

a Social Security number because McArthur understands the Social Security number to be the number of the beast according to the book of Revelation. This motion for partial summary judgment seeks dismissal of all causes of action against Patton.

1.02 The grounds for this motion are as follows:

1. Cause of action under the Federal Religious Freedom Restoration Act ("FRFRA") fails because the FRFRA is unconstitutional per *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997).
2. Cause of action under the Texas Religious Freedom Act ("TRFA") fails because (a) Patton is not the head of a state agency which issues or renews state licenses and permits and (b) the Foundation is not a "Government agency" as defined by the TRFA and therefore Patton has negated an essential element of this cause of action.
3. Cause of action under the Texas Constitution (Tex. Const. Art. 1, § 6) fails because (a) requiring a social security number as a unique identifier from license applicants is a rational regulation to enforce child support payments and (b) Patton is not the head of a state agency which issues or renews state licenses and permits and therefore Patton has negated an essential element of this cause of action.
4. Cause of action under Chapter 106 of the Tex. Civ. Prac. & Rem. Code fails because Patton is not the head of a state agency or of a political subdivision of the state which issues or renews state licenses and permits and therefore Patton has negated an essential element of this cause of action.
5. Cause of action alleging procedural due process rights violation fails because Patton is not the head of a state agency which issues or renews state licenses and permits (the administrative action complained of) and therefore Patton has negated an essential element of this cause of action.

II.

SUMMARY JUDGMENT EVIDENCE

2.01 These exhibits are attached and incorporated by reference as if fully set forth herein for all purposes as follows:

Exhibit A: May 1, 2007 letter from McArthur to Commissioner Todd Staples.

Exhibit B: McArthur's affidavit dated June 11, 1993.

- Exhibit C: TDA Application for Commercial Pesticide Applicator License dated May 1, 2007.
- Exhibit D: TDA Application for Commercial Pesticide Applicator License dated November 21, 2007.
- Exhibit E: Lindy Patton's Affidavit.
- Exhibit F: Letter from TDA to Gene McArthur dated June 4, 2004.

III. FACTS

3.01 Gene McArthur filed an Application for Commercial Pesticide Applicator License with TDA in May and November of 2007 (Exhibits C and D). In both applications, McArthur refused to provide his Social Security number as required by the application based on the following: "The application form requires applicants to identify themselves with a United States Social Security Number. I am prohibited by my religion from identifying with the number of the beast cited by the book of Revelation in the Holy Bible. I am also prohibited from receiving any benefit from association with the number of the beast. The Social Security Number is the number of the beast." (Exhibit A). McArthur has also refused, as an alternative, to provide TDA with an affidavit stating that McArthur does not have a social security number. (Exhibit F).

3.02 TDA is the state agency responsible for regulating pesticides and herbicides, *Tex. Agric. Code* §§ 11.001, 76.003 (Vernon 2004), and licensing their use. *Id.* §§ 76.071, .102, .105. The Foundation, on the other hand, does not have such authority. Instead, the Foundation is a private entity recognized by TDA as the entity to plan, carry out, and operate eradication and diapause programs to eliminate the boll weevil and the pink bollworm from cotton in the state under the supervision of TDA as provided by Chapter 74 of the Texas Agriculture Code. The Foundation does not have rule making authority and it

does not issue or renew state licenses and permits. Gene McArthur has never sought a license from the Foundation or filed an application with the Foundation.

3.03 Because he has not received his license, McArthur filed suit, alleging several causes of action. McArthur's causes of action are premised on the notion that a state agency refused to issue McArthur his commercial applicator's license. Because the Foundation does not issue or renew licenses on behalf of the state of Texas, McArthur's claims against Patton fail as a matter of law.

IV. ARGUMENT AND AUTHORITIES

A. Summary Judgment Pursuant to Rule 166a(c)

4.02 Summary judgment shall be rendered where the movant shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See TEX. R. CIV. P. 166a(c). Summary judgment thus provides a method of summarily terminating a case that involves only a question of law. See *Gaines v. Hamman*, 358 S.W.2d 557 (Tex. 1962); see also *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex.App.—Dallas 2000, pet. denied).

B. Federal Religious Freedom Restoration Act

4.03 1. McArthur's cause of action under the FRFRA fails as a matter of law because the FRFRA is unconstitutional per *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997).

4.04 Congress enacted the RFRA in direct response to *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), in which the Court upheld against a free exercise challenge a state law of general applicability criminalizing peyote use, as applied to deny unemployment benefits to Native American Church members who lost their jobs because of such use. In imposing FRFRA's requirements on the States, Congress

relied on the Fourteenth Amendment, which, in part, guarantees that no State shall make or enforce any law depriving any person. However, the Court found that the FRFRA is not a proper exercise of Congress' Fourteenth Amendment §5 enforcement power because it contradicts vital principles necessary to maintain separation of powers and the federal-state balance. In declaring the FRFRA unconstitutional, the Court noted that the FRFRA operated as "congressional intrusion" into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens. See *City of Boerne* at 19.

C. Texas Religious Freedom Act

4.05 The Texas Religious Freedom Act provides that a government agency may not substantially burden a person's free exercise of religion. *Tex. Civ. Prac. & Rem. Code* §110.003(a). TRFA defines a government agency as this state or a municipality or other political subdivision of this state and any agency of this state or a municipality or other political subdivision of this state, including a department, bureau, board, commission, office, agency, council, or public institution of higher education. *Tex. Civ. Prac. & Rem. Code* §110.001(a)(2).

4.06 The Foundation is a private entity and, specifically, a Texas non-profit corporation. The Texas Legislature, in Chapter 74 of the Texas Agriculture Code, made a delegation of authority to the Foundation "as the entity to plan, carry out, and operate eradication and diapause programs to eliminate the boll weevil and the pink bollworm from cotton in the state under the supervision of the" TDA as set forth in Chapter 74. *Tex. Agric. Code* § 74.1011(a). The Commissioner may even terminate the Foundation's designation as the entity recognized to carry out boll weevil eradication by giving forty-five days' written notice to the Foundation and by designating a successor entity.

4.07 The Legislature specified only two purposes for which the Foundation and its board are considered a state agency: 1) exemption from taxation including exemption from sales and use taxes, vehicle registration fees, and taxes under Chapter 152, Tax Code; and 2) indemnification under Chapter 104, Civ. Prac. and Rem. Code. *Tex. Agric. Code* § 74.109(d). Under no circumstances does the Foundation issue or renew state licenses or permits.

4.08 Based on the summary judgment evidence, it is undisputed that 1) the Foundation, and Patton as the President and CEO of the Foundation, do not issue or renew state licenses or permits and 2) the Foundation is not a state agency as defined by the TRFA. Accordingly, Patton has negated two essential elements of McArthur's cause of action under the TRFA as a matter of law.

D. Tex. Const. Art. 1, § 6

4.09 McArthur alleges that "Defendants have violated Plaintiffs rights under the Texas Constitution (Tex. Const. Art. 1, § 6) by interfering with his rights of conscience regarding matters of his religious beliefs."

4.10 In a Texas attorneys general opinion dealing specifically with McArthur's application, Attorney General Greg Abbott opined that TDA may require a license applicant who has a social security number to provide that number with the application regardless of the applicant's religious beliefs pursuant to *Tex. Fam. Code* § 231.302(c)(1). *Op. Tex. Att'y Gen. No. GA-0289* (2005). The right to work in a particular profession is not a fundamental right. It is a protected right, but one subject to rational regulation. *State v. Project Principle, Inc.*, 724 S.W.2d 387, 391 (Tex.1987); see *Schwartz v. Board of Bar Exam'rs*, 353 U.S. 232, 239, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); see also *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-13, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). The state of Texas has a

legitimate interest in locating absent parents in order to enforce child support payments. Requiring a social security number as a unique identifier from license applicants is a reasonable means of promoting that interest; it is a rational regulation. *Mauldin v. Tex. State Bd. of Plumbing Exam'rs*, 94 S.W.3d 867, 872 (Tex. App.-Austin 2002, no pet). In *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the U. S. Supreme Court analyzed a free exercise of religion claim under a rational basis test. Under this test, a rationally based, neutral law of general applicability does not violate the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice. *Id.* at 879, 110 S.Ct. 1595; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (citing *Smith*, 494 U.S. at 879, 110 S.Ct. 1595).

4.11 Moreover, it is important to note that McArthur's constitutional claim hinges on the misguided belief that the Foundation requires a social security number or that the Foundation issues licenses. The Foundation and Patton do not issue licenses and thus Patton has negated an essential element of McArthur's constitutional claim.

E. Chapter 106 of the Tex. Civ. Prac. & Rem. Code

4.12 Chapter 106 of the Civil Practice and Remedies Code provides that an officer or employee of the state or of a political subdivision of the state who is acting or purporting to act in an official capacity may not, because of a person's race, religion, color, sex, or national origin refuse to issue to the person a license, permit, or certificate. *Tex. Civ. Prac. & Rem. Code* §106.001(a)(1).

4.13 As discussed above, it is undisputed that the Foundation, and Patton as the President and CEO of the Foundation, do not issue or renew state licenses or permits. Therefore, Patton has no authority to issue to McArthur a pesticide applicator's license. As

a matter of law, Patton has negated an essential element of McArthur's Chapter 106 claim (refusing to issue to a person a license, permit or certificate).

F. Procedural Due Process

4.14 As discussed above, it is undisputed that the Foundation, and Patton as the President and CEO of the Foundation, do not issue or renew state licenses or permits. The Foundation is a private entity and not a state agency which conducts contested case hearings. Actions taken (or not taken) by the Foundation are not appealed to the Office of Administrative Hearings. Rather, if TDA proposes to suspend, revoke, or refuse to renew a person's license, a person is entitled to a hearing conducted by the State Office of Administrative Hearings. *Tex. Agric. Code* § 12.0202. Or, under 4 *Tex. Admin. Code* §2.1(b)(3), an applicant may contest the determination made by TDA or TDA's failure to comply by filing a notice of protest. In either case, the administrative action McArthur complains of is an action taken by TDA and not the Foundation or Patton. Therefore, Patton has negated an essential element of McArthur's procedural due process claim as a matter of law.

WHEREFORE, PREMISES CONSIDERED, Defendant requests that the Court grant this motion for partial summary judgment and dismiss all claims against Lindy Patton in his Official Capacity as President and CEO of the Texas Boll Weevil Eradication Foundation, Inc.