s/ Elizabeth G. O'Donnell
ELIZABETH G. O'DONNELL
Deputy Attorney General
Attorneys for Defendants Governor Edmund G. Brown, Jr., Anne Gust, and the State of California

LA2016602117
52266462.doc