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6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 COUNTY OF SAN FRANCISCO

9 KENNETH P. STOLLER, MD.

Case No. CGC-19-576439

10 Plaintiff/Petitioner,

11 COMPLAINT/VERIFIED PETITION TO
12 QUASH AN ADMINISTRATIVE
13 SUBPOENA, FOR DECLARATORY AND
14 INJUNCTIVE RELIEF AGAINST THE
15 SUBPOENA AND IN SUPPORT OF AN
16 ALTERNATIVE STANDARD OF
17 VACCINE EXEMPTIONS RECOGNIZED
18 UNDER CALIFORNIA LAW

16 vs.

17 DENNIS HERRERA, in his official capacity
18 as the CITY ATTORNEY of the City of
19 San Francisco, THE CITY AND COUNTY
20 OF SAN FRANCISCO,

21 Defendants/Respondents.

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23 COMES NOW Kenneth P. Stoller MD, Plaintiff/Petitioner by his undersigned counsel
24 and hereby alleges against the Defendants/Respondents as follows:
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1 **INTRODUCTION**

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- 3 1. On May 8, 2019, the San Francisco City Attorney’s Office issued a press release
- 4 about an Administrative Subpoena he had served on Plaintiff/Petitioner Kenneth P.
- 5 Stoller, MD, who at the time had an office in San Francisco. The subpoena seeks,
- 6 among other things, all of his patients’ medical records for all vaccine exemptions he
- 7 has written since 2016 (the year that California enacted SB 277 to eliminate non-
- 8 medical exemptions for school entry).
- 9
- 10 2. According to the press release and the subpoena, the purported basis of the
- 11 investigation was an alleged public nuisance created by Dr. Stoller based on writing
- 12 “fake” or “fraudulent” vaccine medical exemptions. In fact, Dr. Stoller (and other
- 13 physicians) issues exemptions based on considerations not listed as CDC
- 14 contraindications and precautions, (jointly referred to as “CDC guidelines”).
- 15 However, as demonstrated herein, California law currently gives physicians complete
- 16 discretion to issue medical exemptions beyond CDC guidelines, including family
- 17 history and genetic considerations.
- 18
- 19 3. The subpoena is an unprecedented, highly intrusive, and an illegal
- 20 investigation into a physician’s medical practice under a politically motivated
- 21 public nuisance investigation pretext. The likely purpose of this abusive
- 22 public relations investigative stunt is to assist the City Attorney’s confederates
- 23 in passing SB 276, which bill eliminates physician based medical exemptions.
- 24 SB 276 has recently passed the Senate and is now in the Assembly.
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- 26 4. In addition, circumstances suggest that the City Attorney intends to use or
- 27 share the patient medical records he is seeking in this subpoena with other
- 28 agencies in an effort to circumvent federal and state constitutional privacy and

1 other laws intended to protect patient medical and genetic information.

- 2 5. One coercive litigation tactic being promoted by a likely confederate of the
3 City Attorney which would be furthered by the City Attorney's subpoena, is
4 the filing or threatening to file public nuisance civil actions against the
5 families of children who received medical exemptions from Dr. Stoller and
6 other like-minded physicians.
- 7
- 8 6. Another use of this information may be to assist other investigative agencies
9 which under established law cannot obtain this information. Such action and
10 motivations, would constitute a civil conspiracy to violate state and federal
11 law.
- 12
- 13 7. The same public nuisance theory used to ground this subpoena has been
14 employed by this City Attorney in another large public health related issue,
15 climate change. However, it has been rejected by the local federal district
16 court, and strongly criticized by scholars as an abuse and misuse of public
17 nuisance laws.
- 18
- 19 8. The abuse of legal process is more egregious here because the City attorney is
20 using this public nuisance pretextual investigation to circumvent state and
21 federal privacy and other laws protecting medical and genetic information,
22 which laws protect citizens from what the California landmark privacy case
23 decried as "government snooping."
- 24
- 25 9. This action, which pleads a variety of relief against the City Attorney, seeks to
26 stop the City Attorney's efforts to use the pretext of a public nuisance
27 investigation to obtain constitutionally and statutorily protected private
28 medical and genetic information of Dr. Stoller's patients.

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10. In short, it appears that the City Attorney’s subpoena is part of a broader concerted effort involving other actors to achieve several goals, including
- a. Advancing the bogus “fake exemption” narrative created by Senator Pan, which false narrative is the primary PR tactic used to help him and his allies pass SB 276,
 - b. Help other government agencies obtain information about the vaccine exempt, which other efforts have only been partially successful heretofore, and,
 - c. As a possible initial step to identify and target the families of the vaccine exempt for public or private nuisance lawsuits as a coercive tactic to get them to vaccinate their children, all of which makes the Administrative Subpoena an illegitimate, constitutionally defective abuse of governmental process.

THE PARTIES

11. Plaintiff/Petitioner Kenneth P. Stoller, MD is a California licensed physician, who until the actions complained of herein, worked in a health care clinic in the City and County of San Francisco. As a result of the City Attorney’s wild, unsupported and possibly tortious accusations in his press release, Dr. Stoller was terminated from his position. As of the date of this action, he lives and works in another county in California.
12. Defendant/Respondent Dennis Herrera is the City Attorney for the Defendants/Respondents City and County of San Francisco, and is being sued in his official capacity only, at this time.

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FACTUAL BACKGROUND

The Standards of Medical Exemptions from Vaccines under SB 277 (Cal. Health & Safety Code Section 120370)

13. To fully understand this case, some legislative history of California vaccine law is necessary.
14. Up until 2015, California parents could opt-out of vaccinations for their children based on a personal belief exemption. But, as a result of the Disneyland measles outbreak that year, the California legislature passed SB 277 (amending Health and Safety Code 120325 *et seq.*) which eliminated the personal belief and religious exemptions.¹
15. As originally proposed to the Legislature, SB 277 would continue to allow medical exemptions from vaccines, but exemptions would be limited to a handful of narrow contraindications and precautions recognized by the CDC (Centers for Disease Control).
16. Because of pushback/public uproar from the proposed narrow scope of CDC contraindications, the bill's authors, Senators Richard Pan and Ben Allen, were forced to include a broader definition of medical exemptions which included without limitation "family history." Moreover, with SB277, the phrase "contraindication"

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¹ It was known at the time, but little publicized that 38% (73 of 194) of the individuals who contracted measles in the Disneyland epidemic got it from the vaccine. See Roy F, Mendoza L, Hiebert J, McNall RJ, Bankamp B, Connolly S, Lüdde A, Friedrich N, Mankertz A, Rota PA, Severini A. 2017. *Rapid identification of measles virus vaccine genotype by real-time PCR*. J Clin Microbiol 55:735–743. <https://doi.org/10.1128/JCM.01879-16>. Added to the 38% is the estimated 10% primary measles vaccine failure (i.e., children who receive the vaccine but do not develop sufficient antibodies to combat the disease) See <https://www.ncbi.nlm.nih.gov/pubmed/15176719>. That suggests that almost half of the 194 cases were vaccinated (and most of those got it from the vaccination).

1 was stricken from Cal. Health & Safety Code section 120370, and in its place the
2 Legislature enacted the words “not considered safe” [in the physician’s
3 recommendation, because the Legislature was heeding the public uproar against
4 limiting physicians to narrow CDC contraindications.]

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6 17. The legislative history and public statements about the revised bill make it clear that
7 physicians were given the discretion to issue medical exemptions for conditions far
8 broader than the CDC’s narrow contraindications. The statements by the legislators
9 and others undercut the current negative PR campaign, which is evidenced by the
10 City Attorney’s office in its press release, that exemptions based on conditions
11 beyond narrow CDC contraindications are somehow fake or fraudulent. Here are
12 some examples of government officials’ views about medical exemptions under SB
13 277:
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15 a. The concluding sentence of Governor Jerry Brown’s signing statement,
16 dated June 30, 2015: “Thus, SB 277, while requiring that school children
17 be vaccinated, explicitly provides an exception when a physician believes
18 that circumstances – in the judgement and sound discretion of the physician
19 – so warrant.”

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21 b. Here is the Assembly Bill Analysis on SB277:

22 “A medical exemption letter can be written by a licensed physician that
23 believes that vaccination is not safe for the medical conditions of the
24 patient, such as those whose immune systems are compromised, who are
25 allergic to vaccines, are ill at the time of vaccination, or have other medical
26 contraindications to vaccines for that individual patient. Every state allows
27 medical exemptions from school vaccination requirements. This
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1 determination is entirely up to the professional clinical judgment of the
2 physician.”

- 3 c. The legislative intent of SB277 is further evidenced by the transcript of the
4 official public hearings on SB227. *See e.g.* Assembly Committee hearing
5 transcript, dated June 9, 2015:

6 “Rob Bonta: Thank you, Dr. Pan. And then finally, we have an amendment
7 regarding the medical exemption and a physician's judgement. And I've
8 heard from a number of constituents and Californians regarding concerns
9 that a medical exemption is difficult to obtain or was difficult to obtain. I
10 believe that current law states that a physician has complete, professional
11 discretion over the writing of a medical exemption. However, I have asked
12 the author to take an amendment to clarify that a medical exemption is
13 entirely within the professional judgement of a physician and we have
14 agreement on that amendment.”

15 “SB277 bill author Richard Pan: Yes.”

- 16 d. SB277 bill co-author Ben Allen in that same hearing stated:

17 “One of the things we’ve talked about over and over again is how
18 important it is that there be a strong and robust medical exemption so that
19 anybody who has a legitimate medical concern, genetic predisposition,
20 some sort of immunological problem, they can go to a doctor anywhere in
21 the State and get an exemption from that doctor.”

- 22 e. Here is SB277 bill co-author Richard Pan further addressing the State
23 Legislature during these hearings,

24 “If the physician feels there is a genetic association, with a sibling, a
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1 cousin, some other relative, it's not safe for a vaccine, they can provide a
2 medical exemption for that vaccine. There is no limitation....We are trying
3 to create the space to allow doctors and their patients and their parents to
4 work together, hand in hand.” [and] “... that may be family related, that
5 therefore that child is also at increased risk even though that child has not
6 yet suffered harm, then they can exercise their professional judgment to
7 provide an exemption.”

9 18. *The medical issues referenced in the above-cited legislative history, such as*
10 *“genetic association... with a...cousin” cited by Senator Pan are not CDC*
11 *listed contraindications (or even temporary precautions) to vaccination.*
12 *Rather, they are only precautions to vaccination recognized in different*
13 *measure in different medical communities (i.e., integrative medical*
14 *communities) to justify a medical exemption to vaccination.*

16 19. Physicians like Dr. Stoller have taken Senator Pan seriously and have based their
17 vaccine exemption writing on the broad discretion allowed to them under the law.

19 **Senator Pan Changes His Mind and Now Wants Medical Exemptions Limited to**
20 **Narrow CDC Guidelines, with the Medical Decision to Be Made by Public**
21 **Health Officials Who Do Not See the Patient, Rather Than the Patient's**
21 **Physician**

22 20. Before SB277 went into effect there were approximately 940 vaccine medical
23 exemptions. In 2018, there were approximately 4000. Those numbers translate into
24 0.2 percent of school age children which increased to 0.7 percent of children who
25 received medical exemptions.

26 21. As a result of this 0.5 percent increase, and an uptick of measles cases in California,
27 (which is primarily a result of adults who contract the disease while traveling
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1 abroad), Senator Pan has introduced SB 276, which removes medical exemptions
2 from physicians and places the decision in the hands of state or local public health
3 officials who do not examine the patient. Under SB 276, medical exemptions are
4 granted only for CDC approved guidelines, which not incidentally, the CDC
5 recommends be implemented by a physician who actually sees the patient. So, SB
6 276 is not even completely consistent with the CDC guidelines.
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8 22. SB 276 also sets up a reporting mechanism in which all current medical exemptions
9 will be rescinded if they are not in accordance with CDC guidelines. Therefore, the
10 very thing Senator Pan and his supporters could not achieve in the SB 277 legislative
11 session, is proposed to become law in this session under SB 276.
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13 **The Current Measles Situation in the Bay Area**

14 23. So far in 2019, in the San Francisco Bay Area, there have been 38 reported measles
15 cases, 28 of which were in adults who contracted the disease while traveling abroad.
16 [https://www.sfchronicle.com/health/article/Measles-cases-jump-to-38-in-California-](https://www.sfchronicle.com/health/article/Measles-cases-jump-to-38-in-California-amid-13795838.php)
17 [amid-13795838.php](https://www.sfchronicle.com/health/article/Measles-cases-jump-to-38-in-California-amid-13795838.php). There is no published information as of yet as to how many of
18 the 10 measles cases in children were the wild measles strain, (i.e., unvaccinated
19 children, versus children who contracted symptoms from the vaccine, like the 38% in
20 the Disneyland outbreak), or how many were vaccinated and contracted wild measles
21 due to primary vaccine failure, which may be 10% or more. *See* “The genetic basis
22 for measles vaccine failure” [Jacobson RM¹, Poland GA.](#)

23 <https://www.ncbi.nlm.nih.gov/pubmed/15176719>.

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25 24. Based on this data, it would appear that if there were a public nuisance from the Bay
26 area measles outbreak, the primary cause or vector of the outbreak and source of the
27 public nuisance would be unvaccinated adults, followed by vaccinated children who
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1 either have primary vaccine failure, or vaccine shedding and unvaccinated children,
2 probably in equal measure. Picking on the unvaccinated but medically fragile is
3 illogical in that it does not address the primary cause.

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5 25. In some sense, the City Attorney's actions might be viewed as discriminatory. There
6 is at present, no direct or indirect method to compel the primary vector – traveling
7 adults who are either unvaccinated or who have experienced secondary vaccine
8 failure (i.e., their vaccine wore-off in effect) – to get a booster or for testing of adults
9 to ensure adequate titer levels to make sure they are fully vaccinated. So, the City
10 Attorney is targeting a class of individuals for whom the state does have compulsory
11 vaccination powers, namely children, and that sounds like age discrimination.

12 **Almost all Adults are Unvaccinated According to the CDC**

13 26. Under CDC definitions and the CDC's adult vaccination schedule, the overwhelming
14 majority of American adults are considered "unvaccinated" because they have not
15 received all recommended vaccines and boosters. The CDC surveys adults every
16 year, so vaccination coverage rates are readily available. Walter W. Williams et al.,
17 "Surveillance of Vaccination Coverage Among Adult Populations- United States,
18 2015," *Morbidity and Mortality Weekly Report* 66, no. 11 (2017): 1-
19 28, <https://www.cdc.gov/mmwr/volumes/66/ss/pdfs/ss6611.pdf>

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22 27. For example, the coverage rate for Hepatitis A currently hovers around 9% and
23 pneumococcal around 20%. *Id.* The number of persons who receive every CDC
24 recommended vaccine and booster is very small, which together with lack of titers,
25 means that approximately 90-99% of the City of San Francisco is likely
26 "unvaccinated," per the CDC. The logical implication of the City Attorney's public
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1 nuisance theory is that most San Franciscans contribute to the public nuisance created
2 by people being un- or under vaccinated.

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4 **The Other Side of the Equation: Known and Proven Harm from Vaccination**

5 28. In January 2019, U.S. Federal Circuit Judge Newman issued a dissent from an *en*
6 *banc* denial in a case in which the vaccine court denied compensation to an alleged
7 vaccine injured child. She discussed the legislative history of the 1986 National
8 Vaccine Act which granted legal immunity to vaccine manufactures from lawsuits
9 and instead set up a taxpayer fund to be paid to those who suffered vaccine injury.

10 Her discussion is relevant to this case, and can scarcely be improved on:

11 “The National Childhood Vaccine Injury Act of 1986

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13 It had long been known that a small percentage of childhood vaccinations have led
14 to **grave injury and permanent disability**, as discussed in the legislative record:
15 Childhood vaccines are essential to maintain the health of our society. They have
16 been invaluable weapons against the dread diseases that used to kill or injure
17 hundreds of thousands of children every year: polio, measles, pertussis, diphtheria,
18 tetanus, rubella, mumps, and smallpox. But while these vaccines have brought the
19 gift of life and health to millions, there are a very small number of children every
20 year who are injured by unpredictable side effects of the vaccines through no fault
21 of their own or the vaccine manufacturers. 132 Cong. Rec. S17,343–02 (1986)
22 (statement of Sen. Kennedy). The House Report reiterated the concern for
23 unforeseeable injury flowing from compulsory vaccinations: While most of the
24 Nation’s children enjoy greater benefit from immunization programs, a small but
25 significant number have been gravely injured. But it is not always possible
26 to predict who they will be or what reactions they will have. And since State law
27 requires that all children be immunized before entering school, most parents have
28 no choice but to risk the chance—small as that may be—that their child may be
injured from a vaccine. H.R. Rep. No. 99-908, at 4–6 (1986), as reprinted in 1986
U.S.C.C.A.N. 6344, 6345–46. **The legislative record states that about one half
of one percent of children each year experience vaccine-related injury
[footnote omitted]; and with four million births each year in the United
States, this is about 20,000 vaccine injuries per year. . . .**

(Emphasis added)

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Oliver v. Sec HHS, 17-2540, January 9, 2019 Order, pages 2-3,
<http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/17-2540.Order.1-9-2019.1.pdf>.

1 29. In the mid 1980's when the federal vaccine injury act was being debated, children
2 received approximately 22 doses of 7 different vaccines. In 2019, children receive
3 between 69 to 74 doses of more than 20 different vaccines. It stands to reason that
4 administering more than three times the number of vaccine shots would increase or
5 significantly increase the number of gravely and permanently disabled from
6 vaccination. Just a very conservative half linear increase would make that number
7 around .75%.

9 30. That means that the expected severely and permanently injured vaccine rate is greater
10 than the 0.7% current rate of medical exemptions, which is some indication that there
11 are not an excessive number of medical exemptions in the state.

12 31. Since its creation, the vaccine court has paid out 4 billion dollars to the vaccine
13 injured.

14 [https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/data/monthly-stats-
15 nov-2018.pdf](https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/data/monthly-stats-nov-2018.pdf).

16 32. Most importantly, from the time Congress first considered unavoidably severe and
17 permanent vaccine injury in the 1980's, the literature documenting serious injury and
18 death resulting from childhood vaccination has become depressingly massive, but
19 mostly ignored by the policy makers, professional medical association and the media,
20 and hidden by the manta that "vaccines are safe and effective and side effects are
21 rare." Some have postulated this may be caused by Pharma influence and corruption.
22 As evidenced by recent opioid criminal prosecutions, Pharma influence and its
23 criminal wrongdoings are under increased scrutiny by the authorities, but not in the
24 vaccine arena. This action necessarily involves exploring these issues at trial, as part
25 of the claim that the alternative standard of care employed by physicians like Dr.
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1 Stoller and endorsed by Senator Pan, (version SB 277), is safer for children than
2 Senator Pan’s SB 276 version. (See the Fifth Cause of Action, page 24, *infra*)

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4 **The City Attorney’s Past Unsuccessful Attempt to Misuse the Public Nuisance
5 Laws on a Large Public Health Problem**

6 33. There is no precedent for the City Attorney’s attempt to use the general public
7 nuisance statute as a basis to investigate a physician’s medical practice. However,
8 this City Attorney has unsuccessfully attempted to use a public nuisance theory to try
9 to remedy another large public health related problem, global warming, which is
10 estimated to kill 150,000 people per year around the world.² His and other City
11 Attorneys’ attempt to use public nuisance laws as a method of remedying this large,
12 complicated public health issue has been rejected by the courts under the
13 displacement doctrine,³ which doctrine is applicable in this case since California has
14 an established administrative agency which deals with the exact issue that is the
15 subject of the City Attorney’s pretextual so-called “investigation.” It is called the
16 Medical Board of California.
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23 ² See “Impact of regional climate change on human health Jonathan A. Patz1,2, Diarmid
Campbell-Lend. http://www.precaution.org/lib/05/warming_harms_health.051117.pdf.

24 ³ See *City and County of San Francisco et v BP* 3:17-cv 06012. Copy of decision can be found at:
25 [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180625_docket-317-cv-06011_order-1.pdf)
26 [documents/2018/20180625_docket-317-cv-06011_order-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180625_docket-317-cv-06011_order-1.pdf) (appeal of complaint dismissal
27 pending before the 9th Circuit). See generally, Griffin, Paul A, and Jaffe, A Myers, “Are Fossil
28 Fuel firms informing Investors well enough about the risk of climate Change”, *Journal of Energy
& Natural Resource Law*. <https://www.tandfonline.com/doi/abs/10.1080/02646811.2018.1502240>

1 34. These misguided attempts by municipalities to contort public nuisance laws into a
2 vehicle to address these large societal health public policy problems have been
3 roundly criticized by scholars.⁴
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5 **The Likely Goals of the Possible Concerted Action**

6 35. It is clear from Senator Pan's introduction of SB 276⁵ and his traveling road show
7 throughout the state⁶ to generate support for his bill, that the primary PR tactic is to
8 denounce medical exemptions beyond CDC guidelines as "fake" or "fraudulent." The
9 irony is of course that physicians like Dr. Stoller, who believed and followed Senator
10 Pan and his supporters' statements that it was permissible to do under SB 277, are
11 now being vilified by him for doing what he said they could do.
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13 36. The City Attorney's press release on May 8th about a so-called "investigation" of Dr.
14 Stoller's medical exemption writing practices fits perfectly into Senator Pan's false
15 narrative, and increases the likelihood that SB 276 will become law.
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19 ⁴ The misuse of public nuisance laws by municipalities has received extensive scholarly criticism.
20 *See e.g.* "Waking the Litigation Monster, The misuse of public nuisance litigation." March 2019,
21 U.S. Chamber, Institute for Legal Reform.
22 <https://www.instituteforlegalreform.com/uploads/sites/1/The-Misuse-of-Public-Nuisance-Actions-2019-Research.pdf>; Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4(2) J. TORT L. ii (2011), https://scholarship.law.columbia.edu/faculty_scholarship/823 (concluding that it shouldn't be).

23 ⁵ "Dr. Richard Pan Introduces SB 276 to Combat Fake Medical Exemptions that Put Children
24 and Communities at Risk" <https://sd06.senate.ca.gov/news/2019-03-26-dr-richard-pan-introduces-sb-276-combat-fake-medical-exemptions-put-children-and>

25 ⁶ "Dr. Richard Pan, Los Angeles Public Health Officials, and Coalition of Community
26 Advocates Release Data on Economic Impact of Measles Outbreaks and Cost to California
27 Taxpayers" <https://sd06.senate.ca.gov/news/2019-05-10-dr-richard-pan-los-angeles-public-health-officials-and-coalition-community-advocates>
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1 37. However, beyond advancing the goal of passing SB 276, in the public hearing before
2 the Senate Health Committee on April 24, 2019, Senator Pan advised his co-
3 committee members that the Medical Board needed the bill because it was having
4 trouble in obtaining the medical records of physicians writing these non-CDC based
5 medical exemptions.

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7 38. Fourteen days later, the City Attorney subpoenas the medical records of *all* of Dr.
8 Stoller's patients (not only those in San Francisco which is the clear limit of the City
9 Attorney's jurisdiction and power). Discovery in this case will determine whether this
10 was a coincidence, or a part of a concerted effort among confederates to violate Dr.
11 Stoller's patients' constitutional rights and right to personal autonomy to protect
12 sensitive medical and genetic information.

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14 39. Although the use of a public nuisance investigation appears to be completely
15 unprecedented as a basis for a municipality's "investigation" of a physician's medical
16 decision making, there are two antecedents. First, this City Attorneys' global warning
17 lawsuits against the oil companies under a now rejected public nuisance theory, as
18 discussed above.

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20 40. Second, a well-known pro-vaccine law professor, who works a stone's throw from
21 the City Attorney's office, advocates the use of public nuisance lawsuits against the
22 vaccine exempt children and their families. *See*. "Vaccines and the Law, An
23 Advocate's Toolkit," page 18. ("Non-vaccinating individuals who cause an
24 outbreak may be sued under public nuisance laws. Under state statute or local
25 ordinances, the appropriate government entity can sue for the behavior of one person
26 that can, among other things, be injurious to health. When the harm affects a
27 community, it's a public nuisance, and the state can sue.")
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1 <https://www.voicesforvaccines.org/content/uploads/2014/10/Vaccines-and-the-Law-Toolkit.pdf>.

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3 41. Of course, merely advocating a legal strategy is fully protected speech under the First
4 Amendment. But actions in furtherance of a concerted effort to violate the
5 constitutional and statutory rights of Dr. Stoller's patients, might not be. Discovery in
6 this case may provide further information.

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8 **Tying it all together**

9 42. Combining these facts together leads to the following conclusions:

- 10 a. SB 277 was intended to give physicians the power and discretion to write
11 exemptions much broader than the CDC guidelines.
- 12 b. Senator Pan and his allies used the .05% increase in medical exemptions (.02%
13 before SB 277 removed the PBE to .07% in 2018), and the fact that there have
14 been a greater numbers of measles cases this year, as a reason or pretext to
15 eliminate the broad medical exemptions he was forced to allow because of
16 pushback against his contraindication-only based exemption language in the
17 original SB 277 version. And to ensure physicians like Dr. Stoller would no longer
18 write these exemptions, SB 276 takes away the physician's exemption decision
19 making ability, which was an important reason why SB 277 was passed.
- 20 c. However, based on the Bay area figure (28 of 38 measles cases were in adults, and
21 likely half of the 10 childhood measles cases got it from the vaccine or primary
22 vaccine failure), the actual cause of the so called "public nuisance" or the primary
23 vector of the measles outbreak has nothing to do with children exempt from
24 vaccination, let alone children who are Dr. Stoller's patients. The primary vector is
25 unvaccinated adults and vaccinated children.
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- 1 d. When the Congressionally endorsed estimate of severe vaccine injury rate is
2 compared to the percentage of medically vaccine exempt children in California, it
3 would seem that far too few medical exemptions are being given to California
4 children.
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6 e. Either there are a number of coincidences which have occurred in a relatively short
7 period of time amongst people who have publicly expressed a similar vision of
8 vaccination problems and solutions, and which coincidental action advances their
9 apparent common agenda, or, these people are acting in concert, and one of the
10 tactics or objectives is to circumvent federal and state law to illegally obtain Dr.
11 Stoller's patients' private medical and genetic information.
12

13 **FIRST CAUSE OF ACTION**
14 **CAL CODE CIV. PRO. 1987.1**
15 **TO QUASH THE CITY ATTORNEY'S ADMINISTRATIVE SUBPOENA**

16 **a. Lack of Statutory Authority**

- 17 43. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 – 42 above.
18 44. The Medical Board of California, has the statutory authority to investigate the
19 medical decision making of California licensed physicians and subpoena a
20 physician's records. *See* Cal. Bus. & Prof. Code Part 5 Medicine, and Cal.
21 Government Code section 111080 *et seq.*), subject to compliance with and judicial
22 review of a patient's state constitutionally protected privacy and other rights. *See*
23 *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal. App. 3d 669, and
24 its progeny.
25 45. Municipalities have not been given the same statutory authority to oversee physician
26 conduct or obtain a physician's medical records, or keep those private medical
27 records confidential.
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1 46. The subpoena is purportedly based on the City Attorney’s authority under San
2 Francisco Administrative Code §2A.231. However, that section requires a
3 prerequisite showing that “State law grants to the City Attorney the duty or power to
4 seek enforcement of any provision of State law”. Nothing in Cal. Health & Safety
5 Code section 120325 *et. seq.* grants authority to the City Attorney to enforce the State
6 law under which physicians write medical exemptions.
7

8
9 **b. CFR based Deidentification Does not Adequately Protect the Patient’s
Privacy Rights**

10 47. 45 CFR 164.541(b)(2) deidentification of medical records is insufficient to protect
11 the patients’ privacy and other rights protected by state and federal law, *See* the
12 widely cited, Rothstein, M. “Is Deidentification Sufficient to Protect Health Privacy
13 in Research?” *Am. J. Bioeth.* 2010,
14 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3032399/>. (concluding that it is not).
15

16 48. If deidentification does not protect patient privacy in research, *a fortiori*, it does not
17 protect patient privacy by a government agency conducting an investigation, the basis
18 of which is that the patients whose records are being sought are the actual
19 cause/vector of a public nuisance. Since the City Attorney’s office has no statutory
20 right to patient medical records, there is no specific statutory obligation to keep the
21 nominally deidentified patient information confidential. And since deidentification
22 does not protect Dr. Stoller’s patients’ privacy rights, the state constitutional privacy
23 protections under *Gherardini* and its progeny apply
24

25 49. The fact that all the requested medical records contain genetic test results heightens
26 the protection accorded to medical records under the federal Genetic Information
27 Nondiscrimination Act of 2008 (GINA) and even stronger state law protecting
28

1 genetic information (CalGINA). The fact that Dr. Stoller’s medical records contain
2 genetic testing information makes it even more unlikely that CFR based
3 deidentification would adequately protect patient identities. *See* the Rothstein, *et al*
4 article cited above at pages 5-6). Unlike the Medical Board, the City Attorney’s
5 office lacks confidentiality provisions relating to medical records, and would be free
6 to share them with any government agency, which seems a likely outcome. *This*
7 *alone requires the quashing of the City Attorney’s subpoena. See also* Cal. Health &
8 Safety Code section 120440 – allowing parents to opt-out of vaccination record
9 sharing.
10

11 50. Moreover, Defendants City and County of San Francisco operate schools that
12 already have copies of all medical exemptions for its students because the
13 California statute (section 120370) requires the schools to keep copies. So, if
14 Plaintiff were required to produce to the Defendants deidentified medical
15 records for each patient/student, then all the Defendants would need to do is
16 match up the medical record with the unredacted medical exemption already
17 on file with Defendants’ school records.
18

19 51. There is no basis to conclude that the City Attorney would not share records
20 amongst its various departments or states agencies, triangulate data, or engage
21 in other countless ways to circumvent the privacy and the confidentiality of
22 the records. It remains to be seen if the City Attorney acknowledges any
23 limitation to his use or sharing of these medical records.
24

25 52. In short, the deidentification limitation contained in the subpoena does not prevent
26 the City, or those with whom the City shares the information, from reconstructing
27 personal identifying information from other sources. Thus, deidentification is
28

1 insufficient to protect the patients’ privacy rights under federal and state law, even on
2 the counterfactual assumption that the Defendants had the statutory authority to
3 conduct an investigation of a physician’s medical practice and/or to subpoena
4 protected medical records. Accordingly, the full panoply of privacy protection under
5 federal and state law applies.
6

7 **c. The Purported Nuisance Basis Is a Bad Faith Pretext to Conduct an Unlawful**
8 **Investigation Against State and Federally Protected Medical and Genetic**
9 **Records**

10 53. The California nuisance statute (Cal. Civ. Code §3479) provides: “Anything which is
11 injurious to health . . . is a nuisance.” What is the alleged or possible harm being
12 investigated in this public nuisance investigation? Dr. Stoller’s writing medical
13 exemptions for school age children? As demonstrated above, most of the 2019
14 measles cases in the Bay Area involved traveling adults or vaccinated children. So
15 why is the City Attorney investigating a doctor writing medical exemptions?
16

17 54. Nuisance laws primarily deal with land use and zoning issues. They were never
18 intended to deal with complicated societal health issues. Recently, the San Francisco
19 City Attorney and other city attorneys have attempted to misapply public nuisance
20 laws to another public health crises, global warming. As indicated above, these
21 efforts have failed and have been criticized by scholars. (See pages 13 and 14 above
22 at paragraphs 33 and 34.)
23

24 55. Using a public nuisance theory makes even less sense as a basis to investigate a
25 physician for writing medical exemptions. Vaccine exemptions in California are
26 authorized by Cal. Health & Safety Code Section 120370. There is no provision for
27 governmental review, scrutiny or interference. Not even the Medical Board has the
28

1 power to overturn medical exemptions under current law. There is no possible
2 judicial review or judicial revocation of a medical exemption.

3 56. Furthermore, there would be no legal basis for a court in public nuisance litigation to
4 enjoin a physician from writing an exemption in a particular case since the action is
5 expressly granted by statute which is a complete defense to a nuisance claim. (*See*
6 *Cal. Civ. Code §3782*).

7
8 57. What kind of damage claim could the City Attorney make against Dr. Stoller? Who
9 has been actually injured or harmed by the exemptions he has written based on the
10 2019 Bay Area statistics? The fact that there are no realistic judicial remedies makes
11 a nuisance lawsuit against Dr. Stoller an exercise in futility.

12 58. The bad faith of this subpoena is further demonstrated by two facts and
13 circumstances. First, as indicated, a likely goal of the City Attorney's action is to
14 identify the families of the vaccine exemptees as a target of nuisance lawsuits (or
15 more likely the threat of a nuisance lawsuit preceded by a nuisance investigation).
16 The patients who received an exemption are the actual vectors of whatever harm or
17 injury the City Attorney claims is a result of medical vaccines not being administered
18 to them. A likely confederate of the City Attorney's public nuisance investigation is
19 publicly advocating for public nuisance actions against the vaccine exempt.

20
21 59. Second, this whole subpoena show/investigation seems geared towards assisting
22 Senator Pan, a likely confederate of the City Attorney in passing SB 276. An
23 "investigation" of a physician writing "fake" medical exemptions makes the wholly
24 unsupported fake investigation false narrative sound more plausible, since a respected
25 City Attorney of a major California city is now investigating the issue.
26
27
28

1 **d. The Subpoena is Fatally and Irreparably Overbroad**

2
3 60. Not even the Medical Board - which does have the statutory jurisdiction over
4 Plaintiff –would be authorized to subpoena all of Plaintiff’s patients’ medical
5 records *carte blanche*. See Cal. Bus. & Prof. Code section 2225(a).

6 61. The Administrative Subpoena’s request for all patient medical records is also
7 overbroad because it is not limited to San Francisco residents. A municipality’s
8 jurisdiction ends at its borders. *City of S. Pasadena v. L.A. Terminal Ry. Co.*, 109 Cal.
9 315, 321 (1895). The City Attorney has no legal right or basis to obtain the medical
10 records of non-San Francisco residents. The failure of the Administrative Subpoena
11 to so limit the request makes it overbroad and unenforceable as an unreasonable and
12 *ultra vires* act.
13

14
15 **SECOND CAUSE OF ACTION**
16 **DECLARATORY JUDGMENT THAT THE CITY ATTORNEY’S REQUEST FOR**
17 **PATIENT MEDICAL RECORDS VIOLATES DR. STOLLER’S PATIENTS’ RIGHT OF**
18 **PERSONAL AUTONOMY OVER THEIR MEDICAL INFORMATION EVEN IF**
19 **INITIALLY DEIDENTIFIED, AND A PERMANENT INJUNCTION BARRING THIS**
20 **AND FUTURE ATTEMPTS BY THE DEFENDANTS AGAINST PLAINTIFF**

21 62. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 - 61 above.

22 63. Plaintiff seeks a declaratory judgment under Cal. Code Civ. Proc. 1060 *et. seq.*, that
23 the administrative subpoena violates Dr. Stoller’s patients’ right of personal
24 autonomy over the medical information contained in their medical records, and a
25 permanent injunction barring the Defendants from seeking this information from Dr.
26 Stoller, now or in the future.

27 64. Per the words of the landmark decision in *Gherardini*:
28

1 The data here sought to be obtained would allow the administrative agency to create
2 literally a ‘cradle-to-grave profile on every [Californian] without his knowledge without
3 his consent. Furthermore, fundamental to the privacy of medical information ‘is the ability
4 to control [its] circulation!!!!’ While the statute requires the governmental agency recipient
5 to keep the matters disclosed confidential, [which is something the Defendants in this case
6 are not statutorily required to do] a discerned objective of the constitutional amendment is
7 to keep these areas of privacy specifically away from the eyes and ears of governmental
8 agents to forestall ‘governmental snooping.’

9 *Board of Medical Quality Assurance v. Gherardini, supra* (1979) 93 Cal. App. 3d at
10 678.

11 65. Based on *Gherardini*, and the fact that deidentification does not adequately protect
12 the privacy of the patients’ medical records and genetic information, the Court should
13 declare that the Defendants’ request for nominally deidentified medical records
14 violates the patients’ right of personal autonomy to control access to their medical
15 and genetic information.

16 **THIRD CAUSE OF ACTION**

17 **DECLARATORY JUDGMENT THAT THE CITY ATTORNEY DOES NOT** 18 **HAVE THE STATUTORY AUTHORITY TO INVESTIGATE PLAINTIFF’S MEDICAL** 19 **DECISION MAKING OR OBTAIN HIS PATIENTS’ MEDICAL RECORDS AND A** 20 **PERMANENT INJUNCTION BARRING THIS AND FUTURE ATTEMPTS AGAINST** 21 **THE PLAINTIFF**

22 66. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 - 65 above.

23 67. Plaintiff seeks a declaratory judgment under Cal. Code Civ. Proc. 1060 *et. seq.*, that
24 the Defendants do not have the statutory authority to investigate Plaintiff’s medical
25 decision making under the public nuisance statute (Cal. Civ. Code Sections 3479 *et*
26 *seq.*), that it lacks the statutory authority to subpoena a physician’s medical records
27 pursuant to a purported nuisance investigation, that it lacks sufficient factual basis to
28 conduct the alleged nuisance investigation.

68. Plaintiff also seeks a permanent injunction against the Defendants.

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**FOURTH CAUSE OF ACTION
DECLARATORY JUDGMENT AND PERMANENT INJUNCTION
42 U.S.C. 1983 VIOLATION OF PLAINTIFF'S AND HIS PATIENTS' FOURTH
AMNEDMENT RIGHTS**

69. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 - 68 above.

70. The City Attorney's Administrative Subpoena was specifically purportedly issued under the San Francisco Administrative Code Section 2A.231, thereby satisfying the under color of state law requirement.

71. An administrative subpoena is treated as a constructive search within the meaning of the Fourth Amendment and department heads cannot conduct unreasonable searches. *Brovelli v Superior Court of Los Angeles* (1961) 56 Cal. 2d 524. The Fourth Amendment requires that the subpoena (1) Relate to an inquiry which the government agency is authorized to make, (2) Seek information reasonably relevant to the authorized inquired and (3) Not be too indefinite. *Id.*

72. Because: (1) the City Attorney does not have the statutory authority to conduct this investigation, (2) There lacks probable or good cause to issue the subpoena, (3) The subpoena was issued in bad faith to further a political agenda, namely the passage of SB 276, and to help other government state agencies secure patient medical records in violation of federal and state law, the City Attorney's actions violate Dr. Stoller's and his patients' known and clearly understood Fourth Amendment rights. *U.S. v. Morton Salt. Co.*, (1950) 338 U.S. 632, 652-653 [94 L.Ed. 401, 415-516, 70 S.Ct. 357]; *Brovelli, supra*, at 529; *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal. App. 3d 669, 674-675.

1 73. Plaintiff seeks a declaratory judgement that the subpoena violates Dr. Stoller's
2 and/or his patients' Fourth Amendment rights, and a permanent injunction
3 prohibiting Defendants from enforcing or serving any other subpoena
4 requesting patient medical and/or genetic information, pursuant to Cal Code.
5 Civ. Pro. 526.
6

7
8 **FIFTH CAUSE OF ACTION**
9 **DECLARATORY JUDGEMENT THAT PATIENTS HAVE A STATE STATUTORY**
10 **AND CONSTITUTIONAL RIGHT TO OBTAIN A MEDICAL EXEMPTION BASED ON**
11 **AN ALTERNATIVE STANDARD OF CARE**

12 74. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 - 73 above.

13 75. California citizens have a right to receive unconventional medical care and advice
14 from California licensed physicians Bus. & Prof. Code section 2234.1, and that
15 includes medical advice and services concerning childhood vaccines. The rationale
16 being, per Section 2234.1(c), "Since the National Institute of Medicine has reported
17 that it can take up to 17 years for a new best practice to reach the average physician
18 and surgeon, it is prudent to give attention to new developments not only in general
19 medical care but in the actual treatment of specific diseases, particularly those that
20 are not yet broadly recognized in California."

21 76. Therefore, there are certainly no shortage of physicians critical of using family
22 history and genetic associations to grant medical exemptions because using
23 information beyond CDC guidelines has not gained consensus status, and the science
24 is not settled on identifying children vulnerable to adverse events.
25

26 77. Plaintiff seeks a declaratory judgment that the patients of Dr. Stoller, and the patients
27 of other like-minded physicians, have a right to receive a vaccine medical exemption
28 based on an alternative standard of medical exemptions beyond CDC guidelines,

1 under Bus. & Prof. Code 2234.1 and a state constitution right. *cf Schloendorff v. NY*
2 *Hospital*, 211 NY 125, 105 NE.102 1914 (J. Cardoza) (overruled on other grounds
3 *Bing. V. Thunig* 2 NYS 656, 143 NE2d 3, (1957) (New York citizens have a privacy
4 right to control their own bodies); *Schneider v Revici* 817 F.2d 987 (2nd Cir. 1987).
5 (Acknowledging a patient’s right to receive unconventional medical treatment).
6

7 78. Dr. Stoller will demonstrate that the alternative vaccine standard of care which he
8 uses (and again which had been endorsed by Senator Pan in SB 277) is safer and
9 creates less of a risk of serious harm and permanent injury for children than the CDC
10 guideline based standard of care, which further justifies the Court recognizing the
11 patients’ right to obtain medical exemptions under this alternative standard of care,
12 notwithstanding any current or future law to the contrary.
13

14 79. Plaintiff also seeks a declaratory judgment that based on the existing scientific
15 research, and evidence of wrongdoing, including the suppression of vaccine injury
16 findings, and the intimidation of physicians and researchers, the alternative standard
17 of care for vaccine exemption is safer for children than the CDC guidelines.
18

19 **IN SUMMARY**

20 80. Both legislators who authored SB 277 mentioned genetic associations and
21 predispositions (even in relatives) as a potential reason for getting a medical
22 exemption.
23

24 81. While our understanding of mechanisms behind vaccine adverse events, and our
25 ability to predict or avoid them has many limitations, examining SNPs (single
26 nucleotide polymorphisms) is key to using this information and is the cornerstone of
27 the new field of “adversomics,” the study of vaccine adverse reactions using
28 immunogenomics and systems biology approaches. At present, the results of genetic

1 testing are suggestive but not conclusive evidence of possible problems with
2 vaccination in some children.

3 82. But this type of genetic information, in conjunction with family history of
4 autoimmune disease, neurodevelopmental disorders, and/or a history of adverse
5 events in the children and family members, is the basis of medical exemption analysis
6 used by Dr. Stoller and other forward-thinking physicians in California and
7 throughout the United States. And more importantly, it was clearly supported by the
8 SB 277 co-authors until it wasn't, and then came SB 276.

9
10 83. At the current trajectory of vaccine science, at some point in the not-too-distant
11 future, we will all have a chip in our arms with our individual genetic code. That chip
12 will list all the second and third generation vaccines, which based on conclusive
13 scientific evidence are too dangerous to administer to a child. But, until that time
14 comes, physicians have to use the best available information.

15
16 84. The analysis of most physicians begins and ends with CDC guidelines. However, as
17 has been repeatedly stated, under SB 277 (now Cal. Health and Safety Code, Section
18 120370) physicians are permitted to use genetics, patient history, and family history
19 as a basis of medical exemptions, and that is exactly what physicians like Dr. Stoller
20 are doing.

21
22 85. Apparently unhappy that physicians believed and followed what he said when he was
23 advocating for SB 277, Senator Pan and his allies – and it appears that the City
24 Attorney is one of them – is now pushing the false narrative that physicians who are
25 implementing his clearly stated views about the scope of SB 277, are writing fake and
26 fraudulent exemptions. This false narrative is this cabal's primary PR strategy to
27

28

1 achieve what it could not achieve during the SB 277 legislative battle, namely to limit
2 medical exemptions to CDC guidelines.

3 86. The vaccine exemption medical decision making of physicians who employ Senator
4 Pan's SB277 approach to vaccine exemptions is not a public nuisance. Rather, it is
5 now part of a public debate which is being played out as we speak before the
6 legislature and the Medical Board, which is where the issue belongs. It does not
7 belong in a court on a nuisance lawsuit, where medically fragile children are paraded
8 by Defendants seeking to test their contorted legal theory and gain some short-sighted
9 political talking points. The City Attorney has no business using an administrative
10 subpoena on an *ultra vires* and completely bogus nuisance investigation. We ask the
11 Court to reject his attempt to do so.
12
13

14 **PRAYER FOR RELIEF**

15 WHEREFORE the Plaintiff requests that judgment be entered in his favor and against the
16 Defendants as set forth in the Complaint and Verified Petition, and that the Court:
17

- 18 1. Quash the City Attorney's Administrative Subpoena dated May 8, 2019,
- 19 2. Issue a declaratory judgment that the City Attorney's subpoena violates Dr.
20 Stoller's patients' right of personal autonomy, and a permanent injunction
21 barring the Defendants from seeking such information from the Plaintiff,
22
- 23 3. Issue a Declaratory Judgment that the City Attorney lacks authority to
24 subpoena or investigate Dr. Stoller's medical practice,
- 25 4. Issue a Declaratory Judgment that the subpoena violates Dr. Stoller's and his
26 patients' rights to be free from an unreasonable search and seizure, and a
27 permanent injunction enjoining the enforcement of the subpoena,
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5. Issue a Declaratory Judgment that Dr. Stoller's patients have a right to a vaccine medical exemption under the Californians' right to receive unconventional medical care, and that the alternative standard of care is safer for children than the conventional CDC guidelines.
6. Costs and attorneys' fees as permitted by law,
7. Such other and further relief as the Court deems just and proper.

Dated June 3, 2019

RESPECTFULLY SUBMITTED,

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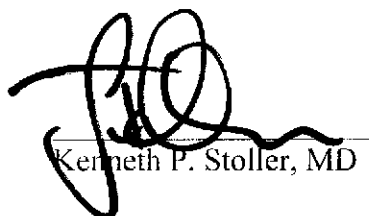
VERIFICATION

Kenneth P. Stoller, MD declares the following under the penalties of perjury pursuant to CCP 446(a):

1. I am the Plaintiff/Petitioner in this action and I am familiar with the facts set forth in this Complaint/Verified Petition.
2. I believe the facts set forth in the Complaint/Verified Petition are true and correct to the best of my knowledge, except for those stated fact upon information and belief and as to those facts, I believe them to be true.

I declare under penalties of perjury under the laws of the State of California that the foregoing is true and correct.

Exccuted this 3rd day of June, 2019 in Santa Rosa, Ca.


Kenneth P. Stoller, MD