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# Chapter 821: Mandated Vaccinations Bring Informed Consent

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## Chapter 821: Mandated Vaccinations Bring Informed Consent

*Annakarina De La Torre-Fennell*

### *Code Section Affected*

Health and Safety Code § 120365 (amended).  
AB 2109 (Pan); 2012 STAT. Ch. 821.

### I. INTRODUCTION

State-mandated vaccinations, despite the intrusion upon one's liberty, benefit the public to such an extent that personal liberty concerns are constrained.<sup>1</sup> Like all other states, California requires children to get vaccinated before starting kindergarten.<sup>2</sup> However, not all parents choose to have their children vaccinated.<sup>3</sup>

Amanda Tarpenting is one parent who chose to exempt her child from mandatory vaccinations.<sup>4</sup> Amanda fears that vaccinations pose greater risks than the diseases the vaccines seek to prevent.<sup>5</sup> Amanda reasons that the “chemicals and biological matter [within the vaccine] could . . . contribut[e] to health problems at large, like cancer or allergies . . . .”<sup>6</sup> Amanda is not alone in her concerns and in her decision to exempt her child.<sup>7</sup> Over eleven-thousand parents obtained exemptions from mandatory vaccines for their kindergarten-aged children in the 2010 school year, a twenty-five percent “increase [in such exemptions] over the previous [two] years.”<sup>8</sup> The vaccination rates in some counties were between seventy-three and seventy-five percent.<sup>9</sup> Some private

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1. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (“[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”).

2. *Guide to the Requirements of the California School Immunization Law for Grades K–12*, CAL. DEP'T OF HEALTH SERVS. (2011), <http://www.sduhsd.net/tp/immunization.html> (on file with the *McGeorge Law Review*).

3. Kimberly Insel, *Treating Children Whose Parents Refuse to Have Them Vaccinated*, 14 VIRTUAL MENTOR 17, 17, 19 (2012).

4. Hannah Guzik, *Number of Vaccinated Children Drops Steadily in California*, HEALTHYCAL (Mar. 28, 2012), <http://www.healthycal.org/archives/8001> (on file with the *McGeorge Law Review*).

5. *Id.*

6. *Id.*

7. Insel, *supra* note 3.

8. The Refusers, *Vaccination Exemptions on the Rise in California Amid Concerns—Medscape*, HEAR THE REFUSERS (Nov. 6, 2011), <http://therefusers.com/2011/11/page/5> (on file with the *McGeorge Law Review*).

9. Guzik, *supra* note 4.

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schools had single-digit vaccination rates.<sup>10</sup> This stark increase in the number of unvaccinated children has led to legislative concern.<sup>11</sup>

Assembly Member Richard Pan introduced Chapter 821 in an effort to “rectify [the immunization exemption] problem by creating a process where [more] parents would be able [to] make an informed decision for their children” by informing the parents of the risks and benefits of mandatory vaccinations.<sup>12</sup>

## II. LEGAL BACKGROUND

Mandatory vaccinations for school admission led to the United States Supreme Court cases of *Jacobson v. Massachusetts* and *Zucht v. King*, which upheld state police power to mandate vaccinations in general and for school admission without infringing on constitutional rights of liberty.<sup>13</sup> However, exemptions to the mandate were sought subsequently and enacted into law.<sup>14</sup>

### A. *Constitutionality of Mandatory Vaccinations*

Decided in the wake of the smallpox pandemic,<sup>15</sup> the Court in *Jacobson* considered whether Massachusetts could constitutionally require residents to be vaccinated against smallpox.<sup>16</sup> The Court held that the police power of the state allows “reasonable regulations” to be established that will “protect the public health.”<sup>17</sup> The Court reasoned that for organized society to succeed, citizens are “subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State.”<sup>18</sup> *Jacobson* established the constitutionality of mandatory vaccinations generally;<sup>19</sup> *Zucht* upheld mandatory vaccinations as a contingency for school admission.<sup>20</sup>

In *Zucht*, the Court held that laws requiring vaccination for school admission do not violate constitutional equal protection because discretionary police power

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10. *Id.*

11. Hannah Dreier, *Calif. Bill Targets Parents Who Skip Kids' Vaccines*, KPBS (May 10, 2012), <http://www.kpbs.org/news/2012/may/10/calif-bill-targets-parents-who-skip-kids-vaccines/> (on file with the *McGeorge Law Review*).

12. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2109, at 3 (Apr. 23, 2012).

13. 197 U.S. 11, 12 (1905); 260 U.S. 174, 176 (1922).

14. See Sean Coletti, *Taking Account of Partial Exemptors in Vaccination Law, Policy, and Practice*, 36 CONN. L. REV. 1341, 1346–47 (2004) (illustrating that states did not begin enacting religious exemption laws until the 1970s).

15. Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 365 (2004).

16. 197 U.S. at 25.

17. *Id.*

18. *Id.* at 26 (quoting *R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)) (internal quotation marks omitted).

19. *Id.* at 39.

20. 260 U.S. 174, 176 (1922).

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allows the state to protect public health.<sup>21</sup> The Court held that such a claim goes to the validity of the authority of the state, not the validity of the ordinance.<sup>22</sup>

*B. Exemptions from Mandatory Vaccinations*

Courts have traditionally upheld mandatory vaccinations for the public welfare over the objections of smaller groups.<sup>23</sup> Although states have the authority under the United States Constitution to impose mandatory vaccinations, all states have created exemptions to mandatory vaccinations.<sup>24</sup>

All states grant medical exemptions to mandatory vaccinations when a minor has an immunodeficiency to which the vaccination poses a high risk of harm to the minor.<sup>25</sup> Other exemptions include the religious belief exemption and the personal belief exemption.<sup>26</sup> States allow a religious belief exemption when a parent's religion does not allow for vaccinations.<sup>27</sup> A personal belief exemption allows for an exemption when the parent has a philosophical objection to vaccinations.<sup>28</sup>

Every state, except West Virginia and Mississippi, allow for some form of religious exemption to mandatory vaccinations.<sup>29</sup> The United States Supreme Court held that there are no constitutional requirements for religious exemptions because the freedom "to practice religion does not include liberty to expose the community or the child to communicable disease . . . ."<sup>30</sup> Courts in Massachusetts<sup>31</sup> and New York have held that religious exemptions that are only available to enumerated, recognized religions, such as Christian Science, are unconstitutional under their respective state constitutions, reasoning that the exemptions discriminate against parents who do not belong to a statutorily

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21. *Id.*

22. *Id.*

23. *See, e.g., id.* at 177 (reasoning that concerns for the public health and safety have repeatedly been allowed to intrude on individual liberty).

24. *See id.* at 176 (upholding mandatory vaccination as a condition of admission to schools); *Jacobson*, 197 U.S. at 28 (upholding the constitutionality of mandatory vaccinations); Daniel A. Salmon, *Mandatory Immunization Laws and the Role of Medical, Religious and Philosophical Exemptions* (2003), <http://www.vaccinesafety.edu/exemptreview101503.pdf> (on file with the *McGeorge Law Review*) (discussing the individual and societal medical risks of exemptions).

25. Salmon, *supra* note 24.

26. Charles J. Russo & Ralph D. Mawdsley, *Student Vaccinations: A Brief Pain That's Worth the Gain?*, 241 ED. L. REP. 519, 526 (2009), available at <https://1.next.westlaw.com/Document/1f9f0290e3b4d11deb055de4196f001f3/View/FullText.html> (on file with the *McGeorge Law Review*).

27. Anthony Ciolli, *Religious & Philosophical Exemptions to Mandatory School Vaccinations: Who Should Bear the Costs to Society?*, 74 MO. L. REV. 287, 287 (2009).

28. *Id.*

29. *Id.*

30. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

31. *Dalli v. Bd. of Educ.*, 267 N.E.2d 219, 222 (Mass. 1971).

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recognized church and to children “whose parents have no such religious convictions.”<sup>32</sup>

In an effort to avoid religious discrimination claims, California and nineteen other states allow for personal belief exemptions, requiring no demonstration of religious affiliation for an exemption.<sup>33</sup> California has a medical, religious, and personal belief exemption to mandatory vaccinations combined in Section 120365 of the California Health and Safety Code.<sup>34</sup> Section 120365 requires a parent or guardian to sign an affidavit at the time of a student’s registration stating that he or she objects to the vaccination because of a medical, religious, or personal belief.<sup>35</sup> To protect the health of other students, however, the California Health Department may order the exclusion of an exempted student.<sup>36</sup>

### III. CHAPTER 821

Chapter 821 amends the requirements for the personal belief exemption from mandated immunizations for school admission.<sup>37</sup> Chapter 821 requires that a parent, guardian, or emancipated minor submit an affidavit or letter from a healthcare practitioner in order to submit for the exemption.<sup>38</sup> The letter or affidavit must indicate that the parent, guardian, or emancipated minor has received information regarding the benefits and risks of the immunization and communicable diseases from the signing practitioner.<sup>39</sup> Chapter 821 narrowly defines and limits the types of practitioners that can sign the letter or affidavit.<sup>40</sup>

32. *Brown v. Stone*, 378 So. 2d 218, 222–23 (Miss. 1979); *see also* MASS. GEN. LAWS ANN. ch. 76, § 15 (West 2007) (allowing for exemptions when it violates sincerely held religious beliefs); N.Y. PUB. HEALTH LAW § 2164 (McKinney 2012) (establishing that the statute does not apply to a parent with a genuine and sincere religious belief).

33. ARIZ. REV. STAT. ANN. § 15-873 (2009); ARK. CODE ANN. § 6-18-702 (2009); COLO. REV. STAT. § 25-4-903 (2004); IDAHO CODE ANN. § 39-4802 (2011); LA. REV. STAT. ANN. § 17:170(E) (2001); ME. REV. STAT. ANN. tit. 20-A § 6355(2)–(3) (2008); MICH. COMP. LAWS ANN. § 333.9208 (West 2001); MINN. STAT. ANN. § 121A.15(3) (West 2008); MO. ANN. STAT. § 210.003(2)(a)–b (West 2010); N.M. STAT. ANN. § 24-5-3 (2003); N.D. CENT. CODE § 23-07-17.1(3) (2002); OHIO REV. CODE ANN. § 3313.671(b)(4)–(5) (LexisNexis 2009); OKLA. STAT. ANN. tit. 70, § 1210.192 (West 2005); 28 PA. STAT. ANN. § 13-1303a(c)–(d) (West 2006); TEX. EDUC. CODE ANN. § 38.001(C) (West 2006); UTAH CODE ANN. § 53A-11-302 (LexisNexis 2009); VT. STAT. ANN. tit.18, § 1122 (2002); WASH. REV. CODE ANN. § 28A.210.090 (West Supp. 2011); WIS. STAT. ANN. § 252.04(3) (West 2010); Allan J. Jacobs, *Do Belief Exemptions to Compulsory Vaccination Programs Violate the Fourteenth Amendment?*, 42 U. MEM. L. REV. 73, 75 (2011).

34. CAL. HEALTH & SAFETY CODE § 120365 (West 2012).

35. *Id.*; CAL. DEP’T OF PUB. HEALTH, CALIFORNIA SCHOOL IMMUNIZATION LAW: EXEMPTION INFORMATION SHEET (2008), available at <http://www.cdph.ca.gov/programs/immunize/Documents/imm488e.pdf> (on file with the *McGeorge Law Review*).

36. *Id.*

37. HEALTH & SAFETY § 120365 (amended by Chapter 821).

38. *Id.* § 120365(a) (amended by Chapter 821).

39. *Id.* § 120365(b)(1) (amended by Chapter 821).

40. *Id.* § 120365(f) (amended by Chapter 821) (defining a “healthcare practitioner” as a Medical Board of California certified physician or surgeon, physician assistants and nurse practitioners authorized to furnish drugs, an osteopathic physician and surgeon, a naturopathic doctor under a physician’s supervision, or a credentialed school nurse).

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The letter or affidavit must be signed within six months before or after the student's first day of school.<sup>41</sup> Chapter 821 also requires that a previously exempted student who is moving from the sixth grade to seventh grade must submit another signed letter or affidavit in order to attend school without the required vaccinations.<sup>42</sup>

## IV. ANALYSIS

The purpose of Chapter 821 is to increase overall vaccination rates.<sup>43</sup> Chapter 821 seeks to accomplish its purpose by requiring the submission of affidavits or signed letters regarding the safety of vaccinations.<sup>44</sup> The success of Chapter 821 turns on: (A) whether parents informed about the benefits of vaccination will choose to vaccinate at higher levels;<sup>45</sup> (B) whether requiring physicians to sign the documents will impede persons seeking an exemption;<sup>46</sup> (C) whether the limited definition of "physician" will result in the de-facto elimination of the personal belief exception;<sup>47</sup> (D) whether the law will withstand constitutional scrutiny;<sup>48</sup> and (E) the legislation's fiscal impact.<sup>49</sup>

*A. A Physician's Signature and Informed Consent*

Chapter 821 assumes that parents seeking vaccination exemptions are uninformed of the benefits of mandatory vaccinations.<sup>50</sup> Some have suggested, however, that if parents were uninformed about vaccinations, they would not seek an exemption for them.<sup>51</sup> For example, the vaccine against the Human Papilloma Virus (HPV) is a contentious vaccine among some parents because the

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41. *Id.* § 120365(b)(1) (amended by Chapter 821).

42. *Id.* § 120365(b)(2) (amended by Chapter 821).

43. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2109, at 2 (Apr. 23, 2012).

44. HEALTH & SAFETY § 120365(b)(1) (amended by Chapter 821).

45. Marcella Terry, *AB2109: No Shots, No School, Not True in California... For How Long?*, AGE OF AUTISM (May 4, 2012, 5:46 AM), <http://www.ageofautism.com/2012/05/ab2109-no-shots-no-school-not-true-in-california-for-how-long.html> (on file with the *McGeorge Law Review*); JUSTIN GARRET, MARCH OF DIMES CAL. CH., SUPPORT AB 2109—ENSURING PARENTS ARE PROPERLY INFORMED ABOUT IMMUNIZATIONS (2012), available at [http://www.marchofdimes.com/pdf/california/AB\\_2109\\_fact\\_sheet.pdf](http://www.marchofdimes.com/pdf/california/AB_2109_fact_sheet.pdf) (on file with the *McGeorge Law Review*); see also *infra* Part IV.A.

46. Melanie Mayo-Laasko, *California Bill AB2109 Threatens Vaccine Freedom of Choice*, MOTHERING (Mar. 20, 2012), <http://mothering.com/all-things-mothering/mothering/health/from-dr-bob-sears-california-bill-threatens-vaccine-freedom-of-choice> (on file with the *McGeorge Law Review*); see also *infra* Part IV.B.

47. Terry, *supra* note 45; see also *infra* Part IV.C.

48. See *infra* Part IV.D.

49. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 2109, at 1 (May 2, 2012); see also *infra* Part IV.E.

50. See Calindrillo, *supra* note 15, at 362 (discussing characteristics of parents and their reasons for exempting their children from vaccinations).

51. See *id.* at 436 (evaluating non-medical or religious reasons for seeking exemptions from mandatory vaccinations).

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HPV vaccine protects against cervical cancer and genital warts, a sexually transmitted disease.<sup>52</sup> Some parents fear that the HPV vaccination encourages sexual activity.<sup>53</sup> Parents who refuse the vaccination on behalf of their daughters usually do so out of fear of side effects.<sup>54</sup> A parent's knowledge of the side effects of vaccinations tends to indicate that the parent is not uninformed.<sup>55</sup> However, studies have shown that more parents change their mind in favor of the HPV vaccination after a discussion with their doctor about the advantages and risks of the vaccination.<sup>56</sup>

However, some parents may simply listen to a doctor's explanation, with no intention of accepting the information, in order to satisfy the exemption requirement.<sup>57</sup> Whether a brief discussion between the parent and the doctor to review the risks and benefits will be fruitful in producing higher vaccination rates is difficult to predict because informed consent is a continuing process requiring a patient to truly appreciate the risks and benefits.<sup>58</sup> Additionally, parents need to have an open mind about the treatment options in order to make a decision considering the information.<sup>59</sup>

*B. Difficulty in Obtaining an Exemption*

In addition to the intended increase in informed consent, some suggest that Chapter 821 gives doctors the power to force vaccinations.<sup>60</sup> Because doctors opposing vaccination exemptions can simply refuse to sign the affidavit, they could leave parents with the alternative of shopping for a doctor willing to treat unvaccinated children.<sup>61</sup> The anticipated outcome is that doctors will comply with Chapter 821 because an ethical imperative placed upon doctors should prevent

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52. Ben Kleifgen, *Informed Consent in Vaccination*, VACCINE ETHICS, [http://www.vaccineethics.org/issue\\_briefs/consent.php](http://www.vaccineethics.org/issue_briefs/consent.php) (last updated July 2010) (on file with the *McGeorge Law Review*).

53. *Id.*

54. Elizabeth Cohen, *Should Your Daughter Get Gardasil, the Vaccination Against HPV?*, CNN (Aug. 13, 2009), [http://articles.cnn.com/2009-08-13/health/hpv.vaccine.gardasil\\_1\\_gardasil-vaccine-doctors-vaccine-schedule?\\_s=PM:HEALTH](http://articles.cnn.com/2009-08-13/health/hpv.vaccine.gardasil_1_gardasil-vaccine-doctors-vaccine-schedule?_s=PM:HEALTH) (on file with the *McGeorge Law Review*).

55. *Id.*

56. Inmaculada de Melo-Martín, *The Promise of the Human Papillomavirus Vaccine Does Not Confer Immunity Against Ethical Reflection*, 11 THE ONCOLOGIST 393, 395 (2006), available at <http://theoncologist.alphamedpress.org/content/11/4/393.full.pdf+html?sid=0c71a568-38d9-46b1-845f-9a84dc4f4a51> (on file with the *McGeorge Law Review*).

57. See Douglas Andres Grimm, *Informed Consent for All! No Exceptions*, 37 N.M. L. REV. 39, 40–41 (2007) (discussing the need for voluntariness as a necessary factor to achieve true informed consent).

58. See *id.* (noting that valid informed consent requires a patient's decision to be free of coercion or manipulation).

59. *Id.*

60. Mayo-Laasko, *supra* note 46.

61. *Id.*

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such conduct.<sup>62</sup> Alternatively, doctors could sign an affidavit and then refer the patient elsewhere if they did not want to treat the patient in the future as a result of the vaccination exemption.<sup>63</sup> However, the possibility of being turned away is a real concern for parents seeking an exemption as nearly thirty percent of physicians refuse to treat unvaccinated children.<sup>64</sup> To date, no state has banned such practices.<sup>65</sup>

There is great support in the medical community for the addition of the informed consent requirement from such institutions as the California Medical Association.<sup>66</sup> From an ethical standpoint, informed consent will allow parents to make responsible choices regarding whether to vaccinate their child.<sup>67</sup> By having a physician who can actually administer the vaccination, there is a greater likelihood of informed consent because the physician is the authority on the risks and benefits of such vaccines.<sup>68</sup> Assembly Member Pan argues that Chapter 821 is not effectively eradicating the personal belief exemption, but that it has made the exemption more difficult to acquire.<sup>69</sup>

Many pro-vaccine groups support the notion that vaccination exemptions should not be easier to obtain than the actual vaccines themselves.<sup>70</sup> According to Assembly Member Pan, the increased difficulty of getting the waiver would rectify the problem of decreased immunization rates by “creating a process where [the] parents would be able [to] make an informed decision for their children.”<sup>71</sup>

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62. Kleifgen, *supra* note 52; Erin A. Flanagan-Klygis et al., *Dismissing the Family Who Refuses Vaccines*, 159 ARCH. PEDIATRIC & ADOLESCENT MED. 929, 933 (2005) (asserting that thirty-nine percent of physicians would “fire” their patients who wanted vaccine exemptions).

63. Flanagan-Klygis et al., *supra* note 62.

64. *Id.* (concluding that twenty-eight percent of pediatricians involved in a study would refer families who were not willing to receive vaccinations).

65. See Shirley S. Wang, *More Doctors ‘Fire’ Vaccine Refusers*, WALL ST. J. (Feb. 15, 2012), <http://online.wsj.com/article/SB10001424052970203315804577209230884246636.html424052970203315804577209230884246636.html> (on file with the *McGeorge Law Review*) (recognizing that while medical associations do not recommend dismissal of unvaccinated patients, the practice exists without repercussions for the refusing physicians).

66. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 2109, at 2 (May 2, 2012).

67. Nancy Berlinger, *Parental Resistance to Childhood Immunizations: Clinical, Ethical, and Policy Considerations*, 8 AM. MED. ASS’N J. ETHICS 681, 683 (2006), available at <http://virtualmentor.ama-assn.org/2006/10/pdf/pfor1-0610.pdf> (on file with the *McGeorge Law Review*).

68. See Grimm, *supra* note 57, at 43 (discussing the practical application of the informed consent doctrine).

69. Kevin B. O’Reilly, *California, Vermont Consider Tougher Exemption Rules*, AM. MED. NEWS (Apr. 9, 2012), <http://www.ama-assn.org/amednews/2012/04/09/prsa0409.htm> (on file with the *McGeorge Law Review*).

70. Flanagan-Klygis et al., *supra* note 62, at 931 (concluding that twenty-eight percent of pediatricians involved in a study would refer families who were not willing to receive vaccinations).

71. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 2109, at 3 (Apr. 17, 2012).



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### C. Impact of Limited Definition of Health Practitioner

The limited scope of healthcare practitioners who qualify to sign the affidavit or letter is a contentious aspect of Chapter 821.<sup>72</sup> Chapter 821 does not include Christian Scientists, chiropractors,<sup>73</sup> or other practitioners who were not previously excluded by the Health and Safety Code.<sup>74</sup>

Limiting the types of healthcare practitioners who have authority to sign the affidavit virtually eradicates the personal belief exemption for parents who do not visit doctors as part of a philosophical or religious lifestyle.<sup>75</sup> Chapter 821 forces some parents seeking an exemption to break their faith by seeing a specific kind of physician for their child to obtain the exemption.<sup>76</sup> Chapter 821 effectively discriminates against parents who do not have “a relationship with a medical provider who will sign off on their choice.”<sup>77</sup>

### D. Constitutional Implications of Chapter 821

California courts may have to consider the viability of potential constitutional claims under Chapter 821.<sup>78</sup> Due to the increased difficulty in obtaining mandatory vaccination exemptions, parents may bring suit concerning personal liberty protections similar to *Zucht* and *Jacobson*.<sup>79</sup> However, the challenges may fail, as did challenges to similar legislation in the State of Washington.<sup>80</sup> Additionally, other courts have found that there is no constitutional right to exemptions (other than medical exemptions).<sup>81</sup> The United States Supreme Court in *Bates v. City of Little Rock*<sup>82</sup> held that a “significant encroachment upon personal liberty . . . may prevail only upon a showing [of] a

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72. Jim Sanders, *Assembly OKs Controversial Bill on Children's Immunizations*, SACRAMENTO BEE (May 10, 2012, 2:05 PM), <http://blogs.sacbee.com/capitolalertlatest/2012/05/california-assembly-oks-controversial-bill-on-children-immunization.html> (on file with the *McGeorge Law Review*).

73. See Donald G. McNeil, Jr., *Worship Optional: Joining a Church to Avoid Vaccines*, N.Y. TIMES, Jan. 14, 2003, at F1 (explaining how churches, such as the chiropractor-founded Congregation of Universal Wisdom, allow for parents to join and claim religious objection to mandatory vaccinations).

74. CAL. HEALTH & SAFETY CODE § 120365(f) (amended by Chapter 821).

75. See Mayo-Laasko, *supra* note 46 (“Many doctors will be unwilling to sign an exemption form for a new patient or a patient who is only there for one visit (just to get the form signed).”).

76. See *id.* (discussing the patient practice of “doctor shopping”).

77. *California Bill to Give MDs Control of Vaccine Exemption*, CHIROPRACTIC J., <http://www.thechiropracticjournal.com/news4.php?M=may&Y=2012> (last visited May 6, 2012) (on file with the *McGeorge Law Review*) (finding Chapter 821 discriminatory against chiropractors and other practitioners).

78. See Coletti, *supra* note 14, at 1346, 1348 (evaluating various constitutional challenges to mandatory vaccination laws).

79. 260 U.S. 174, 178 (1922); 197 U.S. 11, 28 (1905).

80. See WASH. REV. CODE ANN. § 28A.210.090 (West Supp. 2011) (requiring a signature from both a healthcare practitioner and parent or guardian to obtain an exemption).

81. See *Cude v. Arkansas*, 377 S.W.2d 816, 818–19 (Ark. 1964) (holding that there is no infringement of constitutional protections when a state does not allow for religious exemptions to vaccinations).

82. 361 U.S. 516 (1960).

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subordinating interest which is compelling.”<sup>83</sup> Courts have continually found that a state, exercising its police power, may take necessary action to ensure the health and welfare of its citizens against exposure to large threats.<sup>84</sup>

Opponents may raise another constitutional claim of religious discrimination because Chapter 821 does not include all types of religious beliefs.<sup>85</sup> However, this is a weak argument because Chapter 821 contains no restriction based on religious or secular beliefs.<sup>86</sup>

*E. Fiscal Impact*

The major expense of Chapter 821 comes from the dissemination of the new requirements imposed by Chapter 821.<sup>87</sup> Federal funds will cover the estimated \$80,000<sup>88</sup> cost of implementing Chapter 821.<sup>89</sup> The state will bear an estimated \$50,000 for training and staff costs relating to developing the exemption affidavit which parents and doctors sign.<sup>90</sup> However, these are not the only costs the state will incur as a result of Chapter 821.<sup>91</sup>

The Department of Social Services, as well as Medi-Cal, will likely incur greater costs because parents will now need to seek a physician’s advice and signature to obtain the personal belief exemption.<sup>92</sup> The average cost of a visit through the Medi-Cal and Healthy Families Program (a low-cost insurance program for those who do not qualify for Medi-Cal) ranges from twelve to sixty dollars.<sup>93</sup>

However, vaccination supporters argue that this cost is marginal compared to the cost of maintaining public health if children are not vaccinated.<sup>94</sup> Exemptions

83. *Id.* at 524.

84. *See* *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1072 (2011) (discussing the state’s power to compensate for vaccine injuries); *Jacobson*, 197 U.S. at 24–25.

85. *See* *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (holding religious exemptions are discriminatory against parents who do not hold religious beliefs).

86. *See* James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 857–58, 862 (2002) (discussing courts’ rejection of equal protection arguments against mandatory vaccination requirements when no exemptions are allowed); *see also* Ciolli, *supra* note 27 (explaining that two states—Mississippi and West Virginia—do not have any exemptions to accommodate personal or religious beliefs).

87. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 2109, at 1 (May 2, 2012).

88. *Id.*

89. *Id.*

90. *See id.* (explaining that the Department of Social Services may incur costs as a result of compliance with Chapter 821).

91. *Id.*

92. *Id.*

93. Dawn Winkler, *Dawn Winkler on AB2109*, DOCTOR WITHIN (May 2, 2012), <http://www.thedoctorwithin.com/vaccines/dawn-winkler-on-ab2109/> (on file with the *McGeorge Law Review*); *Healthy Families Program*, CA.GOV, <http://www.healthyfamilies.ca.gov/Home/default.aspx> (last visited Mar. 3, 2013) (on file with the *McGeorge Law Review*).

94. David Ropeik, *Not Vaccinated? Not Acceptable*, L.A. TIMES, July 11, 2011, at A11, *available at*

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are prevalent in the northwest region of the United States, resulting in vaccination “hot spots” where more than one in five children are not vaccinated.<sup>95</sup> The creation of “hot spots” could be a “serious monetary blow to our cash-strapped medical system” by risking an outbreak of a vaccine-preventable disease.<sup>96</sup> The cost of the measles outbreak between 1989 and 1991 exceeded \$100 million in national medical expenses alone.<sup>97</sup> In 2011, about \$300,000 was spent to control a potential outbreak of measles.<sup>98</sup> Nationally, “vaccine-preventable diseases impose \$10 billion worth of healthcare costs.”<sup>99</sup> States with easily obtainable exemptions, such as California, have seen a sixty-one percent increase in exemptions between 1991 and 2004, with a concurrent increase in the contraction vaccine preventable diseases.<sup>100</sup> By making such exemptions more difficult to obtain, the legislature hopes that the general welfare will benefit from a greater-vaccinated population, thus reducing the costs placed upon the taxpayers.<sup>101</sup>

V. CONCLUSION

Prior to Chapter 821, obtaining a personal belief exemption to mandatory vaccinations was simple.<sup>102</sup> Assembly Member Pan introduced Chapter 821 to combat the rising rates of vaccine exemptions.<sup>103</sup> Chapter 821 attempts to create a society informed of the risks and benefits of vaccinations, ultimately creating a healthier society by requiring parental and health practitioner signatures.<sup>104</sup>

Chapter 821’s fiscal impact is not clear.<sup>105</sup> With the increase in doctor’s visits resulting from Chapter 821, the state will incur costs greater than anticipated for

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<http://articles.latimes.com/2011/jul/18/opinion/la-oe-ropeik-vaccines-20110718/2> (on file with the *McGeorge Law Review*).

95. Lisa Esposito, *Many Parents Skipping Kids’ Shots, Putting Other Kids at Risk*, HEALTHDAY (Oct. 31, 2011), <http://consumer.healthday.com/Article.asp?AID=658397> (on file with the *McGeorge Law Review*); see also Rebecca Voelker, *US Measles Highest Since 1996*, NEWS@JAMA (Apr. 19, 2012, 3:13 PM), <http://newsatjama.jama.com/2012/04/19/us-measles-cases-highest-since-1996/> (on file with the *McGeorge Law Review*) (explaining the effect of vaccination “hot spots” in relation to outbreaks of vaccine preventable diseases).

96. Calandrillo, *supra* note 15, at 427.

97. *Id.*

98. Steven Reinberg, *Unvaccinated Behind Largest U.S. Measles Outbreak in Years: Study*, HEALTHDAY (Oct. 20, 2011), <http://consumer.healthday.com/Article.asp?AID=658034> (on file with the *McGeorge Law Review*).

99. Calandrillo, *supra* note 15, at 428–29.

100. O’Reilly, *supra* note 69.

101. *Id.*

102. *Id.*

103. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 2109, at 2 (Apr. 17, 2012).

104. *Id.* at 3.

105. Winkler, *supra* note 93.

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reimbursements required by Medi-Cal.<sup>106</sup> However, the California Legislature found such projected costs to be absorbable by the state.<sup>107</sup>

Despite the potential to make a healthier society, Chapter 821 makes it more difficult for families to obtain a personal or religious exemption to mandatory vaccinations if they do not already have a physician willing to give an exemption.<sup>108</sup> At a minimum, Chapter 821 will achieve an increase in doctor visits, ensuring that California is less susceptible to communicable diseases, and parents will be informed of the risks and benefits of mandatory vaccinations.<sup>109</sup>

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106. *Id.*

107. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2109, at 2 (Apr. 23, 2012).

108. O'Reilly, *supra* note 69.

109. *See id.* at 2–3 (arguing that more exposure to preventable diseases not only puts individual children at risk, but also communities in general).