STATE OF CALIFORNIA

CALIFORNIA ENERGY COMMISSION

In the Matter of : Complaint Against and Request for Investigation of CalCERTS, Inc.	Docket No. 12-CAI-01

POSTHEARING BRIEF

OF

ERIK HOOVER AND PATRICK DAVIS,

COMPLAINANTS

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I. INTRODUCTION

In 1994, the California legislature created a new profession, the home energy rating profession. Cal. Pub. Res. Code § 25942; *see* S.B. No. 1922, Chapter 553, Statutes of 1994. Members of this profession perform "field verification and/or diagnostic testing" of the energy efficiency features of homes in the state. Respondents' Ex 246, 562, *2008 Building Efficiency Standards, Residential Compliance Manual* § 2.5. For example, "HERS raters" evaluate whether air conditioning ducts are properly sealed, or whether air conditioning systems are charged with a sufficient amount of refrigerant. *Id*. at § 2.5.1. Members of the HERS rating profession must be "certified" to perform this work. *See* Cal. Pub Res. Code § 25942 (c) (explaining that "[o]n and after January 1, 1996, no home energy rating services may be performed in this state unless the services have been certified . . . ."). CalCERTS is a private corporation, Answer at 6, and is one of only two organizations in the state that can provide this certification. Transcript of Evidentiary Hearing Held May 11, 2012, at 43 (hereinafter "Tr"). CalCERTS is the only entity in the state empowered to certify HERS raters to perform field verification and diagnostic testing for newly constructed homes. Tr 43-44, 210.

Complainants Erik Hoover and Patrick Davis were certified by Respondent CalCERTS, Inc. as HERS raters. Tr 22. This certification licensed Hoover and Davis to perform home energy efficiency tests in the State of California. Claiming that some of the home energy efficiency data collected and submitted by Complainants was inaccurate, CalCERTS summarily suspended Complainants' ability to work as HERS raters, and then decertified them.

Complainants argue that in suspending and decertifying them, CalCERTS violated the HERS regulations that specify what must be done if a rater fails quality assurance (QA) review. Complainants also argue that CalCERTS failed to comply with the constitutional requirements of due process. On the basis of these legal errors, the Complaint and Request for Investigation of CalCERTS, Inc. requests that the Energy Commission reverse CalCERTS' decision to decertify Hoover and Davis. The Complaint also requests that the Energy Commission require CalCERTS to adopt a written procedure that complies with the regulations and the constitutional requirements of due process. Complainants have not asked the Energy Commission to perform a general review of CalCERTS' decision, to determine whether it was correct or justified. The Complaint presents procedural claims only. Because of this narrow focus, much of the evidence presented by CalCERTS dealing with the particular errors Hoover and Davis are alleged to have made, is irrelevant.

II. FACTS

Erik Hoover was certified by CalCERTS as a HERS rater in 2008. Tr 22. Patrick Davis was certified by CalCERTS as a HERS rater in 2007. *Id.* In the time they were certified as HERS raters, Hoover performed approximately 2700 ratings, and Davis performed approximately 4700 ratings. Tr 23. Prior to October, 2011, CalCERTS had provided Hoover with 5 quality assurance evaluations, and had provided Davis with 8 quality assurance evaluations, all of which were passing evaluations. Tr 185.

In September, 2011, CalCERTS received a complaint from a person named Will Barrett about the work done by Hoover and Davis. See Declaration of Michael Charles Bachand in Support of CalCERTS' Answer, Respondent's Ex 206, at 55. CalCERTS began to investigate

the allegations of the complaint by meeting with Mr. Barrett on September 21, 2011. *Id*. At this time CalCERTS did not notify Hoover and Davis that a complaint had been submitted. Tr 188. As part of its investigation, CalCERTS performed additional quality assurance evaluations of Hoover and Davis in October, 2011. Tr 189. These evaluations indicated that Hoover and Davis may have made rating errors. Tr 189. CalCERTS was aware that Hoover and Davis would continue rating homes, Tr 188, and had "grave concerns" about the potential harm to homeowners. Tr 190. Yet at this time CalCERTS did not decide to suspend or decertify them. Tr 190-191. Likewise, at this time CalCERTS did not notify Hoover and Davis about the complaint, Tr 189, or about the QA findings, Tr 191, even though CalCERTS normally notifies raters of failed QAs within about one business day. Tr 194-195. Even though CalCERTS was allegedly concerned about the harm incorrect ratings do to homeowners, it did not notify the homeowners or the builders about the errors. Tr 239.

CalCERTS also performed additional quality assurance evaluations of Hoover in November, 2011. Respondent's Ex 206, at 63-64. Despite again finding possible errors, CalCERTS did not notify Hoover of the possibility he could be suspended or decertified. Tr 197-198. Although CalCERTS performed additional QA evaluations for Davis in early December, 2011, CalCERTS did not notify either Hoover or Davis about QA failures until December 16, 2011. Tr 197-199. By the time Hoover and Davis were notified of QA failures, they had already been suspended. Tr 228.

By December 16, 2011, CalCERTS had "reached a conclusion" about Hoover and Davis, even though it had not yet interviewed them. Tr 200. On that date, CalCERTS notified Hoover and Davis that they had "failed a QA review," and "as a result" had been suspended for 15 days. Complainants' Exs 3, 4. The notice requested that Hoover and Davis schedule a meeting to "discuss this matter," and stated that if they did not contact CalCERTS within 15 days they would be decertified. *Id*. However, the notice did not otherwise notify Hoover and Davis that decertification was a possibility. *Id*. The notice did not indicate that there was some possibility the suspensions could continue beyond 15 days. Although the notice states that the suspension

was to be for 15 days, CalCERTS admits that this was not correct. Tr 229. The notice identified addresses where Hoover and Davis had allegedly "failed QA inspections," but it did not identify the particular tests Hoover and Davis had allegedly performed incorrectly, and it did not tell them the specific nature of their alleged failures. Complainants' Exs 3, 4. The notice did not include any of the documents or data collected by CalCERTS as part of the QA evaluations. *Id*. The notice did not identify or describe the procedure CalCERTS had followed or was following in evaluating their work. *Id*. It did not notify Hoover or Davis that a complaint had been filed against them. *Id*. However, Hoover and Davis were told they would have an opportunity to present their records and documentation. *Id*. Although in early December, 2011, CalCERTS had identified what it deemed additional QA failures by Davis, its December 16, 2011 notice to Mr. Davis did not list the addresses where Davis had allegedly failed QA in early December. Compare Complainants Ex 9, at 2-3, with Complainants' Ex 4.

CalCERTS ultimately had interviews with Mr. Hoover and Mr. Davis. Tr 36. Prior to the interviews, CalCERTS did not provide Complainants with documents describing the tests that had allegedly been done incorrectly. Tr 36. Likewise, CalCERTS did not provide documents at the interviews. Tr 37. At their interviews, CalCERTS did not provide Complainants, or show them, a list of the charges asserted against them. Tr 106-107. Complainants did not have an opportunity to compare Complainants' test results with the quality assurance rater's test results. Tr 37-38. Because of this, Hoover and Davis were not prepared to discuss the particular tests they had failed. Tr 97-98.

At his interview CalCERTS asked Mr. Davis about alleged QA failures at additional addresses that were not listed on his December 16 notice. Tr 38-39. Davis was not notified he would be asked about those addresses. *Id*. Yet CalCERTS considered the QA results at those addresses when making a decision about decertification for Mr. Davis. Tr 229-233. CalCERTS even considered QA results for one house that Davis was never notified or interviewed about because the QA was performed after his interview. *Id*.

Prior to his interview, CalCERTS notified Mr. Hoover of its policy that "[a]ll meetings

with CalCERTS are confidential, and CalCERTS will maintain custody of any recordings" of those meetings. Complainants' Ex 12. In this case, no formal recording of the interviews was made, though notes were taken. Tr 107-108. After the interviews, CalCERTS did not provide Complainants with a summary of the interviews, or detailed findings, or conclusions. Tr 109.

Ultimately, CalCERTS decertified Hoover and Davis.[1] Tr 41-42. CalCERTS never reported Complainants' alleged QA failures in its registry, and it never told them that because of QA failures they were subject to additional quality assurance. Tr 48. Although CalCERTS told Hoover and Davis that their QA failures were "not rectifiable," Complainants' Exs 6-7, CalCERTS did not attempt to rectify their errors. Tr 239. CalCERTS did not offer additional training and did not offer to supervise their work. Tr 46.

The decertifications of Hoover and Davis prevent them from doing solar inspections, even though CalCERTS has never performed quality assurance for their solar inspections. Tr 44-45, 241. Hoover and Davis are not aware of any way to be certified again by CalCERTS. Tr 42.

III. ARGUMENT

The Complaint asserts two primary claims relating to the suspension and decertification of Mr. Hoover and Mr. Davis. First, CalCERTS failed to comply with the quality assurance procedure outlined in Title 20 § 1673 (i)(3). Second, CalCERTS failed to comply with the constitutional requirements of due process. For each of these reasons, the suspensions and decertifications were unlawful and must be reversed.

A. CALCERTS FAILED TO FOLLOW THE QUALITY ASSURANCE PROCEDURE REQUIRED BY THE HERS REGULATIONS.

Title 20 § 1673 (i)(3)(C) states that if quality assurance shows that a rater's work fails to meet the criteria for truth, accuracy, or completeness, the Provider is required to report the

[1] Between the time CalCERTS notified Hoover and Davis of their suspensions on December 16, 2011, and the time CalCERTS notified Complainants they had been decertified on or about January 30, 2012, CalCERTS repeatedly extended Complainants' suspensions beyond 15 days without reason or explanation, other than to say Complainants were still being investigated. See Complainants' Exs 12, 13 and Tr 39-41.

quality assurance failure in the Provider's registry for a period of six months, and conduct additional quality assurance evaluations over a period of 12 months. Cal. Code Regs., tit. 20 § 1673 (i)(3)(C). CalCERTS has not asserted that it is not required to comply with this regulation, and it has not disputed Complainants' claim that it has not in fact complied.

Hoover and Davis received quality assurance evaluation. Tr 46, 185. CalCERTS admits that Hoover and Davis were suspended based upon their alleged quality assurance failures. Answer at 5. But CalCERTS did not report the failures in its registry, and it did not provide Hoover and Davis with additional quality assurance evaluation over a period of 12 months. Tr 48.

CalCERTS has suggested that it may be excused from complying with the quality assurance regulations when it is responding to complaints. Answer at 7, n. 19. There is no support for this in the regulations themselves. In its Answer, CalCERTS attempts, in a footnote, to distinguish between "routine" quality assurance evaluation and quality assurance evaluation aimed at resolving a complaint. Answer at 7, n. 19.

> Petitioners argue that since they failed their quality assurance reviews they are *entitled* to the additional quality control provisions under section 1673(i)(3), applicable to instances where a rater fails a *routine* quality assurance evaluation. (See Complaint at p. 1) The Petitioners did not fail routine quality assurance reviews, but failed numerous quality assurance reviews specifically targeted to resolve a complaint received under section 1673(i)(5), alleging fraud.

Answer at 7, n. 19 (emphasis in the original).

The word "routine," which CalCERTS suggests is so significant here, does not appear in the HERS regulations. In fact, section 1673(i)(3) does not distinguish between quality assurance evaluation done routinely, or in any other manner. The prescribed process applies "[i]f the Provider's Quality Assurance personnel determine that the Rater's results did not meet the criteria for truth, accuracy, or completeness . . . ." Cal. Code Regs., tit. 20 § 1673 (i)(3)(C). There are no qualifiers.

Moreover, the requirement that CalCERTS have a system for receiving and responding to complaints does not provide the blank check CalCERTS apparently claims. In terms of what is required, Title 20 § 1673(i)(5) is quite brief. It states:

> Each Provider shall have a system for receiving complaints. The Provider shall respond to and resolve complaints related to ratings and field verification and diagnostic testing services and reports. Providers shall ensure that Raters inform purchasers and recipients of ratings and field verifications and diagnostic testing services about the complaint system. Each Provider shall retain all records of complaints received and responses to complaints for five years after the date the complaint is presented to the Provider and annually report a summary of all complaints and action taken to the Executive Director.

Cal. Code Regs., tit. 20 § 1673(i)(5). This provision cannot possibly allow CalCERTS to do whatever it wants when it responds to complaints. This provision says nothing about *how* CalCERTS must receive and respond to complaints. It says nothing about *when* CalCERTS must respond. It simply imposes a requirement that CalCERTS *have* a system, and actually *respond to and resolve* complaints. It simply isn't reasonable to conclude that this short and vague requirement allows CalCERTS to depart from the specific and express requirements for doing quality assurance. This is especially so given that CalCERTS admits that the field review process is identical, whether done as part of the quality assurance or in responding to complaints. Tr 265. The factors applied by CalCERTS in the QA process are the same as those applied in Complaint response process. Tr 269. CalCERTS admits that the fact that the issues with Hoover and Davis were brought to CalCERTS' attention through a complaint was not a factor in the decision. Tr 275. Moreover, CalCERTS has admitted that it was also responding to Mr. Barrett's complaint it also performed additional quality assurance evaluation for Mr. Daniel Sidhu, Ms. Jennifer McFall, and Mr. Donald Scott White. Answer at 15. Yet CalCERTS followed the regulations for these raters, while ignoring the regulations for Complainants. *Id*. Clearly, the fact that quality assurance was done pursuant to a complaint was not the reason for

treating Hoover and Davis differently. The Answer makes clear that the real reason Sidhu, McFall and White were treated differently because their alleged failures were "less egregious than those of Mr. Hoover and Mr. Davis." *Id*. In light of these differences, CalCERTS cannot seriously contend that the complaint process requires a different procedure than the quality assurance process.

CalCERTS also hasn't disputed that it failed to provide Hoover and Davis with the quantity of quality assurance evaluation the regulations require. Title 20 § 1673 (i)(3)(A) specifies that CalCERTS must "annually evaluate the greater of one rating, randomly selected or one percent of the Rater′s past 12 month's total number of ratings (rounded up to the nearest whole number) for each measure tested by the Rater." Cal. Code Regs., tit. 20 § 1673 (i)(3)(A). Although Hoover has performed approximately 2700 ratings, Tr 23, CalCERTS has admitted that he received quality assurance evaluation only 5 times prior to the complaint being filed against him, rather than the 27 the regulations would require. Tr 185. Although Davis has performed approximately 4700 ratings, Tr 23, CalCERTS has admitted that he received quality assurance evaluation only 8 times prior to the complaint being filed against him, rather than the 47 the regulations require. Tr 185. CalCERTS admits that it generally performs only 20-25 percent of the quality assurance evaluations required by the regulations. Tr 181.

Hoover and Davis – and other raters – are entitled to the number of quality assurance evaluations specified in the regulations. By failing to fulfill this regulatory duty, CalCERTS has deprived Hoover and Davis of education, supervision, and training that could have helped them be more effective raters.

When CalCERTS suspended and decertified Hoover and Davis, CalCERTS acted unlawfully because it failed to follow the prescribed quality assurance procedure, and because it failed to provide Hoover and Davis with the quantity of quality assurance that could have made them better raters, and made discipline unnecessary. For these reasons, their decertifications must be reversed.

B. CALCERTS VIOLATED HOOVER'S AND DAVIS' CONSTITUTIONAL RIGHTS TO DUE PROCESS WHEN IT DEPRIVED THEM OF THEIR VESTED RIGHT TO WORK AS HERS RATERS WITHOUT PROVIDING THEM WITH PRIOR NOTICE OR A HEARING

The Fourteenth Amendment of the United States Constitution provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law." Section 13 of article I of the California Constitution similarly provides in part that no person shall ". . . be deprived of life, liberty, or property without due process of law . . . ." This provision of the state constitution has been held to be identical in scope and purpose with the Fourteenth Amendment of the Federal Constitution. *Manford v. Singh*, 40 Cal. App. 700 (1919).

While this requirement to provide due process typically only applies to governmental actors, *see Shelley v. Kramer*, 334 U.S. 1 (1948), where sufficient entanglement between government and a private person exists, private persons will be treated like government, and will also be required to comply with due process. For example, the United States Supreme Court has explained that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Lugar v. Edmondson Oil Co.*, 457 US 922, 942 (1982). Likewise, the California Supreme Court has explained that "private conduct may become so entwined with governmental action as to become subject to the constitutional limitations placed on state action by the Fourteenth Amendment to the United States Constitution and article I, section 13, of the California Constitution." *Adams v. Department of Motor Vehicles*, 11 Cal.3d 146, 152 (1974) (citations omitted).

"[T]here is no specific formula for defining state action." *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir.1983) (citation and internal quotation marks omitted). "Under any formula, however, the inquiry into whether private conduct is fairly attributable to the state must be determined based on the circumstances of each case." *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir.1999). "Only by sifting facts and weighing circumstances can the nonobvious

involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

1. ALTHOUGH CALCERTS IS A PRIVATE COMPANY, DUE PROCESS APPLIES TO CALCERTS BECAUSE IT IS SO CLOSELY ENTANGLED WITH GOVERNMENT

a. CalCERTS should be Treated like a State Actor because it is "Clothed with the Authority of State Law" When it Makes Decisions about Certification and Decertification.

The United States Supreme Court has explained that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). CalCERTS is able to make certification and decertification decisions only because the Energy Commission has given it state power to perform those functions. This is sufficient to qualify CalCERTS as a state actor for purposes of due process.

Public Resources Code section 25942 states that "no home energy rating services may be performed in this state *unless the services have been certified.*" Cal. Pub. Res. Code § 25942 (c) (emphasis added). As CalCERTS has acknowledged in its Answer, "CalCERTS is presently the only provider training raters with regards to new construction." Answer at 26. Likewise, CalCERTs is presently the only provider certifying raters with regards to new construction. Tr 43-44, 210. For this reason, any person who wishes as his profession to perform home energy rating services on newly constructed homes – as Hoover and Davis do – *must* go to CalCERTS for training and certification. Thus, the law requires certification before working in this profession, and the law requires that the certification be obtained from CalCERTS.

CalCERTS cannot avoid this special responsibility by crafting careful contracts. Regardless of what its contracts say, CalCERTS could not have power to certify or decertify

HERS raters if the State of California had not granted to it a licensing monopoly over HERS ratings for new construction.[2] Because of its unique position, CalCERTS' denial of a certification to a rater, or its decertification of a rater, effectively denies Complainants access to a government-controlled profession. It is impossible for Hoover and Davis to be excluded from this profession without the support and assistance of government power.[3] This is exactly the kind of "joint participation with state officials in the seizure of disputed property" that the U. S. Supreme Court found "sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *See Lugar v. Edmondson Oil Co.*, 457 US 922, 942 (1982).

In *West v. Atkins*, 487 U.S. 42 (1988), the U. S. Supreme Court found that a similar grant of government power to a private individual qualified that individual as a state actor. In *West v. Atkins*, a private physician under contract with North Carolina to provide orthopedic services at a state prison hospital treated a prison inmate for an injury sustained while the prisoner was incarcerated. 487 U.S. 42, 43-44. The prisoner was barred by state law from employing or electing to see a physician of his own choosing. *Id*. at 44. Alleging that he was given inadequate medical treatment, the prisoner sued the physician under 42 U.S.C. § 1983 for violation of his Eighth Amendment right to be free from cruel and unusual punishment. *Id*. at 45. It was argued that because Doctor Atkins was a private independent contractor, and not an employee, he should

[2] CalCERTS attempts to distinguish between Complainants' rights as certified HERS raters from the rights of licensees, as regulated under the Business and Professions Code. Answer at 25-26. There is no meaningful reason to make this distinction. Complainants' certification was a "license" in the sense that HERS certification provides "permission by competent authority to do an act which, without such permission, would be illegal." *See* Black's Law Dictionary 829 (5th ed. 1979). Certification provides "[p]ermission to do a particular thing, to exercise a certain privilege or to carry on a particular business or to pursue a certain occupation." *Id*. Given that HERS certification, by statute, controls the ability of a HERS rater to pursue a certain occupation, there is no reason to believe that due process applies differently to HERS raters than to licensees regulated under the Business and Professions Code.

[3] The use of state power to exclude a person from a profession has special due process limitations. The California Supreme Court considers it a "settled proposition" that a "[s]tate cannot exclude a person from . . . any . . . occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Endler v. Schutzbank*, 68 Cal.2d 162, 170 (1968) (citing *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957)). Yet because of the way the legislature has authorized the HERS program, and the way the Energy Commission has implemented it, the state has empowered the private company CalCERTS to exclude people from the HERS profession. This is another independent reason due process must apply to CalCERTS' decertification decisions.

not be treated as a state actor. *Id*. at 54-56. The Supreme Court disagreed, explaining that "[i]t is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State." 487 U.S. 42, 55-56. (1988). The Court observed that although the State of North Carolina has an obligation to provide adequate health care to inmates, it

> employs physicians, such as respondent, and defers to their professional judgment, in order to fulfill this obligation. By virtue of this relationship, effected by state law, Doctor Atkins is authorized and obliged to treat prison inmates, such as West. He does so "clothed with the authority of state law." *United States v. Classic*, 313 U. S., at 326. He is "a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U. S., at 937. It is only those physicians authorized by the State to whom the inmate may turn. Under state law, the only medical care West could receive for his injury was that provided by the State. If Doctor Atkins misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care.

West v. Atkins, 487 US 42, 55 (1988)

The same is true here. The Energy Commission has an obligation to ensure that individuals who perform home energy rating services are trained and certified. Cal. Pub. Res. Code § 25942 (c). Because of the way the statute and regulations have been enforced, the necessary training and certification can only be obtained from providers chosen by the state.[4] Tr 210. Raters like Hoover and Davis have no place else to turn. *Id*. Thus, when

[4] This is not required by the statute itself, which directs that certification will be performed "by the commission," rather than by private companies. Cal. Pub. Res. Code § 25942 (c). Thus, when CalCERTS chooses to certify, it exercises a power that has been expressly delegated to the Energy Commission.

CalCERTS acts to certify or decertify, it necessarily does so "clothed with the authority of state law," without which CalCERTS could not act. In the same sense as in *West v. Atkins*, Complainants' deprivation has been caused by the state's decision to vest certification and decertification authority in CalCERTS.

Because the State of California has given CalCERTS authority to control access to the HERS profession, when CalCERTS chooses to certify or decertify a rater, CalCERTS necessarily acts under color of state law, because its very power to act is "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). This entanglement is sufficient to subject CalCERTS to the demands of due process.

b. CalCERTS is Entangled with Government because it has the Power to Control the Occupancy of Newly Constructed Homes.

In its Answer, CalCERTS argues that its function is merely to train and certify HERS raters. Answer at 19. In this respect, CalCERTS is being far too modest. As the only Provider authorized to certify HERS raters for the performance of field verification and diagnostic testing of new homes, CalCERTS functions as the gatekeeper for energy efficiency ratings in the State. Effectively, this allows CalCERTS to control the occupancy of new homes. This is a distinctly governmental function, and a significant entanglement.

The state of California requires HERS testing whenever a new home contains any of a long list of efficiency measures or equipment features.[5] Respondents' Ex 246 at 562, *2008 Building Efficiency Standards, Residential Compliance Manual* § 2.5. When a new home contains these measures or features, California Code of Regulations Title 24 Part 1 Section 10-

[5] These measures and features include: Duct Sealing; Supply Duct Location, Surface Area and R-Value; Low Leakage Ducts in Conditioned Space; Low Leakage Air Handlers; Refrigerant Charge in Split System Air Conditioners and Heat Pumps; Refrigerant Charge Indicator Display (CID); Verified Cooling Coil Airflow; Air Handler Fan Watt Draw; High Energy Efficiency Ratio (EER); Maximum Rated Total Cooling Capacity; Evaporatively Cooled Condensers; Ice Storage Air Conditioners; Building Envelope Sealing; High Quality Insulation Installation (QII); Quality Insulation Installation for Spray Polyurethane Foam; PV Field Verification Protocol. Respondents' Ex 246 at 562, *2008 Building Efficiency Standards, Residential Compliance Manual* § 2.5.

103(d) specifies that agencies throughout the state who are responsible for building permits may not issue a "final certificate of occupancy" for new single family homes unless a Certificate of Field Verification and Diagnostic Testing has been completed.[6] This certificate can only be completed by a certified HERS rater.[7] Because CalCERTS is the only entity currently permitted to certify HERS raters for new construction, Tr 43-44, 210, these certificates cannot be obtained without CalCERTS.

Should CalCERTS decide to exercise the independent contractual rights over HERS raters it claims here, and refuse to continue certifying HERS raters – or if it chooses to decertify them all – builders of new homes could not comply with Section 10-103(d). Accordingly, the law would not permit building departments in California to allow new homes to be occupied. This clearly is a public function. In what other circumstance has the State of California delegated to a private company the power to decide whether new homes can be occupied? If CalCERTS shuts down, the entire homebuilding industry shuts down. This is not the minor effect of a purely private company that merely trains and certifies HERS raters. It is a significant entanglement with government, and a sufficient reason for CalCERTS to comply with the requirements of due process.

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[6] "The enforcement agency shall inspect new construction to determine whether it is consistent with the agency's approved plans and specifications, and complies with Part 6. *Final certificate of occupancy shall not be issued* until such consistency and compliance is verified. . . . Such verification shall include determination that . . . All required Certificates of Field Verification and Diagnostic Testing are posted, or made available with the building permit(s) issued for the building, and are made available to the enforcement agency for all applicable inspections, and that all required Certificates of Field Verification and Diagnostic Testing conform to the specifications of Section 10-103(a)5." Cal. Code Regs., tit. 24, Part 1, Chapter 10, 10-103(d)(2) (2010) (emphasis added).

[7] "For all buildings for which compliance requires HERS field verification, *a certified HERS rater shall conduct all required HERS field verification and diagnostic testing* . . . . Certificates of Field Verification and Diagnostic Testing shall be completed, signed and dated by the certified HERS rater who performed the field verification and diagnostic testing services." Cal. Code Regs., tit. 24, Part 1, Chapter 10, 10-103(a)(5) (2010) (emphasis added).

c. Inherent Limitations on the Delegability of Government Power Require that the Energy Commission Actively Oversee Decisions to Certify or Decertify HERS Raters. This is a Significant Entanglement.

California law requires that "truly fundamental issues should be resolved by the Legislature." *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control*, 65 Cal.2d 349, 369 (1966). The effect of this policy is to limit the delegability of legislative discretion:

> Powers which require the exercise of judgment and discretion . . . must necessarily remain with the public agency and cannot be delegated. Thus the issue in each case of delegation is whether ultimate control over matters involving the exercise of judgment and discretion has been retained by the public entity.

County of Los Angeles v. Nesvig, 231 Cal. App. 2d 603, 616-617 (1965) (internal citations omitted). However, limited administrative functions, that do not require the exercise of discretion, may be delegated:

> [W]hile a public body may not delegate its power of control over public affairs to a private group, it may delegate the performance of administrative functions to such groups if it retains ultimate control over administration so that it may safeguard the public interest.

Id. (internal citations omitted). The purpose of this limitation is to ensure that "a grant of authority [is] accompanied by safeguards adequate to prevent its abuse." *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control*, 65 Cal.2d 349, 369 (1966).

In this case, both the Energy Commission and CalCERTS believe that CalCERTS can make decertification decisions for almost any reasons it chooses.[8] Tr 207-208. Energy Commission staff insist that they make no attempts either to influence decertification decisions,

[8] Note that in its "Certified Rater Agreement," Respondent's Ex 202 at 30, CalCERTS claims such broad authority that it can decertify a rater for "any act or failure to act, which, in CalCERTS' opinion, harms its name or reputation." If a decision about decertification can depend solely upon CalCERTS' opinion about its name or reputation, it claims the power to shut down the occupancy of new homes for essentially any reason, whether real or imagined.

or to review them once made. Tr 207-210. Given the breadth of possible considerations available to CalCERTS, it clearly performs more than mere "administrative functions." The law simply does not allow such a broad delegation of discretion to a private company.[9]

The Energy Commission must "retain[] ultimate control over administration" of CalCERTS' certification and decertification decisions "so that it may safeguard the public interest" *Nesvig* at 616-617. Thus, the Energy Commission must either impose relevant safeguards upon CalCERTS and ensure they are followed, or the Energy Commission must provide the safeguards itself through some process of review. Either way, government power cannot be used to take away Complainants' rights to work in their chosen profession without the protections of due process.

If the Energy Commission had chosen to administer the HERS program as contemplated by the statute,[10] and had elected to certify HERS raters itself according to the adopted regulatory criteria, [11] the choices made and process applied by the Energy Commission clearly would have been subject to due process. California's Administrative Adjudications Act, Cal. Gov. Code §§ 11400 et seq., would have imposed specific due process rules upon any agency decision "that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person," including decisions about whether Hoover and Davis could continue to exercise their right to practice their profession. Cal. Gov. Code § 11405.50. The Energy Commission cannot deny

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[9] California courts have been especially critical and have overturned programs "where representatives from private industry serve on administrative boards with power to make rules affecting their competitors." *See e.g., People ex rel. Lockyer v. Sun Pac. Farming*, 92 Cal. Rptr. 2d 115, 125 (2000). In this case, CalCERTS has admitted that it hires people who earn their livings as HERS raters – business competitors of those they are evaluating – to perform quality assurance evaluations. Tr 168-169.

[10] The plain language of the statute indicates that the certification of HERS raters must be performed "by the commission." Pub. Resources Code section 25942 (c). Thus, when the Energy Commission allows certification decisions to be made by providers, it violates the plain terms of the statute.

[11] The statute also specifies that the Energy Commission must certify raters "to be in compliance with the program criteria." *Id*. Nothing in the statute allows the Energy Commission to certify raters according to any standard other than "the program criteria" adopted by the Energy Commission, which means the HERS regulations. Yet in this case, the Energy Commission clearly believes that where the regulations are silent, private companies like CalCERTS can compel raters like Hoover and Davis to satisfy certification requirements beyond the scope of what the regulations specify. Tr 207-208. This too is unlawful as it goes beyond the scope of the enabling statute.

those protections to HERS raters by delegating the decision-making functions to a private company. Because the Energy Commission must retain ultimate control over certification and decertification, and must impose "safeguards adequate to prevent . . . abuse" of the delegated power, the Energy Commission must have the power to review and correct suspension and decertification decisions by CalCERTS.[12] It is the only way CalCERTS' role in certifying and decertifying HERS raters can be lawful under California's nondelegation doctrine.[13] This is a significant entanglement between CalCERTS and government. It is sufficient to treat CalCERTS as a state actor, and subject CalCERTS to due process.

2. ERIK HOOVER AND PATRICK DAVIS EACH HAD A VESTED FUNDAMENTAL RIGHT TO CONTINUE WORKING AS HERS RATERS

Even if CalCERTS is bound by due process due to its significant entanglement with government, Complainants are protected by due process only if they had a private interest that is entitled to protection. Thus this Committee must determine what rights Hoover and Davis had prior to their suspension and decertification, and whether those rights were "vested," such that due process protects them.

Hoover and Davis were certified as HERS raters. Complainants' Exs 16, 17. CalCERTS has admitted this. Answer at 5. This certification entitled them to perform home energy rating services under Public Resources Code section 25942. Without the certification, "no home

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[12] For this same reason, the Energy Commission cannot simply deem this a contract dispute, and tell the parties to resolve their differences in court. Because of the nature of the HERS program, and the delegation of power from the Legislature to administer it, the Energy Commission must have ultimate control of certification and decertification decisions. This power cannot be delegated. *County of Los Angeles v. Nesvig*, 231 Cal. App. 2d 603, 616-617 (1965).

[13] The statute is actually silent on the question of who must make *de*certification decisions, or what criteria should be applied when making *de*certification decisions. However, the Energy Commission's power is always limited by the general rule that ". . . administrative officers have no inherent powers — only those powers granted them by the Constitution and Legislature." *State Bd. of Education v. Honig*, 13 Cal. App. 4th 720, 750 (1993). Moreover, "administrative regulations may not exceed the scope of authority conferred by the Legislature." *Id*. at 50. Thus, even if a power over decertification is deemed necessarily included in the power over certification, it must be limited in a similar way. In other words, the Energy Commission must develop criteria for decertification, just as it has for certification. The Energy Commission itself cannot exercise unlimited discretion over decertification, and it cannot allow CalCERTS to exercise unlimited discretion over decertification.

energy rating services may be performed in this state . . . ." Cal. Pub. Res. Code § 25942 (c). Hoover and Davis did perform home energy rating services on many occasions. Tr 23.

The California Supreme Court has recognized that

> [t]he right to pursue one's chosen profession free from arbitrary state interference . . . is protected by the due process clauses of both the state and federal Constitutions. Although the state may discipline and regulate the qualifications of individuals employed in certain professions, it must do so within the limits of procedural due process. "The right to practice one's profession is sufficiently precious to surround it with a panoply of legal protections."

In re Marriage of Flaherty, 31 Cal.3d 637, 652 (1982) (internal citations omitted).

The United States Supreme Court has reached a similar conclusion:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law." While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes . . . the right of the individual to . . . engage in any of the common occupations of life . . . .

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Clearly, the right of Hoover and Davis to practice their chosen profession is a fundamental right that is protected by due process, as long as that right was "vested."

The California Supreme Court has explained that "[t]he term 'vested' has been used in a nontechnical sense to denote generally a right 'already possessed' or 'legitimately acquired.'" *Harlow v. Carleson*, 16 Cal.3d 731, 735 (1976) (citing *Bixby v. Pierno*, 4 Cal.3d 130 (1971), and *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal.3d 28 (1974)). Thus, ". . . in the context of a variety of professions and vocations, we often have recognized that an individual, having obtained the license required to engage in a particular profession or vocation, has a 'fundamental vested right' to continue in that activity." *Hughes v. Board of Architectural Examiners*, 17 Cal. 4th 763, 788-789 (1998). Where such a right has vested, it is "subject to

divestment upon periodic review only after a showing of adequate cause for such divestment in a proceeding consistent with minimal due process requirements." *Anton v. San Antonio Community Hosp.*, 19 Cal.3d 802, 824-825 (1977).

CalCERTS has not taken issue with Complainants' contention that prior to their suspension and decertification they had the right to work as certified HERS raters. Rather, CalCERTS attempts to narrow the definition of Complainants' interest by focusing on whether Hoover and Davis had, or could have, a vested right to the continued use of the CalCERTS' proprietary program and database. Answer at 25-26.

CalCERTS unnecessarily conflates the question of whether Complainants should continue to be certified with the question of whether CalCERTS must continue to provide Complainants with access to CalCERTS' proprietary software, program, and database. *See* Answer at 22 (arguing that certification both "warrants Petitioners' ability to accurately rate homes *and* CalCERTS' contractual right to terminate Petitioners access to the online registry"). There is no reason to treat these things the same. Public Resources Code section 25942 does not treat certification as synonymous with access to any database. To the extent the statute mentions a database at all, it says the database should be "centralized," "publicly accessible," and that it should include a "uniform reporting system . . . excluding proprietary information," [14] all features that CalCERTS' database lacks.[15] Section 25942 (a)(4). Clearly the statute does not

[14] CalCERTS emphasizes the proprietary nature of its systems early and often. See e.g., Answer at 26 (arguing that "CalCERTS decertification only bars Petitioners from CalCERTS proprietary program"); *Id*. at 6 (referring to CalCERTS' "proprietary data base); *Id*. at 8 (claiming a "proprietary registry," and a "proprietary interest in its training program, online services, and reputation"); *Id*. at 17 (referring to a "proprietary rating model and software"); *Id*. at 25 (claiming that CalCERTS' offers a "proprietary certification").

[15] The fact that, due to its proprietary nature, CalCERTS' database does not resemble the database contemplated by Public Resources Code section 25942 raises serious questions about whether the HERS program as implemented actually complies with the statute. The HERS regulations do not require a "centralized" database, but rather allow providers to maintain their own databases. Cal. Code Regs., tit. 20 § 1673 (f). Nothing in the regulations requires that any HERS database be "publicly accessible." To the contrary, the regulations state that "*[i]f* the Energy Commission makes" rating information public, "it will be in aggregated form only," suggesting that the data may never be "publicly accessible." *Id*. (emphasis added). The regulations entirely lack any requirement for "a uniform reporting system."

contemplate a private company like CalCERTS exercising proprietary control over HERS data.

Moreover, HERS raters simply do not need access to a Provider's database in order to function as certified raters. Neither the statute nor the regulations impose a duty upon HERS raters to enter data into a database. To the contrary, the regulations impose a duty upon the *provider* to "record and maintain . . . all data collected." Cal. Code Regs., tit. 20 § 1673(e)(1). Thus, a certified HERS rater should be able perform field verification and diagnostic testing without access to CalCERTS' database, by presumably collecting the data and passing the data on to CalCERTS so that it can be recorded and maintained. A HERS rater does not need direct access to the database in order to do this job. Nonetheless, a HERS program that included a database that was "centralized," and "publicly accessible," as the statute requires, would undoubtedly make doing this job easier.

Complainants had vested rights to do what the statute and regulations specify. As "certified" raters, they were entitled to perform "home energy rating services." Cal. Pub. Res. Code § 25942. By taking away their certifications, CalCERTS deprived them of this right.

3. CALCERTS FAILED TO PROVIDE THE LEGAL PROTECTIONS THAT DUE PROCESS REQUIRES

a. The Right to Practice One's Profession Receives a High Degree of Due Process Protection

Although "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation," *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961), there are some standards that approach bright line rules. For example, the California Supreme Court has explained that

> in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and a hearing. Absent extraordinary circumstances justifying resort to summary procedures, this hearing must take place *before* an individual is deprived of a significant property interest.

Beaudreau v. Superior Court, 14 Cal.3d 448, 458 (1975) (internal citations omitted) (emphasis in the original).

This bright line requirement, "absent extraordinary circumstances," for "some form of notice and a hearing" prior to the deprivation, provides the easy answer in this case. CalCERTS deprived Complainants' of their ability to practice their profession before providing Hoover and Davis with notice of any variety, and before providing them an opportunity for a hearing of any nature. Tr 200, 228. The suspension was effective before Hoover and Davis even knew about it. Tr 228. Accordingly, the Committee can and should decide this case without worrying about the nuances of whether any particular notice was adequate, or whether a particular hearing was meaningful. Hoover and Davis received no predeprivation notice or hearing of any kind. Moreover, there were no "extraordinary circumstances" that could justify CalCERTS acting immediately.[16] CalCERTS was fully aware of the risk Hoover and Davis allegedly posed to homeowners for months while CalCERTS allowed Hoover and Davis to continue rating homes. Tr 190-191. Because CalCERTS' actions violated this bright line rule, the decertifications of Hoover and Davis were clearly unlawful, and must be reversed.

Beyond the bright line rules, due process is an inexact science that does require inquiry into the quality of the notice given, and the quality of the hearing provided. "Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951). Accordingly, "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). In cases where a person is deprived of relatively minor interests, very informal hearings may suffice. For example, in *Goss v. Lopez*, the Supreme Court held that the short suspension of a student from school did not

[16] This will be discussed more fully below.

require an "elaborate hearing," but rather "at least an informal give-and-take between student and disciplinarian," where the student is "given an opportunity to explain his version of the facts" and is first "told what he is accused of doing and what the basis of the accusation is." *Goss v. Lopez*, 419 U. S. 565, 580, 582, 584 (1975).

However, when the interest at stake is the right to continue practicing one's profession, courts have required much more. "Procedural due process requires notice, confrontation, and a *full hearing* whenever action by the state significantly impairs an individual's freedom to pursue a private occupation." *Endler v. Schutzbank*, 68 Cal.2d 162, 172 (1968) (emphasis added) (citing *Willner v. Committee on Character*, 373 U.S. 96, 103-106 (1963). "[T]he state may not make a man an outcast in his own profession without affording him a *full opportunity* to present his defense." *Endler* at 173 (emphasis added). *See In re Ruffalo*, 390 U.S. 544, 550-551 (1968) (holding that where administrative proceedings contemplate the deprivation of a license to practice one's profession they are "adversary proceedings of a quasi-criminal nature" and procedural due process must be afforded the licensee); *Emslie v. State Bar*, 11 Cal.3d 210 (1974). Where the right to practice one's profession is at stake, due process requires the disclosure of evidence used to prove the case against them. *Greene v. McElroy*, 360 U.S. 474, 496 (1959). It requires the procedural safeguards of confrontation and cross-examination. *Id*. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996). Because of the nature of the impairment involved in CalCERTS' actions here --- depriving Hoover and Davis of the right to practice their profession --- informal shortcut procedures are not sufficient.

The State of California imposes many more procedural safeguards as part of the Administrative Adjudication Bill of Rights. *See* Cal. Gov. Code §§ 11425.10 – 11425.60. Those faced with an administrative decision that may determine "a legal right, duty, privilege, immunity, or other legal interest," are entitled to receive a copy of the governing procedure. Cal.

Gov. Code § 11425.10 (2). They are entitled to have the hearing be "open to public observation," Cal. Gov. Code § 11425.10 (3). They are entitled to have a decision that "shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision. Cal. Gov. Code § 11425.10 (6).

b. CalCERTS Failed to Provide Hoover and Davis with the Legal Process that was Due.

Hoover and Davis were provided with few of the procedural safeguards that due process requires.[17] For example, the notice provided to Hoover and Davis was inadequate because it incorrectly stated the severity of the penalty CalCERTS was considering, and did not provide them with enough information to meaningfully defend themselves.

The notice e-mail sent to Hoover and Davis on December 16, 2011, said that "as a result" of the fact they had "failed a QA review," they had been suspended for 15 days. Complainants' Exs 3, 4. This incorrectly suggested that CalCERTS had already decided on a penalty for their QA failures. At this time Hoover and Davis knew they had to schedule an interview with CalCERTS, but they did not know CalCERTS was considering any additional punishment relating to failed QAs. Tr 29, 34. Moreover, CalCERTS' description of the punishment that had been imposed was incorrect. The December 16 notice said they had been suspended for 15 days, when CalCERTS actually intended that the suspension extend at least until the interview was actually held. Tr 229. The notice did not tell Complainants that decertification was even being considered. Complainants' Exs 3, 4. For these reasons, Hoover and Davis did not receive fair notice of the severity of the penalty that could be imposed. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996).

[17] Complainants mainly argue that CalCERTS failed to provide a series of procedural protections required by the state and federal constitutions. However, Complainants were also deprived of the procedural protections specified in the HERS regulations, for example the procedure that specifies in Title 20 § 1673 (i)(3)(C) how quality assurance failures must be addressed. Given that these regulations require that a particular process be applied to HERS raters like Hoover and Davis, CalCERTS' failure to follow this process also has implications for constitutional due process requirements. Given that the administration of these regulatory procedures is the responsibility of the Energy Commission, there are also due process concerns if the Energy Commission does not require that the procedures be followed as written.

Significantly, CalCERTS repeatedly characterizes Complainants' conduct as "fraud," or "fraudulent." *See* Answer at 2, 4, 7, 9, 10, 27. In their testimony at the evidentiary hearing, CalCERTS officials repeatedly suggested that Hoover and Davis had "ethical shortcomings." See Tr 238-239, 269, 157, 162. Yet the December 16 notice to Hoover and Davis does not indicate that they were suspended because of fraud, or ethical shortcomings. Complainants' Exs 3, 4. Likewise, the decertification letters dated January 30, 2012 make no mention of fraud, or ethical shortcomings. Complainants' Exs 6, 7. To the contrary, the December 16 notice e-mails and the decertification letters suggest that Hoover and Davis were being disciplined only for technical errors. Complainants' Exs 3, 4. If, as CalCERTS repeatedly argues, Complainants were decertified due to what CalCERTS perceived as fraudulent activity, or "ethical shortcomings," why hasn't CalCERTS formally notified Complainants of this charge? How could CalCERTS have complied with the requirements of due process if it never told Complainants the truth about what they were accused of? How could Hoover and Davis have defended themselves against this charge when CalCERTS kept it secret?

Even under the apparently incorrect belief that Complainants were being accused of making technical errors, the December 16 notice did not tell Complainants specifically what they were accused of doing, and what the basis of the accusation was, a protection that is available even to high school students. *See Goss v. Lopez*, 419 U. S. 565, 580, 582, 584 (1975). The notice identified addresses where Hoover and Davis had allegedly "failed QA inspections," but it did not identify the particular tests Hoover and Davis had allegedly performed incorrectly. Complainants' Exs 3, 4. It did not tell them the specific nature of their alleged failures. *Id*. It did not include any of the documents or data collected by CalCERTS as part of the QA evaluations. *Id*. The notice did not identify or describe the procedure CalCERTS had followed or was following in evaluating their work. *Id*. It did not notify Hoover or Davis that a complaint had been filed against them. *Id*. Because of this, Hoover and Davis were not prepared to discuss the particular tests they had allegedly failed. Tr 97-98. This violated the rule that where the right to practice one's profession is at stake, due process requires the disclosure of evidence used to

prove the case against them. *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

The hearing provided by CalCERTs, which took the form of an interview, also did not provide the necessary due process protections. Just as CalCERTS did not provide documents in its initial notice, it likewise did not provide Complainants with documents prior to, or as part of, their interviews. Tr 36-37. At their interviews, CalCERTS did not provide Complainants, or show them, a list of the charges asserted against them. Tr 106-107. Although Hoover and Davis were told that they didn't pass some tests, they were not told the results of the QA rater's tests, and they did not have an opportunity to compare their own test results with the quality assurance rater's test results. Tr 37-38. Although prior to the December 16 notice, and prior to his interview, CalCERTS had identified what it deemed additional QA failures by Davis, CalCERTS did not notify Davis of those failures in its December 16 e-mail, but it discussed those addresses with him in his interview anyway. Tr 38-39, *compare* Complainants' Ex 9, 2-3, with Complainants' Ex 4. CalCERTS even considered QA results for one house that Davis was never notified or interviewed about because the QA was performed after his interview. Tr 229-233. These procedural errors deprived Complainants of the constitutional guarantees of confrontation and cross-examination that apply to cases such as this. *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

The interviews were not open to the public and were not on the record. Prior to his interview, CalCERTS notified Mr. Hoover of its policy that "[a]ll meetings with CalCERTS are confidential, and CalCERTS will maintain custody of any recordings" of those meetings. Complainants' Ex 12. In this case, no formal recording of the interviews was made, though notes were taken. Tr 107-108. After the interviews, CalCERTS did not provide Complainants with a summary of the interviews, or detailed findings, or conclusions. Tr 109. Because there was no record, some of the apparent findings made by CalCERTS lack evidentiary support. For example, Complainants' decertification letters state that their QA failures "are egregious, establish a pattern, and are not rectifiable." Complainants' Exs 6, 7. This is apparently one of the reasons why CalCERTS chose to decertify Hoover and Davis, rather than imposing some

lesser penalty. But the record compiled by CalCERTS doesn't contain any support for these conclusions.[18]

The procedures followed by CalCERTS in suspending and decertifying Hoover and Davis did not provide the "full hearing" required "whenever action by the state significantly impairs an individual's freedom to pursue a private occupation." *Endler v. Schutzbank*, 68 Cal.2d 162, 172 (1968). For these reasons, the procedure used was unconstitutional.

c. No "Extraordinary Circumstances" Justified CalCERTS Suspending Complainants Prior to Notice and Hearing.

Although CalCERTS has admitted that the suspensions of Hoover and Davis were effective prior to the time they were notified that their ability to work was at risk, Tr 228, CalCERTS argues in its Answer that immediate suspensions followed by post deprivation hearings "are sanctioned" when the public interest is at stake. Answer at 23-24. This is an impossibly broad claim, and clearly wrong. Prehearing deprivations are unconstitutional absent some urgency requiring immediate action. *Beaudreau v. Superior Court*, 14 Cal.3d 448, 458 (1975). CalCERTS clearly had no urgency that compelled it to act without notice.

Like the California Supreme Court,

> We start with the basic proposition that in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and a hearing. Absent extraordinary circumstances justifying resort to summary procedures, this hearing must take place *before* an individual is deprived of a significant property interest.

Beaudreau v. Superior Court, 14 Cal.3d 448, 458 (1975) (internal citations omitted) (emphasis in the original).

Courts have occasionally found that "extraordinary circumstances" justified the

[18] Given that CalCERTS has vague standards for distinguishing between deliberate versus accidental errors, there are good reasons to question whether these conclusions are actually supportable. Tr 272.

government's seizure of property without prior notice and hearing. *See*, e.g., *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 315 (1908) (upholding the power of city food inspectors to act without prior notice and hearing "to forthwith seize, condemn and destroy any . . . putrid, decayed, poisoned and infected food which any such inspector may find . . . ."); *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950) (upholding the power of the Food and Drug Administration to seize, without prior notice and hearing, any misbranded article the agency had probable cause to believe was dangerous to health, fraudulently labeled, "or would be in a material respect misleading to the injury or damage of the purchaser or consumer"); *State Savings etc. Bank v. Anderson*, 165 Cal. 437, 446 (1913) ("Summary seizure and liquidation of unsafe banks can fairly and reasonably be justified on the ground of immediate danger to the public welfare in further permitting their business continuance."). But in these and other cases, the justification for acting prior to notice and hearing is not merely that the action serves the public interest. It is rather that urgent measures were necessary to protect the public interest. This point was illustrated by the Court of Appeal in *Leslie's Pool Mart v. Department of Food & Agriculture,* 223 Cal. App. 3d 1524 (1990).

In *Leslie's Pool Mart*, the Department of Food and Agriculture had entered two of Leslie's retail stores and seized and quarantined a product known as Leslie's oxidizer because it was believed that the product was an unregistered pesticide whose possession and sale was unlawful under the Economic Poisons Act. 223 Cal. App. 3d 1524, 1529 (1990). Leslie's Pool Mart argued that its rights to due process had been violated because its product was seized prior to the department providing notice and offering a hearing. In holding that the seizure prior to a hearing was not justified, the Court of Appeal explained that "[t]he facts of this case amply demonstrate the lack of exigent circumstances to justify the seizure. The record shows the director knew more than a year before the seizure Leslie's was selling its swimming pool oxidizer without registering it as a pesticide." *Id*. at 1533. Moreover, "It would be specious to argue that, after allowing Leslie's unregistered oxidizer to be sold for more than a year, exigent circumstance compelled its summary seizure and quarantine." *Id*.

This case is similar. CalCERTS believed in October 2011 that Hoover and Davis may have been making mistakes as they rated homes. Tr 189. CalCERTS had "grave concerns" that these mistakes were harming homeowners, Tr 190, and CalCERTS understood that Hoover and Davis would continue rating homes. Tr 188. But CalCERTS did not stop them. Tr 190-191. CalCERTS had similar knowledge in November, 2011. Tr 196-198. But CalCERTS waited until mid December 2011before it notified them of alleged quality assurance failures. Complainants' Exs 3, 4. It is simply preposterous for CalCERTS to assert that it needed to act urgently to suspend Hoover and Davis without notice or a hearing, when CalCERTS had knowingly allowed them to continue rating homes for so long.

Prehearing deprivations of property are constitutionally permitted only when the "extraordinary circumstances" require urgent action. *Beaudreau v. Superior Court*, 14 Cal.3d 448, 458 (1975). CalCERTS had no reason for urgency here. Complainants were causing no more risk to public health than they had allegedly caused over the many weeks that CalCERTS was casually investigating the claims they found plausible on September 21.

C. CALCERTS HAS AN IDENTICAL DUTY TO PROVIDE DUE PROCESS TO HERS RATERS, EVEN IF IT IS NOT A STATE ACTOR

Even if CalCERTS is not a state actor, it nonetheless has a legal duty to Complainants that is identical to the demands of due process. The California Supreme Court made this clear in *Pinsker v. Pacific Coast Soc. of Orthodontists*, a case which involved several private organizations that effectively controlled access to the dental profession. 1 Cal.3d 160 (1969). The Court explained:

> Because of the unique position in the field of orthodontics occupied by defendant AAO and its constituent organizations, membership therein, although not economically necessary in the strict sense of the word (as was the case in Falcone), would appear to be a practical necessity for a dentist who wishes not only to make a good living as an orthodontist but also to realize maximum potential achievement and recognition in such specialty. Defendant associations

> hold themselves out to the public and the dental profession generally as the sole organizations recognized by the ADA, which is itself a virtual monopoly, to determine standards, both ethical and educational, for the practice and certification of orthodontics. Thus, a public interest is shown, and the associations must be viewed as having a fiduciary responsibility with respect to the acceptance or rejection of membership applications. Under the circumstances, an applicant for membership has a judicially enforceable right to have his application considered in a manner comporting with the fundamentals of due process, including the showing of cause for rejection.

Pinsker v. Pacific Coast Soc. of Orthodontists, 1 Cal.3d 160, 166 (1969) (internal citations omitted).

The same is true of CalCERTS. Those who wish as their profession to perform HERS ratings on new homes must, as actual rather than merely practical necessity, seek certification from CalCERTS. Tr 43-44, 210. CalCERTS is apparently allowed to determine its own standards for the practice of this profession. See Tr 207-208 (describing the belief of Energy Commission personnel that where the HERS regulations are silent, CalCERTS is empowered to fill that silence). Accordingly, CalCERTS "must be viewed as having a fiduciary responsibility" with respect to its certification and decertification decisions, and must consider decertification "in a manner comporting with the fundamentals of due process." *Pinsker v. Pacific Coast Soc. of Orthodontists*, 1 Cal.3d 160, 166 (1969).

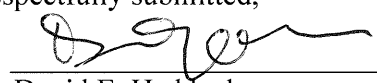
IV. CONCLUSION

In this proceeding, Complainants have requested three remedies. First, they asked the Energy Commission to reverse the decision of CalCERTS to decertify Hoover and Davis, and allow them to continue working as HERS raters until such time as the HERS regulations have been applied to them as written, and they have been provided due process. Second, they asked the Energy Commission to investigate the way CalCERTS imposes discipline on HERS raters.

Third, they asked the Energy Commission to require CalCERTS to adopt a written discipline procedure that complies with the HERS regulations and with the requirements of due process. Complainants are entitled to all three remedies for the reasons discussed herein. CalCERTS clearly did not follow the quality assurance procedure required by the regulations because it suspended and decertified Hoover and Davis, rather than publishing their QA failures in the registry and performing additional quality assurance. Moreover, even though CalCERTS was bound by due process due to its entanglement with the State of California, it did not provide due process to Hoover and Davis. Without notice or hearing of any kind, it suspended their ability to work in their chosen profession. Moreover, the notice and hearing that was later provided was inadequate because it didn't notify them of what was at stake, and didn't provide them with a meaningful way to defend themselves. These actions were unconstitutional. The Energy Commission must use its "ultimate control over administration" of the HERS program to reverse CalCERTS' decertification decisions, and allow Erik Hoover and Patrick Davis to continue practicing their profession until due process has been provided to them.

Dated: June 5, 2012

Respectfully submitted,



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IN THE MATTER OF
COMPLAINT AGAINST AND REQUEST FOR INVESTIGATION OF CALCERTS, INC.

Docket No. 12-CAI-01
(*Revised* 5/21/12)

RESPONDENT
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DECLARATION OF SERVICE

I, David Haddock, declare that on June 5, 2012, I served and filed copies of the Posthearing Brief of Erik Hoover and Patrick Davis, Complainants, dated June 5, 2012. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at:

http://www.energy.ca.gov/HERS/12-cai-01/index.html.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

(*Check all that Apply*)

For service to all other parties:

XXX Served electronically to all e-mail addresses on the Proof of Service list;

XXX Served by delivering on this date, either personally, or for mailing with the U.S. Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "e-mail preferred."

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For filing with the Docket Unit at the Energy Commission:

XXX by sending an electronic copy to the e-mail address below (preferred method); ***OR***

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Attn: Docket No. 12-CAI-01
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

____ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

California Energy Commission
Michael J. Levy, Chief Counsel
1516 Ninth Street MS-14
Sacramento, CA 95814
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

*indicates change