

# Dr. Bureaucrat? Shifting Medical Immunization Exemptions from Doctors to Public Officials

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## *Code Sections Affected*

Health and Safety Code §§ 120372, 120372.05 (new), §§ 120370, 120375, 120440 (amended).

SB 276 (Pan); 2019 STAT. CH. 278.

## TABLE OF CONTENTS

I. INTRODUCTION.....	355
II. LEGAL BACKGROUND.....	357
<i>A. Pre-Modern Constitutional Case Law</i> .....	357
<i>B. Existing California Law</i> .....	358
<i>C. Whitlow v. California: Reaffirming California’s Control Over         Mandatory Vaccinations</i> .....	359
III. CHAPTER 278.....	361
IV. ANALYSIS .....	362
<i>A. California’s Ability to Oversee Doctors to Protect Herd Immunity</i> ...	363
1. <i>Doctors and Bureaucrats</i> .....	363
2. <i>Oversight Over Doctors</i> .....	365
3. <i>California’s Review of the MBE Process</i> .....	365
4. <i>Preserving Herd Immunity</i> .....	366
<i>B. Misguided Challenges to Chapter 278</i> .....	367
1. <i>The Dangers of Vaccinations</i> .....	368
2. <i>Misdirected Legal Challenges</i> .....	370
V. CONCLUSION .....	371

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## I. INTRODUCTION

Three-and-a-half-year-old Ivy is a T-cell lymphoblastic lymphoma patient who has faced hospitalization three times in the past few months.<sup>1</sup> Ivy's hospitalizations have not been for her cancer, nor for any disease that vaccinations can prevent, but rather for the common cold.<sup>2</sup> As Ivy's weakened immune system makes the common cold a potentially life-threatening issue, her mother Alyssa fears that exposure to a more serious disease would kill her daughter.<sup>3</sup> Ivy's immunizations are up-to-date currently, but her cancer treatments will prevent her from receiving additional vaccinations until her treatment is complete.<sup>4</sup> Ivy, like other immunocompromised children, relies on people in her community to protect her from communicable diseases through herd immunity.<sup>5</sup>

In addition to Ivy's current fight against lymphoma, Ivy likely has autism along with a global development syndrome: Potocki-Schaffer Syndrome.<sup>6</sup> Rumors of a link between autism and vaccinations persist in internet communities despite proof the claims are scientifically inaccurate.<sup>7</sup> Nonetheless, Alyssa remains steadfast that she would rather have a child with autism than have a child that dies from a preventable disease.<sup>8</sup>

Currently, the United States is facing a widespread measles outbreak.<sup>9</sup> This outbreak is occurring despite the Centers for Disease Control and Prevention's ("CDC") determination that eradication of measles in the United States occurred in 2000.<sup>10</sup> Experts

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1. Telephone Interview with Alyssa Al-Jamea (July 7, 2019) (notes on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*; see *Herd Immunity*, THE HISTORY OF VACCINES, <https://www.historyofvaccines.org/content/herd-immunity-0> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*) (explaining "the principle of herd immunity" existing when "a large percentage of the population is vaccinated . . . [the high vaccination rate] indirectly protects unimmunized individuals, including those who can't be vaccinated and those for whom vaccination was not successful"); see generally *NCI Dictionary of Cancer Terms*, NATIONAL CANCER INSTITUTE, <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/immunocompromised> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*) (defining immunocompromised individuals as "[h]aving a weakened immune system . . . [weakened immune systems can] be caused by certain diseases or conditions, such as AIDS, cancer, diabetes, malnutrition, and certain genetic disorders [and] . . . certain medicines or treatments, such as anticancer drugs, radiation therapy, and stem cell or organ transplant"); Tamir Lewin, *Sick Child's Father Seeks Vaccination Requirement in California*, N.Y. TIMES (Jan. 28, 2015), <https://www.nytimes.com/2015/01/29/us/father-of-boy-with-leukemia-asks-california-school-officials-to-bar-unvaccinated-students.html> (on file with *The University of the Pacific Law Review*) (describing the extra measures a father must take in order to protect his son with leukemia).

6. See Al-Jamea, *supra* note 1 (clarifying that due to Ivy's young age it is too early to diagnose her with autism).

7. See *infra* notes 168, 169 (describing studies showing there is no scientific evidence that vaccines cause autism).

8. Al-Jamea, *supra* note 1.

9. *Measles is Spreading Across the United States*, CNN, <https://www.cnn.com/health/live-news/measles-outbreak/index.html> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*).

10. *Measles History*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/measles/about/history.html> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*).

believe the current outbreak is a result of the anti-vaccination movement.<sup>11</sup> Between January 1 and to August 1, 2019, the CDC reported 1,172 cases of measles in the United States.<sup>12</sup> The eight-month total tripled 2018's 372 cases, and surpassed the annual rate dating back to 1994.<sup>13</sup>

As a response to a 2014 measles outbreak, amendments to California law removed personal belief exemptions ("PBEs") for vaccinations, leaving only medical based exemptions ("MBEs") as an exemption option.<sup>14</sup> After California removed the PBE option, a handful of doctors began providing MBEs in exchange for money, capitalizing on the new law.<sup>15</sup> An investigation into the practice "found five doctors wrote over half of the 180 forms filed in eight school districts."<sup>16</sup> Concerns about physicians profiting from granting illegitimate MBEs led state Senator Richard Pan to propose Chapter 278.<sup>17</sup>

Chapter 278 prevents doctors from profiting from MBEs and ensures to grant only legitimate medical exemptions.<sup>18</sup> Decreasing MBEs in schools helps to raise the vaccination rate to regain and protect herd immunity.<sup>19</sup> Opponents have voiced complaints on theories of personal rights and the dangers of vaccines; however, Chapter 278's real focus is on the oversight of doctors.<sup>20</sup> Consequently, personal concerns are insufficient to

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*Pacific Law Review*).

11. *Measles is Spreading Across the United States*, *supra* note 9 CNN, <https://www.cnn.com/health/live-news/measles-outbreak/index.html> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*); see *Measles Cases Spike Globally Due to Gaps in Vaccination Coverage*, WORLD HEALTH ORGANIZATION (Nov. 29, 2019), <https://www.who.int/news-room/detail/29-11-2018-measles-cases-spike-globally-due-to-gaps-in-vaccination-coverage> (on file with *The University of the Pacific Law Review*) (describing that an international spike in measles outbreaks are the result of "gaps in vaccination coverage" and the Americas was one of the areas with the "greatest upsurges in cases in 2017").

12. *Measles Cases and Outbreaks*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/measles/cases-outbreaks.html> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*).

13. *Id.*; Julia Jacobo, *Number of Measles Cases in US in 2019 Surpasses Previous Record in 1994*, ABC NEWS (May 30, 2019), <https://abcnews.go.com/US/number-measles-cases-us-2019-surpasses-previous-record/story?id=63380454> (on file with *The University of the Pacific Law Review*).

14. SENATE COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 276, at 3,6 (Apr. 24, 2019) [hereinafter SENATE COMMITTEE ON HEALTH ANALYSIS]; Nina Shapiro, *'My Body, My Choice' Is Not a Vaccine Slogan*, FORBES (June 13, 2019), <https://www.forbes.com/sites/ninashapiro/2019/06/13/my-body-my-choice-is-not-a-vaccine-slogan/#52d18276130d> (on file with *The University of the Pacific Law Review*).

15. *Id.*

16. Cat Ferguson, *California Bill Cracking Down on Vaccine Exemptions Advances in Legislature*, THE MERCURY NEWS (June 20, 2019), <https://www.mercurynews.com/2019/06/20/california-bill-cracking-down-on-vaccine-exemptions-advances-in-legislature/> (on file with *The University of the Pacific Law Review*).

17. SENATE COMMITTEE ON HEALTH ANALYSIS, *supra* note 14, at 3; *id.*

18. SENATE COMMITTEE ON HEALTH ANALYSIS, *supra* note 14, at 3

19. Richard Pan, *The Real Victims of Anti-Vaxxer Fake Medical Exemptions* | *Opinion*, NEWSWEEK (Apr. 2, 2019), <https://www.newsweek.com/anti-vaxxers-medical-exemptions-opinion-1381686> (on file with *The University of the Pacific Law Review*).

20. See *OPPOSE SB 276: Immunizations: Medical Exemptions*, EDUCATE.ADVOCATE, at 1,4 (2019) available at <https://www.educateadvocateca.com/app/download/969388472/Educate+Advocate+SB+276+Oppose+4+20+19.pdf>. (on file with *The University of the Pacific Law Review*) (describing legal concerns raised under Chapter 278) [hereinafter *OPPOSE SB 276*]; ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 276, at 1–2 (July 8, 2019) (summarizing the contents of Chapter 278 as a statewide database for submission of MBEs, a review process and new oversight powers over physicians) [hereinafter ASSEMBLY COMMITTEE ON APPROPRIATIONS ANALYSIS].

bring a successful challenge to this new law and its focus on maintaining public health and penalizing ill-intentioned doctors.<sup>21</sup>

## II. LEGAL BACKGROUND

State-mandated vaccinations have been the source of legal challenges since the late-nineteenth century which continue today.<sup>22</sup> Section A reviews the pre-modern United States and California Supreme Court cases that set the scene for current laws requiring mandatory vaccinations in schools.<sup>23</sup> Section B discusses existing law on vaccinations and school attendance.<sup>24</sup> Section C examines California's recent approach to mandatory vaccinations in schools as discussed in *Whitlow v. California*.<sup>25</sup>

### A. Pre-Modern Constitutional Case Law

There is well-established precedent both by the United States and California Supreme Courts upholding mandatory vaccinations in the interest of public health.<sup>26</sup> In 1905, the Supreme Court held states could regulate health laws under their police powers.<sup>27</sup> In the 1922 case *Zucht v. King*, the Court extended the power to mandate vaccinations to public schools, citing the "broad discretion required for the protection of public health."<sup>28</sup>

Rosalyn Zucht, a grade school child, faced exclusion from public school because she failed to produce a certificate of vaccination.<sup>29</sup> Zucht argued the exclusion denied her due process under the Fourteenth Amendment.<sup>30</sup> Relying on the 1905 precedent, the Court held compulsory vaccination ordinances fell within states' police powers in the interest of public health and dismissed Zucht's claim.<sup>31</sup>

In *Prince v. Commonwealth of Massachusetts*, the Court held that compulsory immunization mandates do not violate the freedom of religion.<sup>32</sup> The Court found "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."<sup>33</sup> Ultimately, the Court

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21. *Infra* Part IV.

22. *Infra* Section II.A., and *infra* Section II.B.

23. *Infra* Section II.A.

24. *Infra* Section II.B.

25. *Infra* Section II.C.

26. See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905) (establishing the authority of the state to mandate vaccinations in the interest of public health); *Abeel v. Clark*, 84 Cal. 226, 230–231 (1890) (establishing California's power to mandate vaccinations in schools).

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

28. 260 U.S. 174, 177 (1922).

29. *Id.* at 175.

30. *Id.*

31. *Id.* at 177.

32. *Cf. Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944) (noting *Prince* was more broadly about distribution of religious literature in public than public health, but the court mentioned public health as an example where public interests can be greater than those with religious objections).

33. *Id.* at 166–67.

## 2020 / Medical Immunization Exemptions from Doctors to Public Officials

determined the interests of the community take precedent over individual religious liberties.<sup>34</sup>

In *Abeel v. Clark*, the California Supreme Court upheld the use of California's police powers to mandate vaccinations for school children.<sup>35</sup> Despite potential shortcomings of vaccinations, the court determined that science had proven vaccines to be the best chance of stopping communicable diseases.<sup>36</sup> Since the court's decision in *Abeel*, several California cases have reaffirmed the state's authority to mandate vaccinations for the purpose of public safety.<sup>37</sup>

### B. Existing California Law

Existing California law lists the required vaccinations for school-aged children.<sup>38</sup> Beyond this list, the state can require additional immunizations if health authorities recommend them.<sup>39</sup> Typically, a student must have all required immunizations to enroll in school or daycare.<sup>40</sup>

In 2015 Senator Pan introduced SB 277 which removed the personal and religious belief exemptions for vaccinations.<sup>41</sup> SB 277's removal of belief-based exemptions contributed to an increase in both vaccination rates in elementary schools and the number of MBEs.<sup>42</sup> Presently, a doctor determines whether it is unsafe for a child to receive an

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34. *Id.* at 166.

35. *Abeel*, 84 Cal. at 230.

36. *Id.* (holding that "vaccination may not be the best and safest preventive possible, . . . [sciences] have proved it to be the best method known to medical science to lessen the liability to infection with the disease").

37. *See* *Brown v. Smith*, 24 Cal. App. 5th 1135, 1140 (Ct. App. 2018) (upholding the legality of mandatory vaccinations against Free Exercise Clause, equal protection, due process, right to attend school, and informed consent arguments); *Love v. State Dept. of Educ.*, 29 Cal. App. 5th 980, 993–995 (Ct. App. 2018), *review denied* (Feb. 13, 2019) (rejecting claims of violations of the right to privacy, due process, and Free Exercise); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1092 (S.D. Cal. 2016) (finding that parents allegation that mandatory vaccinations would violate the Free Exercise clause, right to education, due process was unlikely to succeed and dismissed the case).

38. *See* CAL. HEALTH & SAFETY CODE §§ 120335(b)(1)–(10) (West 2019) (listing the required vaccinations diphtheria, haemophilus influenzae type b, measles, mumps, pertussis, poliomyelitis, rubella, tetanus, hepatitis B, varicella).

39. *See id.* § 120335(b)(11) (listing authorities to include "the Advisory Committee on Immunization Practices of the United States Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians").

40. *Id.* § 120335(b).

41. Karen Kaplan, *Here's What Happened After California God Rid of Personal Belief Exemptions for Childhood Vaccines*, L.A. TIMES (Oct. 29, 2018), <https://www.latimes.com/science/sciencenow/la-sci-sn-vaccine-medical-exemptions-20181029-story.html> (on file with *The University of the Pacific Law Review*).

42. Pan, *supra* note 19; *see* Current Bill Status of SB 276, [https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill\\_id=201920200SB276](https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200SB276) (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*) (illustrating that currently sixteen percent of California counties have an immunization rate below ninety percent) [hereinafter Current Bill Status of SB 276]; Don Thompson, *Public to Weigh in on Revised California Bill*, AP (June 20, 2019), <https://apnews.com/e82739a3289647d39b0cf1c791628e17> (on file with *The University of the Pacific Law Review*) (indicating that schools have ten percent of students with exemption making the vaccination rate ninety percent); *see generally* Aimee Cunningham, *How Holes in Herd Immunity Led to a 25-Year High in Measles Cases*, SCIENCE NEWS (Apr. 29, 2019), <https://www.sciencenews.org/article/holes-herd-immunity-led-25-year-high-us-measles-cases> (on file with *The University of the Pacific Law Review*) (indicating that the herd immunity

immunization.<sup>43</sup> If a doctor deems administering a vaccination to a child as unsafe, the issuance of an MBE is proper.<sup>44</sup> If a parent without an MBE cannot provide documentation of their child's vaccinations, or if there is "good cause to believe" exposure has occurred, a school can exclude a child.<sup>45</sup> The temporary exclusion remains in place until a local health officer believes that the child is not at risk of transmitting or contracting the diseases.<sup>46</sup>

Regulation of health professionals is not an enumerated power in the U.S. Constitution; therefore, it is a power the Constitution reserved for the states as established under the Tenth Amendment.<sup>47</sup> California's Business and Professions Code establishes the ability for the Board to regulate and license doctors.<sup>48</sup> Beyond licensing, the Board's other responsibilities include oversight over disciplinary actions against physicians.<sup>49</sup> Within the same chapter, the code enumerates the highest priority of the Board: protection of the public.<sup>50</sup>

### C. *Whitlow v. California: Reaffirming California's Control Over Mandatory Vaccinations*

California's passage of SB 277 renewed debate over the state's authority to mandate vaccinations.<sup>51</sup> *Whitlow v. California* highlighted this discourse, focusing on the removal of permissible PBEs from the law.<sup>52</sup> In *Whitlow*, a parent challenged the newly-enacted law based on violations of free exercise, due process, equal protection, and the right to education under the California Constitution.<sup>53</sup> Ultimately, the court in *Whitlow* rejected the request for an injunction to stop SB 277 because it determined the claims were unlikely to succeed at trial.<sup>54</sup> The court cited *Jacobson*, *Zucht*, and *Prince* when it decided that precedent allows states to use broad discretion in the interest of furthering public health interests.<sup>55</sup>

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rate for measles vaccine is between ninety two and ninety five percent, making the current rate in California below the necessary herd immunity rate for measles).

43. CAL. HEALTH & SAFETY CODE § 120370(a) (West 2019) (amended by Chapter 278).

44. *Id.*

45. *Id.* § 120370(b).

46. *Id.*

47. *See generally* U.S. CONST. amend X (describing the powers not explicitly delegated to the federal government as reserved for the states).

48. CAL. BUS. & PROF. CODE § 2004(h) (West 2019).

49. *Id.* § 2004(a).

50. CAL. BUS. & PROF. CODE § 2001.1 (West 2019).

51. *See Brown*, 24 Cal. App. 5th at 1145–1148 (upholding the central findings in *Whitlow* and rejecting arguments against informed consent); *Love*, 29 Cal. App. 5th at 987 (affirming the holdings in *Brown*); *Whitlow*, 203 F. Supp. 3d at 1079 (explaining the reason for bringing the injunction action was to prevent SB 277 from removing PBEs from the law); *see also* Dorit Rubenstein Reiss, *A Few Hail Mary Passes: Immunization Mandate Law, SB 277, Brought to Court*, HEALTHAFFAIRS (Feb. 28, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180226.699777/full/> (describing the "legislative battle" and the following litigation related to SB 277).

52. *Whitlow*, 203 F. Supp. 3d at 1081–82.

53. *Id.* at 1082.

54. *Id.* at 1092.

55. *Id.* at 1083–84.

2020 / Medical Immunization Exemptions from Doctors to Public Officials

First, *Whitlow* addressed the violation of free exercise claim.<sup>56</sup> The court concluded that the free exercise of religion does not override the state's interest in maintaining public health and safety.<sup>57</sup> The court's holding on the free exercise claim is consistent with earlier precedent, where public health and safety outweigh religious rights.<sup>58</sup>

Next, the court discussed the alleged violation of equal protection.<sup>59</sup> The plaintiffs argued that under SB 277, schools treated children with PBEs differently from the children who did not have PBEs.<sup>60</sup> The court rejected this argument, stating that the children who had PBEs were not similarly situated; therefore, the facts did not trigger an equal protection analysis.<sup>61</sup>

The court explained further that, even if it was necessary to complete an equal protection analysis, there was a rational basis for a difference in treatment.<sup>62</sup> Students who are not fully vaccinated interfere with the state's interest in public health, whereas students with vaccinations do not.<sup>63</sup> After this analysis, the court concluded that the plaintiffs were unlikely to succeed on their equal protection claim.<sup>64</sup>

The plaintiff's due process argument centered on denying students school admittance and "stigmatizing children with PBEs as 'vectors of disease.'"<sup>65</sup> Raising a parental rights argument, the plaintiffs asserted their ability to make decisions about their children's health and rights to bodily integrity.<sup>66</sup> Citing *Zucht*, the court denied the due process claim because states have authority to mandate vaccinations.<sup>67</sup>

In *Whitlow*, both parties agreed the right to education in California is a fundamental right, which the court examined carefully.<sup>68</sup> The plaintiffs argued that absent a health emergency, California did not have a compelling interest to enact SB 277.<sup>69</sup> In rejecting this argument, the court reasoned the "interest in protecting public health and safety . . . does not depend on or need to correlate with the existence of a public health emergency."<sup>70</sup> Ultimately, the court concluded there is no requirement to allow PBEs, and thus the state possesses the ability to freely give and take them away.<sup>71</sup>

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56. *Id.* at 1085.

57. *Id.* at 1086.

58. *Jacobson*, 197 U.S. at 25; *Prince*, 321 U.S. at 166.

59. *Whitlow*, 203 F. Supp. 3d at 1087.

60. *See Whitlow*, 203 F. Supp. 3d at 1087 (arguing "SB 277 treats children with PBEs differently from other children in denying the former an education, and it treats children with PBEs who have reached 'checkpoints' differently from children with PBEs who are not at 'checkpoints' in excluding the former from school").

61. *Id.* at 1087.

62. *Id.*

63. *Id.* at 1088.

64. *Id.*

65. *Id.* at 1089.

66. *Id.*

67. *Id.* at 1089 (citing *Zucht v. King*, 260 U.S. 174, 176 (1922)).

68. *Id.*

69. *Id.* at 1090.

70. *Id.*

71. *Id.* at 1091.

III. CHAPTER 278

Chapter 278 amends and adds to the Health and Safety Code by providing procedural requirements to track medical exemptions statewide.<sup>72</sup> Chapter 278 requires the California Department of Public Health (“CDPH”) to create a standardized medical exemption form for physicians and surgeons to complete.<sup>73</sup> After completion, automatic transmission of the form to the state occurs utilizing “the existing California Immunization Registry.”<sup>74</sup>

Chapter 278 requires physicians seeking a medical exemption on behalf of their patients to justify the exemption for each type of vaccination.<sup>75</sup> Additionally, physicians must identify themselves on the form and certify they have completed a physical examination of the child.<sup>76</sup> If the physician granting the exemption is not the child’s primary care physician, he or she must explain why the primary care physician did not issue the exemption.<sup>77</sup> Under Chapter 278, physicians cannot charge patients for medical exemptions.<sup>78</sup>

After completing the form, clinically-trained staff members from the CDPH review the submitted exemptions under three circumstances.<sup>79</sup> First, review occurs when the immunization rate in an individual school is less than ninety-five percent.<sup>80</sup> Second, a physician submitting more than five exemptions in a calendar year triggers review.<sup>81</sup> Third, the CDPH conducts a review when a school fails to provide its vaccination rates to the CDPH.<sup>82</sup>

To make a determination on the MBE the CDPH utilizes criteria from the CDC, Advisory Committee on Immunization Practices, and the American Academy of Pediatrics.<sup>83</sup> Beyond agency guidelines, the CDPH can consider other contraindications including family medical history.<sup>84</sup> If an exemption is improper, the State Public Health Officer (“PHO”) or designee, has the authority to revoke the exemption.<sup>85</sup> If the PHO revokes an exemption, a child can remain in school for thirty days on the condition of complying with the immunization schedule during that period.<sup>86</sup>

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72. Current Bill Status of SB 276, *supra* note 42.

73. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 276 at 1 (June 19, 2019) [hereinafter ASSEMBLY COMMITTEE ON HEALTH ANALYSIS].

74. *Id.*

75. SENATE COMMITTEE ON HEALTH ANALYSIS, *supra* note 14, at 2.

76. Current Bill Status of SB 276, *supra* note 42.

77. *Id.*

78. *Id.*

79. ASSEMBLY COMMITTEE ON HEALTH ANALYSIS, *supra* note 73 at 2.

80. Current Bill Status of SB 276, *supra* note 42.

81. *Id.*

82. *Id.*

83. ASSEMBLY COMMITTEE ON HEALTH ANALYSIS, *supra* note 73 at 3.

84. *See also* SENATE COMMITTEE ON HEALTH ANALYSIS, *supra* note 14, at 5 (explaining a contraindication as “conditions in a patient that increases the risk for a serious adverse reaction”).

85. Current Bill Status of SB 276, *supra* note 42.

86. *Id.*



The appeal process for a revoked MBE occurs in a thirty-day period and allows a child to remain in school until the appeals process is complete.<sup>87</sup> The Secretary of California Health and Human Services (“Secretary”) establishes an “independent expert review panel” to hear appeals during this thirty-day period.<sup>88</sup> After the hearing, the panel submits its determination of the appeal to the child’s guardians and the CDPH Secretary.<sup>89</sup> Chapter 278 does not provide for additional administrative appeals.<sup>90</sup>

Chapter 278 authorizes the CDPH to review a physician they believe poses a public health risk by issuing MBEs that fall below the immunization standards of care.<sup>91</sup> If a physician falls below the immunization standard, the proper licensing agencies review the physician’s actions.<sup>92</sup> While the licensing agencies review an allegation against a physician, the CDPH cannot accept additional MBEs from that physician.<sup>93</sup> This prohibition on additional MBEs remains until a determination that the physician has operated within the requisite standard of care.<sup>94</sup> If the licensing agency determines the physician’s acts fell below the standard, the physician cannot issue additional MBEs for two years *and* until they can prove there is no longer a public health risk.<sup>95</sup>

#### IV. ANALYSIS

Passage of Chapter 278 has attracted a wide range of attention from opponents concerned about their children.<sup>96</sup> Celebrities have spoken out regarding immunizations and Chapter 278, utilizing their public platform to advocate for and against the new law.<sup>97</sup> Governor Newsom changed his stance on the law, first explaining his concerns and then his support.<sup>98</sup> As Chapter 278 worked its way through the legislative process, opponents

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.* (including the Medical Board of California and the Osteopathic Medical Board of California).

93. *Id.*

94. *Id.*

95. *Id.*

96. *See* Antonia Blumberg, *California Immunization Bill Advances Amid Anti-Vaccine Protests*, HUFFPOST (Apr. 25, 2019), [https://www.huffpost.com/entry/california-medical-exemption-vaccine-bill\\_n\\_5cc1ed5ae4b066119de37d8d](https://www.huffpost.com/entry/california-medical-exemption-vaccine-bill_n_5cc1ed5ae4b066119de37d8d) (on file with *The University of the Pacific Law Review*) (describing the attention and length of hearing on Chapter 278).

97. *See* Christina Oehler, *Jessica Biel Is Lobbying Against California’s Vaccination Bill SB-276. Here’s Why She Wants Medical Exemptions for Vaccines*, HEALTH (June 13, 2019), <https://www.health.com/vaccines/sb276-vaccine-california-jessica-biel> (on file with *The University of the Pacific Law Review*) (describing lobbying efforts of actress Jessica Biel); Amy Haneline, *Dax Shepard Says He and Kristen Bell are ‘Most Vocal Pro-vaccination Couple in the Biz*, USA TODAY (June 26, 2019), <https://www.usatoday.com/story/life/allthemoms/2019/06/26/kristen-bell-and-dax-shepard-support-vaccines-and-twitter-erupts/1570154001/> (on file with *The University of the Pacific Law Review*) (illustrating the support given to Chapter 278 by actor Dax Shepard and actress Kristen Bell).

98. Hannah Wiley, *Amended California Vaccine Bill Clears Major Hurdle on Its Way to Gavin Newsom*, THE SACRAMENTO BEE (June 20, 2019), <https://www.sacbee.com/news/politics-government/capitol-alert/article231745078.html> (on file with *The University of the Pacific Law Review*).

campaigned at the Capitol arguing against the constitutionality of Chapter 278 and calling for a recall of its author, Senator Pan.<sup>99</sup>

Despite Chapter 278's tumultuous beginnings, this new law has created the ability for California to hold bad-acting physicians accountable for their actions.<sup>100</sup> Chapter 278 is not the proper place to raise concerns regarding safety of vaccinations and constitutionality; issues that scientific studies and litigation already address.<sup>101</sup> Section A discusses California's authority to oversee doctors.<sup>102</sup> Section B evaluates many of the arguments of those who opposed Chapter 278, proving them to be illegitimate or incorrectly directed at Chapter 278.<sup>103</sup>

### *A. California's Ability to Oversee Doctors to Protect Herd Immunity*

Ultimately, Chapter 278's goal is to "increase[] state oversight of medical exemptions to mandatory vaccinations required for school entry and standardizes reporting of such exemptions."<sup>104</sup> Centralized reporting and oversight helps to determine the legitimacy of MBEs, responding to the trend that occurred after SB 277 became law.<sup>105</sup> Currently, the Medical Board of California ("Board") faces obstacles when trying to determine whether a doctor under review followed the standard of care required by the Board.<sup>106</sup> Section 1 addresses the concerns about the roles of doctors and bureaucrats.<sup>107</sup> Section 2 outlines the authority of the state to oversee the actions by doctors.<sup>108</sup> Section 3 examines the state's involvement with examination of MBEs.<sup>109</sup> Finally, Section 4 describes the importance of Chapter 278's ultimate goal: preserve herd immunity.<sup>110</sup>

#### *1. Doctors and Bureaucrats*

In early June 2019, Governor Gavin Newsom announced, "I like doctor-patient relationships, bureaucratic relationships are more challenging for me . . . I'm a parent, I don't want someone that the governor of California appointed to make a decision for my

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99. Hannah Wiley, *Vaccine Skeptic Files Recall Petition Against California Senator*, SACRAMENTO BEE (June 14, 2019), <https://www.sacbee.com/news/politics-government/capitol-alert/article231565133.html> (on file with *The University of the Pacific Law Review*).

100. See ASSEMBLY COMMITTEE ON APPROPRIATIONS ANALYSIS, *supra* note 20, at 1–2 (describing the new review process under Chapter 278 to monitor MBEs and the actions of physicians).

101. *Infra* Section IV.B.

102. *Infra* Section IV.A.

103. *Infra* Section IV.B.

104. ASSEMBLY COMMITTEE ON APPROPRIATIONS ANALYSIS, *supra* note 20 at 1.

105. *Id.* at 3; *Legislative Analysis of SB 276*, MED. BOARD OF CAL., at 3, [http://www.mbc.ca.gov/About\\_Us/Pending\\_Legislation/SB276Analysis.pdf](http://www.mbc.ca.gov/About_Us/Pending_Legislation/SB276Analysis.pdf) (last visited Aug. 6, 2019) (on file with *The University of the Pacific Law Review*) [hereinafter *Legislative Analysis of SB 276*].

106. *Legislative Analysis of SB 276*, *supra* note 105, at 3.

107. *Infra* Section IV.A.1.

108. *Infra* Section IV.A.2.

109. *Infra* Section IV.A.3.

110. *Infra* Section IV.A.4.

family.”<sup>111</sup> Opponents of Chapter 278 praised Newsom following his public statement.<sup>112</sup> Opponents to Chapter 278’s review process described it as hijacking “the private patient physician[-]relationship” by giving authority to a state agency.<sup>113</sup>

Public concerns about replacing doctors’ judgement with bureaucracy forced major amendments to Chapter 278 prior to the Assembly Health Committee Hearing.<sup>114</sup> In Chapter 278’s initial form, the PHO reviewed completed MBE forms and the appeals denying the MBE.<sup>115</sup> The California Governor appoints the PHO—the director of the CDPH—illustrating Newsom’s initial statement.<sup>116</sup> By law, the PHO must have specific medical licenses and experience, but the PHO ultimately owes their appointment to the Governor.<sup>117</sup>

After Newsom’s public statements of concern, Senator Pan worked with the Governor’s Office and the Assembly Health Committee to amend Chapter 278.<sup>118</sup> Chapter 278’s review process provides for an independent review panel to conduct a review of any revoked exemption if a parent or guardian seeks an appeal.<sup>119</sup> Experts on the panel compare the exemption with standards of care reviewing agencies established.<sup>120</sup>

One major concern about the review process for MBEs is the reality that someone would be deciding for a child whom they have never actually examined.<sup>121</sup> While it is true the experts may not have ever personally examined a child, the experts follow guidelines

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111. Melody Gutierrez, *Gov. Newsom Criticized the New Vaccine Bill. Anti-vaccine Activists Are Celebrating*, L.A. TIMES (June 4, 2019), <https://www.latimes.com/politics/la-pol-ca-gavin-newsom-raises-bureaucracy-concern-with-exemption-bill-20190604-story.html> (on file with *The University of the Pacific Law Review*) [hereinafter *Gov. Newsom Criticized the New Vaccine Bill*]; Mike Luery, *Newsom Raises Concerns About Controversial Vaccination Bill*, KCRA 3 (June 2, 2019), <https://www.kcra.com/article/newsom-concerns-vaccination-bill/27694261> (on file with *The University of the Pacific Law Review*) (discussing Newsom’s concerns with bureaucrat involvement and concerns of other parents who could be concerned with the impacts of SB 276).

112. See Robert F. Kennedy, Jr., FACEBOOK (June 3, 2019), <https://www.facebook.com/rfkjr/photos/a.1426921030967975/2327592557567480/> (on file with *The University of the Pacific Law Review*) (responding to Governor Newsom’s public concern of Chapter 278 “just passed that test with his wise and sober opposition to a draconian proposal to forcibly vaccinate medically fragile children against the wishes of their parents and the medical advice of their physician”); see also Mattie Quinn, *Who Should Improve Medical Vaccine Exemptions?*, GOVERNING (June 12, 2019), <https://www.governing.com/topics/health-human-services/gov-california-newsom-vaccine-medical-exemption-measles.html> (on file with *The University of the Pacific Law Review*) (noting medical experts declaring Governor Newsom’s public statements as harmful).

113. See ASSEMBLY COMMITTEE ON HEALTH ANALYSIS, *supra* note 73 at 14 (describing the opposition by the National Vaccine Information Center).

114. Melody Gutierrez, *California Vaccine Bill Undergoes Major Changes and Wins Support of Former Critic Newsom*, L.A. TIMES (June 18, 2019), <https://www.latimes.com/politics/la-pol-ca-major-changes-controversial-vaccine-bill-sb276-2019618-story.html> (on file with *The University of the Pacific Law Review*) [hereinafter *California Vaccine Bill Undergoes Major Changes*].

115. SENATE COMMITTEE ON HEALTH ANALYSIS, *supra* note 14, at 2.

116. CAL. HEALTH & SAFETY CODE § 131005(a) (West 2019); see *Gov. Newsom Criticized the New Vaccine Bill*, *supra* note 111 (paralleling Newsom’s statement about MBEs being in the hands of a person appointed by the governor).

117. CAL. HEALTH & SAFETY CODE § 131005 (West 2019).

118. *California Vaccine Bill Undergoes Major Changes*, *supra* note 114.

119. ASSEMBLY COMMITTEE ON APPROPRIATIONS ANALYSIS, *supra* note 20, at 1 (July 9, 2019).

120. *Id.*

121. *Take Action to Oppose SB 276 in California*, PARENTALRIGHTS.ORG (Apr. 22, 2019) <https://parentalrights.org/oppose-sb276-ca/> (on file with *The University of the Pacific Law Review*).

determined by multiple agencies.<sup>122</sup> This independent review process provides more protections for those seeking MBEs, while keeping an eye on already revoked MBEs to ensure the preservation of herd immunity.<sup>123</sup> Post amendments, Governor Newsom has come out in support of Chapter 278.<sup>124</sup>

## *2. Oversight Over Doctors*

The Business and Professions Code charges the Board with licensing and disciplining medical doctors.<sup>125</sup> Prior to the passage of Chapter 278, the Board faced difficulties in conducting investigations into doctors who were granting MBEs.<sup>126</sup> When the number of MBEs increased after the removal of PBEs from the law, the need for oversight increased to protect herd immunity.<sup>127</sup> Of the 15,000 current medical and temporary exemptions, 5,500 will no longer be in compliance with Chapter 278.<sup>128</sup>

The Board supported Chapter 278 in concept prior to its passage, as it gives the Board the authority to act as a check on doctors.<sup>129</sup> With Chapter 278, the Board now has access to medical records linked to questionable MBEs.<sup>130</sup> The Board has the ability to review the MBEs doctors made to help ensure that patients across California receive the required standard of care.<sup>131</sup> Chapter 278 is important legislation to provide the Board with the tools necessary to ensure the herd immunity rate remains at an appropriate level to be an effective tool against outbreaks.<sup>132</sup> Without this authority,<sup>133</sup> the Board would fail to uphold their statutorily defined priority to protect the public.<sup>133</sup>

## *3. California's Review of the MBE Process*

Early case law established that states have broad authority to take actions in the interest of preserving public health.<sup>134</sup> In light of the current measles outbreak, California's

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122. See ASSEMBLY COMMITTEE ON APPROPRIATIONS ANALYSIS, *supra* note 20, at 2 (describing the review process and the licensed physician requirement to be an expert on the panel).

123. See *id.* at 1 (showing the opportunity to appeal upon the denial of an MBE occurs and the ability to review MBEs determined as improper at the CDPH stage of review).

124. *California Vaccine Bill Undergoes Major Changes*, *supra* note 114.

125. CAL. BUS. & PROF. CODE §§ 2004(a),(h) (West 2019); *Role of the Medical Board of California*, MEDICAL BOARD OF CALIFORNIA, [http://www.mbc.ca.gov/About\\_Us/Role.aspx](http://www.mbc.ca.gov/About_Us/Role.aspx) (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*).

126. *Legislative Analysis of SB 276*, *supra* note 106, at 1.

127. *Id.* at 2.

128. *3 in 4 Californians Back Vaccines as State Debates Making it Tougher to Opt Out* (June 6, 2019), <https://sd06.senate.ca.gov/news/2019-06-06-3-4-californians-back-vaccines-state-debates-making-it-tougher-opt-out> (on file with *The University of the Pacific Law Review*) [hereinafter *3 in 4 Californians Back Vaccines*].

129. *Legislative Analysis of SB 276*, *supra* note 106, at 3.

130. *Id.*

131. *Id.*

132. See *id.* at 2–3 (describing the impact of illegitimate medical exemptions on herd immunity in school populations after SB 277 and the authority granted to the Board from Chapter 278 to determine whether a physician acted properly).

133. See generally CAL. BUS. & PROF. CODE § 2001.1 (West 2019) (describing the statutorily defined priority of the board to protect the public).

134. See *supra* Section II.A. (describing the pre-modern case law establishing the states' rights to maintain

authority to enact legislation to limit the number of cases and exposures supports California's interest in public health.<sup>135</sup> SB 277 has withstood legal challenges that removed the PBEs from the law.<sup>136</sup> Chapter 278 creates a centrally-regulated exemption process, which distinguishes doctors who are issuing MBEs properly from those who are not.<sup>137</sup>

Opponents to Chapter 278 cited concerns over the “chilling” effect the oversight and review requirements might have on doctors.<sup>138</sup> The basis for this concern is the belief that doctors will be afraid of the strict review process and that children who need MBEs will be unable to obtain them.<sup>139</sup> However, doctors administering legitimate MBEs and exceed granting five MBEs per year should not feel “chilled” as they are following the law and relevant guidelines.<sup>140</sup> Some doctors practicing specialties, such as oncologists, will issue more MBEs than primary care physicians, but remain in compliance.<sup>141</sup> Furthermore, granting five or more MBEs does not preclude doctors from issuing more, unless exemptions are illegitimate.<sup>142</sup> If a physician follows the guidelines when issuing exemptions, the physician is following the law and has nothing to fear.<sup>143</sup>

#### 4. Preserving Herd Immunity

Herd immunity is most important where vulnerable members of a population cannot receive vaccinations for legitimate medical reasons.<sup>144</sup> These members include individuals with severe allergic reactions to vaccinations, weakened immune systems,

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public health).

135. See generally Shapiro, *supra* note 14 (arguing that vaccinations are not a personal choice issue, like abortion, but rather a public health issue).

136. See *supra* Section II.C. (detailing the decision and reasoning in *Whitlow*).

137. See generally Current Bill Status of SB 276, *supra* note 42 (adding the review process allows the Board to determine which doctors need to face disciplinary actions for falling below the relevant standards of care).

138. *California Vaccine Bill Undergoes Major Changes*, *supra* note 114.

139. *Id.*

140. See ASSEMBLY COMMITTEE ON APPROPRIATIONS ANALYSIS, *supra* note 20, at 1 (indicating the review process that evaluates each MBE under review to determine if the MBE is consistent with guidelines).

141. See generally *Contraindications and Precautions*, CENTERS FOR DISEASE CONTROL AND PREVENTION <https://www.cdc.gov/vaccines/hcp/acip-recs/general-recs/contraindications.html> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*) (listing concurrent chemotherapy treatment as a contraindication for the measles vaccine), and *Types of Oncologists*, CANCER.NET (last visited Aug. 7, 2019) <https://www.cancer.net/navigating-cancer-care/cancer-basics/cancer-care-team/types-oncologists> (on file with *The University of the Pacific Law Review*) (describing a medical oncologist as an individual who “treats cancer using chemotherapy or other medications”).

142. See ASSEMBLY COMMITTEE ON APPROPRIATIONS ANALYSIS, *supra* note 20, at 2 (describing the review process where doctors are only prevented from issuing additional MBEs if the doctor is concurrently under investigation by the Board or if the CDPH determines the doctor is contributing to a public health risk).

143. See *id.* at 1–2 (providing that doctors determined not to be posing a public health risk would be free from disciplinary actions).

144. VACCINES.GOV, *Vaccines Protect Your Community*, <https://www.vaccines.gov/basics/work/protection> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*).

HIV, and individuals receiving chemotherapy.<sup>145</sup> The benefits of herd immunity also extend to infants who are too young to receive vaccinations.<sup>146</sup>

While adverse side effects from vaccinations are possible, the symptoms of diseases are often more severe.<sup>147</sup> A child with measles may suffer from pneumonia, deafness, lifelong brain damage, or death.<sup>148</sup> Conversely, the most typical side effects from a measles vaccination includes soreness at the injection site, fever, rash, or “temporary pain and stiffness in the joints.”<sup>149</sup>

To sustain vaccines’ effectiveness, populations must maintain a vaccination rate of over ninety-five percent.<sup>150</sup> Chapter 278 helps achieve this goal by placing further restrictions on what appears to have been the source of decreased immunization rates after enactment of SB 277—fraudulent MBEs.<sup>151</sup> With herd immunity rates increasing and fraudulent MBEs decreasing, Chapter 278 improves the health of the overall community.<sup>152</sup>

### B. Misguided Challenges to Chapter 278

Opponents to Chapter 278 cite the dangers of vaccines, state interference with personal beliefs, and violations of fundamental rights.<sup>153</sup> However, these complaints miss the point of Chapter 278.<sup>154</sup> Chapter 278 does not change the types of exemptions accessible, as was the focus of SB 277.<sup>155</sup> Chapter 278 does not force parents to vaccinate their children.<sup>156</sup> Rather, Chapter 278 creates an oversight system for the state to ensure that the sale of MBEs is not occurring, protecting herd immunity.<sup>157</sup> Section 1 evaluates

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145. *Id.*

146. Rhea Boyd, M.D., F.A.A.P., *It Takes a Herd*, AMERICAN ACADEMY OF PEDIATRICS (Apr. 18, 2019), <https://www.aap.org/en-us/aap-voices/Pages/It-Takes-a-Herd.aspx> (on file with *The University of the Pacific Law Review*); see *Vaccine Myths Debunked*, PUBLIC HEALTH, <https://www.publichealth.org/public-awareness/understanding-vaccines/vaccine-myths-debunked/> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*) (describing the outbreak of whooping cough in California in 2010 which killed ten infants).

147. See CENTERS FOR DISEASE CONTROL AND PREVENTION, *Measles and the Vaccine (Shot) to Prevent it*, <https://www.cdc.gov/vaccines/parents/diseases/child/measles.html> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*) (describing side effects of the vaccinations and the symptoms of measles).

148. *Id.*

149. See CENTERS FOR DISEASE CONTROL AND PREVENTION, *Measles, Mumps, and Rubella (MMR) Vaccine Safety*, <https://www.cdc.gov/vaccinesafety/vaccines/mmr-vaccine.html> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*) (listing the most common side effects from the MMR vaccine).

150. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 276, at 1 (June 20, 2019).

151. Pan, *supra* note 19.

152. See ASSEMBLY COMMITTEE ON HEALTH ANALYSIS, *supra* note 73 at 7–8 (describing the opposition by the National Vaccine Information Center).

153. See e.g., *OPPOSE SB 276*, *supra* note 20, at 1, 4 (noting arguments by one of the registered opponents to SB 276 discussing educational hardships, discrimination against “students with exceptional needs” and a violation of due process rights).

154. See ASSEMBLY COMMITTEE ON HEALTH ANALYSIS, *supra* note 73 at 1–2 (reporting the impact of Chapter 278 to change reporting of MBEs to the state and oversight capabilities over doctors by the state).

155. See *id.* at 3 (detailing the history of recent legislation, including the removal of PBEs by SB 277 in 2015).

156. See generally Current Bill Status of SB 276, *supra* note 42 (illustrating that there is no requirement in Chapter 278 that forces parents to vaccinate their children).

157. See *id.* (describing the changes in the law under Chapter 278).

claims about the dangers of vaccinations, and section 2 outlines the past legal challenges to mandatory vaccinations.<sup>158</sup>

### 1. *The Dangers of Vaccinations*

At the Assembly Health Committee hearing thousands of parents, grandparents, and doctors protested Chapter 278.<sup>159</sup> Several parents held up signs and testified their children would lose their medical exemptions under Chapter 278's guidelines.<sup>160</sup> Many parents testified about injuries their children sustained from vaccinations and demanded the state hold someone accountable.<sup>161</sup>

Despite anecdotal evidence at the hearings, vaccine injuries are extremely rare.<sup>162</sup> A measure of the number of vaccine injuries is the statistics of individuals seeking compensation for adverse reactions.<sup>163</sup> Nationally from 2006–2017, 4,328 individuals obtained compensatory awards out of 3,454,269,356 reported cases.<sup>164</sup> Out of all vaccines, the influenza vaccine has the highest number of compensable cases.<sup>165</sup> Despite staggering numbers illustrating the low amount of compensable vaccine injuries, the program is complainant friendly, treating vaccines as “guilty unless proven innocent.”<sup>166</sup> Although vaccine injuries are rare, opponents to mandatory vaccinations have called upon doctors to rethink their promise made when agreeing to the Hippocratic Oath to “do no harm.”<sup>167</sup>

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158. See *infra* Sections IV.B.1–2.

159. Katy Grimes, *The ‘Right to Choose’ Does not Apply to Childhood Vaccinations Under Senate Bill 276*, THE CALIFORNIA GLOBE (June 21, 2019), <https://californiaglobe.com/section-2/a-womans-right-to-choose-does-not-apply-to-childhood-vaccinations-under-senate-bill-276/> (on file with *The University of the Pacific Law Review*).

160. See Alejandro Lazo & Ethan Millman, *Bill to Limit Vaccine Exemptions in California Draws Protests*, WALL STREET JOURNAL (June 20, 2019), <https://www.wsj.com/articles/bill-to-limit-vaccine-exemptions-in-california-draws-protests-11561071209> (on file with *The University of the Pacific Law Review*) (providing photo of individual in opposition to Chapter 278 with sign saying her child’s brain damage would not qualify for an MBE).

161. Melody Gutierrez, *Opponents Call it a ‘Crime Against Humanity,’ but Vaccine Bill Moves Forward*, L.A. TIMES (Apr. 24, 2019), <https://www.latimes.com/politics/la-pol-ca-vaccine-exemption-review-bill-20190424-story.html> (on file with *The University of the Pacific Law Review*) [hereinafter *Opponents Call it a ‘Crime Against Humanity’*].

162. See *Opponents Call it a ‘Crime Against Humanity’*, *supra* note 161 (describing the testimony of parents at the Senate Health Committee hearing addressing vaccine injuries and their children), and *Monthly Statistics Report*, NATIONAL VACCINE INJURY COMPENSATION PROGRAM, at 1, <https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/data/monthly-stats-june-2019.pdf> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*) (describing the rate of compensation as one in one million) [hereinafter *Monthly Statistics Report*].

163. *Monthly Statistics Report*, *supra* note 162, at 1.

164. *Id.*

165. *Id.*

166. Pam Belluck & Reed Abelson, *Vaccine Injury Claims are Few and Far Between*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/health/vaccine-injury-claims.html> (on file with *The University of the Pacific Law Review*).

167. Belluck, *supra* note 166; see generally Laura Hayes, *Citizens Against Mandatory Vaccinations*, AGE OF AUTISM, <https://www.ageofautism.com/2019/05/citizens-against-mandatory-vaccinations.html> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*) (postulating violations that are the result of mandatory vaccinations); see also William C. Shiel Jr., M.D., F.A.C.P., F.A.C.R., *Hippocratic Oath*,

In recent years, several studies have worked to discredit a serious and scientifically incorrect claim: vaccines cause autism.<sup>168</sup> These studies have shown that there is no scientific link between autism and vaccinations.<sup>169</sup> Despite the scientific evidence debunking a connection between the two, a minority of national figures, including President Trump, still believe there is a link between vaccines and autism.<sup>170</sup>

Finally, opponents have raised an argument postulating that mandatory vaccinations violate the principle of informed consent.<sup>171</sup> The argument hinges around the idea that informed consent is the freely given permission to a medical procedure, and the state mandating vaccinations violates this concept.<sup>172</sup> However, Chapter 278 does not actually require that all children receive vaccinations.<sup>173</sup> Rather, families retain a choice

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MEDICINET, <https://www.medicinenet.com/script/main/art.asp?articlekey=20909> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*) (defining the Hippocratic Oath as a promise “to treat the ill to the best of one’s ability, to preserve a patient’s privacy, to teach the secrets of medicine to the next generation”).

168. See Anders Hviid, et. al., *Measles, Mumps, Rubella Vaccination and Autism: A Nationwide Cohort Study*, ANNALS OF INTERNAL MEDICINE (Mar. 5, 2019), available at <https://annals.org/aim/fullarticle/2727726/measles-mumps-rubella-vaccination-autism-nationwide-cohort-study> (on file with *The University of the Pacific Law Review*) (finding that a study of more than 650,000 children found no connection between autism and the MMR vaccine, confirming previous studies), and C. Lee Ventola, M.S., *Immunization in the United States: Recommendations, Barriers, and Measures to Improve Compliance*, 41 P.T. 426, 432 (July 2016) (describing the study where the misconception that vaccinations cause autism likely came from and further studies proving the study was wrong).

169. Hviid, *supra* note 168.

170. See Julia Belluz, *Donald Trump Believes Vaccines Cause Autism. Here’s the Evidence that Proves Him Wrong.*, VOX (Sept. 10, 2015), <https://www.vox.com/2015/9/16/9342825/donald-trump-vaccines-autism> (on file with *The University of the Pacific Law Review*) (describing Donald Trump’s public statements about the links between vaccinations and autism), and Natalie Allison, *Tennessee U.S. Rep.-elect Mark Green Alleges Vaccines May Cause Autism, Questions CDC Data*, TENNESSEAN (Dec. 12, 2018), <https://www.tennessean.com/story/news/politics/2018/12/12/tennessee-mark-green-vaccine-autism-cdc-congressman-anti-vax/2288164002/> (on file with *The University of the Pacific Law Review*) (detailing Representative Mark Green of Tennessee questioning CDC data); see also Lara Hayes, *California’s Senator Richard Pan Publicly Denies Any Increase in Autism*, AGE OF AUTISM (Mar. 16, 2018), <https://www.ageofautism.com/2018/03/californias-senator-richard-pan-publicly-denies-any-increase-in-autism.html> (on file with *The University of the Pacific Law Review*) (describing the “autism epidemic” and the Senator Pan’s denial that it exists).

171. See *Why is Informed Consent to Vaccination a Human Right?*, NAT’L VACCINE INFORMATION CENTER (June 28, 2017), <https://www.nvic.org/nvic-vaccine-news/june-2017/why-informed-consent-to-vaccination-a-human-right.aspx> (on file with *The University of the Pacific Law Review*) (describing informed consent as “the legal right to be fully and accurately informed about the benefits and risks of a medical intervention, including a pharmaceutical product, and are free to make a voluntary decision about whether to accept the risk for yourself or your minor child without being coerced or punished for the decision you make”).

172. Shira Miller, M.D., *Physicians for Informed Consent Testimony Urges Medical Board of California to Oppose SB 276*, PHYSICIANS FOR INFORMED CONSENT (May 28, 2019), <https://physiciansforinformedconsent.org/physicians-for-informed-consent-testimony-urges-medical-board-of-california-to-oppose-sb-276/> (on file with *The University of the Pacific Law Review*); see also *Frequently Asked Questions*, PHYSICIANS FOR INFORMED CONSENT, <https://physiciansforinformedconsent.org/faq/> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*) (describing the need for informed consent for all medical procedures, including vaccinations, to avoid a violation of a basic human right); *Informed Consent*, NATIONAL VACCINE INFORMATION CENTER, <https://www.nvic.org/vaccine-memorial/informed-consent.aspx> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*).

173. See generally Current Bill Status of SB 276, *supra* note 42 (illustrating that Chapter 278 does not force anyone to receive a vaccination).



to vaccinate their child if they are unable to obtain an MBE or seek alternative education arrangements, such as homeschooling.<sup>174</sup> Under Chapter 278, parents still retain the right to learn about vaccinations and make the determination whether they want their child to receive them.<sup>175</sup> It is the decision that parents can make after learning about vaccinations that may prevent their child from enrolling in a traditional school.<sup>176</sup>

## 2. Misdirected Legal Challenges

Historically, those wishing to avoid mandatory vaccinations raise several challenges.<sup>177</sup> The litigation in *Whitlow v. California* mirrors potential legal arguments those seeking to overturn this law will turn to.<sup>178</sup> However, Chapter 278 is not the proper legislation to challenge when claiming violations of personal liberties.<sup>179</sup>

Misguided arguments—that Chapter 278 violates the free exercise of religion, due process, or the right to education—persist, despite previous failures in court.<sup>180</sup> SB 277 opponents have already fought these claims in court, and the court relied on the state’s ability to take actions in to protect public health.<sup>181</sup> Ultimately, the Supreme Court has overwhelmingly established that the state has the ability to regulate vaccinations in the

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174. See Jane Meredith Adams & Diana Lambert, *What Schools and Parents Need to Know About California’s Vaccination Law*, EDSOURCE (June 20, 2019), <https://edsource.org/2019/what-schools-and-parents-need-to-know-about-the-new-vaccination-law/82242> (on file with *The University of the Pacific Law Review*) (describing the education options that parents have under Chapter 278 if parents are unable to obtain an MBE and still choose not to vaccinate their children).

175. See generally Current Bill Status of SB 276, *supra* note 42 (providing that Chapter 278 does not prevent parents to have a discussion with their child’s physician to make their own determination on whether to vaccinate their child, but rather prevents enrollment in schools).

176. See David Taubb, *Pan’s Bill Would Further Restrict Vaccine Exemptions for Schoolkids*, GVWIRE.COM (Mar. 29, 2019), <https://gvwire.com/2019/03/26/pans-bill-would-further-restrict-vaccine-exemptions-for-schoolkids/> (on file with *The University of the Pacific Law Review*) (mentioning Senator Pan’s statement referencing the law that removed the PBEs), and Melody Gutierrez, *California Vaccine Bill Clears Assembly Panel Despite Emotional Backlash from Parents*, L.A. TIMES (June 20, 2019), <https://www.latimes.com/politics/la-pol-ca-vaccine-exemption-bill-hearing-20190620-story.html> (on file with *The University of the Pacific Law Review*) (affirming statements by parents indicating they would have to make the choice to vaccinate or homeschool their children).

177. See *supra* Section II.A., II.C. (discussing the claims of violations from pre-modern and current cases).

178. See *supra* Section II.C. (detailing the claims raised by parents seeking an injunction against SB 277 in *Whitlow*), and *OPPOSE SB 276: Immunizations: Medical Exemptions*, EDUCATE.ADVOCATE, at 1,4 (2019) available at <https://www.educateadvocateca.com/app/download/969388472/Educate+Advocate+SB+276+Oppose+4+20+19.pdf>. (on file with *The University of the Pacific Law Review*) (arguing Chapter 278 will create hardships for access to education and due process violations).

179. See generally ASSEMBLY COMMITTEE ON APPROPRIATIONS ANALYSIS, *supra* note 20, at 1 (summarizing Chapter 278 as a bill about creating a centralized database for MBEs and oversight over physicians).

180. Compare *OPPOSE SB 276*, *supra* note 20, at 1,4 (illustrating the possible education and due process claims), with ASSEMBLY COMMITTEE ON APPROPRIATIONS ANALYSIS, *supra* note 10 at 1–2 (describing the elements of Chapter 278 as a bill to allow review over MBEs).

181. See *supra* Section II.C. (illustrating the points already litigated in *Whitlow*).

interest of public health.<sup>182</sup> California's ability to create a review process to prevent granting illegitimate MBEs and protecting herd immunity is within this power.<sup>183</sup>

## V. CONCLUSION

Generally, Americans believe administration of vaccinations is a positive thing.<sup>184</sup> Nearly seventy-five percent of Californians believe in vaccinating children, and eight in ten are fearful that the measles outbreak will continue to spread.<sup>185</sup> Nationally, seventy-seven percent of Americans believe immunizing children against measles is proper—even if parents object.<sup>186</sup>

Deciding whether to immunize a child is a serious decision to make.<sup>187</sup> However, deciding whether to risk your child's life by sending them to school should not be a question at all.<sup>188</sup> A number of amendments transformed Chapter 278, addressing its opponents' major concerns and ultimately created a stronger law.<sup>189</sup> While MBEs are critical to those who have adverse reactions, the reality is that reactions and vaccine injuries are rare, making the need for an MBE less likely.<sup>190</sup> Chapter 278's underlying goal of

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182. See *supra* Section II.A. (discussing the precedent establishing this review process).

183. See Hannah Wiley, *California Crackdown on Vaccine Exemptions Moves One Step Closer to Becoming Law*, SACRAMENTO BEE (May 22, 2019), <https://www.sacbee.com/news/politics-government/capitol-alert/article230707524.html> (on file with *The University of the Pacific Law Review*) (describing the importance of vaccinations and for physicians to take vaccinations seriously to preserve the health of the community).

184. See *3 in 4 Californians Back Vaccines*, *supra* note 124 (illustrating the high approval rate amongst Californians), and Gabriella Borter, *77% of Americans say Kids Should Get Measles Shot Even if Parents Object: Reuters Poll*, REUTERS (May 7, 2019), <https://www.reuters.com/article/us-usa-measles-poll/77-of-americans-say-kids-should-get-measles-shot-even-if-parents-object-reuters-poll-idUSKCN1SD11P> (on file with *The University of the Pacific Law Review*) (quantifying the high rate of Americans who believe in the administration of vaccinations, even without parental consent).

185. See *3 in 4 Californians Back Vaccines*, *supra* note 124 (indicating that almost seventy five percent of respondents from a poll of 1,713 Californians believe in the vaccination of children).

186. Borter, *supra* note 184.

187. See *Vaccine Information: Vaccinating a Child is Still a Parent's Choice*, FOCUS FOR HEALTH, accessible at <https://www.focusforhealth.org/vaccine-information-vaccinating-child-still-parents-choice/> (last visited Aug. 7, 2019) (on file with *The University of the Pacific Law Review*) (listing important questions parents should ask their doctor before immunizing their child).

188. See Lisa Aliferis, *Not Vaccinated? 'Stay Home From School,' Says Marin Dad of Leukemia Patient*, KQED (Jan. 26, 2015), <https://www.kqed.org/stateofhealth/23624/not-vaccinated-stay-home-from-school-says-marin-dad-of-leukemia-patient> (on file with *The University of the Pacific Law Review*) (emphasizing the reality of the a clash between a father's vulnerable son with leukemia and an unimmunized child stating "[i]f you choose not to immunize your own child and your own child dies because they get measles, OK, that's your responsibility, that's your choice. But if your child gets sick and gets my child sick and my child dies, then . . . your action has harmed my child").

189. See *California Vaccine Bill Undergoes Major Changes*, *supra* note 114 (describing the process of amendments and later change of heart of Governor Newsom).

190. Belluck, *supra* note 166; see *Editorial: Anti-vaxxers have Found a Way Around California's Strict New Immunization Law. They Need to be Stopped*, L.A. TIMES (Nov 8, 2017), <https://www.latimes.com/opinion/editorials/la-ed-vaccine-exemption-crackdown-20171108-story.html> (on file with *The University of the Pacific Law Review*) (explaining that in a normal population no more than three percent should qualify for an MBE) [hereinafter *Editorial: Anti-vaxxers have Found a Way Around California's Strict New Immunization Law*]; see also *Who Should NOT Get Vaccinated with These Vaccines?*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/vaccines/vpd/should-not-vacc.html> (last visited Aug.

maintaining herd immunity—to protect those who cannot receive vaccinations—is critical to outbreak prevention.<sup>191</sup>

Doctors taking advantage of the process to help families who cannot otherwise obtain an MBE interferes with the past achievements of raising vaccination rates and eradicating diseases.<sup>192</sup> It is not a question about who is “worthy” enough to make a decision about vaccinations, it is a question about keeping Californians safe.<sup>193</sup> Herd immunity is critical to the health of all Californians—especially Californians like Ivy, who rely on it to stay alive.<sup>194</sup> Chapter 278 depends on the state’s involvement to help achieve herd immunity for Californians who need it the most.<sup>195</sup> This law protects individuals who cannot protect themselves from preventable, communicable diseases and keeps bad-acting doctors from endangering Californians by exposing them to avoidable harms.<sup>196</sup>

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7, 2019) (on file with *The University of the Pacific Law Review*) (providing a list of who should not get vaccinated for each vaccination because of adverse health risks or reactions).

191. ASSEMBLY COMMITTEE ON APPROPRIATIONS ANALYSIS, *supra* note 20, at 3.

192. Barbara Feder Ostrov, *Exemptions Surge as Parents and Doctors Do ‘Hail Mary’ Around Vaccine Laws*, KAISER HEALTH NEWS (Apr. 5, 2019), <https://khn.org/news/medical-exemptions-surge-parents-doctors-bypass-vaccine-laws/> (on file with *The University of the Pacific Law Review*); see also *Editorial: Anti-vaxxers have Found a Way Around California’s Strict New Immunization Law*, *supra* note 190 (foreshadowing the proposal of Chapter 278 in response to the increase of medical exemptions following SB 277).

193. See *State Victories but Challenges Remain*, PARENTALRIGHTS.ORG (June 11, 2019), <https://parentalrights.org/state-victories-challenges-remain/> (on file with *The University of the Pacific Law Review*) (discussing Chapter 278 in terms of proper decision makers as “[e]ven a parent and their child’s pediatrician together would not be worthy to make the best medical decision for the child”).

194. Al-Jamea, *supra* note 1.

195. ASSEMBLY COMMITTEE ON APPROPRIATIONS ANALYSIS, *supra* note 20, at 3.

196. *Id.*