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By Veronica Urena, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF KERN

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, an agency of the State of California, Plaintiff, v. CATHY'S CREATIONS, INC. d/b/a TASTRIES, a California Corporation; and CATHY MILLER, an individual, Defendants.	CASE NO.: BCV-17-102855 **IMAGED FILE** **DEFENDANTS CATHARINE MILLER'S AND TASTRIES' REPLY BRIEF IN SUPPORT OF MOTION TO ENFORCE THE JUDGMENT** **Reservation No.: 31560** Date: September 5, 2018 Time: 8:30 a.m. Dept: 11 Judge: Hon. David R. Lampe
EILEEN RODRIGUEZ-DEL RIO and MIREYA RODRIGUEZ-DEL RIO, Real Parties in Interest.	Action Filed: December 13, 2017 Judgment Entered: May 1, 2018

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REPLY ARGUMENT

The Department of Fair Employment & Housing (DFEH) has thrown up a lot of sand, but any supporting case law remains buried. Instead, the DFEH analogizes to numerous different situations, attempting to distract from the plain facts and law. This Court's judgment was intended to be, and was, a final determination of the issue of whether Defendants can be held liable for violating the Unruh Act. The DFEH could appeal, and chose not to, thereby acquiescing to the judgment. The notion that there will ultimately be two judgments, one saying that the DFEH cannot succeed as a matter of law, and another potentially contradicting it, is absurd. Nor is the DFEH immune from governmental oversight. All executive actions are subject to judicial oversight. It is simply not the case that "when the [DFEH] does it, that means that it is not illegal." (*The Nixon Interviews* (interview with Richard Nixon, U.S. President) David Paradine Productions (May 19, 1977)). The bottom line is that the DFEH cites no case nor presses any plausible arguments that morph this Court's judgment into a non-judgment. This Court's judgment affirmed and vindicated Defendants' First Amendment rights. This is the end of the case.

1. The DFEH cannot escape judicial review merely because it is an executive branch agency

Throughout its brief the DFEH sometimes compares itself to criminal prosecutors like the Department of Justice (DOJ) or a district attorney's office. In other instances it compares itself to four-letter administrative agencies (ALRB, NLRB, PERB, etc., discussed in cases below). Neither is quite a perfect fit; but in both, the DFEH's continued investigation would be improper.

As explained below, with respect to the four-letter agency situation, the "action" would be the proceeding before the agency itself, which would have both executive (prosecutory) and judicial (adjudicatory) functions. In that situation, however, Defendants could file a motion to dismiss before the agency, which—based on the issue preclusive effect of this Court's ruling—would be granted. (See *Hi-Desert Medical Center v. Douglas* (2015) 239 Cal.App.4th 717, 731 ["The critical question presented in these appeals is whether the administrative actions are barred by the doctrine of res judicata. The answer is yes."].)

With respect to the criminal prosecutor situation, the DFEH would technically only have executive functions, but like a prosecutor with a grand jury, it would have quasi-judicial functions

which would be supervised by the superior courts. In that situation, Defendants could file a motion to dismiss with this Court, which—based on the issue preclusive effect of this Court's ruling—would be granted. (*Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 144-145 [Courts can enjoin grand jury proceedings so long as they have "a clear basis in fact and law" for doing so].) Contrary to the DFEH's argument, there is no situation where the DFEH is absolutely immune from judicial oversight merely because it is an executive agency.

1.1. If the DFEH is akin to four-letter agencies, this Court can still apply preclusion principles[1]

The DFEH is in a unique position. "In general, administrative agencies are allowed to exercise combined functions committed by the California Constitution to state government—executive, legislative and judicial." (Asimow, et al., *California Practice Guide: Administrative Law* (The Rutter Group 2017) § 2:2 [citations omitted].) Thus, some agencies exercise both executive (investigatory and prosecutory) and judicial (adjudicatory) functions. Other agencies exercise solely executive functions. The former would include California's numerous four-letter agencies, such as the ALRB and the PERB (discussed in cases below), while the latter includes local district attorneys, the California Attorney General, and the Department of Justice.

Amazingly, the DFEH only cited one case discussing what type of agency it is. (Oppo., 10:12-13 [citing *Dept. Fair Empl. & Hous. v. Superior Court* (2002) 99 Cal.App.4th 896, 901].) That case held that the DFEH is more akin to the DOJ, a prosecutory agency, because its investigations "are similar to grand jury proceedings." But the case cited no authority for that proposition. (See *Dept. Fair Empl. & Hous.*, 99 Cal.App.4th at 901.)

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[1] The DFEH's opposition brief is confusing because, in its section addressing constitutional separation of powers concerns, it cites several cases which do not concern constitutional issues. (See Oppo., 7:10-22 [citing *Jamison v. Department of Transportation* (2016) 4 Cal.App.5th 356, 363-366; *Schwartz v. Poizner* (2010) 187 Cal.App.4th 592, 598-599].) Separation of powers concerns are only ever addressed in cases where courts are enjoining prosecutors; when courts enjoin four-letter agencies, the analysis always concerns statutory limits on the ability to become subject to a court's jurisdiction. (See *City of Los Angeles v. Superior Court of Los Angeles County* (1959) 51 Cal.2d 423, 430 [citing Code of Civ. Proc. §526; Civ. Code § 3242].) Here, because this court already has jurisdiction, those cases are inapposite. (See Mtn. § 3 [citing, e.g., *Brown v. Brown* (1971) 22 Cal.App.3d 82, 84 ("[A] court of equity retains inherent jurisdiction to oversee and enforce execution of its decrees.")].)

Despite *Dept. Fair Empl. & Hous.*, the Government Code sections appear to frame the DFEH as akin to other four-letter agencies. (See Gov. Code § 12900, et seq.) The DFEH initially begins its investigation as a neutral fact-finder, akin to a district attorney or an attorney general. But unlike a district attorney, the DFEH has investigatory powers it can use prior to commencing a proceeding in superior court. It can issue written interrogatories and propound document and deposition subpoenas (Gov. Code §§ 12963.1-12963.4), and move to compel compliance with them. (Gov. Code § 12963.5.) Then, if the DFEH "determines after investigation that the complaint is valid, the department shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation, and persuasion." (Gov. Code § 12963.7.)

Like the DFEH, Defendants found a dearth of legal authority or literature describing the DFEH, but Defendants did find one helpful law review article. That article shows that the DFEH has changed over time. Citing Government Code sections that no longer exist, the article shows that in the 1980s the DFEH acted both as a prosecutory and adjudicatory agency.

> If the Department determines that an unlawful employment practice has been committed, and is unable to eliminate the unlawful practice through conference, persuasion, or conciliation, it may issue an 'accusation,' which is the administrative law equivalent of a civil complaint. The accusation formally charges the employer with unlawful discrimination and demands a Commission hearing. Once the Department decides to issue an accusation, the Department is no longer a neutral fact finder, but an advocate. The DFEH issues an accusation and pursues the employee's complaint at no expense to the employee. The employee may, under the Commission's procedural regulations, seek to intervene as an actual party and participate in the administrative hearing.

(David Benjamin Oppenheimer Margaret M. Baumgartner, *Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies?* (1989) 23 U.S.F. L. Rev. 145, 155-156 [footnotes omitted; citing Gov. Code § 12969, repealed 2012]; see also Ex. 6, Legis. Counsel's Dig., Sen. Bill No. 1038 (2011-2012), ¶5 ["The bill … would instead require certain actions be brought in court by civil action, rather than by accusation by the department."].)[2]

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[2] Exhibits 1 through 5 are attached to the LiMandri declaration; exhibits 6 and 7 are attached to the Trissell declaration.

Thus, it appears that at one time, "the action" to which issue or claim preclusion could apply would be an "administrative action" commenced by, and litigated before, the DFEH. This also explains why, when trying to explain Government Code section 12974—the statute by which this action was initiated—the DFEH cites to analogous provisions in the statutes governing four-letter agencies who are both prosecutor and judge. The DFEH was once such an agency, but no longer is; and it has held on to old statutory provisions that made sense when it was.

Nevertheless, if the DFEH were a four-letter agency—*which it is not*—then applying issue preclusion or claim preclusion would still be appropriate. The DFEH first argues that issue preclusion only applies to *judicial* actions. (Oppo., 9:23-10:9.) This is wrong. "The doctrines of res judicata and collateral estoppel apply in administrative adjudication. As a result, a prior administrative decision may preclude a subsequent administrative or judicial action and **a prior judicial decision may preclude a subsequent administrative action**." (Asimow, *supra*, at § 10:20; see also *Hi-Desert*, *supra*, 239 Cal.App.4th at 731 ["The critical question presented in these appeals is whether the administrative actions are barred by the doctrine of res judicata. The answer is yes."].)

There are statutory limits on when a court can intervene in an administrative action (see Code of Civ. Proc. §526; Civ. Code § 3242), but in *Alfaro*, the court explained that an administrative agency can be enjoined from applying a statute "(1) where the statute is unconstitutional and there is a showing of irreparable injury; **(2) where the statute is valid but is enforced in an unconstitutional manner; (3) where the statute is valid but, as construed, does not apply to the plaintiff**; and (4) where the public official's action exceeds his or her authority." (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 501 [emphasis added].) As explained in the Court's judgment, the Unruh Act is unconstitutional as applied to Defendants,and, as explained below, the Government Code sections permitting the DFEH to conduct investigations, as construed, do not apply to Defendants.

The DFEH next cites two four-letter-agency cases, neither of which provide it with any help. (Oppo., 11:3-13:13.) First, the DFEH cites a factually similar case where issue preclusion was not found to apply. There, the federal National Labor Relations Board (NLRB) brought an administrative investigation, petitioned for a preliminary injunction, was denied their injunction on the basis of lack of jurisdiction, and then brought a later suit. The court ultimately refused to be

bound by the earlier determination of lack of jurisdiction because "[t]he District Court did not have before it the record on the merits." (*N.L.R.B. v. Denver Bldg. & Const. Trades Council* (1951) 341 U.S. 675, 681-682.) But the application of issue preclusion principles in that case does not change those principles. In *N.L.R.B.* the decision was tentative and the parties were not fully heard. (See *Sperry v. Denver Bldg. & Const. Trades Council* (D. Colo. 1948) 77 F.Supp. 321, 327.) All *N.L.R.B.* stands for is that issue preclusion may, or may not, apply in any given case.

The DFEH next cites a factually dissimilar case with no applicability here. In that case, California's Public Employee Relations Board (PERB) began an investigation into the City of San Diego for violating employee rights codified in the Meyers-Milias-Brown Act (MMBA). By statute, the PERB had "exclusive initial jurisdiction to determine whether City's conduct was lawful under the MMBA." (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1455 ["*MEA*"].) It could also petition for a preliminary injunction, which it did. (*Id.* at 1453.). In that situation, where the PERB is actually an adjudicative body with exclusive jurisdiction, the superior courts have to grant the preliminary injunction unless the PERB's case is "insubstantial or frivolous." (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 896-897.) As a result, "the trial court was not called on to decide the merits of the underlying" MMBA violation, and never did. (*MEA*, *supra*, 206 Cal.App.4th at 1465.) Again, all *MEA* stands for is that issue preclusion may, or may not, apply in any given case.

1.2. If the DFEH is akin to a local prosecutor, this Court can still apply preclusion principles

As stated above, although the DFEH has changed over time, and although there is a dearth of legal authority concerning it, Defendants agree with the court in *Dept. Fair Empl. & Hous.* that the DFEH is most akin to a prosecutor, and that its investigations "are similar to grand jury proceedings." (See *Dept. Fair Empl. & Hous.*, 99 Cal.App.4th at 901.) As the DFEH itself noted, its creation is an exercise of "the police power of the state." (Gov. Code § 12920.)

This is the only situation where the DFEH's "separation of powers" arguments apply. Due to constitutional concerns, courts are reluctant to enjoin criminal investigations and proceedings. (See Oppo., 6:19-7:9 [citing *California Correctional Peace Officers Assn. v. State of California* (2000)

82 Cal.App.4th 294, 311; *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 144-145].) This rule applies regardless of whether the prosecutor is bringing criminal or civil charges. (See *Manchel v. Los Angeles County* (1966) 245 Cal.App.2d 501, 505.) But of course, in no situation is the executive branch immune from all oversight. For example, courts have inherent "supervisory authority" over grand jury proceedings. (*McClatchy Newspapers v. Superior Court* (1988) 44 Cal.3d 1162, 1180.) And here, the Government Code itself gives this court supervisory authority. (See Gov. Code § 12963.5(a) ["The superior courts shall have jurisdiction … [i]f an individual or organization fails to comply … by obstructing any proceeding before the department."].)

The court in *Triple A Machine Shop* turned to federal cases to develop the standard with respect to when it is constitutionally permissible to enjoin prosecutory agencies (like the DFEH). It stated: "[f]ederal decisions have recognized that injunctive relief against [such] investigations is available only under extraordinary circumstances, and have required 'egregiously illegal conduct' by the prosecutor, 'a clear basis in fact and law,' or 'a clear and imminent threat of such future misconduct.'" (*Triple A Machine Shop*, *supra*, 213 Cal.App.3d at 145 [collecting cases].) This is because "[t]he balance between the Executive and Judicial branches would be profoundly upset if the Judiciary assumed superintendence over the law enforcement activities of the Executive branch upon *nothing more than a vague fear or suspicion* that its officers will be unfaithful to their oaths or unequal to their responsibility." (*Peace Officers*, *supra*, 82 Cal.App.4th at 311 [emphasis added].)

Here, it is plain that that the DFEH is engaged in illegal conduct, this Court has a clear basis in fact and law for knowing so, and there is more than a vague fear or suspicion that the DFEH intends to ignore this Court's orders and the law. In two places, California law instructs the DFEH that it may not conduct an investigation where the allegations indicate the conduct is legally permissible. (Cal. Code Regs., tit. 2, § 10004(a) ["The department shall only accept a complaint for investigation where the conduct alleged, if proven, would be a violation of a law"]; *id.* at § 10007(e)(1) ["[T]he department shall only accept complaints for investigation where … [t]he conduct alleged, if proven, would violate a law the department enforces."].) But here, the Court has already determined that Defendants' conduct—as alleged by the Rodriguez-Del Rios and confirmed by Defendants—was lawful due to their constitutional rights. (See generally Ex. 1.) The

DFEH is fishing for a way around this Court's orders, and—like the Colorado Commission on Civil Rights—is fishing for a way around *Masterpiece Cakeshop*. (See Oppo., 9:1-6 [citing article reporting that Colorado Civil Rights Commission is continuing to persecute artist Jack Phillips].) But neither the Rodriguez-Del Rios in their administrative complaint, nor the DFEH in its papers, have alleged any facts that could get around either.

2. Claim and issue preclusion preclude the DFEH's continued investigation

As stated in Defendants' moving papers, both claim preclusion and issue preclusion prevent the DFEH from continuing its prosecution of Defendants. Claim preclusion bars a party from asserting the same primary right, and requires a final judgment. (Mtn., §§ 4.1, 4.3.) Issue preclusion bars a party from re-litigating issues. This only requires that an issue has been finally adjudicated on the merits—usually via a judgment, though not always. (Mtn., §§ 4.2, 4.4.)

The DFEH contests whether the judgment entered in this case was a true judgment. (Oppo., 11, fn. 8.) But that is not dispositive. As the DFEH agrees, the issue is whether the Court's judgment was a "'final adjudication' of an issue" on the merits (Oppo., 11:8), which it was (Mtn., § 4.4.) The DFEH responds by arguing that "the Court explicitly limited its conclusion regarding the likelihood of success on the merits to *the facts presented*." (Oppo., 12:19-20 [original italics].) Defendants believe this is a strained reading of the judgment. This Court is in the best situation to know its own intent, but the use of language such as "[t]he State *cannot succeed* on the facts presented as a matter of law," instead of "the State is *unlikely to succeed* on the merits," unambiguously indicated that "the court intended a final adjudication of the issue involved." (Compare Ex. 1, p. 6 [emphasis added]; with *Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 612 [If "it appears that the court intended a final adjudication of the issue involved, a decision on an application for a preliminary injunction does [] amount to a decision on the ultimate rights in controversy"].)[3]

The DFEH also argues that "it would defy logic to conclude that the DFEH acquiesced in finality by withdrawing an appeal that could only result in temporary relief and, as explained above,

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[3] The DFEH states that "language in the [Court's judgment] cannot expand the issues before the Court." (Oppo., 12, fn. 19 [citing *Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1046, fn. 6].) That is not what *Ryan* says. All *Ryan* says is that in that case, the court decided X, not that it could not have decided Y in its order.

would have become moot no later than October 18, 2018—before the Court of Appeal would likely issue any decision." (Oppo., 13:10-13.) This argument is disingenuous. The Government Code provides that the DFEH must bring a civil action within one year of a complaint being filed with it, or two years if it is proceeding on behalf of a class. (Gov. Code § 12965(a).) But it also envisions that "[t]he superior courts shall have jurisdiction … [i]f an individual or organization fails to comply [with the DFEH's investigation]… by obstructing any proceeding before the department." (Gov. Code § 12963.5(a).) When jurisdiction is with the superior courts, the time to file a complaint is tolled. (*Id.* at subd. (f).) This section concerns when the DFEH petitions the court to enforce its discovery subpoenas, but it is likely that this section, when combined with general equitable tolling principles, would similarly extend the deadline.

The DFEH finally asserts that "[t]o date, no sworn testimony has been taken in connection with the Rodriguez-Del Rios' administrative complaint," and that there has been "no opportunity for cross examination of declarants." (Oppo., 6:3-4, 12:13-15.) First, this is entirely the DFEH's fault. Defendants have never filed a motion to quash, and the DFEH has never filed a motion to compel. The DFEH served deposition subpoenas, but when Defendants asked for new dates due to pre-scheduled plans, the DFEH decided to wait until after the Court's ruling on its motion for a preliminary injunction. (Ex. 7 [emails dated Jan. 22, 2018, 4:46 and 5:45 pm].) Only after the Court's judgment was entered did the DFEH attempt to reschedule those depositions. (Ex. 5 [email dated Jul 16, 2018, 2:02 pm].) The DFEH cannot fault anybody but itself for sitting on its hands.

Moreover, there is no procedural or substantive need for the DFEH to take depositions. Procedurally, "[d]uring the course of its investigation **the department may, but is not required, to issue and serve investigative subpoenas.**" (Cal. Code Regs., tit. 2, § 10026(c) [emphasis added].) Substantively, it is unclear what exactly "cross examination" would uncover—and the DFEH offers no explanation. The only "smoking gun" that Defendants can fathom the DFEH may be looking for is that they harbor malice towards the LGBT community, or that their religious beliefs are not sincere. (Cf. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n* (2018) 138 S.Ct. 1719, 1727 [in clash between religious and LGBT rights, religious rights should be protected if doing so does not cause "serious diminishment to the[] … dignity and worth" of LGBT persons which leads

to "a community-wide stigma"].)

With respect to Defendants' religious rights, however, the DFEH has no need to test them, because it is sufficient for Defendants to assert that they are burdened. It is not for the DFEH to test their sincerity, or see if they are motivated by other concerns. (See, e.g., *Thomas v. Review Bd. of Indiana Employment Sec. Division* (1981) 450 U.S. 707, 715 ["[Petitioner] drew a line [regarding what was permissible and what was not], and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs"].)[4]

With respect to Defendants' speech rights, even if they were motivated by the most vicious form of malice, they would be protected. As stated in the judgment, "*Hurley* established that the State's interest in eliminating dignitary harms is not compelling where, as here, the cause of the harm is another person's decision not to engage in expression. The Court there recognized that 'the point of all speech protection … is to shield just those choices of content that in someone's eyes are … hurtful.' An interest in preventing dignitary harms thus is not a compelling basis for infringing free speech." (Ex. 1, p. 11 [citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (1995) 515 U.S. 557, 574; *Texas v. Johnson* (1989) 491 U.S. 397; *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46, 56].) Thus, even if Defendants' speech were motivated by anti-LGBT bigotry, that would not be a basis for restricting it. (See *Snyder v. Phelps* (2011) 562 U.S. 443, 458.)

But it bears repeating what this Court stated in the judgment: "No court evaluates Free Speech rights against the interest of the State in enforcing public access laws in a vacuum, without regard to circumstances, history, culture, social norms, and the application of common sense." (Ex. 1, p. 10.) Here, there may be evidence of malicious bigotry in this case, but it is not coming from Defendants' side of the "v." If Defendants simply refused to comply with the DFEH's subpoenas, and the DFEH moved to compel, the DFEH would have a hard time overcoming Defendants' First Amendment objections because there is **no evidence** that Defendants are doing anything but

[4] (See also *U.S. v. Ballard* (1944) 322 U.S. 78, 92-94 [Jackson, J., dissenting] ["I can see in their teachings nothing but humbug, untainted by any trace of truth. But that does not dispose of the constitutional question…. If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer…. I would dismiss the indictment and have done with this business of judicially examining other people's faiths."].)

holding to "a belief that is part of the orthodox doctrines of all three world Abrahamic religions, if not also part of the orthodox beliefs of Hinduism and major sects of Buddhism" (Ex. 1, p. 10),[5] and a belief that is so common and respectable that it has been singled out for constitutional protection. (See *Obergefell v. Hodges* (2015) 135 S.Ct. 2584, 2607.)

Bigots may hold up people of faith as anti-LGBT boogeymen, but anybody with any common-sense experience with people of faith knows that they are sincere, moral, and compassionate. The DFEH sought to persecute Cathy Miller and her family. It failed, and now is trying again. This Court should put an end to this witch-hunt.

3. Defendants are entitled to their litigation costs.

The DFEH correctly states that costs awards in FEHA actions should only be awarded if the plaintiff's action was frivolous. (See *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 105.) But the DFEH incorrectly argues that it had no duty to file a motion to tax costs. (See Oppo., 14, fn. 12.) "[B]y failing to move to tax within time the party subject to the payment of costs is deemed to have waived '**any and all objections to the claim for cost**,' and [] it is the duty of the clerk in such event to make entry of the costs in the judgment." (*San Francisco Unified School District v. Board of National Missions* (1954) 129 Cal.App.2d 236, 242-243 [emphasis added]; see also *Santos v. Civil Service Bd.* (1987) 193 Cal.App.3d 1442, 1447 [same]; Cal. Rules of Court, rule 3.1700(b)(4) ["After the time has passed for a motion to strike or tax costs or for determination of that motion, the clerk must immediately enter the costs on the judgment."].) Of note, the deadline for the DFEH to file a motion to tax costs was June 4, 2018, but this Court did not rule on Defendants' motion for attorneys' fees until June 28, 2018.

CONCLUSION

For all of the above-described reasons, Defendants respectfully request that the Court issue an order enforcing its judgment and enjoining the DFEH from continuing its investigation.

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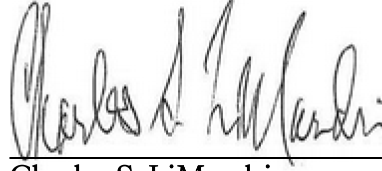
[5] (See *Guthrey v. California Dept. of Corrections and Rehabilitation* (E.D. Cal., June 27, 2012, No. 1:10-CV-02177-AWI) 2012 WL 2499938, at *10 [Motion to compel production of information regarding defendant's controversial religious beliefs denied because disclosure of those beliefs would chill adherence to them and "an individual has First Amendment protection in his religious beliefs, as well as his religious associations."].)

Respectfully submitted,

FREEDOM OF CONSCIENCE DEFENSE FUND



Dated: August 28, 2018 By: ______________________

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