# APPENDIX

# APPENDIX

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## APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 14-56493**
**D.C. No. 2:14-cv-01960-CAS-SH**

**[Filed April 11, 2018]**

ERNEST JOSEPH FRANCESCHI, JR., Attorney, an individual,
*Plaintiff-Appellant*,

v.

BETTY T. YEE, President of California Franchise Tax Board in her Official Capacity; GEORGE RUNNER, Board Member of California Franchise Tax Board in his Official Capacity; JEAN SHIOMOTO, Director of California Department of Motor Vehicles in her Official Capacity; MICHAEL COHEN, Board Member of California Franchise Tax Board in his Official Capacity,
*Defendants-Appellees.*

OPINION

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted November 15, 2017
Pasadena, California

Filed April 11, 2018

Before: Michael Daly Hawkins, Barrington D. Parker,[*] and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Parker

## SUMMARY[**]

### Tax

The panel affirmed the district court's judgment in an action under 42 U.S.C. § 1983, challenging the constitutionality of California Revenue and Tax Code § 19195 (which establishes a public list of the top 500 delinquent state taxpayers) and California Business and Professions Code § 494.5 (which provides for suspension of the driver's license of anyone on the top 500 list). The district court found the statutory scheme constitutional and dismissed the action under Federal Rule of Civil Procedure 12(b)(6).

The panel first held that the taxpayer was not deprived of procedural due process based on his contention that he had an inadequate opportunity to be heard prior to license revocation. The panel explained that California provides tax delinquents with a constitutionally adequate procedure to challenge the

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[*] The Honorable Barrington D. Parker, United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

amount of their tax delinquency, either before or after the deprivation of a driver's license.

The panel next held that the taxpayer was not deprived of substantive due process based on his claims that the statutory scheme impermissibly burdened taxpayer's right to choose a profession, and that the scheme is retroactive. The panel observed that revocation of a driver's license does not operate as a complete prohibition on one's ability to practice law. The panel also explained that § 494.5 does not operate retroactively because it does not sanction taxpayer for past conduct, but for his current refusal to discharge his tax obligations.

The panel was unpersuaded by the taxpayer's equal protection claim, that the challenged statutes impermissibly single out taxpayers who fall within the class of California's 500 largest tax delinquents, resulting in unequal treatment of similarly situated individuals. The panel found a rational basis for state action against a citizen for failing to pay two years' worth of past-due taxes (as taxpayer had done), given California's legitimate and significant interest in the prompt collection of tax revenue.

Finally, the panel rejected the taxpayer's contention that the combined effect of the challenged statutes is to single out the largest 500 tax debtors for legislative punishment, amounting to a bill of attainder. The panel explained that membership in the group of taxpayers subject to suspension turns on the continuing fact of nonpayment, which a delinquent taxpayer can rectify.

## COUNSEL

Ernest J. Franceschi Jr. (argued), Franceschi Law Corporation, Los Angeles, California, pro se Plaintiff-Appellant.

Matthew C. Heyn (argued), Deputy Attorney General; Stephen Lew, Supervising Deputy Attorney General; Paul D. Gifford, Senior Assistant Attorney General; Office of the Attorney General, Los Angeles, California; for Defendants-Appellees.

## OPINION

PARKER, Circuit Judge:

This action challenges the constitutionality of Section 19195 of the California Revenue and Taxation Code and Section 494.5 of the California Business and Professions Code. Section 19195 establishes a public list of the top 500 delinquent state taxpayers who owe in excess of $100,000. In turn, Section 494.5 provides for suspension of the driver's license of a taxpayer on the delinquent list until full payment of the tax obligation is arranged.

Appellant Ernest J. Franceschi, Jr., Esq. is a major tax delinquent. Anticipating the suspension of his driver's license after the publication of the next edition of the top 500 list—which would include him—Franceschi sued, under 42 U.S.C § 1983, challenging Sections 19195 and 494.5 on various federal constitutional grounds. The District Court rejected his claims and dismissed the complaint. *See Franceschi v. Chiang*, No. 2:14-cv-01960-CAS-SH, 2014 WL 12069866 (C.D. Cal. Aug. 4, 2014). Franceschi appeals and we affirm.

## I. BACKGROUND

Franceschi is an attorney who has been licensed to practice law in California since 1984. Appellee Betty Yee is the chairwoman of the California Franchise Tax Board (the "*FTB*"); appellees George Runner and Michael Cohen are members of the FTB; and appellee Jean Shiomoto is the director of the California Department of Motor Vehicles.

Despite being a member of the bar for many years, Franceschi failed to file any California state income tax returns between 1995 and 2012 and failed to pay any state income taxes, penalties, or interest for those years, contending that he owed none. For each of those years, the FTB gave written notice of proposed deficiency assessments of taxes, interest and penalties (an "*NPA*").

California's Revenue and Taxation Code sets forth a framework under which a delinquent taxpayer, like Franceschi, has multiple opportunities to challenge deficiency assessments. Cal. Rev. & Tax Code § 19031, *et seq*. At the outset, the FTB is required to send the taxpayer notice of the proposed deficiency assessment for any tax deficiency it proposes to assess. *Id.* § 19033(a). The taxpayer may then file a protest within sixty days. *Id.* § 19041(a). If the taxpayer files a protest, the FTB must reconsider the assessment and, if the taxpayer so requests, grant the taxpayer a hearing on the deficiency. *Id.* § 19044(a). If the deficiency is not resolved at this stage, a taxpayer has further recourse by appealing to the State Board of Equalization. *Id.* § 19045. After the State Board of Equalization rules on the matter, a still dissatisfied

taxpayer can then petition the State Board of Equalization for rehearing. *Id.* § 19048.

Still further, a taxpayer has an additional opportunity to be heard on the validity of his or her tax delinquency by paying the taxes and filing a claim for refund with the FTB. *Id.* § 19382. Utilization of this procedure here would have permitted Franceschi to both challenge the original assessments and to retain his driver's licence while doing so. If the FTB denied the claim he could have sued for a refund in California Superior Court. Franceschi concedes that he did not avail himself of any of these multiple remedial procedures.

If, however, a taxpayer like Franceschi fails to protest the NPA within sixty days, the proposed deficiency assessment becomes final. *Id.* § 19042. Once the assessment becomes final, the FTB can demand payment and the amount owed becomes a lien on the taxpayer's real property in California. *Id.* §§ 19049, 19221.

The FTB compiles a list of the top 500 tax delinquents in the state (the "*Top 500 List*"). *Id.* § 19195(a). Specifically, Section 19195 directs the FTB to "make available as a matter of public record at least twice each calendar year a list of the 500 largest tax delinquencies in excess of one hundred thousand dollars ($100,000)[.]"[1] *Id.* Prior to placing a delinquent taxpayer on the Top 500 List, the FTB is required to

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[1] The Top 500 List includes the taxpayer's name and address, the amount of tax delinquency, the taxpayer's occupation, and the type, status, and license number of any occupational or professional license held by the tax delinquent. *Id.* § 19195(c).

provide thirty days' notice to the taxpayer. *Id.* § 19195(d). If within thirty days after this notice, the delinquent taxpayer does not remit the amount due or make arrangements with the FTB for payment, the delinquent taxpayer is named on the Top 500 List. *Id.*

Important for this appeal, effective January 1, 2012, Section 494.5 was enacted to provide that a state governmental licensing entity "shall suspend" a license if a licensee's name is included on the Top 500 List.[2] Cal. Bus. & Prof. Code § 494.5(a)(1). Specifically, Section 494.5 provides that, on at least ninety days' notice, the California Department of Motor Vehicles "shall suspend" the driver's license of any licensee whose name is included on the Top 500 List. *Id.* § 494.5(a)(2), (b)(1), (f)(1).[3] Within this notice period, a delinquent taxpayer can challenge inclusion and seek to avoid revocation of a driver's license by (1) presenting a written submission that the tax delinquency was paid, (2) entering into a payment agreement, or (3) demonstrating financial hardship. *Id.* § 494.5(h).

Franceschi's cumulative tax deficit encompasses the years 1995 through 2012. After the enactment of Section 494.5 in 2012, the FTB, in April 2012, March 2013, and March 2014, served him with NPAs for the years 2010 through 2012. Franceschi then had sixty

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[2] Section 494.5 was originally passed in 2012 but was amended in 2013, in a manner not relevant here.

[3] Furthermore, the State Bar of California "may recommend to refuse to issue, reactivate, reinstate, or renew a license and may recommend to suspend a license if a licensee's name" is included on the Top 500 List. *Id.* § 494.5(a)(3), (b)(1).

days to protest these additional proposed deficiencies. He took no steps to do so.

Franceschi alleges that he received notice from the FTB dated February 2014 indicating that he was to be included in the next publication of the Top 500 List because he owed $242,276.73 in back taxes. Franceschi further alleges that he anticipated that the DMV would suspend his driver license after the next publication of the Top 500 List.

In an effort to forestall his suspension, Franceschi sued under 42 U.S.C. § 1983, asserting claims for violations of his procedural and substantive due process rights, and the Equal Protection Clause.[4] In addition he claimed that the 2012 enactment of Section 494.5 constituted a bill of attainder. *See Franceschi*, 2014 WL 12069866, at *1. Franceschi also sought a preliminary injunction seeking to prohibit the publication of his name on the Top 500 List and the suspension of his driver's license. During the pendency of this action, after the District Court denied Franceschi's application for interlocutory relief, the DMV suspended his driver's license.

The defendants moved to dismiss Franceschi's lawsuit under Federal Rule of Civil Procedure 12(b)(6). The District Court concluded that the statutory scheme Franceschi challenged was constitutional. It held, among other things, that Franceschi had received adequate notice and an opportunity to be heard before

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[4] Franceschi also brought a claim for violation of the Privileges or Immunities Clause which the District Court dismissed. On appeal, he abandons this claim.

his license was suspended. It also determined that the application of Sections 19195 and 494.5 to him did not violate his substantive due process rights by impermissibly burdening his right to practice his profession or having retroactive effect, did not violate his equal protection rights, and did not constitute a bill of attainder. *Id.* at *1–*13. Accordingly, the District Court denied Franceschi's request for injunctive relief and dismissed his lawsuit.

This appeal followed. We review *de novo* the District Court's decision to dismiss Franceschi's complaint under Rule 12(b)(6). *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030–31 (9th Cir. 2008).

## II. DISCUSSION

### A. Procedural Due Process

Franceschi's procedural due process claim has two elements. He must plausibly allege: "(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Hufford v. McEnaney* 249 F.3d 1142, 1150 (9th Cir. 2001) (citation omitted). Most licenses are constitutionally protected property and cannot be taken away without procedural due process required by the Fourteenth Amendment. *See Bell v. Burson*, 402 U.S. 535, 539 (1971). "[T]he Due Process Clause applies to the deprivation of a driver's license by the State[.]" *Dixon v. Love*, 431 U.S. 105, 112 (1971).

The essence of procedural due process is that "individuals whose property interests are at stake are entitled to 'notice and an opportunity to be heard.'" *Dusenbery v. United States*, 534 U.S. 161, 167 (2002)

(quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48, (1993)). It is well-established that because due process is a flexible concept, "[p]recisely what procedures the Due Process Clause requires in any given case is a function of context." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 983 (9th Cir. 1998); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

On appeal, Franceschi advances two main arguments why the challenged statutory scheme provides inadequate process prior to the deprivation of his driver's license. First, he argues that Section 494.5 does not provide an adequate opportunity to be heard prior to license revocation. Second, he argues that Section 494.5's payment plan and financial hardship exemptions are illusory. Neither of these contentions has merit.

The Supreme Court has held that a driver's license can be revoked without a pre-revocation hearing. *See Dixon*, 431 U.S. at 112–15. Franceschi has no response to *Dixon*. He nevertheless goes on to argue that he should have been afforded a pre-deprivation hearing. Specifically, Franceschi argues that at such a pre-deprivation hearing, he would have been able to demonstrate that his actual tax delinquency was below the threshold $100,000 for inclusion on the Top 500 List when time-barred assessments, interest and penalties on time-barred assessments are excluded.[5]

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[5] Specifically, Franceschi argues that a substantial amount of his tax delinquency is time-barred by Section 13680 of the California Revenue & Taxation Code, which establishes a ten year statute of limitations. However, this is incorrect. Section 13680 is

Franceschi's arguments overlook the fact that he had a readily available, constitutionally valid, pre-deprivation opportunity to prevent the suspension of his license. After receipt of the notice of revocation and before his license was suspended, Franceschi could have challenged his threatened suspension by paying his taxes and filing a refund claim with the FTB. *See* Cal. Rev. & Tax Code § 19382. The payment of his tax liability would have allowed him to retain his driver's license. He would then have the opportunity to file a refund claim and challenge the original tax assessment. In the event the FTB denied his refund claim, he could still obtain relief by suing for a refund in California Superior Court.

Courts have consistently held that pay first, litigate later procedures such as these satisfy due process in the context of tax collection. *See Todd v. United States*, 849 F.2d 365, 369 (9th Cir. 1998) (collecting Supreme Court cases holding that in the federal context, "taxpayers do not have the right to a hearing prior to collection efforts by the IRS"); *see also Bob Jones Univ. v. Simon*, 416 U.S. 725, 746–48 (1974); *Aronoff v. Franchise Tax Bd.*, 383 P.2d 409, 410 (Cal. 1963) ("The due process clause does not guarantee the right to judicial review of tax liability before payment." (quoting

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inapplicable because it only concerns the collection of gift and estate taxes, not the collection of income taxes, as the District Court correctly concluded. *See* Cal. Rev. & Tax. Code § 13680 (referring to the "collection of any tax imposed by *this part*" (emphasis added)); *see generally* Cal. Rev. & Tax. Code, Part 8 (referring to "Gift and Death taxes"). We note that to the extent that Franceschi can advance a credible argument that his tax delinquency is time-barred, he is free to do so in a refund action.

*Modern Barber Colls. v. Cal. Emp't Stabilization Comm'n*, 192 P.2d 916, 919 (Ca1. 1948))). More generally, where tax liability is involved, postponement of a judicial inquiry is not a denial of due process if the opportunity for an ultimate judicial determination of the tax liability is adequate. *See Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 595 (1931) (observing that when an "adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained"). California, therefore, provides tax delinquents with a constitutionally adequate procedure to challenge the amount of their tax delinquency, either before or after the deprivation of a license under Section 494.5.

Moreover, as noted, Franceschi had multiple opportunities to challenge the tax deficiencies that the FTB proposed at the time of their assessment and well before he faced license suspension. For each of the years from 1995 through 2012, for which Franceschi failed to file a tax return, he received written notices of proposed deficiency assessments. Further, Franceschi does not contest that he received these notices and in fact concedes that he became obligated to the FTB as far back as 1995. These procedures afforded him multiple opportunities to challenge the validity of the assessments that led to the revocation of his driver's license. For whatever reason, he failed to avail himself of any of them. What Franceschi seeks is a forum in which to dispute his tax delinquencies well after the time they become final. Franceschi does, however, have access to such a forum, but must satisfy his tax deficiencies first.

This result is congruent with the three-part procedural due process test that the Supreme Court established in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See, e.g.*, *Gant v. Cty. of Los Angeles*, 772 F.3d 608, 619 n.12 (9th Cir. 2014). Under *Mathews* we consider (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) the government's interest in minimizing the cost and burden of additional or substitute procedures. 424 U.S. at 335.

First, the private interest at issue here is a driver's license and, while subject to a level of constitutional protection, a driver's license is not a fundamental right and can be suspended without a prior hearing. *See Dixon*, 431 U.S. at 113–15. Second, the risk here that the challenged statutory scheme will result in the erroneous deprivation of a protected interest is low. The facts supporting the suspension have already been established through prior proceedings with adequate process involving multiple opportunities to challenge the deficiency assessments. *Cf. Air N. Am. v. Dep't of Transp.*, 937 F.2d 1427, 1438 (9th Cir. 1991) ("[T]he due process clause does not require a hearing when . . . there are no factual questions to resolve."). Franceschi nonetheless argues that he did not have the same incentive to challenge the deficiency assessments before Section 494.5 established that his license could be revoked. To the extent that Franceschi suggests that his lack of incentive to challenge the initial assessments created a greater risk of erroneous deprivation, we think that risk is adequately mitigated

by the availability of a refund action under Section 19382. Finally, California obviously has a strong interest in revenue collection, and the challenged statutory scheme appropriately reflects the importance of this interest. *See Jolly v. United States*, 764 F.2d 642, 646 (9th Cir. 1985). In sum, we readily conclude that the *Mathews* factors have been met and that Franceschi was not denied procedural due process.

### B. Substantive Due Process

Franceschi contends that the statutory scheme set forth in Sections 19195 and 494.5 violates his substantive due process rights in two respects: first, by impermissibly burdening his chosen profession, and, second, by acting retroactively. Neither argument has merit.

#### 1. Burden on Profession

The Due Process Clause of the Fourteenth Amendment includes "a substantive component that protects certain individual liberties from state interference[.]" *Mullins v. Oregon*, 57 F.3d 789, 793 (9th Cir. 1995); *see also Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003) (per curiam) (observing that the Due Process Clause protects individuals from state action that "interferes with rights implicit in the concept of ordered liberty" (internal quotation marks and citation omitted)). The range of liberty interests that substantive due process protects is narrow and "[o]nly those aspects of liberty that we as a society traditionally have protected as fundamental are included within the substantive protection of the Due Process Clause." *Mullins*, 57 F.3d at 793. Substantive due process has, therefore, been largely confined to

protecting fundamental liberty interests, such as marriage, procreation, contraception, family relationships, child rearing, education and a person's bodily integrity, which are "deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

A "right" to drive to work does not resemble any of these categories. To be sure, the liberty component of the Due Process Clause includes a generalized right to choose one's field of employment, but that right is subject to reasonable government regulation. *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999) (collecting cases). "[I]t is well-recognized that the pursuit of an occupation or profession is a protected liberty interest that extends across a broad range of lawful occupations[,]" although the precise contours of this liberty interest have not been defined. *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999) (quoting *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 65 n.4 (9th Cir. 1994)). What is clear is that, as observed by the Supreme Court, "the line of authorities establishing the liberty interest [in pursuing a profession] 'all deal[] with a complete prohibition of the right to engage in a calling[.]'" *Id.* (quoting *Conn*, 526 U.S. at 292).

Franceschi argues that the enforcement of Sections 19195 and 494.5 violates his liberty interest in the pursuit of his profession because the ability to drive is essential to a "meaningful" pursuit of the practice of law and, thus, the suspension of an attorney's driver's license for reasons unrelated to public safety and solely

attributable to tax indebtedness materially interferes with his constitutionally protected liberty interest to practice law without inconvenience.

This contention has no merit for the obvious reason that the revocation of his driver's license does not operate as a complete prohibition on his ability to practice law, which it must to violate substantive due process. Franceschi attempts to sidestep this straightforward requirement by arguing that a driver's license is "indispensable" to the practice of law while at the same time conceding that "it may be possible to get to some courts on a bus or other public transportation." He nevertheless argues doing so would be burdensome and time consuming. No doubt an inability to drive oneself around Los Angeles could make the practice of law more difficult. However, Franceschi still has access to public transit, taxis, or services such as Lyft or Uber. Accordingly, whatever burden may exist does not amount to a "complete prohibition" on Franceschi's ability to practice law, and thus, does not rise to a violation of substantive due process. *See Lowry v. Barnhart*, 329 F.3d 1019, 1023 (9th Cir. 2003) (holding that an "indirect and incidental burden on professional practice is far too removed from a complete prohibition to support a due process claim").

To resist this conclusion, Franceschi cites *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014), for the proposition that the inability to obtain a driver's license will likely result in irreparable harm. However, *Arizona Dream Act Coalition* is inapposite. There, the plaintiffs were undocumented immigrants who were brought to the United States as children and were allowed to remain pursuant to a federal program

then in existence (the Deferred Action for Childhood Arrivals program). *Id.* at 1057–58. Arizona officials implemented a policy that denied driver's licenses to these individuals. *Id.* at 1058. The plaintiffs sought a preliminary injunction prohibiting the implementation of the policy, arguing that it violated the Equal Protection Clause and the Supremacy Clause. *Id.* The district court concluded that the policy violated the Equal Protection Clause but nonetheless denied the request for a preliminary injunction. *Id.* In reversing, this Court concluded that the plaintiffs demonstrated a likelihood of success on their equal protection claim and were likely to suffer irreparable harm unless the policy was enjoined because the lack of a driver's license "diminished their opportunities to pursue their chosen professions." *Id.* at 1068.

Here, Franceschi contends that in *Arizona Dream Act Coalition*, this Court implicitly recognized that the deprivation of a driver's license does not need to amount to a "complete prohibition" on the ability to pursue a profession for substantive due process purposes. All that needs to be shown, he contends, is that it operates as a "limitation" or "diminishes opportunity" to pursue a chosen profession. However, *Arizona Dream Act Coalition* says nothing of the sort. On the contrary, *Arizona Dream Act Coalition* involved an equal protection claim and sheds little light on Franceschi's substantive due process claim. Concluding that, where plaintiffs have shown a likelihood of success on the merits of their equal protection claims, the denial of a driver's license would cause irreparable harm as required to support the issuance of an injunction, does not establish that the denial of a driver's license would amount to a substantive due

process violation. Concededly, the revocation of Franceschi's driver's license will complicate his law practice. But this complication is not a substantive due process violation since it does not amount to a complete prohibition on his ability to practice law. *See Lowry*, 329 F.3d at 1023.

Even if Sections 19195 and 494.5 operated as a *de facto* complete prohibition on Franceschi's ability to practice law—which they do not—the sections would still withstand constitutional scrutiny. A state may regulate entry into a profession, so long as the regulation is rationally related both to a legitimate state interest and to the applicant's fitness or capacity to practice the profession. *Dittman*, 191 F.3d at 1030. When reviewing a challenge to a legislative act that does not infringe on a fundamental right, rational basis review applies, under which we need only determine "whether the legislation has a 'conceivable basis' on which it might survive constitutional scrutiny." *Id.* at 1031 (quoting *Lupert v. Cal. State Bar*, 761 F.2d 1325, 1328 (9th Cir. 1985)).

Here, the ability to practice law in California is not a fundamental right, and Section 494.5 is related to a legitimate state interest: the collection of tax revenue. The government obviously has a powerful interest in the prompt collection of revenue. *See Phillips*, 283 U.S. at 597. The "[f]ailure to honor legal commitments and obligations is a proper ground for refusing to issue a certificate as to the possession of the requisite character and moral fitness" for the practice of law. *Dittman*, 191 F.3d at 1032 (alteration in original) (citation omitted). It is therefore rational for California to require that those who practice law be current on tax

obligations as a condition of licensure, as their failure to do so could speak to moral character. *See id.*; *c.f. People v. Cully*, 675 N.E.2d 1017, 1024 (Ill. Ct. App. 1997) (noting that "[i]f the licensee culpably does not repay [his student loan], this calls his moral character into question and could constitute conduct that defrauds or harms the public"). Accordingly, the challenged statutory scheme does not impermissibly burden Franceschi's chosen profession.

**2. Retroactivity**

Franceschi argues that the statutory scheme—and specifically Section 494.5's 2012 enactment—violates substantive due process by operating retroactively to impose a penalty that did not exist at the time his tax deficiencies were first assessed in 1995. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) (internal citation omitted). A statute operates retroactively when it "attaches new legal consequences to events completed before its enactment." *Id.* at 269–70; *see also Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

Section 494.5 does not operate retroactively because it does not sanction Franceschi for past conduct: the incurrence of past-due tax obligations. Rather it is his current refusal to discharge his tax obligations that exposes him to license revocation. In other words, the effective date of Section 494.5 is not dispositive because Section 494.5's sanction is dependent on a taxpayer's current conduct (whether a taxpayer takes steps to discharge a past-due tax obligation) and not on past

conduct (the incurrence of a past-due tax obligation). Consequently, Section 494.5 does not attach new legal consequences to events completed before its enactment. Moreover, after Section 494.5 was enacted, Franceschi received additional proposed assessments in April 2012, March 2013, and March 2014, all of which he ignored. For these reasons, this substantive due process claim fails.

### C. Equal Protection

The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Governmental conduct, such as revocation of a driver's license, that "neither proceeds along suspect lines nor infringes fundamental constitutional rights" is subject to rational basis review and, as such, does not violate the Equal Protection Clause "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (citation omitted); *see also Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012).

Franceschi argues that Section 494.5, together with Section 19195, impermissibly singles out taxpayers who fall within the class of California's 500 largest tax delinquents (provided they owe more than $100,000). Franceschi contends that because this selection criteria has the effect of meting out unequal treatment to

similarly situated individuals, it is arbitrary and unreasonable.[6]

We have no difficulty in concluding that a citizen's failure for nearly twenty years to pay unusually large amounts of past-due taxes supplies a rational basis for the state's action. This is especially so because legislatures have particularly "broad latitude in creating classifications and distinctions in tax statutes." *Armour*, 566 U.S. at 680 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983)).

California has a legitimate—and significant—interest in the prompt collection of tax revenue. *See Jolly*, 764 F.2d at 646. As the District Court correctly concluded, the California legislature's decision to single out the 500 individuals and corporations with the largest tax delinquencies via Section 19195 and then impose sanctions on that group through Section 494.5 is rationally related to California's legitimate interest in the prompt collection of tax revenue. Although the California legislature could have established an incrementally higher or lower threshold for tax delinquency, that the legislature chose a $100,000 cutoff does not render the statutory scheme unconstitutional. *See Beach Commc'ns*, 508 U.S. at 316 (noting that "the fact [that] the line might have been

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[6] For the first time on appeal, Franceschi argues that the public disclosure of his alleged tax liability on the Top 500 List violates his right to privacy under the California Constitution. We decline to reach this contention. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (observing that, as a general rule, the court does not consider arguments that are raised for the first time on appeal).

drawn differently at some points is a matter for legislative, rather than judicial, consideration" (alteration in original) (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980))). For these reasons, Franceschi's equal protection claim fails.

**D. Bill of Attainder**

Franceschi next contends that Sections 19195 and 494.5 together constitute a bill of attainder. The Constitution provides that "[n]o State shall . . . pass any Bill of Attainder[.]" U.S. Const. art. I, § 10, cl. 1.[7] A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *SeaRiver Mar. Fin. Holdings Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977)); *see also Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 817 (9th Cir. 2016).

The key features of a bill of attainder are "that the statute (1) specifies the affected persons and (2) inflicts punishment (3) without a judicial trial." *SeaRiver*, 309 F.3d at 668 (citing *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847 (1984)). The

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[7] The United States Constitution contains two sections prohibiting the passage of a bill of attainder, one aimed at the federal government (Article I, Section 9, Clause 3) and one aimed at the states (Article I, Section 10, Clause 1). The same analysis applies to both sections. *See SeaRiver Mar. Fin. Holdings Inc. v. Mineta*, 309 F.3d 662, 672 n.6 (9th Cir. 2002); *see also Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 816 n.5 (9th Cir. 2016). Accordingly, we rely on cases interpreting either section in assessing the constitutionality of Sections 19195 and 494.5.

"clearest proof" is required before courts can conclude that a legislative enactment is as a bill of attainder. *Id.* (citing *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 83 (1961)).

Not every law which burdens some persons or groups is a bill of attainder; after all, practically every law burdens someone. "How the class is designated and what purposes the law furthers governs the specificity analysis[.]" *United States v. Munsterman*, 177 F.3d 1139, 1142 (9th Cir. 1999). "If a law merely designates a properly general characteristic . . . and then imposes upon all who have that characteristic a remedial measure reasonably calculated to achieve a nonpunitive purpose," there is no attainder. *Id.* (quoting Laurence H. Tribe, *American Constitutional Law* § 10-4 at 643 (2d ed. 1988)). Franceschi contends that the combined effect of Sections 19195 and 494.5 is to single out the largest 500 tax debtors for legislative punishment and for these reasons the sections constitute a bill of attainder. This contention has no merit.

In considering whether a statute singles out a person or class, we look to various established guideposts. *See SeaRiver*, 309 F.3d at 669. "First, we look to whether the statute or provision explicitly names the individual or class, or instead describes the affected population in terms of general applicability." *Id.* (citation omitted). Sections 19195 and 494.5 do not expressly name Franceschi. He does not contend that when the provisions were enacted anyone in the legislature had him in mind as opposed to the thousands of other residents who were persistently delinquent in their taxes. To the contrary, Section 19195 is couched in general terms and Section 494.5

simply refers to Section 19195. Accordingly, this factor weighs against the conclusion that the Sections constitute a bill of attainder.

Second, we determine "whether the identity of the individual or class was 'easily ascertainable' when the legislation was passed." *Id.* (quoting *United States v. Brown*, 381 U.S. 437, 448–49 (1965)). The group of the 500 largest tax delinquents with delinquencies over $100,000 was no doubt ascertainable at the time Section 494.5 was enacted, as the list could have been calculated. But this fact adds little to the analysis because the list was fluid. Such taxpayers may have paid their taxes, prevailed in litigation, died, or filed for bankruptcy. Thus, at the time Section 494.5 was enacted, there was manifest uncertainty as to who would be affected.

"Third, we examine whether the legislation defines the individual class 'by past conduct [that] operates only as a designation of particular persons.'" *Id.* (alteration in original) (quoting *Selective Serv. Sys.*, 468 U.S. at 847). "Thus, this third inquiry seeks to determine whether the statute is retrospective, or whether it carries the potential to encompass a larger class than the individual or group allegedly targeted." *Id.* at 670.

As noted, the Top 500 List is not static. Section 19195 directs the FTB to update the list twice a year, and the 500 largest tax delinquents will not necessarily remain the same on different versions of the List. In this way, Sections 19195 and 494.5 can affect a growing number of persons over time and their effect is not limited to any particular group in existence at the time of the statute's enactment. Accordingly, this factor

weighs against the conclusion that Sections 19195 and 494.5 specify the affected persons.

Franceschi, however, argues that the Top 500 List's fluidity is "of no moment" because the category itself, the "Top 500 tax delinquents," remains constant even though particular members "come and go" from the list. In support, Franceschi cites *Brown*, 381 U.S. 437. This argument makes no sense. If names "come and go" from a list, then the list does not remain constant. Moreover, Franceschi misunderstands both *Brown* and the specificity requirement. In *Brown*, the Supreme Court held that a statute that imposed criminal liability upon Communist Party members who became officers in labor unions was a bill of attainder. *Brown*, 381 U.S. at 456-62. In doing so the Supreme Court rejected the argument that the challenged statute did not constitute a bill of attainder because it did not "inflict[] its deprivation" upon named individuals but instead targeted the membership of the Communist Party. *Id.* at 461 ("We cannot agree that the fact that [the challenged statue] inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named individuals takes it out of the category of bills of attainder."). However, the Supreme Court in *Brown* held that certain individuals were targeted, and, as such, the specificity requirement was clearly met there. *See id.* at 452 ("The moment [the challenged statue] was enacted, respondent was given the choice of declining a leadership position in his union or incurring criminal liability."). Tellingly, the statute in question in *Brown* had a trailing five-year disqualification period: it disqualified from holding union office not just present members of the Communist Party but also any one who within the

previous five years had been a member of the Communist Party, an easily ascertainable group. *See id.* at 458. The situation here is different. Franceschi does not dispute that the group of taxpayers who find themselves subject to suspension is not static. And even more importantly, these taxpayers have the power to escape license revocation by fulfilling their tax obligations.

"Finally, we review whether the past conduct defining the affected individual or group consists of 'irrevocable acts committed by them.'" *SeaRiver*, 309 F.3d at 669 (quoting *Selective Serv. Sys.*, 468 U.S. at 848). "If the defining act is irrevocable, the individual or class may not escape the effect of the legislation by correcting the past conduct, thereby exiting the targeted class." *Id.* at 671 (citing *Selective Serv. Sys.*, 468 U.S. at 851). Sections 19195 and 494.5 do not focus on irrevocable conduct. The non-payment of delinquent taxes is the action that led Franceschi (and others) onto the Top 500 List and to license suspension. A taxpayer can escape publication on the Top 500 List (and the attendant consequences) by, among other ways, making other payment arrangements with the FTB for full satisfaction of the tax delinquency, filing for bankruptcy protection, or making payment arrangements satisfactory to the FTB. *See* Cal. Rev. & Tax. Code § 19195(b). Franceschi argues that it "appears" that the exemptions and releases from a Top 500 List are granted or denied in a "completely arbitrary and capricious manner," and that, as such, the methods which the statute provides for exiting the list are "largely illusory." However, Franceschi does not allege that he ever applied for or was denied a release from the Top 500 List, arbitrarily or otherwise. In the

absence of plausibly pleaded allegations of arbitrary and capricious administration of the Top 500 List, we need not entertain his bare argument on appeal that the list is administered in such a manner.

In sum, far from being triggered by past and ineradicable actions, license suspension as a result of Sections 19195 and 494.5 turns on the continuing fact of nonpayment, something which a delinquent taxpayer can rectify. *Selective Serv. Sys.*, 468 U.S. at 851 (citing *Communist Party*, 367 U.S. at 81). Because all the relevant guideposts point against Franceschi, and because he has unquestionably not adduced the "clearest proof" that the statutory scheme constitutes a bill of attainder, we reject his contention that the statutory scheme constitutes a bill of attainder.[8]

## III. CONCLUSION

For these reasons, we **AFFIRM** the judgment of the District Court.[9]

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[8] Because Franceschi fails to show that Sections 19195 and 494.5 meet the specification prong of a bill of attainder claim, we need not consider whether the statutory scheme inflicts punishment or fail to provide a judicial trial. *See Fowler Packing Co.*, 844 F.3d at 809 (explaining that where one element is not satisfied, "we need not address whether [the statutes] satisfy the other two elements of a bill of attainder claim").

[9] We **GRANT** Franceschi's unopposed motions, filed February 24, 2015 and February 27, 2015, to take judicial notice of orders in other proceedings. *See United States v. Navarro*, 800 F.3d 1104, 1109 n.3 (9th Cir. 2015). We also **GRANT** Appellees' unopposed motion, filed April 30, 2015, to take judicial notice of legislative history pertaining to Section 494.5. *See Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012).

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**CIVIL MINUTES - GENERAL**

**Case No. 2:14-cv-01960-CAS-SHx**

**[Filed August 4, 2014]**

Case No. 2:14-cv-01960-CAS-SHx

Date August 4, 2014

Title ERNEST J. FRANCESCHI V. JOHN CHIANG, ET AL.

Present: The Honorable CHRISTINA A. SNYDER

ISABEL MARTINEZ FOR CATHERINE JEANG
Deputy Clerk

LAURA ELIAS
Court Reporter / Recorder

N/A
Tape No.

Attorneys Present for Plaintiffs:
ERNEST J. FRANCESCHI

Attorneys Present for Defendants:
LESLIE SMITH

**Proceedings:**

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (Dkt. #21, filed May 28, 2014)

DEFENDANTS' MOTION TO DISMISS (Dkt. #26, filed June 12, 2014)

## I. INTRODUCTION

Plaintiff Ernest J. Franceschi, Jr., an attorney proceeding pro se, filed this action on March 14, 2014, against defendants John Chiang, Jerome E. Horton, Michael Cohen, and George Valverde. Dkt. #1. Plaintiff asserts the following four claims for relief under 42 U.S.C. § 1983 ("Section 1983"): (1) violation of substantive and procedural due process rights secured by the Fourteenth Amendment to the United States Constitution (the "Fourteenth Amendment");[1] (2) violation of the Equal Protection Clause of the Fourteenth Amendment; (3) violation of the Privileges or Immunities Clause of the Fourteenth Amendment; and (4) violation of the prohibition against bills of attainder set forth in Article I, Section 10, Clause I of the Constitution. Id.

Plaintiff filed a motion for a preliminary injunction on May 28, 2014. Dkt. #21. Defendants filed an opposition on June 10, 2014, dkt. #24, and plaintiff replied on July 7, 2014, dkt. #30. Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. #26. Plaintiff filed an opposition on July 7, 2014, dkt. #31, and defendants

[1] Unless otherwise noted, all references to the "Constitution" are to the United States Constitution.

replied on July 21, 2014, dkt. #34. The Court held a hearing on August 4, 2014. After considering the parties' arguments, the Court finds and concludes as follows.

## II. DEFENDANTS' MOTION TO DISMISS

### A. Background

Plaintiff alleges that he has been licensed to practice law in California since 1984, and that he has practiced law continuously since that time. Compl. ¶¶ 3, 13. Plaintiff avers that he maintains an office in Los Angeles County. Id. ¶ 3. Plaintiff further alleges that defendant John Chiang is the chairman of the California Franchise Tax Board ("FTB"), Jerome Horton and Michael Cohen are board members of the FTB, and George Valeverde is the director of the California Department of Motor Vehicles ("DMV"). Id. ¶¶ 4-7. Plaintiff avers that defendants enforce the following two statutes, resulting in a violation of his constitutional rights.

First, Section 19195 of the California Revenue and Taxation Code directs the FTB to "make available as a matter of public record at least twice each calendar year a list of the 500 largest tax delinquencies in excess of one hundred thousand dollars . . . under Part 10 and Part 11 of this division" (the "List").[2] Cal. Rev. & Tax. Code § 19195(a). The amount of the tax delinquency is defined as "the total amount owed by a taxpayer to the State of California for which a notice of state tax lien

[2] Parts 10 and 11 of Division 2 of the Revenue and Taxation Code pertain to the personal income tax and taxes on corporations.

has been recorded in any county recorder's office in [the state of California]." Id.[3]

Second, Section 494.5 of the California Business & Professions Code provides that the DMV "shall suspend" the driver's license of any licensee whose name is included on the List. Cal. Bus. & Prof. Code § 494.5(a)(2), (b)(1). Additionally, the State Bar of California "may recommend to refuse to issue, reactivate, reinstate, or renew a license and may recommend to suspend a license if a licensee's name" is included on the List. Id. § 494.5(a)(3), (b)(1).[4]

Plaintiff alleges that he has received a notice from the FTB notifying him that his name will be included on the next edition of the List. Compl. ¶ 11. According to plaintiff, the FTB currently claims that plaintiff is delinquent on his taxes in the amount of $242,276.73, including interest and penalties. Id. ¶ 15.[5] Plaintiff avers that he anticipates that the DMV will suspend his California driver's license after the next publication of the List. Id. ¶ 14.

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[3] The FTB is required to provide a "preliminary written notice" to a person that their delinquency will be included on the List. Cal. Rev. & Tax. Code § 19195(d). A person receiving such a notice has 30 days to remit the amount due or "make arrangements with the Franchise Tax Board for payment of the amount due." Id. Otherwise, the delinquency is included on the list. Id.

[4] Section 494.5 also provides for the revocation or non-renewal of other professional licenses. That portion of Section 494.5 is not at issue in the present case.

[5] Plaintiff does not allege any reason or justification for his non-payment of taxes.

**B. Legal Standard**

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "[F]actual allegations must be enough to raise a right to relief above the speculative level." Id.

In considering a motion pursuant to Rule 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the light most favorable to the nonmoving party. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). However, "[i]n keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1950 (2009); Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) ("[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.") (citing Twombly and Iqbal);

Sprewell, 266 F.3d at 988; W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Ultimately, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 129 S.Ct. at 1950.

Furthermore, unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). In re American Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1537 (9th Cir. 1996), rev'd on other grounds sub nom Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or alleged in the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999); Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

For all of these reasons, it is only under extraordinary circumstances that dismissal is proper under Rule 12(b)(6). United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir.

1986); see Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

**C. Discussion**

Plaintiff asserts four claims under Section 1983. The Court addresses each claim in turn. For the reasons set forth below, the Court concludes each of these claims fails.

1. Due Process

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "The Supreme Court has interpreted the Due Process Clause . . . to include a substantive component that protects certain individual liberties from state interference, no matter what process is given, unless the infringement is narrowly tailored to achieve a compelling state interest." Mullins v. Oregon, 57 F.3d 789, 793 (9th Cir. 1995). The Due Process Clause also contains a procedural component which requires that "certain substantive rights–life, liberty, and property–cannot be deprived except pursuant to constitutionally adequate procedures." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). Plaintiff alleges that the statutory scheme set forth in Section II(A) violates his rights to substantive and procedural due process.

a. Substantive Due Process

Plaintiff alleges that the enforcement of Section 494.5, and, by extension, Section 19195, violates his liberty interest in the pursuit of his profession, namely, the practice of law. Compl. ¶ 18. In this regard,

plaintiff alleges that the practice of law requires appearances in courts throughout California, and that the ability to drive is crucial to a lawyer's ability to make those appearances. Id. ¶ 19. Thus, according to plaintiff, the suspension of his driver's license pursuant to Section 494.5 would "materially burden[] and interfere[] with" his ability to practice law.

Defendants argue that plaintiff fails to state a claim for a violation of his substantive due process rights because the suspension of plaintiff's driver's license represents only an incidental burden on plaintiff's practice of law. The Court agrees. An "indirect and incidental burden on professional practice is too far removed from a complete prohibition to support a due process claim." See Lowry v. Barnhart, 329 F.3d 1019, 1023 (9th Cir. 2003). In Lowry, the plaintiff David Lowry, a social security lawyer, commenced an action under the Mandamus and Venue Act, 28 U.S.C. § 1361, against Dan Hyatt, an administrative law judge who often presided over the plaintiff's cases. Id. at 1020. Lowry alleged that Judge Hyatt frequently used "intimidation and anger" to shorten Lowry's hearings, refused to hear certain evidence, and denied him the opportunity to conduct cross-examination. Id. After Lowry began filing motions to recuse Judge Hyatt, Judge Hyatt responsed by writing letters to Lowry's clients "defending his impartiality and encouraging them to ask Hyatt about their 'rights to representation.'" Id.

The district court denied Lowry relief, and the Ninth Circuit affirmed. In response to Lowry's argument that Judge Hyatt's bias "violates his constitutional due process right to practice his

profession," the court found that Hyatt's interference fell "far short of a complete prohibition" on the practice of law. Id. at 1023. The court noted that Lowry did not claim that Hyatt "barred him from retaining clients or appearing at hearings." Id. "At worst," the court stated, Lowry "may have a harder time finding clients," but such an "indirect and incidental burden on professional practice is too far removed from a complete prohibition to support a due process claim." Id.

Here, plaintiff alleges that the revocation of his driver's license would impose an "indirect and incidental burden" on plaintiff's law practice. See id. An inability to drive oneself around Los Angeles County could plausibly make the practice of law more difficult due to the County's geographical size and the fact that a lawyer practicing in this area may be required to attend multiple depositions or hearings throughout the County in the course of a single day. This inconvenience, however, does not represent a "complete prohibition" on plaintiff's ability to practice law because plaintiff may avail himself of public transit, taxis, or other services that do not require a driver's license. See id. As in Lowry, plaintiff retains his ability to "retain[] clients or appear[] at hearings," but must find ways to do so that do not require him to drive a car. Accordingly, the Court finds that the revocation of plaintiff's driver's license pursuant to Section 494.5 does not violate plaintiff's substantive due process rights.

Plaintiff cites Arizona Dream Act Coalition v. Brewer, ---F.3d---, 2014 WL 3029759 (9th Cir. July 7, 2014), for the proposition that a driver's license is often essential to earning a living. That case is inapposite.

There, the plaintiffs, a group of undocumented immigrants who came to the United States as children, were granted the right to remain in the United States pursuant to a federal program. Id. at *1. The state of Arizona adopted a policy denying driver's licenses to these individuals. Id. The plaintiffs sought a preliminary injunction preventing the enforcement of that policy on the grounds that it violated the Supremacy Clause and the Equal Protection Clause. Id. The district court denied the plaintiffs' motion for a preliminary injunction, and the Ninth Circuit reversed, finding that Arizona's policy was likely preempted by federal law, and was likely not rationally related to a legitimate governmental interest. Id. at *5-11. Arizona Dream Act Coalition is inapposite to the viability of plaintiff's substantive due process claim because there, the Ninth Circuit did not consider whether the denial of a driver's license constitutes a "complete prohibition" on a person's ability to practice their chosen profession. Rather, the Ninth Circuit's discussion of the necessity of a driver's license arose in the context of considering whether Arizona's policy was preempted by federal law, whether it violated the Equal Protection Clause, and whether the plaintiffs would suffer irreparable harm if the enforcement of Arizona's policy was not preliminarily enjoined. Id.

b. Procedural Due Process

"It is clear that the Due Process Clause applies to the deprivation of a driver's license by the State." Dixon v. Love, 431 U.S. 105, 112 (1977). "[L]icenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." Bell v. Burson, 402 U.S. 535, 539 (1971). Plaintiff alleges

that Section 494.5 violates his right to procedural due process in two distinct ways. Compl. ¶¶ 21-29. The Court addresses each of plaintiff's contentions in turn.

I. Lack of Adequate Hearing

First, plaintiff alleges that Section 494.5 does not provide adequate hearing rights because it does not provide for a hearing prior to the revocation of a license. Rather, it "only allows hearings with regard to tax delinquencies prior to the tax delinquency becoming a judgment." Id. ¶ 23. According to plaintiff, if Section 494.5 provided for a pre-revocation hearing, he would be able to demonstrate that his tax liability is actually less than $100,000, and that his name therefore should not appear on the List in the first instance. Id. ¶ 26.

The Court finds that these allegations fail to state a claim for a violation of plaintiff's procedural due process rights. The Due Process Clause does not require a hearing if all of the antecedent facts for a revocation were previously determined through constitutionally adequate procedures. See Air N. Am. v. Dep't of Transp., 937 F.2d 1427, 1438 (9th Cir. 1991) ("[T]he due process clause does not require a hearing when . . . there are no factual questions to resolve."). The District of Massachusetts' decision in Almeida v. Lucey is instructive in this regard. See 372 F. Supp. 109 (D. Mass. 1974), aff'd, 419 U.S. 806 (1974). There, the plaintiff was convicted at a bench trial for driving under the influence of alcohol. Id. at 110. Pursuant to a Massachusetts statute, the Registrar of Motor Vehicles was required to revoke the plaintiff's driver's license upon receiving notice of the conviction. Id. n.1. After his conviction, the plaintiff sought an injunction

preventing the Registrar from revoking his license. Id. The plaintiff contended that the statute violated his right to procedural due process because it did not provide for a hearing prior to the revocation. Id. The district court rejected the plaintiff's claim, finding that "[d]riving under the influence constitutes reasonable cause for revocation of a license. For a determination adequate to support revoking a license, a non-jury district court proceeding provides all the necessary elements of due process." Id. at 111.

Similarly, in Conley v. Kentucky, 75 F. Supp. 2d 687 (1999), the plaintiff was convicted by guilty plea of two counts of assault, three counts of wanton endangerment, and driving under the influence of alcohol. Id. at 688. The convictions arose out of an automobile collision. Id. Several days after the plaintiff pled guilty, the plaintiff's driver's license was suspended. Id. The district court found that this suspension did not violate the plaintiff's procedural due process rights because the plaintiff "had the opportunity to participate in a meaningful manner in the revocation process during the 'full judicial hearing in connection with each of his traffic convictions.'" Id. at 689 (quoting Dixon, 75 F. Supp. 2d 687)). The district court went on to state that "[d]ue process does not require a separate hearing from the criminal conviction proceedings prior to or after the license revocation became effective.'" Id. (quoting Div. of Driver Licensing v. Bergmann, 740 S.W.2d 948, 951 (Ky. 1987)).

The Maryland Court of Special Appeals' decision in Knoche v. State, 908 A.2d 1247, 1252 (Md. 2006) also speaks to this issue. In Knoche, the plaintiff, a licensed

dentist, accumulated unpaid income tax liability of $166,591.91 during the years 1980-1991. Id. at 1249-50. In 2003, the Maryland General Assembly enacted the Budget Reconciliation and Financing Act of 2003, in an effort to "ensure tax compliance by not renewing certain State licenses if the license holders had not paid their taxes." Id. at 1250. The statute directed various licensing boards to verify that a professional license renewal applicant "has paid all undisputed taxes" prior to granting the renewal application. Id. In 2004, the plaintiff received a letter from the Maryland State Board of Dental Examiners, informing him that his dental license would not be renewed because of his unpaid tax liability. Id. The plaintiff contacted the Maryland Comptroller, and requested a hearing, but was told that no hearing process was available. Id.

Thereafter, the plaintiff filed an action in Maryland state court, seeking a declaratory judgment that the Budget Reconciliation and Financing Act was unconstitutional because it denied him the right to work in his chosen profession without a hearing. Id. at 1250-51. The trial court found that the statute did not violate the plaintiff's procedural due process rights, and the Maryland Court of Special Appeals affirmed. Id. at 1252. The Court of Special Appeals noted that the Maryland Tax Code provided procedures for a taxpayer to dispute the amount of his tax liability at the time that the taxes were first assessed, including a right of appeal to the Maryland Tax Court, and subsequent judicial review in a Maryland trial court. Id. at 1253. Since the Budget Reconciliation and Financing Act's license non-renewal procedures only applied to "undisputed" tax liability, i.e., liability for which "licensees . . . have either exhausted their procedural

rights [or] lost or waived their rights to a hearing," the Court of Special Appeals held that the Act afforded the necessary due process. Id.; see also Crum v. Vincent, 493 F.3d 988, 993 (8th Cir. 2007); Pickell v. Sands, 2012 WL 6047286, at *7 (E.D. Cal. Dec. 5, 2012).

Here, as in Almeida, Conley, and Knoche, the antecedent facts supporting the revocation of plaintiff's driver's license have already been established through prior proceedings. In this regard, defendants provide Notices of Proposed Assessment for the tax years 1995-2012, see Mot. Dismiss Ex. A, along with the declaration of Emilio Lopez, a Principal Compliance Representative for the FTB, see Lopez Decl. Lopez certifies that these Notices of Proposed Assessment were sent to plaintiff for each of the corresponding tax years. Id. ¶ 6.[6] Pursuant to the California Revenue & Taxation Code, a taxpayer may file a written protest against a deficiency assessment "[w]ithin 60 days after the mailing of each notice of proposed deficiency assessment." Cal. Rev. & Tax. Code § 19041.[7] If a

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[6] Defendants request that the Court take judicial notice of these records. The Court may properly take judicial notice of the records of a public agency when considering a Rule 12(b)(6) motion. See Torrance Redevelopment Agency v. Solvent Coating Co., 763 F. Supp. 1060, 1066 (C.D. Cal. 1991). Defendants' request is accordingly GRANTED.

[7] Under California law, "a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." Cal. Evid. Code § 641. Plaintiff does not allege that he did not receive these notices from the FTB, or that he was otherwise unaware that the FTB was assessing taxes against him from 1995 to 2012. Accordingly, the Court presumes that plaintiff received the notices that defendants append to their motion to dismiss.

protest is filed, the FTB must "reconsider the assessment of the deficiency and, if the taxpayer has so requested in his . . . protest, . . . grant the taxpayer or his or her authorized representatives an oral hearing." Id. § 19044. A taxpayer may appeal an unfavorable decision to the State Board of Equalization. Id. § 19045. However, if "no protest is filed, the amount of the proposed deficiency assessment becomes final upon the expiration of the 60-day period provided in Section 19041." Id. § 19042. These provisions of the Revenue and Taxation Code demonstrate that, as in Knoche, procedures exist for a taxpayer to dispute the amount of his tax liability during the 60 days following the FTB's mailing of a notice of deficiency. The Due Process Clause does not require that plaintiff be permitted a second hearing on the same subject matter prior to the revocation of his driver's license. See, e.g., Knoche, 908 A.2d at 1253.

Plaintiff resists this conclusion on the grounds that a pre-revocation hearing would provide him with the opportunity to demonstrate that his total tax liability is actually less than $100,000. Compl. ¶ 26. Specifically, plaintiff alleges that the FTB is barred from collecting a portion of plaintiff's tax liability by the statute of limitations set forth in Revenue & Taxation Code Section 13680. That section is inapplicable here, because it pertains only to the collection of gift and estate taxes, and not to the collection of income taxes. See id. (referring to "collection of any tax imposed by this part" (emphasis added)); see generally Cal. Rev. & Tax. Code, Part 8 (referring to "Gift and Death taxes"). Moreover, even if Section 13680 were applicable, plaintiff does not explain how an error by the FTB in calculating his total

tax liability gives rise to a violation of his procedural due process rights with respect to the enforcement of Sections 19195 and 494.5.

Plaintiff next argues that a hearing is required prior to the revocation of a driver's license because Section 494.5 provides that a licenseholder can obtain relief from a license revocation if he can demonstrate that he is "unable to pay the outstanding tax obligation due to a current financial hardship," or if he has entered into a payment plan with the FTB. See Cal. Bus. & Prof. Code § 494.5(h)(1)-(3). According to plaintiff, "a hearing could provide information and evidence" that would assist in the formulation of an installment plan, or would assist in the determination of financial hardship.

The Court finds this argument unpersuasive. Section 494.5 provides taxpayers with the opportunity to demonstrate financial hardship through written submissions to the FTB or the State Board of Equalization. Id. § 494.5(h). Similarly, Section 19195 states that a taxpayer's name shall not be included on the List if the taxpayer has "contacted the [FTB] and resolution of the delinquency has been arranged." Cal. Rev. & Tax. Code § 19195(f)(1). That a hearing might be helpful in making these determinations is immaterial; rather, the relevant inquiry is whether the Due Process Clause requires a hearing. The Court answers this question in the negative. As the Court has already found, the procedural requirements of the Due Process Clause are satisfied here because plaintiff had the opportunity to contest his tax liability at the time that the FTB sent him notices of proposed assessment for each of the tax years 1995-2012.

## II. Retroactivity[8]

Second, plaintiff alleges that these statutes apply retroactively because Section 494.5 was passed in 2012, but applies to plaintiff's tax liability incurred since 1995. Id. ¶ 22. Thus, at the time that plaintiff incurred the tax liability at issue, he was not on notice that failure to pay those taxes could result in the loss of a driver's license. Id. ¶ 24. Plaintiff argues that Sections 19195 and 494.5 therefore constitute retrospective punishment in contravention of the Due Process Clause, because plaintiff could not have known at the time that he incurred tax liability pre-dating 2012 that this liability would eventually result in the revocation of his driver's license.

The Court finds this argument unpersuasive. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994). "The Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation." Id. at 266. However, "[a] statute is not made retroactive merely

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[8] Plaintiff asserts that these statutes' retroactivity offends the procedural component of the Due Process Clause. It appears that the Supreme Court has viewed challenges to a statute's retroactivity as arising under the substantive component of the Due Process Clause. See Eastern Enters. v. Apfel, 524 U.S. 498 (1998). The Court accordingly analyzes plaintiff's claim under substantive due process principles, but discusses it in this section so that the organization of this order tracks the organization of plaintiff's complaint.

because it draws upon antecedent facts for its operation." Cox v. Hart, 260 U.S. 427, 435 (1922). Rather, the relevant question is "whether the new provision attaches new legal consequences to events completed before its enactment." Landgraf, 511 U.S. at 269-70. In Bhalerao v. Illinois Department of Financial and Professional Regulations, 834 F. Supp. 2d 775, 780 (N.D. Ill. 2011), the plaintiff physician challenged an Illinois statute, enacted in 2011, mandating the revocation of the licenses of health care workers upon conviction of a "criminal battery against any patient." The plaintiff, who was convicted of misdemeanor battery against a patient in 2000, argued that the revocation of his license violated the Due Process Clause because it was punishing him for conduct that predated the enactment of the statute. Id. at 782-83. The Bhalerao court rejected the plaintiff's claim, finding that the Illinois statute did not "impose new legal consequences to completed events such as Plaintiff's conviction," but rather "looks prospectively at Plaintiff's right to continue practicing medicine in the future." Id. at 783. The court noted that the statute did not "impinge on the right that Plaintiff had in the preceding years to practice—for example, by divesting him of any profits that he earned prior to its enactment or deeming unauthorized his practice of medicine during the time between his conviction and the revocation of his license." Id.

This case is analogous to Bhalerao. Sections 19195 and 494.5 do not impose additional penalties on plaintiff for his past failure to pay taxes, such as through the levying of fines based solely on plaintiff's past unpaid tax liability. Rather, these statutes "look[] prospectively at [p]laintiff's right to continue" holding

a driver's license in the future. See id. Accordingly, the Court finds that these statutes do not violate the Due Process Clause by "attach[ing] new legal consequences to events completed before [their] enactment." See Landgraf, 511 U.S. at 265.[9]

2. Equal Protection

The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Under traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest." United States. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973). This type of analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Commc'ns., Inc., 508 U.S. 307, 314 (1993). Moreover, the Supreme Court has "repeatedly pointed out that '[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes.'" Armour v. City of Indianapolis, 132 S. Ct. 2073, 2080 (2012) (quoting

[9] The Court recognizes that another court in this district reached a contrary conclusion in Berjikian v. Franchise Tax Board, 2:13-cv-06301-DDP-JCGx (C.D. Cal. Feb. 20, 2014). However, the Court finds Bhalerao to be more persuasive for the reasons stated herein.

Regan v. Taxation With Representation of Wash., 461 U.S. 540, 547 (1983)).

Here, plaintiff contends that the combined operation of Section 19195 and Section 494.5 arbitrarily singles out California's top 500 tax delinquents and subjects them to special sanctions. Plaintiff further avers that this classification is not rationally related to the collection of tax revenue. Compl. ¶¶ 32-33. The Court disagrees. Plaintiff does not allege that Section 19195 imposes a suspect classification, such as a classification based on race or national origin. Cf. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Accordingly, the Court considers whether Section 19195's delineation of California's top 500 tax delinquents is "rationally related to a legitimate governmental interest." See Moreno, 413 U.S. at 533. The Court concludes that it is.

First, California has a legitimate governmental interest in the effective collection of taxes. See Jolly v. United States, 764 F.2d 642, 646 (9th Cir. 1985) (noting that the government "obviously has a powerful interest in the prompt collection of revenue"(internal quotation marks omitted)). Next, the California Legislature's decision to identify the 500 individuals and corporations with the greatest unpaid tax liability under Section 19195, and impose particular sanctions on that group through Section 494.5, is rationally related to that interest because it seeks to provide additional incentives for the persons and corporations who owe the most taxes to pay what they owe, and do so promptly. Statutory schemes in which the legislature chooses, as here, to proceed incrementally in addressing a problem have consistently been upheld

by the federal courts. See, e.g., Beach Commc'ns., 508 U.S. at 316 (noting that "the legislature must be allowed leeway to approach a perceived problem incrementally"); Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (observing that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind").

Plaintiff resists this conclusion, arguing that it is irrational and arbitrary for the 500th person on the List, who according to plaintiff owes $167,112.05, to be subject to sanctions under Section 494.5, while tax delinquents who owe less than this amount are not. This argument fails because, in fashioning incremental solutions to societal problems, the Legislature "ha[s] to draw the line somewhere." Beach, 508 U.S. at 316. The Equal Protection Clause does not require that a state "draw the perfect line nor even to draw a line superior to some other line it might have drawn." Armour, 132 S. Ct. at 2083. Here, at the very least, it was rational for the Legislature to draw the line at the "top 500" in the interests of "administrative convenience" in identifying the delinquent taxpayers who should be subject to additional sanctions. See Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 511-12 (1937) (upholding tax exemption for businesses with fewer than eight employees because the legislature could have reasonably found that "the large number of small employers and the paucity of their records of employment would entail greater inconvenience in the collection and verification of the tax than in the case of larger employers"). Accordingly, the Court finds that

Sections 19195 and 494.5 do not violate the Equal Protection Clause as to plaintiff.[10]

Plaintiff resists this conclusion by arguing that the present case is analogous to Deibler v. City of Rehoboth Beach, 790 F.2d 328 (3d Cir. 1986). There, the plaintiff challenged a provision of the charter of the City of Rehoboth Beach, Delaware, which required that a candidate for the position of commissioner be a "nondelinquent taxpayer and freeholder." Id. at 329. The City argued that the provision served two legitimate government interests: screening of candidates to ensure that those who run for office have "the necessary commitment to the well-being of the City," and "public respect for city government." The Third Circuit rejected the City's arguments. It first held that the non-delinquency provision was not rationally related to the screening of candidates because an "individual's decision to pay taxes does not logically reflect his commitment to the city," but may "rest solely on economic, ideological or other personal grounds." Id. at 335. Next, the Third Circuit held that the provision was not rationally related to the "public respect for city government" interest because the provision actually decreased respect for the City government by "den[ying] voters the opportunity to establish standards for their representatives through the power of the ballot box." Id. at 336.

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[10] This conclusion is consistent with Berkjikian, 2:13-cv-06301-DDP-JCGx (C.D. Cal. Feb. 20, 2014), in which the court found that Sections 19195 and 494.5 bear "a rational relationship to . . . the collection of outstanding taxes," and that the "top 500" classification is not arbitrary.

Deibler is inapposite. The Ninth Circuit has held that the effective collection of revenue is a legitimate governmental interest. Jolly, 764 F.2d at 646. As set forth above, Sections 19195 and 494.5 are rationally related to that interest because they create a strong incentive for citizens with substantial unpaid tax liability to resolve that liability, and to do so expeditiously. Moreover, the present case does not implicate the concerns present in Deibler about the democracy-chilling effects of imposing restrictions on who may become a candidate for political office. See Deibler, 790 F.2d at 336. Accordingly, plaintiff's reliance on Deibler is unavailing.

3. Privileges or Immunities Clause

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. Here, plaintiff alleges that Sections 19195 and 494.5 deprive him of the ability to drive in the State of California, "in violation of the privileges and immunities guaranteed [by] the Fifth and Fourteenth Amendments to the United States Constitution." Compl. ¶ 36.[11] The complaint further alleges that these statutes' "irrational classifications" deprive him of his "right to equal protection." Id. ¶ 37.

The Court has already addressed plaintiff's equal protection argument in the previous section, and does

[11] Plaintiff cites no cases and advances no argument in support of this claim, either in his opposition brief to defendants' motion to dismiss, or his briefing in support of his motion for a preliminary injunction.

not revisit it here. To the extent that plaintiff contends that these statutes otherwise violate the Privileges or Immunities Clause, the Court disagrees. In the Slaughter-House Cases, the Supreme Court held that the Privileges or Immunities Clause "protects only those rights 'which owe their existence to the Federal Government, its National character, its Constitution, or its laws.'" McDonald v. City of Chicago, 130 S. Ct. 3020, 3028 (2010) (quoting the Slaughter-House Cases, 16 Wall. 36 (1873)). Under this "narrow reading," see id., the Court stated that the Clause protects things such as the right

> to come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions . . . [and to] become a citizen of any State of the Union by a bonafide residence therein, with the same rights as other citizens of that State.

Id. (quoting the Slaughter-House Cases, 16 Wall. at 79-80 (internal quotation marks omitted). The Ninth Circuit has noted that "[t]he courts and legal commentators have interpreted [the Slaughter House Cases] as rendering the Clause essentially nugatory." Paciulan v. George, 229 F.3d 1226, 1229 (9th Cir. 2000). Indeed, the Supreme Court in McDonald held that, "[f]or many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause." 130 S. Ct. at 3030-31. Thus, the Privileges or Immunities Clause does not

protect "rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by State law." Glicker v. Mich. Liquor Control Comm., 160 F.2d 96, 98 (6th Cir. 1947) (holding that Privileges or Immunities Clause did not provide cause of action to challenge revocation of a liquor license because such a license is "derived solely from the relationship of the citizen and his state established by State law").[12]

Like the liquor license in Glicker, a driver's license is a "right pertaining to state citizenship," as such licensing is traditionally administered by the states. No authority supports plaintiff's claim for a violation of the Privileges or Immunities Clause based on the revocation of a driver's license, because a driver's license is not a right "which owe[s] its existence to the Federal Government, its National character, its Constitution, or its laws." The Slaughter-House Cases, 16 Wall. at 79-80. Accordingly, the Court finds that the complaint fails to state a claim under Section 1983 for violation of the Privileges or Immunities Clause.

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[12] The primary exception is in the context of the right to interstate travel, where the Supreme Court held in Saenz v. Roe that the Privileges or Immunities Clause protects the right of "travelers who elect to become permanent residents [of a state] the right to be treated like other citizens of that State." 526 U.S. 489, 500 (1999). Here, plaintiff does not argue that Sections 494.5 and 19195 are impairing his right to become a permanent resident of California, or to travel freely through states other than California. Accordingly, Saenz is inapposite to the present case.

4. Prohibition Against Bills of Attainder

The United States Constitution provides that "[n]o State shall . . . pass any Bill of Attainder." U.S. Const. art. I, § 10, cl. 1. "A bill of attainder is 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'" SeaRiver Maritime Financial Holdings, Inc. v. Mineta, 309 F.3d 662, 672 n.6 (9th Cir. 2002) (quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977)). Plaintiff contends that the combined effect of Sections 19195 and 494.5 is to single out the top 500 tax delinquents by name, and then to impose legislative punishment on that group. Compl. ¶¶ 38-42. In other words, plaintiff contends that Section 19195 and 494.5 collectively constitute a bill of attainder. For the reasons set forth below, the Court disagrees.

In order for a statute to be deemed a bill of attainder, it must possess "[t]hree key features." SeaRiver, 303 F.3d at 668.[13] The statute must: "(1) specif[y] the affected persons, and (2) inflict[] punishment (3) without a judicial trial." Id. (citing Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 847 (1984)). As set forth below, the

[13] The United States Constitution contains two provisions prohibiting the passage of bills of attainder—one directed at the federal government, and the other against the states. The Ninth Circuit has held that the same analysis is applicable to both provisions. See SeaRiver Maritime Financial Holdings, Inc. v. Mineta, 309 F.3d 662, 672 n.6 (9th Cir. 2002). The Court accordingly relies on cases interpreting both provisions when considering whether Sections 19195 and 494.5 constitute bills of attainder.

Court finds that Sections 19195 and 494.5 do not possess the first or second "key features" of a bill of attainder. Accordingly, the Court does not address whether these statutes possess the third such feature.

a. Specifying Affected Persons

In determining whether a statute or group of statutes "specifies . . . or singles . . . out" affected persons, the Court considers four nonexclusive factors. As set forth below, the Court concludes that the first, third, and fourth factors weigh against the conclusion that Sections 494.5 and 19195 constitute a bill of attainder. Id. First, the Court "look[s] to whether the statute or provision explicitly names the individual or class, or instead, describes the affected population in terms of general applicability." Id. Here, Sections 19195 and 494.5 do not identify plaintiff by name. Rather, Section 19195 is "couched in general terms applicable" to the group of persons who constitute the top 500 tax delinquents in California, and Section 494.5 simply refers to that list. See id.

Next, the Court considers whether the class of persons affected by the statutes "was easily ascertainable" when the statutes were enacted. Id. The Court concludes that the class of persons affected by Sections 494.5 and 19195 was easily ascertainable at the time of passage because total delinquent tax liability can presumably be determined from a mathematical calculation based on government records.

The third inquiry examines whether "the individual is . . . described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons," id. (quoting Selective Serv. Sys.,

468 U.S. at 847), or whether the statutes "carr[y] the potential to encompass a larger class than the individual or group allegedly targeted," id. Sections 494.5 and 19195 do not operate "only as a designation of particular persons" because, "[i]n time, [these statutes] ha[ve] the potential to impact a greater and growing number of" persons. See id. In this regard, the FTB's list of the top 500 tax delinquents is not a static list; Section 19195 directs the FTB to make the List available "twice each calendar year," Rev. & Tax. Code § 19195(a), and the 500 largest tax delinquencies in California will not remain static from year to year. Thus, the persons identified in a list issued in 2014 will not necessarily be the same persons identified in a list issued in another year. Section 19195 (and, by extension, Section 494.5) therefore have the potential to affect a growing number of persons over time, and is not limited to specific group in existence at the time of the statute's enactment.

Finally, the fourth factor examines whether the provisions at issue "define[] the specific class of persons affected by the 'irreversible acts committed by them.'" Id. at 671 (quoting Selective Serv. Sys., 468 U.S. at 848). "If the defining act is irrevocable, the individual or class may not escape the effect of the legislation by correcting the past conduct, thereby exiting the targeted class." Id. Here, Sections 19195 and 494.5 do not focus on irrevocable conduct because Section 19195 mandates the removal of a person from the List if that person makes payment arrangements with the FTB for satisfaction of the delinquent tax liability, files for bankruptcy protection, or otherwise resolves the tax liability through communication with the FTB. See Rev. & Tax. Code § 19195(b). By taking one of these

steps, a person on the List can correct his or her past conduct, "thereby exiting the targeted class." See id.; accord Selective Serv. Sys., 468 U.S. at 851 (holding that statute barring students who failed to register for the draft from government-sponsored financial aid was not irreversible because students could register for the draft after the statute's passage, thereby restoring their eligibility for aid).

As set forth above, three of the four SeaRiver factors weigh against a finding that Sections 494.5 and 19195 "specif[y] the affected persons." See SeaRiver, 309 F.3d at 668. The Court therefore concludes that these statutes do not bear the "specificity" mark of a bill of attainder.

b. Infliction of Punishment

The Court next considers whether these statutes "inflict punishment on the specified individual or group." See Selective Serv. Sys., 468 U.S. at 851. "Three inquiries determine whether a statute inflicts punishment on the specified individual or group: '(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" SeaRiver, 309 F.3d at 673 (quoting Selective Serv. Sys., 468 U.S. at 852).

The Court first concludes that Sections 19195 and 494.5 do not fall within the historical meaning of legislative punishment because they do not impose "imprisonment, banishment, [or] the punitive

confiscation of property," nor do they "bar[] . . participation . . . in specific employments or professions." Selective Service Sys., 468 U.S. at 852. Rather, they merely cause the revocation of a license, which numerous courts have found to fall outside the traditional definition of punishment. See Club Misty, Inc. v. Laski, 208 F.3d 615, 617 (7th Cir. 2000) ("[N]or is the revocation of a license a characteristically punitive sanction."); Brookpark Entertainment, Inc. v. Taft, 951 F.2d 710, 717 (6th Cir. 1991), superseded by statute on other grounds by Ohio Rev. Code §§ 4303.02, et seq. (affirming dismissal of bill of attainder claim arising from revocation of liquor license by popular referendum); cf. Rivera v. Pugh, 194 F.3d 1064, 1068 (9th Cir. 1999) ("[L]icense revocation is the loss of a privilege, rather than a punishment.").

Next, the Court concludes that Sections 19195 and 494.5 "reasonably can be said to further nonpunitive legislative purposes." See SeaRiver, 309 F.3d at 674. This is so because it is plain that these statutes are designed to provide a strong incentive for persons with substantial delinquent tax liability to pay what they owe. A person falling within the ambit of Section 19195 can avoid adverse consequences altogether by making arrangements with the FTB for the resolution of unpaid tax liability. As a result, these statutes are "plainly a rational means to improve compliance" with the legal requirement to pay taxes because they condition the holding of a driver's license on the resolution of unpaid tax liability. See Selective Serv. Sys., 468 U.S. at 854 (finding that statute withholding student aid from persons who failed to register for the draft furthered nonpunitive legislative goals because "[c]onditioning receipt of . . . aid on registration . . .

would be a strong tonic to many nonregistrants"). Thus the Court finds that Sections 19195 and 494.5 do not inflict punishment because revocation of a license does not fall within the historical definition of punishment, and these statutes can reasonably be said to further nonpunitive legislative purposes.[14]

In sum, the Court finds that Sections 494.5 and 19195 do not contain the "specificity" or "punishment" features of a bill of attainder, and therefore do not constitute a bill of attainder. See Selective Serv. Sys., 468 U.S. at 856 (holding that law was not bill of attainder because it did not single out an identifiable group and did not inflict punishment).

## III. PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

As stated in Section II, the Court finds that all of plaintiff's claims are subject to dismissal for failure to state a claim. Moreover, as set forth in Section IV below, this dismissal shall be without leave to amend. Accordingly, the Court finds that plaintiff's motion for a preliminary injunction should be denied without prejudice as moot.

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[14] The Court has been unable to locate any legislative history materials that bear on the legislative intent behind Sections 494.5 and 19195. However, given that license revocation does not fall within the traditional definition of punishment, and that the plain text of the statutes evinces an intent to pursue legitimate nonpunitive goals, the Court is persuaded, even in the absence of legislative record materials, that these statutes do not inflict punishment.

## IV. CONCLUSION

In accordance with the foregoing, defendants' motion to dismiss is hereby GRANTED. In a tentative order distributed prior to oral argument on these motions, the Court stated that it would grant plaintiff leave to amend his complaint. However, at oral argument, plaintiff stated that he did not believe that he could amend his complaint to plead additional facts that would correct what the Court had found to be the legal deficiencies in his claims. Accordingly, plaintiff requested that the Court immediately enter judgment in favor of defendants. Based on plaintiff's request, the complaint is dismissed without leave to amend. Each party shall bear its own attorney's fees and costs. Defendants shall lodge a proposed form of judgment no later than **August 12, 2014**.

Plaintiff's motion for a preliminary injunction is DENIED without prejudice as moot.

IT IS SO ORDERED.

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## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION**

**CV 14-1960-CAS(SHx)**

**[Filed August 18, 2014]**

| | |
|---|---|
| ERNEST J. FRANCESCHI, JR. , Plaintiff, | ) |
| v. | ) |
| JOHN CHIANG, President of California Franchise Tax Board in his Official Capacity; JEROME E. HORTON, Board Member of the California Franchise Tax Board in his Official Capacity; MICHAEL COHEN, Board Member of the California Franchise Tax Board in his Official Capacity; GEORGE VALDEVERDE, Director of the California Department of Motor Vehicles in his Official Capacity, Defendants. | ) |

**~~[PROPOSED]~~ JUDGMENT AND ORDER**

Date: August 4, 2014
Time: 10:00 a.m.
Courtroom: 5

Judge: Hon. Christina A. Snyder
Action Filed: 3/14/2014

The above-entitled matter came on calendar in Courtroom 5 on August 4, 2014, Judge Christina A. Snyder presiding.. Attorney Ernest J. Franceschi, Jr. appeared in pro se and attorney Leslie Branman Smith, Deputy Attorney General, State of California Department of Justice, appeared for defendants John Chiang, Jerome E. Horton, Michael Cohen and George Valverde.

The following events took place:

On May 28, 2014, plaintiff filed a Notice of Motion and Motion for Preliminary Injunction against defendants. Document 21.

On or about June 10, 2014, defendants filed an Opposition to Motion for Issuance of a Preliminary Injunction. Document 24.

On June 12, 2014, defendants filed a Notice of Motion and Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief. Document 26.

On July 7, 2014, plaintiff filed a Reply Motion for Preliminary Injunction against defendants, Document 30.

On July 7, 2014, plaintiff filed an Opposition to Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief, Document 31.

On July 21, 2014, defendants filed a Reply to Plaintiff's Opposition to defendants' Motion to Dismiss, Document 34.

Both motions were scheduled to be heard on August 4, 2014 at 10:00 a.m., Document 33.

The matter came on for hearing on August 4, 2014, before the Honorable Christina A. Snyder. After reviewing all of the documents filed in this matter and after hearing oral argument, the Court ruled that the defendants' Motion to Dismiss Plaintiff's Complaint was granted without leave to amend. The Court also found that plaintiff's Motion for a Preliminary Injunction should be denied without prejudice as moot.

THE COURT HEREBY ORDERS:

1. Judgment in favor of the defendants John Chiang, Jerome E. Horton, Michael Cohen and George Valverde.

2. All parties to bear their own costs.

Dated: August 18, 2014

/s/ Christina A. Snyder
Christina A. Snyder
Judge of the Central District Court
of California

## APPENDIX D

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 14-56493**
**D.C. No. 2:14-cv-01960-CAS-SH**
**Central District of California, Los Angeles**

**[Filed August 1, 2018]**

ERNEST JOSEPH FRANCESCHI, JR., Attorney, an individual,
Plaintiff-Appellant,

v.

BETTY T. YEE, President of California Franchise Tax Board in her Official Capacity; GEORGE RUNNER, Board Member of California Franchise Tax Board in his Official Capacity; JEAN SHIOMOTO, Director of California Department of Motor Vehicles in her Official Capacity; MICHAEL COHEN, Board Member of California Franchise Tax Board in his Official Capacity,
Defendants-Appellees.

ORDER

Before: HAWKINS, PARKER,[*] and IKUTA, Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing.

Judge Ikuta has voted to deny the petition for rehearing en banc, and Judges Hawkins and Parker have so recommended. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc are DENIED.

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[*] The Honorable Barrington D. Parker, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

## APPENDIX E

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 16-56337**
**D.C. No. 2:15-cv-04793-RGK-RAO**

**[Filed April 11, 2018]**

KEITH R. DEORIO, an individual,
Plaintiff-Appellant,

v.

BETTY T. YEE, President of the California Franchise Tax Board in her Official Capacity; et al.,
Defendants-Appellees.

MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted November 15, 2017
Pasadena, California

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: HAWKINS, PARKER,[**] and IKUTA, Circuit Judges.

Plaintiff-Appellant Keith DeOrio appeals from a judgment of the United States District Court for the Central District of California. The District Court granted summary judgment in favor of Defendants-Appellees, dismissing the Appellant's claims: (i) a procedural due process challenge to Section 19195 of the California Revenue and Taxation Code ("Section 19195") and Section 494.5 of the California Business and Professions Code ("Section 494.5") and (ii) a Fourth Amendment claim regarding an investigation into the Appellant's medical center and the Appellant's subsequent arrest on suspicion of the unlicensed practice of medicine.

With respect to the Appellant's procedural due process challenge, we conclude that it fails for substantially the reasons stated in *Franceschi v. Yee*, No. 14-56493, slip op. at 9–13 (9th Cir. April 11, 2018). First, procedural due process does not require a second, pre-suspension hearing when the Appellant had a full and fair opportunity to dispute his tax delinquency each year when assessed (and, indeed did so in certain years). *See id.* Second, Section 494.5 is not retroactive because it is the *current refusal* to discharge the tax obligations that can subject the taxpayer to license revocation. *See id.* at 18–19. Additionally, we find no merit in the Appellant's contention that he is

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[**] The Honorable Barrington D. Parker, United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

statutorily entitled to license reinstatement because Section 495.4 contains no such requirement.

We see no merit to the Appellant's Fourth Amendment claim. First, the undercover operations in question by Investigator McKenzie fit squarely within the invited informer doctrine, as the District Court correctly concluded. *See Maryland v. Macon*, 472 U.S. 463, 470 (1985) ("An undercover officer does not violate the Forth Amendment merely by accepting an offer to do business that is freely made to the public."). Second, there was ample probable cause for the Appellant's arrest. For example, as the District Court correctly concluded, Dr. Briones-Colman's expert opinion supports probable cause. Dr. Briones-Colman reviewed the transcripts of the undercover recordings, the advertising material, and Investigator Fuller's investigation report in reaching her conclusion that the Appellant had unlawfully held himself out as a physician and had practiced medicine without a license. *See United States v. Underwood*, 725 F.3d 1076, 1081 (9th Cir. 2013) (expert opinions may of offered in a probable cause analysis).

Third, we find no merit in the Appellant's contention that Fuller engaged in judicial deception. The Appellant contends that Fuller deceived Assistant Deputy District Attorney Fong into pursuing the arrest of the Appellant. The Appellant rests his argument on an email exchange between a government attorney representing the investigator defendants and Deputy District Attorney Campbell, who took over the Appellant's criminal case but who played no role in securing the warrant for the Appellant's arrest. As the District Court correctly concluded, the email exchange

is unreliable hearsay written nearly a year after the arrest warrant by someone who was trying to reconstruct the thought process of someone who was involved in the arrest of the Appellant. As such, it is mere speculation, and insufficient to raise a genuine issue of material fact whether Fuller "deliberately or recklessly made false statements or omissions that were material to the finding of probable cause." *KRL v. Moore*, 384 F.3d 1105, 1117 (9th Cir. 2004) (citation omitted).

We have considered the Appellant's other arguments and conclude they are meritless.

**AFFIRMED.**

## APPENDIX F

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**CIVIL MINUTES - GENERAL**

**Case No. CV-15-4793-RGK (RAOx)**

**[Filed July 28, 2016]**

Case No. CV-15-4793-RGK (RAOx)

Date July 28, 2016

Title *Keith DeOrio v. Betty Yee et al.*

Present: The Honorable R. GARY KLAUSNER, UNITED.STATES DISTRICT JUDGE

Sharon L. Williams
Deputy Clerk

Not Reported
Court Reporter / Recorder

N/A
Tape No.

Attorneys Present for Plaintiffs:
Not Present

Attorneys Present for Defendants:
Not Present

**Proceedings:**

**(IN CHAMBERS) Order Re: Motion for Summary Judgment filed by Defendants Fuller and McKenzie (DE 53)**

## I. INTRODUCTION

On June 24, 2015, Keith DeOrio ("Plaintiff") filed suit against three sets of Defendants. The first group comprises board members on the California Franchise Tax Board: Betty Yee, Jerome Horton, Michael Cohen (collectively, "FTB Defendants"). The second group consists of members serving on the California Medical Board: David Sewell and Barbara Yaroslavsky (collectively, "Medical Board Defendants"). Finally, the third group contains two investigators working on behalf of the California Medical Board: Errol Fuller and Charlaine McKenzie (collectively, "Investigator Defendants").

Plaintiff alleges two claims. The first claim, brought only against the FTB Defendants and Medical Board Defendants, challenges the constitutionality of California Business and Professions Code Section 494.5. The second claim, brought only against Investigator Defendants, alleges a violation of Plaintiff's Fourth Amendment right to be free from unreasonable searches.

Presently before the Court is a motion for summary judgment filed by Investigator Defendants. For the following reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment.

## II. FACTUAL BACKGROUND

On October 1, 2014, Plaintiff was arrested at his medical clinic for practicing medicine without a license in the State of California. The investigation leading to arrest had been conducted by Defendants Fuller and McKenzie. Plaintiff contends that Defendants violated his Fourth Amendment rights because they did not have probable cause to arrest him. The Court recounts the salient points of the investigation below, beginning with the suspension of Plaintiff's medical license and culminating on the day Plaintiff was arrested.

### A. Suspension of Plaintiff's Medical License

In California, a delinquent taxpayer who accrues enough deficiencies with the Franchise Tax Board ("FTB") may find himself on a list of the top 500 tax delinquencies in the state. California Revenue and Taxation Code Section 19195 directs the FTB to "make available as a matter of public record at least twice each calendar year a list of the 500 largest tax delinquencies in excess of one hundred thousand dollars ($100,000)." Cal. Rev. & Tax. Code § 19195(a). Under California Business and Professions Code Section 494.5, state licensing agencies are required to suspend the occupational, professional, and driver's licenses of any individual appearing on the Top 500 List.

Plaintiff's name was published on the Top 500 List in April 2013, indicating that he owed over $352,680 in unpaid taxes. On May 24, 2013, the Medical Board sent Plaintiff a 90-day notice of its intent to suspend his medical license pursuant to section 494.5 because of his

placement on the Top 500 List. After rejecting Plaintiff's challenge to the license suspension, the Medical Board suspended Plaintiff's medical license effective August 30, 2013.

The practice of medicine without a license in California is a crime. Cal. Bus. & Prof. Code § 2052(a). An individual without a medical license may, however, provide complementary and alternative medicine as long as he discloses to clients that he is not a licensed physician. Cal. Bus. & Prof. Code § 2053.6(a)(1)(A). An individual providing alternative healthcare may not conduct "procedure[s] . . . that puncture[] the skin"or "[h]old out, state[], indicate[], advertise[], or impl[y] to a client or prospective client that he [] is a physician." Cal. Bus. & Prof. Code § 2053.5(a)(1), (8). Moreover, a CAM provider is prohibited from advertising his services using "the words 'doctor' or 'physician,' the letters or prefix 'Dr.,' the initials 'M.D.,' or any other terms or letters indicating or implying that he or she is a physician." Cal. Bus. & Prof. Code § 2054(a).

### B. Initial Complaints and Investigation

On August 12, 2013, even before Plaintiff's medical license was suspended for failure to pay his tax debt, the Medical Board received a complaint questioning Plaintiff's mental fitness to practice medicine. On September 27, 2013, the Medical Board received a second complaint from another patient who questioned Plaintiff's mental fitness and alleged that Plaintiff engaged in "bizarre" behavior. Both complaints were assigned to Defendant Fuller who interviewed the complainants in November 2013.

On October 21, 2013, Detective Fuller received additional information pertaining to Plaintiff from the Medical Board. Contained in the information was a "booklet" prepared by Plaintiff, which included a letter in which he disputed the validity of the 90-Day Notice of Suspension and the validity of the suspension of his medical license. In that same communication to the Medical Board, Plaintiff demanded that his medical license be cancelled instead of suspended.

It was only upon review of the materials sent to the Medical Board by Plaintiff that Defendant Fuller learned about Plaintiff's license suspension. As a result of learning that Plaintiff's license had been suspended a few months prior, Defendant Fuller's administrative investigation expanded to include a criminal investigation into whether Plaintiff was continuing to practice medicine despite the license suspension.

### C. The Sting Operations

On November 1, 2013, the Los Angeles County District Attorney granted investigators with the California Medical Board permission to surreptitiously record communications made in the course of a criminal investigation. With this authorization, the Medical Board conducted two sting operations to investigate Plaintiff's clinic, the DeOrio Wellness Center ("Clinic").

The first sting operation occurred on December 4, 2013, when Defendant McKenzie attended an appointment with Plaintiff using an assumed name and fake address. Before Defendant McKenzie could see Plaintiff, she was required to sign a membership agreement ("Membership Agreement," which failed to

disclose that Plaintiff lacked a medical license. The Membership Agreement also offered treatments such as intravenous vitamin therapy and prolo therapy injections. While at the Clinic, Defendant McKenzie received business cards, advertisements, and brochures referring to Plaintiff as "Dr. DeOrio" and "Keith DeOrio, M.D."

When Defendant McKenzie finally saw Plaintiff, she presented fabricated lab results indicating that she suffered from severe anemia. In response, Plaintiff recommended several homeopathic remedies and an emergency blood transfusion. According to Defendant McKenzie, Plaintiff also held himself out as a "medical doctor" and stated that he could perform a blood draw. Defendant McKenzie did not receive a blood draw, but she did purchase supplements recommended by Plaintiff.

The second sting operation occurred on March 20, 2014, when Defendant McKenzie returned to the Clinic for a second appointment with Plaintiff. She presented more fabricated lab results suggesting low hemoglobin levels. Defendant McKenzie claims that Plaintiff again offered to draw blood, but she refused. Much like she did at the first visit, Defendant McKenzie purchased supplements during the second appointment. She recorded both sting operations.

Plaintiff largely acknowledges Defendants' version of events, but he disputes two points. First, he argues the Membership Agreement properly disclosed that he is not a licensed medical doctor. Second, he claims that he neither advertised prolotherapy injections nor stated that he could draw blood; rather, he merely offered to check Defendant McKenzie's blood work if

she obtained a blood draw from another physician or lab.

Once he had collected enough evidence, Defendant Fuller sought an expert opinion from Dr. Felicia Briones-Colman as to whether Plaintiff had been practicing medicine without a license. In forming her opinion, Dr. Briones-Colman reviewed the following material: complaints from Plaintiff's former patients, audio transcripts of both sting operations, Defendant Fuller's investigation report, and advertising material taken from the Clinic. On May 14, 2014, Dr. Briones-Colman submitted a report in which she concluded that Plaintiff had engaged in the unlicensed practice of medicine and extremely departed from the medical standard of care in treating Defendant McKenzie.

**D. Arrest Warrant**

On September 15, 2014, Defendant Fuller presented his report and accompanying material to Assistant Deputy District Attorney ("ADDA") Karine Fong who prepared a felony complaint for arrest warrant alleging that Plaintiff had engaged in the practice of medicine without a license. Defendant Fuller claims in his declaration that he made no oral representations to ADDA Fong. He also states that she did not ask him any questions; she based her decision for an arrest warrant purely on the following information:

1. Brochures referring to Plaintiff as "Dr." and describing the Clinic as a "medical center . . . integrating the medicines of the world" without any disclaimer about the suspended license. (Fuller Decl. Ex. A-9, ECF No. 53.)

2. The Membership Agreement Defendant McKenzie signed, which identified Plaintiff as "Keith DeOrio M.D," and advertised procedures such as "intravenous vitamin therapy" and "prolotherapy." (Fuller Decl. Ex. A-16, ECF No. 53.)

3. Audio transcripts from the recorded undercover investigations. (Fuller Decl. Ex. A-11 and A-18, ECF No. 53.)

4. Dr. Briones-Colman's expert report. (Fuller Decl. Ex. A-21, ECF No. 53.)

5. Defendant Fuller's investigative report. (Fuller Decl. Ex. A, ECF No. 53.)

Ultimately, Judge Kathryn A. Solorzano reviewed the investigation report and attached material and signed the felony arrest warrant for the arrest of Plaintiff. Defendant Fuller did not present any other written materials to the Judge, nor did he make any oral representations to her regarding the investigation, the investigation report, or its attachments. Defendant McKenzie was not present at the meeting with either ADDA Fong or Judge Solarazano.

On October 1, 2014, Defendant Fuller, along with other Medical Board investigators, executed the arrest warrant. Defendant McKenzie was not involved in the execution of the arrest warrant. The Felony Complaint against Plaintiff was prosecuted but eventually transferred to the Santa Monica City Attorney as a misdemeanor for handling. The Santa Monica City Attorney's office ultimately dismissed the complaint.

## III. JUDICIAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(a), a court may grant summary judgment only where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Upon such a showing, the court may grant summary judgment on all or part of the claim. *See id.*

To prevail on a summary judgment motion, the moving party must show that there are no triable issues of material fact as to matters upon which it has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). On issues where the moving party does not have the burden of proof at trial, the moving party needs to show only that there is an absence of evidence to support the non-moving party's case. *See id.*

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. *Id.* at 324. Nor may the non-moving party merely attack or discredit the moving party's evidence. *See Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324.

## IV. DISCUSSION

Defendants argue that summary judgment is proper because there are no triable issues of fact on Plaintiff's Fourth Amendment claim. Plaintiff advances three theories supporting his Fourth Amendment Claim: (1) Defendants impermissibly conducted a warrantless

search of his clinic when they performed the undercover investigations, (2) Defendants lacked probable cause to arrest him, and (3) Defendant Fuller falsified information to obtain an arrest warrant.

### A. The Undercover Investigations Did Not Violate the Fourth Amendment

"The Fourth Amendment prohibits unreasonable searches and seizures in those areas in which a person has a 'reasonable expectation of privacy.'" *United States v. Nohara*, 3 F.3d 1239, 1241 (9th Cir. 1993). Plaintiff contends that Defendants violated his reasonable expectation of privacy by conducting two undercover investigations of the Clinic, which, according to Plaintiff, is a membership-only association not open to the public. The Court disagrees.

"A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." *Lewis v. United States*, 385 U.S. 206, 211 (1966). "An undercover officer does not violate the Fourth Amendment merely by accepting an offer to do business that is freely made to the public." *Maryland v. Macon*, 472 U.S. 463, 470 (1985) (holding that an undercover officer's investigation of an adult bookstore did not constitute a search because "[t]he officer's action in entering the bookstore and examining the wares that were intentionally exposed to all who frequent the place of business did not infringe a legitimate expectation of privacy"). As the Ninth Circuit explained, "The invited informer doctrine is part of a greater principle of fourth amendment jurisprudence: 'a person has no legitimate expectation of privacy in information he voluntarily turns over to

third parties.'" *United States v. Aguilar*, 883 F.2d 662, 697-98 (9th Cir. 1989) (collecting cases "permitting consensual recording of conversations without warrants").

The case of *United States v. Mayer*, aptly illustrates the invited informer doctrine. 503 F.3d 740 (9th Cir. 2007). In *Mayer*, an FBI agent launched an undercover investigation of the North American Man/Boy Love Association ("NAMBLA"). *Id.* at 745. After the agent was accepted as a member, he attended a NAMBLA conference not open to the public; in fact attendees "were told to say they were with the 'Wallace Hamilton Press' and to be discreet." *Id.* at 746. While at the conference, the agent surreptitiously recorded a conversation in which a fellow attendee admitted to engaging in sex tourism. *Id.* at 747. The government later prosecuted the attendee for sex crimes, and he moved to suppress his recorded statements, arguing that the agent's undercover investigation violated the Fourth Amendment. The Court rejected that argument and explained,

> Undercover operations, in which the agent is a so-called "invited informer," are not "searches" under the Fourth Amendment. Even though a conversation between an agent and a target may occur in an otherwise private environment, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Finding an expectation of privacy in the defendants' surreptitiously recorded comments would have been, we observed, "inimical to established fourth amendment doctrine."

*Id.* at 750. The Court also explained that the information obtained by the agent fell within the scope of NAMBLA's invitation. Because "NAMBLA invited [the agent] to join its group, participate in its holiday card program, attend its conferences, and participate in the privacy committee[,] . . . [the agent's] conversations with other members were well within the scope of that invitation, and NAMBLA had no legitimate expectation of privacy in them." *Id.* at 753–54.

The invited informer doctrine governs the instant dispute and compels a single result. Here, Defendant McKenzie posed as an undercover agent and entered Plaintiff's clinic to seek medical advice; in other words, she entered "for the very purposes contemplated by the occupant." *Lewis*, 385 U.S. at 211. The Clinic staff voluntarily provided Defendant McKenzie with advertising material, invited her to complete a Membership Agreement, and ultimately ushered her in to consult with Plaintiff. Throughout both visits, Defendant McKenzie surreptitiously recorded conversations in which Plaintiff voluntarily divulged information regarding medical procedures and different courses of treatment. Therefore, Defendants did not violate Plaintiff's Fourth Amendment rights because "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Mayer*, 503 F.3d at 750.

Plaintiff's contention that the Clinic is a membership-only association closed to the public does not alter this Court's conclusion. As *Mayer* teaches, an undercover agent who has been legitimately invited to join an organization—even a members-only, private organization—does not violate a reasonable expectation

of privacy by participating in group activities and interacting with fellow members. In *Mayer*, for instance, the undercover agent gained membership in NAMBLA (a private, members-only organization) and subsequently used his membership to surreptitiously record a private conversation with a fellow member. *Id.* at 747. The court there did not find a Fourth Amendment violation because the agent's conduct fell within the scope of NAMBLA's invitation. *Id.* at 753-54. Here, Defendant McKenzie was granted membership at the Clinic, which she then utilized to clandestinely record Plaintiff. Much like the agent in *Mayer*, Defendant McKenzie's behavior did not exceed the scope of the Clinic's invitation: she was afforded membership rights to consult with Plaintiff and other members about healthcare issues, and her conversation with Plaintiff involved exclusively healthcare issues.

Accordingly, the Court concludes that Defendants did not violate Plaintiff's Fourth Amendment rights by conducting the two undercover investigations.

### B. The Arrest Was Supported by Probable Cause

"Probable cause is established if, at the time the arrest is made, 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.'" *Bailey v. Newland*, 263 F.3d 1022, 1031 (9th Cir. 2001).

Before delving into the discussion of probable cause, the Court briefly explains the statutory violations for which Plaintiff was arrested. Under California law,

> [A]ny person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate . . . is guilty of a public offense, punishable by [a fine or imprisonment].

Cal. Bus. & Prof. Code § 2052(a). Although § 2052 criminalizes the unlicensed practice of medicine, California allows an exception for complementary and alternative medicine ("CAM") providers.

CAM providers must comply with certain requirements, two of which are particularly relevant in the instant action. First, a CAM provider may not conduct any procedures that puncture the skin or hold himself out to potential clients as a licensed physician. Cal. Bus. & Prof. Code § 2053.5(a)(1), (8). Second, not only must a CAM provider refrain from representing himself as a physician, but California imposes a further, affirmative obligation on CAM providers to "disclose in [any] advertisement that [they are] not licensed by the state as a healing arts practitioner." Cal. Bus. & Prof. Code § 2053.6. Failure to comply with either of these requirements constitutes unlicensed practice of medicine in violation of section 2052.

California law also prohibits a CAM provider from using "the words 'doctor' or 'physician,' the letters or prefix 'Dr.,' the initials 'M.D.,' or any other terms or

letters indicating or implying that he or she is a physician" on any "sign, business card, [] letterhead, or in an advertisement." Cal. Bus. & Prof. Code § 2054(a). A CAM provider who uses the proscribed terms is guilty of a misdemeanor. *Id.* The statute exempts two categories of unlicensed medical providers and allows them to use the otherwise prohibited terms: medical school graduates enrolled in postgraduate training programs and medical school graduates who hold active medical licenses issued by another jurisdiction. Cal. Bus. & Prof. Code § 2054(c).

In the present case, Defendants secured a warrant to arrest Plaintiff for the crime of "practicing medicine without a certification, in violation of Business and Professions Code section 2052(a)." (Fuller Decl. Ex. B, ECF No. 53.) In obtaining the arrest warrant, Defendants relied on evidence falling into three categories: (1) advertising material, (2) expert report, and (3) transcripts of the undercover investigation. As discussed below, the Court concludes that Defendants possessed ample evidence providing probable cause to believe that Plaintiff had violated several provisions of California law governing the practice of medicine.

1. *Advertising Material*

Several of the brochures Defendant McKenzie obtained from the Clinic's waiting room reference prolo therapy and neural therapy, both procedures involving injections. (Fuller Decl. Ex. A-9 at 43, 50-53, 65, ECF No. 53.) Additionally, the Membership Agreement that Defendant McKenzie signed includes the following language, "The . . . members have chosen Keith DeOrio M.D as the person best qualified to perform services to members of the Association which include . . .

Intravenous Vitamin therapy [and] Prolotherapy." (Fuller Decl. Ex. A-16 at 2, ECF No. 53.) The brochures and the Membership Agreement provide probable cause to believe that Plaintiff was violating California law, which prohibits unlicensed medical providers from conducting any "procedure on another person that punctures the skin." Cal. Bus. & Prof. Code § 2053.5(a)(1).

The advertising material and Membership Agreement also fail to divulge in plain language that Plaintiff is not a licensed physician. Therefore, these documents provide probable cause to warrant a belief that Plaintiff violated California law requiring a CAM provider to "[d]isclose to the client in a written statement using plain language . . . [t]hat he or she is not a licensed physician." Cal. Bus. & Prof. Code § 2053.6(a)(1)(A).

Finally, Plaintiff's business cards, Membership Agreement, and other advertising material refer to him as "Dr. DeOrio" or "Keith DeOrio, M.D." (Fuller Decl. Ex. A-9 at 42, 50-52, 62-63, ECF No. 53.) These documents provide probable cause to support Plaintiff's arrest for the separate misdemeanor offense of using "Dr." and "M.D." on advertising material without holding a medical license. Cal. Bus. & Prof. Code § 2054(a). The Court notes that the warrant Defendants obtained in this case sought Plaintiff's arrest for a felony violation of section 2052 (unlicensed practice of medicine) not a misdemeanor violation of 2054 (using prohibited terms in medical advertising). However, the arrest remains valid even if the evidence provides probable cause pertaining to a crime different than the crime for which Defendants secured the arrest

warrant. *United States v. Magallon-Lopez*, 817 F.3d 671, 675 (9th Cir. 2016) ("[I]f the facts support probable cause to arrest for one offense, the arrest is lawful even if the officer invoked, as the basis for the arrest, a different offense as to which probable cause was lacking."). Thus, the advertising material provides probable cause to arrest for violation of section 2054 even though that provision was not the basis for the arrest warrant.

Plaintiff does not dispute the authenticity of the evidence proffered by Defendants; instead, he advances four arguments to demonstrate that he fully complied with California law. First, Plaintiff argues, based on the following language, that the Membership Agreement properly disclosed he was not a licensed physician:

> I understand that the fellow members of the Association that provide health assessment, therapy, treatment and care, products, electronic instruments, etc. do so in the capacity of a fellow member and not in the capacity as a licensed health care provider. I further understand that within the Association no doctor-patient relationship exists

(Fuller Decl. Ex. A-16 at 2, ECF No. 53.) According to Plaintiff, the quoted paragraph fully complies with California's disclosure requirements because the language explains that fellow members at the clinic are not licensed health care providers or doctors. The Court disagrees. Nowhere in the Membership Agreement does Plaintiff clearly state that he, Keith DeOrio, is not a licensed physician. In fact, other sections of the document appear to convey the opposite impression.

For instance, the Membership Agreement states, "The . . . members have chosen Keith DeOrio M.D as the person best qualified to perform services to members of the Association . . . ." (Fuller Decl. Ex. A-16 at 2, ECF No. 53.) In another section, the document provides, "I understand that the *doctors*, *nurses*, and other providers who are fellow members of the Association are offering me advice . . . ." (Fuller Decl. Ex. A-16 at 2, ECF No. 53.) (emphasis added). At worst, the Membership Agreement actually suggests that Plaintiff is a licensed medical professional; at best, it creates enough ambiguity such that Plaintiff's role and status remain unclear. Either way, the Membership Agreement provides probable cause to believe that Plaintiff violated California law requiring each CAM provider to "[d]isclose to the client in a written statement using plain language . . . [t]hat he or she is not a licensed physician." Cal. Bus. & Prof. Code § 2053.6(a)(1)(A).

Second, Plaintiff contends that because he holds a medical degree, he is entitled to use the letters "M.D." after his name. Not so. California law prohibits an unlicensed healthcare provider from using the prefix "Dr." or the initials "M.D." on business cards or advertisements. Cal. Bus. & Prof. Code § 2054(a). Moreover, Plaintiff does not fit either of the two statutory exceptions: medical school graduates enrolled in postgraduate training programs or medical school graduates who hold active medical licenses issued by another jurisdiction. Cal. Bus. & Prof. Code § 2054(c). Thus, Plaintiff's use of "Dr." and "M.D." warrants a belief that he violated section 2054 and creates probable cause for his arrest.

Third, Plaintiff argues that California law requires him, as a CAM provider, to disclose his "educational, training, experience, and other qualifications regarding the services to be provided." Cal. Bus. & Prof. Code § 2053.6(a)(1)(F). He claims that complying with this requirement is impossible if he cannot use the initials "M.D." to explain his qualifications. The Court rejects this argument because Plaintiff can simply explain that he earned a medical degree, which would communicate the same message as the prohibited initials.

Finally, Plaintiff argues that "not one scintilla of evidence exists that [he] was performing [prolo therapy and intravenous vitamin therapy] at any time after his license suspension." (Pl.'s Opp'n to Def.s' Mot. Summ. J. 24:6-8, ECF No. 62.) He claims that he ceased performing such procedures after his license was suspended "and that other members of the association would provide these services." (Pl.'s Opp'n to Def.s' Mot. Summ. J. 24:5, ECF No. 62.) This argument fails as well. The advertising material featured the prohibited procedures without explaining, as Plaintiff claims, that others would be conducting the procedures. Therefore, at the time Defendants obtained the advertising material, they had probable cause to believe that Plaintiff was administering injection treatments in violation of California law.

Accordingly, the advertising material provides probable cause to arrest Plaintiff for the felony offense of practicing medicine without a license (section 2052) as well as the misdemeanor offense of using prohibited terms in medical advertising (section 2054).

2. *Expert Report*

"Expert opinion may also be considered in the totality of the circumstances analysis for probable cause." *United States v. Underwood*, 725 F.3d 1076, 1081 (9th Cir. 2013). In order for an expert opinion to provide probable cause, the purported expert must have the necessary experience and qualifications to render the opinion. *United States v. Meek,* 366 F.3d 705, 712 (9th Cir. 2004) (expert opinion provided probable cause where the expert was a "veteran sex crimes investigator"); *United States v. Seybold,* 726 F.2d 502, 504 (9th Cir. 1984) (expert opinion supported probable cause where the expert had "14 years' experience in drug enforcement and his participation in hundreds of searches"). Additionally, the expert must articulate the observations, special expertise, veteran knowledge, or other basis for any opinion rendered. *United States v. Needham*, 718 F.3d 1190, 1198 n.2 (9th Cir. 2013) (holding that an expert opinion did not support probable cause where the ostensible expert possessed seven months' of experience and "did not explain her basis within the four corners of the affidavit").

Here, Defendants relied on the expert opinion of Dr. Briones-Colman as a basis for arresting Plaintiff. Dr. Briones-Colman reviewed the transcripts of the undercover recordings, the advertising material, and Defendant Fuller's investigation report in reaching her conclusion that Plaintiff had unlawfully advertised as a physician and practiced medicine without a license. (Fuller Decl. Ex. A-21, ECF No. 53.) The Court concludes that Dr. Briones-Colman's expert opinion supports probable cause because she possessed the

necessary qualifications and clearly articulated the basis for her conclusion.

Dr. Briones-Colman has earned three postgraduate degrees in the medical sciences, she is board certified in internal medicine, and she has twenty years of practical experience in the medical profession. Based on these credentials, she was qualified to assess whether Plaintiff had engaged in the practice of medicine.[1] Furthermore, Dr. Briones-Colman meticulously reviewed the advertising material from the Clinic as well as the transcripts from the undercover operations. After analyzing these materials, Dr. Briones-Colman identified specific conduct that demonstrated Plaintiff's unlicensed practice of medicine. She then proceeded to articulate in detail, and tracking the statutory language, the factual and legal bases for her conclusion. For instance, she explained that during his interaction with Defendant McKenzie, Plaintiff performed a patient history, attempted to diagnose the cause of her anemia, conducted a physical exam by analyzing her pallor, and offered to perform or review blood work. Based on this conduct, Dr. Briones-Colman opined that Plaintiff had engaged in the unlicenced practice of medicine.

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[1] Plaintiff attacks Dr. Briones-Colman's qualifications because, he maintains, Defendants fail to cite any evidence showing that Dr. Briones-Colman had experience in alternative healthcare. The Court rejects this challenge. It does not matter that Dr. Briones-Colman lacks experience as a CAM provider because in her report she analyzed whether Plaintiff's conduct constituted the practice of medicine not alternative healthcare.

Accordingly, the expert report provided probable cause to arrest Plaintiff for the unlicensed practice of medicine.

3. *Transcripts of Undercover Investigation*

The final category of evidence consists of the two transcripts from Defendant McKenzie's undercover investigations. During the first appointment, Defendant McKenzie asks Plaintiff, "But — but you're, uh, like a traditional M.D.?" (Fuller Decl. Ex. A-11 at 29:12-13 ECF No. 53.) In response, Plaintiff states, "Yeah, I'm a medical doctor." (Fuller Decl. Ex. A-11 at 29:14, ECF No. 53.) Later in the conversation, Defendant McKenzie mentions that she has recently moved and, therefore, still has not found a new physician. Plaintiff replied, "If you can't find somebody, you know, to be like a primary care person, we can check blood too. . . . Yeah. Simple blood tests." (Fuller Decl. Ex. A-11 at 62:10-14, ECF No. 53.) Defendant retorts that he never offered to "draw" blood, he merely suggested that he could "check" blood, meaning that he would review the blood work obtained from another lab or physician.

The Court finds that the first statement, "I'm a medical doctor" is a statement in which Plaintiff unequivocally holds himself out to be a physician, which violates California law prohibiting a CAM provider from representing that he is a physician. Cal. Bus. & Prof. Code § 2053.5(a)(8). The second statement in which Plaintiff offers to check blood is more ambiguous. It is unclear whether Plaintiff is offering to perform the entire blood test or simply to review and explain the results of a blood draw conducted elsewhere. Given the context of the conversation,

however, Plaintiff's statement can be reasonably interpreted as an offer to server as Defendant McKenzie's primary care physician and administer the blood draw. *See* Cal. Bus. & Prof. Code § 2053.5(a)(1) (prohibiting a CAM provider from conducing a procedure that punctures the skin). Therefore, both statements provide probable cause to believe that Plaintiff violated California law.

Overall, considering the totality of the facts and circumstances suggested by the advertising material, expert report, and transcripts of the sting operations, there existed a fair probability that Plaintiff had violated sections 2052 and 2054 of the California Business and Professions Code. Accordingly, the Court concludes that Plaintiff's arrest was supported by probable cause.

### C. Defendant Fuller Did Not Engage In Judicial Deception

"To support a § 1983 claim of judicial deception, a plaintiff must show that the defendant deliberately or recklessly made false statements or omissions that were material to the finding of probable cause. The court determines the materiality of alleged false statements or omissions." *KRL v. Moore*, 384 F.3d 1105, 1117 (9th Cir. 2004).

The crux of Plaintiff's argument is an email exchange between the government attorney representing Investigator Defendants in the instant action and Deputy District Attorney Alexandra Campbell, who took over the case after Plaintiff's arrest but was not involved in securing the warrant. On August 26, 2015, the government attorney emailed

Campbell and asked about her recollection of Plaintiff's arrest. She responded with the following email:

> When DDA Karine Fong initially filed the case, she was so offended by [Plaintiff's] conduct . . . that she filed a felony based on the injuries that the victims all claimed they had suffered while under his care. At the time of filing, we were not aware that his license had not been suspended until AFTER those patients had been treated. When 1 followed up with investigator Fuller, he confirmed that the only "medicine" the good doctor had allegedly practiced without a license was the two appointments with the undercover investigator. During both of those consultations, [Plaintiff] made diagnoses and "prescribed" or "recommended" various supplements and medications for the investigator's aliments, but according to Investigator Fuller that conduct would only rise to the misdemeanor charge level. Since all of the crazy treatments occurred while he was still licensed, they would fall more under a "malpractice" charge which would be handled by the medical board and not our office.

(Pl.'s Opp'n to Def.s' Mot. Summ. J. Ex. 2 at 17, ECF No. 62.) DDA Campbell goes on to explain that the case was ultimately dismissed because "when left with just the undercover investigation it was a relatively weak case." (*Id.*)

Based on this email, Plaintiff contends that Defendant Fuller "deliberately manipulated the presentation to misled Deputy D.A. Fong into filing a charge based on conduct that was undertaken when Plaintiff held a valid license and which was completely

legal." (Pl.'s Opp'n to Def.s' Mot. Summ. J. 9:6-9, ECF No. 62.) In other words, Plaintiff argues that ADDA Fong must have been duped into pursuing charges against Plaintiff because she believed that he was licenced at the time he treated the two complaining patients. Because Defendant Fuller was the lead investigator who communicated with ADDA Fong, Plaintiff asserts that Defendant Fuller must have made an intentional or reckless misrepresentation to color ADDA Fong's perception of the facts.

The Court concludes that Plaintiff has failed to: (1) make a substantial showing of deception or (2) demonstrate that any alleged deception was material. *Ewing v. City of Stockton*, 588 F.3d 1218, 1224 (9th Cir. 2009) ("If a party makes a substantial showing of deception, the court must determine the materiality of the allegedly false statements or omissions.").

1. *Substantial Showing of Deception*

Plaintiff has failed to make a substantial showing that Defendant Fuller made intentional or reckless statements. The email on which Plaintiff relies was written almost a year after the relevant events transpired, and it was composed by DDA Campbell who was not involved in securing the arrest warrant. As such, the email is merely Campbell's speculation, devoid of any personal knowledge, as to ADDA Fong's thought process in issuing the warrant application. In fact, ADDA Fong testified at her deposition that she was not consulted when Campbell wrote this email. (Pl.'s Opp'n to Def.s' Mot. Summ. J. Ex. 2 at 24-26, ECF No. 62.) Therefore, the email is unreliable hearsay written by Campbell who was attempting to

reconstruct the thought process of Fong almost a year after the arrest warrant.

Additionally, the overwhelming weight of the evidence in this case undermines Campbell's speculative conclusion that ADDA Fong sough an arrest warrant based on her mistaken belief that Plaintiff treated the two complaining patients while he was still licensed. The felony complaint for arrest warrant alleges that Plaintiff engaged in the unlicensed practice of medicine on December 4, 2013 and March 20, 2013—both dates of the undercover investigation. Notably absent from the felony complaint is any mention of dates or instances in which Plaintiff treated the two complaining patients when he still possessed a license. Furthermore, Dr. Briones-Colman's expert report briefly notes the two complaining patients, explains that these patients were treated when Plaintiff still had a license, and exclusively analyzes Plaintiff's interactions with Defendant McKenzie (not the two complaining patients) to reach the conclusion that he practiced medicine without a license. Therefore, the material submitted to secure the warrant indicates that ADDA Fong did not base her decision to arrest Plaintiff on his pre-suspension conduct with the two complaining patients.

2. *Materiality of the Alleged Misrepresentations*

"[An] evaluation of materiality requires that we consider the effect of any false statements or omissions." *United States v. Ruiz*, 758 F.3d 1144, 1148 (9th Cir. 2014). "If an officer submitted false statements, the court purges those statements and

determines whether what is left justifies issuance of the warrant." *Ewing*, 588 F.3d at 1224.

In the present case, once the allegedly false representations are excised, ample evidence still stands to support Plaintiff's arrest. The supposedly false statements here (that Plaintiff treated the two complaining patients while his license was suspended) appear in Defendant Fuller's investigative report. If the Court were to purge all references to Plaintiff's treatment of the two complaining patients, the following evidence remains unaffected: the advertising material gathered from the Clinic, the transcripts of Defendant McKenzie's recorded undercover investigations, and the expert report analyzing Plaintiff's behavior during the sting operation. As explained previously in the Court's discussion of probable cause, these three categories of evidence provide probable cause to believe Plaintiff violated California law governing the practice of medicine. Therefore, whatever alleged misrepresentations occurred, if any, were not material to the issuance of an arrest warrant.

Accordingly, the Court rejects Plaintiff's judicial deception argument.

## V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment.

**IT IS SO ORDERED.**

_____:_____

Initials of Preparer _____

## APPENDIX G

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**CIVIL MINUTES - GENERAL**

**Case No. CV-15-4793-RGK (RAOx)**

**[Filed July 25, 2016]**

Case No. CV-15-4793-RGK (RAOx)

Date July 25, 2016

Title *Keith DeOrio v. Betty Yee et al.*

Present: The Honorable R. GARY KLAUSNER, UNITED.STATES DISTRICT JUDGE

Sharon L. Williams
Deputy Clerk

Not Reported
Court Reporter / Recorder

N/A
Tape No.

Attorneys Present for Plaintiffs:
Not Present

Attorneys Present for Defendants:
Not Present

**Proceedings:**

**(IN CHAMBERS) Order Re: Motion for Partial Summary Judgment filed by Plaintiff (DE 46) and Motion for Summary Judgment filed by Defendants Yee, Horton, Cohen, Sewell, Yaroslavsky (DE 49)**

## I. INTRODUCTION

On June 24, 2015, Keith DeOrio ("Plaintiff") filed suit against three sets of Defendants. The first group comprises board members on the California Franchise Tax Board: Betty Yee, Jerome Horton, Michael Cohen (collectively, "FTB Defendants"). The second group consists of members serving on the California Medical Board: David Sewell and Barbara Yaroslavsky (collectively, "Medical Board Defendants"). Finally, the third group contains two investigators working on behalf of the California Medical Board: Errol Fuller and Charlaine McKenzie (collectively, "Investigator Defendants").

Plaintiff alleges two claims. The first claim, brought only against the FTB Defendants and Medical Board Defendants, challenges the constitutionality of California Business and Professions Code Section 494.5. The second claim, brought only against Investigator Defendants, alleges a violation of Plaintiff's Fourth Amendment right to be free from unreasonable searches.

Presently before the Court are cross-motions for summary judgment filed by Plaintiff and the FTB and Medical Board Defendants. For the following reasons, the Court **DENIES** Plaintiff's Motion for Summary

Judgment and **GRANTS** Defendants' motion for Summary Judgment.

## II. UNDISPUTED FACTS

The cross-motions for summary judgment involve only the first claim for relief. Plaintiff alleges that Defendants enforce an unconstitutional statutory scheme that resulted in the deprivation of his medical license without procedural due process.

In California, most income tax is self-assessed and is due at the time a taxpayer files his tax return. Cal. Rev. & Tax. Code § 19001. Following the filing of a taxpayer's return (or if the taxpayer fails to file a return when he or she is required to do so), the FTB is required to review the return and determine the correct amount of the tax. *Id.* § 19032. However, if the individual fails to file a tax return, the FTB has the authority to estimate the income and assess tax, interest, and penalties. *Id.* § 19087. If the FTB determines a deficiency, it must send a Notice of Proposed Assessment ("NPA"), which informs a taxpayer that the California Franchise Tax Board ("FTB") intends to assess additional taxes or penalties. *Id.* § 19033.

If a taxpayer disagrees and wishes to challenge the FTB's tax assessment, he must file a written protest within 60 days of receiving an NPA. Cal. Rev. & Tax. Code § 19041(a). If the taxpayer files a protest, the FTB "shall reconsider the assessment of the deficiency and, if the taxpayer has so requested in his or her protest, shall grant the taxpayer or his or her authorized representatives an oral hearing." Cal. Rev. & Tax. Code § 19044(a). "If no protest is filed, the amount of the

proposed deficiency assessment becomes final upon the expiration of the 60-day period." Cal. Rev. & Tax. Code § 19042.

Next, a delinquent taxpayer who accrues enough deficiencies with the FTB may find himself on a list of the top 500 tax delinquencies in the state. California Revenue and Taxation Code Section 19195 directs the FTB to "make available as a matter of public record at least twice each calendar year a list of the 500 largest tax delinquencies in excess of one hundred thousand dollars ($100,000)." Cal. Rev. & Tax. Code § 19195(a). "The FTB's 'top 500 list' includes the taxpayer's name and address, the amount of tax delinquency, the taxpayer's occupation, and the type, status, and license number of any occupational or professional license held by the person or persons liable for payment of the tax." *Berjikian v. Franchise Tax Bd.*, 93 F. Supp. 3d 1151, 1153 (C.D. Cal. 2015). Prior to placing an individual on the Top 500 List, the FTB must provide 30 days' notice. Cal. Rev. & Tax. Code § 19195(e). "If within 30 days after issuance of the notice, the person or persons do not remit the amount due or make arrangements with the [FTB] for payment of the amount due, the tax delinquency shall be included on the list." *Id.*

Finally, a delinquent taxpayer listed on the Top 500 List is subject to suspension of his professional, occupational, or driver's license. California Business and Professions Code Section 494.5, which became effective in 2012, provides that "a state governmental licensing entity shall refuse to issue, reactivate, reinstate, or renew a license and shall suspend a license if a licensee's name is included on a certified list." Cal. Bus. & Prof. Code § 494.5(a)(1). The statute

defines "certified list" as "the list provided by the Franchise Tax Board of persons whose names appear on the lists of the 500 largest tax delinquencies pursuant to Section [] 19195 of the Revenue and Taxation Code." Cal. Bus. & Prof. Code § 494.5(b)(1). A licensing agency must provide 90 days' notice before suspending the taxpayer's license. Cal. Bus. & Prof. Code § 494.5(e)(2). During the 90-day period, the taxpayer can (1) present a written submission to show the tax delinquency was paid, (2) enter into a payment agreement, or (3) demonstrate financial hardship. Cal. Bus. & Prof. Code § 494.5(h).

Taken together, sections 19195 and 494.5 authorize California state licensing agencies to suspend the licenses of individuals whose names appear on the Top 500 List. These two statutes comprise the legislative scheme that Plaintiff challenges as unconstitutional.

In the present case, the FTB assessed tax deficiencies against Plaintiff in the following years: 1994-2002, 2006, 2008, 2010, 2011, and 2012. Each year, the FTB mailed Plaintiff an NPA and informed him that he could challenge the assessment within 60 days. On seven occasions, Plaintiff chose to protest the NPAs within the allotted time, but he has never prevailed. (Basquez-Cunningham Decl. ¶11, ECF No. 51.) On the remaining seven occasions, Plaintiff failed to challenge the tax deficiency.

On February 15, 2013, the FTB provided Plaintiff 30 days' notice of its intent to publish his name on the Top 500 List based on the total tax liability he had accrued. Plaintiff's name was published on the Top 500 List in April 2013, indicating that he owed over $352,680 in unpaid taxes.

On May 24, 2013, the Medical Board sent Plaintiff a 90-day notice of its intent to suspend his medical license pursuant to section 494.5 because of his placement on the Top 500 List. On July 15, 2013, Plaintiff responded to the 90-day notice with a request for release from the Top 500 List. He provided sixteen reasons in opposition to the Medical Board's decision to suspend his license. Among other things, Plaintiff claimed that he did not belong on the Top 500 List because he had "legally separated himself form [*sic*] any association with the U.S. Federal Government and the State of California," "compensation for professional services is not 'income,'" and "[Section 494.5] is generic extortion."

On August 13, 2013, the FTB issued a letter denying Plaintiff's request for release. At no point in his request for release or afterward did Plaintiff request a payment arrangement, state a financial hardship, attempt to provide documentation showing that he had satisfied his tax delinquency, or show that, factually, he had no income in the relevant years. Until today, Plaintiff continues to owe the FTB back taxes in an amount over $350,000.

Effective August 30, 2013, Plaintiff's medical license was suspended. At some point in 2014, Plaintiff's name was removed from the Top 500 List, but he claims Defendants have refused to reinstate his medical license without any legal cause.

## III. JUDICIAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(a), a court may grant summary judgment only where "there is no genuine issue as to any material fact and

. . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Upon such a showing, the court may grant summary judgment on all or part of the claim. *See id.*

To prevail on a summary judgment motion, the moving party must show that there are no triable issues of material fact as to matters upon which it has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). On issues where the moving party does not have the burden of proof at trial, the moving party needs to show only that there is an absence of evidence to support the non-moving party's case. *See id.*

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. *Id.* at 324. Nor may the non-moving party merely attack or discredit the moving party's evidence. *See Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324.

## IV. DISCUSSION

The question raised by the parties' cross motions for summary judgment is whether the legislative scheme described above violates procedural due process. A procedural due process claim consists of two elements: (1) deprivation of a constitutionally protected liberty or property interest, and (2) denial of adequate procedural protections. *Hufford v. McEnaney*, 249 F.3d 1142, 1150 (9th Cir. 2001).

The first prong is not at issue in the instant action. Neither party disputes that Plaintiff has a legally cognizable property interest in his medical license. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."); *Jones v. City of Modesto*, 408 F. Supp. 2d 935, 950 (E.D. Cal. 2005) ("Courts have long recognized that licenses which enable one to pursue a profession or earn a livelihood are protected property interests for purposes of a Fourteenth Amendment analysis.").

The only question, then, is whether Plaintiff was afforded adequate procedural protection before Defendants revoked his medical license. Plaintiff advances two theories in support of his argument that the legislative scheme detailed above violates procedural due process. The Court addresses each argument in turn.

### A. Lack of Adequate Hearing

Plaintiff first argues that section 494.5 is unconstitutional because it does not provide for a hearing to challenge the underlying tax liability giving rise to a license suspension. Instead, the only way a taxpayer can prevent a license suspension under section 494.5 is through a written submission demonstrating: (i) that the tax debt has been paid, (ii) that an installment agreement to pay has been reached with FTB, or (iii) that financial hardship excuses the non-payment. Cal. Bus. & Prof. Code §§ 494.5(h), (m). Plaintiff maintains that without the opportunity for a

pre-revocation hearing to challenge his underlying tax deficiency, section 494.5 violates procedural due process.

The Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The statutory scheme at issue here provides taxpayers an adequate hearing opportunity to contest a tax deficiency before license suspension. Initially, a taxpayer is allotted 60 days after the mailing of each NPA to challenge a tax assessment levied against him through a protest hearing. Cal. Rev. & Tax. Code § 19044(a) (providing that if a taxpayer challenges an NPA, the FTB "shall reconsider the assessment of the deficiency and, if the taxpayer has so requested in his or her protest, shall grant the taxpayer or his or her authorized representatives an oral hearing"). If the taxpayer is unsatisfied with the FTB's decision after a protest hearing, he may appeal to the California Board of Equalization. Cal. Rev. & Tax. Code § 19045. Even after a protest hearing and appeal, a taxpayer can continue challenging a deficiency by paying the amount assessed against him and filing a lawsuit seeking a refund in superior court. Only after a delinquent taxpayer loses his challenges (or fails to protest a tax deficiency) does FTB place him on the Top 500 List where he is then subject to license revocation under section 494.5. Therefore, a taxpayer is afforded hearing opportunities to challenge the tax deficiency that

results in placement on the Top 500 List and triggers license revocation under section 494.5.

In light of the ample hearing opportunity provided to taxpayers who wish to challenge a deficiency assessed by the FTB, the Court concludes that Plaintiff's procedural due process rights have not been violated. Here, Plaintiff received NPAs in each of the following years: 1994-2002, 2006, 2008, 2010, 2011, and 2012. Each NPA informed Plaintiff that he had the right to a hearing to challenge the tax liability assessed against him within 60 days. In fact, on seven occasions Plaintiff protested the amount levied against him, but he did not prevail a single time. Thus, before Defendants revoked Plaintiff's medical license for non-payment of taxes, Plaintiff was afforded a hearing opportunity to contest the tax deficiency upon which the license revocation is based.

Plaintiff retorts that because he did not know about the prospect of losing his license before section 494.5 was enacted in 2012, any pre-2012 hearing opportunity was not meaningful and, therefore, cannot save this legislative scheme. Put differently, Plaintiff contends that he is entitled to another hearing on the issue of tax liability prior to license suspension because now he is aware of the stakes. The Court disagrees. The Ninth Circuit has explained that "[t]he due process clause does not require a hearing when . . . there are no factual questions to resolve." *Air N. Am. v. Dep't of Transp.*, 937 F.2d 1427, 1438 (9th Cir. 1991). As explained above, Plaintiff was afforded a full hearing to dispute each NPA setting forth his tax deficiencies, and those tax deficiencies ultimately served as the basis for his inclusion on the Top 500 List and license

suspension. On seven occasions, Plaintiff challenged the NPAs and lost. On the remaining occasions, Plaintiff simply chose not to protest the assessed tax deficiency. Either way, Plaintiff was provided a hearing to dispute the only factual issue on which his license suspension is predicated, and he is not entitled to a second hearing on the same exact issue.

While the Ninth Circuit has not opined on the constitutionality of section 494.5, the Eighth Circuit has upheld a similar legislative scheme. *Crum v. Vincent*, 493 F.3d 988 (8th Cir. 2007). In *Crum*, the court considered Missouri Revised Statutes section 324.010, which requires the Director of Revenue to revoke a delinquent taxpayer's professional license after 90-day notice. *Id.* at 991. The plaintiff in *Crum* was notified of his tax deficiency and provided a hearing to protest the assessed taxes. *Id.* at 992. After 90 days lapsed without any challenge from the plaintiff, the Director of Revenue notified the Board of Healing Arts, which revoked the plaintiff's medical license. *Id.* The plaintiff then brought suit against the Director of Revenue and the Board of Healing Arts, alleging that the statute at issue violated procedural due process because it failed to provide a separate hearing before license revocation. *Id.* at 992-93. The Eighth Circuit rejected the argument "that [the plaintiff] was constitutionally entitled to opportunities for two hearings—one to challenge the tax deficiency and another to challenge the revocation of his license." *Id.* at 993. The court explained,

> So long as one hearing will provide the affected individual with a meaningful opportunity to be heard, due process does not require two hearings

> on the same issue. Both the Director's finding of a tax deficiency and the subsequent license revocation had the same factual predicate—[the plaintiff's] failure to file his tax returns. A license revocation hearing could add nothing to a tax deficiency hearing in this case, because the outcome of the tax hearing would necessarily determine the outcome of the revocation hearing.

*Id.* Much like the plaintiff in *Crum*, Plaintiff here is not entitled to a second hearing before license suspension where he has already been afforded an opportunity to challenge the factual predicate underlying the suspension.

Citing the *Crum* decision, another court in the Central District of California has rejected an identical challenge to section 494.5. In *Franceschi v. Chiang*, the court held that section 494.5 does not violate procedural due process because a delinquent taxpayer is afforded hearing rights to challenge an assessed tax deficiency at the moment the FTB issues an NPA. Case No. 2:14-cv-01960-CAS-(SHx) at *10. The *Franceschi* court explained, "The Due Process Clause does not require a [second] hearing if all of the antecedent facts for a revocation were previously determined through constitutionally adequate procedures." *Id.* at *8 (citing *Conley v. Kentucky*, 75 F. Supp. 2d 687 (E.D. Ky. 1999); *Almeida v. Lucey*, 372 F. Supp. 109 (D. Mass. 1974), *aff'd*, 419 U.S. 806, 95 S. Ct. 22, 42 L. Ed. 2d 36 (1974)).

Plaintiff invokes a decision by another court in the Central District of California, which held that section 494.5 is unconstitutional because it violates procedural due process. *Berjikian v. Franchise Tax Bd.*, 93 F. Supp. 3d 1151 (C.D. Cal. 2015). The *Berjikian* court explained,

> The essential problem in Plaintiffs' case is that at the time Plaintiffs had the opportunity for a hearing regarding their tax assessments, they did not have notice that they could lose their licenses. Indeed, Plaintiffs' first such notice occurred over a decade after any opportunity for a hearing expired. Thus, although Plaintiffs had notice of the deprivation at one point in time and, arguably, the opportunity for a hearing at another point in time, notice and opportunity for a hearing never existed contemporaneously. . . . Had Plaintiffs known they might suffer this broader consequence, their response to the notices of tax delinquencies may very well have been different. Plaintiffs suggest that, given the "bigger stakes," they may have protested the tax assessments, hired a lawyer, or had [Mrs.] Berjikian argue that she was an innocent taxpayer who was not involved in her husband's business.

*Id.* at 1158.[1] The court also distinguished the aforementioned *Crum* decision on the basis that the plaintiff there "had notice that he could lose his license if he failed to file his returns, and he was thus apprised

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[1] Plaintiff also cites an unpublished California appellate decision involving the same Berjikian plaintiffs and reaching the same conclusion as the federal district court. *Berjikian v. Franchise Tax Bd.*, No. B252427, 2015 WL 136825, at *7 (Cal. Ct. App. Jan. 12, 2015) ("Therefore, at the time the Berjikians were able to challenge the factual predicate supporting respondents' decision to suspend the Berjikians' licenses, the statute authorizing that decision had yet to go into effect. Accordingly, when the Berjikians did have the opportunity to challenge the grounds supporting respondents' suspension of their licenses, their property interests in those licenses had yet to be implicated by section 494.5.").

of the matters that would be at stake in a tax deficiency hearing." *Id.* (citing *Crum*, 493 F.3d at 993).

The linchpin of the *Berjikian* court's reasoning is that a taxpayer who knew about section 494.5 at the time of receiving an NPA would be more vigilant in protesting a tax deficiency because the stakes (license suspension) would be high enough to justify a challenge against the FTB. This Court is not so convinced. For starters, even before the enactment of section 494.5, the stakes were adequately weighty to spur a delinquent taxpayer into action. At the time Plaintiff received each NPA he was fully apprised of his legal obligation to pay income tax as well as the FTB's ability to recover a tax deficiency through a variety of means such as garnishing wages, imposing tax liens, and obtaining a superior court judgment on the debt. In fact, Plaintiff actually did challenge the FTB's proposed assessment on seven occasions and lost each time.

Even more problematic for Plaintiff is his inability to articulate exactly how his course of conduct would have varied had he been aware of the potential for license suspension. Plaintiff merely states that if he "was provided a hearing on these antecedent NPAs as a precondition to the suspension of his medical license, [he] would have challenged each NPA and demanded that the FTB substantiate the basis for each and every one. Plaintiff would also have provided evidence that he did not have taxable income." (Pl.'s Opp'n to Mot. Summ. J. 6:11-15, ECF No. 64.) Beyond this paragraph, Plaintiff does not provide any evidence or explain in any detail how his response at a license suspension hearing would have differed from the arguments he raised at his seven fruitless hearings.

Finally, Plaintiff takes aim at the procedures available to challenge an NPA. As explained previously, Plaintiff was allowed a hearing to challenge his tax deficiency within 60 days of receiving each NPA. Cal. Rev. & Tax. Code § 19044(a). In each NPA, the FTB arrived at Plaintiff's tax liability "by determining the average income of other medical practitioners in California according to statistical information derived from those other practitioners' federal tax returns." (Def.s' Opp'n to Mot. Summ. J. 5:16-18, ECF No. 66.) Plaintiff contends that the statistical information underlying the FTB's determination was never provided because the FTB claimed that such information was "confidential, secret, and proprietary . . . in response to discovery demands in this case." (Pl.'s Mot. Summ. J. 16:5-7, ECF No. 46.) Because the FTB refused to disclose the information on which liability is predicated, Plaintiff maintains that the procedure to challenge an NPA is inadequate. The Court disagrees for two reasons.

First, Plaintiff has only demonstrated that the FTB refused to divulge the statistical information during discovery in this case. He offers no evidence that the statistical information was also unavailable during his actual hearing to challenge the NPA. Second, Plaintiff's gripe with the FTB's tax assessment does not even center on the statistical information. In challenging his tax debt, Plaintiff does not question the accuracy of the FTB's statistics for medical practitioners' income in California; rather he claims that as a self-employed physician, he sets his own income falling below the $10,000 reporting threshold. (Pl.'s Mot. Summ. J. 15:8-10, ECF No. 46.) Thus, even assuming Plaintiff did not have access to the statistical information at the time he

challenged the NPA, he was still afforded a meaningful hearing opportunity to prove his actual theory: that his income fell below the $10,000 reporting threshold. Accordingly, the Court finds that the hearing procedures available for challenging an NPA are adequate.

Overall, the Court concludes that section 494.5 does not violate procedural due process. Plaintiff is not entitled to a second hearing to resolve the exact same factual issues that he has previously had an opportunity to dispute. Plaintiff has been provided all the process he is due.

**B. Retroactivity**

Plaintiff contends that section 494.5 applies retroactively because it was passed in 2012 but requires state licensing agencies to use tax delinquencies pre-dating 2012 as a basis for license suspension.

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994). "A statute is not made retroactive merely because it draws upon antecedent facts for its operation." *Cox v. Hart*, 260 U.S. 427, 435 (1922). Addressing this very issue, the *Franceschi* court rejected the argument that the challenged statutory scheme applies retroactively. The court explained, "Sections 19195 and 494.5 do not impose additional

penalties on plaintiff for his past failure to pay taxes, such as through the levying of fines based solely on plaintiff's past unpaid tax liability. Rather, these statutes 'look prospectively at plaintiff's right to continue' holding a [] license in the future." Case No. 2:14-cv-01960-CAS-(SHx) at *12 (citing *Bhalerao v. Illinois Dep't of Fin. & Prof'l Regulations*, 834 F. Supp. 2d 775, 783 (N.D. Ill. 2011)).

This Court agrees with the reasoning of the *Franceschi* decision. Section 494.5 does not attach new consequences to taxpayers based on their underlying tax liability. It does not, for instance, penalize a taxpayer merely by virtue of her prior placement on the Top 500 List, nor does it impose additional fines stemming exclusively from a taxpayer's past refusal to pay an accrued deficiency. Instead, section 494.5 targets future conduct occurring after its 2012 enactment, namely taxpayer's continued refusal and willful failure to pay outstanding tax deficiencies. Here, Plaintiff's license was not suspended because he accrued tax deficiencies and neglected payment in prior years (1994-2002, 2006, 2008, 2010, 2011, 2012); rather, the Medical Board suspended his license because of his refusal to discharge a tax liability that is presently due.

Accordingly, the Court rejects Plaintiff's argument that section 494.5 applies retroactively.

## V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

**IT IS SO ORDERED.**

_____:_____
Initials of Preparer _____

## APPENDIX H

**UNITED STATES DISTRICT COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**
**CENTRAL DIVISION**

**Case No: 2:15-cv-04793-RGK-RAO**

**[Filed August 15, 2016]**

KEITH R. DeORIO, Plaintiff,

v.

BETTY YEE, *et al.*, Defendants.

KAMALA D. HARRIS
Attorney General of California
ELIZABETH S. ANGRES
Supervising Deputy Attorney General
ELIZABETH G. O'DONNELL
Deputy Attorney General, State Bar No. 162453
VLADIMIR SHALKEVICH
Deputy Attorney General, State Bar No. 173955
MATTHEW C. HEYN
Deputy Attorney General, State Bar No. 227474
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2000
Fax: (213) 897-2810
E-mail: Elizabeth.ODonnell@doj.ca.gov

E-mail: Vladimir.Shalkevich@doj.ca.gov
E-mail: Matthew.Heyn@doj.ca.gov
*Counsel for Defendants Betty Yee, Jerome E. Horton, Michael Cohen, David Serrano Sewell, and Barbara Yaroslavsky, in their official capacities, and Defendants Errol Fuller and Charlaine McKenzie, in their individual capacities*

**[~~PROPOSED~~] JUDGMENT IN A CIVIL ACTION**

On July 25, 2016, the Court entered its order [Doc. No. 80] granting the motion for summary judgment of Defendants Betty Yee, Jerome Horton, Michael Cohen, David Sewell and Barbara Yaroslavsky [Doc. No. 49] and denying the motion for partial summary judgment of Plaintiff Keith R. DeOrio [Doc. No. 46]. On July 28, 2016, the Court entered its order [Doc. No. 81] granting the motion for summary judgment of defendants Errol Fuller and Charlaine McKenzie [Doc. No. 53]. The orders on the parties' motions for summary judgment have resolved all of the claims presently asserted in the above-captioned action.

Therefore, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Plaintiff Keith R. DeOrio shall recover nothing from Defendants Betty Yee, Jerome E. Horton, Michael Cohen, David Serrano Sewell, Barbara Yaroslavsky, Errol Fuller and Charlaine McKenzie.

2. Defendants Betty Yee, Jerome E. Horton, Michael Cohen, David Serrano Sewell, Barbara Yaroslavsky, Errol Fuller and Charlaine McKenzie may recover costs from Plaintiff Keith R. DeOrio by submitting a bill of costs consistent with Local Rule 54-3.

3. All claims in this lawsuit are hereby dismissed with prejudice on the merits.

Dated: August 15, 2016

/s/ Gary Klausner
Hon. R. Gary Klausner
United States District Judge

**SUBMITTED BY:**

KAMALA D. HARRIS
Attorney General of California

*/s/ Matthew Heyn*
Matthew C. Heyn, Deputy Attorney General
*Counsel for Defendants Yee, Horton, Cohen, Serrano Sewell, Yaroslavsky, Fuller, and McKenzie*

**CONSENT AS TO FORM OF JUDGMENT:**

FRANCESCHI LAW CORPORATION

*/s/ Ernest J. Franceschi*
Ernest J. Franceschi, Esq.
*Counsel for Plaintiff Keith R. DeOrio*

## APPENDIX I

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 16-56337**
**D.C. No. 2:15-cv-04793-RGK-RAO**
**Central District of California, Los Angeles**

**[Filed August 1, 2018]**

KEITH R. DEORIO, an individual,
Plaintiff-Appellant,

v.

BETTY T. YEE, President of the California Franchise Tax Board in her Official Capacity; et al.,
Defendants-Appellees.

ORDER

Before: HAWKINS, PARKER,* and IKUTA, Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing.

* The Honorable Barrington D. Parker, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

Judge Ikuta has voted to deny the petition for rehearing en banc, and Judges Hawkins and Parker have so recommended. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc are DENIED.