TYLER & BURSCH, LLP
Nicolai Cocis, Esq., CA Bar No. 204703
ncocis@tylerbursch.com
ADVOCATES FOR FAITH & FREEDOM
Mariah Gondeiro, Esq., CA Bar No. 323683
mgondeiro@faith-freedom.com
25026 Las Brisas Road
Murrieta, California 92562
Tel: (951) 600-2733
Fax: (951) 600-4996

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **CALVARY CHAPEL OF SAN JOSE** **dba CALVARY CHRISTIAN ACADEMY,** **Employer.**	Inspection No. **1564732** **EMPLOYER'S BRIEF IN RESPONSE TO REQUEST FOR FURTHER BRIEFING**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

Abelleira v. Dist. Ct. of Appeal, 17 Cal. 2d 280 (1941) 8

Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128 (3d Cir. 1979) .... passim

Baldwin Metals Co. v. Donovan, 642 F.2d 768 (5th Cir. Unit A Apr. 1981) 5, 7

Chromalloy Am. Corp., 7 BL OSHC 1547 (No. 77-2788, 1979) 4

Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982) 7

Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982) 5, 6, 7, 11

Goldin v. Pub. Utils. Comm'n, 23 Cal. 3d 638, 592 P.2d 289 (1979) 8

I.N.S. v. Lopez-Mendoza 468 U.S. 1032 (1984) 6

In re Bimbo Bakeries USA, No. 03-R1D3-5217, 2010 WL 2706195 (Cal. Occ. Safety & Health Appeals Bd. June 9, 2010) (decision after reconsideration) 8

In re Establishment Inspection of Kohler Co., 935 F.2d 810 (7th Cir. 1991) 5, 6, 7

In re Establishment Inspection of Manganas Painting Co., 104 F.3d 801 (6th Cir. 1997) 5

In re Gould Pub. Co., 934 F.2d 457 (2d Cir. 1991) 7

In re J.R. Simplot Co., 640 F.2d 1134 (9th Cir. 1981) 7, 8

In re Rudolph & Sletten, Inc., No. 01-R1D5-478, 2004 WL 817770 (Cal. Occ. Safety & Health Appeals Bd. Mar. 30, 2004) (decision after reconsideration) 8

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 4

Marshall v. Cent. Mine Equip. Co., 608 F.2d 719 (8th Cir. 1979) 5

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) 7

People v. Gallegos, 54 Cal. App. 4th 252 (1997) 6

Sacramento County Deputy Sheriff's Assn. v. Cnty. of Sacramento, 220 Cal. App. 3d 280 (1990) 8

Sanders Lead Co., 15 BL OSHC 1640 (No. 87-260, 1992) 5, 9, 10, 11

Sarasota Concrete Co., 9 BL OSHC 1608 (No. 78–5264, 1981) 11

Smith Steel Casting Co. v. Brock, 800 F.2d 1329 (5th Cir. 1986) 6, 7

Trinity Marine Products, Inc. v. Chao, 512 F.3d 198 (5th Cir. 2007) 9
United States v. Leon, 468 U.S. 897 (1984) 10, 11
United States v. Williams, 622 F.2d 830 (5th Cir. 1980) 10
Weyerhaeuser Co. v. Marshall, 592 F.2d 373 (7th Cir. 1979) 7

Statutes

29 U.S.C. § 657(a) 4
29 U.S.C. § 660 8
Cal. Civ. Proc. Code § 1822.56 9
Cal. Lab. Code § 6627 8

Regulations

8 C.C.R. § 350.1 6
8 C.C.R. § 390 10

ARGUMENT

In November of 2021, the Division of Occupational Safety and Health ("the Division") obtained a warrant to inspect the premises of Employer, Calvary Christian Academy ("the Academy"), a small church-run private school. The Academy filed a Motion to Suppress Evidence gained through the Division's unlawful search of the Academy's premises. After receiving briefs from the Division and the Academy, the administrative law judge ("ALJ") found that the Division included "no detail" in its affidavit but only "a conclusory statement that employee complaints have been received." Order Mot. Suppress Evid. 6. The ALJ granted the Academy's motion. Id. at 8.

The Division argues that this Board is forced to admit the unlawfully obtained evidence—despite the serious constitutional defects of the inspection warrant. But this Board's federal counterpart and the federal courts have overwhelmingly rejected similar arguments and have adopted the Academy's position that this Board has the administrative autonomy to conduct its proceedings as it sees fit and to suppress illegally obtained evidence. And those courts have also refused to give the Good Faith Exception the expansive application the Division accords it. For those reasons, the Academy requests that this Board affirm the holding of the ALJ suppressing the evidence from the Division's illegal search.

I. This Board can suppress evidence for its own proceedings without upsetting the separation of powers.

The federal Occupational Safety and Health Review Commission ("the Commission") has not always considered challenges to inspection warrants. Prior to 1978, the Commission refrained from ruling on the constitutionality of warrants because it would require it to rule on the constitutionality of 29 U.S.C. § 657(a). This statute authorized warrantless searches, so requiring a properly obtained warrant would imply that the statute was unconstitutional. *Chromalloy Am. Corp.*, 7 BL OSHC 1547, 1547–48 (No. 77-2788, 1979). But after the United States Supreme Court ("Supreme Court") held in *Marshall v. Barlow's, Inc.* that warrantless OSHA inspections were unconstitutional, 436 U.S. 307, 315 (1978), the Commission could now review the sufficiency of warrants without passing on the constitutionality of the statute, *Chromalloy*, 7 BL OSHC at 1548. And so it did. *Id.* at 1549.

The Circuit Courts of Appeal unanimously rejected the same argument that the Division now brings—that the administrative tribunals have no authority to suppress evidence obtained with a warrant issued by a judge. *E.g.*, *In re Establishment Inspection of Kohler Co.*, 935 F.2d 810, 814 (7th Cir. 1991); *Babcock & Wilcox Co. v. Marshall*, 610 F.2d 1128, 1136 (3d Cir. 1979); *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1066 (11th Cir. 1982); *see also Baldwin Metals Co. v. Donovan*, 642 F.2d 768, 773 (5th Cir. Unit A Apr. 1981) (dismissing argument that allowing the Commission to make constitutional rulings on a warrant's validity violates the separation of powers); *Marshall v. Cent. Mine Equip. Co.*, 608 F.2d 719, 721–722 (8th Cir. 1979) (noting that a challenge to the validity of a search warrant could be raised in the Commission); *In re Establishment Inspection of Manganas Painting Co.*, 104 F.3d 801, 803 (6th Cir. 1997) (requiring a motion to suppress evidence gained from an OSHA inspection pursuant to a warrant to be brought in "the proper administrative forum"). And they have generally agreed on two major holdings. First, administrative tribunals like the Commission (or this Board) do not contravene the separation of powers by taking on judicial functions or reviewing the actions of a court. In fact, the separation of powers and administrative autonomy requires that administrative agencies have the power to conduct their proceedings without interference from courts requiring them to admit certain evidence. And second, the exhaustion of administrative remedies requirement means that litigants like the Academy must seek relief in the available administrative tribunals before turning to the courts.

A. This Board's authority to regulate evidence for its own proceedings does not violate the separation of powers.

The Division argued to the ALJ that if this Board suppresses the evidence from the search, it will "[i]nvalidate a Judicially-Issued Inspection Warrant." Division's Opp. Mot. Suppress 2. This is essentially, a separation-of-powers argument. But the Commission has rejected that view. *See, e.g.*, *Sanders Lead Co.*, 15 BL OSHC 1640, 1650 (No. 87-260, 1992). And the federal circuit courts have uniformly held that suppression by the Commission does not interfere with or nullify any judicial action; it is a mere exercise of evidentiary power. *E.g.*, *In re Kohler Co.*, 935 F.2d at 814 ("Nothing the Review Commission does now can effect [sic] the validity of the warrant. The

Commission will merely decide whether to admit the evidence obtained by means of the warrant."); *Babcock & Wilcox Co.*, 610 F.2d at 1136 ("In deciding whether to use this evidence the Review Commission must of course, make its own judgment as to the propriety of the warrant, but such a determination does not reverse the magistrate's action, nor does it contravene a judicial order."); *Sarasota Concrete*, 693 F.2d at 1066 ("[R]eview by OSHRC does not directly affect the substance of the magistrate's determination."). Because proceedings before the Commission (and this Board) are self-contained and suppression generally applies only to the instant case, *see People v. Gallegos*, 54 Cal. App. 4th 252 (1997), the power of the courts remain undisturbed, *see Babcock & Wilcox*, 610 F.2d at 1137 ("Any conflict between two branches of government over the propriety of the warrant is mostly imaginary . . . .").

In fact, the separation-of-powers concern works just the other way. A magistrate's ability to control whether evidence is admissible in Board proceedings would significantly interfere with this Board's administrative autonomy and sovereignty. "Indeed, to prohibit such [evidentiary] review would be to allow the magistrate to control admissibility determinations in contravention of administrative autonomy." *Sarasota Concrete*, 693 F.2d at 1066; *accord In re Kohler*, 935 F.2d at 814. This understanding is consistent with this Board's authority to "rule on objections, privileges, defenses, and the receipt of relevant and material evidence," which inherently requires autonomy in its proceedings. 8 C.C.R. § 350.1.

One circuit's precedent requires a little more explanation on this point—the Fifth Circuit's opinion in *Smith Steel Casting Co. v. Brock*. 800 F.2d 1329 (5th Cir. 1986). After the Supreme Court held in dicta that "[p]resumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action," *I.N.S. v. Lopez-Mendoza* 468 U.S. 1032, 1046–47 (1984), the Fifth Circuit concluded that the exclusionary rule would not apply in OSHA actions to *correct* violations. *Smith Steel*, 800 F.2d at 1334. But the Fifth Circuit noted that "illegally obtained evidence must be excluded for purposes of 'punishing the crime,' i.e. the exclusionary rule should be applied for purposes of assessing penalties against an employer after the fact for OSHA violations." *Id.*

The Fifth Circuit's decision in *Smith Steel* does not affect the Academy's motion. Indeed,

the Division seeks to collect upwards of $67,000 in fines from the Academy. Citation and Notice of Penalty 21. And the Division does not—and cannot—seek to correct any violations as no ongoing violations are occurring given that the COVID-19-related regulations on which most of fines are based are no longer in effect.[1] This case thus falls squarely outside of whatever persuasive value this Board may accord to *Smith Steel*.

B. Due to the exhaustion of remedies requirement, no other remedy is currently available to the Academy.

The Division further argues that the proper forum for any concern over a warrant is the Superior Court, Division's Opp. Mot. Suppress 5, but if federal case law is any guide, the Superior Court is powerless to hear the issue until this Board's proceedings terminate due to the exhaustion of remedies requirement. The exhaustion of remedies doctrine requires that a party seek every administrative remedy available before seeking relief in the judiciary. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938). Exhaustion protects administrative autonomy and conserves judicial resources. *Baldwin Metals Co.*, 642 F.2d at 771–72. Here, too, the circuit courts show remarkable unity in holding that a litigant in an OSHA enforcement action is required to exhaust his administrative remedies before asking a court to review his fourth amendment allegations. *E.g.*, *Sarasota Concrete*, 693 F.2d at 1065 (citing *Baldwin*, 642 F.2d at 773–74 n.11) (11th Circuit); *Babcock & Wilcox*, 610 F.2d at 1138 (3d Circuit); *In re J.R. Simplot Co.*, 640 F.2d 1134, 1137 (9th Cir. 1981); *In re Gould Pub. Co.*, 934 F.2d 457 (2d Cir. 1991). While the Seventh Circuit originally caused a split of authority on the issue, it eventually joined the other circuits in requiring "parties challenging complete OSHA inspections on fourth amendment grounds to address their arguments to the Review Commission before turning to the federal courts." *In re Kohler*, 935 F.2d at 814.[2]

Exhaustion is just as applicable in California. "The rule . . . . is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under

[1] And for those citations that were not based on COVID-19 regulations, the Employer has already abated the violations.
[2] The two cases cited by *In re Kohler* as having reached contrary holdings were *Weyerhaeuser Co. v. Marshall*, 592 F.2d 373 (7th Cir. 1979) and *Donovan v. Federal Clearing Die Casting Co.*, 695 F.2d 1020 (7th Cir. 1982). The court in *In re Kohler* noted that its holding in *Weyerhaeuser* "continues to stand for the proposition that we will not require parties to exhaust administrative remedies when to do so would be pointless." 935 F.2d at 814.

the doctrine of stare decisis, and binding upon all courts." *Abelleira v. Dist. Ct. of Appeal*, 17 Cal. 2d 280, 193 (1941). While California courts do not appear to have addressed the application of the doctrine to review of the sufficiency of a warrant, they have applied exhaustion to Cal/OSHA complaints. *Sacramento County Deputy Sheriff's Assn. v. Cnty. of Sacramento*, 220 Cal. App. 3d 280, 288 (1990). And they have made clear that reviewing the sufficiency of warrants is not beyond the purview of administrative tribunals. *See Goldin v. Pub. Utils. Comm'n*, 23 Cal. 3d 638, 668–69(1979) (noting that tribunals like the Public Utilities Commission have "the power to make an assessment of the affidavits presented in support of a search warrant pursuant to which evidence sought to be introduced before it was obtained . . . .").

If the Academy had sought relief in the Superior Court, the Superior Court would have denied any relief because the Academy had not exhausted its remedies before this Board. This is true for two reasons. First, state law allows the losing party to petition the California courts to review this Board's orders through a writ of mandate. Cal. Lab. Code § 6627. A statutory remedy in the courts was enough to convince the Ninth Circuit that the legislature intended exhaustion to apply. *Matter of J.R. Simplot Co.*, 640 F.2d at 1137 ("[T]his statutory procedure contemplates exhaustion of the administrative remedies . . . ."). While the grounds for review are narrower in Section 6627 than in the federal provision (29 U.S.C. § 660), this only strengthens the argument that the Legislature has chosen this Board as the preferred venue for all litigation resulting from Division citations. Second, this Board has previously addressed Fourth Amendment issues and motions to suppress. *E.g.*, *In re Bimbo Bakeries USA*, No. 03-R1D3-5217, 2010 WL 2706195, at *10 (Cal. Occ. Safety & Health Appeals Bd. June 9, 2010) (decision after reconsideration) (addressing whether an inspection was valid under the Fourth Amendment); *In re Rudolph & Sletten, Inc.*, No. 01-R1D5-478, 2004 WL 817770, at *5 (Cal. Occ. Safety & Health Appeals Bd. Mar. 30, 2004) (decision after reconsideration) (discussing whether evidence should be excluded on a Fourth Amendment basis).

In addition to disputing the venue for the motion, the Division also disputes its form, claiming that it should have been made as a motion to quash. Division's Opp. Mot. Suppress 3. But this argument was dismissed in *Babcock & Wilcox*, where a corporation brought a motion to quash

in a federal district court. 610 F.2d at 1132. That federal court held that a motion to quash is moot if the inspection has already occurred. *Id.* at 1133–34. Here, the Division obtained its warrant in an *ex parte* proceeding with no forum for the Academy to object.[3] And while the Division's application did not include a request to make forcible entry as would have been required under Cal. Civ. Proc. Code § 1822.56, the caselaw never suggests that an employer must risk contempt in order to preserve its objection to the warrant (which would negate the purpose of a motion to suppress in all contexts). In *Babcock & Wilcox*, the court decided to treat the motion to quash as a motion to suppress (before holding that exhaustion applied and the motion would have to be litigated in front of the Commission). 610 F.2d at 1134.

To conclude, the federal authorities addressing the authority of an administrative tribunal to suppress evidence based on the insufficiency of the warrant application support the holding that this Board has that authority. Further, those cases show that the Academy was correct to litigate the issue here with a motion to suppress rather than in the Superior Court with a motion to quash.

II. The good faith exception does not bar this Board from suppressing the evidence obtained.

Federal authorities are also pertinent to the issue of the good faith exception in two regards. First is the question of whether this Board should even reach the exception, given that the Division failed to bring it up in front of the ALJ. But if this Board decides to consider arguments for the exception anyway, the second question is whether the defense allows for admission of the evidence under the facts of this case.

A. The Division carried the burden to show it was entitled to the exception, but it waived the argument by failing to present it to the ALJ.

In *Sanders Lead Co.*, the Commission held that the beneficiary of the good faith exception has the burden of proof. 15 BL OSHC at 1651. That means that the Division has the burden of proving that it should have this evidence admitted if it would otherwise be suppressed; it is not

[3] While federal OSHA agents have generally allowed employers to forbid entry and make their case in a contempt hearing before the warrant is executed, there is no constitutional right to such a procedure. *See Trinity Marine Products, Inc. v. Chao*, 512 F.3d 198, 203–204 (5th Cir. 2007) (explaining OSHA's general practice but finding no constitutional violation when the agency instead brought federal marshals to force immediate execution of a warrant).

entitled to it. But the Division failed in meeting its burden when it waived the argument in front of the ALJ. This Board's rules allow for reconsideration only "with respect to any matters determined or covered by the order or decision." 8 C.C.R. § 390. The Division's opposition to the Academy's motion never once mentions the words "good faith." And as a result, neither did the ALJ's order on the Motion to Suppress Evidence. This can hardly fit within the scope of a matter "determined or covered by the order or decision."

Further, allowing the Division's argument to proceed prejudices both the Academy and the ALJs of this Board. The Academy is now forced to litigate an issue on reconsideration that it could not address below in its reply brief. And if this Board allows the Division to make arguments on reconsideration it never made prior, ALJs will be subjected to completely avoidable reversals and remands on issues they were never asked to consider. The Division should not be allowed to put redundant work on both employers and the judges of this Board when it fails to bring an argument it later decides it wants to use.

B. Even if this Board does apply the good faith defense here, suppression adequately fulfills the deterrent purpose of the rule.

While the Division treats the Good Faith Exception as some kind of insurmountable bar to a motion to suppress, the rule is far less harsh in its application. Because the exclusionary rule is intended to deter future misconduct, the exception allows unlawfully obtained evidence to be admitted if it can be shown that the official acted in good faith when they asked for the warrant. *See United States v. Leon*, 468 U.S. 897, 919-20 (1984). The premise of the rule is that if the government reasonably believed it was acting lawfully, then there is no misconduct to be deterred, and thus there is nothing to be gained by the exclusionary rule. *Sanders Lead Co.*, 15 BL OSHC 1640, 1651 (No. 87-260, 1992). Good faith is not a mere state of mind; objectively unreasonable behavior can strip an officer of the exception as well as ill intent. *See United States v. Williams*, 622 F.2d 830, 841 n.4a (5th Cir. 1980); *Leon*, 468 U.S. at 922–23.

In weighing the application of the good faith exception here, the body of law this Board asked for briefing on is of limited usefulness because most of those cases were decided prior to 1992 when the Commission adopted the good faith exception in *Sanders Lead* (and for that matter,

1984 when *Leon* gave a unified vision for the good faith exception). But the Commission's findings in *Sarasota Concrete Co.* shed light on the balance between protection of rights versus the need for enforcement. 9 BL OSHC 1608, 1613–14 (No. 78–5264, 1981). While the Commission had not yet adopted the good faith exception for its proceedings, it noted that "application of the exclusionary rule in Commission proceedings would have an appreciable deterrent effect on the actions of OSHA officials and inspectors" and that "a relatively rapid and widespread effect in ensuring that OSHA inspections are conducted in accordance with the fourth amendment." *Id.*

In the Academy's case, the ALJ found that the Division's affidavit contained only one sentence that referenced the basis for the inspection. Order Mot. Suppress Evid. 4. The complaint was "utterly devoid of detail about the complaint." Order Mot. Suppress Evid. 5. "Indeed, there is no statement in the declaration that the Division inspectors observed any behaviors that would give rise to a violation of any safety orders." Order Mot. Suppress Evid. 6. This is exactly the type of behavior that *Leon* made exception for when it allowed for suppression when there were "no reasonable grounds for believing that the warrant was properly issued." 468 U.S. at 922. Suppression from this Board would serve the purposes identified by the Commission in bringing a "rapid and widespread effect" among Division inspectors. The Haskell Declaration was an objectively unreasonable attempt to secure a warrant, and this Board should apply suppression to serve as the "appreciable deterrent" the Division needs.

CONCLUSION

In *Sarasota Concrete*, the Eleventh Circuit wrote that "all three branches of government are bound to uphold the Constitution in the exercise of their duties. . . . Here, an executive agency is undertaking this enforcement action. Thus the Commission refused to allow a constitutional infringement to form the basis of its action against the company." 693 F.2d at 1067. Similarly, an obvious constitutional abuse took place against the Academy. The Division asks this Board to look away and allow it to continue its abuses unchecked. But the Academy respectfully asks this Board

//

//

//

to vindicate its constitutional rights and affirm the order granting its motion to suppress.

Date: January 30, 2023

Respectfully submitted,

/s/Nicolai Cocis
Nicolai Cocis
TYLER & BURSCH, LLP
Counsel for Employer

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

In the Matter of the Appeal of
Calvary Chapel of San Jose dba Calvary Christian Academy
Inspection Number 1564732

I am employed in the county of Riverside, State of California. I am over the age of 18 and not a party to the within action; my business address is 25026 Las Brisas Rd., Murrieta, California 92562.

On January 30, 2023, I caused to be served the foregoing documents described as **EMPLOYER'S BRIEF IN RESPONSE TO REQUEST FOR FURTHER BRIEFING** on the interested parties in this action

☐ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list: **(SEE ATTACHED MAILING LIST)**

☐ **BY MAIL**

☐ I deposited such envelope in the mail at or near Murrieta, California. The envelope was mailed with postage thereon fully prepaid.

☐ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at or near Murrieta, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY PERSONAL SERVICE**
Such envelope was delivered by hand to the office(s) of the addressee(s).

☒ **BY E-SERVICE/FACSIMILE TRANSMISSION**
I caused all of the pages of the above-entitled document to be sent to the recipient(s) noted below via electronic transfer (facsimile) at the respective telephone numbers indicated above.

Kathryn Tanner, Staff Counsel, Division of Occupational Safety & Health
1515 Clay Street, Suite 1901
Oakland, CA 94612
Email: ktanner@dir.ca.gov

☐ **OVERNIGHT MAIL**
I caused such all of the above-described documents to be served on the interested parties noted above by Overnight Mail.

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

Nicolai Cocis