

1 DANIELLE LUCIDO, Chief Counsel (SBN 237258)  
2 KATHRYN A. TANNER, Staff Counsel IV (SBN 257962)  
3 STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS  
4 DIVISION OF OCCUPATIONAL SAFETY AND HEALTH  
5 1515 Clay Street, Suite 1901  
6 Oakland, CA 94612  
7 Telephone: (510) 286-7348  
8 Fax: (510) 286-7039  
9 ktanner@dir.ca.gov

10 Attorneys for Division

11 BEFORE THE  
12 OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
13 DEPARTMENT OF INDUSTRIAL RELATIONS  
14 STATE OF CALIFORNIA

15 In the Matter of the Appeal of: )  
16 ) **Appeal No. 1564732**  
17 **CALVARY CHAPEL OF SAN JOSE** ) **DIVISION'S OPPOSITION TO**  
18 **dba CALVARY CHRISTIAN** ) **EMPLOYER'S MOTION TO SUPPRESS**  
19 **ACADEMY,** ) **EVIDENCE**  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )  
Employer.

29 The DIVISION OF OCCUPATIONAL SAFETY AND HEALTH ("division") hereby  
30 submits its Opposition to Employer's Motion to Suppress Evidence in the above-captioned  
31 matter. The Division respectfully files this brief with the Occupational Safety and Health  
32 Appeals Board ("the Board") in the appeal of Calvary Chapel of San Jose ("employer").

33 Employer failed to oppose the inspection warrant in the appropriate venue (Superior  
34 Court) with the appropriate recourse (a Motion to Quash) at the appropriate time (prior to the  
35 inspection taking place). Now Employer asks the Board to act outside of its legal authority and  
36 decide retrospectively whether there was cause for the Superior Court judge to issue the  
37 inspection warrant.  
38

1 **I. The Board Does Not Have Legal Authority to Invalidate a Judicially-Issued Inspection**  
2 **Warrant.**

3 Employer seeks to suppress any evidence gained by the division in its inspection of  
4 employer's business premises. This inspection was executed under an inspection warrant issued  
5 by the Superior Court of California, Santa Clara County. Employer argues that the affidavits in  
6 support of the division's application for inspection warrant were insufficient to establish  
7 "probable cause." Employer did *not* file a motion to quash the inspection warrant in Superior  
8 Court prior to the inspection that the division conducted pursuant to the warrant. Employer now  
9 seeks an unorthodox remedy by filing a motion to suppress evidence in its administrative appeal  
10 of the citations issued as a result of inspection.

11 As a threshold issue, the Board should deny employer's motion because the Board lacks  
12 authority to review the actions and decisions of a Superior Court Judge in the issuance of a  
13 warrant. Title 8 CCR §350.1 sets forth the specific authority granted to Administrative Law  
14 Judges of the Board. The Board has broad authority for overseeing the administrative hearing  
15 process. Notably absent from the list of powers in §350.1 is the power to issue an inspection  
16 warrant. That power remains vested with a "judge of a court of record." Code of Civil Procedure  
17 §1822.50. The Superior Court has the legal authority to issue inspection warrants; no concurrent  
18 authority exists for the Board. Both the Labor Code and the Code of Civil Procedure grant the  
19 authority to review an application for inspection warrant only to a judge of the Superior Court.  
20 Cal. Labor Code § 6314 and Code of Civil Procedure §1822.53.

21 The Superior Court judge had the opportunity to question Mr. Haskell and any other  
22 witnesses under oath, and to satisfy himself on the existence of grounds for granting the  
23 application. *Id.* It is clearly outside the scope of the Board's authority to determine the  
24 sufficiency of cause to issue the warrant, or if cause is lacking, to quash the warrant. Therefore, it  
25 must follow that it is outside the authority of the Board to determine that evidence obtained  
26 pursuant to an inspection warrant should be suppressed when the employer's arguments are those  
27 that should have been presented in a motion to quash.  
28

1 The proper procedure to challenge the validity of a warrant is to file a motion to quash or  
2 traverse the warrant with the issuing court. (*Franks v. Delaware* (1978) 438 U.S. 154; see also  
3 *County of Contra Costa v. Humore*, (1996) 145 Cal.App.4th at 1349- 1350, adopting *Franks* as it  
4 applies to civil inspection warrants.) Employer could have pursued a remedy in the Superior  
5 Court but failed to timely seek a motion to quash. Employer was represented by counsel at the  
6 time of the inspection and the issuance of the warrant, so ignorance of the law is no excuse.  
7 Employer should now be barred from advancing its arguments before the Board. Seeking for the  
8 Board to suppress of evidence *without* a judicial determination of the warrant's validity  
9 essentially asks the Board to assume the role of a higher court to review the actions of the  
10 Superior Court judge.

11 Moreover, the Supreme Court has "repeatedly said that after-the-fact scrutiny by courts  
12 of the sufficiency of an affidavit should not take the form of *de nova* review. A magistrate's  
13 determination of probable cause should be paid great deference by reviewing courts." *Illinois v.*  
14 *Gates*, 462 U.S. 213, 236 (1983) (citation omitted). *See also West Point-Pepperell, Inc. v.*  
15 *Donovan*, 689 F.2d 950, 959 (11th Cir. 1982) ("A magistrate's probable cause determination is  
16 entitled great deference and is conclusive in the absence of arbitrariness." (internal citation  
17 omitted)). This remains the standard even though a *de nova* standard is applied to review  
18 determinations of reasonable suspicion and probable cause when no warrant was  
19 involved, which is not the case here. *Ornelas v. United States*, 517 U.S. 690, 698-99 (1996).

20 **II. The Board is Not Bound by the Penal Code, nor the Provisions of Cal. Penal Code**  
21 **§1538.5.**

22 The California Labor Code grants division inspectors "free access to any place of  
23 employment to investigate and inspect during regular working hours, and at other reasonable  
24 times when necessary for the protection of safety and health, and within reasonable limits and in  
25 a reasonable manner." Cal. Lab. Code §6314. If an employer refuses permission to the inspector  
26 to inspect the place of employment, the inspector "may obtain an inspection warrant pursuant to  
27 the provisions of Title 13 (commencing with Section 1822.50) of the Code of Civil Procedure."  
28 *Id.* Section 1822.50 states, "[a]n inspection warrant is an order, in writing, in the name of the

1 people, signed by a judge of a court of record, directed to a state or local official, commanding  
2 him to conduct any inspection required or authorized by state or local law or regulation relating  
3 to building, fire, safety, plumbing, electrical, health, labor, or zoning.” Code of Civil Procedure §  
4 1822.50.

5 The California Penal Code Part 2 on Criminal Procedure sets forth the grounds and  
6 procedure for a criminal defendant to seek a motion to suppress evidence that is obtained through  
7 an invalid search warrant. Cal. Penal Code §1538.5. There is no similar remedy available under  
8 the Code of Civil Procedure Title 13 for evidence obtained pursuant to an inspection warrant.

9 Employer’s counsel conflates and confuses the standards governing issuance of a  
10 criminal search warrant and an administrative inspection warrant throughout employer’s motion,  
11 though does admit that “[t]he standard for probable cause for an administrative inspection  
12 warrant is relaxed from the criminal probable cause standard.” Employer’s Motion at 9:3-4. An  
13 inspection warrant is inherently more limited than a criminal search warrant. For example, the  
14 inspection may not be made outside of the hours of 8:00 a.m. to 6 p.m. unless specifically noted,  
15 and may not be completed in the absence of the owner or occupant of the premises unless  
16 specifically noted. Code of Civil Procedure § 1822.56. Forcible entry is also not allowed under  
17 an inspection warrant except in case of immediate threat to health or safety. *Id.* Nor does the  
18 division have the right to “seize” property, though division inspectors may obtain physical  
19 materials directly related to the purpose of the inspection and conduct sampling or testing.

20 The standard for a magistrate to grant a search warrant is also different and more  
21 stringent than the standard for granting an inspection warrant. A criminal search warrant “cannot  
22 be issued but upon probable cause, supported by affidavit, naming or describing the person to be  
23 searched or searched for, and particularly describing the property, thing, or things and the place  
24 to be searched.” Cal. Penal Code § 1525. Whereas a civil inspection warrant “shall be issued  
25 upon cause...” Code of Civil Procedure § 1822.51. “Cause shall be deemed to exist if either  
26 reasonable legislative or administrative standards for conducting a routine or area inspection are  
27 satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is  
28 reason to believe that a condition of nonconformity exists with respect to the particular place,

1 dwelling, structure, premises, or vehicle.” Code of Civil Procedure § 1822.52. This standard is  
2 less stringent than the probable cause standard in criminal code.

3 The Decision after Reconsideration in *In re Bimbo Bakeries USA* specifically states, “the  
4 Board is not bound by the penal code.” *In re Bimbo Bakeries USA*, No. 03-R1D3-5217, 2010  
5 WL 2706195, at \*10 (Cal. Occ. Safety & Health Appeals Bd. June 9, 2010) (decision after  
6 reconsideration). In that case, OSHAB held that an employer could raise on appeal a defense that  
7 the inspection was “invalid” on an alleged Fourth Amendment basis, and the burden would  
8 remain on the employer “to present evidence, at the hearing, substantiating those claims.” *Id* at  
9 11. *In re Bimbo Bakeries* differs from employer’s appeal because in that case the division did  
10 not obtain an inspection warrant; employer merely asserted in a post-hearing brief that the  
11 inspection was invalid on Fourth Amendment grounds without a factual basis. OSHAB did not  
12 consider the issue of whether it had authority to question the validity of an inspection warrant  
13 issued by a Superior Court judge.

14 It is worth noting that when a motion to suppress is filed in a criminal case, “the motion  
15 should first be heard by the magistrate who issued the search warrant if there is a warrant.” Cal.  
16 Penal Code §1538.5(b). This also demonstrates that the proper venue for employer’s claims was  
17 the Superior Court.

### 18 **III. The Superior Court Validly Issued the Inspection Warrant.**

19 Here, Employer admits that it refused permission to inspect to Mr. Jackson and Mr.  
20 Haskell on November 18, 2021 and instructed the Division’s inspectors to contact Employer’s  
21 attorney. Employer’s Statement of Facts says that two Division inspectors (referred to as  
22 “agents” in Employer’s motion) arrived at the business location and requested permission to  
23 inspect, and Mr. McClure “declined the agents’ request to inspect the Academy premises.”  
24 (Employer’s Motion, 6:15).

25 Division’s counsel contacted Employer’s counsel via phone and email and asked whether  
26 permission to inspect would be granted when the inspectors returned to the business location.  
27 When Employer’s counsel did not provide an answer, the Division obtained an inspection  
28 warrant as authorized by the Labor Code. “Cause for the issuance of a warrant shall be deemed

1 to exist...if any complaint that violations of occupational safety and health standards exist at the  
2 place of employment has been received by the division....” Cal. Labor Code § 6314. Here, the  
3 inspection warrant states that based upon the proof of Mr. Haskell’s declaration “there is reason  
4 to believe that conditions of noncompliance with the Occupations Safety and Health  
5 Regulations” existed at employer’s business location. Employer’s Motion, Exhibit 1.

6 As noted in *Salwasser II*, "In cases in which the Fourth Amendment requires that a  
7 warrant to search be obtained, 'probable cause' is the standard by which a particular decision to  
8 search is tested against the constitutional mandate of reasonableness." (Citing *Camara v.*  
9 *Municipal Court*, supra, 387 U.S. 523, 534 [18 L. Ed. 2d 930, 939].) "[P]robable cause is a fluid  
10 concept -- turning on the assessment of probabilities in particular factual contexts -- not readily,  
11 or even usefully, reduced to a neat set of legal rules." (Citing *Illinois v. Gates* (1983) 462 U.S.  
12 213, 232 [76 L. Ed. 2d 527, 544, 103 S. Ct. 2317].) Probable cause is a "practical, nontechnical  
13 conception" dealing with "factual and practical considerations of everyday life on which  
14 reasonable and prudent men, not legal technicians, act." (*Id.* at p. 231 [76 L.Ed.2d at p. 544].)  
15 "Unfortunately, there can be no ready test for determining reasonableness other than by  
16 balancing the need to search against the invasion which the search entails." (Citing *Camara v.*  
17 *Municipal Court*, supra, 387 U.S. at pp. 536-537 [18 L.Ed.2d at p. 940].) (*Salwasser Mfg. Co. v.*  
18 *Occupational Safety. & Health Appeal Bd.*, 214 Cal. App.625 (1989)).

19 The reasonableness of the cause is indeed relevant. The public interest in the inspection  
20 must outweigh the invasion of privacy which the inspection entails. (*Burkart Randall Div. of*  
21 *Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980) 1313, 1319.) Here, public interest  
22 weighed strongly on the side of the division being able to conduct its inspection. The  
23 complainant told the division that employer was not complying with the indoor masking  
24 requirements for K-12 schools that had been issued at that time by the California Department of  
25 Public Health for the prevention of Covid-19 and with Covid-19 outbreak reporting  
26 requirements. The public in November 2021 had a strong interest in quelling the spread of  
27 Covid-19, especially among children who may have been too young at the time to receive the  
28 vaccine. Additionally, Mr. Haskell and Mr. Jackson observed Ms. Wood emerge from the office

1 without a mask, which led them to the reasonable belief that she had not been wearing a mask  
2 while inside the building.

3 Although employer attempts to make much of the fact that division representatives did  
4 not divulge the name of the complainant to employer, the California Labor Code explicitly  
5 prohibits the Division from revealing the identity of complainants. Cal. Labor Code §6309(a).  
6 The division determined that the allegations in the complaint were credible and that an  
7 investigation was warranted.

8 The representatives of the division had a reasonable belief based on a sincere complaint  
9 that violations of the indoor mask mandate had been committed and were ongoing at this place of  
10 employment. The employer's privacy interest in the premises during business hours of its school  
11 for children (as opposed to say, a person's home) did not outweigh the public safety interest, and  
12 this was a valid and reasonable conclusion that the Board must defer to.

13 For all the reasons stated above, the division requests that Employer's motion to suppress  
14 evidence be denied.

15  
16 Date: July 28, 2022

17 DIVISION OF OCCUPATIONAL  
18 SAFETY AND HEALTH

19 By: Kathryn Tanner  
20 KATHRYN A. TANNER  
21 Staff Counsel  
22  
23  
24  
25  
26  
27  
28

1 **PROOF OF SERVICE**

2 *In the Matter of the Appeal of Calvary Chapel of San Jose*  
3 *dba Calvary Christian Academy*  
4 *Inspection Number 1564732*

5 I am employed in the county of San Francisco, State of California. I am over the age of  
6 18 and not a party to the within action; my business mailing address is 1515 Clay Street, Suite  
7 1901 Oakland, California 94612.

8 On 07-28-22, I caused to be served the foregoing documents described as **DIVISION’S**  
9 **OPPOSITION TO EMPLOYER’S MOTION TO SUPPRESS EVIDENCE** on the  
10 interested parties in this action by placing the true copies thereof enclosed in sealed envelopes  
11 addressed as stated on the attached mailing list:

12 **BY E-SERVICE/FACSIMILE TRANSMISSION**

13 I caused all of the pages of the above-entitled document to be sent to the recipient(s) noted  
14 below via electronic transfer (facsimile) at the respective telephone numbers indicated above.

15 **TYLER & BURSCH, LLP**  
16 Nicolai Cocis, Esq., CA Bar No. 204703  
17 [ncocis@tylerbursch.com](mailto:ncocis@tylerbursch.com)

18 **ADVOCATES FOR FAITH & FREEDOM**  
19 Mariah Gondeiro, Esq., CA Bar No. 323683  
20 [mgondeiro@faith-freedom.com](mailto:mgondeiro@faith-freedom.com)  
21 25026 Las Brisas Road  
22 Murrieta, California 92562

23 I declare under penalty of perjury under the laws of the State of California that the above is true  
24 and correct.

25 **DIVISION OF OCCUPATIONAL**  
26 **SAFETY AND HEALTH**

27 By: 

28 **KATHRYN A. TANNER**  
Staff Counsel